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VOIR DIRE IN FEDERAL CRIMINAL TRIALS: PROTECTING THE DEFENDANT'S RIGHT TO AN IMPARTIAL JURY

The sixth amendment of the United States Constitution guarantees the criminal defendant the right to be tried by an "impartial jury."¹ This right has been secured in the federal courts by granting the defendant and the prosecutor the opportunity to request the exclusion of certain prospective jurors through challenges for cause or peremptory challenges.² In order that the parties may intelligently exercise these challenges, the Federal Rules of Criminal Procedure provide for an examination of prospective jurors known as the voir dire.³ The Rules leave the trial court

1. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,

U.S. CONST. amend. VI.

2. Challenges for cause are unlimited in number, but are available only where a party can show legally cognizable evidence of partiality. *Swain v. Alabama*, 380 U.S. 202 (1965). Peremptory challenges permit the parties to have a limited number of prospective jurors excused "without a reason stated, without inquiry and without being subject to the court's control." *Id.* at 220. While the right to challenge jurors for cause is mandated by the sixth amendment, *Dennis v. United States*, 339 U.S. 162, 171-72 (1950), the peremptory challenge has not been thought to be so required. However,

[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. . . . Although "[t]here is nothing in the Constitution of the United States which requires the Congress . . . to grant peremptory challenges," . . . nonetheless the challenge is "one of the most important of the rights secured to the accused,"

Swain v. Alabama, *supra* at 219.

The Federal Rules of Criminal Procedure regulate the number of peremptory challenges available to each party:

If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

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

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

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

wide discretion in conducting the voir dire.⁴ The vast majority of federal district judges have exercised this discretion to conduct the entire examination themselves.⁵ This is unlike the practice in many states, where counsel actively participate in the voir dire.⁶ This note will measure court-conducted voir dire against the constitutional goal of an impartial jury⁷ and suggest reforms which would better achieve the objective.

4. The Rules provide no standards for deciding how extensive the examination should be, what questions should be asked, what questions are inappropriate, under what circumstances counsel should be allowed to conduct the examination, or on what grounds the court may refuse to ask questions submitted by the parties.

5. A survey of federal court voir dire practices showed that in 51 districts judges conduct the entire voir dire, in 22 districts both the judge and counsel examine the jury and in 12 districts the voir dire is conducted entirely by counsel. *Report of the Judicial Conference Committee on the Operation of the Jury System, The Jury System in the Federal Courts*, 26 F.R.D. 409, 466 (1960) [hereinafter cited as *Judicial Conference*].

Challenges to court-conducted voir dire based on the alleged unconstitutionality of Rule 24(a) have been unsuccessful. *United States v. Amick*, 439 F.2d 351 (7th Cir. 1971); *Rodgers v. United States*, 402 F.2d 830 (9th Cir. 1968).

6. The federal rule is followed in about ten states; approximately the same number provide for examination only by the judge; in 22 states provision is made for examination by the judge and the attorneys, and in the other states examination is left to counsel.

A.B.A. ADVISORY COMMITTEE ON THE CRIMINAL TRIAL, AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 63 (1968) [hereinafter cited as A.B.A. ADVISORY COMMITTEE].

7. An impartial jury is not a wholly attainable objective. Impartiality is only one of the many legal fictions surrounding the operation of our jury system. Jurors are expected to recall at the trial's end all the testimony they have heard and the exhibits they have seen, often without even being permitted to take notes. They are expected to disregard all evidence stricken from the record as inadmissible and to apply certain facts to one issue while disregarding them with respect to another. Jurors are required not to reach a decision until they have heard all the evidence. They are presumed to understand and apply the law as given by the court in its instructions. See Broeder, *The Functions of the Jury: Facts or Fictions?* 21 U. CHI. L. REV. 386 (1954).

