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To Tell You the Truth, Federal Rule of Criminal Procedure 24(A) Should Be Amended to Permit Attorneys to Conduct Voir Dire of Prospective Jurors

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TO TELL YOU THE TRUTH, FEDERAL RULE OF CRIMINAL PROCEDURE 24(A) SHOULD BE AMENDED TO PERMIT ATTORNEYS TO CONDUCT VOIR DIRE OF PROSPECTIVE JURORS

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I. INTRODUCTION

Jury voir dire,[1] the process of questioning prospective jurors in order to determine whether they can be fair and impartial judges of the facts,[2] is critical to

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1. The term "voir dire" derives from the French infinitive verbs for "to see" (voir) and "to speak" (dire), and in that sense accurately and poetically describes the process of seeing and questioning jurors during the jury selection process. Apparently, in Old French the words used together meant "to speak the truth." DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 101–02

a judicial system that relies on juries to resolve disputes.[3] Jury voir dire is the basis upon which courts decide whether to remove prospective jurors for cause[4] and whether attorneys should use peremptories[5] to remove prospective jurors.[6] Jury voir dire is most important in criminal cases where a defendant's liberty, or life, will be determined by a group of citizens randomly pulled from the community.[7]

Yet in federal criminal trials,[8] the parties are not guaranteed by law that anyone will question the prospective jurors about anything.[9] Federal Rule of

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(1963) (citing *voir dire* BLACK'S LAW DICTIONARY 1746 (4th ed. 1951); 3 WILLIAM BLACKSTONE, COMMENTARIES 332; 2 JOHN BOUVIER, A LAW DICTIONARY 480 (1839); 2 JOHN BURKE, JOWITT'S DICTIONARY OF ENGLISH LAW 1869 (2d ed.1977); THE LAW-FRENCH DICTIONARY 143 (2004); 19 OXFORD ENGLISH DICTIONARY 738 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989)) (stating that "voir dire" derives from Old French and means "to speak the truth," and commenting that "confusion results if the term is judged by the standards of modern French"). *See also* Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 491 n.1 (1978) (stating that the accurate translation of "voir dire" is "true talk" because the French word "voir" derives from the Latin word "versus," which means "truth"). Thus, in America voir dire has the legal definition of "to speak the truth." *Voir Dire*, BLACK'S LAW DICTIONARY 1569 (7th ed. 1999). Although our hope may be that jurors speak the truth during voir dire, the literal translation of the French verbs of "to see and to speak" strikes this author as more accurately describing the jury selection process.

2. *See* Mu'Min v. Virginia, 500 U.S. 415, 431 (1991) (explaining that jury voir dire enables courts to select impartial juries and assists counsel in exercising peremptory strikes).

3. "*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion).

4. A court may remove a prospective juror for cause if the trial judge believes the prospective juror cannot be fair and impartial. 28 U.S.C. § 1866(c)(2) (2012) (trial court may dismiss a prospective juror who is "unable to render impartial service"). Either party may challenge a juror for cause, asking the court to remove the juror, or the court may do so sua sponte. *See* 2 CHARLES A. WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE §§ 376, 382–84 (4th ed. 2009) (citations omitted). There are no limits to the number of "for cause" challenges a party may make. *See* JAMES J. GOBERT & WALTER E. JORDAN, JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY § 8.02 n.30 (2d ed. 1990) ("The number of challenges for cause is unlimited.").

5. Peremptories, or peremptory strikes, are a means by which attorneys can remove prospective jurors for any reason, or no reason at all, so long as the removal is not based on gender, race, or national origin. *See infra* text accompanying notes 30–56 for a more thorough discussion of peremptory strikes.

6. *See* Stephen R. DiPrima, Note, *Selecting a Jury in Federal Criminal Trials After* Batson *and* McCollum, 95 COLUM. L. REV. 888, 890 (1995) ("Voir dire 'sets the stage' for both cause and peremptory challenges by helping the judge and the parties identify biased potential jurors.").

7. Although this Article focuses on the importance of attorney voir dire of prospective jurors in criminal cases, much of the analysis and reasoning would equally apply to jury voir dire in civil cases.

8. Just as this Article focuses on criminal trials, its focus is also primarily on federal criminal trials. This is for two reasons. First, federal cases and practices guide and inform state court decisions regarding jury selection in criminal cases. *See, e.g.*, Drain v. Woods, 595 F. App'x

Criminal Procedure 24(a) provides only that a court "may examine prospective jurors or may permit the attorneys for the parties to do so,"[10] but does not require jury voir dire by a judge or attorneys. So, in theory, a jury could be empaneled in a federal criminal case having not been subject to questioning by anyone. Without questioning prospective jurors, a trial judge would be compelled to determine whether to remove prospective jurors for cause in a vacuum, and the lawyers would be left with little but the appearance, demeanor, and stereotypes of the jurors upon which to exercise peremptory strikes.[11]

In practice, though, federal judges usually conduct some voir dire, but often exercise their authority, pursuant to Rule 24(a), to bar lawyers from directly questioning prospective jurors in federal criminal cases.[12] The justification for barring the attorneys from directly participating in the selection of their own jury is based primarily on a concern that it takes too much time, as well as a belief that judges do a better job at voir dire.[13] Studies and surveys, including those conducted by the Federal Judicial Center, show these justifications are without support.[14]

The question, then, is whether Federal Rule of Criminal Procedure 24(a) ought to be amended to explicitly permit parties to directly participate in the selection of the jury that will decide their case. This Article posits that attorney participation in voir dire is essential to jury selection, particularly in federal criminal trials. The first part of this Article briefly reviews the origin and purpose of jury voir dire and peremptory strikes to set the stage for examining whether attorney participation in jury voir dire advances these purposes.[15] The

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558, 567–68 (6th Cir. 2014) (addressing jury selection issues in state habeas corpus proceeding); Libby v. Neven, 580 F. App'x 560, 563–64 (9th Cir. 2014) (same); Benjamin v. Meyer, 568 F. App'x 603, 607–08 (10th Cir. 2014) (same). The second reason is more practical and parochial: the author's experience in criminal cases is limited primarily to federal practice.

9. *See* FED. R. CRIM. P. 24(a).

10. *Id.*

11. Courts, commentators, and practitioners often use the terms "challenges" and "strikes" interchangeably to refer to the removal of prospective jurors either for cause or peremptorily by the parties. Discussion of jury selection would be more precise were the removal of prospective jurors for cause termed "challenges" and the peremptory removal of prospective jurors termed "strikes," as the former requires a judicial decision, while the latter does not. Lawyers may "challenge" a prospective juror's qualifications or ability to serve, and therefore seek to have a prospective juror removed for cause, in response to which challenge the trial judge must rule. In contrast, lawyers do not "challenge" a prospective juror when exercising peremptories; rather, lawyers simply "strike" the prospective juror. There is no challenge, response, or ruling. Accordingly, for-cause removal of prospective jurors should be termed "challenges," and peremptory removal of prospective jurors should be termed "strikes." This Article therefore adopts that practice, recognizing that courts and other commentators use the terms interchangeably, and does not disturb their choice of terms when quoted herein.

12. *See infra* text accompanying notes 126–140.

13. *See infra* text accompanying notes 187–189.

14. *See infra* text accompanying notes 191–194.

15. *See infra* Part II.

Article next examines the constitutional, statutory, and federal rules addressing jury selection.[16] The Article then reviews voir dire as it is actually practiced in federal criminal trials, including an examination of the use of written jury questionnaires as part of the voir dire process.[17] The penultimate portion of this Article discusses problems and criticism with jury voir dire, both when judges and attorneys conduct the voir dire.[18] The final portion of the Article argues that jury voir dire in federal criminal cases should involve written jury questionnaires, voir dire by judges, and voir dire by attorneys, and proposes an amendment to Federal Rules of Criminal Procedure 24(a) that would entitle attorneys for the parties in a federal criminal case to conduct jury voir dire.[19]

II. JURY VOIR DIRE AND PEREMPTORY STRIKES

To determine whether attorney participation in jury voir dire is appropriate in federal criminal cases, it is proper to consider the history and purpose behind the practice. Moreover, the origin and purpose of peremptory strikes is relevant to the extent that there is arguably a relationship between the need for attorney participation in jury voir dire and the need for peremptory strikes. After exploring these topics, the Article will turn to what the federal law says about them.

A. The Origin and Purpose of Jury Voir Dire

Juries date back to as early as 500 B.C. in Greece, and evolved over the centuries to the form they take today in America.[20] Juries used to consist of people who had knowledge of the case and the litigants, but this changed over time when the concept of an impartial jury of one's peers took root.[21] Thus, by the end of the fifteenth century, an English jury was intended to consist of impartial men.[22] The requirement that jurors be impartial was incorporated into

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16. *See infra* Part III.
17. *See infra* Part IV.
18. *See infra* Part V.
19. *See infra* Part VI.
20. *See* Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 310 (2012) (citing Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 814 (1997)) [hereinafter *Peremptory Challenges*] (relating the history of the American jury).
21. *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 390 (1996).
22. *See* William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1407–08 (2001) (citing WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 125–38 (James Appleton Morgan ed., 2d ed. 1875); Thomas A. Green, *A Retrospective on the Criminal Trial Jury, 1200–1800*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND 249–57 (J.S. Cockburn & Thomas A. Green eds., 1988); Douglas Hay, *The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century*, *in* TWELVE GOOD

the American common law.[23] Prior to the American Revolution, it was the practice for the local sheriff to choose the jurors to sit on a case, with no questioning of the prospective jurors.[24]

The purpose of jury voir dire is to seek information to inform a trial court's decision whether to remove prospective jurors for cause, and to inform the parties' decision whether to remove prospective jurors using peremptory strikes.[25] There was little need for voir dire historically when juries consisted of people with knowledge of the case. Thus, voir dire developed as an outgrowth of the desire to seat impartial and unbiased citizens as jurors.[26]

As will be discussed in more detail below, the United States Constitution incorporated the jury system in both criminal and civil trials.[27] After adoption of the Constitution, the early practice was for judges alone to conduct the voir dire.[28] Since then, the trend has consistently reflected that judges alone conduct voir dire in federal criminal cases.[29]

B. The Origin and Purpose of Peremptory Strikes

Peremptory strikes, that is, the ability of a party to strike prospective jurors for any reason, originated from a desire to ensure an impartial jury.[30] There is no provision in the Constitution for peremptory strikes.[31] The Supreme Court has recognized, however, that peremptory strikes serve as an essential safeguard for

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MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND 305 (J. S. Cockburn & Thomas A. Green eds., 1988); LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 56 (2d ed. 1988); ROBERT VON MOSCHZISKER, TRIAL BY JURY §§ 43–44, at 34–36 (1922)).

23. *See* Lewis O. Unglesby, *"Speaking the Truth" About Attorney Voir Dire*, 62 LA. B.J. 90, 91 (2014) (stating that in the treason trial of Aaron Burr, Chief Justice Marshall held that an impartial jury was required by the common law).

24. *Id.*

25. Diprima, *supra* note 6, at 890 ("Voir dire 'sets the stage' for both cause and peremptory challenges by helping the judge and the parties identify biased potential jurors.").

26. *See* Unglesby, *supra* note 23, at 91 (suggesting that voir dire "developed because society became disconnected from the old English village traditions due to changes caused by the expansion of the population" such that "a litigant had to secure some direct information about the jurors and could not be expected to rely on general community knowledge.").

27. *See* U.S. CONST. amends. VI, VII.

28. Unglesby, *supra* note 23, at 91.

29. *See infra* text accompanying notes 126–140.

30. *See generally*, *Peremptory Challenges*, *supra* note 20, at 812–27 (1997) (citations omitted) (relating that peremptory strikes originated in England as a means for the government to ensure that unbiased people served as jurors).

31. *See* U.S. CONST. amends VI, VII. *See also* Ross v. Oklahoma, 487 U.S. 81, 85–88 (1988) (noting that peremptory strikes are not constitutionally required, but, rather, were "a means to achieve the end" of empaneling an impartial jury, so no constitutional violation occurred when defendant had to use a peremptory strike to remove a juror who arguably should have been removed for cause). Indeed, it appears that peremptory challenges were never even discussed in drafting the Constitution or its amendments. *See Peremptory Challenges*, *supra* note 20, at 825.

seating an impartial jury.[32] Historically, parties were free to exercise peremptory strikes without having to give any explanation for striking a prospective juror, and the decision could not be challenged.[33]

In the second half of the last century, however, the Supreme Court began to restrict the previously unrestricted exercise of peremptory strikes, and opened to examination the reasons attorneys claimed for striking particular jurors.[34] This is because the Supreme Court concluded that striking jurors based on their gender, ethnic origin, or race could violate a criminal defendant's right to equal protection as guaranteed by the Fifth Amendment to the Constitution.[35] The Supreme Court later recognized that the discriminatory exercise of peremptory strikes could negatively affect prospective jurors' equal protection rights, not just

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32. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986) (citations omitted) (noting that the essential nature of peremptory strikes is to permit a party to strike a prospective juror "without a reason stated" and "without being subject to the court's control" to further the party's effort to remove biased jurors) (citing Lewis v. United States, 146 U.S. 370, 378 (1892); State v. Thompson, 206 P.2d 1037, 1039 (Az. 1949)).

