

Voir Dire: How Should It Be Conducted To Ensure That Our Juries Are Representative and Impartial?*

By JON VAN DYKE**

During the questioning of prospective jurors for the 1971 murder trial of Black Panthers Bobby Seale and Ericka Huggins in New Haven, defense attorney Catherine Roraback frequently stood directly behind her client while asking questions to make the juror look at Ericka Huggins and recognize that the white attorney had a friendly and respectful attitude toward her black client. After one juror had said repeatedly that she could be fair, Ms. Roraback moved behind her client and asked, "Is there anything about your attitude or experiences we haven't covered in all of these questions that would make you unable to listen to the evidence in this case and reach an unbiased verdict?"

The prospective juror looked directly at the defendant for the first time and burst out, "She's guilty!"

A startled Judge Harold M. Mulvey asked, "What did you say?" and the woman in the jury box again said, "She's guilty." Judge Mulvey promptly excused her for cause.¹

Such outbursts and the prejudice that lies behind them are less rare than one might think, and many trial lawyers argue vociferously that it is during this pretrial selection of jurors, the voir dire, that cases are won or lost. The term voir dire is of ancient origin and is variously translated as "to speak the truth," or "to see what he or she says." Whatever

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1. Ginger, *What Can Be Done to Minimize Racism in Jury Trials?*, 20 J. PUB. L. 427, 437-38 (1971).

the literal translation of the term, it is now widely used, and the conduct of voir dire is now widely controversial. Should the judge alone question the jurors to uncover possible bias because the judge is best suited to carry on the inquiry impartially? Or should the competing attorneys question the jurors directly because only they know all the issues that will be raised during the course of the trial and only they will probe the inner psyches of the jurors? Should the prospective jurors be questioned individually or collectively? What kinds of questions can be asked? What is the purpose of questioning the jurors at all?

After the 1972 Angela Davis murder trial, Mary Timothy, who had been jury forewoman, said she felt attorney-conducted voir dire was instrumental in securing an impartial jury:

Let me illustrate. There had been a large sum of money authorized by the Presbyterian Church to be used for the defense of Angela Davis. This situation was peculiar to this case, and it was of vital importance that prospective jurors who belonged to this religious organization be queried about their reaction to the Church's decision to give this money to the defense.

In another instance, a prospective juror who stated repeatedly that he would be able to give Ms. Davis a fair trial despite the fact that she was an avowed communist, through very adroit questioning, finally admitted that he might very well not be able to accept the testimony of *other* communists who might appear as witnesses for the defense.²

Even with the extensive questioning in that case, all prejudices were not uncovered, and a number of the jurors were unable to accept the veracity of the attorneys who testified. Mary Timothy said after the trial that some of the jurors had stereotyped lawyers "as artful, mendacious, deceitful and untrustworthy,"³ and were unable to give any credence to their accounts of the events. Fortunately, the testimony of the various attorneys was not central to the case of either the prosecution or the defense.

Jurors can be challenged either *for cause*, "on a narrowly specified, provable and legally cognizable basis of partiality,"⁴ or *peremptorily*, according to the whim or strategy of the competing litigants and their lawyers. An unlimited number of jurors can be challenged for cause, but the trial judge must agree that the juror is prejudiced in some way. Each side is given a finite number of peremptory challenges which they can exercise without judicial approval. The bias necessary to justify

2. Affidavit prepared by Mary Timothy, submitted in the case of United States v. McNeil, CR No. 73-0098 (N.D. Cal., Mar. 28, 1973) (emphasis in original).

3. *Id.*

4. Swain v. Alabama, 380 U.S. 202, 220 (1965).

challenging a juror for cause includes, for instance, being related to a litigant or having some special interest in the controversy. It may also include racial prejudice against a litigant—one of the debates that we will examine shortly. The preliminary question is, however, whether it is possible to discover all the prejudices that jurors bring into court through voir dire, and whether the effort to uncover all of those prejudices is worth the costs—costs not only in terms of time and expense but also in terms of intimating that some people are going to be “better” and “more impartial” jurors than others. I have concluded that if the list from which jurors are selected is a complete or nearly complete census of the community and if excuses are granted only in exceptional circumstances, then justice would be better served if juries were composed of the first twelve persons randomly selected from that list, and that the questioning and challenging of jurors should be limited to actual blood or friendship ties between jurors and litigants. Until such truly representative lists become standard, however, a careful questioning of jurors and exercise of challenges is necessary to counter partially the biases present in the selection process.⁵

A Brief History of the Voir Dire

During the early days of the Anglo-Saxon jury, litigants had no right to question prospective jurors about their prejudices. In fact, at least some of the jurors were expected to be familiar with the dispute and, because they were selected from the propertied class, they were expected to favor the Crown in criminal cases.⁶ Jurors could be challenged for specific bias, such as blood, marriage or economic relationship to a litigant; but a nonspecific bias, such as ill-feeling toward a litigant's class, race or religion, could not be the basis for a challenge for cause, and no questioning on such matters was allowed.

When a prospective juror was charged with specific bias during this early period, the party making the challenge had to do so before any questions were asked of the juror. Then, once the challenge was made, the justice appointed two impartial “triers” who might be coroners, attorneys or unchallenged members of the jury, and these triers would make a decision based on evidence offered by the challenging party and any rebuttal evidence presented.⁷

5. The underrepresentation of nonwhites, the young, women and the poor that results from the use of such standard lists as the registered voters list is discussed and documented at length in OUR UNCERTAIN COMMITMENT, *supra* note *.

6. See, e.g., Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290, 292 (1972) [hereinafter cited as Gutman].

7. J. PROFFATT, A TREATISE ON TRIAL BY JURY 247 (1877); H. ROSCOE, CRIMI-

This practice continued until the time of the American Revolution, when, because of the controversial trials that became a focal point for political disputes, the revolutionaries demanded the right to question jurors about their prejudices. Patrick Henry argued that he would prefer to be tried by a judge alone than by a jury selected without the right to question and challenge.⁸ The Select Committee of the House of Representatives that was empowered to draft the Bill of Rights specifically mentioned "the right of challenge" in its first draft of what became the Sixth Amendment, but this language was later excluded because the words "an impartial jury" in the Sixth Amendment, when considered in conjunction with the Ninth Amendment's reservation of unmentioned rights to the states and the people, had the effect of securing the right to question and challenge jurors.⁹ About twenty years later, during the treason trial of Aaron Burr in 1807, Chief Justice John Marshall (sitting as a trial judge) had occasion to confirm this history and to assert firmly and eloquently that prospective jurors should be examined at length in order to root out prejudices.¹⁰

Burr had been vice-president under Thomas Jefferson from 1801 to 1805, but the two men were political enemies throughout this period. The enmity grew when Burr killed Alexander Hamilton in a duel in 1804. Shortly thereafter, Burr apparently assembled a small army in Kentucky, and Jefferson brought treason charges against him. The media of the day described the feud between Jefferson and Burr in detail, the citizenry chose sides, and the difficulties in selecting an impartial jury increased. John Marshall was no friend of Jefferson, and he made a number of rulings during the trial that have stood the test of time but may initially have been made, at least in part, for partisan reasons.

The government attorneys argued that jurors should not be disqualified simply because they have some preconceived notions about the dispute, but Marshall ruled that such prejudice was ground for a challenge for cause and that jurors should be questioned to determine their feelings on the evidence. Marshall analogized the situation to that of a hypothetical juror who was distantly related to a litigant:

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

NAL EVIDENCE 281 (15th ed. 1928); Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 GEO. L.J. 438, 443 (1928) [hereinafter cited as Moore].

8. Gutman, *supra* note 6, at 296-97.

9. *Id.* at 297-99.

10. *United States v. Burr*, 25 F. Cas. 49 (No. 14,692(g)) (C.C.D. Va. 1807).

jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.¹¹

Similarly, persons with some preconceived notion about the facts or the litigants must be disqualified. A person who has some preliminary ideas about the matter, just like a person who has some relationship with a litigant, cannot be an impartial judge:

He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.¹²

This decision was enormously influential. Virtually all the state courts fell into line and authorized the questioning of jurors in areas of non-specific bias,¹³ a sharp departure from the practice in England and Canada, countries that to this day do not permit such questioning.¹⁴

Does the Voir Dire Really Produce an Impartial Jury?

The American voir dire was thus expanded to cover areas of nonspecific bias to ensure that only jurors who would be able to adjudicate objectively would be impaneled. But is this really the likely result? Or does the process of questioning and challenging jurors lead instead to a jury that is *less representative* of the community than would be the first twelve persons on a randomly selected list?

In the spring of 1973, the weekly *Texas Observer* obtained a copy of a book prepared in the Dallas County district attorney's office that spelled out in astonishingly frank terms the kinds of jurors that prosecutors try to impanel. This book, entitled *Prosecution Course*, was assembled to help train prosecuting attorneys in Texas. The chapter on "Jury Selection in a Criminal Case" was written by an assistant district attorney in Dallas named Jon Sparling, who had become locally famous for persuading a jury to impose a 1,000-year sentence on a convicted felon. Excerpts from his chapter are reprinted at length here because they provide a rare, candid glimpse into the prosecutorial mentality:

11. *Id.* at 50.

