Pennsylvanians' Constitutional Right to Juries Free of any Suspicion of Partiality in Danger?

Thomas J Foley, III
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ABSTRACT

Jury selection is the critical beginning, and all too often the untimely end, to any “fair” civil or criminal jury trial. Some Pennsylvania trial judges give short shrift to litigants’ challenges both for cause and peremptory, and improperly empanel potential jurors despite possible biases and prejudices revealed during voir dire. These trial judges jeopardize the Pennsylvania constitutional right to a fair trial before an ostensibly unbiased jury, one free of any suspicion of partiality. They not only endanger the rights of the litigants themselves, but threaten continued acceptance of the laws by litigants and by the public at large. Three pending appeals present an opportunity for our appellate courts to eliminate these errors, to correct the course of the trial courts, and to preserve the Pennsylvania constitutional right to “Trial by jury . . .” for generations to come.

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IMPROPER DENIAL OR IMPAIRMENT OF CHALLENGES IS THE PROBLEM

At its living, beating heart, the prerequisite of the enjoyment of the fundamental Pennsylvania Constitutional right to “Trial by jury . . .” 2 is the jury panel itself, fair and impartial from the first through the last person. In 1936, two years before his death, Clarence Darrow, with perhaps some small exaggeration, stated: “Never forget, almost every case has been won or lost when the jury is sworn.”

Now pending before our Supreme and Superior Courts are three appeals of critical import to our right to “Trial by jury”:

• Cornelius v. Menio, M.D., argued and decision pending before Superior Court, at 1382 EDA 2013
• Cordes v. Associates of Internal Medicine, 87 A.3d 829 (Pa. Super. 2014) (en banc), appeal expected to Supreme Court
• Commonwealth v. Noel, 53 A.3d 848 (Pa. Super. 2012), argued and decision pending before Supreme Court, at No. 23 EAP 2013

“Never forget, almost every case has been won or lost when the jury is sworn.”

Clarence Darrow (1936)

In Cornelius, a medical malpractice case out of Monroe County, one issue is the trial court’s allegedly improper denial of the plaintiffs-appellants’ strikes for cause, resulting in the seating of potentially prejudiced jurors on the panel, after the exhaustion of the allotted four peremptory challenges for a civil trial. The empaneled jury included two nurses who worked with the defendant doctor, one of them at the very hospital where some of the relevant events transpired. Not to mention patients and family members of patients of the defendant doctor.3

In Cordes, another medical malpractice case, originating in Beaver County, one issue is likewise the allegedly improper denial of the plaintiffs-appellants’ strikes for cause, with the seating of potentially prejudiced jurors after exhaustion of four peremptories. The empaneled jury in Cordes included: a husband of a patient of the defendant doctor; the daughter of a patient of the defendant doctor; and an employee of the parent medical corporation whose subsidiary employed the defendant doctor.4

And in Noel, a Philadelphia County criminal case, the issue is the forced exhaustion of the criminal defendant’s allotted seven peremptories on day one of a two-day jury selection, in violation of Pa.R.Crim.P. 631(E)(2) List System of Challenges. The trial court employed a “use ‘em or lose ‘em” policy, ruling that the “Day 1” prospective jurors would not be called back for “Day 2.” And if the prospective jurors were not struck then and there, on “Day 1,” they would be seated on the panel on “Day 2.” The defendant understandably followed the principle of the “devil you know,” and utilized all seven of his peremptories on “Day 1.” Then, the second day of jury selection came, and a “Day 2 juror”—a police officer’s sister—was seated on the panel, after the trial court rejected the defendant’s challenge for cause.

3. One should also be aware that in Cornelius, there were 350 total prospective jurors in the Monroe County Courthouse. 40 of these were called to Courtroom #5 for jury selection in this case. 310 were left in Courtroom #1 waiting for something to do.
4. It is noteworthy that the renowned insurance defense firm of Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP represents the medical provider defendants in both of these high stakes medical malpractice cases, Cornelius and Cordes. The stakes are so high in Cornelius that Weber, Gallagher was compelled to retain as co-counsel the even more highly esteemed appellate services of Lamb McErlane, PC.
Thus, all three cases involve the exhaustion of peremptories, and the seating of at least one objected to (and at least one potentially if not presumptively prejudiced) juror on the panel.

