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# JUROR BIAS, VOIR DIRE, AND THE JUDGE-JURY RELATIONSHIP

NANCY S. MARDER\*

## INTRODUCTION

Jury selection in the United States begins with voir dire, but not all countries with juries follow this practice. For example, in England,<sup>1</sup> Australia,<sup>2</sup> and Canada,<sup>3</sup> there is a right to a jury trial in criminal cases, and yet, there is no voir dire or questioning of prospective jurors as part of their jury selection. Rather, in these three countries, the first twelve people whose names have been randomly selected are seated in the jury box. In England, at the Old Bailey, the clerk randomly selects twelve names, and with each name, when the person answers “yes,” he or she is seated in the jury box.<sup>4</sup> In Australia, in a criminal trial, the clerk also calls twelve names, and each prospective juror whose name is called walks in front of the defendant, who sits in the dock in the back of the courtroom.<sup>5</sup> By the time that prospective juror reaches the jury box, the defendant announces whether he wishes to exercise a peremptory challenge against that prospective juror. Even with peremptory challenges, a jury is seated in a matter of minutes. In Canada, a trial judge might ask prospective jurors if anyone has a health problem, hardship, or relationship with any of the parties that will preclude

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1. See Juries Act, 1974, c. 23, §§ 1–23, schs. 1–3 (U.K.).

2. See AUSTRALIAN CONSTITUTION S 80.

3. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 11(f) (U.K.) (“Any person charged with an offence has the right . . . except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum penalty for the offence is imprisonment for five years or a more severe punishment . . .”).

4. See Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons From England*, 86 CHI-KENT L. REV. 537, 552–53 (2011) (describing jury selection at the Old Bailey based on two weeks of in-court observations).

5. Jury selection in Australia, as in England, does not entail voir dire; however, the defendant in a criminal jury trial in Australia can exercise a limited number of peremptory challenges. In one jury selection that I observed in Melbourne, Australia, all that was known about the prospective jurors were their names and occupations, though the defendant could also observe their gender, race, possibly age, and general appearance. He seemed to exercise his six challenges against nurses and teachers. Nancy S. Marder, *Observations in County Court, Melbourne, Australia* (Nov. 10, 2014) (notes on file with author).

them from serving, but if not, the prospective jurors are presumed to be impartial and able to serve.<sup>6</sup> In Canada, as one writer explained, “[T]here is no equivalent of an American *voir dire*.”<sup>7</sup> In England, too, “there is no English equivalent of *voir dire*.”<sup>8</sup>

These examples from other countries suggest that jury selection does not require *voir dire*, and yet, the American jury system has always had *voir dire*. There is *voir dire* in state court and federal court, though there are differences between the two. For example, *voir dire* in federal court is fairly quick and is conducted typically by the judge,<sup>9</sup> whereas *voir dire* in state courts is usually more extensive and can be conducted exclusively by the attorneys.<sup>10</sup> One question that arises after observing the different practices in different countries is: Why have *voir dire*? It is not inevitable, and yet, it has always been and remains an essential feature of jury selection in the American jury system.

The explicit purpose of *voir dire* in the American jury system is to determine if a prospective juror can be impartial.<sup>11</sup> Lawyers and judges

6. Regina Schuller & Neil Vidmar, *The Canadian Criminal Jury*, 86 CHI-KENT L. REV. 497, 503 (2011).

7. *Id.* at 502. The Canadian jury system does use a unique procedure in cases in which potential racial bias might be an issue. Defendants can seek a “challenge for cause” if they make a *prima facie* showing of potential racial bias. In such cases, jurors are then chosen by “triers,” who are the first two laypeople randomly selected to serve on a petit jury. The two triers decide whether the next randomly selected prospective juror can serve based on his or her answer to one or two questions about whether he or she can be impartial. If that person is seated on the jury, then one trier is excused and the remaining trier and the juror decide on the next juror. When the next juror is seated, then the second trier is excused. The two jurors then decide on the third juror, and this process continues until a jury of twelve has been selected. In designing this procedure, Canadian courts were careful to avoid an “‘American-style’ *voir dire*.” *Id.* at 515. For a detailed account of this unusual procedure, see *id.* at 514–24.

8. John Baldwin & Michael McConville, *Does the Composition of an English Jury Affect Its Verdict?*, 64 JUDICATURE 133, 135 (1980); see also Samuel J. Cohen, *The Regulation of Peremptory Challenges in the United States and England*, 6 B.U. INT’L L.J. 287, 306 (1988) (“English law does not permit litigants to question jurors prior to their selection.”) (footnote omitted).

9. See FED. R. CIV. P. 47(a) (providing that when the judge conducts *voir dire* in a civil case, the court “must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper”); FED. R. CRIM. P. 24(a) (providing for the judge or attorneys to conduct *voir dire* in criminal cases, but if the judge conducts the *voir dire*, the attorneys can request or ask additional questions).

10. New York is an example of a state with extensive *voir dire*. Until Chief Judge Judith Kaye, now retired, undertook jury reform and made jury duty more tolerable for jurors, *voir dire* was conducted exclusively by lawyers and could go on for days or weeks. In some cases, it could last longer than the trial itself. Prospective jurors resented the length of the *voir dire*, the intrusiveness of the questions, and the manner in which they were often asked. After Chief Judge Kaye’s jury reforms, *voir dire* was still conducted by the lawyers, but was supervised by the judge in civil cases. See Jan Hoffman, *Favorable Verdict for Jury Changes; Lawyers Are Unhappy. Other Signs Are Hopeful, Too*, N.Y. TIMES, Apr. 12, 1995, at B1.

11. See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 50 (1988) (“The *voir dire* is designed by law to serve only one purpose: to enable counsel to probe jurors for information about their state of mind that might pro-

alike agree on this purpose, though lawyers have other, advocacy-related purposes in mind as well, such as beginning to make their case to the jury and to establish rapport with the jurors.<sup>12</sup>

If the purpose of voir dire is to distinguish those who can be impartial from those who have biases that preclude them from serving on the jury in a particular case, then voir dire is not well designed to achieve this purpose. Among the current design flaws are that prospective jurors are questioned in a group in open court and they are asked to decide for themselves whether they can be impartial. There is little evidence that jurors can perform this self-assessment quickly and publicly. Lawyers are not much better than prospective jurors at discerning bias from the little information that is available to them, even though lawyers might believe otherwise. If the main purpose of voir dire is to discover which prospective jurors are biased and remove them from the jury, then the voir dire process should be redesigned to address these design flaws. Alternatively, if voir dire is poorly designed to achieve its stated purpose, it could simply be eliminated. After all, England, Australia, and Canada have done so.

In my view, however, voir dire should not be eliminated because it performs two other unacknowledged, but nonetheless vital, roles. One role that voir dire plays is to transform laypeople from “reluctant citizens” into “responsible jurors.” Citizens are summoned to serve and are asked to put aside their personal and professional obligations and to resolve a dispute between parties they have never met. Not surprisingly, they are reluctant to serve. Yet, inexplicably, the voir dire process helps to transform citizens so that they no longer think about asking the judge to excuse them, but instead focus on serving and doing the best job they can.

Another role that voir dire plays is to lay the foundation for the judge-jury relationship. Although judge and jury each have their own roles to perform, they need to work together. One way of viewing their ongoing partnership is as a dialogue. Voir dire begins this dialogue, literally and figuratively, and this dialogue continues throughout the trial, and even after it has ended.

In Part I of this Article, I consider the main purpose of voir dire, which is to uncover biased jurors and to remove them from the petit

vide grounds for their removal.”); Barbara Allen Babcock, *Voir Dire: Preserving ‘Its Wonderful Power,’* 27 STAN. L. REV. 545, 545 (1975) (“Voir dire provides litigants with information that enables them to select a jury either by arguing to excuse for cause or by challenging peremptorily.”).

12. KASSIN & WRIGHTSMAN, *supra* note 11, at 50–51.

jury. I note that voir dire as it is currently practiced is not well suited to perform this function, but that voir dire could be redesigned to make it more likely to accomplish its ostensible purpose. However, even if voir dire is not reformed, it still accomplishes two other critical, but unrecognized, functions. In Part II, I describe how voir dire transforms “reluctant citizens” into “responsible jurors,” and in Part III, I consider the important role that voir dire plays in establishing the judge-jury relationship. The traditional view that a judge is omniscient and a jury is passive must be discarded. Instead, the judge and jury need to be seen as working together throughout the trial. One way to understand this judge-jury relationship is as an ongoing dialogue, which begins with voir dire, continues with instructions, and ends when the judge meets with the jurors after the trial.