12. *Id.*

13. Gutman, *supra* note 6, at 307-08 n.54.

14. P. DEVLIN, *TRIAL BY JURY* 27-37 (1956); Maxwell, *The Case of the Rebellious Juror*, 56 A.B.A.J. 838, 840 (1970), citing R. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 289-92 (1952); Moore, *supra* note 7, at 453; Note, *Judge Conducted Voir Dire as a Time-Saving Trial Technique*, 2 RUTGERS-CAMDEN L.J. 161 (1970).

Who you select for the jury is, at best, a calculated risk. Instincts about veniremen may be developed by experience, but even the young prosecutor may improve the odds by the use of certain guidelines—if you know what to look for. . . .

III. What to look for in a juror.

A. Attitudes.

1. *You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree.*

2. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused.

3. You are not looking for the free thinkers and flower children.

B. Observation is worthwhile.

1. Look at the panel out in the hall before they are seated. You can often spot the showoffs and the liberals by how and to whom they are talking.

2. Observe the veniremen as they walk into the courtroom.

a. You can tell almost as much about a man by how he walks, as how he talks.

b. Look for physical afflictions. These people usually sympathize with the accused.

3. Dress.

a. Conservatively, well dressed people are generally stable and good for the State.

b. In many counties, the jury summons states that the appropriate dress is coat and tie. One who does not wear a coat and tie is often a non-conformist and therefore a bad State's juror.

4. Women.

a. I don't like women jurors because I can't trust them.

b. They do, however, make the best jurors in cases involving crimes against children.

c. It is possible that their "women's intuition" can help you if you can't win your case with the facts.

d. Young women too often sympathize with the defendant; old women wearing too much make-up are usually unstable, and therefore are bad State's jurors.¹⁵

An assistant district attorney in Albuquerque, New Mexico, told me that he considered voir dire to be necessary to remove the "nuts"

15. The Texas Observer, May 11, 1973, at 9 (emphasis added). See Time Magazine, June 4, 1973, at 67.

from the jury, who might force the jury to "hang" by holding out for acquittal in the face of eleven other jurors who might want to convict. "We have to question them," he said, "to get the flaky wierdos off the jury."¹⁶

Defense attorneys are, of course, seeking jurors with apparent biases in the opposite direction. Depending on the nature of the case, they will look for the young, the better educated, the nonwhite, the odd or whatever. Lawyers who regularly try personal injury cases have their own stereotypes of who should be picked as jurors and who should be avoided.¹⁷ One attorney who represents plaintiffs says that he tries to impanel older jurors, persons who are in low-income categories, persons who are the same sex as the plaintiff, and in general people who like other people.¹⁸ Another San Francisco plaintiff's attorney says that he usually challenges retired military officers, accountants, engineers and postal employees, because these persons tend not to give high verdicts.¹⁹ All of these generalizations are, of course, based on stereotypes and deny the uniqueness of each person. The exercise of challenges by opposing attorneys tend to cancel each other. The process of questioning and challenging prospective jurors then becomes a battle of wits that produces not the most impartial jury, but rather a group of the least interesting persons in the courthouse.

Does a Conflict Exist Between Representativeness and Impartiality?

Would a jury impaneled without any questioning and challenging for nonspecific bias now be unconstitutional? Such a jury, if randomly selected from a complete census of the community, would certainly be more representative and would be more likely to be a "cross-section of the community." Would it be impartial? Does a conflict exist between the demand for impartiality and the desire for representativeness? Or is a representative jury necessarily more impartial because it includes diverse elements of the community, including many persons who would almost inevitably be challenged in any trial? Is "impartiality" a value-free concept implying attainable objectivity, or does it simply mean a balance between the diverse views and experiences in our society? Is a

16. Interview with Joseph A. Jelso, Assistant District Attorney of Albuquerque, New Mexico, June 3, 1974.

17. See, e.g., Kallen, *Peremptory Challenges Based Upon Juror Background—A Rational Use?*, 13 TRIAL LAWYERS'S GUIDE 143 (1969) [hereinafter cited as Kallen].

18. Interview with Joseph Cotchett, San Francisco attorney, Aug. 21, 1972.

19. Interview with E. Robert Wallach, San Francisco attorney, Aug. 4, 1972.

body containing only the middle-of-the-road members of the community likely to be more "impartial" than a body also containing persons to the left and right of center?

Justice Byron White said in *Swain v. Alabama*²⁰ that "[t]he function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."²¹ Are the people unobjectionable to either side really more likely to weigh the evidence more impartially than the apparently strong-minded persons who are challenged by one side or the other?

Professor Dale W. Broeder studied this question as part of the massive Ford Foundation-funded Chicago Jury Project of the 1950's and 1960's and discovered that the voir dire and the challenging process that followed were ineffective in achieving the results desired by the competing attorneys:

The message here is exceedingly clear: *Voir dire* was grossly ineffective not only in weeding out "unfavorable" jurors but even in eliciting the data which would have shown particular jurors as very likely to prove "unfavorable."²²

Professor Broeder studied twenty-three civil jury trials held in a midwest federal court in the late 1950's, and he questioned the lawyers and jurors after each case. He found a remarkable number of people with explicit prejudices who were nonetheless permitted to sit on juries and found that most lawyers did not take the voir dire very seriously. Some of these observations are not typical, because the study was made when federal jurors were specially selected according to the "key-man" system and hence were predominately upper-middle-class and also because the judge involved did not approve of a protracted questioning period. But two of Professor Broeder's observations are important: (1) in most cases the personalities of the jurors were simply too complex to enable the attorneys to pick and choose their jurors carefully (the jurors were influenced in unexpected ways during the trial);²³ and (2) *the prospective jurors often withheld the truth when being questioned.*²⁴ If they wanted to serve as jurors they responded so that they would be accepta-

20. 380 U.S. 202 (1965).

21. *Id.* at 219.

22. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505 (1965).

23. *Id.* at 515-21.

24. *Id.* at 510-15.

ble to the two attorneys, and if they did not want to serve they gave answers that would lead to a challenge.

Professor Broeder's study raises serious questions about the value of the voir dire, especially when it is demonstrated that the process of questioning and challenging produces a jury that is less representative than a jury selected randomly from a complete census would be. It is, for instance, not uncommon even today for the prosecution to exercise its peremptory challenges to eliminate all or almost all the jurors of the defendant's ethnic background.²⁵ Personal injury attorneys freely admit that they consider seriously the juror's ethnic and occupational background when deciding whether to challenge.²⁶ And recently, in important political cases, defense teams and the F.B.I. have carefully checked into each prospective juror's background by questioning neighbors and employers in order to exercise challenges with the greatest effect.²⁷ The result, if the original list of jurors were representative,

25. See, e.g., *United States v. Thompson*, 518 F.2d 534, 535 (8th Cir. 1975); *United States v. Pollard*, 483 F.2d 929, 930 (8th Cir. 1973), *cert. denied*, 414 U.S. 1137 (1974); *United States v. Carlton*, 456 F.2d 207, 208 (5th Cir. 1972); *United States v. Pearson*, 448 F.2d 1207, 1216 (5th Cir. 1971); *United States v. Corbitt*, 368 F. Supp. 881, 886-88 (E.D. Pa. 1973); *Brown v. State*, 248 Ark., 561, 566-67, 453 S.W.2d 50, 53-54 (1970); *In re Wells*, 20 Cal. App. 3d 640, 647-48, 98 Cal. Rptr. 1, 4-5 (1971); *People v. Boyd*, 16 Cal. App. 3d 901, 905, 94 Cal. Rptr. 575, 577 (1971); *Allen v. State*, 231 Ga. 17, 19, 200 S.E.2d 106, 108 (1973), *cert. denied*, 414 U.S. 1159 (1974); *Hobbs v. State*, 229 Ga. 556, 560, 192 S.E.2d 903, 907 (1972); *State v. Arceneaux*, 302 So. 2d 1, 4 (La. 1974); *State v. Jack*, 263 La. 75, 285 So. 2d 204, 207 (1973); *State v. Smith*, 263 La. 75, 78, 267 So. 2d 200, 201 (1972); *State v. Lee*, 261 La. 310, 312, 259 So. 2d 334, 335 (1972); *State v. Amphy*, 259 La. 161, 171-72, 249 So. 2d 560, 564 (1971), *cert. denied*, 405 U.S. 1074 (1972); *State v. Richey*, 258 La. 1094, 1119-21, 249 So. 2d 143, 152-53 (1971); *State v. Square*, 257 La. 743, 827-29, 244 So. 2d 200, 230 (1971), *penalty vacated and remanded*, 408 U.S. 938 (1972); *Johnson v. State*, 9 Md. App. 143, 148-51, 262 A.2d 792, 796-97 (1970); *Commonwealth v. Cook*, 308 N.E.2d 508, 510 (Mass. 1974); *People v. Redwine*, 50 Mich. App. 593, 595-96, 213 N.W.2d 841, 842-43 (1973); *State v. Brookins*, 468 S.W.2d 42, 46 (Mo. 1971); *Clark v. State*, 465 S.W.2d 557, 558 (Mo. 1971); *State v. Smith*, 465 S.W.2d 482, 485 (Mo. 1971); *State v. Huddleston*, 462 S.W.2d 691, 692 (Mo. 1971); *State v. Bradford*, 462 S.W.2d 664, 671 (Mo. 1971); *State v. Davison*, 457 S.W.2d 674, 676-77 (Mo. 1970); *State v. Smith*, 55 N.J. 476, 483-84, 262 A.2d 868, 871-72, *cert. denied*, 400 U.S. 949 (1970); *State v. Noell*, 284 N.C. 670, 681-83, 202 S.E.2d 750, 758-59 (1974); *Commonwealth v. Darden*, 441 Pa. 41, 51, 271 A.2d 257, 262 (1970), *cert. denied*, 401 U.S. 1004 (1971); *Johnson v. State*, 3 Tenn. Crim. App. 17, 456 S.W.2d 864, 866 (1970), *cert. denied*, 400 U.S. 997 (1971); *Noah v. State*, 495 S.W.2d 260, 265 (Tex. Crim. App. 1973); *Hill v. State*, 487 S.W.2d 64, 64-65 (Tex. Crim. App. 1972); *Reese v. State*, 481 S.W.2d 841, 842 (Tex. Crim. App. 1972); *Brown v. State*, 476 S.W.2d 699, 700-01 (Tex. Crim. App. 1972); *Hardin v. State*, 475 S.W.2d 254, 255-57 (Tex. Crim. App. 1971), *cert. denied*, 408 U.S. 927 (1972).