Some may ask the question: “So what?” I would respectfully reply that if there is any reasonable doubt that any prospective juror cannot be fair and impartial, the juror must be disqualified. And if post-trial there is any reasonable doubt that any member of the jury rendering a verdict was not ostensibly fair and impartial, the verdict should be rejected, and a new trial awarded.5

**JURY NULLIFICATION IS THE UNDERLYING CONCERN**

The underlying force unifying all three appeals is the possibility, if not the fact, of “jury nullification”—the sometimes ally and sometimes opponent of all who entrust their case to a jury. “Jury nullification” occurs where the jury does not follow the judge’s instructions as to the law, and renders a verdict contrary to the evidence adduced at trial, thus “nullifying the law.”6

The issue has long perplexed the courts.7 One may be for jury nullification. Or one may be against jury nullification. But one cannot deny the existence of jury nullification—it is a fact beyond dispute.8 This is true not only in criminal cases, but in civil cases as well.9 In The Palladium of Justice—Origins of Trial by Jury, Professor Levy noted: “In 1998, a public opinion poll revealed that most Americans eligible to serve on a jury asserted that they would act on their own beliefs as to right and wrong, regardless of a judge’s instructions on the law of a case. Had a similar poll been taken three and a half centuries earlier, the results would have been the same. Jury verdicts then and now reflected jury instructions on the law of a case. Had a similar poll been taken three and a half centuries earlier, the results would have been the same. Jury verdicts then and now reflected jury instructions on the law of a case.”10

Like carbon monoxide, jury nullification can suffocate the life out of a case; or like helium, it can give it a lift. Invisibly. Silently. In the jury room.


7. Compare, e.g., Bushell’s Case, Howell’s State Trials, 6:999 (1670) (relating to charges against the juror who refused to convict William Penn); Kane v. Commonwealth, 89 Pa. 522, 525 (1879) (endorsing jury nullification); Commonwealth v. Castellana, 277 Pa. 117, 120-122, 121 A.2d 50, 50-51 (1962) (disapproving express instruction by judge re: power of jury nullification); and In re Schofield, 362 Pa. 251, 261, 66 A.2d 675, 683 (1949) (attorney disciplined for advocating jury nullification to jury).

8. See, e.g., Commonwealth v. Telford, 598 Pa. 639, 715, 960 A.2d 1, 46 (2008) (jury nullification is an “ever present prospect” in a case tried to a jury); Boden v. Irwin, 92 Pa. 345, 1880 WL 13234, 2 (1879) (“Juries are prone enough to disregard the evidence, and set up their own standard of right between the parties without a permission to do so from the court.”).


It has been noted that at least in some types of personal injury cases, “contrary to common expectation, nullification works in favor of defendants and against plaintiffs.” Lars Noah, Civil Jury Nullification, 86 Iowa L. Rev. 1601, 1610-1612 (2001). Regarding such cases, it has been said jury nullification would “serve merely as an escape route for people . . . who, by their negligence, have harmed another person. Jury nullification would serve as a mechanism by which such people can avoid the legal consequences of their actions.” Id. at n. 140. Unfortunately, our courts do not keep detailed statistics of civil jury demands, verdicts, settlements, etc. which would aid in an empirical study aimed at evaluation of the issue.

FAIR AND IMPARTIAL JURIES ENGENDER RESPECT FOR THE RULE OF LAW

The United States Supreme Court in Edmondson v. Leesville Concrete Co. stated that “the objective of jury selection proceedings is to determine representation on a governmental body.”12 As the Court further related therein:

Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.13

“[T]he jury system performs the critical governmental functions of guarding the rights of litigants and ‘ensur[ing] continued acceptance of the laws by all the people.’”14 In other words, acceptance by the parties and by the public at large.

The Pennsylvania Supreme Court is in accord, stating in Commonwealth v. Panetta that “[t]he jury is more than just a juridical instrument, it is a political institution which should not be hastily infringed upon in particular and difficult cases lest the generality of freedom which it purports to represent be undermined without planned substitute.”15 And in Commonwealth v. Dinwiddie, the Court stated:

[T]he purpose of the jury system is to impress upon the [litigants] and the community as a whole that a verdict . . . is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood on these terms if the jury is chosen by unlawful means at the outset.16

Chief Justice Castille, at his Installation on January 14, 2008, in referring to the judicial branch, stated:

We only dispense justice, and any power that we have derives from that single beneficence as directed by the Constitution and the laws of the Commonwealth. While we are dependent upon the other branches of government, we are not subservient to those branches. As an equal branch, our true power derives from the moral authority arising out of our jurisprudential decisions. We command only by the force of this moral authority, and that force is clearly derived from the citizens’ support for the law and from those elected and appointed leaders who believe in the rule of law.

. . . We are simply elected to serve a higher calling: Justice. This Court is here to serve all the citizens of this Commonwealth—to dispense fair and impartial justice to all—justice for the most favored in our society, and even justice for the most hated and despised in our society. [Underlining in original; bolding added.]17

No truer words were ever spoken. Threats to the perceived integrity of our juries, and to the moral authority of their verdicts, are threats to our very form of government itself. The courts should not allow public confidence in the administration of justice to be undermined.18

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13. Id.
PEREMPTORY CHALLENGES ARE AN EFFECTIVE AND ESSENTIAL MEANS FOR ACHIEVING A FAIR AND IMPARTIAL JURY