33. *See* Alan Rogers, *An Anchor to the Windward: The Right of the Accused to an Impartial Jury in Massachusetts Capital Cases*, 33 SUFFOLK U. L. REV. 35, 66 (1999).

34. *See, e.g.*, *Batson*, U.S. 476, at 96–98 (citing Castaneda v. Partida 430 U.S. 482, 494 (1977); Alexander v. Louisiana, 405 U.S. 625, 632 (1972); Avery v. Georgia, 345 U.S. 559, 562 (1953); Norris v. Alabama, 294 U.S. 587, at 598(1935)) (overruling its earlier decision that the defense must show that the prosecution systematically used peremptory strikes in a discriminatory manner and holding that a defense attorney can question the prosecution's use of peremptory strikes without the burden of showing systematic discrimination).

35. *See, e.g.*, United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000) ("Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race."); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 127 (1994) (gender); Hernandez v. New York, 500 U.S. 352, 355 (1991) (ethnic origin (citing to *Batson* 476 U.S. at 96–98)); *Batson*, 476 U.S. at 96–98 (race (citing *Castaneda*, 430 U.S. at 494)); *Alexander*, 405 U.S. at 632; *Avery*, 345 U.S. at 562; *Norris*, 294 U.S. at 598. The Supreme Court has yet to apply *Batson* beyond race, ethnic origin, and gender. *See* United States v. Heron, 721 F.3d 896, 900 (7th Cir. 2013) (noting that the Supreme Court has applied *Batson* only to race and gender). Lower courts are divided on whether the *Batson* principle should apply to religion. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3(d), at 1092 (5th ed. 2009). They are also divided on whether *Batson* should apply to other areas under constitutional protection, such as sexual orientation or identity. *See* SmithKline Beecham Corp. v. Abbot Labs., 740 F.3d 471, 484 (9th Cir. 2014) (applying heightened scrutiny to a *Batson* challenge that was based on sexual orientation). On November 12, 2012, the Attorney General of the United States adopted "as a matter of Department policy, [*Batson*] should be interpreted to extend to juror strikes based on sexual orientation." Memorandum to All Department Employees from Eric H. Holder, Jr., Attorney General, on Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples (Feb. 10, 2014) (citing Memorandum to All Department Employees from Eric H. Holder, Jr., Attorney General, Guidance on Application of *Batson v. Kentucky* to Juror Strikes Based on Sexual Orientation (Nov. 14, 2012)). Courts have not otherwise expanded the application of *Batson*. *See, e.g.*, United States v. Santiago-Martinez, 58 F.3d 422, 422–23 (9th Cir. 1995) (refusing to extend *Batson* to prohibit peremptory strikes on the basis of obesity because obesity is not subject to heightened scrutiny under the Equal Protection Clause).

the equal protection rights of criminal defendants.[36] For that reason, the prohibition against exercising peremptory strikes based on a person's gender, ethnic origin, or race applies equally to the government and the criminal defendant.[37] It also applies equally in civil cases, not just criminal cases.[38] Thus, a white defendant can object to the government using peremptory strikes to remove minorities from the jury,[39] an African-American defendant can challenge the government's use of peremptory strikes to remove whites,[40] and the government can object to a defendant's similarly improper use of peremptory strikes.[41]

In exercising peremptory strikes, attorneys often rely in part on stereotypes, assuming that certain types of people from particular areas or with similar socioeconomic backgrounds share certain belief systems favorable or unfavorable to one side or the other.[42] For example, prosecutors may believe wealthy, well educated, or politically conservative people are more likely to be favorable to the government in a criminal case.[43] In contrast, defense attorneys may believe that actors, writers, and artists are better for criminal defendants.[44] Studies have shown, however, that attorneys often draw inaccurate conclusions about prospective jurors relying on stereotypes.[45] As inaccurate as reliance on

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36. *See* United States v. Hernandez-Estrada, 749 F.3d 1154, 1171 n.2 (9th Cir. 2014) (Smith, J., concurring) (recognizing that *Batson* protects prospective jurors' rights (citing *Batson*, 476 U.S. at 84)).

37. *See* Georgia v. McCollum, 505 U.S. 42, 48–59 (1992) (Rehnquist, C.J., concurring) (citations omitted) (holding that a criminal defendant's exercise of racially-discriminatory peremptory strikes violates the prospective juror's constitutional right to equal protection).

38. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618 (1991) (applying *Batson* to jury selection in a civil case).

39. *See* Powers v. Ohio, 499 U.S. 400, 415 (1991).

40. *See* Roman v. Abrams, 822 F.2d 214, 227–28 (2d Cir. 1987).

41. *See McCollum*, 505 U.S. at 59.

42. *See, e.g.*, Rachael A. Ream, *Limited Voir Dire: Why It Fails to Detect Juror Bias*, 23 CRIM. JUST. 22, 22 (2009) (stating that some attorneys "rely on stereotypes that relate certain demographic characteristics such as gender, age, race, and occupation to a pro-prosecution or pro-defense predisposition."); Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*, 95 ILL. B.J. 474, 477 (2007) (asserting that recent studies suggest that "traditional methods of juror profiling, such as age, race, sex or wealth, do not accurately predict juror attitudes when compared to directing [sic] questioning.").

43. *See* Jeffrey T. Frederick, *Jury Behavior: A Psychologist Examines Jury Selection*, 5 OHIO N. U. L. REV. 571, 574–75 (1978) (citing John P. Reed, *Jury Deliberations, Voting, and Verdict Trends*, 65 SW. SOC. SCI. Q. 361, 366 (1965)) (noting studies that show that "[j]urors of higher economic status and higher educational levels were more likely to convict.").

44. *See* Caroline Crocker Otis et al., *Hypothesis Testing in Attorney-Conducted Voir Dire*, 38 LAW & HUM. BEHAV. 392, 392 (2014) (citing Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N. U. L. REV. 229, 230–31 (1990)) (relating common "lay theories" or "attorney folklore" about prospective jurors).

45. *Id.* at 401 (citing Holley S. Hodgins & Miron Zuckerman, *Beyond Selecting Information: Biases in Spontaneous Questions and Resultant Conclusions*, 29 J. EXPERIMENTAL SOC. PSYCHOL.

stereotypes may be, attorneys may nevertheless still exercise their peremptory strikes relying on them so long as the stereotype is not based on a constitutionally protected area.[46]

If one side believes that the other exercised a peremptory strike for an unconstitutional reason, the party may make a so-called *Batson* challenge, which requires the trial court to hold a *Batson* hearing.[47] This three-part procedure, borrowed from a similar process used in employment discrimination cases,[48] begins with the objecting party making an initial prima facie showing that the peremptory strike was unconstitutionally motivated.[49] If the moving party is able to make such a showing, the burden shifts to the party who exercised the peremptory strike to articulate a neutral explanation for the challenges.[50] The standard here is not high. "Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[51]

If the non-moving party articulates a non-discriminatory reason, the court must then decide whether it was the real and legitimate reason, or was merely a pretext for striking the juror for an unconstitutional reason.[52] "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding [the alleged discriminatory] motivation rests with, and never shifts from, the opponent of the strike.'"[53] If the trial court finds the peremptory strike was motivated by a constitutionally improper reason, the court may remedy the improper use of peremptory challenges by discharging the entire venire (the group of citizens from which the jury is selected) and selecting a new panel,[54] or by disallowing

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387, 403 (1993)) (summarizing the conclusion from one such study, showing it was consistent with past studies finding that attorney generalizations about prospective jurors are often mistaken).

46. *See* Anthony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 261 (2005).

47. *See* State v. Chapman, 317 S.C. 302, 305–06, 454 S.E.2d 317, 319–20 (1995).

48. Barbara O'Brien & Catherine M. Grosso, *Beyond* Batson*'s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Peremptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1631 (2013) (citing Batson v. Kentucky, 476 U.S. 79, 94 n.18, 96 n.19 (1986)) (stating that the Batson procedure was borrowed from the procedure used in employment discrimination cases).

49. *See Batson*, 476 U.S. at 93–94 (citing Washington v. Davis, 426 U.S. 229, 239–42 (1976)).

50. *Batson*, 476 U.S. at 94 (citing Alexander v. Louisiana, 405 U.S. 625, 631–32 (1972)).

51. Rice v. Collins, 546 U.S. 333, 338 (2006) (quoting Purkett v. Elem, 514 U.S. 765, 767–68 (1995) (per curiam)).

52. *See* Johnson v. California, 545 U.S. 162, 168 (2005) (quoting *Purkett*, 514 U.S. at 767); United States v. Uwaezhoke, 995 F.2d 388, 394 (3rd Cir. 1993).

53. *Rice*, 546 U.S. at 338 (quoting *Purkett*, 514 U.S. at 768).

54. *See* Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1116 (1994).

the improper challenge and seating the struck juror.[55] If the *Batson* objection is incorrectly dismissed but found on appeal, the remedy is a new trial.[56]

All of this is important to the extent that a robust voir dire record provides the basis upon which trial and appellate courts are able to evaluate whether a peremptory strike has been used for proper or improper purposes. Therefore, as we explore whether it is preferable to have the parties directly participate in voir dire, it is appropriate to recognize there is a direct relationship between voir dire and peremptory strikes.

C. The Relationship Between Voir Dire and Peremptory Strikes

Courts and commentators are often critical of peremptory strikes.[57] Some commentators argue peremptory strikes should be abolished, while others argue that the number of peremptory strikes afforded each side should be limited.[58] It does not appear that peremptory strikes will be eliminated any time soon.[59] The Supreme Court has recognized the symbiotic relationship between adequate voir dire and the ability of attorneys intelligently to exercise peremptory strikes.[60] "The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories . . . ."[61]

Nevertheless, some commentators have argued there is, or perhaps ought to be, an inverse relationship between voir dire and peremptory strikes.[62] In other

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55. *See* Youngblood v. Brown, 465 F. Supp. 2d 270, 278–79 (S.D.N.Y. 2006) (holding that reseating two struck white prospective jurors was appropriate remedy when court found merit in the prosecution's "reverse *Batson* claim," concluding the defendant's striking of white prospective jurors was race-based and his purported neutral explanation pretextual); *see also* Cynthia Richers-Rowland, Note, Batson v. Kentucky*: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195, 1220–21 (1987) (citing *Batson*, 1476 U.S. at 99 n.24) (summarizing remedies for successful *Batson* challenges).

56. *See* United States v. Kimbrel, 532 F.3d 461, 469 (6th Cir. 2008) (holding that only a new trial can remedy a *Batson* violation found on appeal because the error is deemed structural and not subject to harmless error analysis).

57. *See, e.g.*, Maisa Jean Frank, Note, *Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota as a Case Study*, 94 MINN. L. REV. 2075, 2091 (2010) (stating that lawyers have proposed changing the number of peremptory strikes afforded each party).

58. *See, e.g.*, Pizzi & Hoffman, *supra* note 22, at 1432 (advocating for the abolition of peremptory strikes); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, The Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 168–69 (2010) (advocating for the abolition of peremptory strikes).

59. *See* Bennett, *supra* note 58, at 167 (recognizing "there has admittedly been little support from courts or legislatures" to eliminate peremptory strikes).

60. *See* Swain v. Alabama, 380 U.S. 202, 219–20 (1965).

61. *Id.* at 218–19.

62. *See* NANCY GERTNER & JUDITH H. MIZNER, THE LAW OF JURIES § 4:1, at 133 (7th ed. 2013) ("Peremptory challenges are necessary, it is argued, so long as voir dire is perfunctory.").

words, the argument is that peremptory strikes are necessary because attorneys lack sufficient information about prospective jurors to be able to challenge them for cause.[63] If, however, attorneys are provided with the ability to conduct voir dire, then the need for peremptory strikes is removed or at least diminished.[64] This reasoning has led some to argue that an increase in attorney participation in voir dire decreases the need for voir dire.[65]

This argument assumes, however, that jury voir dire will successfully uncover all jury biases and disqualifications, and further assumes that, once uncovered, a party could then successfully challenge a prospective juror for cause. These are faulty assumptions. First, even when attorneys are permitted full participation in jury voir dire, it is no guarantee that it will uncover hidden biases or other facts that would render a prospective juror subject to removal for cause.[66] Although voir dire certainly increases the likelihood of uncovering bias, it is unrealistic to believe that it will always do so.