26. Kallen, *supra* note 17, at 150-52.

27. See, e.g., Schulman, Shaver, Colman, Emrich & Christie, *Recipe For a Jury*, 6 PSYCHOLOGY TODAY, May 1973, at 37.

would be to distort that cross section and impanel an unrepresentative jury.

Most lists of potential jurors today are not representative, so the research of litigants is to some extent defensive—to reduce the biases that result from the choice of lists. As long as biased lists are used, such efforts must continue. The questions that concern trial lawyers operating in the present system are (1) who shall conduct the voir dire and (2) what kinds of questions should be asked.

Who Shall Conduct the Voir Dire?

During the 1960's and early 1970's judges sharply curtailed the opportunity for lawyers to question prospective jurors and increasingly assumed the task themselves, sometimes with skill and sometimes with disinterest and disdain. Arguing that lawyer-conducted voir dire takes excessive time and that lawyers abuse their privilege by asking inappropriate questions and indoctrinating the jurors, the judges have now taken exclusive control over the questioning in thirteen states plus in the federal system.²⁸ This controversy is a complicated one, and the various alternatives, with their supporting arguments, follow.

Attorney-Conducted Voir Dire

The two most important arguments in favor of allowing attorneys to question prospective jurors directly are that attorney-conducted voir dire: (1) helps the attorney gain rapport with the jurors and decide how best to present the evidence to them; and (2) enables the attorney to secure impartial jurors through the informed use of challenges.²⁹

(1) *Rapport*. If attorneys are to be able to communicate effectively the position of their clients, they must understand the jurors. Furthermore, an attorney must be able to screen out any jurors who might have some personality conflict with either the attorney or the client. An attorney can spot first-impression hostilities flowing from the prospective juror only if the attorney can engage the prospective juror in a short conversation. Some attorneys begin by asking, "And where did you

28. See Table II *infra*.

29. See generally THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE (Kairys ed. 1975); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975); Padawer-Singer, Singer & Singer, *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 JUDICATURE 386 (1974). A particularly useful volume in this field is A. GINGER, *JURY SELECTION IN CRIMINAL TRIALS* (1975). This book presents numerous examples of attorney-conducted voir dire and provides an excellent discussion of most of the issues that are still unresolved.

grow up, Mr. Jones?" simply to see whether the man has an affirmative outlook on life or is a sourpuss.³⁰ A juror may dislike the attorney's clothes, mannerisms, accent or ethnic background, and if such is found to be the case, the juror must be challenged.

Frequently, the attorneys try to explain elements of their case in a sympathetic manner to the prospective jurors or to influence the jurors on questions of law while they are trying to establish "rapport," and it is this subtle indoctrination that has offended many judges and commentators who argue that such adversary arguments have no place in the jury selection phase and should wait until the trial actually begins. The attorneys respond by saying that they are trying to mold ordinary people into jurors—for most, a new and unfamiliar role—and that some legal discussion is necessary.

(2) *Informed Use of Challenges.* The lawyer and not the judge exercises peremptory challenges, and the lawyer can do this only after speaking directly to the prospective juror and thereby evaluating the juror's personality and prejudices.³¹ Only if the lawyer is allowed to look in the juror's eyes while asking a probing question can the lawyer evaluate the juror's honesty in answering and thus decide carefully whether to challenge the juror. Without the chance to interrogate the prospective jurors personally and fully, lawyers are obliged to rely on information provided by commercial services (sometimes called jury "stud" books), in those cities that have them, for basic demographic data about prospective jurors, and on their own intuition, both of which are uncertain guides.

Even in the case of challenges for cause upon which the judge rules, attorney-conducted voir dire is essential if hidden prejudices are to be uncovered because judges generally do not ask pressing and probing questions that truly explore the prospective juror's attitudes. After the first trial of Huey Newton in Oakland in 1968 for the death of a policeman, his lawyer Charles Garry wrote the following in defense of attorney-conducted voir dire:

The average judge's idea of voir dire is just to ask, "Can you be fair?" Once the prospective juror has answered, "Yes," everything else is considered irrelevant and the judge passes on to the next juror, even though Adolph Hitler himself would have answered that question in the affirmative.³²

30. Burnett, *Voir Dire Examination*, 8 FOR THE DEFENSE 4 (Mar. 1973).

31. See, e.g., *People v. Crowe*, 8 Cal. 3d 815, 835, 506 P.2d 193, 207, 106 Cal. Rptr. 369, 383 (1973) (Mosk, J., dissenting).

32. Garry, *Attacking Racism in Court before Trial*, in *MINIMIZING RACISM IN JURY TRIALS* xxii (A. Ginger ed. 1969).

Either because of institutional pressures to keep their calendars moving or because of their lack of sympathy to one or both of the litigants, many judges question prospective jurors without much interest or enthusiasm, hoping that a panel can be quickly assembled and that the trial can begin. Another experienced California trial attorney wrote in response to a questionnaire circulated by the California Judicial Council in 1972 that judges become bored with questioning jurors:

After a judge has gone through this procedure 30 or 40 times, it gets to be a pretty tedious task. Even a conscientious judge runs through things rather perfunctorily after awhile. On the other hand . . . the attorneys . . . have a strong motivating force to make sure that the juror is going to be fair to their own individual client. If both [attorneys] are doing this, and are reasonably competent, I think that the zeal with which this is approached exceeds that of the judge.³³

Only the attorney understands the complexities of the arguments that he or she will present, and thus only the attorney knows what prejudices are particularly important to explore. Finally, it is sometimes argued that unless the attorney is allowed to question the jurors, the jury will in effect be selected by a representative of the government, the judge, and that this procedure would defeat the purpose for the jury—namely to protect the citizen from governmental oppression.³⁴

Judge-Conducted Voir Dire

California's recent battle over whether the judge or the attorneys should question jurors provided an opportunity for the protagonists in this debate to present their arguments in vivid terms. Early in 1973, the California Supreme Court abruptly ended the right of attorneys in that state to carry on what the court described as the "excess rococco examination" of jurors.³⁵ The following year, the state legislature, responding to pressure from trial lawyers, enacted a statute that restored the right of attorneys to participate in the questioning.³⁶ The court's strong action and the legislature's quick response serve to illustrate the depths of passion on this subject.

33. California State Bar Ass'n, Committee on Rules of Court Procedure, Report and Recommendation Re: 1972 Voir Dire Procedures, Exhibit B, at 4, Dec. 5, 1972.

34. N.Y. Times, May 18, 1972, at 46, col. 8 (letter from Paul G. Chevigny, staff counsel, New York Civil Liberties Union).

35. *People v. Crowe*, 8 Cal. 3d 815, 819, 506 P.2d 193, 195, 106 Cal. Rptr. 369, 371 (1973).