Challenges for cause alone do not suffice to ensure an ostensibly fair and impartial jury. The United States Supreme Court itself has acknowledged that “[e]xperience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge.”19 The Pennsylvania Supreme Court held in Commonwealth v. Ingham that “wrongful deprivation of one or more of the number of peremptory challenges provided for by statute or rule of court is clearly an impairment of the . . . right to peremptory challenges.”20

Wrongful denial by a trial court of a challenge for cause, such as is suggested to have occurred in Cornelius, Cordes and Noel, and the forced exercise of even one of a litigant’s allotted peremptory challenges, should not be countenanced. The Pennsylvania Supreme Court held in Commonwealth v. Fugmann that the Pennsylvania Constitution guarantees “an ample right of challenge both for cause and peremptorily.”21 Under the Pennsylvania Constitution, the right to “Trial by jury” must be construed with reference to the common law as modified by statutes in force in England and in Pennsylvania at the time of adoption of our Pennsylvania Constitution.22 The right to peremptory challenge was “essential” to and a “leading characteristic” or “leading feature” of “trial by jury” at common law and in Pennsylvania, before and since the enactment of our Pennsylvania Constitution.23

A few opinions running contrary to the foregoing principles have issued from our Honorable Courts.24 These are subject to the fatal diathesis of being derived from decisions of our federal courts interpreting the Constitution of the United States. But they are only sometimes openly so; a relatively recent example is the Superior Court’s 1995 decision in Commonwealth v. Rico.25 The Rico decision itself, and other such Pennsylvania decisions beg the question: What are the Pennsylvania state-created means to the Constitutional end of an impartial jury and a fair trial?26 The answer lies in Pa. Const. art. I, §6: “Trial by jury shall be as heretofore, and the right thereof remain inviolate.” There is no express cognate in the federal Constitution, and, thus, the federal decisions provide no binding guidance on the meaning of this provision.

Further, as Judge David N. Wecht observed in his Dissenting Opinion in Noel, “peremptory challenge is a necessary part of trial by jury.”27 It is worth noting that in the Frame of Government of Pennsylvania, issued by William Penn in 1682, he declared: “the power of necessity . . . is a solicitor that will take no denial.” And, to paraphrase Judge Wecht, it cannot be denied that Pennsylvania law protects peremptory challenges to a greater extent than federal law.28

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27. Noel, 53 A.3d at 862 (Wecht, J. Dissenting).
The wrongful denial of the right to “intelligently exercise peremptory challenges,” such as occurred in Noel, as well as in Cornelius and Cordes, should not be affirmed. Such an error is not harmless because the litigant was forced to use at least one of his peremptory challenges to excuse an objectionable juror, and the litigant exhausted his peremptories before the jury was seated.

A TRIAL COURT’S GOAL SHOULD BE A JURY LIKE “WHITE PAPER,” FREE OF ANY SUSPICION OF PARTIALITY

On March 12, 2014, the Pennsylvania Superior Court sitting en banc issued three opinions in Cordes v. Associates of Internal Medicine. The first was a 35-page Opinion in Support of Reversal (and remand for new trial), authored by the Honorable David N. Wecht, and joined by Judge John T. Bender, with Judge Mary Jane Bowes and President Judge Susan Peikes Gantman concurring in the result. The second was a 16 page Opinion in Support of Reversal authored by the Honorable Christine L. Donohue, joined by President Judge Gantman and Judge Pamela Francisco Ott, with Judge Bowes again concurring in the result. And, the third was a 36-page Dissenting Opinion (in support of affirmance and denial of a new trial) by the Honorable Judith Ferrence Olson, joined by Judge Cheryl Lynn Allen.

How does one make consubstantial sense of these three Cordes opinions, totaling 87 pages, with at least four seemingly separate views of the law? (Remember, the Honorable Mary Jane Bowes concurred in the results of but did not join the two Opinions in Support of Reversal.) I believe it can be done. All of the judges are in important respects correct. To paraphrase Joseph Conrad in Heart of Darkness: the three seemingly separate opinions “mingle[] at last and suggest[] the theme of the story—the indissoluble and organic oneness . . . that underlies the surface of contradictions.” The theme of that story yields what Conrad called “decisive truths,” and turns darkness into light.

The Pennsylvania Constitution provides at Article I, Section 6 as follows: “Trial by jury shall be as heretofore, and the right thereto shall remain inviolate.” (Emphasis added). Simple . . . clear . . . the Constitution. “Heretofore” . . . not “heretohence.” Judges Wecht and Donohue followed this constitutional precept, and looked to the “old cases,” going back to the early 1900s. Justice Holmes also directed us along this “path of the law,” stating that “[a] page of history is worth a volume of logic.”