Realizing the impossibility of attaining absolute impartiality, some authorities have suggested that the goal be abandoned in favor of court procedures designed to achieve a "randomly biased" jury representing a cross-section of the community. Blauner, *Sociology in the Courtroom: The Search for White Racism in the Voir Dire in MINIMIZING RACISM IN JURY TRIALS: THE VOIR DIRE CONDUCTED BY CHARLES R. GARRY IN PEOPLE OF CALIFORNIA V. HUEY P. NEWTON* 69 (A. Ginger ed. 1969) [hereinafter cited as *MINIMIZING RACISM*]; Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 925 (1971) [hereinafter cited as *Expediting Voir Dire*]; Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839, 843 (1968) [hereinafter cited as Okun]. There is, however, evidence that a randomly biased jury will produce, not a verdict based on the evidence, but a verdict based on juror prejudices. One empirical study of a jurisdiction with the practice of having only a short, perfunctory voir dire revealed that in a large number of cases the verdict reached had been substantially influenced by unrevealed biases of individual jurors. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965) [hereinafter cited as *Empirical Study*]. Thus, although courts may recognize that the goal of absolute impartiality is not achievable, it is their duty under the "impartial" requirement of the sixth amendment to make all reasonable efforts to eliminate juror prejudice.

COURT-CONDUCTED VOIR DIRE—PURPOSES AND PROBLEMS

The Judicial Conference Committee on the Operation of the Jury System has recommended that court-conducted voir dire be adopted by all federal courts.⁸ Those who support court-conducted voir dire are primarily concerned with saving time.⁹ One study found that court-conducted voir dire averaged 64 minutes, while counsel questioning averaged 111 minutes.¹⁰ A secondary argument of those favoring examination by the trial judge is that questioning by the court "improves the character" of voir dire.¹¹ Voir dire examinations conducted wholly by counsel have been widely reported to include serious improprieties.¹² Lawyers have been criticized for using voir dire to influence the entire panel in order to obtain a favorably inclined jury¹³ and for "preinstructing" jurors on the facts or law involved in the case.¹⁴ A content analysis of voir dire has shown that attorneys spend the bulk of their time preparing prospective jurors for the case and less than half of the time selecting jurors.¹⁵

8. *Judicial Conference*, *supra* note 5, at 424. Court-conducted voir dire has also been endorsed by a number of other authorities. A.B.A. ADVISORY COMMITTEE, *supra* note 6, at 63; A. VANDERBILT, *JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION* (1956) [hereinafter cited as VANDERBILT]; *Expediting Voir Dire*, *supra* note 7; Comment, *Voire Dire Examination—Court or Counsel*, 11 ST. LOUIS U. L.J. 234 (1967) [hereinafter cited as Comment].

9. VANDERBILT, *supra* note 8, at 73; *Expediting Voir Dire*, *supra* note 7, at 956; *Judicial Conference*, *supra* note 5, at 467; Comment, *supra* note 8, at 248. However, this goal has been criticized for its insensitivity toward basic rights. Okun, *supra* note 7, at 849 n.40.

10. *Expediting Voir Dire*, *supra* note 7, at 948. *But see* DEVITT & BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL AND CRIMINAL* § 3.01, at 49 (2d ed. 1970) (no significant difference found).

11. *Expediting Voir Dire*, *supra* note 7, at 950; *Judicial Conference*, *supra* note 5, at 467.

12. *See, e.g., Expediting Voir Dire*, *supra* note 7, at 942-44; Comment, *supra* note 8, at 241-45; Note, *Voire Dire—Prevention of Prejudicial Questioning*, 50 MINN. L. REV. 1088, at 1092-95 (1966).

Commentary critical of counsel voir dire has largely been based on observations of civil trials. The major empirical study comparing voir dire methods, *Expediting Voir Dire*, *supra* note 7, included only civil trials, yet its conclusion recommended court-conducted voir dire for both civil and criminal trials. Here, as elsewhere, insufficient attention was given to the question whether the disparate nature of civil and criminal trials necessitates different methods of jury selection.