36. CAL. PENAL CODE § 1078 (West Cum. Supp. 1975).

The California Supreme Court's majority opinion states:

We conclude that direct examination by counsel has perverted the purpose of *voir dire*, and transformed the examination of jurors into a contest between counsel for the selection of a jury partial to his cause and for the attainment of rapport with the jurors so selected, a contest which may overshadow the actual trial on the merits.³⁷

This conclusion is particularly remarkable because the statute on the books at that time explicitly stated that the trial judge "shall permit reasonable examination of prospective jurors *by counsel for the people and for the defendant*."³⁸ The legislative history of this statute unmistakably indicated that it was designed to ensure that lawyers could question the jurors, because this statute was modified from an earlier proposed version which stated that the trial judge "*may, in his discretion, permit reasonable examination . . .*"³⁹ Moreover, legislative attempts to curtail lawyer-conducted voir dire in 1971 and 1972 foundered unsuccessfully.⁴⁰ Nonetheless, this highly respected court reached out to nullify the legislation for no apparent constitutional reason—an example of the judiciary's strong desire to exert greater control over the jury selection procedure.

The United States Supreme Court took the right to question prospective jurors from attorneys in federal trials twenty-nine years earlier when they approved Rule 24(a) of the Federal Rules of Criminal Procedure:

Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.⁴¹

A 1970 study of 219 federal judges showed that 53.4 percent questioned jurors by themselves, 31.1 percent allowed attorneys to ask some supplemental questions, 13.2 percent allowed attorneys to ask all the questions, and 2.3 percent authorized the questioning of jurors by a

37. 8 Cal. 3d at 828, 506 P.2d at 202, 106 Cal. Rptr. at 378.

38. Ch. 605, § 1, Cal. Stats. 1927, at 1039.

39. 8 Cal. 3d at 822, 506 P.2d at 197, 106 Cal. Rptr. at 373 (emphasis added).

40. *Id.* at 834 n.1, 506 P.2d at 206 n.1, 106 Cal. Rptr. at 382 n.1 (Mosk, J., dissenting).

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

clerk or the attorneys outside the judge's presence.⁴² The two reasons the California Supreme Court offered to justify curtailing attorney-conducted voir dire are the "inordinate time consumed in the process of the selection of jurors"⁴³ and the "abuses" that attorneys engage in when they ask their questions.⁴⁴ We will address the time question shortly, but first let us be clear about what the judges mean by "abuses."

The judges assert that a litigant has no right to a favorable jury, but only a right to an impartial jury, and that any questioning that tends to "indoctrinate" the jurors or to obtain a jury sympathetic to one side or the other is improper.⁴⁵ Only if the judge is at the questioning helm can we be sure that no abusive, embarrassing or improper questions will be asked of jurors. Lawyers sometimes pose hypothetical questions that are related to the facts of the case and that may sneak in evidence that is not admissible in trial. A prosecutor, for instance, once asked a prospective juror if he would convict a defendant of rape if the prosecution proved that the defendant had raped and communicated venereal disease to a little girl.⁴⁶ Such a question, by implying that the girl has such a disease, predisposes the juror to infer that rape has occurred and perhaps precludes an objective weighing of the evidence. Even if the judge intervenes and does not allow the juror to respond, the damage has been done because the notion has been implanted in the juror's mind.

The Federal Judicial Conference's Committee on the Operation of the Jury System phrased the matter as follows in a 1960 report:

The trial judge, sitting daily in the trial of cases, both civil and criminal, knows that bias may exist, both because of the nature of the parties involved and because of the general nature of the case itself. Experienced as he thus is along these general lines, and with the potential jurors before him . . . he can thus best ask a single question directed to them along each of such lines. Not only so, but such general questioning coming from him, the impartial arbiter, is much more likely to prove acceptable to counsel on both sides than would a similar question asked by counsel on one side. Therefore, where the jury is selected in the presence of the judge, the Committee recommends that all questions should be asked by the judge for effectiveness and expedition.⁴⁷

42. *The Jury System in the Federal Courts* (Works of the Committee on the Operation of the Jury System of the Judicial Conference of the United States 1966-73) (West Publishing Co.) 174.

43. 8 Cal. 3d at 825, 506 P.2d at 199, 106 Cal. Rptr. at 375.

44. *Id.*

45. *Id.* at 824, 828, 506 P.2d at 199, 202, 106 Cal. Rptr. at 375, 378.

46. *Fields v. State*, 203 Ark. 1046, 159 S.W.2d 745 (1942).

47. Report of the Judicial Conference Committee on the Operation of the Jury System, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 467 (1961).

Perhaps this is so, but the implications of this approach should be clearly understood. By taking the questioning of jurors away from attorneys and entrusting it to the judge, a decision is being made that rejects the adversarial approach toward justice and moves toward the inquisitorial approach used in most of Europe where the judiciary dominates the trial process. In the adversarial system, as it has been traditionally understood in the Anglo-American world, justice is achieved by pitting two sides against each other, allowing them to present their contrasting versions of a factual situation to a jury which then determines the just result of the controversy. The judge moderates the confrontation but does not play an active role in deciding what evidence is presented or what verdict is reached. In the inquisitorial system, the judge decides what evidence is needed, conducts much of the questioning, and the lawyers play a more passive role of responding to the judge's requests.

Many of the judges in the United States are discontented with their passive role and are now assuming greater responsibilities and power over what takes place in their courtroom. The desire of judges to question prospective jurors themselves is part of this movement, and the dramatic *tour de force* of the California Supreme Court in *People v. Crowe*,⁴⁸ just discussed, is evidence of the lengths to which the judiciary will go. But, one might ask, why stop here? If the desire is simply for an impartial jury, why not strip opposing counsel of the right to exercise peremptory challenges altogether? All partial jurors are presumably excused for cause by the judge. What need, then, for peremptory challenges, made without announced reason?

In California, the legislature intervened to reverse the Supreme Court's decision in *People v. Crowe*. In September 1974, the legislature added to the requirement of Penal Code section 1078 that the judge "shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant" the explicit words "such examination to be conducted orally and directly by counsel."⁴⁹

In those jurisdictions that still empower the judges to conduct all the questioning, many judges take the assignment seriously, but many others simply go through the motions. An example of the worst kind of judicial questioning—an example that is unfortunately not unique—is offered by the procedures of Judge Julius J. Hoffman in the 1969-1970 Chicago Conspiracy Trial. A group of perhaps 100 prospective jurors was summoned to the federal courtroom and Judge Hoffman asked

48. 8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973).

49. CAL. PENAL CODE § 1078 (West Cum. Supp. 1975).

them all the following questions: (a) whether they were acquainted with employees of the F.B.I. or the Justice Department; (b) whether they were acquainted with the defendants, their lawyers or their associates; (c) whether they would follow the law as given to them by Judge Hoffman; (d) whether they could keep an open mind until the end of the trial; (e) whether they could treat the testimony of a government agent the same as that of any other witness; (f) whether prior jury service would prevent them from being impartial; and (g) whether any reason existed that would prevent them from being fair and impartial jurors in that case. Fifty-six of those assembled stated without explanation that they could not be impartial and were excused without further ado by agreement of the two sides. Two others gave particular reasons why they could not be impartial and were also excused.

Twelve of the persons who remained were then called into the jury box and they were individually asked questions about their families and occupations. Two persons who said they worked for the federal government were asked whether that would influence their judgment. Another was asked whether his father's job as a police officer would affect his judgment. All replied they could be impartial. The group was then asked whether any of them had close relatives or friends employed by a law enforcement agency or by any other agency of local, state or federal government. Five answered "yes," but asserted that their judgment would not be affected thereby. This question was not asked of the succeeding persons who entered the jury box.

The defense submitted a long list of questions to Judge Hoffman about the war in Vietnam, racism, the youth culture and the political associations of the prospective jurors, but he refused to ask them because they were not "germane" to the issues presented by the trial. Defense lawyers were not permitted to ask any questions of the prospective jurors. A jury was selected after the twenty-four persons were examined, the defendants having exercised ten peremptory challenges and the government having exercised only two.⁵⁰

How many things did Judge Hoffman do wrong? His first error—and one of the grounds on which the convictions were later reversed—was to ask the questions about bias to the group as a whole rather than to the individual jurors.⁵¹ Few persons are brave enough to talk about

50. *United States v. Dellinger*, 472 F.2d 340, 366-67 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

51. *Id.* at 367, 369. See *Patriarca v. United States*, 402 F.2d 314, 318 (1st Cir. 1968), *cert. denied*, 393 U.S. 1022 (1969); *People v. Barrett*, 207 Cal. 47, 276 P. 1003 (1929); *People v. Estorga*, 206 Cal. 81, 273 P. 575 (1928).

their prejudices in public, fewer still to raise their hand in response to a general question and thus to single themselves out for such a discussion.⁵²

Judge Hoffman's second departure from an ideal standard was to ask questions that were too general. Even the California Supreme Court in the 1973 *Crowe* decision conceded that specific questions requiring the juror to talk rather than simply give short answers are necessary if bias is to be uncovered.⁵³