## I. VOIR DIRE

### A. *The Main Purpose of Voir Dire*

Lawyers and judges typically describe the purpose of voir dire as revealing which prospective jurors have biases that preclude them from serving on the petit jury in a particular case.<sup>13</sup> Only jurors who are impartial are permitted to serve. This is true whether the case is criminal or civil<sup>14</sup> and whether it is in federal or state court. Voir dire, or the questioning of prospective jurors, is supposed to enable judges and lawyers to identify and to remove those prospective jurors who they believe cannot be impartial. Judges can remove prospective jurors

13. See, e.g., *id.* at 50; Babcock, *supra* note 11, at 545.

14. U.S. CONST. amend. VI, § 1 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”). The U.S. Supreme Court has applied the requirements of the Sixth Amendment to the states through the Fourteenth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”). The Supreme Court has also interpreted the Seventh Amendment, which provides for a jury trial in certain civil cases, to include a right to an impartial jury, even though it is not explicitly mentioned in the Seventh Amendment. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”). Although the Seventh Amendment has not been applied to the states as the Sixth Amendment has been, the Due Process Clause of the Fourteenth Amendment applies to the states, and the Due Process Clause provides for a fair trial. Whether the trial is before a judge or a jury, one of the attributes of a fair trial is an impartial decision-maker. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (noting that “the minimum requirements of due process” in parole violation hearings include “a ‘neutral and detached’ hearing body”).

through for cause challenges<sup>15</sup> and lawyers can remove a certain number of prospective jurors through peremptory challenges.<sup>16</sup>

In federal court, the judge usually conducts the questioning of prospective jurors.<sup>17</sup> Lawyers can ask supplemental questions, either by submitting them to the judge or by asking them directly.<sup>18</sup> In either case, though, the questions are basic. In a typical voir dire in federal court, the judge usually asks prospective jurors where they live, what they do, whether they are married, and if so, what their spouse does, whether they have children, and if so, how old they are and what they do.<sup>19</sup> Eventually, the judge will ask the prospective juror whether he or she can be impartial, or as one judge put it, “Is there anything that you can think of . . . that would give you a slant one way or another in this case?”<sup>20</sup> If the prospective juror says that he or she can be “impartial” or “has no particular slant one way or another,” then the prospective juror can serve, unless one of the lawyers uses a peremptory challenge to remove that prospective juror.

The voir dire in federal court is usually quick and cursory. In part, this is to save time and money, and in part, this is to be respectful of jurors. In federal court, where the judge conducts the voir dire, the judge’s goal is to seat an impartial jury. If the prospective juror indicates that he or she can be impartial, then that will usually suffice for the judge. After all, the judge does not want to intrude too deeply into a prospective juror’s private life. The judge wants to be seen as a neutral decision-maker—not an advocate or an investigator—and thus is re-

15. There is no set number of for cause challenges. Rather, they are left to the discretion of the judge. They are generally exercised when a prospective juror has a familial relationship to one of the trial participants, has a financial stake in the outcome of the case, or says that he or she cannot be impartial. *See* *Hopt v. Utah*, 120 U.S. 430, 433 (1887). The defining feature of for cause challenges is that a reason must be given in open court for why the prospective juror is being removed.

16. The number of peremptory challenges varies depending on whether the case is in state or federal court and whether it is a civil or criminal case. For example, in federal court, each side in a civil case has three peremptory challenges. *See* 28 U.S.C. § 1870 (2014). In contrast, in a criminal case in federal court, the number of peremptory challenges depends on the seriousness of the crime and who is exercising the peremptory. *See* FED. R. CRIM. P. 24(b). The defense and the prosecution do not always have the same number of peremptory challenges. For example, in non-capital felony cases in which the crime is punishable by imprisonment of more than a year, the defense is allotted ten peremptory challenges, while the government has six. *See* FED. R. CRIM. P. 24(b)(2).

17. *See* Babcock, *supra* note 11, at 548 (“Increasingly judges are conducting voir dire examinations rather than allowing counsel to propound questions.”).

18. *See* FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a).

19. *See, e.g.*, Trial Transcript, *United States v. Torres*, No. 77 Cr. 680 (S.D.N.Y. May 19, 1980) (transcript of jury selection).

20. *Id.* at 77.

luctant to delve too deeply into a prospective juror's psyche. Moreover, the judge wants the prospective juror to serve unless there is some glaring reason why that person cannot serve. Judges also know that it is hard to get people to serve as jurors, summonses notwithstanding. So, the questions during a traditional voir dire, especially in federal court, tend to be general and basic. If the level of questioning has to take a more private turn, such as in a rape case, where prospective jurors might be asked about their own personal experiences, the judge can continue the inquiry in the robing-room. Even if the questioning moves to the robing-room, it is still being conducted in the presence of the lawyers and court reporter, but not in front of the public, the press, and fellow jurors.<sup>21</sup>

The main purpose of voir dire, at least as articulated by judges and lawyers, is to determine if the prospective juror can be impartial.<sup>22</sup> Lawyers might have other purposes in mind, but they will say that their goal is to choose an impartial jury. In fact, they are really seeking jurors who will be sympathetic to their client—or at least jurors who are not antagonistic to them or to their client<sup>23</sup>—but they will usually couch this in terms of seating an impartial jury.

Lawyers try to use voir dire in other ways, but these other ways are not the intended purpose of voir dire. Lawyers view voir dire as an opportunity to begin to make their case to the jury, to establish a rapport with the jurors, to elicit promises from jurors, to make examples of some prospective jurors and then to remove them so that the remaining jurors will be clear about what is expected of them.<sup>24</sup> However, these are not legitimate uses of voir dire.<sup>25</sup> Perhaps the one exception is when lawyers say that they use voir dire to exercise their peremptory challenges wisely. This is a legitimate use of voir dire, assuming they are not using their peremptory challenges in a discriminatory manner.<sup>26</sup>

21. See, e.g., Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1118–20 (1996).

22. See, e.g., *United States v. Thomas*, 116 F.3d 606, 617 (2d Cir. 1997) (“Indeed, one of the principal purposes of voir dire is to ensure that the jurors ultimately selected for service are unbiased . . .”); KASSIN & WRIGHTSMAN, *supra* note 11, at 50.

23. See, e.g., KASSIN & WRIGHTSMAN, *supra* note 11, at 50 (“[I]t is no secret that [lawyers] strive to obtain not an impartial panel, but a sympathetic one.”); Babcock, *supra* note 11, at 551 (“Of course, neither litigant is trying to choose ‘impartial’ jurors, but rather to eliminate those who are sympathetic to the other side, hopefully leaving only those biased for him.”).

24. KASSIN & WRIGHTSMAN, *supra* note 11, at 50.

25. *Id.*

26. I have argued elsewhere that peremptories should be eliminated because lawyers continue to use them in a discriminatory manner. See Nancy S. Marder, *Batson Revisited*, 97 IOWA L.



### *B. Voir Dire Is Not Well Designed for its Main Purpose*

Judges and lawyers agree that the main purpose of voir dire is to seat an impartial jury, yet voir dire is not well designed for this purpose. Voir dire, at least as it is currently practiced in federal court, consists of a brief and superficial questioning of prospective jurors by the judge. The prospective jurors are questioned as a group in open court; thus, it is easy for them to remain silent even if they hear a question that pertains to them. After all, it is hard to speak up in public, especially if the response requires a prospective juror to reveal a personal experience or to admit to holding a view that is not socially acceptable, or “socially desirable,” in psychologists’ parlance.<sup>27</sup> It might be even more difficult for prospective jurors to acknowledge these biases before “the authoritative presence of the judge.”<sup>28</sup> Even when the questioning is directed at an individual prospective juror, and a response is required, it is still easier to give the socially desirable answer than to offer a candid response about bias.

Voir dire, as it is currently practiced, depends on prospective jurors being able to decide whether they have any biases that will affect their judgment in a particular case. This is difficult to do when one is being questioned in public and a response is called for on the spot and without time for reflection. One small study found that when jurors were asked about their impartiality in the presence of other jurors, “no

REV. 1585, 1607–08 (2012); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1124 (1995). Unfortunately, the elaborate jurisprudence established by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, has not succeeded in eliminating discriminatory peremptories. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5 (2010), <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf>. Prosecutors in death penalty cases in the South have been particularly adept at using peremptories to remove African-American prospective jurors from the jury when the defendant is African-American and the victim is white. *Id.* at 23–27. For example, “[i]n death penalty cases from 2005 to 2009 in one Alabama county, prosecutors used peremptory strikes to remove 80 percent of the qualified African Americans in the jury venires, according to the [EJI] report.” Henry R. Chalmers, *A Long Way to Go: Report Finds Lingering, Hard-to-Eradicate Discrimination in Jury Selection*, LITIG. NEWS, Fall 2010, at 6, 7. *Batson* challenges have had little effect in remedying this situation, especially in the South, because judges are not inclined to grant them.

27. Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and ‘Terrorist’ Trials*, 78 CHI-KENT L. REV. 1143, 1150 (2003) (“Some prospective jurors who hold biases are likely to state that they can be impartial solely because that answer is consistent with socially learned values that people should be impartial, a phenomenon that psychologists call ‘socially desirable’ responses.”); Regina A. Schuller & Caroline Erentzen, *The Challenge for Cause Procedure in Canadian Criminal Law*, OñATI SOCIO-LEGAL SERIES (forthcoming 2015) (manuscript at 26–27) (“Moreover, the accuracy of juror’s self-reported bias is not known, and it is possible that many felt pressure to report impartiality due to social desirability demands.”).