Second, it is a false assumption that information learned through jury voir dire would justify removal of the prospective juror for cause. It may be that jury voir dire reveals a bias or belief system that does not rise to the level that the juror is subject to removal for cause. Prospective jurors often assert they can be fair and impartial, despite their beliefs, and that is generally sufficient to defeat challenges for cause.[67] That does not mean, however, that the prospective jurors

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63. *See id.*

64. *See* Bennett, *supra* note 58, at 168 ("The more information a lawyer obtains from a potential juror, the better informed the lawyer and the judge are on challenges for cause, but the greater the likelihood that the lawyer would exercise a peremptory challenge based upon the lawyer's own explicit and implicit bias."). This author disagrees with Judge Bennett's cynical presumption; the more information a lawyer has about a prospective juror, there is a higher chance that the lawyer will not have to rely upon stereotypes and preconceived biases, and the greater the likelihood the lawyer will base peremptory strikes on facts about the prospective juror's actual views and values. Judge Bennett admits "increased lawyer participation in voir dire should increase the information about jurors' biases" on which strikes for cause can be based. *Id.* at 168. He does not explain why increasing the information available to the lawyer about a prospective juror will impact challenges for cause, but when it comes to the exercise of peremptory strikes, the lawyer will fall back upon the lawyer's explicit or implicit biases.

65. *See id.* at 168 (arguing that lawyer participation in voir dire should be increased, but peremptory strikes eliminated).

66. *See* ROBERT A. WENKE, THE ART OF SELECTING A JURY 66 (1979) (recognizing that prejudice and bias "may be buried deep within the subconscious" of prospective jurors).

67. *See* Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1984) (if a prospective juror expresses the belief he or she is able to set aside an opinion and render a verdict based on the evidence, a court is not required to remove the juror for cause, no matter what the opinion); *see also, e.g.*, United States v. Allen, 605 F.3d 461, 464–65 (7th Cir. 2010) (finding the district court did not err in denying a motion to remove a prospective juror for cause, where the prospective juror's child had been kidnapped, when the prospective juror made assurances during voir dire that she could remain impartial (citing *Patton*, 467 U.S. at 1036; Thompson v. Altheimer & Gray, 248 F.3d 621, 626 (7th Cir. 2001); United States v. Gonzalez, 214 F.3d 1109, 1114 (9th Cir. 2000))); United States v. Fulks, 454 F.3d 410, 433–34 (4th Cir. 2006) (in a criminal case involving charges of sexual assault, finding the district court did not err in denying a motion to remove for cause a prospective juror

will be fair and impartial. Peremptory strikes remain a method by which the attorneys can remove such suspect prospective jurors and thereby inch closer to a truly fair and impartial jury.[68]

This point is best made by way of illustration. Imagine a case where a defendant is charged with arson, and a prospective juror reveals during voir dire that his mother died in an arson fire. Imagine further, though, that the prospective juror swears he can be fair and impartial despite that personal history. No self-respecting defense attorney would want that prospective juror to sit in judgment of the arson defendant. It is reasonable to believe that, all things being equal, someone without that prospective juror's personal experience is more likely to be able to render a fair and impartial verdict. This same prospective juror may be a fine juror in a different criminal case with different charges, like a drug case, for example, or in a civil case. But, this prospective juror is not likely to be the most fair and impartial juror in an arson case. If the parties were deprived of peremptory strikes, it would be difficult to persuade a judge to remove this prospective juror for cause when the prospective juror swears he or she can be fair and impartial. As a result, without peremptory strikes this highly suspect juror, who may not even fully appreciate his or her own latent bias, could sit in judgment of the arson defendant.

Moreover, if parties are deprived of peremptory strikes, it increases the chance that erroneous rulings on for-cause challenges will require new trials. This is because if a trial court should have removed a prospective juror for cause, but a defendant uses a peremptory strike to remove that prospective juror, there is no reversible error unless the defendant can show that the resulting jury was biased.[69] Deprived of peremptory strikes, litigation over the granting or denial of for-cause challenges would increase. As it is, peremptory strikes serve as an insurance policy against erroneous rulings on challenges for cause.

Accordingly, the relationship between attorney participation in jury voir dire and attorneys being able to exercise peremptory strikes is positive, not inverse.

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whose sister had been the victim of a sexual assault because the prospective juror assured the court she could be impartial).

68. Indeed, peremptory strikes are a means of insurance for removing prospective jurors who prove reluctant to reveal bias and harbor ill will toward the attorney who tried to uncover it. *See* Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1176 (1993) (citing Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L REV. 725, 721 (1992)) ("[A]bolition of the peremptory would make it more difficult for the litigant to lay the groundwork for a cause challenge, as the vigorous questioning may antagonize and hence prejudice a potential juror. The peremptory challenge is the insurance that makes genuine inquiry into juror bias possible.").

69. *See* Ross v. Oklahoma, 487 U.S. 81, 86 (1988) (holding that where a trial court improperly failed to remove a prospective juror for cause, but the defendant removed that prospective juror by exercising a peremptory strike, no error occurred unless the defendant can show the empaneled jury was biased (citing Lockhart v. McCree, 476 U.S. 162, 184 (1986))).

Jury voir dire aids the parties in exercising peremptory strikes.[70] The need for peremptory strikes does not decrease as attorney participation in jury voir dire increases.

III. FEDERAL LAW PERTAINING TO JURY SELECTION IN CRIMINAL CASES

Having explored the origins of jury voir dire, peremptory strikes, and the relationship between the two, this Article will now turn to examine the federal law as it pertains to jury selection generally, and jury voir dire specifically, in federal criminal cases. An examination of this process reveals sparse treatment and spare rules regarding jury voir dire, leaving it within the wide discretion of federal judges to grant, deny, or restrict jury voir dire by attorneys representing the United States or a criminal defendant.

A. Constitutional Provisions

The Constitution explicitly says little about criminal juries, and nothing about the jury selection process.[71] Although it commands juries in criminal cases,[72] there are no provisions in the Constitution regarding the composition or size of a criminal jury. There are likewise no provisions for voir dire.[73] As discussed below, judicial decisions have put some meat on the bones of the Constitutional skeleton of the right to a jury in a criminal case, but the process largely remains irregular and unregulated.[74]

Whether a defendant is constitutionally entitled to a jury depends on the charges and the degree of punishment to which the defendant could be subjected.[75] The Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."[76] The Supreme Court has

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70. *See* Mu'Min v. Virginia, 500 U.S. 415, 431 (1991) (recognizing that jury voir dire aids attorneys in exercising peremptory strikes).

71. *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amends. VI, VII.

72. *See* U.S. CONST. art. III, § 2, cl. 3.

73. *See* U.S. CONST. amends. VI, VII.

74. *See* Baldwin v. New York, 399 U.S. 66, 69 n.6 (1970) (deciding that a potential sentence prison sentence in excess of six months is not a "petty" offense, worthy of a jury trial). *But see* Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (holding that a defendant has a right to a jury trial "only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense . . . is a 'serious' one.").

75. *See* Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (Harlan, J., dissenting) (citing Cheff v. Schnackenberg, 384 U.S. 373, 379 (1966); District of Columbia v. Clawans, 300 U.S. 617, 624, 628–30 (1937); Schick v. United States, 195 U.S. 65, 68 (1904); Natal v. Louisiana, 139 U.S. 621, 624 (1891)).

76. U.S. CONST. art. III, § 2, cl. 3.

concluded, though, that the right to a jury does not apply to petty offenses.[77] That is so even if the defendant is charged with multiple petty offenses for which, if punishment was aggregated, the sentence could result in the equivalent of punishment for more serious offenses.[78]

There is nothing in the Constitution establishing the size of a criminal jury.[79] At common law at the time the Constitution was adopted, a typical jury consisted of twelve people,[80] but this was not always the case.[81] Indeed, in *Williams v. Florida*, the Supreme Court concluded that "the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'"[82]

As mentioned previously, the purpose of jury selection in the United States courts is to arrive at an impartial jury.[83] This purpose is reflected in and now founded upon the Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right to a

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77. *See Duncan*, 391 U.S. at 159 (citing *Cheff*, 384 U.S. at 379; *Clawans*, 300 U.S. at 624; *Schick*, 195 U.S. at 68; *Natal*, 139 U.S. at 624).

78. *See* Lewis v. United States, 518 U.S. 322, 330 (1996). What constitutes a petty offense is more complicated than it would seem. Generally, any offense punishable by a term of imprisonment of not more than six months is a petty offense. *See Baldwin*, 399 U.S. at 69 n.6. Nevertheless, if the statute imposes other penalties in addition to imprisonment, then the defendant may be entitled to a jury trial. *See Blanton*, 489 U.S. at 543 (discussing issue).

79. *See* United States v. Burr, 25 F. Cas. 55, 141 (C.C.D. Va. 1807).

80. *See* Colgrove v. Battin, 413 U.S. 149, 177 (1973) (citing Williams v. Florida, 399 U.S. 78, 98–99 n.45 (1970); Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, *in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 412 (Ass'n Am. Law Schs. eds. 1907)) (relating history of American colonies adopting English common law tradition of providing for juries consisting of twelve people); *see also Williams v. Florida*, 399 U.S. at 98–99 n.45 (similarly reciting common law history of juries consisting of twelve people); Patton v. United States, 281 U.S. 276, 288 (1930) (holding that the words "trial by jury" contained in the Sixth Amendment "means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted . . . . Those elements were: (1) That the jury should consist of twelve men, neither more nor less . . . ."); *Burr*, 25 F. Cas. at 141 (in famous trial of Aaron Burr, Chief Justice Marshall held that, although the Constitution is silent as to the size of a criminal jury, "whether of twelve, thirteen, twenty-three, or any other number," it is taken to mean a jury of twelve men because that was is the number at common law).

81. *See generally* Dru Stevenson, *The Function of Uncertainty Within Jury Systems*, 19 GEO. MASON L. REV. 513, 513–29 (2012) (citations omitted) (relating the history of jury systems throughout history, noting for example that the ancient Greeks empaneled juries of 500 citizens).

82. Williams v. Florida, 399 U.S. 78, 102 (1970) (quoting Duncan v. Louisiana, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). *But see* SpearIt, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1, 15–16 (2013) (quoting FORSYTH, *supra* note 22, at 45 n.2) (citing Robert H. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. PA. L. REV. 620, 634–36 (1998)) (tracing the number of 12 jurors to Christian religious origin, mirroring the number of Christ's Apostles).

83. *See supra* text accompanying notes 21–26.

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[84]

The word "impartial" pertains to both the selection of the citizens constituting the venire as well as the selection of the jurors serving as the petite jury.[85] The Sixth Amendment fails, however, to define the meaning of an impartial juror, leaving the term to judicial interpretation.[86]

The requirement of an impartial jury guaranteed in the Sixth Amendment has been interpreted as requiring that jury panels be drawn from citizens representing a "fair cross section" of the community in which the defendant is being tried.[87] This "fair cross section" requirement, however, applies only to the larger jury venire and not to the composition of the ultimate petite jury deciding an individual case.[88] Thus, "the Sixth Amendment guarantees the *opportunity* for a representative jury venire, not a representative venire itself."[89] Courts are granted, through the federal supervisory power, the authority to control the jury selection process to achieve this goal, subject to limited statutory provisions.[90]

B. Statutory Provisions

Only one statute and two rules address federal criminal juries and jury selection.[91] By statute, the basic qualifications for people to serve as federal jurors is that they must be citizens of the United States, over eighteen years of age, and live in the district for a year.[92] Yet, any such person who has pending felony charges or convictions; cannot read, write or understand English; or suffers from physical or mental disabilities that would make it impossible to serve, is deemed unqualified to be a federal juror.[93]

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84. U.S. CONST. amend. VI.

85. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (Frankfurter, J., dissenting) (stating that juries must have a "broad representative character . . . as assurance of a diffused impartiality." (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946))).

86. *See* Scott Brooks, Comment, *Guilty by Reason of Insanity: Why a Maligned Defense Demands a Constitutional Right of Inquiry on Voir Dire*, 20 GEO. MASON L. REV. 1183, 1189 (2013) (citing United States v. Wood, 229 U.S. 123, 145–46 (1936); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1618–21 (2011)) (noting that, because the text of the Sixth Amendment does not define "impartial," interpretations have been left to the courts and commentators).

