Who Is an Impartial Juror in an Age of Mass Media?

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ARTICLES

WHO IS AN IMPARTIAL JUROR IN AN AGE OF MASS MEDIA?

NEWTON N. MINOW*
FRED H. CATE**

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"We have a criminal jury system which is superior to any other in the world; and its efficiency is only marred by the difficulty of finding twelve every day men who don't know anything and can't read."\(^1\)

**Introduction**

The sixth amendment to the United States Constitution requires that criminal defendants be tried by an impartial jury from the state and district in which the crime was committed.\(^2\) Defining and impaneling "impartial" juries have proven to be daunting tasks with which the United States' judicial system has struggled since before the founding of the nation.

The quest for an "impartial" jury is made all the more difficult in trials involving issues, events, or people of public interest. In these situations, the press—vigorously exercising its first amendment rights—may saturate the public with news and opinions about every facet of the case. Potential jurors may arrive at the courthouse on the first day of the trial with extensive knowledge about the victim, the crime, and the defendant, including inaccurate or influential information which may, for evidentiary or strategic purposes, never be introduced in court. Judges are, for at least two reasons, virtually powerless to stem this flow of information. First, the United States Supreme Court has repeatedly held that judges may not prohibit the press from publishing truthful, lawfully obtained information relating to the trial.\(^3\) Judges may seek to limit the release of information to the press, particularly by prosecutors, police, and court officers,\(^4\) but the first amendment provides an extraordinarily high obstacle to restrictions on the press itself.\(^5\)

The second impediment to judicial control over publication of information about a case is even more powerful than the protection

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2. U.S. Const. amend. VI. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." Id.
3. See, e.g., Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (refusing to restrain publication of juvenile offender's name, pursuant to state statute, where press had obtained name at scene of offense and state had not demonstrated highest order interest); Oklahoma Publishing Co., v. District Court, 430 U.S. 308, 310 (1977) (disallowing pre-trial restraining order for publication of name and picture of minor, where same had already appeared and was public); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (refusing to allow court to prohibit publication of information obtained at public hearing).
4. See Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (allowing restraint where press had decided guilt prior to trial by slanting coverage and printing gossip, prosecutor and judge were up for re-election, and trial turned into "bedlam at the courthouse" to which jurors were constantly exposed).
5. The first amendment states, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.
the first amendment affords the press. It is often impossible for a judge to control the publication of prejudicial information because, increasingly, the most dramatic revelations occur at the time of the crime itself, long before there is a trial, much less a judge selected to oversee the trial. Photographs of the victim or of the defendant being led away in handcuffs by police, details about the crime, and the outraged community’s response are highly inflammatory, even though they first appear well in advance of any trial.

As a result, in cases where control of the media is impossible or simply not constitutionally permitted, the judicial system must focus its attention on identifying, remedying, and avoiding, rather than preventing, partiality among potential jurors. Courts employ a variety of techniques in their attempt to minimize the partiality problem.6 The technique most heavily relied upon is the voir dire process, by which lawyers and judges question potential jurors to determine bias.

Even though judges regularly rely on these techniques to help fulfill their constitutional duty to impanel impartial juries, many social scientists question their effectiveness.7 In addition, critics charge that the use of these methods impinges on important rights, such as the sixth amendment right to be tried before a jury chosen from “the State and district wherein the crime shall have been committed.”8 Moreover, as frequently employed, these measures, especially voir dire, may focus the court’s attention on the mere fact of exposure to press reports, rather than on the existence and degree of any bias or prejudice that may have been engendered by such exposure. As a result, some courts mistake “unaware” for “impartial,” and so search unnecessarily for jurors who know nothing about the case to be heard. This process, particularly in notorious cases, is often time consuming and expensive. If the defendant is unusually well-known, it may be impossible to impanel a jury wholly ignorant of his or her activities. Such a quest may exclude qualified citizens from the jury, resulting in panels composed of citizens who are less knowledgeable about their surrounding community. At a minimum, the search for “unaware” jurors diverts the court’s attention from its

6. These techniques include: change of venue, continuance, and jury instructions. See infra notes 92-151 and accompanying text (discussing and critiquing these bias-minimizing techniques).

7. See infra notes 92-151 and accompanying text (criticizing techniques used to remedy juror bias).

8. U.S. CONST. amend. VI; see supra notes 95-100 and accompanying text (critiquing change of venue); notes 102-04 and accompanying text (discussing effect of continuance).
constitutional obligation to seat an "impartial" jury.\textsuperscript{9}

Mark Twain noted this tendency to seat "unaware" jurors in place of "impartial" jurors when he described the system by which jurors are selected as putting "a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury."\textsuperscript{10} Twain wrote that when juries were first used, in Twain's view by Alfred the Great, news could not travel fast, and hence [Alfred] could easily find a jury of honest, intelligent men who had not heard of the case they were called to try—but in our day of telegraph and newspapers his plan compels us to swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.\textsuperscript{11}

Twain’s concern was that judges were responding to the expansion of the media—in 1871, telegraph and newspapers—and news reports about people and events which later were the subject of a trial, by banning informed citizens from juries. Twain wrote about the jury selection in one trial:

I remember one of those sorrowful farces, in Virginia, which we call a jury trial. A noted desperado killed Mr. B., a good citizen, in the most wanton and cold-blooded way. Of course the papers were full of it, and all men capable of reading read about it. And of course all men not deaf and dumb and idiotic talked about it.

A minister, intelligent, esteemed, and greatly respected; a merchant of high character and known probity; a mining superintendent of intelligence and unblemished reputation; a quartz-mill owner of excellent standing, were all questioned in the same way, and all set aside. Each said public talk and the newspaper reports had not so biased his mind but that sworn testimony would over-throw his previously formed opinion and enable him to render a verdict without prejudice and in accordance with the facts. But of course such men could not be trusted with the case. Ignoramuses alone could mete out unsullied justice.\textsuperscript{12}

More than a century later, The Daily Telegraph wrote about jury selection in United States courts for another trial, that of Lieutenant Colonel Oliver North: “[I]gnorance is the path to enlightenment . . . . The slightest taint of interest in the world beyond home and

\textsuperscript{9} See infra text accompanying notes 162-85 (arguing that focus of impartiality determination should not be how ignorant of case each juror is, but how well jury as whole is representative of community).

\textsuperscript{10} M. TWAIN, ROUGHING IT 307 (Iowa Center for Textual Studies ed. 1972) (reprinting Twain’s 1871 work).

\textsuperscript{11} Id.

\textsuperscript{12} Id. at 307-08.
work is enough to win dismissal.”13

The issues raised by Mark Twain and The Daily Telegraph demand more attention than ever today. Satellites, mobile equipment, broadcast and cable television, and other new technologies, combined with an insatiable public curiosity, have led to an explosion in news coverage and dramatic reenactments of criminal activities. In 1980, only twenty-one percent of American homes had cable television; less than one percent had VCRs.14 Today, more than fifty-seven percent of television owners have cable television and seventy percent have VCRs.15 The average hours of television use by household has risen to approximately seven per day and average radio use is almost three hours per day.16 In addition, more than sixty-four percent of American households read newspapers.17

Moreover, beginning with press coverage of civil rights demonstrations in the early 1960s and then Vietnam War protests later in the decade, the role of the press in politics and government has expanded dramatically. New styles of investigative journalism and more protective libel laws have led us to accept as commonplace the role of the press in driving a president from office and more than one presidential candidate from the campaign trail.18 This proliferation of the mass media in American life makes it impossible for any responsible citizen to be unaware of alleged major crimes in the local community. Even on the national level, Lieutenant Colonel Oli-

15. See VCR Use Rises; Pay Cable Falls, The Christian Science Monitor, Oct. 2, 1990, at 8, col. (commenting that 70% of households in U.S. with televisions have VCRs); see also NIELSON REPORT ON TELEVISION 1990 11 (stating that over two-thirds of TV households own VCRs).

In addition to inundating the public with news about events which may later be the subject of a trial, television programs may influence the public concerning the trial process. See Skipp, Jurors' TV Viewing Is Growing Issue, N.Y. Times, Dec. 29, 1989, at B9, col. 1 (explaining that "L.A. Law" may shape jurors' attitudes in real trials).
ver North, District of Columbia Mayor Marion Barry, Exxon Valdez tanker captain Joseph Hazelwood, billionaire Leona Helmsley, or Panamanian leader Manuel Noriega are household names.

Justice Frankfurter wrote in a 1961 concurrence that “[n]ot a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts.” But the frequency of such claims—driven by technological expansion, greater institutional prerogative on the part of the media, and heightened public expectations—has led to an explosion in claims by criminal defendants and their counsel of juries biased by press reports. The public is being inundated with courthouse steps claims by defense lawyers that “my client can’t get a fair trial because of pre-trial publicity.” In the decade just ended, the national newspapers and wire services alone carried over 3,100 such claims.

19. Lieutenant Colonel Oliver North was accused of several crimes arising out of arms-for-hostages dealings with Iran, but was ultimately convicted on charges of “lying to Congress, shredding White House documents and accepting a $14,000 security fence from an Iran-contra arms dealer.” White House Crime: Punish or Expose?, N.Y. Times, Aug. 1, 1990, at A20, col. 1.

Mayor Marion Barry of the District of Columbia, although acquitted on one count, was convicted on one misdemeanor count for possession of cocaine after the jury was unable to reach a verdict on the remaining 12 counts. See Ayres, Jr., Barry Will Not Be Retried on 12 Unresolved Charges, N.Y. Times, Sept. 18, 1990, at A18, col. 1.