28. Vidmar, *supra* note 27, at 1150.

juror reported bias.”<sup>29</sup> In addition, individuals—judges and jurors alike—are not always aware of their own biases. They could have unconscious biases.<sup>30</sup> Even if prospective jurors want to aid the court in determining whether they can be impartial, they might not know this about themselves. They might believe they can be impartial, even when they cannot. This is one of the challenges of asking prospective jurors to decide for themselves.

Lawyers might not put much stock, or at least as much stock as judges do, in prospective jurors’ self-assessments of bias because lawyers believe that they can discern biases in prospective jurors based on voir dire. However, there is little empirical evidence to support this claim. In fact, the empirical studies suggest that lawyers cannot discover biased prospective jurors through voir dire. In one study using mock jurors, researchers showed prosecutors, defense attorneys, and judges a taped voir dire and asked them which jurors they would have excused.<sup>31</sup> The researchers found that those who were excused “were no more or no less likely to convict than those who were acceptable to judges and defense attorneys.”<sup>32</sup> Although the attorneys thought that they would be correct in their predictions about how prospective jurors would vote 71.9% of the time, in fact, they were correct only 45.4% of the time.<sup>33</sup> The lawyers did “about as well as one might do by flipping a coin.”<sup>34</sup> As the authors of another study observed: “It is difficult to recognize one’s own prejudice, and even more difficult to admit to it in open court. It is perhaps more difficult yet to recognize it in another person . . . .”<sup>35</sup> They noted that “there exists a wealth of re-

29. Schuller & Erentzen, *supra* note 27, at 19, 23, 27.

30. See, e.g., Vidmar, *supra* note 27, at 1150 (“In other instances, the juror may not be self-cognizant of his or her own biases.”); Schuller & Erentzen, *supra* note 27, at 10–11 (“[P]eople may be unaware of existing biases and often maintain that they are personally fair and egalitarian.”); see also *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (“A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror had acted identically. A judge’s own conscious or unconscious racism may lead him to accept such an explanation as well supported.”).

31. See Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120, 126 (1994). See generally Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 699 (1991).

32. Kerr, *supra* note 31, at 126.

33. *Id.*; Kerr et al., *supra* note 31, at 689.

34. Kerr, *supra* note 31, at 126; see Kerr et al., *supra* note 31, at 685 (“Thus, in identifying jurors hostile to their cases, defense attorneys would have done no worse in exercising their peremptory challenges had they simply flipped coins rather than analyzing the responses jurors made to questions about their exposure to pretrial publicity.”).

35. Schuller & Erentzen, *supra* note 27, at 27.

search suggesting that people (whether trained or untrained) are not much better than chance in assessing whether someone is truthful or not.”<sup>36</sup>

In three other experiments, another group of researchers found that lawyers tended to rely on just a few characteristics in deciding whether a juror was biased.<sup>37</sup> In the first experiment, the researchers found that there was some agreement among trial lawyers about which characteristics revealed bias among jurors.<sup>38</sup> In the second experiment, the researchers found that the trial lawyers’ use of these two or three characteristics for which there was agreement was no more sophisticated than characteristics used by college sophomores in selecting jurors.<sup>39</sup> In the third experiment, when the researchers asked trial lawyers and students whether to accept or reject a juror, both groups exhibited the same pattern of errors: “Both attorneys and students made more incorrect acceptance and rejection choices than corresponding correct choices . . . .”<sup>40</sup>

In spite of empirical studies to the contrary, trial lawyers continue to rely on their own anecdotal evidence. Lawyers believe that they are able to spot prospective jurors who have biases and to remove them with their peremptory challenges. But as Alan Dershowitz, a law professor and trial lawyer, observed: “Lawyers’ instincts are often the *least* trustworthy basis on which to pick jurors. All those neat rules of thumb, but no feedback. Ten years of accumulated experiences may be 10 years of being wrong.”<sup>41</sup> Moreover, lawyers are not well-equipped to perform the task of spotting biased jurors. There is nothing in their legal training that prepares them to perform this task, and it is difficult for them to acquire on-the-job training because there is no way of knowing how the challenged jurors would have performed if they had been seated on the jury.<sup>42</sup>

36. *Id.* at 27 n.74 (citing literature).

37. Paul V. Olczak et al., *Attorneys’ Lay Psychology and its Effectiveness in Selecting Jurors: Three Empirical Studies*, 6 J. SOC. BEHAV. & PERSONALITY 431, 438 (1991) (finding that lawyers have “a tendency to emphasize only a few characteristics when forming judgments of bias”).

38. *Id.* at 435, 440.

39. *Id.* at 442.

40. *Id.* at 446.

41. Morton Hunt, *Putting Juries on the Couch*, N.Y. TIMES, Nov. 28, 1982, § 6 (Magazine), at 70, 82 (emphasis added).

42. Kerr et al., *supra* note 31, at 699.

### *C. Possible Revisions to Voir Dire*

If the main purpose of voir dire is to identify biased prospective jurors and remove them so that they are not seated on the petit jury, then there are several ways that voir dire could be redesigned so that it is more likely to accomplish this purpose. Judges and jury researchers have identified several changes to voir dire that would enable judges and lawyers to identify biased jurors more readily.

One judge recommended adding an individual voir dire to the general group voir dire as a means of eliciting more sensitive and complete information about a prospective juror's biases.<sup>43</sup> Judge Gregory Mize, now retired, not only made this recommendation, but also implemented it in his own courtroom. When he was still presiding over jury trials in the D.C. Superior Court, he conducted a general group voir dire, in which he asked prospective jurors the questions that are typically asked during voir dire, such as whether the prospective jurors know any of the trial participants or whether they know of any reason why they could not be impartial. However, Judge Mize took the additional step of conducting an individual voir dire of each prospective juror after the general group voir dire.<sup>44</sup> He found that the individual voir dire did not add much time to the process,<sup>45</sup> but that it did elicit useful information. He conducted the individual voir dire in the jury deliberation room.<sup>46</sup> Even though both sides' attorneys were present, as was the court reporter, defendant, and deputy U.S. Marshal, and the questioning was on the record, Judge Mize found that the setting<sup>47</sup> and the individual questioning yielded responses that the group voir dire had not. Prospective jurors could no longer remain silent, as some had done in the group voir dire.

The individual voir dire sometimes resulted in for cause challenges, or at least gave attorneys more information about the prospective juror than they otherwise had.<sup>48</sup> One of the more startling discoveries that Judge Mize made during an individual voir dire was when a prospective juror admitted that she was the defendant's fiancée, even

43. Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, Ct. REV., Spring 1999, at 10.

44. *Id.* at 10–12.

45. *Id.* at 12.

46. *Id.* at 12 & n.8.

47. Judge Mize is not alone in this view. Judge Kimba Wood also found that jurors were more forthcoming when they were questioned in the intimacy of the judge's robing-room rather than the public setting of the courtroom. See Wood, *supra* note 21, at 1118–20.

48. Mize, *supra* note 43, at 12–13.

though she had not spoken up in open court when asked, albeit as part of the group voir dire, if she knew any of the trial participants.<sup>49</sup> The information she offered during the individual voir dire resulted in her removal for cause.<sup>50</sup> In another case, a prospective juror admitted during the individual voir dire that he did not want to be a juror and that he had already lied during the group voir dire.<sup>51</sup> He, too, was removed for cause.<sup>52</sup>

Another change to voir dire that would make it easier for judges and lawyers to identify prospective jurors who cannot be impartial is to include a written questionnaire in addition to the face-to-face, in-court voir dire.<sup>53</sup> The written questionnaire would be a supplement to, not a substitute for, the in-court, face-to-face voir dire. A written questionnaire provides several benefits. One is that it allows the attorneys to ask the same question in writing and face-to-face. If a prospective juror responds in different ways, the inconsistency might reveal a bias. In addition, the written questionnaire allows the attorneys to ask the same question phrased in several different ways.<sup>54</sup> Again, inconsistent responses to questions could reveal biases that the prospective juror was unaware of or unwilling to share in an in-court public voir dire. In addition, a written questionnaire gives a prospective juror time to think about his or her response. The prospective juror has the opportunity with a written questionnaire to be more thoughtful and reflective about his or her responses than with an in-court voir dire. The written questionnaire also allows the judge and lawyers to reach different types of prospective jurors. An extrovert might feel more comfortable responding in open court whereas an introvert might feel more comfortable responding to a written questionnaire.<sup>55</sup> When the court uses both forms of voir dire, it increases the likelihood of obtaining useful information from a broad swath of prospective jurors with different personality traits and predilections.

49. *Id.* at 12.

50. *Id.*

51. *Id.*

52. *Id.*

53. See Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1198–99 (2003) (recommending more frequent use of written questionnaires).

54. See, e.g., Vidmar, *supra* note 27, at 1168–69 (describing survey data that were collected by questionnaire and interviews to explore the effects of pretrial publicity in an upcoming terrorist trial and finding that respondents who said they could be impartial in response to some questions answered similar questions, albeit phrased slightly differently, in a way that revealed bias).