87. *See Taylor*, 419 U.S. at 535–36.

88. *See id.* at 538 ("Defendants are not entitled to a jury of any particular composition." (citing Fay v. New York, 332 U.S. 261, 284 (1947); Apodaca v. Oregon, 406 U.S. 404, 413 (1972))).

89. United States v. Jackman, 46 F.3d 1240, 1244 (2d Cir. 1995) (citing Roman v. Abrams, 822 F.2d 214, 229 (2d Cir. 1987)) (emphasis original).

90. Mu'Min v. Virginia, 500 U.S. 415, 422 (1991).

91. *See* 28 U.S.C. § 1865 (2012); FED. R. CRIM. P. 23; FED. R. CRIM. P. 24.

92. *See* 28 U.S.C. § 1865(b) (2012).

93. *See id.*

Rule 23 of the Federal Rules of Criminal Procedure addresses the size and composition of a jury in a federal criminal case.[94] Rule 23(a) of the Federal Rules of Criminal Procedure provides that, if a defendant is entitled to a jury trial because of the nature of the charges, the case must be decided by a jury unless the defendant and the government both waive a jury trial, and the court approves.[95] The Supreme Court upheld the constitutionality of Rule 23(a), and rejected the argument that a defendant should be able to waive a jury regardless of whether the government consents.[96] Furthermore, "Rule 23(a) does not require that the Government articulate it reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver."[97]

Rule 23(b) provides for the size of a jury in a criminal case. Generally, a federal criminal jury is to consist of twelve jurors.[98] The rule makes provision for a smaller jury, however, either by stipulation of the parties, or when a juror is excused for good cause after the trial begins.[99] Rule 23(c) sets out the findings a trial judge must make when a case is tried without a jury.[100]

The only rule addressing the jury voir dire is Rule 24(a).[101] Rule 24(a)(1) provides that "[t]he court may examine prospective jurors or may permit the attorneys for the parties to do so."[102] Rule 24(a)(2) states that, "[i]f the court examines the jurors, it must permit the attorneys for the parties" to either "(A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper."[103] Rule 24 does

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94. *See* FED. R. CRIM. P. 23.

95. *See* FED. R. CRIM. P. 23(a).

96. *See* Singer v. United States, 380 U.S. 24, 36–37 (1965).

97. *Id.* at 37.

98. FED. R. CRIM. P. 23(b)(1).

99. Rule 23(b) permits a jury of less than twelve jurors if, "[a]t any time before the verdict, the parties may, with the court's approval, stipulate in writing that: (A) the jury may consist of fewer than 12 persons; or (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins." The rule further provides that, "[a]fter the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins." FED. R. CRIM. P. 23(b)(2).

100. When a case is tried to the court, Rule 23(c) requires the trial judge must find the defendant guilty or not guilty, and if requested by one of the parties, must state its findings of fact in writing or in open court. FED. R. CRIM. P. 23(c).

Frankly, this Rule should be amended to recognize the possibility of a third verdict: not guilty only by reason of insanity. *See* 18 U.S.C. § 4242(b) (2012) ("If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—(1) guilty; (2) not guilty; or (3) not guilty only by reason of insanity.").

101. *See* FED. R. CRIM. P. 24(a).

102. FED. R. CRIM. P. 24(a)(1).

103. FED. R. CRIM. P. 24(a)(2).

not define what constitutes a proper or improper question.[104] It does not provide any guidance for judges in determining whether to allow lawyers to participate in voir dire, nor does it restrict the court's discretion in any way in making the decision.[105]

Rule 24(a) gives courts broad discretion over jury voir dire in federal criminal trials.[106] The rule expressly permits trial courts to deny attorneys direct participation in jury voir dire, and the trial court need not give justification for it.[107] Appellate courts will seldom reverse district courts when they deny attorney's requests that the court ask specific questions.[108] That is because in ruling on matters during voir dire, trial judges often have to rely on their perceptions and evaluations of demeanor and credibility.[109] Consequently, appellate courts grant trial courts broad discretion in controlling the questions attorneys ask when they are allowed to directly examine prospective jurors.[110] The Supreme Court has required voir dire questions be posed only when a prospective juror's views regarding race,[111] ethnicity,[112] or the death penalty[113]

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104. *See* FED. R. CRIM. P. 24.

105. *See id.*

106. *See, e.g.*, Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981) ("[F]ederal judges have been accorded ample discretion in determining how best to conduct the voir dire."); Skilling v. United States, 561 U.S. 358, 386 (2010) (stating that trial judges have wide discretion over jury selection and that it is "particularly within the province of the trial judge" (quoting Ristaino v. Ross, 424 U.S. 589, 595 (1976))); United States v. Sherman, 551 F.3d 45, 52 (1st Cir. 2008) (finding no abuse of discretion when the court refused the defendant's list of proposed questions); United States v. Harper, 527 F.3d 396, 409–10 (5th Cir. 2008) (finding no abuse of discretion where court refused to ask jurors whether they could follow specific laws at issue).

107. *See* FED. R. CRIM. P. 24(a)(1).

108. *See* GORDON BERMANT & JOHN SHAPARD, THE VOIR DIRE EXAMINATION, JUROR CHALLENGES, AND ADVERSARY ADVOCACY 14 (Fed. Jud. Ctr. ed. 1978) ("Appellate courts have been very reluctant to reverse trial judges' decisions not to allow a particular line of questioning that was aimed at obtaining information for exercising peremptory challenges.").

109. *See Rosales-Lopez*, 451 U.S. at 188 (noting that, "[d]espite its importance, the adequacy of voir dire is not easily subject to appellate review [because judges] must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions.").

110. *See* Mu'Min v. Virginia, 500 U.S. 415, 424 (1991) (affording trial judges wide discretion in determining what questions are permissible during jury voir dire); *Rosales-Lopez*, 451 U.S. at 190 (noting that the Constitution leaves it to the trial court to determine the need for particular questions during voir dire); *see also* GOBERT & JORDAN, *supra* note 4, § 11.11 (noting that judges use their discretion in controlling the questions attorneys ask in jury voir dire).

111. *See* Ristaino v. Ross, 424 U.S. 589, 596–97 (1976).

112. *See Rosales-Lopez*, 451 U.S. at 192 (citing *Ristaino*, 424 U.S. 589; Aldridge v. United States, 283 U.S. 308 (1931)).

113. *See* Morgan v. Illinois, 504 U.S. 719, 731 (1992) (citing Witherspoon v. Illinois, 391 U.S. 510, 523 (1968)).

are at issue in a case, and has found voir dire may be necessary where pretrial publicity may impact the ability to seat an impartial jury.[114]

Rule 24(b) addresses how many peremptory "challenges" or strikes each side is allowed, which differs depending on the nature of the charges.[115] Rule 24(b) provides that a court may increase the number of peremptory strikes in the limited circumstance that there are multiple defendants.[116] If a court grants additional peremptory strikes, the committee notes to the Rule provide that "the prosecution may request additional challenges in a multi-defendant case, not to exceed the total number available to the defendants jointly."[117] The court is not, however, required to provide additional peremptory strikes or equalize the number of peremptory strikes.[118] The rules are silent as to the procedure for how the parties are to exercise peremptory strikes.[119]

Rule 24(c) deals with alternate jurors.[120] Courts routinely seat alternate jurors as insurance against having to declare a mistrial should one or more jurors become ill or otherwise unable to serve.[121] These alternate jurors may be substituted for regular jurors during the course of the trial in the event a regular

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114. *See* Skilling v. United States, 561 U.S. 358, 386 (2010) (relying on the trial judge who "sits in the locale" where the publicity takes place to determine whether voir dire is needed in light of pretrial publicity (quoting *Mu'Min*, 500 U.S. at 424)).

115. Generally, in capital cases each side is permitted twenty peremptory strikes, in felony cases the government is permitted six peremptory strikes and the defendant or defendants ten, and in misdemeanor cases each side is permitted three peremptory strikes. *See* FED. R. CRIM. P. 24(b). Criminal defendants are provided more peremptory strikes in felony cases because a defendant's interest in seating an unbiased jury outweighs the government's interest. Frank, *supra* note 57, at 2091. It has always struck this author as irrational that a defendant facing death or a misdemeanor punishment have the same number of peremptory strikes as the government, but defendants facing a felony charge are permitted more peremptory strikes than the government. Indeed, the history of the number of peremptory strikes afforded each party in a criminal case is complex, largely arbitrary, and mired in mystery. *See generally Peremptory Challenges*, *supra* note 20, at 819–22 (relating the history of peremptory challenges, including the number afforded each side in a criminal case).

116. FED. R. CRIM. P. 24(b).

117. FED. R. CRIM. P. 24(c) advisory committee's note to 2002 amendment.

118. *See, e.g.*, United States v. Cochran, 955 F.2d 1116, 1121 (7th Cir. 1992) (holding that whether to grant more peremptory strikes to criminal defendants lies solely within the discretion of the trial judge (citing United States v. Farmer, 924 F.2d 647, 653 (7th Cir. 1991))); United States v. Espinosa, 771 F.2d 1382, 1406 (10th Cir. 1985) (holding that trial judge has discretion whether and when to grant additional peremptory strikes to parties). *But see* United States v. Harbin, 250 F.3d 532, 541 (7th Cir. 2001) (opining in dicta that "a shift in the balance of peremptory challenges favoring the prosecution over the defendant can raise due process concerns.").

119. *See* FED. R. CRIM. P. 24.

120. FED. R. CRIM. P. 24(c).

121. *See* James R. Coltharp, Jr., *Acting Without "Just Cause": An Analysis of the Ninth Circuit's Decision in* United States v. Symington, 89 KY. L.J. 227, 228–29 (2000) (citing FED. R. CRIM. P. 24(c)) (relating evolution of court using alternative jurors as substitutes and not dismissing them at the start of deliberations).

juror is deemed unable to serve.[122] Alternate jurors may also be substituted for regular jurors after the jurors have begun deliberations.[123]

IV. THE PRACTICE OF JURY VOIR DIRE IN FEDERAL CRIMINAL CASES

Having reviewed the origin and purpose of jury voir dire, and examined the limited relevant Constitutional and statutory provisions and rules on the subject, it is now appropriate to turn to surveying how jury voir dire is practiced in federal criminal trials. A natural consequence of the limited, broad, and optional language of Rule 24(a) has unsurprisingly led to very diverse voir dire practices in federal courts around the country.[124] The practices vary federal district to federal district, and in some cases judge to judge within districts, and the practice has changed over time.[125] One of the developments in jury voir dire is the use of written jury questionnaires as a means of eliciting information from prospective jurors in advance of jury selection to aid the court and attorneys in voir dire.[126]

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122. FED. R. CRIM. P. 24(c)(1).

123. Rule 24 was amended in 1999 to permit courts to substitute alternate jurors for jurors who were excused for cause after deliberations began. FED. R. CRIM. P. 24(c) advisory committee's note to 1999 amendment.

124. Jury selection practices vary greatly in federal courts in many other ways, not only with respect to whether and to what extent lawyers are permitted to participate in jury voir dire. For example, because no statute or rule establishes the procedure for parties to exercise peremptory strikes, the manner in which they exercise them can be dramatically different. The method varies dramatically in logistically how many jurors are initially questioned, whether the attorneys exercise peremptory strikes in front of the jury, whether they are required to exercise all their peremptory strikes, and whether they take turns exercising strikes. All of this is left to the whims of individual judges and local practice. Although there is some benefit to leaving discretion to judges in the operation of their courtrooms, it seems to this author that rules establishing a uniform practice for the exercise of peremptory strikes would promote national consistency and ensure parties received the full benefit of the peremptory strikes provided them by statute. Further, if the process was subject to some study, it may be found that one method is preferable over another in the sense of being less subject to abuse by attorneys, such as using peremptory strikes to remove prospective jurors based on race, gender, or some other protective class.

125. *See* Ham v. South Carolina, 409 U.S. 524, 528 (recognizing that judges have broad discretion during voir dire (citing Aldridge v. United States, 283 U.S. 308, 310 (1931))); Ashok Chandran, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 COLUM. J. RACE & L. 28, 37 (2015) (acknowledging the Supreme Court's attitude toward voir dire has changed dramatically over the twentieth century).

126. *See* Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1, 6 (2007).