13. VANDERBILT, *supra* note 8, at 73; *Expediting Voir Dire*, *supra* note 7, at 942-44; Okun, *supra* note 7, at 842.

14. *Expediting Voir Dire*, *supra* note 7, at 943-44. One study found voir dire to be an extremely effective mechanism for "indoctrinating" the jurors. *Empirical Study*, *supra* note 7, at 522. The use of voir dire to convey instructions on the law need not be viewed as illegitimate. Consider, for example, how effectively the presumption of innocence is conveyed at voir dire where each prospective juror is personally addressed and affirms his acceptance of the presumption before hearing any of the evidence. Using voir dire for instructions is certainly more effective than the mechanical recitation of a long series of pattern instructions at the end of trial.

15. H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURTS* 103 n.9 (1959).

However, while court-conducted voir dire may be successful in eliminating the problems posed by uncontrolled counsel voir dire, voir dire conducted wholly by the trial judge introduces problems of its own which may inhibit the constitutional right of the accused to have his case heard before an impartial jury. These problems include (1) the inadequacy of appellate review of voir dire; (2) the ineffectiveness of a limited examination in disclosing juror prejudices likely to have a substantial impact upon the verdict; and (3) the encouragement of outside investigation of jurors where the voir dire examination is excessively limited.

The objective of voir dire is to discover prejudice and thereby assure impartiality,¹⁶ but if the voir dire is inadequate, appellate review will provide no cure for the defendant and few guidelines to future litigants. Since Rule 24(a) grants the trial court wide discretion in conducting the examination of prospective jurors, the defendant is only entitled to reversal on appeal if he can demonstrate that the court's conduct was both an abuse of discretion¹⁷ and prejudicial error.¹⁸ The abuse of discretion standard affords unusually weak protection to an important constitutional right. Appellate courts have often labeled a trial judge's examination improper or inadequate while declining to find it so inappropriate as to constitute an abuse of discretion.¹⁹ Even if considered an abuse of discretion, errors on voir dire cannot be easily proven prejudicial²⁰ because

16. See notes 1-3 *supra* & text accompanying.

17. *Haslam v. United States*, 431 F.2d 362 (9th Cir. 1970); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971); *Kreuter v. United States*, 376 F.2d 654 (10th Cir. 1967), *cert. denied*, 390 U.S. 1015 (1968); *Spells v. United States*, 263 F.2d 609 (5th Cir.), *cert. denied*, 360 U.S. 920 (1959); *Butler v. United States*, 191 F.2d 433 (4th Cir. 1955).

18. *Silverthorne v. United States*, 400 F.2d 627, 640 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971). See also *United States v. Rivers*, 468 F.2d 1355 (4th Cir. 1972) (although the defendant had the right to question jurors about racial prejudice, a denial of that right may be harmless error).

19. *United States v. Mattin*, 419 F.2d 1086 (8th Cir. 1970); *Kreuter v. United States*, 376 F.2d 654 (10th Cir. 1967), *cert. denied*, 390 U.S. 1015 (1968); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), *vacated on other grounds*, 392 U.S. 651 (1968); *United States v. Lebron*, 222 F.2d 531 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955). Appellate courts have explained the need to rely on the judgment of the trial judge in voir dire decisions on the basis that he is in the best position to evaluate the jurors' demeanor and determine whether the prospective jurors can be fair and impartial. See, e.g., *United States v. Ploof*, 464 F.2d 116, 118 (2d Cir. 1972). However, an unexpressed explanation for the hesitancy to reverse for voir dire errors might be the natural reluctance to discard the results of an entire trial because of errors which occurred before the testimony even began.

20. However, when a court has found the trial court's conduct of voir dire clearly in error, the requirement of proving that the error was prejudicial can be easily evaded. See, e.g., *Silverthorne v. United States*, 400 F.2d 627, 640 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971); *New England Enterprises, Inc. v. United States*, 400 F.2d 58, 69 (1st Cir. 1968), *cert. denied*, 393 U.S. 1036 (1969); *Lurding v. United States*, 179 F.2d 419, 421 (6th Cir. 1950).

the secrecy which surrounds jury deliberations prevents the appellate court from discovering whether the jury was in fact biased.