Finally, Judge Hoffman arguably erred in not allowing the attorneys to ask some additional questions after he finished his inquiry. The American Bar Association's *Standards Relating to Trial by Jury*⁵⁴ originally stated that the judge should ask opposing counsel to submit additional questions after the judge finishes questioning, and that the judge should ask the questions that are appropriate.⁵⁵ This suggestion was revised to permit the supplemental questioning to be conducted by the lawyers themselves, on the theory that more time would be saved by this procedure. The judge can, of course, control the additional questioning if it becomes improper.⁵⁶

This compromise is the best approach if voir dire is to be retained. To vest the trial judge with absolute control over voir dire would challenge the very foundation of our adversary system, and reduce the possibility of exposing bias in controversial cases. To give lawyers uncontrolled discretion over the conduct of the questioning, on the other

52. See *United States v. Colabella*, 448 F.2d 1299, 1303-04 (2d Cir. 1971), cert. denied, 405 U.S. 929 (1972). Some judges now try to question each prospective juror in private, so that other jurors will not be able to pick up answers that will permit them to be excused if they so wish, or to remain on the jury if they want to try the case. In 1973, a judge in Santa Cruz, California (with the approval of both attorneys) actually banned the press from the questioning of jurors in a sensational murder trial on the theory that other prospective jurors might read about his questioning. *People v. Superior Court of Santa Cruz*, No. 33516 (Cal. Ct. App. Dist. 1, Div. 4 July 12, 1973). This practice goes too far. It violates the public's right to know, which is guaranteed through the First Amendment, see *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972)), to accomplish a goal that could just as easily be achieved by barring prospective jurors from reading newspapers and watching television news concerning the trial.

53. *People v. Crowe*, 8 Cal. 3d 815, 831 n.31, 506 P.2d 193, 204 n.31, 106 Cal. Rptr. 369, 380 n.31 (1973).

54. A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY (1968) [hereinafter cited as A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE].

55. *Id.* § 2.4, at 63.

56. *Id.* § 2.4 (supp.), at 2.

hand, sometimes wastes valuable time and energy. Both sides should be flexible and each should play a role.

Voir Dire Without a Judge

Some courts in New York State, in Los Angeles, and in a few federal districts select their jurors without the aid of a judge.⁵⁷ The jurors are summoned into a commissioner's office and are questioned either by a jury commissioner or by the opposing attorneys. Sometimes the commissioner leaves the room, allowing the attorneys to be alone with the prospective jurors. Challenges are then made as usual and are ruled upon by the commissioner. Only if an intricate point of law arises is a judge called in to decide the matter. This procedure obviously saves the time of the judge, but may take longer in toto than the procedure combining the talents of the judge and the lawyers.

No Voir Dire At All (Use of Questionnaires)

In some Boston courts no voir dire is conducted. The attorneys must base their challenges on lists of jurors that provide each juror's name, address, military status, sex, occupation, name of spouse and name of employer.⁵⁸ This limited information is obviously inadequate for any serious exercise of challenges, but it might be possible to devise a more sophisticated questionnaire that would be filled out by each prospective juror and would eliminate the need for many of the questions asked in open court.

Such a questionnaire system was used in February 1974 to impanel a jury to try the most serious mass murder ever committed in Washington, D.C. Six hundred and fifty jurors were summoned, and all were given a three-page questionnaire to fill out. The questionnaire asked if sitting on a sequestered jury for six to twelve weeks would cause "extreme difficulty and hardship," if the prospective juror had heard about the crime and had a "fixed opinion" about the defendants' guilt, and finally if the prospective juror or any close relative had been a victim of or had been arrested for a crime like the murder at issue. The

57. National Conference of Metropolitan Courts, Final Report on the Jury Administration Project 23, Mar. 1973 [hereinafter cited as National Conference of Metropolitan Courts]; Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 931-34 (1971); Report of the Judicial Conference Committee on the Operation of the Jury System, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 467 (1961).

58. National Conference of Metropolitan Courts, *supra* note 57, at 21.

questionnaire was then fed into a computer which eliminated 261 of the prospective jurors and said that 389 were qualified to serve. Two hundred seventy of the 389 were randomly selected for further questioning conducted by the judge, and after individual questioning ranging from the juror's religion to previous jury service, another 100 were eliminated "for cause." Names were randomly selected from the remaining 170, and the attorneys exercised their peremptory challenges in the usual fashion until 12 jurors and 12 alternates were selected to try the case.⁵⁹

The Time and Efficiency Arguments

Judges who have advocated taking over completely the conduct of voir dire have always complained about the inefficiency of attorney-conducted voir dire, but they have rarely documented the time actually involved. Chief Justice Warren Burger told the National Conference on the Judiciary at Williamsburg, Virginia, in March 1971, that the voir dire has "become in itself a major piece of litigation consuming days or weeks,"⁶⁰ apparently in response to a few major political trials that had generated massive publicity. Trials that are notorious or involve political controversy always raise special problems in the selection of jurors. Either because of the political controversies surrounding the defendants or because of the sensational media accounts of the crimes, many—perhaps most—prospective jurors will have formed tentative opinions on the matter and many will find it difficult to pass objectively upon the evidence offered to them. If the goal is to impanel an "impartial" jury, extensive time must be expended to discover whether the prospective jurors are tainted, and this time must be spent whether the questioning is conducted by the lawyers or by the judge.

The relevant question concerns the amount of time consumed by the questioning of jurors in the ordinary personal injury civil suit or the relatively routine felony trial. Statistics are, of course, elusive in this area, but attempts have been made to produce reliable numbers. The chart that follows includes as many of the recent studies as I have found.

59. N.Y. Times, Feb. 24, 1974, at 29, col. 1.

60. L.A. Times, Mar. 13, 1971, at 17, col. 1.

Table I
Time Required to Select Juries

Method of Jury Examination, Type of Trial, Date and Place	Average Time in Minutes From Start of Voir Dire Until Jury is Sworn	Source
A. ATTORNEY-CONDUCTED VOIR DIRE:		
(i) CIVIL TRIALS:		
1. Late 1950's—A Midwest Federal Court.	30	Broeder, <i>Voir Dire Examinations: An Empirical Study</i> , 38 S. CAL. L. REV. 503 (1965).
2. 1969—Los Angeles, California ("Test Judges")	111	Levit, Nelson, Ball & Chernick, <i>Expediting Voir Dire: An Empirical Study</i> , 44 S. CAL. L. REV. 916, 961 (1971). "Test Judges" are those who impaneled jurors using attorney-conducted voir dire and judge-conducted voir dire during different periods in 1969.
3. 1969—Los Angeles, Cali- fornia ("Non Test Judges")	106	Same as #2, at 967. "Non Test Judges" are those Los Angeles judges who did not experiment with judge-conducted voir dire during 1969 and simply continued to impanel juries allowing attorney-conducted voir dire as usual.
	130	
4. 1969 Los Angeles-Based Study of Judges in other urban areas of California		Same as #2, at 965. These statistics were assembled from 17 of the most populous California counties.
5. 1969 RUTGERS-CAMDEN L.J. study:		Note, <i>Judge Conducted Voir Dire as a Time-Saving Trial Technique</i> , 2 RUTGERS-CAMDEN L.J. 161, 184 (1970).
(a) Estimates by 65 New Jersey Trial Lawyers	About 75	
(b) Estimates by 27 New Jersey Trial Judges	About 75	
6. 1970 California Judicial Council Survey	123	Judicial Council of California Superior Court Committee, Report and Recommendations Concerning Rules 228 and 516 Relating to the Examination of Prospective Civil Trial Jurors, Oct. 25, 1972 (mimeographed staff draft).
7. 1973—Harris County (Houston), Texas (4 month study)	114	Stevens & Munsterman (Bird Engineering-Research Associates, Inc.), <i>Juror Usage in Houston, Harris County, Texas</i> (1974).

Time Required to Select Juries

Method	Time	Source
8. 1973—Hennepin County (Minneapolis), Minnesota (2 month study)	59	Munsterman (Bird Engineering-Research Associates, Inc.), Juror Utilization in Hennepin County Courts (1974).
9. 1973—Atlanta, Georgia	78	Bird Engineering-Research Associates, Inc. (unpublished data on file at Hastings Constitutional Law Quarterly).
<u>(ii) CRIMINAL TRIALS:</u>		
10. 1969 RUTGERS-CAMDEN L.J. study:		Same as #5, at p. 184.
(a) Estimates by 65 New Jersey Trial Lawyers	About 160	
(b) Estimates by 27 New Jersey Trial Judges	210	
(c) Estimates by 10 New Jersey County Prosecutors	About 165	
11. 1973—Denver County, Colorado		Stevens & Munsterman (Bird Engineering-Research Associates, Inc.), Juror Utilization in Arapahoe, Boulder, Denver, El Paso, Jefferson, and Pueblo Counties, Colorado (1974).
(a) 12-person juries (39 trials)	378	
(b) 3-person juries (14 trials)	72	
12. 1973—El Paso County (Colorado Springs), Colorado		Same as #11.
(a) 12-person juries (28 trials)	240	
(b) 3-person juries (19 trials)	36	
13. 1973—Hennepin County (Minneapolis), Minnesota (2 month study)	108	Same as #8.
14. 1973—Harris County (Houston), Texas (4 month study)	96	Same as #7.
15. 1973—Atlanta, Georgia	86	Same as #9.
<u>(iii) ALL TRIALS:</u>		
16. 1973—Denver County, Colorado		
6-person juries (110 trials)	96	Same as #11.
17. 1973—El Paso County (Colorado Springs), Colorado		
6-person juries (26 trials)	78	Same as #11.
18. 1973—El Paso, Texas	138	Bird Engineering-Research Associates, Inc., Juror Utilization in Prince George's County of the Seventh Judicial Circuit of Maryland (1974).