A. Participation of Attorneys in Jury Voir Dire

Federal judges historically have been hostile toward attorney participation in jury voir dire.[127] The 1924 Judicial Conference of Senior Circuit Judges advocated that judges alone conduct jury voir dire.[128] This became the trend during the middle of the last century, with federal trial judges generally depriving parties from direct participation in jury voir dire.[129] A 1960 survey showed a majority of federal judges barred attorneys from directly examining prospective jurors.[130] By 1977, attorneys were only rarely allowed to directly participate in questioning prospective jurors.[131]

A more recent survey by the Federal Judicial Center, however, showed a shift toward greater attorney participation in voir dire.[132] In 1994, a majority of federal judges surveyed "allowed at least some direct attorney participation" in jury voir dire.[133] Another study completed about the same time, however, suggested that a majority of federal judges exclusively conduct jury voir dire.[134] The Federal Judicial Center has not conducted a survey on this issue in the last

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127. *See generally* Recommendations of Judicial Conference of Senior Circuit Judges, 10 A.B.A. J. 875, 875 (1924) (stating that the Judges recommended removing attorney participation in voir dire).

128. *Id.* (recommending that "the judge alone" examine prospective jurors for the "dispatch of business" and "[i]f counsel on either side desires that additional matter be inquired into, he shall state the matter to the judge, and the judge, if the matter is proper, shall conduct the examination.").

129. *See* GORDON BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT COURT JUDGES 5–10 (1977) [hereinafter VOIR DIRE EXAMINATION] (noting that from 1957 to 1977, "judicial control of the voir dire examination has increased.").

130. *See* Judicial Conference Committee on the Operation of the Jury System, The Jury System in the Federal Courts, 26 F.R.D. 409, 466 (1960) [hereinafter *Judicial Conference*] (summarizing the results of a survey showing that judges alone conducted jury voir dire in 51 of the 94 federal districts, a combination of judges and counsel conducted jury voir dire in 22 of the federal districts, and in twelve districts, jury voir dire was conducted solely by counsel. In other words, approximately 30% of judges allowed some attorney questioning).

131. *See* H.R. REP. No. 95-195, at 7 (1977) ("In most Federal courts the judge conducts voir dire. Only rarely are counsel permitted to question prospective jurors directly.").

132. *See* Memorandum from John Shapard & Molly Johnson on Survey Concerning Voir Dire to Advisory Committee on Civil Rules & Advisory Committee on Criminal Rules 1 (Oct. 4 1994) [hereinafter 1994 Memorandum] (stating that less than 30% of district judges allowed voir dire in "typical" cases in 1977, whereas 59% reported attorney participation in 1994).

133. *Id.* (reporting that in a random survey of 150 active district court judges, "59% indicated that they allowed at least some direct attorney participation in voir dire of civil trial juries, and 54% so indicated with regard to criminal juries.") (noting a margin of error of 8%).

134. *See* KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: JURY TRIAL § 4:7, at 184 n.8 (6th ed. 2006) (in survey of 450 federal judges, 67% indicated they alone conduct examination of prospective jurors).

twenty years, so it is hard to know whether the trend toward increased participation by attorneys in jury voir dire continues.[135]

In practice, the type and manner of jury voir dire conducted by judges varies considerably.[136] Some judges conduct minimal voir dire and do not permit lawyers to conduct any voir dire.[137] Other judges conduct lengthy and sometimes robust voir dire,[138] and will permit the lawyers to conduct voir dire as well. Still, other judges adopt practices that fall somewhere between these extremes.[139] When judges do permit lawyers to conduct voir dire, they usually place time limitations on the lawyers.[140] This varied voir dire practice is inconsistent with the goal of uniformity in federal court practice across the nation.[141]

B. Use of Written Jury Questionnaires in Aid of Jury Voir Dire

It is now a common practice among district courts to have prospective jurors fill out written questionnaires when their names are drawn for potential service.[142] The questionnaires seek basic, important information about prospective jurors, such as age, occupation, education, prior jury service,

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135. Telephone Interview with Matt Sarago, Fed. Jud. Ctr. (Feb. 20, 2015) (notes retained by author).

136. This is based on the author's own experience, having tried more than 60 federal criminal cases before nineteen judges in six federal district courts, and upon experiences related to the author by other federal prosecutors.

137. This was the author's experience when he tried a federal criminal case in the Northern District of Florida in 2010.

138. One federal judge, for example, engages in a lengthy jury voir dire practice, which involves a civics lesson complete with a PowerPoint presentation. *See* Kirk W. Schuler, *In the Vanguard of the American Jury: A Case Study of Jury Innovations in the Northern District of Iowa*, 28 N. ILL. U. L. REV. 453, 469–72 (2008) (citing GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 27 (2007)).

139. It has been this author's experience in most federal criminal trials that judges perform a relatively brief voir dire, eliciting basic information from prospective jurors, largely through close-ended questions in response to which prospective jurors are to raise their hands if they have affirmative answers. In most cases, the judges then permit the lawyers to conduct jury voir dire, limited usually to approximately one-half hour. *See, e.g.*, State v. Cornwell, 715 N.E.2d 1144, 1150 (1999) (limit on voir dire allotting each side one-half hour to question each prospective juror).

140. *See* Ann M. Roan, *Reclaiming Voir Dire*, THE CHAMPION, July 2013, at 23 (noting that many courts impose rigid time limits on attorney-conducted voir dire).

141. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1568 (2008) ("Ensuring the uniform interpretation of federal law has long been considered one of the federal courts' primary objectives, and uniformity is regularly cited in some of the most intractable debates about the structure and function of the federal court system.").

142. *See* United States v. Rolle, 204 F.3d 133, 135 (4th Cir. 2000) (noting that it is a "common practice" to have potential jurors complete questionnaires prior to trial for use by the parties and the court to conduct jury selection).

criminal history, etc.[143] The questionnaires are then provided to the trial judge and the lawyers to be used for the purpose of jury selection. Written questionnaires can be an efficient and effective way to get non-case-specific, basic information about prospective jurors.[144]

In addition to these standard questionnaires routinely issued by federal courts, case-specific questionnaires may also be submitted to prospective jurors seeking much greater information.[145] This is often done in complex cases[146]—such as capital cases where juror views on the death penalty are critical in jury selection[147]—or in cases where there has been substantial publicity about the case.[148] Courts have broad discretion, however, to refuse to issue such questionnaires.[149]

There are some limitations and disadvantages to written jury questionnaires. First, written questionnaires are not standard or uniform across federal district courts.[150] The information sought in the standard questionnaires vary considerably in depth from court to court.[151] Second, prospective jurors may not provide full and complete information in written questionnaires.[152] Third, prospective jurors may not understand a question in a written questionnaire

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143. Attached as Appendix A is the standard jury questionnaire used in the United States District Court for the Northern District of Iowa.

144. *See* Robert J. Hirsh et al., *Attorney Voir Dire and Arizona's Jury Reform Package*, 32 ARIZ. ATT'Y 24, 29 (1996) (suggesting that pretrial questionnaires may be the most efficient and reliable method of obtaining information about prospective jurors).

145. *See, e.g.*, Skilling v. United States, 561 U.S. 358, 371 (2010) (discussing case-specific juror questionnaire used in complex security fraud case).

146. *See, e.g.*, *id.*; United States v. Moore, 651 F.3d 30, 49 (D.C. Cir. 2011) (discussing case-specific juror questionnaire used in complex organized crime case).

147. *See, e.g.*, United States v. Hager, 721 F.3d 167, 190 (4th Cir. 2013) (referencing case-specific juror questionnaire used in capital case); United States v. Fell, 531 F.3d 197, 213–14 (2nd Cir. 2008) (discussing case-specific questionnaire in capital case).

148. *See, e.g.*, United States v. Kadir, 718 F.3d 115, 120 (2d Cir. 2013) (referencing case-specific juror questionnaire used because of publicity issues); United States v. Poulsen, 655 F.3d 492, 507 (6th Cir. 2011) (referencing case-specific juror questionnaire used because of extensive pretrial publicity).

149. *See, e.g.*, United States v. Treacy, 639 F.3d 32, 46 (2d Cir. 2011) (quoting United States v. Quinones, 511 F.3d 289, 300 n.8 (2d Cir. 2007) (stating the trial court did not abuse its discretion when it refused to issue a written questionnaire to prospective jurors).

150. A sample juror questionnaire was attached to the 1994 Federal Judicial Center Memorandum, but it was only referenced as an example. *1994 Memorandum*, *supra* note 132, at Exhibit B 2–6. There appears to be no attempt by the United States Court to develop a uniform written jury questionnaire.

151. This is based on the author's experience trying cases in many different federal district courts. In one federal district, the jury questionnaire consisted of two pages with the most basic biographic information, such as residence, job, and education. In contrast, the United States District Court for the Northern District of Iowa worked with a panel of practicing attorneys to develop a fairly lengthy and informative questionnaire. (Attached as Appendix A).

152. It is the author's experience, for example, that it is not uncommon to find that jurors do not fully disclose criminal history in response to questions in jury questionnaires. This is discovered when the parties research criminal records of prospective jurors.

because it is vague.[153] By definition, there is no opportunity for follow up or ask clarifying questions in a written questionnaire. Fourth, answers in questionnaires may be vague, imprecise, or unintelligible. Again, there is no opportunity for the question to be clarified. Fifth, the setting and circumstances surrounding the completion of juror questionnaires do not necessarily ensure complete, accurate, or thoughtful answers. Prospective jurors may rush through the questionnaire, viewing the task as a hassle, and therefore not give careful thought to answers. Further, when prospective jurors complete jury questionnaires at home, there is none of the aura of importance and seriousness present in a federal courtroom that serves to create a sense of responsibility to provide candid, contemplative answers. Finally, answers to written questionnaires may not reflect the prospective juror's own views. When prospective jurors fill out the questionnaires at home, they may seek input from family members, others, or receive such unsolicited input when completing the questionnaire.[154]

On the other hand, in some instances prospective jurors may actually provide more complete or candid answers in jury questionnaires than in open court. Jurors may feel less inhibited in sharing information in writing than orally in front of strangers.[155] This is particularly so with respect to controversial topics, such as a prospective juror's views about race or capital punishment.[156] Thus, the form of questioning by written questionnaire is likely to elicit information that is different from that which would occur in response to oral jury voir dire.

Regardless of the pros and cons of jury questionnaires, they cannot adequately substitute for jury voir dire, as has been explored on occasion.[157] Appellate courts have affirmed trial judges' removal of jurors for cause based solely on their answers to jury questionnaires, even without the benefit of voir

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153. *See, e.g.*, Hatten v. Quarterman, 570 F.3d 595, 602 (5th Cir. 2009) (noting vague question propounded in jury questionnaire); United States v. Basciano, No. 05-CR-60, 2011 WL 913197, at 3 (E.D.N.Y. Feb. 4, 2011) (rejecting proposed jury question because it was vague); Watts v. Maine, No. 08-290-B-W, 2009 WL 249236, at 9 (D. Me. Feb. 2, 2009) (finding question in jury questionnaire to be vague).

154. *See* Green v. White, 232 F.3d 671, 672 (9th Cir. 2000) (involving evidence that the juror's wife filled out the juror questionnaire for her husband).

155. *See* Ream, *supra* note 42, at 26 (arguing "prospective jurors are more forthcoming in answering private questionnaires than in a public forum."); Lisa Blue Baron & Robert B. Hirschhorn, *Top Five Voir Dire Strategies*, TRIAL, 32, 32 (2014) (without citation to authority, survey, or study, the authors opined that "most jurors feel more comfortable writing their answers than publicly answer questions.").

156. It is not uncommon for the author to have reviewed juror questionnaires where prospective jurors have written racist comments or expressed views showing the prospective juror is prejudiced against some group, but when asked in open court by the trial judge whether the defendant's race would affect any of the prospective jurors' ability to be fair and impartial, the same prospective jurors have sat silently, hands fixed at their sides. Likewise, the author has tried capital cases and found that, in some instances, prospective jurors' answers in jury questionnaires differed dramatically regarding their views of capital punishment than did their answers in open court.

157. *See* Ream, *supra* note 42, at 26; Baron & Hirschhorn, *supra* note 155, at 32.

dire to explore answers to written questionnaires.[158] Though, when this occurs a trial judge's decision is afforded no deference on appeal because the trial judge did not make the decision based on a credibility assessment.[159] More importantly, removal of a few clearly biased prospective jurors based on answers to written questionnaires does not eliminate the need for voir dire of the remaining prospective jurors who may still harbor biases or other disqualifying views, but, perhaps, were less honest or less expressive of their views in the written questionnaires.