Joseph Hazelwood, captain of the Exxon Valdez, was sentenced on one misdemeanor count of negligence for the events leading to the huge Alaskan oil spill, but was acquitted of the criminal charges. See Rempel, Hazelwood Tells of Images That Still Haunt Him, Los Angeles Times, Mar. 25, 1990, at A1, col. 4.

Leona Helmsley was sentenced for federal income tax fraud for billing personal expenses to her own hotel and real estate business, thus evading $1.2 million in taxes. Sullivan, Helmsley Rejects Plea Agreement in State Tax Case, N.Y. Times, Dec. 22, 1989, at B3, col. 1.

General Manuel Noriega will face trial for indictments in both Miami and Tampa stemming from drug-trafficking allegations. See Lewis, Noriega’s Surrender: The Prosecution; U.S. to Start Noriega Case with Miami Indictment, N.Y. Times, Jan. 4, 1990, at A12, col. 1. On the Noriega proceedings, one author remarked that General Noriega would be “assured a fair trial only if the courts can summon 12 unbiased jurors with the mental alertness of moist towelettes.” Richmond, Loan over Miami: The On-Target Humor of Dave Barry, N.Y. Times, Sept. 23, 1990, § 6, at 44, col. 1 (quoting columnist Dave Barry).

20. Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring). Irvin v. Dowd involved a barrage of pre-trial publicity concerning a multiple killing in a small town. Id. at 720. The Court found that the community had already decided the guilt of the accused because of the pre-trial publicity. Id. at 725.

21. See, e.g., Judge Rejects Lawyer’s Plea In Jogger Trial, N.Y. Times, Oct. 27, 1990, at A27, col. 6 (discussing attorney’s request for new jury based on publicity surrounding previous representation of Tawana Brawley, newsworthy figure in race controversy); Petti Opts for Judge, Not Jury, to Hear Money-Laundering Case, Los Angeles Times, Oct. 6, 1990, at B3, col. 1 (describing defense attorney’s strategy which focused on widespread publication of defendant’s photograph); Salcido Weeps as Trial Begins: Disturbing Testimony On Slain Little Girls, San Francisco Chronicle, Sept. 18, 1990, at A7, col. 1 (commenting that trial was moved because defense complained of pre-trial publicity).

22. This figure is based on searches in the NEXIS newspaper and wire service databases using the following search terms: (No or Not or Impossible or Unlikely or Prejudicial or Biast)
This Article examines the dilemma created when potential jurors are exposed to media coverage of the events or people that later become involved in high visibility criminal trials. Part I examines the early common law background of criminal juries and describes the standards that the United States Supreme Court has developed for insuring the selection of impartial juries. Part II analyzes, in light of current social science research, the techniques available to state and federal trial courts for ferreting out unacceptably biased members of the venire. Part III focuses on the roles juries and jurors fill in the judicial system and in society generally, and considers the meaning of an "impartial" jury in light of its historical context and the reality of the current judicial system and mass communications market.

The Article concludes that courts must neither ignore the impact of media coverage prior to the trial on the selection of an impartial jury, nor become hopelessly enmeshed in examining the amount and type of media coverage. The language of the sixth amendment, the dictates of the Supreme Court, and the realities of modern society require that courts impanel juries that are impartial, but are not without knowledge and opinions.

I. THE EVOLUTION OF THE CRIMINAL JURY AND EARLY EFFORTS TO CONTROL THE IMPACT OF THE PRESS ON JURY SELECTION

A. The Early History of the Criminal Jury

In its earliest common law origins, the jury was composed of people specifically chosen for their knowledge of the parties and facts involved in the case. This was the case with the Assize of Clarendon of 1166 which called for "the twelve most lawful men of the hundred" and "the four most lawful men of every vill" to give testi-

23. See infra notes 162-85 (arguing that impartial juror in today's society cannot be required to come into court as "blank slate"). The Supreme Court summarized this idea by stating that it "is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 722-24 (1961) (citing Holt v. United States, 218 U.S. 245 (1910)).

24. V. HANS & N. VIDMAR, JUDGING THE JURY 23-24 (1986) (stating that early jurors were required to know either parties involved or facts of dispute in order to serve).
mony about accused felons in the region.\textsuperscript{25} Records exist for a trial as early as 900 A.D., in which the court summoned thirty-six people—eighteen friends of each of the two parties—to settle a property dispute.\textsuperscript{26}

These people became known as compurgators because they frequently took oaths as to the honesty and character of the parties.\textsuperscript{27} As a result, a requirement developed that the compurgators be peers or equals of the parties.\textsuperscript{28} In the Magna Carta, King John pledged "[n]o free man shall be taken or [dispossessed] or outlawed or exiled or in any way destroyed . . . except by lawful judgment of his peers and the law of the land."\textsuperscript{29}

Early jury selection, like present-day voir dire, focused on the degree to which potential jurors were knowledgeable about the facts of the case. Unlike the situation today, however, knowledge of the facts was a requirement for jury service, not an obstacle.\textsuperscript{30}

With the growth of modern society and urban populations, the judicial system evolved so that it no longer required actual knowledge by jurors. The concept of jurors as knowledgeable, active participants in the judicial decision-making process, however, continued. Therefore, a juror lacking actual knowledge was required to, at least, "speak from belief and conscience."\textsuperscript{31}

When the American colonists adopted jury systems, they retained this commitment to informed jurors. The colonists prized the right to trial by jury as a bulwark against government oppression.\textsuperscript{32} They

\textsuperscript{25} T. Plucknett, A Concise History of the Common Law 112-13 (5th ed. 1956) (describing convocation of type of inquisition that was forerunner of modern day grand jury).

\textsuperscript{26} This is the famous case of Alfinnoth, who claimed land in possession of a monastery. W. Forsyth, History of Trial by Jury 59-60 (2d ed. 1971). The monks, who also claimed ownership, and Alfinnoth appeared before a 36 person panel to resolve the dispute. \textit{Id}. The panel concluded that Alfinnoth's claim was false and ordered him to forfeit his property to the King because of his false claim. \textit{Id}.

\textsuperscript{27} See V. Hans & N. Vidmar, \textit{supra} note 24, at 23-24 (describing function of compurgators and comparing their role to that of character witness today).

\textsuperscript{28} 17 John (Magna Carta) (1215), \textit{quoted in J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Jury Panels} 3 (1977).

\textsuperscript{29} \textit{Id}.

\textsuperscript{30} L. Moore, The Jury 39 (1973). Professor Moore described the jury selection process at the Grand Assize as follows:

Both parties had a right to be present at the election [of the jurors] and challenge for good cause members of the proposed jury . . . . If it developed that the jurors testified under oath that they were unacquainted with the facts, other jurors were summoned until there were 12 who had knowledge and who agreed. Knowledge did not mean first-hand knowledge, but declarations of a juror's father or other equally reliable sources were sufficient.

\textit{Id}

\textsuperscript{31} Bracton, fol. 186, \textit{quoted in T. Plunknett, supra} note 25, at 129 (1956) (recommending that jurors ignorant of facts be placed with others who know truth).

\textsuperscript{32} \textit{See The Federalist No. 83}, at 499 (A. Hamilton) (New Am. Library ed. 1961) (not-
believed that local, lay juries would prevent arbitrary exercise of government authority, that juries were "a valuable safeguard to liberty" and "the palladium of free government." This faith in the virtues of trial by jury culminated in 1789 with the adoption of the sixth amendment to the Constitution.

Beginning in the early days of the republic, however, American courts began to struggle with the issue of whether exposure to media coverage biases potential jurors. Perhaps the earliest and most often quoted case to deal squarely with the issue was the 1807 treason trial of Aaron Burr, over which Chief Justice John Marshall presided. Media coverage of the feud between Burr and President Jefferson had heightened interest in the sensational trial. Burr's attorneys argued that finding citizens for the jury who were unfamiliar with the parties and the incident—a virtually impossible task—was essential to protect the rights of their client. The Chief Justice ruled on a motion which sought to disqualify citizens from the jury who, though they had no opinion as to the guilt or innocence of Burr, nonetheless were aware of the facts of the case.

Chief Justice Marshall explained that an impartial jury, as required by the Constitution and the common law, had to be composed of those who would fairly hear the testimony offered, and would base their verdict on that testimony and the applicable law. According to Chief Justice Marshall, any person with "strong prejudices" had to be excluded from jury service because such a person would favor testimony that confirmed his opinion. Yet, the Chief Justice noted, requiring that jurors have no opinions "would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony." The court, therefore, held that: "light impressions which

33. Id.
34. See Commentators on the Constitution: Public and Private 462 (State Historical Society of Wisconsin 1981) (citing Centinal II, Philadelphia Freeman's Journal, Oct. 24, 1787) (criticizing failure to include provision that jury panels will be drawn "from the vicinage"); id. at 243 (citing Strictures on the Proposed Constitution, Philadelphia Freeman's Journal, Sept. 26, 1787) (decrying convention's failure to enact specific provision mandating that jury verdicts be reached by majority vote). These concerns were rectified by passage of the sixth amendment. Id. at 242.
36. See United States v. Burr, 25 F. Cas. 49, 49 (C.C.D. Va. 1807) (No. 14, 692g) (editors' comments on same); id. at 50-51 (commenting on desirability yet impossibility of locating unaware citizens).
37. Id. at 50.
38. Id. (noting difference between juror who has personal prejudices and juror who is prejudiced because of previously formed opinion).
39. Id. at 51.
may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror."