The opinions of those appellate courts which have reviewed voir dire examinations provide little guidance for the trial judge who might be interested in determining the limits of his discretion and little support for the defendant asserting his right to an impartial jury. With few exceptions,²¹ the Supreme Court has not given the lower courts any specific standards for voir dire questioning, and has regularly refused to resolve the inconsistencies among circuit court decisions in the area.²² Even a

21. In *Aldridge v. United States*, 283 U.S. 308 (1931), the Court held that a Negro defendant on trial for the murder of a white policeman was entitled to have the jurors asked on voir dire whether they had any racial prejudices which would prevent a fair and impartial verdict. In *Morford v. United States*, 339 U.S. 258 (1950), the Court reversed the conviction of the defendant for failure to produce documents before the House Un-American Activities Committee where the trial court had not permitted the defendant to interrogate government employees on the jury panel with specific reference to the effect of the "Loyalty Order" on their ability to render an impartial verdict.

The Supreme Court recently missed an opportunity to clarify the law in this area when it ruled unanimously that a criminal defendant in a state court had the right to have the court examine jurors on voir dire as to possible prejudice arising from the fact that the defendant was a Negro. *Ham v. South Carolina*, — U.S. —, 93 S. Ct. 848 (1973). Not only does the opinion by Justice Rehnquist fail to clarify the constitutional standards for voir dire, but it succeeds in further clouding the issue by reinterpreting *Aldridge* and failing to cite other decisions which seem to conflict with that new interpretation. Justice Rehnquist describes *Aldridge* as "not expressly grounded upon any constitutional requirement," *id.* at —, 93 S. Ct. at 850, and implies that the decision might be based on the general supervisory powers of the Supreme Court over the federal courts and not on the Constitution. *Id.* at —, 93 S. Ct. at 850-51. Although it is true that the *Aldridge* opinion does not refer specifically to any single constitutional provision, the opinion repeatedly uses the word "impartial," as in the sixth amendment, to explain the goal that voir dire should achieve. Justice Rehnquist does not mention any of the previous Supreme Court opinions that clearly grounded voir dire decisions on the sixth amendment right to an impartial jury. *See, e.g.*, *Morford v. United States*, 339 U.S. 258 (1950); *Dennis v. United States*, 339 U.S. 162 (1950). Of the three opinions written in the *Ham* case, only Justice Marshall, concurring in part and dissenting in part, mentions that voir dire is based on the sixth amendment right to an impartial jury.

22. For example, the District of Columbia Circuit has twice reversed for the failure to ask jurors if they would give greater weight to the testimony of a law enforcement officer merely because he was an officer. *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964); *Sellers v. United States*, 271 F.2d 475 (D.C. Cir. 1959). The Fourth and Ninth Circuits, however, considered the refusal to ask the same question not to be error. *United States v. Gore*, 435 F.2d 1110 (4th Cir. 1970); *Fredrick v. United States*, 163 F.2d 536 (9th Cir.), *cert. denied*, 332 U.S. 775 (1947). The Tenth Circuit found fault with a defendant's proposed wording of the same question and consequently found no error in the trial court's refusal to ask it. *Chavez v. United States*, 258 F.2d 816 (10th Cir. 1958), *cert. denied*, 359 U.S. 916 (1959). In *Chavez*, the Tenth Circuit ignored the Supreme Court's directive that an otherwise proper question should not be refused merely because it has been misphrased by counsel. *Aldridge v. United States*, 283 U.S. 308, 311 (1931).