V. THE PROBLEMS AND CRITICISMS OF JURY VOIR DIRE

To determine whether jury voir dire should be reformed, and in particular whether the law should be changed to ensure attorneys have the ability to conduct jury voir dire, it is appropriate to consider the perceived problems and expressed criticisms of jury voir dire practice. This may best be accomplished by considering each of the jury voir dire options set forth in Federal Rule of Criminal Procedure 24(a). The alternative forms of jury voir dire permitted under Rule 24(a) are: (1) nobody conducts voir dire; (2) the judge conducts voir dire, with or without input from the attorneys; or (3) the court conducts voir dire and permits the attorneys to directly examine the prospective jurors. There are problems with each method standing alone.

A. If Nobody Conducted Voir Dire

Federal Rule of Criminal Procedure 24(a) allows a trial judge to dispense with voir dire entirely.[160] It is unlikely, in practice, that any judge does so.[161] This is probably because the problems with conducting no jury voir dire are obvious. Parties cannot intelligently challenge prospective jurors for cause, or the judge intelligently determine whether to remove prospective jurors for cause, if the parties and the judge are ignorant of information necessary to determine if

158. *See, e.g.*, United States v. Contreras, 108 F.3d 1255, 1269–70 (10th Cir. 1997) (discussing the dismissal of a juror based on questionnaire answers); United States v. Paradies, 98 F.3d 1266, 1277, 1279 (11th Cir. 1996) (allowing the dismissal of a juror based on questionnaire answers); United States v. North, 910 F.2d 843, 909–10 (D.C. Cir. 1990), *withdrawn and superseded in part by* United States v. North, 920 F.2d 940 (1990).

159. *See, e.g.*, United States v. Chanthadara, 230 F.3d 1237, 1270 (10th Cir. 2000) (reviewing de novo a district court's decision to remove jurors for cause based solely on answer to written questionnaires).

160. *See* FED. R. CRIM. P. 24(a)(1) ("The court may examine prospective jurors or may permit the attorneys for the parties to do so.").

161. The author has never tried a case, criminal or civil, state or federal, where the trial judge did not conduct some type of jury voir dire. Nor could the author find any reported federal criminal cases where it appears that a trial judge completely dispensed with jury voir dire. *See also* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 129 (2003) (stating that all American jury trials involve some jury voir dire questioning).

a juror can be fair and impartial. Moreover, lawyers cannot exercise peremptory challenges fairly and rationally if they know little or nothing about the prospective jurors.[162]

One of the most compelling reasons that jury voir dire, at the very least jury voir dire conducted by the trial judge, is critical to jury selection is how it impacts the appropriate exercise of peremptory strikes.[163] The less information lawyers have to work with in exercising peremptory strikes, the more likely it is that the lawyers will exercise those strikes relying on stereotypes and hunches.[164] Left with little information, lawyers trying to exercise peremptory strikes are more likely to make such decisions based on appearance or generalizations about a prospective juror's employment, residence, age, or some other basic information the lawyer does know or can visually perceive about the juror.[165] Ignorance, in this instance ignorance of useful information about prospective jurors, breeds prejudice.[166] Worst yet, ignorance about prospective jurors invites the exercise of peremptory strikes based on unconstitutionally biased grounds, such as race or gender.[167] Jury voir dire, therefore, should decrease the

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162. Some commentators would reform the jury selection system by eliminating voir dire and eliminating or severely limiting peremptory strikes. *See, e.g.*, Marie D. Natoli, *Au Revoir, Voir Dire and Other Costly and Socioeconomically Unjust Judicial Practices*, 47 NEW ENG. L. REV. 605, 617–22 (2013) (citations omitted) (arguing that voir dire wastes time and lawyers use jury consultants to warp the process).

163. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143–44 (1994) ("If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering the actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.").

164. *See* Valerie P. Hans & Alayna Jehle, *Avoid Bold Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT. L. REV. 1179, 1190–91 (2003) (citing Abbe Smith, *"Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523, 524–28 (1998); Barbara Allen Babcock, *Jury Service and Community Representations*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 460, 463 (Robert E. Litan ed., 1993); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975)) [hereinafter *Wonderful Power*] (noting studies which show that when attorneys lack sufficient information about prospective jurors, they fall back on stereotypes as a basis for exercising peremptory strikes).

165. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 168 (1989) (the author found courts' presumption that prosecutors are motivated by racism in exercising peremptory strikes insulting and "exhibited an apparent misunderstanding of the litigation process" whereby prosecutors are compelled to exercise peremptory strikes on the basis of limited information).

166. *See* RAM RAMAKRISHNAN, MANY PATHS, ONE DESTINATION: LOVE, PEACE, COMPASSION, TOLERANCE, AND UNDERSTANDING THROUGH WORLD RELIGIONS xxvi (2009) ("Ignorance breeds prejudice, hatred, fear, and misunderstanding."); PETER TREMAYNE, BADGER'S MOON: A MYSTERY OF ANCIENT IRELAND 75 (2003) ("Ignorance breeds prejudice, prejudice breeds fear, fear breeds hate.").

167. *See J.E.B.*, 511 U.S. at 143 ("If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypes and pejorative notions about a particular gender or race both unnecessary and unwise.").

unconstitutional exercise of peremptory strikes by increasing the information parties have upon which rationally to base peremptory strikes.

B. When Only the Judge Conducts Voir Dire

Rule 24(a) contemplates the possibility of the trial judge alone asking questions of the jurors, at the court's discretion aided by input by the parties.[168] Judge-only voir dire is, in fact, the practice in many federal district courts.[169] As will be seen, though, there are a myriad of reasons why judge-only jury voir dire is inadequate to constitute effective jury selection.

Prospective jurors view judges differently than other humans. Sitting on high, in flowing black robes, with all the trappings and authority of office, judges can be intimidating to citizens, particularly those unfamiliar with the judicial system.[170] When, then, these authority figures ask prospective jurors questions, the answers will be influenced by the setting and dramatically different positions occupied by the questioner and the questioned.[171] The environment and circumstances simply are not conducive to candid responses.[172] Rather, it is more likely that prospective jurors will provide answers they believe will please or at least be acceptable to this priest-like figure.[173] It is a brave, or disturbing,

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168. *See* FED. R. CRIM. P. 24(a)(2) ("If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.").

169. *See supra* notes 127–139.

170. *See* Unglesby, *supra* note 23, at 92 (stating that, in 2005, the American Bar Association found that empirical research showed "jurors would be more candid responding to an attorney who they see as more of a 'coequal' rather than the authoritarian figure represented by the judge."); Brian McKeen & Phillip Toutant, *The Case for Attorney-Conducted Voir Dire*, 90 MICH. B.J. 30, 31 (2011) ("Judges, as robe-cloaked authority figures, may inadvertently chill jurors' responses to questions during voir dire.").

171. *See, e.g.*, William H. Levit et al., *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 926 n.46 (1971) [hereinafter *Empirical Study*] (citing Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 526–27 (1965)) (summarizing results of post-trial interviews in which jurors expressed views that their integrity was at issue when being examined by a judge); Laura Cooper, *Voir Dire in Federal Criminal Trials: Protecting the Defendant's Right to an Impartial Jury*, 48 INDIANA L.J. 269, 276 (1973) (stating that "the authority and imposing appearance of the judge may awe prospective jurors into giving what they think is the appropriate response rather than the candid one."); Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 143 (1987) (citing *Empirical Study*, *supra*, at 939) (reporting that prospective jurors are more candid and less likely to give socially desirable answers to lawyers than they are to judges).

172. *See Empirical Study*, *supra* note 171, at 926 n.46 (citing Broeder, *supra* note 171, at 526–27).

173. *See* Hans & Jehle, *supra* note 164, at 1194 (citing Shari Seidman Diamond et al., *Realistic Responses to the Limitations of* Batson v. Kentucky, 7 CORNELL J.L. & PUB. POL'Y 77, 92–93 (1977)) (summarizing a study showing that, when questioned by judges, prospective jurors are likely to give answers they perceive will please the judge).

juror indeed who would candidly respond to a trial judge's question about race, for example, with a racist answer.[174] Thus, when judges ask questions, the answers are often based on what prospective jurors think the judge wants to hear, not based on what the prospective jurors really believe. Despite the overwhelming empirical evidence to the contrary, however, judges still believe "jurors will be more candid in responding to the judge than to counsel."[175]

Further, with all due respect to trial judges everywhere, they are often not as skilled as practicing trial lawyers in asking questions, despite what they may think.[176] Some federal district court judges were not trial lawyers before ascending to the bench, and therefore have no practice in conducting voir dire at all.[177] Due to a lack of practice, other judges, though once practicing trial lawyers, have lost the edge on the interrogation skills they once possessed. Jury voir dire is part of trial advocacy, trial advocacy is a skill, and all skills must be practiced regularly to be at their best. It takes skillful jury voir dire to uncover latent biases held by prospective jurors reluctant to reveal them.[178] The Federal Rule of Evidence prohibition on leading questions is limited to direct examination of a witness,[179] so skillful lawyers can use any combination of open-ended and leading questions necessary to tease relevant information out of reticent prospective jurors.

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174. *See* Bennett, *supra* note 58, 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.' I find it remarkable when a juror has the self-knowledge and courage to answer that he or she cannot be fair in a particular case, and even more remarkable when the juror's explanation for that inability is based on a factor that neither I, nor the parties, have raised.").

175. *1994 Memorandum*, *supra* note 132, at 6 (reflecting survey results that "[a] number" of responding judges believed they elicited more candid responses from jurors than do attorneys).

176. As one might anticipate, judges don't necessarily share that view. *See id.* (reflecting that a "number" of responding judges expressed the view that "judges simply do a better job of voir dire questioning," in part because "counsel aren't very good at it."). Although jury voir dire skill level certainly differs from attorney to attorney, on average practicing attorneys are more in practice in examining people than are sitting judges. *See* McKeen & Toutant, *supra* note 170, at 31 (noting that attorneys are better positioned to conduct voir dire questions "because of their knowledge of the case, tendency to probe relevant bias-influencing factors, and ability to elicit honest responses.").

177. As an example, a review of just the first thirty-five Article III judges listed in JUSTICES AND JUDGES OF THE UNITED STATES COURT, Administrative Office of the United States Courts (2006), reveals one judge who was in private practice for one year, whose career otherwise consisted of serving on the staff of a Senate committee, being a law clerk, and teaching as a professor. Another judge was an associate at a law firm for four years, then was a professor before becoming a trial judge. Still another was a trial attorney for only three years before serving in state appointed offices and as a state court judge before becoming a federal trial judge. Finally, another federal trial judge's entire experience consisted of being a juvenile referee, a municipal judge, and a state appellate judge; nothing in the judge's biography suggests he ever tried a case.

178. *See* Cooper, *supra* note 171, at 274–75 ("A voir dire examination must be thorough and probing to overcome a venireman's strong desire to conceal disqualifying personal information.").

179. *See* FED. R. EVID. 611(c) ("Leading questions should not be used on direct examination except as necessary to develop a witness's testimony.").

Another reason that judge-only jury voir dire is inadequate is that a trial judge will not know the case at the bar anywhere near as well as the lawyers trying the case.[180] A skillful and effective jury voir dire is one tailored for the case being tried.[181] It is important to ask prospective jurors questions not just about basic background information about them, but also about their views regarding specific matters that are at issue in the litigation.[182] Using an arson case again as an example, it would be important to know whether a prospective juror has experienced a fire, or served as a firefighter, or works for an insurance company, among other things. The trial lawyers are simply better informed, and therefore better equipped, to conduct effective questioning of prospective jurors.[183]

Finally, the American judicial system is premised on the belief that adversarial process is the best method for arriving at the truth.[184] The confidence we have in the adversarial process should extend to jury selection.[185] Just as the process of having adverse parties question witnesses is most likely to draw out

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180. *See* Wonderful Power, *supra* note 164, at 549 noting that judges' relative lack of knowledge of the case of either party makes them less effective examiners); Cooper, *supra* note 171, at 275–76 ("Another advantage of counsel participation in voir dire is that, unlike the judge, trial attorneys are familiar with facts of the case which may present important areas for inquiry."). *See also* United States v. Ledee, 549 F.2d 990, 993 (5th Cir. 1977) (concluding that "voir dire examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties. A judge cannot have the same grasp of the facts, the complexities and nuances as the trials attorneys entrusted with the preparation of the case.").

181. *See* Bennett, *supra* note 58, at 150, 160 ("At the beginning of the jury selection process, judge-dominated voir dire, with little or no attorney involvement, prevents attorneys from using informed strikes to eliminate biased jurors. For a variety of reasons, judges are in a weaker position than lawyers to anticipate implicit biases in jurors and determine how those biases might affect the case. Thus, permitting judges to dominate the initial jury selection causes more biased jurors to remain on a case and exacerbates the role of implicit bias in jury trials." "Because lawyers almost always know the case better than the trial judge, lawyers are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome.").