55. See generally SUSAN CAIN, *QUIET: THE POWER OF INTROVERTS IN A WORLD THAT CAN'T STOP TALKING* (2013).

Although written questionnaires are used in some jury trials, they are typically reserved for trials that are high profile or are the subject of extensive pretrial publicity.<sup>56</sup> Run-of-the-mill cases are less likely to include a written questionnaire. The reasons for this are largely practical. A written questionnaire takes time on the part of the attorneys to develop and to assess (and is therefore more expensive for the client) and it takes time on the part of the judge to get both sides to agree to the questions that the written questionnaire will include. In addition, a written questionnaire imposes a cost on prospective jurors. They have to take the time to complete the questionnaire. They also have to worry about what will happen to the written information once they submit it to the court. Although voir dire is typically conducted in public, and a written questionnaire is part of the voir dire and therefore open to the public, the court can still afford some protections to prospective jurors who complete a written questionnaire, such as redacting names if the questionnaires are eventually made public.

Greater participation by attorneys during voir dire could also help the voir dire be more effective at uncovering biased jurors. This is so because attorneys are more familiar with their own case than the judge is and might be more aware of which biases are more likely to interfere with judgment in their case. Attorneys not only know which follow-up questions to ask, but are also more willing than the judge to ask them. The attorneys know that if they push too far with their questions and cause resentment, they can always use a peremptory challenge to remove that prospective juror. In contrast, the judge is reticent to be too intrusive, even if he or she knows which follow-up questions to ask. The judge is trying to maintain his or her position as a neutral decision-maker and is also trying to protect the jurors' privacy and the jurors' opportunity to serve. Even if attorneys do not know which questions to ask in order to reveal bias, they are willing to ask more questions than the judge. The attorneys, unlike the judge, do not mind if the voir dire takes a long time. The more questions an attorney asks—even if there is no magical question for revealing juror bias—the more opportunities the prospective juror has to speak, and in speaking, perhaps the prospective juror will reveal more than he or she had intended, including his or her biases.

56. See, e.g., James C. McKinley Jr., *In Selection for Patz Jury, 22 Pages of Questions*, N.Y. TIMES, Jan. 7, 2015, at A17 (describing a twenty-two page questionnaire used in the trial of Pedro Hernandez, who was charged with the kidnaping and murder of six-year old Etan Patz over twenty-five years ago).

As jury researchers have noted, additions to the traditional in-court voir dire, such as an individual voir dire, a written questionnaire, or attorney participation, are likely to improve the chances that judges and lawyers can identify those jurors who have biases,<sup>57</sup> yet courts are slow to adopt these reforms. There seems to be little impetus for change coming from judges, lawyers, or jurors. Judges, especially federal judges, want voir dire to proceed as quickly as possible. Their goal is to seat an impartial jury and to do so in the least intrusive way to the juror. Lawyers, though they would like a more extensive voir dire, take comfort in the fact that they have a certain number of peremptory challenges, which they believe they can exercise to remove biased jurors (or at least jurors who are biased against them or their clients). Jurors want the least intrusive voir dire possible. The questions in open court, while intimidating, are at least few in number and typically superficial.

If voir dire is not going to be redesigned to accomplish its main purpose of uncovering which prospective jurors are biased, should we abandon the practice altogether? Is it merely an ineffectual exchange that allows us to think that biased jurors are being detected and removed when in fact they are not? Should we join England, Australia, Canada, and other countries that have followed this course? In the Parts that follow, I explore why voir dire should not be eliminated even if it fails to accomplish its stated purpose.

## II. VOIR DIRE AND THE TRANSFORMATION OF CITIZENS INTO JURORS

When citizens receive a jury summons in the mail, their first response is usually not one of joy.<sup>58</sup> Rather, the typical response is one of annoyance. It is never a good time to serve on a jury. The person who has just received a jury summons thinks of all the reasons why he or she cannot serve, and all the ways that jury duty will interfere with his or her professional and personal obligations. Unfortunately, not everyone who receives a jury summons obeys it,<sup>59</sup> but even those who obey their summons are not always eager to serve.

57. See, e.g., Hans & Jehle, *supra* note 53, at 1201 ("By expanding the use of questionnaires, modifying the questioning method and content, and allowing direct attorney participation, the courts could create a more effective voir dire.").

58. See, e.g., Phillip H. Hamilton, *Juror Number 10, Attorney at Law*, 98 ILL. B.J. 296 (2010) ("My first reaction upon getting the [jury] summons was that I was interested but too busy. What happens if it's a long trial?").

59. In an effort to improve response rates to summons, states have taken both carrot-and-stick approaches. The carrot approach includes greater education and outreach to the community.

Those citizens who obey their summons still think about possible excuses they have for not serving as they proceed from the Jury Assembly Room, where they have been waiting, to a courtroom, where they will be part of a venire, or panel, from which the petit jury will be selected. When prospective jurors enter the courtroom, they are still thinking about the reasons that they cannot serve and the possible hardship excuses that they could give the judge so that they will be dismissed.<sup>60</sup>

However, as prospective jurors are questioned during voir dire, a remarkable transformation occurs: They shift from wanting to be excused to wanting to serve. If one is in the courtroom observing voir dire, this moment becomes almost palpable. Although it is difficult to document, perhaps the best sources are the individual accounts of jurors who have written about their jury service. They note that they entered the courtroom hoping to be dismissed, but that they experienced a transformation as they went through voir dire. At some point, they wanted to be chosen to serve on the petit jury. Graham Burnett, a professor of intellectual history, who served on a jury in a murder trial in New York City and wrote a book about his experience, underwent this transformation.<sup>61</sup> Upon reporting for jury duty, he “decided to treat the *unwelcome interruption* . . . as something like a vacation, a brief visit to a foreign country of bureaucratic languor and vast waiting rooms . . . .”<sup>62</sup> Yet, by the time of voir dire, he “was completely absorbed—aware that this was a rare opportunity to participate in something important, weighty, real, something very different from [his] academic life.”<sup>63</sup> In another account, a prospective juror who was not selected for the petit jury recounted: “Surprisingly, that [excusal] was a bittersweet moment for me. I had gone from wanting to get out of this [jury service], to a heartfelt obligation to serve.”<sup>64</sup> That response is not unusual. The nurse who could have sought a deferral but who chose not to because she saw jury duty as “just as important as working as an emergency nurse at a large city hospital,” was both “relieved” when

*See, e.g.*, JURY TRIAL INNOVATIONS 26–27 (G. Thomas Munsterman et al. eds., 1997). The stick approach includes increasing fines, *see, e.g.*, Greg Moran, *When Jury Duty Calls: Counties Wrestle with High Evasion Rates*, CAL. LAW., May 2001, at 22, and sending uniformed marshals to peoples’ doorsteps with an order to show cause. *See id.*

60. *See, e.g.*, Trial Transcript, *supra* note 19, at 55–68 (providing examples of excuses that prospective jurors offered immediately upon entering the courtroom).

61. D. GRAHAM BURNETT, A TRIAL BY JURY 17–32 (2001).

62. *Id.* at 17 (emphasis added).

63. *Id.* at 29.

64. Dan Hatfield, *Jury Service an Engaging Adventure*, JUDGES’ J., Fall 2004, at 34, 36.



she was not chosen to sit on a criminal jury but also “disappointed.”<sup>65</sup> So, too, was another prospective juror who was excused from a jury and responded: “[A] part of me was a little disappointed.”<sup>66</sup>

This transformation is not only difficult to document, but also difficult to explain. It could be that the prospective jurors start to feel a sense of duty that transcends their own quotidian concerns. For the first time, they see the parties sitting before them. They also see the judge in front of them, attired in his or her black robe. They are inspired by the solemnity of the courtroom, replete with its flags, seals, and other symbols of justice. For many, this might be their first time in a courtroom. The courtroom provides an august setting in which to conduct the voir dire, and is likely to contribute to the transformation of citizens into jurors.

The questions that the judge asks during voir dire lead the prospective jurors to think beyond their own everyday concerns and to ask themselves whether they can serve. They become aware of the enormity of the task they will be asked to perform as jurors: To make a judgment that will affect other peoples’ lives. They become intrigued by the brief description of the case that the judge usually offers at the start of the voir dire and inspired by the judge’s description of the importance of the jury and of the right to trial by jury.

For many jurors, this might be their first time in a courtroom, and they are being asked to play a role in it. Not only is this out of their ordinary experience, but also it is the opportunity to participate in an event of public note. Psychologists have observed that people have a tendency “to maintain they were present when a significant historical event took place . . . even though they were not there at all.”<sup>67</sup> They do it not just “to sound interesting,” but also “to be a small part of history.”<sup>68</sup> The opportunity to participate in a jury trial might work in a similar way. Citizens who are selected to serve on the jury will have the opportunity to be present at an important event, and not merely to be present, but also to play an integral role. As the elderly juror in *12 Angry Men* explained to his fellow jurors about why the elderly witness

65. Deborah J. Golder, *Reflections: A Different Duty*, 90 AM. J. NURSING 92 (1990).

66. *My Day in Court. Reflections on Jury Duty*, STEPHEN J. STIRLING, <http://www.stephenjstirling.com/my-day-in-court-reflections-on-jury-duty/> (last visited May 2, 2015).

67. Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23, 26.

68. *Id.*

might have said that he saw the defendant run down the stairs even if he could not actually reach the door in time to see the defendant:

This is a quiet, frightened, insignificant old man who has been nothing all of his life, who has never had recognition, his name in the newspapers. . . . A man like this needs to be recognized, to be listened to, to be quoted just once. This is very important.<sup>69</sup>

The elderly juror understood the plight of the elderly witness and his yearning to be part of something greater than himself. Of course, jurors can have less benign reasons for wanting to serve on a jury, such as bias or revenge.

The formal questioning of prospective jurors signals to them that what they are being asked to do as jurors is beyond the realm of their everyday concerns. The questioning reminds them to put aside their own inconveniences and to think about what it would mean to participate as a juror in this trial. The transformation from "reluctant citizen" to "responsible juror" is not carried out just during voir dire, but voir dire marks the starting point. The process will be ongoing, with reminders and guidance from the judge throughout the trial.

Thus, even if voir dire does not fulfill its stated purpose of enabling the judge and attorneys to uncover biased jurors, voir dire does fulfill this other unacknowledged, but very important, role. It transforms citizens, who have answered their jury summons but who are still reluctant to serve, into jurors who will try to fulfill their role as best they can.

### III. VOIR DIRE AND THE JUDGE-JURY RELATIONSHIP

Another overlooked but no less vital function of voir dire is that it provides the foundation for the judge-jury relationship. Although judges in England, Australia, and Canada, who do not conduct voir dire, have other opportunities to develop the judge-jury relationship, they have to do so in a piecemeal fashion and without the benefit of this important starting point.

#### *A. Voir Dire and Laying the Foundation for the Judge-Jury Relationship*

A judge can use voir dire in a number of different ways to lay the foundation for a positive judge-jury relationship throughout the trial.

69. Reginald Rose, *Twelve Angry Men* 241 (screenplay version of the 1957 movie, *12 Angry Men*).

For such a relationship to develop ultimately into a good working partnership, the judge can use voir dire to set a tone of respect for the jury and the important work it will do. Typically, a judge will use voir dire to explain to the prospective jurors a little about the case, the trial, and the important role the jury will play. A federal judge will usually ask very basic questions that do not intrude unnecessarily into the prospective jurors' private lives. The judge tries to ask questions that he or she thinks will indicate whether any prospective juror needs to be removed for cause. This light touch when it comes to juror questioning allows the judge to perform his or her role in deciding for cause challenges while still being respectful of the jurors' privacy and committed to preserving their opportunity to serve.

The relationship between judge and jury begins through a back and forth between judge and jury during voir dire, as the judge asks questions and the prospective jurors respond. Thus, their relationship begins with an exchange, with a question and answer. The judge wants to find out basic information about the prospective jurors to see if they can serve. During voir dire, the judge is seeking information from the jurors and the judge needs the jurors to respond as honestly as possible. At later stages in the trial, the jurors are likely to seek information from the judge. The partnership depends on the judge responding as candidly as possible. However, jurors do not always respond as fully as they should during voir dire, and judges do not always respond as fully as they should to juror questions later in the trial.

During the trial and deliberations, there is still an ongoing exchange between judge and jury, but there is also a shift. During the trial and deliberations, the jury asks the questions, and if there is a good judge-jury relationship, then the judge responds and answers the jury's questions. The more opportunities the jury has to get its questions answered, the more likely it will feel that it has done the best job possible. The challenge has been that judges have resisted answering jurors' questions, whether they are about the jury instructions or whether they occur during deliberations.<sup>70</sup>

Judges need to see juror questions as part of the ongoing judge-jury relationship begun during voir dire and continued throughout the

70. In one juror's experience:

[The judge] was terse and elliptical when he addressed us, and had obviously given the officers of the court instructions to answer few questions and, when obliged, to do so in the least precise way—but this approach was never more in evidence than when he handed the case over to us for deliberations.

BURNETT, *supra* note 61, at 81.

trial. Judges need to answer juror questions as best they can and when they cannot answer them, they need to explain why. Just as judges ask questions of lawyers because they think the information will help them to decide a motion or to understand an argument, so too, jurors ask questions of judges because they believe the information will help them to understand the trial and their role in it.

### *B. The Traditional View of the Judge-Jury Relationship*

The traditional view of the judge-jury relationship is of an omniscient or paternalistic judge and a group of passive jurors. According to the traditional view, jurors are passive vessels into which information can simply be poured.<sup>71</sup> The portrayal of jurors in movies, with the exception of *12 Angry Men*,<sup>72</sup> is consistent with this view.<sup>73</sup> The idea is that jurors can retain everything presented at trial, just as vessels hold liquid, and that they will have access to this information in its entirety when they deliberate.<sup>74</sup> During the trial, they are simply supposed to sit and observe. They are viewed as passive observers and passive learners.

In contrast, the judge is seen as an omniscient figure in the courtroom. The judge appears knowledgeable insofar as he or she knows information that will not be shared with the jury. The judge's knowledge can come from exhibits that will not be admitted into evidence because they are more prejudicial than probative to colloquies that occur between judge and attorneys and to which the jury is not privy. In addition, the judge knows what the law is, and the jurors do not. At the end of the trial, the judge will instruct the jurors on the law,

71. B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, 68 IND. L.J. 1229, 1230 (1993).

72. 12 ANGRY MEN (Orion-Nova Productions 1957).

73. See Carol J. Clover, *Movie Juries*, 48 DEPAUL L. REV. 389, 389 (1998). Professor Clover described jurors as being portrayed in film and television as passive, silent observers. *Id.* at 390 ("Within the film's universe, the jury is a kind of visual and narrative blank, viewed as so much human furniture when present, but mostly just absent."). She noted that the portrayal of jurors in *12 Angry Men* was an aberration, and one that was not repeated again, perhaps because the movie did not do well in the box office or with the critics. *Id.* at 403. The movie *12 Angry Men* was produced in 1957, and was later updated for television in 1997. See 12 ANGRY MEN (MGM Television 1997). Although the movie has survived the test of time, and celebrated its 50<sup>th</sup> anniversary several years ago, see Symposium, *The 50th Anniversary of 12 Angry Men*, 82 CHI.-KENT L. REV. 551 (2007), it did not lead to a revision in how jurors or juries are portrayed in film or television; the passive jury still prevails.

74. See Dann, *supra* note 71, at 1229 (describing the traditional view of jurors as passive vessels and rejecting it as contrary to the way people actually learn).

and they will be told to take the law as the judge gives it to them,<sup>75</sup> and to apply it to the facts, as they find them.<sup>76</sup>

Some judges do a good job of explaining to jurors why information is being kept from them, but others do not, and instead contribute to a view of the judge as paternalistic. Jurors do not always understand why information is withheld, especially if they feel that the information is important for them to know and will help them to reach the correct verdict. Good judges try to explain this to the jury. For example, they will explain why it is important that the case is decided only on the evidence presented in the courtroom and why jurors must resist turning to outside sources, such as social media, for answers to their questions or for sharing their opinions online while the trial and deliberations are ongoing.<sup>77</sup> When judges fail to offer a cogent explanation, they are likely to be seen as authoritarian or paternalistic—authoritarian if they just announce prohibitions that seem arbitrary and paternalistic if they make it sound like jurors just cannot be trusted with this information and must be kept in the dark. One jury felt that the judge treated everyone with disdain,<sup>78</sup> liked to keep the jury “as out of it as possible,”<sup>79</sup> and provided little guidance especially when the jury felt most in need of it.<sup>80</sup> The jury’s request for a written copy of the instructions was denied by the judge, and instead, he responded simply by rereading the instructions in their entirety.<sup>81</sup> In the words of the foreperson, “[t]his, of course, had answered exactly none of our questions.”<sup>82</sup>

75. Judges typically explain to the jury: “I instruct you that the law as given by the Court in these and other instructions constitute the only law for your guidance. It is your duty to accept and to follow the law as I give it to you even though you may disagree with the law.” KEVIN F. O’MALLEY ET AL., 1A FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10.01, at 5 (5th ed. 2000).

76. Judges typically instruct the jury as to its role as follows: “Your job is to decide all of the factual questions in this case . . . I will decide all of the legal questions in this case . . .” *Id.* § 10.01, at 8.

77. See, e.g., Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible?* 67 SMU L. REV. 617, 654–57 (2014) (noting the importance of instructions that explain to jurors why they must rely only on the evidence presented in court and refrain from looking up information on the Internet and social media).

78. See, e.g., BURNETT, *supra* note 61, at 57 (“This was the judge who had browbeaten everyone who had spoken to him throughout the trial, who had been magnificently impolite at every opportunity.”).

79. *Id.* at 81 (“The judge . . . liked his juries as out of it as possible. This became clear early . . .”).