Chief Justice Marshall's oft-quoted words did not, of course, end the difficulties encountered by courts seeking to impanel juries in notorious cases. An 1846 legal commentary expressed the author's concern that mistaking ignorant jurors for impartial ones would exclude informed citizens from juries:

"Ours is the greatest newspaper reading population in the world; not a man among us fit to serve as a juror, who does not read the newspapers... In the case of a particularly audacious crime that has been widely discussed it is utterly impossible that any man of common intelligence, and not wholly secluded from society, should be found, who had not formed an opinion."

This sentiment was voiced again in 1874 when the Pennsylvania Supreme Court lamented that newspaper publicity may result in important cases being decided by jurors whose "dark minds have never been smitten by the rays of intelligence."

B. Response of the United States Supreme Court

In 1878, the United States Supreme Court addressed the question of whether a person who was aware of the facts of a case could serve as a juror. In *Reynolds v. United States*, the Court rejected a motion to overturn a conviction for bigamy based in part on the trial judge having impaneled a juror who "'believed' he had formed an opinion which he had never expressed, and which he did not think would influence his verdict on hearing the testimony."

The Court began by acknowledging that to be impartial, as required by the sixth amendment, a juror must "be indifferent as he stands unsworn." It then discussed the unsettled state of the law in the lower and English courts. The Court stated that while the lower courts were not in agreement as to the "knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will," they did agree that the opinion must be more than "a mere impression." The Court determined, citing Chief Justice Marshall

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40. *Id.*
43. 98 U.S. 145 (1878).
45. *Id.* at 154 (quoting COKE ON LITTLETON 155b).
46. *Id.* at 155 (citations omitted).
in *Burr*, that every opinion which a potential juror may hold need not render that person unfit for jury service.\textsuperscript{47} It is up to the trial judge, Chief Justice Waite wrote, to determine, in each juror's case, the line between opinion and partiality.\textsuperscript{48} Because the question involves the determination of facts based on the evidence presented to the trial court, the Supreme Court held that the finding of the trial judge should be overturned by a reviewing court only for manifest error.\textsuperscript{49}

The Supreme Court went on to point out, in a surprisingly modern vein, that when considering questions about opinions held by potential jurors, reviewing courts "ought not to be unmindful of the fact . . . that jurors not infrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists."\textsuperscript{50} In such cases, the jurors' manner while testifying often tells more about their opinion than do their words.\textsuperscript{51} Unless the challenger raises the presumption of partiality by demonstrating that a juror actually holds a firm opinion, the juror will not necessarily be excused; nor is refusal to excuse such a juror reversible error.\textsuperscript{52}

Almost a century after *Reynolds*, the Supreme Court, in *Irvin v. Dowd*,\textsuperscript{53} overturned a murder conviction for lack of an impartial jury and, in the process, set forth the structural framework through which juror prejudice might be demonstrated. The Court held that some knowledge of the facts and issues alone will not necessarily disqualify a person from jury service.\textsuperscript{54} It stated that:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to sit as jurors will not have formed some impression or opinion as to the merits of the case.

\textsuperscript{47} Id. at 155-56. Chief Justice Waite stated:

> In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.

\textsuperscript{48} Id. at 156.

\textsuperscript{49} Id.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 156-57.

\textsuperscript{52} Id. at 157.

\textsuperscript{53} 366 U.S. 717 (1961).

This is particularly true in criminal cases.\textsuperscript{55} The Court acknowledged that important cases are highly publicized and often arouse the interest of the community.\textsuperscript{56} Therefore, many of those best qualified to sit as jurors will have formed some impression or opinion of the case.\textsuperscript{57} The Court found that an opinion, unless it is so strong that it cannot be overcome by testimony and evidence, is insufficient to disqualify a potential juror.\textsuperscript{58} Thus, so long as "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court," the juror will not be disqualified.\textsuperscript{59}

In the case before the Court, however, the trial transcript showed that eight out of the twelve jurors stated during voir dire that they thought the defendant was guilty.\textsuperscript{60} The Court found that "[w]ith such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations."\textsuperscript{61} In short, the Court found actual evidence of constitutionally impermissible bias among members of the jury.\textsuperscript{62} The Court, however, also explained that even where the individual jurors have offered assurance of impartiality, in some instances bias can be presumed if a tremendous amount of public passion surrounds a case.\textsuperscript{63}

Irvin has been interpreted by the Supreme Court and lower courts as articulating a two-prong approach to identifying bias among potential jurors resulting from their knowledge or opinions about the case.\textsuperscript{64} First, actual bias might be demonstrated through voir dire

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. (noting that this was particularly true in criminal cases).
\textsuperscript{58} Id. (explaining that if "mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, [was] sufficient to rebut the presumption of a prospective juror’s impartiality," it would be impossible standard to overcome).
\textsuperscript{59} Id. at 723.
\textsuperscript{60} Id. at 727.
\textsuperscript{61} Id. The Court explained that the "influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Id.
\textsuperscript{62} Id. (holding that evidence of jurors’ pre-trial opinions as to defendant’s guilt or innocence showed actual bias).
\textsuperscript{63} Id. at 728.
\textsuperscript{64} See, e.g., United States v. Angiulo, 897 F.2d 1169, 1180-83 (1st Cir. 1990) (finding minimal media coverage of case satisfied neither bias prong); United States v. Peters, 791 F.2d 1270, 1296 (7th Cir. 1985) (stating that defendant had failed to present evidence of actual prejudice and judge’s actions prevented possibility of presumed prejudice); Swindler v. Lockhart, 693 F. Supp. 760, 763 (E.D. Ark. 1988) (stating inquiry into possible prejudice stemming from pretrial publicity requires two prong approach). There is a third avenue for identifying bias among potential jurors which is not relevant to this Article. The Supreme Court has permitted bias to be presumed among certain specific categories of persons, such as relatives and employees of parties. See, e.g., Smith v. Phillips, 455 U.S. 209, 222 (1982) (O’Connor, J., concurring) (arguing that presumption of actual bias is appropriate when juror is actual employee of prosecutor or if juror is close relative of participant); United States v. Scott, 854
Second, prejudice might be presumed from the circumstances surrounding the trial. In Murphy v. Florida, however, the Supreme Court withdrew its reliance on this method of identifying prejudice and began to insist on evidence of actual prejudice in the jury box. Murphy involved a flamboyant jewel thief, Murph the Surf, who first gained notoriety for his part in the daring theft of the Star of India sapphire from a New York museum. At issue in the case was whether exposure of potential jurors to prejudicial information about the defendant’s prior convictions rendered them ineligible for jury service.

The Supreme Court began by distinguishing Irvin as involving “actual prejudice against the petitioner to a degree that rendered a
fair trial impossible." The Court then distinguished cases in which prejudice was presumed, on the basis that in such cases, pervasive media influence destroys the "solemnity and sobriety" that prevents a fair trial from becoming a "verdict of the mob." The Court refused to interpret those cases as holding that exposing a juror to information about a defendant's prior convictions or to news accounts of the crime, without more, deprives the defendant of due process. Instead, it determined that a reviewing court must look to the "totality of the circumstances" to determine the fundamental fairness of the trial.

The Court reiterated its holding in Irvin that qualified jurors need not be totally ignorant. For juror bias to be found, the defendant must demonstrate the "actual existence" of an opinion in the juror's mind that raises the "presumption of partiality." The Court in Murphy took special pains to point out that the issue is not "mere familiarity with petitioner or his past" but rather "an actual predisposition against him."

Because, in the case before it, seven months had passed between arrest and trial and most of the news reports were largely factual in nature, the Murphy court held that there was no evidence of actual prejudice against the defendant. In the absence of evidence of actual prejudice in the totality of the circumstances surrounding the trial, the Court refused to presume prejudice.

The Supreme Court's evolution toward the principle that jurors could be constitutionally impartial, even if they had been exposed to information about the case prior to trial and even if they had formed some opinions about the case, reached its apex in Patton v. Yount. In Patton, the defendant was convicted of the first-degree murder and rape of an eighteen-year-old high school student. The conviction was overturned because Yount's constitutional rights had been

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72. Id. at 798 (emphasis added).
73. Id. at 799.
74. Id.
75. Id.
76. Id. at 799-800 (discussing Irvin v. Dowd, 366 U.S. 717, 723 (1961)).
77. Id. at 800 (quoting Irvin, 366 U.S. at 723).
78. Id. at 800, n.4. The Court went on to say that "[t]o ignore these real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well-known in the community, whether they be notorious or merely prominent." Id.
79. Id. at 802-03.
80. Id. at 803.
violated in the process of securing his confession. The defendant was re-tried in the same community and was again convicted of first-degree murder. The case reached the Supreme Court on petition for habeas corpus relief.

Publicity surrounding the second trial revealed the defendant's prior conviction for murder, his confession, and his prior plea of temporary insanity, none of which were admitted into evidence in the second trial. All but two of the 126 persons in the venire had heard of the case; eight of the fourteen jurors seated said that at one time, they had formed an opinion as to defendant's guilt. Although it would be difficult to imagine a case in which prejudice could more easily be proven or presumed, the Court stated that "[t]he relevant question is not whether the community remembered the case, but whether the jurors at Yount's trial had such fixed opinions that they could not judge impartially the guilt of the defendant." The Court held that it could find no evidence of bias in the voir dire transcript sufficient to overcome the presumption of correctness due to determinations of fact, and that it could not presume bias from the record of publicity surrounding the trial.