So I followed their lead and looked even further back, and found the Goodright v. M’Causland decision issued by the Pennsylvania Supreme Court in 1794, which states: “A juror should be as white paper, superior to all suspicion of partiality.” M’Causland cites to Blackstone’s Reports (1746-80) which predate Article 9, Section 6 of our Pennsylvania Constitution of 1790—which itself provided: “Trial by jury shall remain as heretofore, and the right thereof shall remain inviolate.” (Emphasis added). M’Causland was decided four years after enactment of the Pennsylvania Constitution of 1790.

M’Causland accords with Judge Wecht’s view that the goal of voir dire is a jury with “a clean slate and an open mind.” It also accords with Judge Donohue’s views, including her:

“emphatic agreement with Judge Wecht that ‘[t]he critical consideration that animates our ruling regarding all three jurors in this case is the importance of ensuring not only

32. The page counts refer to the slip opinions.
35. Cordes, 87 A.3d at 836 (Wecht, J., Opinion in Support of Reversal).
a jury that is impartial in fact, but one that appears to be free of the taint of partiality to a disinterested observer.’… Contrary to this overarching consideration, too often trial courts almost inexplicably find it necessary to shoehorn certain prospective jurors into the jury box when faced with information that at the very least gives the appearance of an inability to be impartial. [FN1] In my view, we must be guided by the jury selection principle articulated by our Supreme Court that ‘no person should be permitted to serve on a jury who stands in any relation to a party to the cause that would carry with it prima facie evident marks of suspicion of favor.’

Seeherman v. Wilkes-Barre Co., 255 Pa. 11, 14, 99 A. 174, [175] (1916) (emphasis added) (internal quotation marks omitted). As succinctly stated by the Seeherman Court: “[T]he cause should be tried by persons free even from the suspicion of partiality.” Id. at 14-15, 99 A. at [176].

[FN1] I recognize that there are financial considerations associated with bringing citizens to the courthouse to participate in the jury selection process. In my view, however, such considerations do not trump the guarantee provided by both the United States and Pennsylvania Constitutions of a trial “by an impartial jury [.]” U.S. Const. amend. 6; Pa. Const. art. I §9; see also Pa. Const. art. I §6 (“Trial by jury shall be as heretofore, and the right thereof remain inviolate.”). Thus, I do not believe that presumptively partial and unfair jurors should be seated if there was no other way to empanel a jury. A trial is either fair or it is not and the litigants are entitled to a jury free from bias and prejudice.36

Judge Olson was also correct in her Dissenting Opinion that under the current regime imposed by the 2001 Superior Court panel decision in McHugh v. Proctor and Gamble Paper Products Co.,37 as well as the combined effect of the two Opinions in Support of Reversal in Cordes, “a trial judge will [not] be able to discriminate between cases that involve a juror/non-party relationship that is so indirect or mediated that exclusion should remain a matter within the court’s discretion and cases that involve such a ‘sufficiently close’ relationship that exclusion is compelled as a matter of law.”38

The obvious solution is for trial judges to seat only jurors with no known relationship of any kind with the parties—jurors like white paper, with a clean slate and an open mind, free of any suspicion of partiality. The courts in every case must scrupulously grant challenges for cause on “the slightest ground of prejudice” to “prevent even the possibility of undue bias;” no duty of a trial court should be held more important.39 Some might ask: “But at what cost?” And I would answer: Only the cost of as little as $9.00 per day per prospective juror.40 Is this too high a price to pay to ensure that “the right to trial by an ‘impartial jury’ . . . remain inviolate?”41 Too high a price to guard “the rights of the litigants and ensure continued acceptance of the laws by all the people?”42 I respectfully submit it is not.

JUROR “REHABILITATION” IS USUALLY A FUTILE EXERCISE

As Judge Donohue stated in Cordes, trial judges all too often “shoehorn” ostensibly biased jurors into the jury box. They attempt to do so through the device of the “rehabilitation” question. These rituals usually follow a script along the lines of: “Do you feel given those circumstances that you could sit as a fair and impartial juror in this case,

38. Cordes, 87 A.3d at 856 (Olson, J., Dissenting Opinion). I respectfully disagree, however, with Judge Olson’s opinion to the extent that it suggests that questionable jurors lie within the proper parameters of a trial judge’s “exercise of discretion.”
39. Commonwealth v. Lesher, 17 Serg. & Rawle 155, 1551827 WL 2776, 2 (Pa. 1828) (“The law, in every case, is scrupulous to prevent even the possibility of undue bias; it does not deal with a juror as with a witness; admit him, though it doubts him; the slightest ground of prejudice is sufficient. The prejudice itself need not be made out; the probability of it is enough. . . . Nothing in the law can well be more extensive than this right of challenge propter affectum.”). The right to an impartial jury was deemed “sacred” by our founding fathers, as indicated by the Pennsylvania Constitution of 1776. Pa. Const. (1776) ch. 1, cl. 11.
40. See, 42 Pa.C.S. § 4561, Compensation of and travel allowance for jurors.
42. See, Edmondson, supra, 500 U.S. at 628.
render a fair and impartial verdict based solely on the evidence? These attempted exorcisms of the demons of past and present associations and opinions are usually doomed to failure, and often inappropriately conducted. President Judge Johnson of the Georgia Court of Appeals observed in Walls v. Kim:

Many judges on this court have served as trial judges and wholeheartedly agree with the principle that trial judges must have significant discretion in deciding whether to excuse jurors for cause. Just as wholeheartedly, we disagree with the way that the “rehabilitation” question has become something of a talisman relied upon by trial and appellate judges to justify retaining biased jurors. Especially when the better practice is for judges simply to use their discretion to remove such partial jurors, even when the question of a particular juror’s impartiality is a very close call.

A trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors because, in reality, the judge is the only person in a courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury. While the parties to litigation operate under the guise of selecting an impartial jury, the truth is that having a jury which is truly fair and impartial is not their primary desire. Instead, their goal is to select a jury which, because of background or experience or whatever other reason, is inclined to favor their particular side of the case. The trial judge, in seeking to balance the parties’ competing interests, must be guided not only by the need for an impartial jury, but also by the principle that no party to any case has a right to have any particular person on their jury.

Voir dire must not simply call for the jurors’ subjective assessments of their own impartiality. Questions requiring jurors’ subjective evaluation of their ability to be fair and impartial have repeatedly been held to be an inadequate basis upon which to assess jurors’ qualifications. Scientific case studies confirm the unreliability of jurors’ self-reports of bias or prejudice, confirm that they will often minimize same, and contradict the commonly held judicial view that superficial questioning is sufficient to uncover bias or prejudice. Juror “rehabilitation should not be done through argumentative or leading questions. Furthermore, when it is the trial court rather than opposing counsel asking the

44. These efforts are also unequivocally unnecessary, inasmuch as a sufficient number of prospective jurors can be summoned at minimal cost to the courts. See, 42 Pa.C.S. §4561, Compensation of and travel allowance for jurors.
46. Id. at 799. See also, Bruckshaw v. Frankford Hosp. of City of Philadelphia, 58 A.3d 102, 108 (Pa. 2012) (no party is entitled to the services of any particular juror).
47. See, e.g. Commonwealth v. Lesher, 17 Serg. & Rawle 155, 1827 WL 2776, 3 (Pa. 1828) (“[A]ll these matters of real or supposed taint, upon the fairness of a juror, are not to be left to the direction of triers. There is to be no inquiry whether the firmness of the man may not enable him to give a true verdict, when upon his oath, notwithstanding his previous opinions. The law makes no such experiment; but the moment that any such fact of relationship, of favor, enmity, bias, or preconceived opinion is made out, it removes the juror, without hearing one word further. Such are the general rules of law, relative to challenges for cause.”) (emphasis in original). See also, e.g., Morgan v. Illinois, 504 U.S. 719 (1992); Murphy v. Florida, 421 U.S. 794 (1975); Irwin v. Dowd, 366 U.S. 717 (1961); U.S. v. Davis, 583 F.2d 190, 197 (5th Cir. 1978); U.S. v. Polizzi, 500 F.2d 856, 879 (9th Cir. 1974); Government of Virgin Islands v. Dowling, 814 F.2d 134, 141 (3d Cir. 1987); Silverthorne v. U.S., 400 F.2d 627, 639 (9th Cir. 1968); Patriarca v. U.S., 402 F.2d 314, 318 (1st Cir. 1968); U. S. ex rel. Bloeth v. Denno, 313 F.2d 364, 372 (2d Cir. 1963); Murphy v. Wheeler, D.O., 671 S.E.2d 714 (W.Va. 2008).
49. See, e.g., Parsons v. Commonwealth, 121 S.E. 68, 69-70 (Va. 1924) (jurors found to be incompetent where the “rehabilitating statements” did not spontaneously emanate from the jurors but were suggested by argumentative and leading questions addressed to them to which they assented.); Williams v. Common-
questions, “rehabilitative” or otherwise, it is incumbent upon the trial court to do so with extreme care and caution to avoid its authority from pressuring the juror to answer in a particular way.50

Jurors, like judges, should be both expected and permitted to avoid even the appearance of impropriety. No party or jurist should have the right to impose upon a prospective juror the Hobson’s choice of the embarrassment of admitting they cannot be “fair and impartial” in open court,51 or of the dishonor of serving on the panel as a “stealth juror.”52

**INFRINGEMENTS ON THE RIGHT TO A JURY LIKE “WHITE PAPER” MUST BE MINIMIZED**

Regarding the goal of a jury like “white paper,” another “ancient case,” the 1844 decision of the Pennsylvania Supreme Court in Commonwealth v. Flanagan, echoes concerns raised in Cordes by Judge Olson:

> It is urged, and there are dicta to that effect, that a juror should be as white paper; superior to all suspicion of partiality, they must be omni exceptione majores. It has also been ruled, that, if they have declared their opinions, it is good cause of challenge. 1 Bl.Rep. 481; Bul.N.P. 302. Notwithstanding the general principle is freely admitted, yet the good of society requires that these rules must be taken with great qualification. Thus, in M’Causland v. Crawford (1 Yeates 378), where the same objection to the verdict was vehemently urged, the court uses this language: “it were much to be wished that the minds of jurors should be as white paper; but it can

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51. *Pa. Const. art. I, §11: Courts to be open. . . . “All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”* (Emphasis added.) In light of this provision, how do we end up with sometimes anonymous jurors in the opinions and transcripts of our courts? The right to a public jury trial attaches when the jury trial begins, and applies to monwealth care and refrain from questioning which may pressure a witness to answer in a particular way); in injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. . (Emphasis added.) In light of this provi-

52. *It should be noted that in Pennsylvania civil cases, there is no requirement that a trial court swear* to the public, in whole or in part, the particular interest, and the threat to that interest, must be articulated with findings specific enough that an appellate court can determine whether the closure order was constitutionally entered. *See, e.g., Presley v. Georgia*, 558 U.S. 209 (2010). When a court effectively closes voir dire to the public, in whole or in part, the particular interest, and the threat to that interest, must be articulated with findings specific enough that an appellate court can determine whether the closure order was constitutionally entered. *See, e.g., Presley v. Georgia*, 558 U.S. 209 (2010). The constitutional right to a public trial, including public voir dire, is maintained if and only if: (a) voir dire is openly conducted in the courtroom and/or (b) a full and complete transcript of the proceedings was made, and it is later made a matter of public record. *See, e.g., Commonwealth v. Briggs*, 12 A.2d 291 (Pa. 2011), cert denied, 132 S.Ct. 267 (2011); *Commonwealth v. Hartman*, 638 A.2d 968 (1994); *Commonwealth v. Harris*, 703 A.2d 441 (Pa. 1997). *See also, generally, Commonwealth v. Winfield*, 464 Mass. 672, 685, n.2 (Mass. 2013).

52. It should be noted that in Pennsylvania civil cases, there is no requirement that a trial court swear in prospective jurors prior to voir dire, although some authorities note that it should be required. See *Pa. SSJ (Civ.), §1.50 (2013)—Oath Prior to Voir Dire. Cf., Hostetler v. Kraisel*, 322 Pa. 248, 254-255, 185 A. 300, 303 (Pa.1936) (“[J]urors, their employment being temporary and their prior acquaintance with the system being but casual, are often unacquainted with the solemnity of their duties and have not a full comprehension of their scope. Wherever and whenever possible, therefore, the judges of the lower courts should fully instruct them as to the measure of their obligations and responsibilities.”)

In any event, the decisions of the Pennsylvania courts regarding juror bias in civil cases are thus often unclear as to whether they are discussing sworn or unsworn “testimony” of prospective jurors. (On the other hand, there is a specific rule in Pennsylvania criminal cases requiring a voir dire oath by prospective jurors. See *Pa.R.Crim.P. 631(B).*)
scarcely be expected when they come *de vicineto*. Every judicial as well as political system has its disadvantages as well as advantages.\(^{53}\)

After reading Article I, Section 6 of the Pennsylvania Constitution, and the opinions in *M’Causland, Flanagan*, and *Cordes*, as well as those in *McHugh* and other cases, I realized that what we are talking about is a simple question: the basic question of the qualification of a constitutional right, a Pennsylvania constitutional right. Every law student learns in his or her constitutional law class that qualifications of fundamental constitutional rights are to be narrowly construed.\(^{54}\)

[T]he right to a trial by an impartial jury is enshrined in the Pennsylvania Constitution.\(^{55}\) This right (and all that it entails) is a fundamental constitutional right.\(^{56}\) A practice which burdens this fundamental constitutional right can only be justified only upon a showing of a compelling state interest, incapable of achievement in some other fashion, which outweighs the interest protected by the right.\(^{57}\)

In all but the most notorious cases, the courts should readily be able to ensure the seating of a jury like white paper, with a clean slate and an open mind, free of even the suspicion of partiality. Again, this can be accomplished at minimal cost to the courts, and there would appear to be no compelling state interest excusing the failure to do so.

As indicated by Chief Justice John Marshall’s opinion in the case of Aaron Burr, exceptions should be based only upon the “absolute necessity of the case, and... where this necessity exists the rule perhaps must bend to it, but the rule will bend no further than is required by actual necessity.”\(^{58}\) And as our own Supreme Court stated in *Munshower v. Patton*: “The wisdom of our ancestors guarded the purity of the administration of justice even the suspicion of partiality;... jurors... were, as far as human precaution could provide, to stand unprejudiced.”\(^{59}\)

The practice of juror “rehabilitation,” particularly as it is employed by some of our trial judges, unnecessarily burdens the fundamental constitutional right to an impartial jury. It is difficult, if not impossible, for the appellate courts to effectively assess and regulate, and renders uncertain the achievement of impartial juries.