80. *Id.* (“[The judge] gave us almost no direction at all as to how we were to conduct ourselves in the jury room, and he ran through the charges we were to consider very briskly, despite their complexity.”).

81. *Id.* at 90–91.

82. *Id.* at 91.

### C. Challenging the Traditional View

Judge Michael Dann, a former trial court judge in Maricopa County, Arizona, wrote a seminal article in 1993 in which he challenged the notion of passive jurors as contrary to educational theories about how people actually learn.<sup>83</sup> His challenge was consistent with social science research and numerous studies “show[ing] that jurors do not simply store and record evidence; rather, they draw upon their prior understandings of the world as they evaluate and make sense of the evidence presented at trial.”<sup>84</sup> Judge Dann, consistent with this literature, described the need for jurors to be “active” participants during the trial.<sup>85</sup> He concluded that jurors need to be fully engaged in the trial and to assist in their own learning. One way to do this was to allow jurors to organize<sup>86</sup> and to discuss the material that they were introduced to during the trial.<sup>87</sup> Another way was to make sure that jurors received answers to the questions they had during the trial and deliberations.<sup>88</sup> Yet another way was to obtain the assistance of the judge at particular junctures when it would be helpful.<sup>89</sup>

Judge Dann saw the judge and jury as engaged in an ongoing “dialogue.”<sup>90</sup> This dialogue proved to be critical when the jury reached an impasse in its deliberations. Before declaring the jury to be a hung jury, Judge Dann suggested that the judge see if he or she could clarify the sticking points for the jury or ask the attorneys to undertake additional argument to clarify the remaining issues for the jury.<sup>91</sup> Although this back and forth between judge and jury when a jury reached an impasse did not catch on, the idea of the judge and jury as engaged in a dialogue is a useful way to think about the relationship between judge and jury.

Although Judge Dann’s idea of equipping jurors with the tools to be active jurors was met with resistance from some lawyers<sup>92</sup> and

83. See Dann, *supra* note 71, at 1241.

84. Vidmar, *supra* note 27, at 1148; see also *id.* at 1147–48 & n.36.

85. Dann, *supra* note 71, at 1241 (“[J]urors must be permitted to become more active in the trial.”).

86. See *id.* at 1250–53.

87. See *id.* at 1265–68.

88. See *id.* at 1253–55, 1260–61.

89. See *id.* at 1269–75 (observing that the judge’s assistance could help the jury when it reached an impasse and providing a case study).

90. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 283 (1996).

91. See *id.*

92. See, e.g., Pamela Manson & Rebecca Adams, *Jury Reforms Aim to Empower Panel of Peers in Arizona, Those Who Serve to Get Wider Role, Greater Voice*, ARIZ. REPUBLIC, Aug. 20, 1995, at A1

judges,<sup>93</sup> many of the tools that Judge Dann and others in Arizona<sup>94</sup> and other states<sup>95</sup> recommended to make jurors more active participants have been widely adopted. These tools, several of which have become commonplace in many courtrooms, include allowing jurors to take notes during the trial and to bring their notes into the jury room when they deliberate,<sup>96</sup> permitting jurors to ask questions of witnesses by submitting them in writing to the judge,<sup>97</sup> and giving jurors individual written copies of the instructions to follow as the judge reads the instructions aloud and permitting jurors to take their copies into the jury room when they deliberate.<sup>98</sup> These tools allow jurors to become active learners much like students.<sup>99</sup> They can take notes, organize their materials, get answers to their questions, and have access to critical in-

(citing lawyers who objected to allowing jurors to discuss the case during the trial or to submit written questions to witnesses).

93. See, e.g., William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions: Power to the Jurors*, CHRISTIAN SCI. MONITOR, Feb. 22, 1996, <http://www.csmonitor.com/1996/0222/22011.html> (“Some of these changes frighten some judges because it means more decision points, more work, more discretion exercised, and they know that sound discretion is required.” (quoting Maricopa County Superior Court Judge Michael Dann)).

94. Judge Dann was not the only jury reformer in Arizona. In 1993, the Arizona Supreme Court established a jury reform committee that issued 55 recommendations, many of which were adopted by the Arizona Supreme Court. See Dann & Logan, *supra* note 90, at 282.

95. Arizona was not the only state engaged in jury reform. In California, jury reform efforts were led by the Chief Justice of the California Supreme Court, who formed a Blue Ribbon Judicial Commission that made a number of jury reform recommendations. In New York, Chief Judge Judith Kaye was the prime mover behind jury reform. For a fuller description of the efforts undertaken by these states, see Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 475–77, 483–85 (2006).

96. Although in the late 1980s an Administrative Office of the U.S. Courts’ estimate had indicated that “90 percent of the federal judges do *not* permit jurors to take notes,” KASSIN & WRIGHTSMAN, *supra* note 11, at 128, by the late 1990s, juror note-taking had become “widespread.” JURY TRIAL INNOVATIONS, *supra* note 59, at 141.

97. See, e.g., Bruce Pfaff, John L. Stalmack & Nancy S. Marder, *The Right to Submit Questions to Witnesses*, CBA REC., May 2009, at 36, 39 (providing a survey of state court decisions and federal courts of appeals decisions indicating jurisdictions that permit juror questions).

98. See, e.g., Marder, *supra* note 4, at 566 & n.114 (providing the results of an informal survey by the National Center for State Courts showing that “in thirty-seven out of fifty states and the District of Columbia (or seventy-three percent of the states and D.C.), the jury is given at least one written copy of the instructions fifty percent or more of the time.”). Some states, such as Illinois, now provide for judges, at least in civil trials, to give each juror a written copy of the instructions. See ILL. SUP. CT. R. 239(e); see also Jerry Crimmins, *New Rule May Make Jurors’ Lives Easier*, CHI. DAILY L. BULL., Oct. 30, 2009, at 3. For an empirical study finding that written copies of the instructions aid jurors in reaching a correct understanding of the instructions during their deliberations, see Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1594–95, tbl.6 (2012).

99. See Videotape: Order in the Classroom (Institute of the International Association of Defense Counsel (IADC) Foundation 1998) (showing what would happen if students were asked to learn in the same way that jurors are).

formation, such as the instructions, through several means, including lecture and text, because not everybody learns in the same way.<sup>100</sup>

#### *D. Creating a More Interactive Judge-Jury Relationship*

Although the judge and jury have separate roles to play, they need to work together and to understand that they are engaged in a partnership. Rather than seeing the judge as omniscient and the jurors as passive, there is a need to see the judge as working with the jury and the jurors as being active participants in the trial process. Borrowing from Judge Dann, the judge and jury need to participate in an ongoing dialogue. Only in this way will the jury achieve the necessary understanding to deliberate effectively and to reach an accurate verdict. Voir dire lays the foundation for this judge-jury relationship—this ongoing dialogue. Other practices, such as jury instructions, can foster (or impede) this judge-jury relationship depending on how they are structured.

##### 1. Making Jury Instructions More Interactive

One way to view jury instructions is as an opportunity to continue the ongoing dialogue between judge and jury begun during voir dire. Admittedly this conception of jury instructions runs counter to the traditional view. The traditional view of jury instructions is as a monologue—with the omniscient judge reading the instructions aloud and the passive jurors absorbing them, just as a sponge absorbs water. The traditional presentation of jury instructions involves the judge reading the instructions aloud at the end of the trial, with the jurors sitting quietly and passively, and supposedly retaining everything they heard.

However, as Judge Dann, drawing on educational theory, pointed out, that conception of learning has been rejected. And in fact, jury instructions have long eluded jurors. There are myriad empirical studies, conducted over the past thirty-five years, showing that jurors have long had difficulty understanding jury instructions.<sup>101</sup> For courts to instruct jurors more effectively, they need to subscribe to a different model of learning. The model of the “active juror” proposed by Judge

100. See Dann, *supra* note 71, at 1247–61.

101. See Marder, *supra* note 95, at 454–58. For an empirical study suggesting that jurors continue to have difficulty with jury instructions, not because of confusing language, but because instructions do not make clear how they connect to each other and fail to take into account jurors' expectations, see Diamond, Murphy & Rose, *supra* note 98, at 1597–98.



Dann means giving jurors a different set of tools that would allow them to understand the instructions more readily.