The Supreme Court has interpreted the Constitution to permit jury service by a person possessed of knowledge or opinions about the case, provided that (1) the knowledge and opinions are not so closely held that they cannot reasonably be put aside in the face of evidence; and that (2) the publicity surrounding the case is not so widespread or prejudicial as to render the person's assurances of impartiality unbelievable. The primary lesson of the Court's rulings in Murphy and Patton, however, is that the standard for proving actual prejudice on the part of jurors is very high, and is a matter about which the reviewing court owes special deference to the trial

83. Commonwealth v. Yount, 435 Pa. 276, 277, 256 A.2d 464, 465-66 (1969) (holding that because defendant was given no Miranda warnings, his confession was invalid).
84. Yount, 467 U.S. at 1028.
85. Id.
86. Id. at 1029.
87. Id.
88. Id. at 1035 (citing Irvin).
89. See 28 U.S.C. § 2254(d) (1990) (mandating that determination of factual issue by lower court, after rehearing on merits, carries presumption of correctness).
90. Yount, 467 U.S. at 1040.
91. Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988). In Harris, the United States Court of Appeals for the Ninth Circuit interpreted the two standards as follows. Under the actual prejudice standard, the court must determine that the juror demonstrated "actual partiality or hostility that could not be laid aside." Id. at 1363. To satisfy the presumed prejudice standard, the court may presume prejudice "when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." Id. at 1361.
court. The standard for presuming prejudice may be impossible to satisfy.92

II. CURRENT JUDICIAL REMEDIES

As the Supreme Court has repeatedly noted, judges rely on a variety of techniques to identify impartiality and to minimize its impact in the courtroom.93 These include change of venue, continuance, voir dire, jury instructions, and jury deliberation. Judges and prosecutors generally believe that these existing remedies are effective means for ensuring impartiality.94 A central problem with all of these devices, however, is that, irrespective of more than a century of Supreme Court guidance on the issue, there appears to be little consensus on what an impartial jury really is. Is it a panel of people without biases or opinions? Is it a panel on which the court has sought to place a representative sample of biases, or an equal number of jurors biased in favor of and against the defendant? Or is it a panel of people who believe that they can be fair and can follow the law, in spite of their opinions? If so, must that belief be supported by any evidence?

The resolution of these questions is important when selecting techniques for assuring that an "impartial" jury—however it is defined—is impaneled. Answering these questions alone, however, is not enough. Even if judges agree on what an "impartial" jury is, they still face the difficult—some say insurmountable—task of trying to find one. The techniques that judges use in their attempt to accomplish this task are explored below.

A. Change of Venue

Change of venue involves moving the trial to another jurisdiction.95 Courts are extraordinarily reluctant to grant motions for

92. See Smith v. Phillips, 455 U.S. 209, 233-35 (1982) (holding that bias may not be implied from fact that sitting juror applied for job in district attorney's office; actual bias must be proven) (emphasis added). Justice O'Connor concurred separately to express the view that the majority opinion did not "foreclose the use of 'implied bias' in appropriate circumstances." Id. at 221 (O'Connor, J., concurring). Justice Marshall, joined by Justices Brennan and Stevens, dissented from the majority's holding that "the Constitution requires only that the defendant be given an opportunity to prove actual bias." Id. at 228 (Marshall, J., dissenting).


94. See Carroll, Kerr, Alfini, Weaver, MacCoun & Feldman, Free Press and Fair Trial: The Role of Behavioral Research, 10 LAW & HUM. BEHAV. 187, 192 (1986) (acknowledging that voir dire, instructions to jurors, sequestration, continuance, additional peremptory challenges, and gag orders on attorneys are all useful tools for dealing with bias).

95. See 28 U.S.C. § 1404 (1988) (providing that judges may change trial site "in the interest of justice" to location in which case could have been brought). Most states have similar
change of venue, particularly if the motion is based solely on claims of pre-trial publicity. A judge may resist changing venue because of a reluctance to admit that the defendant could only receive a fair trial in another jurisdiction. Even in the case of Jack Ruby, where by the time of the trial every citizen of Dallas might be expected to have seen the film clip of Ruby shooting Lee Harvey Oswald, the trial judge refused to grant a motion for change of venue.

Even when permitted, however, changing the venue of a trial may violate the defendant’s sixth amendment right to a trial before a “jury of the State and district wherein the crime shall have been committed.” Although the motion to change venue is almost always brought by the defendant, it effectively requires a defendant to choose between two constitutional rights: the right to an impartial jury and the right to a local jury.

Change of venue may also frustrate the local community’s legitimate interests in resolving the case. Moreover, it may be wholly ineffective as a remedy for pretrial publicity when that publicity has not been limited to the area in which the crime was committed. Where in the United States can a jury unfamiliar with the acts of Manuel Noriega and the United States invasion of Panama be impaneled?

B. Continuance

Granting a continuance, which involves delaying the trial, is an
equally dubious remedy. As with change of venue, courts are reluctant to grant a motion for continuance, in part because of the burdens "on the system in terms of witnesses, records, and fading memories."\textsuperscript{103} Moreover, where granted, a lengthy continuance may violate a defendant's sixth amendment right to a "speedy and public trial."\textsuperscript{104} Although continuance is among the least studied judicial remedies for pretrial publicity, results of one study show that a twelve day continuance was ineffective in curing jury bias created by "emotional publicity," such as the publication of graphic pictures of the crime scene.\textsuperscript{105}

C. Judicial Instructions

Judicial instructions, such as directions from the judge telling the jury to ignore information learned outside of the courtroom, although relied upon in almost every case, also have been demonstrated to be ineffective.\textsuperscript{106} Judge Learned Hand called such instructions a "placebo,"\textsuperscript{107} requiring of the jury "a mental gymnastic which is beyond, not only their powers, but anybody's else. [sic]"\textsuperscript{108} Similarly, psychologist Norbert Kerr stated that there has not been a single study which indicates that judicial instructions limit the effects of jury bias.\textsuperscript{109}
D. Jury Deliberation

Jury deliberation\(^{110}\) takes place in every trial and is frequently cited as an important tool in minimizing the impact of bias on the verdict.\(^{111}\) Some research supports this conclusion.\(^{112}\) Other research, however, suggests that group deliberation may be polarized by individual opinions.\(^{113}\) It is feared that a small bias at the individual level may be exacerbated by group deliberation.\(^{114}\)

Two recent studies have shown that pretrial bias may affect the ways in which jurors recall, recount, and weigh evidence, thus creating biased jury deliberations.\(^{115}\) According to Professor Kerr, jury deliberation tends to exaggerate the initial bias of individual jurors.\(^{116}\) Because of the possible bias amplification resulting from group deliberation, some jury researchers have concluded, jury deliberation should not be viewed as a general remedy for pretrial publicity exposure.\(^{117}\)

E. Voir Dire

The remedy for pretrial publicity most favored by judges,\(^{118}\) and the primary means through which most courts seek to determine the

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110. Jury deliberation is the process in which a properly formed jury, within the secrecy of the jury room, analyzes, discusses, and weighs the evidence brought before it with the goal of reaching a verdict based upon applicable law and facts. Rushing v. State, 565 S.W.2d 893, 895 (Tenn. Ct. App. 1978) (rejecting defendant's contention that jury separation after case created flaw in jury deliberation process).

111. See Ellsworth, Are Twelve Heads Better Than One?, 52 LAW & CONTEMP. PROBS. 205, 206 (1989) (explaining that jury deliberation is beneficial because it forces jurors to realize limited nature of individual perceptions).

112. Id.; see Hans & Doob, supra note 109, at 236 (explaining that group discussion is useful because logical discussion with others may “wash out” effects of individual decision making); Kaplan & Miller, Reducing the Effects of Jury Bias, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1443, 1454 (1978) (stating that deliberation ameliorates pretrial jury bias); Shaw, A Comparison of Individuals and Small Groups in the Rational Solution of Complex Problems, 44 Am. J. PSYCHOLOGY 491, 504 (1932) (concluding small groups are more proficient than individuals at reaching correct decisions).

113. See Myers & Lamm, The Group Polarization Phenomenon 83 PSYCHOLOGY BULL. 602, 602-03 (1976) (indicating that decisions of jury may differ from individual jurors' views because group situation deemphasizes importance of caution).

114. See Hans & Doob, supra note 109, at 235, 237 (discussing differences between group decision making and individual decision making).


116. Panel One, supra note 97, at 562 (statement of Norbert L. Kerr).

117. See Kramer, et al. supra note 105, at 413.

118. Carroll, et al., supra note 94, at 192 (stating that judges are strong believers in voir dire).
qualifications of citizens to sit on a jury, is voir dire. Through this procedure, the judge and/or, in some jurisdictions, attorneys, question potential jurors in an effort to determine whether they can be impartial. The Supreme Court has repeatedly lauded the benefits of voir dire. For example, in 
Pattton,
the Court stated that "[i]t is fair to assume that the method we have relied on since the beginning, e.g., United States v. Burr, usually identifies bias."  