182. *See* Unglesby, *supra* note 23, at 93 (arguing that a "court will rarely understand the particular nuances of a case that require follow-up questions to certain answers.").

183. *See id.* (citing WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS 188–94 (2004)) (arguing that "lawyers who know their case are in the best position to recognize the problems" of bias).

184. *See* United States v. Thompson, 827 F.2d 1254, 1259 (9th Cir. 1987) (asserting that the adversarial process "helps us get at the truth.").

185. *See* Frank, *supra* note 57, at 2075 ("In an adversarial system, when both sides engage in [the jury selection] process, they theoretically produce a balanced jury."). It is noteworthy, however, that the vast majority of judges lack confidence in the adversarial system when it comes to jury selection. *See* VOIR DIRE EXAMINATION, *supra* note 129, at 19 (recording that in 1977, 84% of judges surveyed believed that jury selection should proceed independently of the adversarial process).

the truth,[186] so too the process of having adverse parties engage in jury voir dire is more likely to draw out the true facts and views of prospective jurors.[187]

C. When Attorneys Participate in Jury Voir Dire

Federal Rule of Criminal Procedure 24(a) leaves to trial judges unfettered discretion of allowing, or disallowing, the parties to directly participate in selecting their own jury. Many federal judges exercise their discretion to permit parties to directly question prospective jurors. Direct involvement by attorneys in jury voir dire is not without its own problems. Criticisms include assertions that attorney-conducted jury voir dire consumes too much time and that attorneys abuse the opportunity to question prospective jurors by trying to improperly influence them.[188] As will be seen, the time criticism is not supported by the empirical evidence, and both time and abuse issues can be and are adequately addressed by the exercise of judicial supervision over the process.

The principle reason justifying the exclusion of attorneys from jury voir dire is the perception that it is necessary to save time.[189] It is commonly believed that if lawyers are permitted to participate in jury voir dire, jury selection will become unreasonably long.[190] The empirical data shows this concern to be misplaced and overstated, at least as it is practiced in federal court. Jury voir

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186. *See* California v. Green, 399 U.S. 149, 158 (1970) ("cross-examination [is] 'the greatest legal engine ever invented for the discovery of the truth.'" (quoting 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940))).

187 *See* Cooper, *supra* note 171, at 275 ("It is likely that the judge, not having an adversarial interest in the trial, will tend to ask general questions whose desired answer is evident, rather than specific questions that might reveal information on which to base a challenge.") (citing Silverthorne v. United States, 400 F.2d 627, 638 (9th Cir. 1968) (cert. denied); Smith v. United States, 262 F.2d 50, 51 (4th Cir. 1958))).

188. *See 1994 Memorandum*, *supra* note 132, at 4 (noting that survey results of judges reveal that questioning of prospective jurors "takes too much time."); Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 705 (1991) (arguing that some attorneys attempt to influence prospective jurors, instead of conducting proper questioning during jury voir dire).

189. *See, e.g.*, *1994 Memorandum*, *supra* note 132, at 4 (50% of surveyed judges reported that questioning of prospective jurors by attorneys "takes too much time."); *Judicial Conference*, *supra* note 130, at 467 (identifying how voir dire examinations by the judge "results in great savings of time."); Cooper, *supra* note 171, at 271 (citing *Judicial Conference*, *supra* note 130, at 467; *Empirical Study*, *supra* note 171, at 955; Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U. L. REV. 1, 73 (1956); Comment, *Voir Dire Examination—Court or Counsel*, 11 ST. LOUIS U. L.J. 234, 248 (1967)) ("Those who support court-conducted voir dire are primarily concerned with saving time.").

190. United States District Court Judge William L. Dwyer opined that jury selection often takes "days, weeks, or even months" and "[t]he chief cause is uncontrolled jury questioning by lawyers—voir dire." WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY 164 (2002). *See also* Alschuler, *supra* note 165, at 157 ("In the United States, the process of selecting a jury is often prolonged, sometimes consuming as much time as the trial.").

dire does not take a significant amount of time, particularly in federal court.[191] Further, studies have revealed that jury voir dire where attorneys are permitted to directly examine prospective jurors does not take much more time than when judges alone question the prospective jurors.[192] In a study conducted by the Federal Judicial Center, Judges wrongly perceived that questioning of prospective jurors by attorneys would "more than double the time required for voir dire," but the study found this was "at odds with" the results of the survey "which indicate[d] very little difference in voir dire time regardless of whether the judges allows much, little, or no counsel questioning of jurors."[193] Moreover, the number of federal trials have decreased substantially over time, suggesting that the concern about time management is less urgent today than perhaps it has been in the past.[194]

If there is a concern that attorney participation in voir dire would cause unreasonable delay in the trial, this problem is easily solved by court-imposed time limits.[195] Trial judges have wide discretion regarding jury voir dire, and may impose time limits on the parties when attorneys conduct jury voir dire.[196] In theory, time limits could be written into the rules,[197] but trial judges are better

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191. *See, e.g.*, *1994 Memorandum*, *supra* note 132, at 2 (reflecting the average time spent questioning prospective jurors was 31 minutes in civil cases and 40 minutes in criminal cases); NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 89 (2007) (citing GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 7 (1983)) (Nationally, the average time for jury selection in civil cases is 3.1 hours in state court and 2.3 hours in federal court, and for criminal felony cases the average is 3.8 hours in state court and 3.6 hours in federal court).

192. *See, e.g.*, *1994 Memorandum*, *supra* note 132, at 2 ("Perhaps most intriguing, however, is the absence of much relationship between total voir dire time and the judge's indication of his or her standard practice regarding attorney participation in voir dire . . . ."); VIDMAR & HANS, *supra* note 191, at 89 (noting that whether attorneys in federal courts participate in voir dire does not change the amount of time it took to select a jury).

193. *1994 Memorandum*, *supra* note 132, at 4.

194. *See* Unglesby, *supra* note 23, at 92 (exploring federal court statistics, which show that by early 2000, 1% of civil cases and 5% of criminal proceeded to trial, a 67% decrease from 1962).

195. In the United States District Court for the Northern District of Iowa, for example, the practice is for each party to have a half-hour to conduct jury voir dire. The court may, of course, extend that time limit in appropriate cases. The time limit is reflected in the court's standard trial scheduling order entered in each case.

196. In practice, when judges permit attorneys to directly examine prospective jurors, they set time limits, on average 25 minutes in criminal cases. *See 1994 Memorandum*, *supra* note 132, at 5. The author has tried many federal cases, both civil and criminal, and his experience is that courts typically limit jury voir dire in the usual case to one-half hour. It has been the author's experience that this is a reasonable time limit. Together with the court's jury voir dire, the jury is typically selected in one morning, with evidence starting in the afternoon of the first day of trial. This hardly imposes a significant time burden on the judicial system, particularly when weighed against the importance of seating an impartial and unbiased jury in a federal criminal case.

197. Indeed, such amendments have been unsuccessfully proposed. *See* Barat S. McClain, Turner's *Acceptance of Limited Voir Dire Renders* Batson's *Equal Protection a Hollow Promise*, 65 CHI.-KENT L. REV. 273, 301 (1989) (citing *A Bill to Amend the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure with Respect to Examination of Prospective Jurors: Hearing on S. 1532 Before the S. Subcomm. on Courts of the S. Comm. on the Judiciary*,

situated to impose reasonable time limits on a case by case basis, depending on the complexity of the case at bar.[198]

Another criticism of lawyers directly participating in jury voir dire is that they improperly attempt to try the case during voir dire.[199] In other words, in the guise of asking voir dire questions, lawyers attempt to argue the merits of the case during jury voir dire or instruct the prospective jurors about the law.[200] There are no known empirical studies regarding whether and how often this actually occurs; the criticism could be as misplaced as the concern that attorney participation in jury selection takes too much time. To the extent it occurs, however, courts have the discretion to control this type of questioning.[201] Courts may prohibit attorneys from asking questions that incorporate any alleged facts involved in the case or ask other questions the court finds improper.[202] In

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97th Cong. 1 (1981)) (noting that amendments to the Federal Rules of Civil and Criminal Procedure permit attorneys for parties to examine prospective jurors were proposed multiple times in the 1980s).

198. For example, a similar argument could be made that time limits should be imposed for opening statements and closing arguments because the danger exists that attorneys could waste considerable time when addressing juries. There are no federal rules setting time limits on opening statements or closing arguments, however, and none are necessary because trial courts have and exercise the discretion to place reasonable time limits on attorneys when addressing the jury. *See, e.g.*, United States v. Ransfer, 749 F.3d 914, 937 (11th Cir. 2014) (acknowledging that the period of time allotted to attorneys for closing arguments is within the sound discretion of the trial judge (quoting United States v. Carter, 760 F.2d 1568, 1581 (11th Cir. 1985))); United States v. Holt, 493 F. App'x 515, 521–22 (5th Cir. 2012) (although disagreeing with the district court's "severe limit" on closing arguments, the court held that the limitation did not constitute plain error (citing United States v. Gray, 105 F.3d 956, 963 (5th Cir. 1997))); United States v. Wright, 651 F.3d 764, 773 (7th Cir. 2011) (noting that trial judges have substantial discretion to place time limits on "peripheral issues" such as opening statements and closing arguments (quoting United States v. White, 472 F.3d 458, 462 (7th Cir. 2006))).

199. *See, e.g.*, *1994 Memorandum*, *supra* note 132, at 4 (67% percent of federal judges surveyed responded that questioning of prospective jurors by attorneys "[r]esults in counsel using voir dire for inappropriate purposes (e.g., to argue their case, or simply to 'befriend' jurors."); Hastie, *supra* note 188, at 705 (arguing that some attorneys attempt to influence prospective jurors, instead of conducting proper questioning during jury voir dire).

200. *See* Cooper, *supra* note 171, at 271 (citing Broeder, *supra* note 171, at 522; *Empirical Study*, *supra* note 171, at 942–44; Joshua Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839, 842 (1968); Vanderbilt, *supra* note 189, at 73)) ("Lawyers have been criticized for using voir dire to influence the entire panel in order to obtain a favorably inclined jury and for 'preinstrucing' jurors on the facts or law involved in the case."); Broeder, *supra* note 171, at 522 ("Conservatively, about eighty per cent of the lawyers' *voir dire* time was spent indoctrinating, only twenty per cent in sifting out the favorable from the unfavorable veniremen.").

201. *See* Turner v. Murray, 476 U.S. 28, 37 (1986) ("[T]he trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively.").

202. *See* Mu'Min v. Virginia, 500 U.S. 415, 424 (1991) (holding that a trial judge has broad discretion to determine what questions are asked of jurors during voir dire); Woods v. Swarthout, No. C-13-0309 EMC (PR), 2014 WL 988988, at 12 (N.D. Cal. Mar. 5, 2014) (affirming district

practice, judges who permit attorneys to directly examine prospective jurors exercise this discretion to control such questioning.[203]

Finally, in some instances, lawyers may not be as effective as judges in examining prospective jurors. Although jury voir dire is primarily designed to elicit information about prospective jurors, it can also be a means to educate jurors about, and inculcate in jurors, fundamental constitutional rights afforded criminal defendants.[204] During jury voir dire, it should be a goal of the judge and both attorneys to discover, and remove, jurors who are unable or unwilling to afford criminal defendants the presumption of evidence and the right to remain silent, and hold the government to its burden of proving the defendant's guilt beyond a reasonable doubt. Recognizing, however, that the most rigorous and effective jury voir dire may still not uncover concealed or unconscious beliefs regarding these basic principles, jury voir dire can be used to inform jurors of those rights and duties, and to extract promises from prospective jurors to afford the accused of those rights and hold the government to its burden.[205] The hope, of course, is to guilt prospective jurors into suppressing their inclinations and adopting the fundamental constitutional guarantees. Arguably, this is best accomplished when performed by the judge, whose word carries more authority and whom jurors seek to please.[206] As mentioned above, judges are held in awe by average citizens.[207] Is it more likely, then, that a juror will feel morally bound to keep promises made to a judge than if the same promises are extracted by an attorney for one of the parties?

VI. THE SOLUTION

The best jury selection practice would encompass juror questioning in all its forms: written jury questionnaire, questions from the judge, and direct attorney examination of prospective jurors. The use of all these methods is most likely to elicit the greatest amount of information so that the court, and the parties, may make decisions about whether to remove jurors for cause, or through peremptory strikes, in the most intelligent and rational way possible. The use of all three methods, with appropriate judicial oversight and reasonable time limits, can

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court's ruling which barred the defendants from asking questions of prospective jurors during voir dire based on the specific facts of the case at bar).