To paraphrase President Judge Roger N. Nanovic in *Leskin v. Christman*:

An uncertain right, or one which purports to be certain but results in widely varying applications by the courts, is little better than no right at all. Consequently, when a right is properly invoked, unless the purpose of the right would be frustrated by its enforcement or extraordinary circumstances exist, the right and the public policy underlying the right must not be unpredictably discarded. Even then, when the interests protected by the right are relaxed or outweighed, the exceptions engrafted on the right scarcely be expected when they come *de vicineto*. Every judicial as well as political system has its disadvantages as well as advantages.\(^{53}\)

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53. *Commonwealth v. Flanagan*, 7 Watts & Serg. 415, 1844 WL 5033, 5 (Pa. 1844) (emphasis added). The citation to “Bl.Rep.” references Blackstone’s Reports (1746-80) and that to “Bu.N.P.” references Sir Francis Buller’s *An Introduction to the Law, Relative to Trials at Nisi Prius* (1788) (originally published in the 1700s), both of which predate Article I, Section 6 of our Pennsylvania Constitution of 1790, which provided that “Trial by jury shall remain as heretofore, and the right thereof shall remain inviolate.” (Emphasis added)


56. See, *Commonwealth v. Bethea*, 474 Pa. 571, 575, 379 A.2d 102, 104 (1977). See generally, *Gormley, et al.*, supra, at Chapter 9, Trial By Jury, Article I, Section 6, §9.1 Introduction. Indeed, the Constitution of Pennsylvania, at Article I, Declaration of Rights, Section 25, Reservation of powers in people, itself emphasizes the protection to be afforded to the other rights enumerated in Article I, such as the Section 6 right to “Trial by jury...”, stating: “To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”


58. *United States v. Burr*, 25 F.Cas. 49, 52 (No. 14692g) (C.C.Va. 1807). Chief Justice Marshall also stated therein: “The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.” Id. at 50.

Further, as Justice Bradley wrote in *Boyd v. United States*:

> [I]llegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions ... should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*

It is respectfully submitted that the appellate courts of Pennsylvania should *obsta principiis* (resist the encroachments), and strongly discourage if not prohibit the practice of juror “rehabilitation” through questions asking for jurors’ self-assessments of their ability to be fair and impartial.

**EMPAANELMENT ONLY OF JURORS ABOVE “SUSPICION OF PARTIALITY” SHOULD NOT BE DEEMED DISCRETIONARY**

Again, I respectfully disagree with Judge Olson’s dissenting opinion in *Cordes* to the extent that it suggests that empanelment of jurors not above the “suspicion of partiality” lies within the proper parameters of a trial judge’s “exercise of discretion.”

Regarding the nature of “discretion,” Judge Aldisert has written: “[D]iscretion means the power of [a] court to choose between two or more courses of action.” And, the Fifth Circuit Court of Appeals soundly noted in the *Matter of Gary Aircraft Corp.*, that “in reviewing an exercise of “discretion, we must always ask an antecedent question: Is this decision truly discretionary?”

As previously discussed herein, decisions of the Pennsylvania Supreme Court going back to *M’Causland* in 1794 make plain the requirement of jurors like white paper, free of any suspicion of partiality. In 1960, our Supreme Court stated in *Finney v. G. C. Murphy Co.* that “[a] jury should be as neutral as a thermometer and as detached as an almanac.” The fact that this constitutional jurisprudence is not of recent vintage does not make it any less commanding or valid today. Indeed, in 2012, our Supreme Court in *Bruckshaw* reaffirmed that the Pennsylvania Constitution guarantees the right to trial by an “impartial jury.”

Our courts must guarantee that the integrity of our juries is on the “highest plane” and “above reproach;” otherwise, the right to “trial by jury” will not only be thwarted on a case by case basis, but may fall into disrepute and be jeopardized generally. This can-
not be allowed to happen—even at the expense of some “judicial discretion.”

Justice She recently wrote in upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable.”

Judge Bowes is justifiably wary of decisions old and new. The absence of a “bright line rule” raises the hauntful spectre of post-trial motion on top of post-trial motion, and appeal after appeal, such as in Cordes, Cornelius, and Noel. All of the Cordes judges are correct that this must be avoided—even at a cost of $9.00 per day for each prospective juror. It must be avoided, or the financial and psychological costs to the litigants, and the costs to the moral authority of our courts to render “Justice,” will bankrupt them all.

Precedents past lay clear the path of the law for the courts to extricate themselves from the bramble bush. Return to the “bright white rule” of the “old days” and the “old ways,” the Constitutional ways. The appellate courts should direct the trial courts to empanel only jurors that are like white paper, jurors with a clean slate and an open mind, jurors free of any suspicion of partiality—as nearly as is humbly possible.