There has, however, been little research about the effectiveness of voir dire as a means of identifying prejudice. The research that is available suggests that voir dire is ill-suited to this important task. Many critics charge that voir dire fails to elicit accurate or honest responses from potential jurors, or members of the venire. Repeated studies have concluded that jurors tend not to speak out during voir dire, nor admit to their true prejudices and preconceptions. Furthermore, jurors may even lie during open court questioning. Many trial attorneys and judges believe jurors

119. Siebert, Trial judges' Opinions on Prejudicial Publicity in FREE PRESS AND FAIR TRIAL 6-8 (Bush ed. 1970) (showing percentage of judges relying on voir dire).
120. Patton v. Yount, 467 U.S. 1025, 1038 (1984). In fact, the Court has cited to the United States Court of Appeals for the District of Columbia Circuit opinion in In re Application of National Broadcasting Co., for the proposition that voir dire has been long recognized as an effective method of uncovering pre-trial jury bias, especially when voir dire is conducted carefully and thoroughly. Id. at 1038, n.13 (quoting In re Application of National Broadcasting Co., 653 F.2d 609, 617 (D.C. Cir. 1981)). In addition, the Court cited with approval to a concurring opinion by the Third Circuit's Judge Garth, for the broad proposition that thorough and skillfully conducted voir dire should prove an effective method of identifying juror bias, even in a community saturated with adverse publicity. Yount, 467 U.S. at 1030 (quoting Yount v. Patton, 710 F.2d 956, 979 (3d Cir. 1983) (Garth, J., concurring).
121. Bronson, The Effectiveness of Voir Dire In Discovering Prejudice In High-Publicity Cases: An Archival Study of the Minimization Effect 3 (June 8, 1989) (paper prepared for 25th anniversary meeting of Law and Society Association) (noting lack of social science literature on general effectiveness of voir dire).
122. See Ellsworth, supra note 110, at 206-07 (suggesting goal of voir dire is incorrectly set to find incompetent jurors, rather than those with expertise or above average educations); see also Broeder, supra note 109, at 753 (implying that voir dire is tool to jurors' indoctrination to particular view, rather than searching for qualified jurors).
123. Carroll, Speaking the Truth: Voir Dire in the Capital Case, 3 AM. J. TRIAL ADVOC. 199, 200-01 (1979) (describing problems associated with conducting successful voir dire examinations). Accurate and honest answers are unlikely because, practically speaking, it is rare to find a juror willing to openly and honestly discuss his or her beliefs and biases. Id.; see Broeder, supra note 109, at 748 (indicating voir dire questions aimed at obtaining impartial jurors may actually result in juries more apt to convict); see also Fisher v. State, 481 So. 2d 203, 220 (Miss. 1985) (stating group voir dire is unable to determine influences of substantial pre-trial publicity due to principles of group psychology—jurors are extremely reluctant to expose their biases in front of group).
124. See Broeder, Voir Dire Examinations: An Empirical Study, 38 S. CAL. L. REV. 503, 528 (1965) (concluding that jurors are likely to lie, either consciously or unconsciously, when publicy questioned about views).
use confessions of prejudice as a convenient method of avoiding jury duty.\textsuperscript{126}

Social influences may also cause voir dire to be ineffective. For instance, it is unlikely that someone will admit publicly to being a bigot.\textsuperscript{127} Potential jurors are influenced by a desire to get the "right" answer, find approval from the judge, and be in the majority.\textsuperscript{128} In addition, as one commentator noted, "[p]rospective jurors observe what happens to those that are not sufficiently uninformined: the judge asks them to leave; they have failed the test as fair and impartial jurors."\textsuperscript{129}

The fact that fewer jurors admit to possible bias as the voir dire questioning progresses suggests that potential jurors learn from their colleagues' answers the "right" answers to the voir dire questions.\textsuperscript{130} This problem was demonstrated in \textit{Copeland v. State},\textsuperscript{131} a case in which a black defendant was tried for the murder of a nineteen-year old white woman.\textsuperscript{132} In \textit{Copeland}, four out of the first nine people questioned said that they could not be impartial.\textsuperscript{133} Of the remaining fifty-two, only one admitted to bias.\textsuperscript{134} One commem-

\textsuperscript{126} Judge Thomas Penfield Jackson stating that jurors who expressed reasonable doubt about charges against Mayor Barry were lying; York, \textit{Barry's Lawyers Claim Trial Judge Was Biased}, The Washington Post, Feb. 12, 1991, at B3, col. 1 (discussing motion filed by Barry's attorneys requesting consideration of Judge Jackson's speech in Barry's appeal and alleging that speech reveals prejudice of judge against Barry at time of sentencing); see generally Moran, Cutler & Loftus, \textit{Jury Selection in Major Controlled Substance Trials: The Need for Extended Voir Dire}, 5 Forensic Rep. 331 (1990).

\textsuperscript{127} See Reynolds v. United States, 98 U.S. 145, 156 (1878) (indicating juror confession of bias may be tool to avoid jury duty). More than a century ago, Chief Justice Waite in \textit{Reynolds} suggested "[w]e ought not to be unmindful of the fact we have so often observed in our experience that jurors not infrequently seek to excuse themselves on the ground of having formed an opinion when, on examination, it turns out that no real disqualification exists." See generally Bronson, supra note 121, at 25 n.91 (stating it is surprising to find anyone who tells Court they can be impartial).

\textsuperscript{128} See Bronson, supra note 121, at 54 n.182; see also Broeder, \textit{Voir Dire Examinations: An Empirical Study}, 38 S. Cal. L. Rev. 505, 510-14 (1965) (arguing that voir dire is grossly ineffective both in weeding out unfavorable jurors and in eliciting data which would show particular jurors as unfavorable); Carroll, supra note 122, at 203 (suggesting that where race is issue, defendant should be allowed to question jurors directly in order to gauge true juror reaction).

\textsuperscript{129} See Broeder, supra note 109, at 748 (implicating that specific questioning on viewpoints may create jurors likely to vote in manner which judge sought to avoid); see also Bush, supra note 125, at 17 (stating that jurors' answers may be controlled by desire to please judge); Suggs & Sales, \textit{Juror Self-Disclosure in Voir Dire: A Social Science Analysis}, 56 Ind. L.J. 245, 259 (1981) (suggesting that group voir dire questions tend to elicit uniform responses due to individual need to conform).

\textsuperscript{130} See Bronson, supra note 121, at 29 (noting that judges use language like "step down" or "step aside" when dismissing jurors); Suggs & Sales, supra note 128, at 259-60 (discussing effects of juror desire to associate with group during voir dire).

\textsuperscript{131} 457 So. 2d 1012 (Fla. 1984).

\textsuperscript{132} Copeland v. State, 457 So. 2d 1012, 1014-15 (Fla. 1984).

\textsuperscript{133} Bronson, supra note 121, at 25 n.91.

\textsuperscript{134} Id.
tator refers to this as the "minimization effect"—potential jurors minimize their possible bias in response to voir dire questioning.\(^{135}\) In addition, many jurors underestimate their exposure to the case. Follow-up questions, however, demonstrate that they have considerable knowledge about the facts.\(^{136}\) For instance, in *Copeland*, a juror, who denied having any knowledge about the case, admitted upon further questioning to having read about and discussed the case.\(^{137}\)

Even when the voir dire is conducted in the judges' chambers, away from public and press scrutiny, the procedure is rife with impediments to identifying impartial jurors. For instance, judges and lawyers often indicate the answers that they want.\(^{138}\) In *Copeland*, the judge asked: "You haven't read about [the case] or heard [about] it on television or anything or discussed it with anybody whereby you might have formed an opinion about the case?"\(^{139}\) Or, "[w]ell, from what you're telling me, then, you could sit here and be fair and impartial and listen to the evidence as it comes to you, as it is presented in this courtroom and based solely on that evidence?"\(^{140}\)

The specificity or subject matter of the questions is not the only area of difficulty. Even when the judge or attorneys wish to ask the right questions, they find that voir dire questions are difficult to frame. General questions addressing a prospective juror's fairness and impartiality fail to focus the juror's attention on specific

\(^{135}\) Id. at 28-29 (stating that potential jurors' desire to appear like "good citizens" results in minimizing personal bias).

\(^{136}\) See Fisher v. State, 481 So. 2d 203, 221 (Miss. 1985) (stating that many jurors do not know that they hold any opinion until questioned).

\(^{137}\) Bronson, supra note 121, at 41-42.

\(^{138}\) See Broeder, supra note 109, at 748 (noting suggestiveness of voir dire questioning).

\(^{139}\) See Bronson, supra note 121, at 37 (citing voir dire transcript from *Copeland*).

\(^{140}\) Id. at 46 (citing voir dire transcript from *Copeland*); see Loftus & Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 586-88 (1974) (stating form of question markedly affects answer). Commentators are split on whether very specific voir dire questions are useful. Judge Stanley Sporkin of the United States District Court for the District of Columbia has stated:

Another question I ask when a person has some knowledge of the matter is whether they can forget about what they have read or heard about this case, whether they can take the facts as presented in the courtroom, and whether they can decide the case on those facts. Nine times out of ten, they certainly can.