203. *See 1994 Memorandum*, *supra* note 132, at 5 (noting that judges set parameters for permissible voir dire and will admonish counsel when necessary).

204. Bennett, *supra* note 58, at 160 (reflecting that the author, a federal trial judge for fifteen years, did not always resist the "temptation" of "pos[ing] questions with the intent of educating jurors.").

205. *See* GERTNER & MIZNER, *supra* note 62, § 3:19, at 97 (noting that trial judges "know how to use the power of the office to educate the juror" that they are not to be biased or prejudiced).

206. *See supra* text accompanying notes 170–175.

207. *See supra* text accompanying note 170.

exploit the benefits of each method while mitigating the problems each method possesses when used in isolation.

First, written juror questionnaires should be used in every federal criminal case.[208] Jury questionnaires are of inestimable value to the judge and lawyers in jury selection. Ideally, the United States Courts would formulate a standard questionnaire that would be used in every federal district court across the country, designed to elicit basic information that would be helpful in every federal trial, criminal or civil, for the court and parties to select a fair and impartial jury.[209] In appropriate cases, where the issues are complex or where publicity is an issue, district courts should issue more comprehensive and case-specific questionnaires. To be clear, although jury questionnaires are very beneficial for courts and litigants in the exercise of for-cause challenges and peremptory strikes, they are not adequate by themselves. There is no substitute for oral jury voir dire.

Second, the trial judge should begin jury selection by examining the prospective jurors in every federal criminal case. The judge's questions should at least focus on the trial process, the constitutional rights of the accused, and controversial issues such as race or publicity. The trial judge can also most efficiently elicit basic information from prospective jurors, such as prior jury service, whether any of the prospective jurors know the parties, witnesses, or each other, familiarity with the facts of the case, and other basic information. The trial judge can either ask appropriate follow up questions to affirmative answers, or leave the follow up to the attorneys. Trial judges should generally leave attorneys to ask questions that probe potential bias or prejudice against the parties based on case-specific facts. Finally, judges should use the aura of office to inculcate jurors with the importance of a criminal defendant's constitutional and the government's burden of proof.[210]

Finally, in stark contrast to what the Federal Rules of Criminal Procedure currently provide, attorneys for the parties should be permitted to examine prospective jurors in every federal criminal trial. Having made the case that effective and fair jury selection is best accomplished when lawyers participate in

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208. The ABA American Jury Project includes submitting written jury questionnaires among its suggestions for creating a more uniform and effective system of selecting juries. *See* Am. Bar Ass'n, *American Jury Project*: *Principles for Juries and Jury Trials* 13 (2005), http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf.

209. The Federal Judicial Center's sample jury questionnaire would serve the purpose. *See 1994 Memorandum*, *supra* note 132, at Exhibit B 2–6.

210. It might be most effective for the trial judge to conduct this type of inculcation after the court has completed the rest of its voir dire and the attorneys have conducted their voir dire. If done before, it could discourage prospective jurors from truthfully divulging beliefs inconsistent with these core constitutional principles. Once the rest of the voir dire process is complete and any motions to remove jurors for cause has passed, then this type of an address to the prospective jurors will promote the goal of compelling prospective jurors to afford a criminal defendant with the constitutional rights.

jury voir dire, then it follows that in criminal cases where the consequences are grave that the Federal Rules of Criminal Procedure be amended to permit lawyers to participate in jury voir dire in federal criminal cases. Courts may, and should, supervise attorney-conducted voir dire to place reasonable time limits and restrict the scope of examination to questions designed to elicit information relevant to for-cause challenges and the exercise of peremptory strikes.

As it reads now, Rule 24(a)(1) provides that courts may, but are not required to, permit attorneys for the parties to examine prospective jurors. Rule 24(a)(2) goes on to provide that, if the court decides to examine prospective jurors, then it may permit attorneys for the parties to ask follow up questions or submit questions for the court to ask if it deems them proper. Both of these provisions should be changed. The rule should reflect that both the court, and the attorneys for the parties, are permitted to question prospective jurors. The rule should further be amended to provide explicit discretion to the court to adopt time and content limitations on attorney-conducted voir dire to prevent unreasonable delay and promote efficient, effective, and fair jury selection.

Rule 24(a)(1) should be amended to read:

> (a) Jury Voir Dire. The court should examine prospective jurors regarding their qualifications and ability to serve as jurors. The court must then permit attorney for the parties to examine the prospective jurors. The court may impose reasonable time limits on the parties' examinations of prospective jurors, and may limit the questions to those the court considers proper.[211]

VII. CONCLUSION

If the constitutional guarantee of an impartial jury is to be afforded criminal defendants, then jury voir dire should be reformed in a manner best designed to elicit information that would allow judges to remove jurors for cause and for parties to exercise peremptory strikes for permissible reasons. The presumption that attorney-conducted voir dire causes unreasonable delay is unsupported by

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211. A redlined version of the current language of Rule 24(a) more readily exposes the proposed changes:

> ~~(1) In General.~~ Jury Voir Dire. The court ~~may~~ should examine prospective jurors regarding their qualifications and ability to serve as jurors. ~~or may~~ The court must then permit the attorneys for the parties to ~~do so~~ examine the prospective jurors.
>
> ~~(2) Court Examination. If the court examines the jurors, it must permit the attorneys for the parties to:~~
>
> (A) ~~Ask further questions that~~ The court may impose reasonable time limits on the parties' examination of prospective jurors, and may limit the questions to those the court considers proper~~; or~~
>
> ~~(B) Submit further questions that the court may ask if it considers them proper.~~

FED. R. CRIM. P. 24(a).

empirical studies and judges' antagonism toward attorney-conducted voir dire is misplaced. The time has come to recognize that a comprehensive approach to voir dire—one combining the use of written jury questionnaires, and examinations by judge and attorneys—is most likely to uncover information important in attempting to remove biased prospective jurors. Because Federal Rule of Criminal Procedure 24(a) does not guarantee attorneys the right of jury voir dire, it should be amended to do so.

APPENDIX A

Juror Questionnaire
United States District Court
for the Northern District of Iowa

I. Background Information
Name:
Date of Birth:

A. Residence Information
City of Residence:
County:
With respect to your residence, do you: Own
How long have you lived at your current address?
In what city and state did you grow up?
B. Education Information
What is the highest education level you have completed?
Do you speak a language other than English? No
If yes what language?
Do you regularly use a computer? None
If yes, at: None
C. Employment Information
Are you employed? No
(If you are retired or disabled, respond below based on where you last worked)
If employed, where do you work?
How long have you worked at your current job?
What is your job title and/or duties?

Where did you work before that job?

How long did you work at that prior job?
What was your job title and/or duties?
D. Military Experience.
Have you ever been in the military? No
If yes,
What was your branch and highest rank?
What were your duties?

When and where did you serve?

Were you honorably discharged? No
E. Family Information – Spouse/Significant Other
What is your marital status? Single
complete the following section if applicable

Name of spouse/significant other:
Is this person employed outside of the home? No
(If he or she is retired or disabled, respond below based on his or her last work)
If yes, where does he or she work?

How long has he or she worked at the current job? Years
What are his or her job title and or/duties?

Where did he or she work before the current job?

How long did he or she work at that job? Years
What were his or her job duties and/or title?

What is the highest educational level he or she completed?
F. Family Information - Children **Complete the following if you have children**
Age and gender of any children:

Do your children live with you?
Any additional information you wish to provide regarding your children's living arrangements:

If you have any adult children, what are their occupations? *(If your adult child is a student, describe what he or she is studying).*

G. Household Information - Other
Does anyone else live with you? No
If yes, who else lives with you and what is their relationship to you?

II. INTERESTS, ACTIVITIES AND EXPERIENCES

A. Memberships

Have you ever been a member of any union, professional group, civic group, special interest group, charitable foundation, or other similar organization? No

If yes, what organization(s) or group(s)?

Have you ever held a leadership position in the group(s)? No

If yes, what position(s)?

B. Interests and Activities

What do you enjoy doing in your spare time?

What newspapers and magazines do you regularly read?

What radio programs do you regularly listen to?

What television programs, including news programs, do you regularly watch?

What websites or blogs do you routinely visit?

Do you, or does any member of your household, possess any firearms? No

If yes, what type of guns?

How are they used (e.g., hunting, personal protection, target shooting, collection)?

C. Prior Jury Experience ***Complete this section only if you have served on a jury****

Have you ever served on a jury in a criminal case, where the defendant on trial was accused of committing a crime? No

If yes,

When was the trial?

Where was the trial?

Was the trial in state or federal court? None

What crime(s) was/were alleged?

What was the verdict? Guilty

Were you the foreperson? None

Have you ever served as a grand juror? None

Have you ever served on a jury in a civil case, such as one involving personal injury, a contract or property dispute, employment discrimination, or a similar case? No

If yes,

When was the trial?

Where was the trial?

Was the trial in state or federal court? None

What was the lawsuit about?

Was the verdict? None

Were you the foreperson? None

How did your experience as a juror affect your thoughts about the legal system?

D. Prior Legal Experiences – Criminal System

Have you ever been arrested or charged with any criminal offense, other than a traffic violation?

(Arrests for OWI-type offenses should be listed).

No

If yes, provide details including when, and where, this occurred:

Were you convicted of the offense(s) alleged? No

Have any of your close friends or family members been arrested or charged with any criminal offense, other than minor traffic offenses? *(OWI-type offenses should be liste*

If yes, what is your relationship to that person?

What happened?

Have you ever been the victim of any crime? No

If yes, what type of crime(s)?

Do you have any law enforcement experience? *(Include any educational programs or training attended, as well as any work for police departments, sheriff's offices, probat*
If yes, describe this work or training:

Do any of your close friends or family members (including any former spouses) have any law enforcement experience? *(Include any educational programs or training, as w similar jobs).* No
If yes, describe the individual, his or her relationship to you, and the nature of their work.

E. Prior Legal Experiences - Civil Matters
Have you ever been a party in a civil case? No
If yes, were you: None
What was the lawsuit about? (e.g., personal injury, contract, employment, small claims)?

Have any of your close friends or family members been a party in a civil case? No
If yes,
What is your relationship to that person?

What was the lawsuit about?

Have you been injured in an accident or suffered from a severe medical condition? No
If yes, describe the accident or condition:

Have any of your close friends or family members been injured in an accident or suffered from a severe medical condition? No
If yes, describe the accident or condition:

Have you ever been a stock holder, director, officer, employee, or agent of any insurance company? No
If yes, describe:

Do you have any close friends or family members who have ever been officers, directors, employees, or agents of any insurance company? No
If yes, describe:

F. General Matters
Are any of your close friends or family members employed as an attorney or in a law office or legal department? No
If yes, what is his or her relationship to you, what is their occupation, and where are they employed?

Do you have any opinions about the legal system (criminal or civil), or about any particular law? No
If yes, describe:

Do you have any objections to, or concerns about, sitting as a juror? No
If yes, describe:

Have you, your family, or close friends ever been affected by alcohol, drugs, or substance abuse in such a way that it would be difficult for you to serve as a juror? No

If yes, describe:

Is there anything about your beliefs, values, or life experiences that would make it difficult for you to be a fair and impartial juror in a case involving someone of a particula
If yes, describe:

Do you know of any reason - not otherwise explained above - that you could not serve as a fair and impartial juror in any particular type of case? No
If yes, describe:

G. Health
Do you have any physical or mental health condition(s) you believe could interfere with your ability to serve in a trial as a juror? No
If yes, what?

What accommodations could be made to assist you in serving as a juror?

By typing my name into the signature block below, I declare under penalty of perjury that I am the person who completed this form and the answers above are true to the be
Signature:
Date:

Please list vacation dates or other prior commitment dates so we may try to work around these scheduled events.

1. The following medical condition(s) make it impossible for me to serve as a juror:

Please send an excuse from your doctor or an explanation of why you cannot secure such a statement to:

(Cedar Rapids)
US District Court
ATTN: Jury Administrator
111 7th Ave SE
Cedar Rapids, IA 52401

(Sioux City)
U.S. District Court
ATTN: Jury Administrator
320 6th St. Room 300
Sioux City, IA 51101

NOTE: Fax number available upon request.

2. I am the sole operator of a business, which would be required to shut down if I am absent for more than days. Please list the name and nature

3. Service as a juror would constitute an undue hardship for the following reasons (please be specific):

4. The following commitments make it impractical for me to serve as a juror at this time:

therefore I request my jury service be deferred until:

By typing my name into the signature block below, I declare under penalty of perjury that the foregoing is true and correct.

Date:
Signature:

Submit

*