Time Required to Select Juries

Method	Time	Source
B. JUDGE-CONDUCTED VOIR DIRE:		
(i) CIVIL TRIALS:		
19. 1967 Estimate by William J. Campbell Chief Judge for the Northern District of Illinois	90	Kerr, <i>Varieties in Jury Selection Methods</i> , 44 F.R.D. 277, 278, 284 (1967).
20. 1969—Los Angeles, California	64	Same as #2, at p. 959.
21. 1969 RUTGERS-CAMDEN L.J. Study:		Same as #5, at p. 184.
(a) Estimates by 65 New Jersey Trial Lawyers	About 75	
(b) Estimates by 27 New Jersey Trial Judges	About 75	
22. 1971—New Jersey:		The Institute of Judicial Administration, Inc., A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts (1972).
(a) 12-person juries	24	
(b) 6-person juries	12.7	
23. 1971—U.S. District Court for the Eastern District of New York	75	The Institute of Judicial Administration, Inc., Suggestions for Improving Juror Utilizations in the United States District Court for the Eastern District of New York, Aug. 31, 1971 (mimeographed).
24. 1971—U.S. District Court for the District of Columbia:		Pabst, <i>Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries</i> , 14 WM. & MARY L. REV. 326, 327 (1972).
(a) 12-person juries	52.1	
(b) 6-person juries	52.0	
25. 1971—District of Columbia (91 trials)	58	Pabst, Juror Waiting Time Reduction, June 1971 (National Technical Information Service, U.S. Dept. of Commerce).
26. 1972 California Judicial Council Survey	87 (in court) + 38 (pre and post examination conferences) = 125 (total time)	Same as #6.
27. 1973—Prince George's County, Md. (48 trials)	20	Same as #18.

Time Required to Select Juries

Method	Time	Source
28. 1970-73—Federal District Courts in Maine, Massachusetts, New Hampshire & Rhode Island		Beiser, <i>The Trial Jury: Empirical and Normative Considerations</i> , (text of address to 1973 Annual Meeting, American Political Science Association, New Orleans, Louisiana, Sept. 4-8, 1973).
(a) 12-person juries (40 trials)	40	
(b) 6-person juries (38 trials)	42	
29. 1973—Essex County, N.J.		Pabst and Munsterman (<i>Bird Engineering-Research Associates, Inc.</i>), <i>Juror Utilization in Essex County, N.J., Courts (1974)</i> .
(a) District Courts (6-person juries) (31 trials)	24	
(b) County and Superior Courts		
(i) 12-person juries (11 trials)	102	
(ii) 6-person juries (100 trials)	56	
(ii) <u>CRIMINAL TRIALS:</u>		
30. 1967 Estimate by William J. Campbell Chief Judge for the Northern District of Illinois	180	Same as #19.
31. 1969 RUTGERS-CAMDEN L.J. study:		Same as #5.
(a) Estimates by 65 N.J. Trial Lawyers	47	
(b) Estimates by 27 N.J. Trial Judges	45	
(c) Estimates by 10 N.J. County Prosecutors	About 80	
32. 1971—U.S. District Court for the Eastern District of New York	85	Same as #23.
33. 1971—New York City Study: The Bronx Manhattan	150 203	Subcommittee on the Jury System of the New York Departmental Committee for the Court Administration of the Appellate Division, First and Second Departments, Interim Report, Nov. 13, 1972 (mimeographed report).
34. 1971—District of Columbia (154 trials)	57	Same as #25.
35. 1973—Prince George's County, Md. (46 trials)	20	Same as #18.
36. 1973—Essex County, N.J. (177 trials)	74	Same as #29.

Time Required to Select Juries

Method	Time	Source
(iii) <u>ALL TRIALS:</u> 37. 1960 and 1967 Estimates by Judge Ewing T. Kerr, U.S. District Judge for the District of Wyoming (Jurors are questioned col- lectively rather than individually)	20-30	Same as #19, and <i>Proceedings of the Seminar on Practice and Procedure under the Federal Rules of Civil Procedure</i> , 28 F.R.D. 37, 185 (1960).
38. 1971—U.S. District Court for the Southern District of New York (8 trials)	64	Federal Judicial Center, Guidelines for Improving Juror Utilization in United States District Courts, October 1972.
39. 1973—Newark, New Jersey	72	Same as #18.
C. VOIR DIRE WITHOUT A JUDGE: <u>CIVIL TRIALS:</u>		
40. 1970 Los Angeles Study	135	Same as #2, at 935.
41. 1972 California Judicial Council Study	82 (in court) +23 (pre and post examination conferences) = 105 (total time)	Same as #6.

These surveys and estimates were made in different places, in different contexts, and many variables enter into the picture that are not carefully sorted out. Nonetheless, several generalizations can be made from this data:

1. *The time differences among these various procedures are not dramatic.* Although it is not insignificant that fifteen minutes or a half hour might be saved in each trial, the differences are not dramatic enough to lead to a restructuring of the conduct of voir dire if other factors that relate to the due process rights of litigants are involved. Chief Justice Burger's alarm about excessive delays is not justified if one examines the normal trial.

2. *Furthermore, the evidence does not indicate conclusively that any of the systems is necessarily less time consuming.* The California Judicial Council's surveys in the early 1970's produced the seemingly incongruous conclusion that judge-conducted voir dire in civil cases actually takes two minutes longer than attorney-conducted voir dire,

when the time for the pre- and post-examination conferences is included—as it should be if the real concern is time. The other surveys and estimates ignored this component. An even more dramatic disparity appears if the results of the New York City study, where judge-conducted voir dire in criminal cases took about three hours on the average, are compared to Professor Broeder's findings, where attorney-conducted voir dire in civil cases (under the careful scrutiny of a respected judge) took only a half hour.

3. *Variables other than how the questioning is conducted are probably more important.* We must conclude that other factors are at least as important as the issue of who conducts the questioning. A careful and respected judge can guide an attorney's questions in the normal case so that it proceeds expeditiously and without "abuses." A careless or indifferent judge might abuse the prospective jurors as much as a sloppy attorney, or worse still, conduct only perfunctory questioning. The important considerations are thus not who asks the questions, but what kinds of questions are asked and how the attorneys and the judge relate to each other. This leads to the final question of this inquiry.

What is the Scope of Voir Dire?

The major dispute regarding the scope of permissible questioning is whether it is proper to inquire into areas not related to the challenges for cause but which might form the basis for a peremptory challenge. The United States Supreme Court stated specifically in 1965 that questioning to form the basis for the exercise of a peremptory challenge is appropriate: "The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories"⁶¹ The opposite rule is in force in California, however, where the California Supreme Court restricts questioning to areas relevant to a challenge for cause: "It is now well settled in this state that a juror may not be examined on *voir dire* solely for the purpose of laying the foundation for the exercise of a peremptory challenge."⁶² The argument in favor of the California rule is that the grounds for challenges for cause are broad enough to permit sufficient questioning to allow for the

61. *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965). *But see Ham v. South Carolina*, 409 U.S. 524, 527-28 (1973).

62. *People v. Ferlin*, 203 Cal. 587, 598, 265 P. 230, 235 (1928), *quoted with approval in People v. Crowe*, 8 Cal. 3d 815, 830, 506 P.2d 193, 203, 106 Cal. Rptr. 369, 379 (1973) and *People v. Rigney*, 55 Cal. 2d 236, 244, 359 P.2d 23, 27, 10 Cal. Rptr. 625, 629 (1961).

intelligent exercise of peremptory challenges. This argument, however, reduces the significance of peremptory challenges and turns them into mere extensions of the challenges for cause. In California, the exercise of peremptories cannot be genuinely arbitrary because the litigants do not have the information they may need to express their own arbitrary choices. Indeed, if the California rule is to govern, why allow peremptory challenges at all?

In California, as in most states,⁶³ a prospective juror can be challenged for cause (1) if the juror is related to a party to the litigation,⁶⁴ (2) if the juror has a unique interest in the subject matter,⁶⁵ (3) if the juror has served in a related case or on the grand jury that indicted the accused,⁶⁶ or most importantly (4) if the juror has "a state of mind" that will prevent her or him from "acting with entire impartiality and without prejudice to the substantial rights of either . . . party" ⁶⁷ The difficult question is how to define that important "state of mind."