Selecting Impartial Juries: Must Ignorance Be a Virtue in Our Search for Justice, Panel Two: Current Judicial Practice, Legal Issues, and Existing Remedies, Annenberg Washington Program Conference, May 11, 1990, 40 Am. U.L. Rev. 573, 575 (1990) [hereinafter Panel Two] (statement of Judge Stanley Sporkin). Defense attorney Ronald Olson feels that this type of specific question "is probably the worst single voir dire question to ask." Id. at 579 (statement of Ronald Olson). Similarly, law professor Stephen Saltzburg states that "[j]urors who confess to being predisposed are permitted, if not coerced by the trial judge, to state that they will be fair and thus to avoid challenges [for] cause." Saltzburg, *Understanding the Jury with the Help of Social Science*, 83 MicH. L. Rev. 1120, 1137 (1985).
problems.\textsuperscript{141} Jurors often do not understand what information is prejudicial or improper or know that they possess such information.\textsuperscript{142} How can the attorney probe for specific prejudicial opinions without emphasizing the information that he or she wants the juror not to have?\textsuperscript{143} In fact, the very act of questioning about bias may induce a counter bias.\textsuperscript{144}

Limiting the power to question jurors to the judge also may not adequately protect the defendant's sixth amendment rights; in fact, it may increase the ineffectiveness of voir dire.\textsuperscript{145} Judicial questioning often inhibits juror candor.\textsuperscript{146} The judge's questions may even lock jurors into their "good-citizen" responses, thus preventing later questions by the attorneys from uncovering the jurors' real feelings.\textsuperscript{147}

Haste, as well as the nature and detail of voir dire questions, may also taint the jury selection process. Both judges and lawyers tend to hurry through voir dire; as the process drags on, they speed up the questioning. For example, in \textit{Copeland}, voir dire of the first four jurors took sixty-one pages of transcript; the remaining forty-nine took 161 pages.\textsuperscript{148} As voir dire continues, the questioner may be reluctant to ask follow-up questions because of time constraints.\textsuperscript{149}

Overexposure in the media may ultimately control who participates in questioning the jury. In some cases, the judge may not conduct any individualized voir dire at all before excluding members of the venire because of exposure to press accounts of the case.\textsuperscript{150} Judge Stanley Sporkin of the United States District Court for the District of Columbia has stated that in one trial which was the subject of considerable publicity, "I merely asked the panel how many

\begin{itemize}
  \item \textsuperscript{141} Bronson, supra note 121, at 44.
  \item \textsuperscript{142} \textit{Id.} (recalling how potential juror, after being questioned more in depth, was found to possess substantial knowledge of case where she originally said she knew little about incident).
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} See Hans, \textit{Death by Jury}, in \textsc{Challenging Capital Punishment} 155 (K. Haas & J. Incardi eds. 1988) (stating that questions aimed at determining juror's attitudes about capital punishment may produce jury predisposition to render guilty verdict and implement death sentence).
  \item \textsuperscript{145} See Bush, supra note 125, at 16 (suggesting that judges are too concerned with duration of voir dire and may place efficiency over fairness to defendant).
  \item \textsuperscript{146} See Jones, supra note 125, at 134 (concluding that voir dire by judges leads to less candid responses than by attorneys because of perceived social distance between jurors and judge).
  \item \textsuperscript{147} Bronson, supra note 121, at 44.
  \item \textsuperscript{148} \textit{Id.} at 53.
  \item \textsuperscript{149} See \textit{id.} (indicating that as voir dire drags on, time becomes serious concern).
  \item \textsuperscript{150} See Suggs & Sales, supra note 128, at 259 (indicating that individual questioning is matter of judicial discretion and is often not used prior to excluding jurors in well-publicized case).
\end{itemize}
of them had heard about this case. Maybe a third said they had; so I excluded them . . . ”

Moreover, the problem that plagues all techniques for identifying and remediying bias—a lack of consensus as to what an impartial juror really is—is particularly problematic in the case of voir dire. If an impartial juror is someone without bias, judges are wasting the public's time and money conducting voir dire, because it is impossible to assemble twelve people without opinions or prejudices. If, however, an impartial juror is one who can apply the law irrespective of his or her views, then voir dire must be targeted at identifying those people and testing whether their opinions will obstruct fair deliberation, rather than focusing on possible exposure to media coverage about the case.

Although estimates as to the degree of ineffectiveness differ, social science research and the experience of judges and attorneys suggest that existing techniques for minimizing the impact of bias—change of venue, continuance, jury instructions, jury deliberation, and voir dire—do not adequately guarantee that a fair and impartial jury will be seated. Yet courts, perhaps believing that no other alternatives exist, continue to rely on these inadequate remedies.

III. THE CONCEPT OF AN "IMPARTIAL" JURY IN AN AGE OF MASS COMMUNICATIONS

Resolving the issues created when members of the venire are exposed to pre-trial publicity, particularly considering the ineffectiveness of existing techniques as presently employed, requires a clear understanding of the roles juries and jurors are to fill and the qualities that they must possess to do so successfully. As is discussed below, social science has a vital function to perform in that process.

A. The Role of Juries

The United States Supreme Court has identified a number of es-

151. Panel Two, supra note 140, at 575 (statement of Judge Stanley Sporkin).
152. Stout, The Problem with Jury Selection, or, Raise Your Hand if You Are Prejudiced or Unfair, THE CHAMPION, Nov. 1987, at 19. Defense attorney Michael L. Stout summed up many of the concerns about voir dire:

Everyone has a problem with jury selection—everyone. Jurors snicker with insecurity at having their names called for questioning. We lawyers are confused as to the meaning of the information we receive, intimidated at the thought of appearing foolish during voir dire, yet are ill-prepared for questioning. Judges treat the process like a tail-gate party, an event which is sociable but largely irrelevant to the game itself. All involved feel some degree of annoyance, incompetence, or anxiety about the selection process.

Id.
sentential roles that juries play in the American judicial system. For instance, according to the Court, one important function of juries is to protect citizens against "arbitrary law enforcement,"153 "the corrupt or overzealous prosecutor,"154 and "the compliant, biased, or eccentric judge."155 Juries interpose "the common sense judgment of a group of laymen" between the accused and his or her accuser.156 The jury function is largely symbolic and may serve to reinforce social mores concerning appropriate behavior.157

Juries also play an important role in preserving social order. As one scholar explains, so long as trials—and therefore juries—appear to be a viable method for resolving controversies, "citizens will bring their disputes to the legal system rather than settle them in the streets."158 In addition, trials provide an apparently neutral means for legitimating the state's power over its citizenry and "its claim of a monopoly over physical violence."159

Despite the Supreme Court's rhetoric on the importance of juries in determining truth,160 objective truth may not be a goal of the judicial system. Instead, courts look to juries for legally accurate verdicts, not factually accurate ones.161 It is clear that accuracy and efficiency are plainly not the highest priorities of the judicial system, because a host of legal rules run directly contrary to those goals. For instance, the law requires a presumption of innocence or that guilt in criminal matters be proved beyond a reasonable doubt.

155. Id.
156. Williams, 399 U.S. at 100 (describing how juries advance purpose of preventing government oppression); see generally Loftus & Greene, Twelve Angry Peoples: The Collective Mind of the Jury, 84 COLUM. L. REV. 1425, 1433 (1984).
157. See Tanford, The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology, 66 IND. L.J. 137, 164-65 (1990) (stating that trials symbolize importance of individual autonomy and government respect for individual rights and jury symbolizes democratic ideals); see also A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 249 (1st ed. 1835) (J. Meyer & M. Lerner eds. 1966). Tocqueville states that juries spread "respect for the courts' decisions and the idea of right throughout all cases, . . . teach men equity in practice, [and] . . . teach each individual not to shirk responsibility for his own acts . . . ." Id. at 252. Juries also "invest each citizen with a sort of magisterial office [that] make all men feel that they have duties toward society and that they take a share in its government. Id. Tocqueville concludes that juries "should be regarded as a free school which is always open and in which each juror learns his rights . . . and is given practical lessons in the law . . . ." Id.
159. Id.
161. Tanford, supra note 157, at 163-64.
Moreover, the trial system "encourages lawyers to conceal and suppress damaging information, exaggerate the significance of favorable evidence, and to try to deceive the jury about the importance of facts or the way the law works."\textsuperscript{162}

\textbf{B. The Role of Jurors}

The various remedies described in Part II above, and the frequent association of "impartial" with "unaware," create an assumption that ideal jurors are ignorant jurors. It is, however, a legal fiction that "the jury operates on a blank slate, influenced only by what it hears and sees in court, and influenced by predispositions and expectations."\textsuperscript{163} The legal system, in fact, values jurors "who are aware of what is going on in the community and who stay informed."\textsuperscript{164}

Other countries which rely on juries, such as Canada and Great Britain, have rejected the practice of questioning jurors about their background and attitudes, except in unusual circumstances.\textsuperscript{165} These countries recognize the obvious fact that every juror brings opinions, biases, and prejudices to the jury box.\textsuperscript{166} Juries are used, rather than a judge or a single juror, because they are supposed to represent the interests and the breadth of their communities' moral sense.\textsuperscript{167}

If the jury is to perform the many functions assigned to it—safeguarding liberty, protecting citizens against the government, representing the community, preserving social order, and determining guilt or innocence—the jury must be composed of informed citizens who are representative of the community. Jurors need to reflect the community's collective interests and experiences.\textsuperscript{168} The same reasoning that supports the Supreme Court's refusal to permit exclusion of blacks and women from juries applies to the exclusion of

\textsuperscript{162} Id. at 162-64.

\textsuperscript{163} Diamond, Casper & Ostergren, \textit{Blindfolding the Jury}, 52 LAW & CONTEMP. PROBS. 247, 251 (1989) (stating that jurors come to task with range of both accurate and inaccurate perceptions concerning specific parties and trials in general).

\textsuperscript{164} Id. at 251-52; see Panel Two, supra note 140, at 581 (statement of Jay B. Stephens) (arguing that government benefits from intelligent, well-informed jurors).

\textsuperscript{165} See V. HANS & N. VIDMAR, supra note 24, at 48-49 (recounting views from attorneys of several countries and their opinions on American jury selection process).

\textsuperscript{166} Id. at 48.