A review of the cases finding the omission of questions to be reversible error provides no standards for determining which questions need be included on voir dire. Cases where counsel's question was designed to reveal a relevant prejudice present no

trial judge examining only the decisions of his own circuit will receive little guidance because the opinions often state only the conclusion, "no abuse of discretion," without giving any indication of the basis for the decision.²³

A court-conducted voir dire is also likely to be inadequate to secure an impartial jury since the questioning is usually too limited to disclose the prejudices of the prospective jurors. Once a person has been unsuccessful in avoiding jury duty he would probably prefer being seated as a juror to spending his time in jury assembly rooms,²⁴ so he is not likely to volunteer information which might disqualify him,²⁵ and he may even lie in order to avoid being excused.²⁶ A voir dire examination must be

difficulty. In such circumstances reversal is clearly in order. *See, e.g.,* United States v. Gore, 435 F.2d 1110 (4th Cir. 1970) (reversal for failure to ask about racial prejudice); Smith v. United States, 262 F.2d 50 (4th Cir. 1958) (reversal for failure to go beyond general racial prejudice and inquire specifically about Ku Klux Klan membership). *See also* United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972) (reversal for failure to ask about juror association with organizations employing the chief government witnesses); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971) (reversal for failure to inquire specifically about juror exposure to pretrial publicity); Cook v. United States, 379 F.2d 966 (5th Cir. 1967) (reversal for failure to ask if the jurors were acquainted with a government witness). There have, however, also been reversals for seemingly less significant omissions. In a civil case, with the same "abuse of discretion" standard, a verdict was reversed for failure to use questions submitted by counsel concerning jurors' opinions about casualty insurance. Kiernan v. VanSchaik, 347 F.2d 775 (3d Cir. 1965). In a tax evasion case where some of the defendant's income was derived from an illegal "handbook" (bookie) operation on his property, the circuit court ruled that the defendant was entitled to inquire of jurors whether they were opposed to the use of handbooks, even though such use was illegal. Lurding v. United States, 179 F.2d 419 (6th Cir. 1950). In a prosecution for impersonation of a Veteran's Administration official the appellate court reversed for the trial court's failure to ask jurors if they would be prejudiced against the defendant because he was an admitted liar. United States v. Napoleone, 349 F.2d 350 (3d Cir. 1965).

23. *See, e.g.,* Lowther v. United States, 455 F.2d 657 (10th Cir. 1972); United States v. Beneke, 449 F.2d 1259 (8th Cir. 1971); Hawkins v. United States, 434 F.2d 738 (5th Cir. 1970); United States v. Rabb, 394 F.2d 230 (3d Cir. 1968); Kreuter v. United States, 376 F.2d 654 (10th Cir. 1967), *cert. denied*, 390 U.S. 1015 (1968).

24. *Empirical Study, supra* note 7, at 526.

25. Broeder gives an example from a narcotics trial where the young son of one of the jurors had only a week before been offered drugs by a professional peddler. The juror was conscious of the bias that incident had created, yet he failed to disclose it. He told the interviewer later, "At several points during the trial, I felt like standing up and disqualifying myself." The juror's sense of guilt induced bizarre behavior in the jury room where he voted for acquittal on the first ballot to show "impartiality" even though he was strongly for conviction. *Empirical Study, supra* note 7, at 512.

26. A larceny case observed by Broeder provides an excellent example of concealment and its potential effect on verdicts. One juror who was a friend and great admirer of defense counsel admitted on voir dire only a casual acquaintance and said, "I know him to speak to, but that won't influence me." Her comment, however, was contradicted by her behavior in the jury room where she argued for acquittal on the grounds that her friend, the defense counsel, "would never defend a guilty man." *Empirical Study, supra* note 7, at 511.

thorough and probing to overcome a venireman's strong desire to conceal disqualifying personal information.

There are a number of reasons for believing that questioning by counsel is more effective in overcoming this barrier than questioning by the trial judge. It is likely that the judge, not having an adversarial interest in the trial, will tend to ask general questions whose desired answer is evident, rather than specific questions that might reveal information on which to base a challenge.²⁷ An attorney is more apt to have the tenacity to discover prejudice instead of being satisfied with pro forma affirmations of impartiality.²⁸ Another advantage of counsel participation

27. In *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971), a case involving substantial pre-trial publicity, the trial court had only asked the jurors if they could be impartial despite any pre-trial publicity they might have heard. The circuit court found that the voir dire "did not adequately dispel the probability of prejudice accruing from the pre-trial publicity," 400 F.2d at 638, since the questions had been calculated to evoke subjective assessments of the juror's own partiality and the examination too general to adequately probe the prejudice issue. *Id.* The court directed that in such cases each juror, out of the presence of other members of the panel, should be asked specifically about what he had heard about the case.