Failure to do so will force the appellate courts of this Commonwealth to repeatedly grapple with, if not wallow in, difficult, time-wasting controversies regarding which jurors were properly seated on jury panels, and which were not. It will force all of the

WILL THE PAST BE PROLOGUE?

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Perhaps this is why Judge Bowes concurred in the result, but not the scholarly but incomplete narratives, of either of the Opinions in Support of Reversal authored by Judges Wecht and Donohue. But she did not say. That question will have to be answered another day. (It is noted that Judge Bowes did not say that she concurred “in the result only” of those two scholarly opinions). Judge Bowes is justifiably wary of decisions old and new. She recently wrote in Commonwealth v. Taylor:

“[T]he doctrine of stare decisis is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish[.]”

Precedents past lay clear the path of the law for the courts to extricate themselves from the bramble bush. Return to the “bright white rule” of the “old days” and the “old ways,” the Constitutional ways. The appellate courts should direct the trial courts to empanel only jurors that are like white paper, jurors with a clean slate and an open mind, jurors free of any suspicion of partiality—as nearly as is humbly possible.

Failure to do so will force the appellate courts of this Commonwealth to repeatedly grapple with, if not wallow in, difficult, time-wasting controversies regarding which jurors were properly seated on jury panels, and which were not. It will force all of the

ing upon an unchartered course of experimentation with other untried methods. It is the duty of jurors to so act that their conduct will not bring the administration of justice into disrepute and to perform with fidelity their duties as fact finders in accordance with the evidence presented, uncorrupted by external influences, and free of all bias and prejudgment, especially that arising from sympathy.

In Matter of Gary Aircraft Corp., 698 F.2d 775, 780 (5th Cir. 1983) the Fifth Circuit further noted the rather grim view of judicial “discretion” held by some: “The discretion of a judge is said by Lord Camden to be the law of tyrants; it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable.”

Justice Scalia himself testified before the Senate Judiciary Committee in 2011: “The jury is a check on us. It is a check on the judges . . . a way of reducing the power of the judges . . . .”

Sheldon Whitehouse, Restoring the Civil Jury’s Role in the Structure of our Government, 55 Wm. & Mary L. Rev. 1241, 1278 (2014). It thus would be ironic if trial judges were granted unchecked discretion in determining the impartiality of prospective jurors.

This is equally true in criminal and civil cases. “[T]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.”

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, C.J.) “Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”

James Madison (1789). Sir William Blackstone also explained: “[T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another’s right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.”


Id. at 467 (quoting Cooper v. Schoffstall, 905 A.2d 482, 493–494 (Pa. 2006)).
courts to engage in retrospective confabulation. And the taint will have an unbearable stink about it. At this point, the rot has only just begun to set in. It must be excised from the “body judicial.”

Would the courts rather endure a manageable number of reversals for new trials now, or an unmanageable number of same later on, if the United States Supreme Court takes up the matters under the Due Process Clause of the 14th Amendment to the United States Constitution? The rescue of a Pennsylvania fundamental constitutional right by the “junior” Supreme Court (of the United States) would be an embarrassment. Pennsylvania courts interpreting the Pennsylvania Constitution or other Pennsylvania Laws are not ordinarily bound by, or subjected to, federal precedent on these issues. The Pennsylvania Supreme Court has stated that the Pennsylvania courts are “free to interpret the [Pennsylvania] Constitution in a more generous manner than the federal courts” interpret the United States Constitution. Lesser generosity of any stripe is another matter entirely.

There is no express cognate in the federal Constitution for the phrase in Article 1, Section 6 of the Pennsylvania Constitution that “Trial by jury shall be as heretofore, and the right thereof remain inviolate.” A right of Pennsylvanians which existed heretofore, and hopefully will exist heretofore, became a mere shibboleth. A faery tale told to young children at bedtime.

Will the Pennsylvania Supreme and Superior Courts follow the path laid clear? Will the Courts shine the bright white light of “fair and impartial justice to all” upon the citizens of Pennsylvania, and release their right to “Trial by jury. . .” from the “Heart of Darkness”? Will the Courts obsta principis? Will the Courts dispense Justice even “for the most hated and despised in our society,” such as the criminal defendant in Noel, and the personal injury plaintiffs in Cordes and Cornelius?

Time will tell the tale.

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72. See, e.g., Ross v. Oklahoma, 487 U.S. 81, 89 (1988) (due process concerns implicated where a court has denied or impaired the right to peremptory challenges as provided by state law).

73. The Pennsylvania Supreme court is the oldest sitting Supreme Court in the Nation, an institution of more than 328 years (predating even the “junior Supreme Court,” the United States Supreme Court, by 67 years). See Pennsylvania State Archives—RG-33 Records Of The Supreme Court Of Pennsylvania—Agency History. Available at: http://www.phmc.state.pa.us/bah/dam/rp/rp33ah.htm.