\textsuperscript{167} Id. As one British barrister declared: "[C]ertainly in this country the whole basis of the system is that you are presuming you are entrusting cases to jurors. And so you must, if you're going to ask people to do a job, then I think you must trust them." \textit{Id.}

well-informed, curious, even opinionated people from juries.169

As Judge Irving R. Kaufman, head of the federal judiciary's Committee on the Operation of the Jury System, stated in his testimony before Congress:

If the law is to reflect the moral sense of the community, the whole community—and not just a special part—must help shape it. If the jury's verdict is to reflect the community's judgement—the whole community's judgement—jurors must be fairly selected from a cross-section of the whole community, not merely a segment of it.170

Judge Stanley Sporkin has noted that under common law, jurors were "supposed to be local citizens who knew something about what was going on . . . ."171 Similarly, the United States Attorney for the District of Columbia, Jay B. Stephens, stated that:

[F]rom the perspective of the government, . . . it is generally to our advantage to have intelligent jurors who listen to the evidence, who evaluate the evidence, and who do not go off on extraneous kinds of issues. That purpose is served, I think, by informed jurors, by jurors who are an integral part of the community, who participate in the community, who are aware of what is going on in the community and who stay informed. If you eliminate people across the board who have read something, heard something, watched something, seen something, or talked to somebody, then it seems to me you have essentially prejudiced the case against the government at the start.172

Ronald Olson, a defense lawyer and former president of the American Bar Association Section of Litigation, agreeing with the United States Attorney, stated that "categorical elimination of people who have been exposed to press coverage is as prejudicial as the elimination based on race."173

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169. See generally Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970) (requiring states which choose to provide grand and petit juries to select members without racial bias); Patton v. Mississippi, 332 U.S. 463 (1947) (using gross statistical disparity in racial composition of juries to find equal protection violation); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (requiring juries to be drawn from cross-section of community); Norris v. Alabama, 294 U.S. 587 (1935) (finding state action precluding blacks from jury service solely because of race to be unconstitutional); Carter v. Texas, 177 U.S. 442 (1900) (determining that grand jury racial exclusion by any state entity denies defendant equal protection); Strauder v. West Virginia, 100 U.S. 303 (1880) (holding that fourteenth amendment equal protection clause prohibits exclusion of black jurors).


171. Panel Two, supra note 140, at 575 (statement of Judge Stanley Sporkin).

172. Id. at 581 (statement of Jay B. Stephens).

173. Id. at 578 (statement of Ronald Olson). Olson argued that this is particularly difficult for those who are defending institutions because it reduces the opportunity for rational appeal and increases the likelihood of emotional appeal. Id.
Therefore, while jurists agree that jurors need to be impartial, impartiality, as defined by the Supreme Court and the experience of other countries that use jury systems, does not mean uninformed or unopinionated. It does not require an unrealistic, undesirable, and unobtainable robot-like ability to disregard prior knowledge, whether obtained via the media or through first-hand experience. Persons with such traits, if they exist, are poor choices for jurors.\textsuperscript{174}

According to the Supreme Court, impartiality is not compromised by "mere familiarity with petitioner or his past," but by "an actual predisposition against him."\textsuperscript{175} Impartial means willingness to hear the facts as presented in court and to evaluate those facts in light of experience and common sense.\textsuperscript{176} Impartial jurors make a conscious effort to hear and evaluate fairly, but we should recognize frankly that they will never be entirely successful.

Regular exposure to media, however, may improve their chance of succeeding.\textsuperscript{177} In fact, the skills of discernment that most citizens exercise and refine daily in evaluating the barrage of news, advertising, and rhetoric presented by the media may help jurors to be both capable and impartial.\textsuperscript{178}

Moreover, competent jurors are not so easily led by the media.\textsuperscript{179} The recent inability of the jury to reach a verdict on twelve counts in the cocaine and perjury trial of District of Columbia Mayor Marion Barry should give pause to those who believe that a jury is easily

\textsuperscript{174}. See Fein, \textit{Uninformed Jurors Put Justice at Risk}, USA Today, Feb. 9, 1989, at 8A. Bruce Fein, a former General Counsel of the Federal Communications Commission, wrote with regard to jury selection for the trial of Lieutenant Colonel Oliver North:

> The trial judge has disqualified as potential jurors persons who watched or read the riveting testimony North was compelled to give the congressional Iran-Contra committees and a worldwide TV audience in 1987. The minuscule remainder eligible for jury service have either been understudies of Rip Van Winkle or congenitally somnolent in the world of government. They are incompetent for the jury role.

\textit{Id.}

Fein concluded with the words of Chief Justice William Howard Taft: "[T]he jury system needs citizens trained to the exercise of the responsibilities of jurors." Balzac v. Porto [sic] Rico, 258 U.S. 298, 310 (1922) (describing difficulty foreign legal culture may have in adopting Anglo-American system of trial by jury).

\textsuperscript{175}. Murphy v. Florida, 421 U.S. 794, 800 (1975) (stating that fair trial does not require jury to be totally ignorant of facts and issues involved).

\textsuperscript{176}. See Irvin v. Dowd, 366 U.S. 717, 723 (1961) (stating that focus of impartiality determination should be willingness of juror to lay aside any opinions and decide case based on facts presented in court).

\textsuperscript{177}. See Murphy v. Florida, 421 U.S. 794, 801 (1975) (describing views of juror who stated that media's account of defendant's prior criminal activities led juror to believe that defendant was being singled out for suspicion of new crimes).

\textsuperscript{178}. \textit{But see} Irvin, 366 U.S. at 725-27 (concluding that jury was prejudiced by extensive exposure to media).

\textsuperscript{179}. \textit{See Murphy}, 421 U.S. at 802 (diminishing significance of media coverage of defendant's prior crimes).
IMPARTIAL JURORS swayed by the press. In that case, following a barrage of press stories about the Mayor's arrest and legal maneuvers and speculation about his political future, the jury watched a videotape of Mayor Barry smoking crack cocaine, and heard Barry's defense counsel acknowledge that the Mayor had used drugs, while the Mayor testified before a grand jury that he had never used drugs. Still, the jury acquitted Barry on one count and refused to convict him on twelve of the thirteen others. This suggests that "jurors really are more skeptical than you would think they are about what they hear, read, and see." The sixth amendment guarantees a defendant's right to trial by impartial jury, not impartial jurors. Protecting this right does not depend on finding jurors with no opinions or prejudices, but rather on the rough and tumble interaction of twelve members of the community, and the experiences and knowledge they bring into the jury box. Their verdict is not merely the sum of twelve independent votes; it is the product of the deliberation, of the interaction be-

181. Id.; see also Pear, Verdict Called Rebuke to Federal Prosecutors, The New York Times, Aug. 11, 1990, § 1, at 12, col. 5 (stating that Mayor Barry was convicted on single misdemeanor drug possession count, acquitted on another possession count, and mistrial declared on 12 other counts).

An even more dramatic result was reached in the drug trial of John DeLorean, where a jury acquitted the former car manufacturer, despite a videotape showing DeLorean purchasing cocaine and toasting the success of his illegal venture. See generally S. Brill, TRIAL BY JURY 201-65 (1989) (discussing DeLorean case). Fred Graham, Chief Anchor and Managing Editor of The American Trial Network and former CBS News law correspondent, described the exaggerated impact of the media as follows:

I first began to suspect that our lawyerlike way of addressing this issue had swept off the track when I was assigned by CBS to cover a series of some of the most sensational trials of the century. It became absolutely clear to me that jurors were absolutely unphased by all of that broadcasting that my colleagues and I had been doing on television. It first struck me with regard to the Maurice Stans case in Watergate. He was acquitted, and we said, "how can this be?" Then, over the years, I covered a drumbeat of cases, including the trials of John Hinkley, John Connelly, John DeLorean. John DeLorean was a man who was seen committing the alleged crime on television, and he was acquitted. Then, of course, in the Watergate cases themselves, although some defendants were convicted, there were some acquittals .... I was persuaded in the Watergate case, as in the others, that the jurors were impressed that they had been given great power. As citizens they were given responsibility over the high and the mighty. They were not going to let someone like me tell them what to think because I had been on television two and a half minutes on a few nights when they had sat through six weeks of a trial; it was so clear to me that we were not affecting that process.


182. See Panel Two, supra note 140, at 592 (statement of Jay B. Stephens).
183. U.S. CONST. amend. VI; see supra note 2 (providing language of sixth amendment).
tween the twelve sets of experiences and knowledge, and thus a reflection of the community. As Professors Zeisel and Diamond write:

The law recognizes that jurors cannot perceive and evaluate the evidence before them without being affected by their attitudes and beliefs, and thus it insists that the differing values held by the jurors be adequately mixed. The insistence that the values of the jury be reflective of the distribution of values that exist in the community provides the law with an objective standard against which the "fairness" of the jury can be measured: A representative jury, then, is the first approximation to the ideal jury.\(^1\)

Thus, the term "jury selection" is a misnomer. Attorneys and judges do not select juries. Instead, in the words of defense attorney Olson, they de-select "those [individual members of the venire] who have particular biases against you that you think would be unfair."\(^2\)

Therefore, extensive voir dire and challenges—permitting attorneys to de-select their way to a panel less representative of the community—may prove a far greater threat to the fundamental fairness of the verdict than exposure to any media coverage. While social science research has raised many questions about the fairness of the outcome of the interaction between jurors, it is clear that if the membership of the panel is skewed by the selection process, then the fundamental guarantee of fairness—the diversity and breadth of experiences and views—is likely to be compromised.\(^3\)

C. The Role of Social Science

Social science has a great deal to contribute not only to the debate over impartial jurors, but also to the practical effort to impanel impartial juries. Justice Frankfurter, never a friend to the use of social science in the courtroom, lamented that as of 1952,

[science with all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent itself or whether the powerful impression bound to be made

\(^{184}\) Zeisel & Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court, 50 Stan. L. Rev. 491, 531 (1978) (emphasis added); see also Smith v. Phillips, 455 U.S. 209, 226 (1982) (Marshall, J., dissenting) (insisting that jury be selected from representative cross-section of community and stating that selection procedures that exclude significant portions of population, and thus increase risk of bias, are invalid).