Several tools help jurors to be “active” during the presentation of jury instructions. These include: presenting some of the instructions at the beginning of the trial, so that jurors have a framework in which to place the evidence; providing other instructions on an as-needed basis so jurors see their relevance; instructing jurors at the end of the trial in plain language; providing headings with the instructions so that jurors understand how one instruction relates to another; giving jurors a written copy of the instructions to follow as the judge reads the instructions aloud; and at least in civil trials, allowing jurors to take notes so that they can jot down their questions and discuss them with their fellow jurors during the deliberations; allowing jurors to pose written questions to witnesses through the judge; and allowing jurors to discuss the evidence during the trial.<sup>102</sup>

If jury instructions are to be part of an ongoing dialogue between judge and jury, then they need to be structured differently. To begin with, they need to allow for more back and forth between judge and jury than is currently permitted. Such interaction is likely to improve juror comprehension. One empirical study that used former jurors found that they understood the instructions on the law less than one-half of the time.<sup>103</sup> However, the jurors who requested help from the judge performed better than jurors who did not.<sup>104</sup> One finding of this study was that “[w]hen the judge responded by providing supplemental information, either in the form of written instructions or by explaining the instructions in their own words, the jurors’ understanding of the instructions reached fairly high levels (up to 67%).”<sup>105</sup>

One way to make jury instructions more of a dialogue than a monologue is to permit jurors to ask questions about the instructions after the judge has read them aloud and to have the judge answer those questions, to the extent the judge is permitted to do so. Judge Dann proposed this change,<sup>106</sup> and others have taken up the cause,<sup>107</sup>

102. See Dann, *supra* note 71, at 1249–50, 1256–60; Dann & Logan, *supra* note 90, at 281–83; Carlile, *supra* note 93; Margaret A. Jacobs, *Arizona Supreme Court Approves Major Changes in Jury Practices*, WALL ST. J., Nov. 2, 1995, at B12.

103. See Alan Reifman et al., *Real Jurors’ Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 550 (1992).

104. *Id.* at 551.

105. *Id.*

106. Dann, *supra* note 71, at 1260.

but so far, few judges are willing to answer jurors' questions about the instructions. They worry that any deviation from the pattern instructions might lead them to say something that could result in a reversal on appeal.<sup>108</sup> Trial judges' concerns are reinforced by appellate courts that continue to review jury instructions by parsing each individual word,<sup>109</sup> rather than by considering jury instructions from the jurors' perspective.

Judges also need to respond to the jury's questions about the instructions once the jury has begun its deliberations. Currently, when the jury begins its deliberations, it is permitted to send a note to the judge whenever it has a question, including a question about the instructions. However, some judges resist answering questions. They simply respond by calling everyone back into the courtroom and re-reading the relevant portion of the instruction or all of the instructions,<sup>110</sup> though such a rereading, as one juror remarked "answered exactly none of our questions."<sup>111</sup> Instead, the judge needs to try to answer the jury's question about the instructions. The judge and jury are engaged in a common endeavor. It is critical for both that the jurors understand the instructions.

107. See Diamond, Murphy & Rose, *supra* note 98, at 1607; Marder, *supra* note 95, at 501-02; Peter Tiersma, *Asking Jurors To Do the Impossible*, 5 TENN. J. L. & POL'Y 105, 146-47 (2009).

108. Federal District Court Judge Stanley Sporkin was once asked why he did not deviate from pattern jury instructions and devise jury instructions that jurors could actually understand. He looked over at Chief Judge Abner Mikva of the United States Court of Appeals for the District of Columbia and explained: "[Chief Judge Mikva] would overturn me." Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1111 (1993).

109. See, e.g., *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696 (2005) (providing an example of appellate review of jury instructions that assumes jurors can focus on particular words in an instruction, such as "knowingly with the specific intent to subvert, undermine or impede" and whether it captures the statutory use of "knowingly . . . corruptly persuades," rather than recognizing that the instructions were read to jurors over the course of several hours; they did not receive individual written copies of the instructions, and thus, it was unlikely that they could undertake the same kind of parsing that the appellate courts were so careful to do).

110. See, e.g., Jacqueline Connor, *Jurors Need To Have Their Own Copies of Instructions*, L.A. DAILY J., Feb. 25, 2004, at 7, 7 ("When jurors would send out questions asking about the meaning of a concept or term, the custom was always to reread the instructions, as if the jurors would understand a second recital with the renewed dulcet tones of the judicial officer."); Mike Kataoka, *Eschewing Obfuscation: The Judicial Council Strives for Plain English with its New Jury Instructions*, CAL. LAW., Dec. 2000, at 52, 53 ("[Judges] sit up there and read the instructions and watch people trying really hard to understand. And often the judges respond to questions by simply reading the same instructions louder." (quoting Justice Carol A. Corrigan, Chairwoman of the Judicial Council Task Force on Jury Instructions and Chairwoman of the Criminal Subcommittee in California)).

111. See, e.g., BURNETT, *supra* note 61, at 91.

## 2. Testing the Judge-Jury Relationship

Even when jurors understand the instructions, they might resist following them, and it is the judge-jury relationship—begun during voir dire and developed throughout the trial—that might ultimately persuade jurors to adhere to the instructions. A good judge-jury relationship, established through an ongoing dialogue between judge and jury throughout the trial, might inspire jurors to follow even those instructions that they are not initially inclined to accept. One such instruction is the need for jurors to refrain from using the Internet and social media to do research or to convey views about the trial or deliberations.<sup>112</sup> Jurors, especially young jurors, use the Internet and social media every day, whether to communicate to friends and family, to find information, or just to share how they are spending the day. The idea that they cannot use the Internet and social media as they ordinarily would while they are jurors is difficult for them to accept.

A number of courts have rewritten this instruction so that jurors will understand it,<sup>113</sup> but ultimately, it might come down to the strength of the judge-jury relationship as to whether jurors follow this instruction. Courts have made great strides in rewriting this instruction, taking care to be specific about what is prohibited and why.<sup>114</sup> Judges have also learned that it is important to give this instruction at the beginning of the trial, throughout the trial (before and after every recess), and at the end of the trial (before deliberations).<sup>115</sup> Some judges have also supplemented this instruction with visual reminders, such

112. See *infra* notes 113–115.

113. See, e.g., ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS–CIVIL § 1.01 [11] (2011) [hereinafter IPI]; OHIO STATE BAR ASS'N JURY INSTRUCTIONS COMM., OSBA JURY INSTRUCTIONS § I.C.1 (2010); JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (June 2012), available at <http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf>.

114. See, e.g., Susan MacPherson & Beth Bonora, *The Wired Juror, Unplugged*, TRIAL, Nov. 2010, at 40, 42 (drawing on social science research to demonstrate that “compliance can be measurably increased by simply adding the word ‘because’ and some type of explanation”).

115. See, e.g., IPI, *supra* note 113, § 1.01 (explaining to judges that it is important to give this cautionary instruction at the beginning of the trial, before and after every recess, and at the end of the trial before the jury begins deliberations). One federal judge, Judge James F. Holderman, explained that he went one step further. He asked jurors whenever they returned from a recess to raise their hand to indicate that they had abided by the instruction during the break. See Nancy S. Marder, Panel Discussion: Social Media and Internet Use by Jurors During Civil Trials, Allerton Conference, Starved Rock, Illinois (Apr. 12, 2013) (unpublished notes on file with author). In this way, Judge Holderman required jurors to take the affirmative step of raising their hand as a way of making sure that they would abide by the instruction. *Id.*

as posters in the jury room or individual copies of notices to jurors.<sup>116</sup> Some judges even ask prospective jurors during voir dire if they can adhere to this instruction,<sup>117</sup> and some ask jurors during voir dire to sign a statement acknowledging that they understand the instruction and agree to abide by it.<sup>118</sup>

However, the most important determinant of whether jurors will follow this instruction not to communicate online about the trial or the deliberations might well be the strength of the judge-jury relationship, which started during voir dire and developed throughout the trial. Judge Amy St. Eve's empirical study, conducted with the aid of her former law clerk, and using surveys collected from jurors in two federal courtrooms and one state courtroom,<sup>119</sup> captured well the jurors' reasons for adhering to the judge's instruction not to communicate online

116. Washington State has a poster that it places in its jury rooms, reminding jurors that they are not to communicate online about the trial. See Email from Rick Neidhardt, Reporter, Washington Pattern Jury Instruction Committee to Pattern Jury Instruction List [PJILIST] (Nov. 21, 2011) (providing .pdf of poster). The National Center for State Courts has also created a poster, which is available at [www.ncsc.org](http://www.ncsc.org) that six states have already begun to use. *New Poster Offers Juror Guidelines*, @THE CENTER, Sept. 2014, at 1. A number of federal district courts have started using Washington's poster in their jury rooms. See Gabriell Butler, *Federal Judges, Courtroom Posters Say "No" to Social Media*, 95 JUDICATURE 240, 240 (2012). In England, a study conducted at the request of the Ministry of Justice recommended giving jurors written guidelines that they could carry with them, describing their rights and obligations as jurors, including the obligation to refrain from online communication about the trial. See CHERYL THOMAS, ARE JURIES FAIR? 50 (Feb. 2010) (search "Google" for "Cheryl Thomas Are Juries Fair"; then follow "Are juries fair? – Ministry of Justice" hyperlink). Meanwhile, some English judges have distributed a jury notice that performs the same function. See *Att'y Gen. v. Davey*, [2013] EWHC (Admin) 2317, Q.B. 348 [11], [13], [59] (Eng.). The High Court of Justice, Queen's Bench Division, in England is considering "whether to recommend that the practice [of handing the jury a notice] should be universally followed." *Id.* at 61.

117. See, e.g., Tricia R. DeLeon & Janelle S. Forteza, *Is Your Jury Panel Googling During the Trial?*, ADVOC., Fall 2010, at 36, 39 (quoting Judge Craig Smith from the 192nd Judicial District Court in Dallas County, Texas, who suggested that attorneys should "ask questions about potential juror[s'] use of the Internet, including participating in networking sites like Twitter and Facebook").