In *Smith v. United States*, 262 F.2d 50 (4th Cir. 1958), the court found a general question about prejudice inadequate and reversed for failure to inquire specifically if jurors were members of the Ku Klux Klan. The court agreed with the argument of the appellants that "the right to challenge would be empty if the right to question as to material facts is abridged." *Id.* at 51.

28. An excellent example of this is provided by Charles R. Garry's voir dire in the Huey Newton murder trial where a prospective juror was being questioned about his acceptance of the presumption of innocence. As the following excerpt shows, the juror repeatedly responded affirmatively to the judge's lofty phrases about the judicial system, but only to Mr. Garry's more direct questions did he indicate that he really could not accept the fact that the defendant was innocent until proven guilty.

THE COURT: Now . . . it is the law of the United States and of the State of California that a defendant charged with a crime is presumed to be innocent until his guilt is established beyond and to the exclusion of every reasonable doubt. Do you understand what that means?

THE JUROR: (Juror nods head affirmatively.)

THE COURT: Now, if that is the case, you must — before you hear any evidence at all — you must start on the theory and believe that this man is innocent. But as soon as they produce proof which satisfies you beyond a reasonable doubt that he is guilty, then you can feel otherwise. Do you understand that?

THE JUROR: Yes.

MR. GARRY: But you are not willing, Mr. Strauss, as you have already stated, to accept the fact that Huey Newton is absolutely innocent as he sits right now, are you, sir?

A. Well, that's a question I can't answer before I hear the evidence.

Voir Dire by Defense (Extracts), in *MINIMIZING RACISM*, *supra* note 7, at 92-3.

MR. GARRY: As Huey Newton sits here next to me now, in your opinion is he absolutely innocent?

A. Yes.

Q. But you don't believe it, do you?

A. No.

in voir dire is that, unlike the judge, trial attorneys are familiar with facts of the case which may present important areas for inquiry.²⁹ Finally, the authority and imposing appearance of the judge may awe prospective jurors into giving what they think is the appropriate response rather than the candid one. A venireman being examined on voir dire by the court may feel that his own integrity is on trial³⁰ and phrase the answers accordingly. The informality of questioning by trial counsel is better calculated to put the prospective juror at ease and induce greater spontaneity and candor.

These limitations on a court's ability to elicit information may lead to more serious problems as the parties seek elsewhere the information which they need to effectively exercise their right to challenge jurors. Outside investigation of veniremen can threaten the integrity of the judicial process and make each party's opportunity to have an impartial jury rest on its investigative resources. The courts facilitate investigations since in most federal districts jury lists are available to counsel well in advance of trial.³¹ Private counsel may subscribe to a commercial juror investigation service, employ a detective agency, or have investigators permanently attached to the attorney's staff. Government counsel make use of the investigatory services of the Federal Bureau of Investigation, the Internal Revenue Service and local police departments.³²

Outside investigations of prospective jurors may seriously compromise the judicial system's ability to give criminal defendants a fair trial. When jurors are aware that they have been investigated their fear or resentment of the investigating party may influence their verdict.³³ If the inadequacies of court-conducted voir dire result in outside investi-

THE COURT: Challenge is allowed.

Id. at 94.

29. Although under Rule 24(a) counsel are entitled to submit suggested questions to the court, the court is under no obligation to ask the recommended questions and its refusal to do so is not generally subject to effective review. *See* text accompanying notes 17-23 *supra*.