\(^{185}\) See Panel Two, supra note 140, at 580 (statement of Ronald Olson).

\(^{186}\) Reducing the size of juries or permitting less than unanimous verdicts in criminal trials, both of which are permitted by the Supreme Court, may also compromise the representative nature, and therefore counteracting perspectives, of the jury. See generally V. Hans & N. Vidmar, supra note 24, at 165-76 and sources cited therein (discussing ramifications of utilizing six-person juries and nonunanimous twelve-person decisions upon criminal and civil cases).
by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in court.\textsuperscript{187}

But, since Justice Frankfurter's statement, social science has focused considerable attention on the practices of courts, particularly relating to juries. It can help us better understand how bias really operates and, therefore, help courts identify jurors who may not be able to be impartial. Social scientists may also facilitate potential jurors' understanding of what they need to do in order to be as fair as possible.

Social science helps critique existing remedies for minimizing the impact of bias.\textsuperscript{188} As a result, it helps us formulate better methods and employ them more effectively to reduce particularly overwhelming or distorting biases. Analysis of empirical research helps us think more clearly and effectively about juries and their interaction with judges and attorneys.\textsuperscript{189}

Social science may also focus our attention on forces in the jury box which are more powerful and distorting than exposure to press reports. For example, charges of racial politics have dominated the recent trial of District of Columbia Mayor Marion Barry on drug and perjury charges, and trial of the three black youths convicted of raping and beating a young white woman in New York's Central Park.\textsuperscript{190} Similarly, in the recent District of Columbia murder trial of black defendant Darryl Smith, a juror revealed that she and nine other jurors agreed to acquit despite their belief that the man was guilty because the "foreman said she didn't want to send anymore young black men to jail, even if he did kill that young man over drugs."\textsuperscript{191} Because of cases such as these, courtrooms are being viewed as places where conflicts are intensified rather than resolved.\textsuperscript{192}

\textsuperscript{187.} Stroble v. California, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting).
\textsuperscript{188.} See supra notes 92-161 and accompanying text (critiquing change of venue, continuance, jury instructions, jury deliberation, and voir dire as bias remedies).
\textsuperscript{189.} See generally Bronson, supra note 121 (using empirical studies to analyze effectiveness of voir dire in high publicity cases). See also Moran, supra note 124, at 24-26 (listing empirical data relied upon for author's critique of voir dire process).
\textsuperscript{190.} See United States v. Barry, Criminal Case No. 90-0068 (D.D.C. 1990); Treadwell, Blaming a Hidden Enemy; More Blacks Are Saying They're Targets Of A Conspiracy That Includes Problems Of Their Leaders And Drugs On Their Streets Some Fear The Plot Theories Mask Real Problems, Los Angeles Times, Sept. 17, 1990, at A1, col. 1 (stating many blacks feel prosecution of Mayor Barry is racially motivated); see also McCarthy, Pinning Hopes on Jury Prudence, Newsday, June 18, 1990, at 8 (city ed.) (discussing importance of having diverse jury in Central Park jogger rape trial because trial is "tinged with racial overtones").
\textsuperscript{192.} Justice in Black and White, Newsweek, Aug. 13, 1990, at 36 (describing courtrooms and trials as "the new racial battlegrounds").
Confusion and misunderstanding may also impede justice in the jury box. One defense attorney has noted that the jury instructions meant to cure these problems are not only confusing for jurors, but are meaningless to the lawyers who are supposedly following them. This view is shared by numerous legal scholars. The potential impact of the press on jury deliberation pales in the face of forces such as racism and misunderstanding. Social science has much to tell us about these and other powerful forces which may operate in the jury room.

CONCLUSION

The answer to the problem of selecting impartial juries is not provided by social science any more than it has been provided by existing judicial remedies. Rather, the answer lies in the public and the court understanding that jurors have an active and meaningful role to play in the trial process. Thus, we have come full circle. When juries were first used, English village and town life was such that everyone was likely to know what was going on. A crime of sufficient gravity to warrant a jury was likely to be the talk of the town. In order to sit on a twelfth century jury, one had to be knowledgeable about the parties involved and the facts of the case. A stranger was ineligible.

193. See generally Marcotte, The Verdict Is . . . , A.B.A. J., June 1990, 32, 32 (reporting results of ABA Litigation Section's study on jury comprehension authored by psychologist Elizabeth Loftus). The report claimed that the "typical juror in complex federal cases . . . is bored and confused. What's more, he misunderstands key legal concepts and struggles to reach a just decision. And, the juror's task is made more difficult by the way lawyers and judges present evidence and explain legal concepts." Id.

194. Panel One, supra note 97, at 556 (statement of Jamie S. Gorelick).

195. See Elwork, Sales & Alfini, Juridic Decisions: In Ignorance of the Law or In Light of It?, 1 LAW & HUM. BEHAV. 163, 178 (1975). These researchers argue that:

If a jury is to successfully apply the law to a case, the judge's instructions must be written in language that is understandable to the average juror and they must be delivered at times when they can be most effective. There is little doubt that present procedures do not meet these criteria. Unless the situation is corrected, juries will continue to reach decisions arbitrarily, and countless litigants will be denied their constitutional right to a fair trial.

Id.; see also Charrow & Chartrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 COLUM. L. REV. 1306, 1359 (1979) (stating that studies underscore fact that jury instructions are not written for intended audience). The inability of jurors to understand the charge has obvious implications concerning the soundness of the jury system. Id. If jurors do not fully comprehend the laws that they are required to apply, it is possible that they reach verdicts "either without regard to the law or by using improper law." Id.; accord Forston, Sense and Non-Sense: Jury Trial Communication, 1975 B.Y.U. L. Rev. 601, 606 (finding that condition of pervasive confusion exists among jurors in present jury system largely due to poor communication). Forston explains that jurors often "improperly find the facts because the concept of legal evidence is seldom adequately communicated to them." Id. Furthermore, they improperly apply the law because they are unable to understand the jury instructions and they often fail to consider rationally legal arguments because of their difficulty in comprehending legal jargon. Id.
Today the world is dramatically different. Villages and towns have given way to cities and sprawling metropolises. Yet through the vast expansion of the media and the proliferation of communications technologies, we once again frequently know what is going on in our communities. In fact, we almost certainly know more about notorious cases than did our twelfth century predecessors.

To think that jurors wholly unacquainted with the facts of a notorious case can be impaneled today is to dream. Anyone meeting that standard of ignorance should be suspect. The search for such a jury is a chimera. It is also unnecessary. Knowledgeable jurors today, like 800 years ago, can form an impartial jury. In fact, the very diversity of views and experiences that they possess is the best guarantee of an impartial jury.

Faced with escalating media coverage of the people and events which subsequently become embroiled in trials, and practical as well as constitutional hurdles to stymieing that interest, courts are betting the constitutional rights of criminal defendants, not to mention their liberty and in some cases their lives, on ineffective judicial remedies for identifying and remedying jury bias. These measures, however, especially voir dire, misfocus the court's attention on the exposure to press reports, rather than on the existence and degree of any bias or prejudice that may have been engendered by such exposure. As a result, some courts mistake "unaware" for "impartial," and so search at great length for jurors who know nothing about the case.

In the trial of District of Columbia Mayor Marion Barry, the court distributed twenty-two pages of written questions to potential jurors. These questions sought information on what television and radio programs the potential jurors watched, what newspapers and magazines they read, their political activities, the regularity of their church or synagogue attendance, their views on the legalizations of drugs and law enforcement techniques, their possible experience with prejudice, and their "religious and philosophical beliefs." A jury chosen according to these tests may raise serious questions about the meaning of impartiality.

It is all too easy for the search for "unaware" jurors to divert a court's attention from its constitutional obligation to seat an "impartial" jury. Moreover, such a quest excludes qualified citizens from the jury, thereby denying the defendant's right to a representative, competent jury and denying media-literate citizens the oppor-

tunity to study in a "free school . . . in which each juror learns his rights . . . and is given practical lessons in the law . . . ."\textsuperscript{197}

Courts need neither ignore the impact of media coverage on the selection of an impartial jury nor become hopelessly enmeshed in examining the amount and type of media coverage through extended and far-reaching voir dire. The language of the sixth amendment, the dictates of the Supreme Court, and the realities of modern society require that courts impanel juries which are impartial, but not without knowledge and opinions.

Mark Twain's words of outrage that informed citizens were being excluded from juries, penned more than a century ago, continue to argue forcefully against the judicial practice of excluding the informed from juries:

In this age, when a gentleman of high social standing, intelligence, and probity swears that testimony given under solemn oath will outweigh, with him, street talk and newspaper reports based upon mere hearsay, he is worth a hundred jurymen who will swear to their own ignorance and stupidity, and justice would be far safer in his hands than in theirs. Why could not the jury law be so altered as to give men of brains and honesty an equal chance with fools and miscreants?\textsuperscript{198}

\textsuperscript{197} A. de Tocqueville, \textit{supra} note 157, at 249.

\textsuperscript{198} M. Twain, \textit{supra} note 10, at 307.