Chief Justice John Marshall, presiding at Aaron Burr's trial, ruled that the United States Constitution demands that a jury in a criminal trial must be free from "those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them" ⁶⁸ He said that "light impressions" may be presumed capable of yielding to evidence and are not therefore capable of rendering the jury partial.⁶⁹ Thus, he defined "impartial" as being free from the dominant influence of knowledge acquired outside the courtroom.

This is a noble definition, but it leaves many questions unresolved. How is the court to determine whether a juror has been dominantly influenced by outside events? Where is the dividing line between "deep" and "light" impressions? Chief Justice Morrison R. Waite wrote in 1879 that:

The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or

63. See, e.g., American Law Institute Code of Criminal Procedure, § 277, reprinted in A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *supra* note 54, at 68-69.

64. CAL. CODE CIV. PROC. § 602 (West Cum. Supp. 1975); CAL. PENAL CODE § 1074 (West 1970).

65. See, e.g., United States v. Poole, 450 F.2d 1082 (3d Cir. 1971) (it is reversible error to refuse to ask the prospective jurors, "Have you or any member of your family ever been the victim of a robbery or other crime?" in a bank robbery trial).

66. See note 64 *supra*.

67. CAL. PENAL CODE § 1073 (West 1970). See also CAL. PENAL CODE § 1074 (West 1970); CAL. CODE CIV. PROC. § 602 (West Cum. Supp. 1975).

68. United States v. Burr, 25 F. Cas. 49, 51 (No. 14,692g) (C.C.D. Va. 1807).

69. *Id.*

whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive; others, that it must be decided and substantial; others, fixed; and, still others, deliberate and settled. All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside.⁷⁰

In the case before the Supreme Court at the time, the district attorney had asked one of the prospective jurors, "Have you formed or expressed any opinion as to the guilt or innocence of this charge?" The juror responded, "I believe I have formed an opinion,"⁷¹ but the Court held that it was proper nonetheless to allow him to remain on the jury because such a belief is merely a "hypothetical opinion" and falls far short of establishing such partiality that nothing is left for the "conscience or discretion" of the juror.⁷²

Most modern problems in this area involve either (1) pretrial publicity, or (2) racial, ethnic, political, religious or lifestyle prejudice that interferes with impartial judgments. It is of course impossible to expect jurors to come into court with no preconceptions at all on the issues to be tried, and if we were to insist on such a rule, all alert citizens would be excluded from jury duty. John Marshall said at the Burr trial:

It would seem to the court that to say that any man who had formed an opinion on any fact conducive to the final decision of the case would therefore be considered as disqualified from serving on the jury, would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony, and would perhaps be applying the letter of the rule requiring an impartial jury with a strictness which is not necessary for the preservation of the rule itself.⁷³

And in a modern context, Judge John Sirica asked the panel assembled to consider the first Watergate indictments in January 1973 whether they had heard of the case, fully expecting the entire panel to respond affirmatively. When a handful indicated they had not heard of the

70. *Reynolds v. United States*, 98 U.S. 145, 155 (1879) (citations omitted).

71. *Id.* at 147.

72. *Id.* at 156.

73. *United States v. Burr*, 25 F. Cas. 49, 51 (No. 14,692g) (C.C.D. Va. 1807). The United States Supreme Court reaffirmed the approach taken by Chief Justice John Marshall and District Judge John Sirica in the recent case of *Murphy v. Florida*, 421 U.S. 794 (1975). Justice Thurgood Marshall's opinion for the majority stated that "[q]ualified jurors need not . . . be totally ignorant of the facts and issues involved" and that the governing standard was whether the prospective juror exhibited "a partiality that could not be laid aside." *Id.* at 799-800.

scandal, he expressed astonishment and indicated that those persons ought perhaps to be the least qualified to sit on the jury.⁷⁴

Some balance is needed to separate those few whose inflamed passions make it impossible to sit impartially from the rest who can conscientiously concentrate on the evidence presented at trial.⁷⁵ When the problem is that of pretrial publicity in, for instance, a sensational murder trial, careful questioning of the prospective jurors can usually separate those who have developed a knee-jerk response to the case from those who have maintained an open perspective on the facts.

When the problem is that of racial, ethnic or life-style prejudice, the feelings may be so deeply ingrained in the prospective juror that much more probing questioning is required. Black Panther attorney Charles Garry has perhaps elevated the science of probing for racial prejudice to its highest level. His techniques have been reproduced in a book entitled *Minimizing Racism in Jury Trials*,⁷⁶ which reprints many of the questions he asked of jurors before the first Huey Newton trial in 1968.

A question such as the following may make a juror pause and thus open up a discussion of racism:

If you were staying at the house of two friends—one white and one black—and if you forgot your toothbrush, whose would you borrow?

Or if the accused is a Chicano, the jurors might be asked:

How would you feel if your child married a Chicano?

Do you feel nervous when driving through the barrio?

The juror must be encouraged to talk about some personal experience if any true discussion of racist feeling is to occur.

Traditionally, this line of reasoning has been extended to other types of potential prejudices that may exist against a litigant or defendant. The United States Court of Appeals for the Seventh Circuit ruled in 1943 that an accused Jehovah's Witness could ask prospective jurors whether they might be prejudiced against Jehovah's Witnesses even though religion was not an issue at trial.⁷⁷ The United States Supreme Court ruled during the early Cold War days that in a case involving contempt of the House Un-American Activities Committee prospective

74. *Murphy v. Florida*, 95 S. Ct. 2031, 2036 (1975).

75. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968).

76. Edited by Ann Fagan Ginger, and published by the National Lawyers Guild (Box 673, Berkeley, Calif.) in 1969.

77. *United States v. Daily*, 139 F.2d 7, 9 (7th Cir. 1943).

jurors who were government employees had to be asked about the possible influence of a "Loyalty Order" on their ability to remain impartial.⁷⁸ The "Loyalty Order" had said that special vigilance was to be exercised to ensure that disloyal persons were not allowed into the federal government,⁷⁹ and government employees might therefore be reluctant to acquit an accused Communist for fear that they might then be suspect as disloyal themselves. The possible prejudice against left-of-center defendants was, therefore, a necessary inquiry to ensure the possibility of a fair trial.

Later, the United States Court of Appeals for the Seventh Circuit ruled that a defendant accused of evading wagering taxes could ask prospective jurors whether they held religious scruples against gambling.⁸⁰ In 1972, on reviewing the 1969-1970 Chicago Conspiracy Trial, the same court held that this right to inquire extended to any other significant possible prejudice, such as prejudice against antiwar activists and against the youth culture.⁸¹ The rationale for these decisions was simply that: "We do not believe that the court could safely assume, without inquiry, that the veniremen had no serious prejudice on this subject, or could recognize such prejudices and lay them aside."⁸²

Two months after the Seventh Circuit's strong opinion on the desirability of inquiring into all possible prejudices that may interfere with a fair trial, the United States Supreme Court reversed this position and ruled that appellate review over the questioning of jurors would be limited.⁸³ Gene Ham, a young, bearded black who had been active in civil rights activity in South Carolina, was convicted of possessing marijuana and sentenced to eighteen months imprisonment. Prior to the trial, the judge had asked the prospective jurors whether they were conscious of any bias or prejudice for or against him, and whether they could be fair and impartial. The judge refused, however, to ask whether the jurors were prejudiced against Negroes, whether they would be influenced by the term "black," whether they could disregard the defendant's beard, and whether they had been influenced by local publicity involving the drug problem.

78. *Morford v. United States*, 339 U.S. 258 (1947).

79. Exec. Order No. 9835, 3 C.F.R. 627 (1950).

80. *United States v. Clancy*, 276 F.2d 617, 632 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961).

81. *United States v. Dellinger*, 472 F.2d 340, 366-70 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

82. *Id.* at 368.

83. *Ham v. South Carolina*, 409 U.S. 524 (1973).

In an opinion written by Justice William Rehnquist, the United States Supreme Court ruled that the trial judge had erred by not posing the racial prejudice question but that the Constitution does not require that questions about beards be asked. Justice Rehnquist said that he was unable to "constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices," and therefore would not require that any questions about beards be asked.⁸⁴ Although Justices Douglas and Marshall argued in their partial dissents that the Sixth Amendment's requirement of an "impartial jury"⁸⁵ mandates that such questions be asked,⁸⁶ the majority opinion makes no mention of that amendment. The following year, in another opinion written by Justice Rehnquist, the Court stated that *Ham* required questioning about racial prejudice only "in *certain* situations".⁸⁷ The effect of this opinion is to vest almost unreviewable discretion in the trial judge over what other questions are appropriate.

These decisions are but another assertion of judicial supremacy—and another curtailment of the opportunity for a fair trial in politically volatile contexts. They seem also to reverse the language in *Swain v. Alabama*,⁸⁸ that had elevated to constitutional dimensions the requirement of a free-wheeling voir dire to lay the framework for peremptory challenges. And they may eliminate the need for any voir dire at all except for questions about racial prejudice in "certain" situations.