30. *United States v. Lewin*, 467 F.2d 1132, 1137 (7th Cir. 1972). Broeder's post-trial interviews with jurors revealed that "most felt being challenged would adversely reflect upon their ability to be fair and impugn their good faith." *Empirical Study*, *supra* note 7, at 526. When asked individually on voir dire the seemingly innocuous question, "Can you be fair and impartial?" the jurors were "almost uniformly resentful and felt that their integrity had been brought into question." *Id.* at 526-27.

31. *Okun*, *supra* note 7, at 849. However, federal statute only requires that jury lists be released in advance of trial to those charged with treason or other capital offense. 18 U.S.C. § 3432 (1970).

32. *Okun*, *supra* note 7, at 851-54.

33. As one juror reported, "I felt they must have been spying on us for a month. That didn't help the defendant one bit, I can tell you that." *Empirical Study*, *supra* note 7, at 526.

gations, the court may be permitting and even encouraging undue invasions of the privacy of prospective jurors. When there is public knowledge of the prevalence of pre-trial investigations, citizens may become even more determined to avoid jury service, further limiting the representativeness of the pool from which trial jurors may be drawn.

Despite the threats to the integrity of the judicial system posed by pre-trial investigation of jurors, the courts generally have not prohibited or even condemned the practice. In one early case, a conviction was reversed because the court clerk had sent questionnaires to the venire panel for the use of the United States Attorney in jury selection.³⁴ More recent decisions, however, have been more approving. One court found the use of a commercial jury service a necessary concomitant of the right to challenge jurors.³⁵ Although the service telephoned neighbors and friends of the prospective juror to obtain personal information, the court refused to find that the acts "would normally have a tendency to intimidate the juror."³⁶ One district judge justified his refusal to ask a submitted question on voir dire by citing the availability of a juror investigation service in the district.³⁷ Furthermore, appellate courts have not disapproved of juror investigations by the government. Courts have found no impropriety in the use by a United States Attorney of F.B.I. reports,³⁸ special reports prepared by the Internal Revenue Service,³⁹ or a jury book containing information on how particular jurors had voted in previous trials.⁴⁰ In addition, when requested to do so, the courts have refused to grant defendants access to the government's information.⁴¹

The loss of the defendant's constitutional right to an impartial jury

34. *Gideon v. United States*, 52 F.2d 427 (8th Cir. 1931).

35. *Dow v. Carnegie-Illinois Steel Corp.*, 224 F.2d 414 (3d Cir. 1955), *cert. denied*, 350 U.S. 971 (1956).

36. 224 F.2d at 431.

37. *Kiernan v. VanSchaik*, 347 F.2d 775, 777 (3d Cir. 1965). The appellate court found the judge's reasoning erroneous and reversed.

38. *Best v. United States*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951); *Christoffel v. United States*, 171 F.2d 1004 (D.C. Cir. 1948), *rev'd on other grounds*, 338 U.S. 84 (1949).

39. *United States v. Costello*, 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). One of the appellant's contentions was that the government had violated the confidential nature of income tax returns. The court held that the appellant, who had been convicted of income tax evasion, did not have standing to complain of the inspection of jurors' tax returns.

40. *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958), *cert. denied*, 359 U.S. 916 (1959). Although the United States Attorney had testified that the jury book contained only information obtained in open court, the judge's *in camera* examination of the book revealed a number of reports about the behavior of individual jurors in the jury room.

41. *Best v. United States*, 184 F.2d 131, 141 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951); *Christoffel v. United States*, 171 F.2d 1004, 1006 (D.C. Cir. 1948), *rev'd on other grounds*, 338 U.S. 84 (1949).

is inevitable where his ability to intelligently challenge jurors is made dependent upon his ability to match the information-gathering capacity of the federal government. The United States Attorney's investigative advantages are overwhelming.