118. Judge Shira A. Scheindlin in the Southern District of New York had jurors in a criminal case "sign a pledge not to research the case on the internet and warned them that they would face perjury charges if they broke the agreement." Lance J. Rogers, *ABA Panelists Explore Intersection of Social Media and Criminal Justice System*, 91 CRIM. L. REP. 653, 655 (2012) (quoting Judge Mitchell S. Goldberg, Eastern District of Pennsylvania).

119. Judge St. Eve and Judge Matthew Kennelly, both federal district court judges in the Northern District of Illinois, gave a survey to jurors in their respective courtrooms at the end of their jury service. After sixteen months, the two judges had collected 160 surveys. Judge St. Eve and her law clerk, Michael Zuckerman, published the findings in 2013. See Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 20–21 (2012). Judge St. Eve then worked with Judge Charles Burns, a state court judge, to distribute additional surveys to jurors in their respective courtrooms. She used the surveys collected from all three courtrooms, which gave her a total of 583 surveys from jurors in federal and state court, and published the findings in a follow-up study. See Amy J. St. Eve, Charles P. Burns & Michael A. Zuckerman, *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 79, 90 (2014).

about the trial, even if they were “tempted” to do so.<sup>120</sup> Among the reasons that jurors gave were the following: “Judge told us not to communicate,” “The request of the judge,” and “The Judge saying not to.”<sup>121</sup>

These reasons suggest that jurors are persuaded by the judge and by what the judge has told them about the trial and their role in it. Interestingly, while only 8.06% of the jurors (47 out of 583) who completed surveys were “tempted” to communicate online, none of them succumbed to that temptation (or at least none of them admitted on their anonymous survey that they had succumbed to that temptation).<sup>122</sup> Although the authors concluded that it was the instruction that persuaded jurors to cooperate,<sup>123</sup> it might also have been the power of the judge-jury relationship. Although the federal instruction is well written, and is a good model for other courts, that is not the source of its power. What makes it persuasive to jurors—even to jurors who are initially resistant to its message—is that it was delivered by the judge over the course of the trial and in the context of a judge-jury relationship that the jurors respect.<sup>124</sup>

### 3. Continuing the Judge-Jury Relationship after Trial

The judge-jury relationship, which started with voir dire and developed through other interactions with the judge, such as jury instructions, can continue even after the trial has ended when judge and jury meet for one last exchange. Not all judges meet with jurors after the trial, but some do, and this practice further enhances the judge-jury relationship.<sup>125</sup> One way to view this final meeting is as a bookend to voir dire. This time, however, the jurors ask questions and the judge

120. The survey asked: “Were you tempted to communicate about the case through any social networks, such as Facebook, My Space, LinkedIn, YouTube or Twitter?” St. Eve, Burns & Zuckerman, *supra* note 119, at 79. The survey should have used a more neutral word, such as “considered,” rather than “tempted.” “Tempted” reminds jurors that the behavior was wrong and they should not have engaged in it. Jurors might be more reticent to admit to having engaged in the behavior when they are reminded that the behavior was wrong.

121. *Id.* at 80.

122. Forty-five of the forty-seven jurors who were tempted said that they did not succumb to the temptation; the remaining two did not say one or the other. *Id.*

123. *Id.* at 87, 90–91.

124. Of course, this remains a hypothesis in need of empirical testing.

125. See JURY TRIAL INNOVATIONS, *supra* note 59, at 201 (“Trial judges who have used this technique report that they learn a great deal from jurors during these meetings . . . Jurors generally stay for these meetings and appreciate the personal touch from the judge.”). For a detailed description of the value of such judge-jury meetings to judge and jury alike, 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, 482–84 (2008) (describing Federal District Court Judge Mark Bennett’s jury trial practices and innovations).

provides answers. One juror explained the value of the post-verdict meeting and the judge's responsiveness throughout the trial as follows: "I greatly appreciate the whole process as a learning opportunity. The education we received throughout the process of the trial was excellent. . . . Thank you for allowing us to learn and ask questions."<sup>126</sup> Another way to view this meeting is that it helps jurors make the transition from juror back to private citizen and provides them with practical information that will ease that transition.

Judges typically use this meeting as an opportunity to thank the jurors for their service.<sup>127</sup> Some judges ask jurors to complete a questionnaire, providing their suggestions about improvements that the judge can make to the jury process.<sup>128</sup> Judges also ask the jurors if they have any questions about the trial (other than whether the jury reached the correct verdict). Some judges use this exchange to tell jurors that they can follow the case even though their role in the trial has ended. For example, if the jury convicted in a criminal case, the jurors can attend the sentencing.<sup>129</sup> One judge keeps the jurors informed about the case by sending them a letter letting them know what happened with the case on appeal.<sup>130</sup> In particularly stressful cases, the judge might provide information about counseling or other ways to cope with what jurors have seen or heard during the trial.<sup>131</sup> Some judges use this meeting to tell jurors that they do not have to speak to anyone about the case after they leave the courthouse, including the attorneys or the press.<sup>132</sup> Although states vary as to post-verdict interviews of jurors, many leave it up to the jurors to decide whether to be interviewed. Therefore, it is important for the judge to let jurors know that they might be asked for interviews and that they can decide

126. Schuler, *supra* note 125, at 483 n.125.

127. See Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in JURY TRIAL INNOVATIONS 170–71 (G. Thomas Munsterman et al. eds., 2d ed. 2006).

128. See Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 705 n.202 (2002) (noting that Judges Schwartz and Chotiner in L.A. Municipal Court have distributed questionnaires to jurors for years); Schuler, *supra* note 125, at 483–84 (noting that Judge Mark Bennett, a federal district court judge in the Northern District of Iowa, not only meets with jurors after the verdict in order to get their feedback, but also provides them with a voluntary post-trial questionnaire).

129. See Marder, *supra* note 4, at 574 & n.168.

130. See Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1279 n.95 (2001) (describing Judge Donald E. Shelton's practice of sending post-verdict letters to jurors).

131. See, e.g., JURY TRIAL INNOVATIONS, *supra* note 59, at 203 ("Debriefing Sessions to Alleviate Juror Stress").

132. See, e.g., *id.* at 299–300 ("Appendix 12: Suggested Procedures for Judges Conducting Juror Debriefings").

whether to participate. In high-profile cases, judges often explain to jurors that they can leave through a side entrance of the courthouse so that they can have some time to reflect on their experience before they encounter questions from the media.

This last meeting of judge and jury, oftentimes conducted in the more intimate setting of the robing-room, provides a fitting coda to the judge-jury relationship begun during voir dire. The judge thanks jurors for their time, answers their questions, provides them with practical information, and helps them to return to their private lives. If voir dire marks the beginning of a transformation from private citizen to juror, this final meeting signals the beginning of a transformation from juror back to private citizen. Just as the judge helped the prospective jurors during voir dire to understand the role they were expected to play as jurors, during this final meeting the judge can give jurors information that will help them return to their private lives.

#### CONCLUSION

Although voir dire might not be well designed for the purpose that it is supposed to serve—discovering biased prospective jurors—it is well designed for two other unrecognized, but no less vital, purposes. One essential purpose of voir dire is to transform reluctant citizens into willing and responsible jurors. Another essential purpose of voir dire is to lay the groundwork for a good judge-jury relationship.

Voir dire lays the foundation for the judge-jury relationship by beginning a dialogue between judge and jury that will continue throughout the trial. The dialogue begins with the judge telling prospective jurors about the case and the role they will play, and continues with the judge asking prospective jurors about their capacity to serve. The questioning can be quick and cursory because the judge has only to decide whether a for cause challenge is appropriate. Such limited questioning allows the jurors to regard the judge as a neutral figure who is respectful of their privacy and protective of their opportunity to serve.

Voir dire establishes the groundwork for the judge-jury relationship, but other practices develop this relationship during the trial. For example, jury instructions have the potential to foster the judge-jury relationship. The traditional view of instructions, where the judge speaks and the jurors listen, needs to be replaced by a more interactive model. Jurors will understand the instructions more readily when they have certain tools, such as the opportunity to read the instructions, write notes on their individual written copy of the instructions, and

even to ask questions about the instructions. Although some of these tools are widely accepted now, others, such as juror questions about the instructions, remain elusive.

Forging a positive judge-jury relationship is important not only so that jurors will understand what they need to do and do it well, but also so that when they resist what they have to do, they will do it anyway. The instruction about jurors and social media provides a current example. Some jurors struggle with what they have been asked to do—namely, to refrain from using the Internet and social media to communicate about the trial—but they abide by the instruction, not simply because it is specific and understandable, but also because of their respect for the judge. They develop respect for the judge and understanding of their role through an interactive judge-jury relationship, which began with voir dire, was fostered during the trial, especially through instructions, and which should include a final meeting with the judge after the trial. This dialogue between judge and jury can help jurors make the transition from juror to private citizen after the trial just as voir dire had helped them make the transition from private citizen to juror at the start of the trial.