Conclusion

The United States Supreme Court, the California Supreme Court and other judges throughout the land have been trying to limit the questioning of jurors whenever possible, so that trial judges increasingly have total control of the process. This tightening of the voir dire has come about because of a concern for the time required by extensive questioning and an institutional desire to speed trials whenever possible. Little concern has been given to the human costs involved in abandoning the voir dire, the costs of sending innocent persons to jail because their jurors are not free from prejudice against them.

84. *Id.* at 528.

85. U.S. CONST. amend. VI.

86. *Ham v. South Carolina*, 409 U.S. 524, 529-30 (1973) (Douglas, J., concurring in part and dissenting in part); *id.* at 531-34 (Marshall, J., concurring in part and dissenting in part).

87. *Hamling v. United States*, 418 U.S. 87, 140 (1974) (emphasis added). See also *Ristiano v. Ross*, 44 U.S. L.W. 4305 (U.S. Mar. 3, 1976).

88. 380 U.S. 202 (1965).

If the lists from which jurors are picked were truly representative of the entire population, then little danger would result from the abandonment of the voir dire and peremptory challenges. In fact, the juries would become more diverse and more representative of the community.⁸⁹ It is difficult to sort out the many prejudices we all hold and it may be better to accept a jury with representative prejudices instead of trying to impanel one with no prejudices.

But, with biased lists in use, the voir dire is an important tool to enable attorneys to discover prejudice and to form the basis for challenges for cause and peremptory challenges. With the present lists in use, the abandonment of the voir dire and the placing of jury selection in the hands of the trial judge means that the jury will be less a voice of the people and more an extension of the government.

Table II

Voir Dire—State by State

KEY:	<i>Judge</i> —indicates that the judge has unfettered control of the questioning of jurors. Attorneys may submit questions to the judge, which the judge may or may not ask the jurors, and the judge can in his or her discretion allow the attorneys to ask questions directly of the jurors after the judge has concluded questioning. <i>Attorney</i> —indicates that the attorneys have primary control of the questioning of the jurors, subject to judicial control only for abuse. <i>Judge plus attorney</i> —indicates that the judge will generally begin the questioning with standard questions on bias, but that the attorneys will then have a right to question the jurors directly at the conclusion of the judge's questions. Local practices differ and many judges have their own individual approaches to this problem.
Alabama	Attorney (ALA. CODE tit. 30, § 52 (1959)).
Alaska	Judge (ALASKA R. CIV. P. 47(a); ALASKA R. CRIM. P. 24(a)).
Arizona	Civil: judge (ARIZ. R. CIV. P. 47(b)); Criminal: judge plus attorney (ARIZ. R. CRIM. P. 18.5).
Arkansas	Judge (ARK. STAT. ANN. § 39-226 (1962)).
California	Attorney (CAL. PENAL CODE § 1078 (West Cum. Supp. 1975)).
Colorado	Judge plus attorney (COLO. R. CIV. P. 47(a); COLO. R. CRIM. P. 24(a)).

89. Statistics illustrating this phenomenon appear in another chapter of my forthcoming book.

Connecticut	Attorney (CONN. GEN. STAT. ANN. § 51-240 (Supp. 1975)).
Delaware	Judge (DEL. SUPER. CT. (CIV.) R. 47(a); DEL. SUPER. CT. (CRIM.) R. 24(a)).
District of Columbia	Judge (D.C.R. CIV. P. 47(a); D.C.R. CRIM. P. 24. (a)).
Florida	Civil: attorney (FLA. R. CIV. P. 1.431(b)); Criminal: judge plus attorney (FLA. R. CRIM. P. 3.300(b)).
Georgia	Civil: attorney; Criminal: judge plus attorney (GA. CODE ANN. § 59-705 (1965)).
Hawaii	Attorney (HAWAII REV. STAT. § 635-27 (1968)).
Idaho	Attorney (<i>See State v. Hoagland</i> , 39 Idaho 405, 417-18, 228 P. 314, 318-19 (1925); <i>Hurt v. Monumental Mercury Mining Co.</i> , 35 Idaho 295, 299, 206 P. 184, 185 (1922)).
Illinois	Judge plus attorney (ILL. REV. STAT. ch. 110A, § 234 (1968)).
Indiana	Judge plus attorney (IND. R. TRIAL P. 47(A)).
Iowa	Attorney (IOWA R. CIV. P. 187(b); IOWA CODE § 779.6 (1950)).
Kansas	Attorney (KAN. STAT. ANN. § 60-247(a) (1964)).
Kentucky	Civil: judge (KY. R. CIV. P. 47.01); Criminal: judge plus attorney (KY. R. CRIM. P. 9.38).
Louisiana	Attorney (LA. CODE CIV. PRO. art. 1763 (1961); LA. CODE CRIM. PRO. art. 786 (1967)).
Maine	Civil: judge (ME. R. CIV. P. 47(a)); Criminal: judge plus attorney (ME. R. CRIM. P. 24(a)).
Maryland	Judge (MD. R. P. 543(d), 745).
Massachusetts	Judge (MASS. GEN. LAWS ch. 234, § 28 (Cum. Supp. 1975). <i>See also</i> MASS. R. CIV. P. 47(a)).
Michigan	Judge (MICH. COURT R. 511.3).
Minnesota	Judge plus attorney (MINN. R. CIV. P. 47.01; MINN. R. CRIM. P. 26.02, subd. 4(1)).
Mississippi	Attorney (MISS. CODE ANN. § 13-5-69 (1972)).
Missouri	Judge (MO. ANN. STAT. § 546.160 (1953); <i>State v. Crockett</i> , 419 S.W.2d 22, 26 (1967); <i>Smith v. Nickels</i> , 390 S.W.2d 578, 582 (1965)).
Montana	Attorney (MONT. REV. CODES ANN. § 95-1909(c) (1969); MONT. R. CIV. P. 47(a)).
Nebraska	Attorney (<i>Oden v. State</i> , 166 Neb. 729, 90 N.W.2d 356 (1958)).
Nevada	Judge (NEV. R. CIV. P. 47(a); NEV. REV. STAT. § 175.031 (1973)).
New Hampshire	Judge (N.H. REV. STAT. ANN. § 500-A:22 (Supp. 1973)).
New Jersey	Judge (N.J. COURT R. 1:8-3(a); <i>State v. Manley</i> , 54 N.J. 259, 271-83, 255 A.2d 193, 200-06 (1969)).

New Mexico	Judge plus attorney (N.M. STAT. ANN. § 41-23-39(a) (Supp. 1975)).
New York	Attorney (N.Y. CIV. PRAC. LAW §§ 4105, 4107 (McKinney Supp. 1975); N.Y. CRIM. PRO. LAW § 270.15 (McKinney 1971)).
North Carolina	Judge plus attorney (N.C. GEN. STAT. § 9-15(a) (Cum. Supp. 1974)).
North Dakota	Attorney (N.D.R. CIV. P. 47(a); N.D.R. CRIM. P. 24(a)).
Ohio	Judge plus attorney (OHIO R. CIV. P. 47(A); OHIO R. CRIM. P. 24(A)).
Oklahoma	Judge plus attorney (OKLA. DIST. CT. R. 6).
Oregon	Civil: attorney (ORE. REV. STAT. § 17.160 (1973)); Criminal: judge plus attorney (ORE. REV. STAT. § 136.210 (1973)).
Pennsylvania	Judge plus attorney (PA. R. CRIM. P. 1106(f), 1107 subd. B.2).
Rhode Island	Judge plus attorney (R.I. GEN. LAWS ANN. § 9-10-14 (Supp. 1974)).
South Carolina	Judge (S.C. CODE ANN. § 38-202 (1962)).
South Dakota	Attorney (S.D. CODE § 15-6-47(a) (1967)).
Tennessee	Judge (TENN. R. CIV. P. 47.01).
Texas	Attorney (TEX. CODE CRIM. PRO. art. 35.17 (Cum. Supp. 1975)).
Utah	Judge (UTAH R. CIV. P. 47(a)).
Vermont	Attorney (VT. R. CIV. P. 47(a); VT. R. CRIM. P. 24(a)).
Virginia	Judge plus attorney (VA. CODE ANN. § 8-208.28 (Cum. Supp. 1975)).
Washington	Civil: judge plus attorney (WASH. SUPER. CT. (CIV.) R. 47(a); Criminal: attorney (WASH. SUPER. CT. (CRIM.) R. 6.4(b)).
West Virginia	Attorney (W. VA. CODE ANN. § 56-6-12 (1966)).
Wisconsin	Attorney (WIS. R. CIV. P. 805.08(1)); WIS. STAT. ANN. § 972.01 (1971)).
Wyoming	Attorney (WYO. R. CIV. P. 47(a); WYO. R. CRIM. P. 25(a)).
Federal	Judge (FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a)).