In the place of private detective agencies or investigation services the Government has available the vast resources of its law enforcement and crime detection network. In the place of random notation by individual attorneys in a jury book, the Government has the benefit of continuous recording by all of its counsel, uninterrupted by the passage of time.⁴²

The F.B.I. and the Internal Revenue Service have access to information beyond the reach of any private investigator. Individuals and institutions are likely to refuse information to a private detective which they would willingly reveal to a government agent. While private investigators may be subject to court punishment for improper conduct, there are no practical limitations upon the government's investigatory practices.⁴³

REFORMING VOIR DIRE IN THE FEDERAL COURTS

The serious inadequacies of court-conducted voir dire could be remedied with only minor reforms by the Judicial Conference.⁴⁴ The Federal Rules of Criminal Procedure or the rules of the individual districts could be amended to prohibit gathering any information about prospective jurors outside the courtroom. Perhaps the most effective means of discouraging investigations would be to withhold lists of jurors from the parties until the time of trial,⁴⁵ except in cases where disclosure is required by statute.⁴⁶ Rules which attempt to prohibit the government from using outside information sources may be extremely difficult to en-

42. Okun, *supra* note 7, at 852 (footnotes omitted).

43. *Id.* at 853. Although government investigations are theoretically subject to supervision, the government's investigatory improprieties are not effectively controlled for a number of reasons. The public is less likely to bring complaints about governmental investigatory practices to the attention of law enforcement agencies. While such agencies may regularly police private investigations, there is no governmental agency to police the F.B.I. or the United States Attorney's office. Courts will be reluctant to prohibit government investigations because of the difficulty of framing such orders without proscribing legitimate investigations.

44. Since appellate review cannot produce voir dire reform, *see* text accompanying notes 17-23 *supra*, affirmative action would be needed to accomplish the suggested changes.

45. Some jurisdictions currently have district rules or standing court orders which require that lists of prospective jurors be withheld. *Stone v. United States*, 324 F.2d 804 (5th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958), *cert. denied*, 359 U.S. 916 (1959).

46. *E.g.*, 18 U.S.C. § 3432 (1970).

force.⁴⁷ A potentially effective means of reducing, if not wholly eliminating, governmental investigations of veniremen would be to amend the Federal Rules of Criminal Procedure to curtail or eliminate the government's right to make peremptory challenges.⁴⁸ If prohibition of investigations or elimination of peremptory challenges is unsuccessful, the courts could require the government to disclose to the defendant all its outside information about prospective jurors before the time of jury selection.

The federal courts, through the Judicial Conference, could articulate clear policy statements about the type of questioning appropriate in the voir dire⁴⁹ as well as specific lists of model questions to be used in most criminal trials and lists of special questions appropriate to trials for particular crimes⁵⁰ or for particular categories of defendants, such as blacks or political activists.⁵¹ In order to make appellate review effective, the Conference should urge that the entire voir dire proceedings, including any questions submitted by counsel which the court declined to ask, be preserved in the record and that appellate courts report in detail the nature of the voir dire proceedings which they consider. Pre-trial conferences could be used as an opportunity for the court and the parties to agree on

47. See note 43 *supra* & text accompanying.

48. Refusing the prosecution the right to challenge jurors peremptorily is not as drastic a measure as it may appear. The presumption of innocence entitles the prosecution only to twelve jurors, each of whom, at the outset of the trial, is convinced of the defendant's innocence. Charles R. Garry argues that the prosecution should not be entitled to peremptory challenges under any circumstances and presents historical evidence that peremptory challenges were developed solely for the benefit of the defendant. Garry, *Attacking Racism in Court Before Trial*, in *MINIMIZING RACISM*, *supra* note 7, at xxiii; Stender, *Appellate Brief on Jury Selection*, in *MINIMIZING RACISM*, *supra* note 7, at 240-41.

49. Such policies might, for example, encourage use of specific, objective, open-ended questions rather than general, subjective questions capable of being answered by a simple affirmative or negative response. Questions which use hypothetical statements to attempt to precommit a juror to a verdict could be prohibited. Questioning of individual jurors out of the presence of other prospective jurors might be called for when the responses would have a tendency to prejudice, as would responses about pretrial publicity. Questions posed to individual jurors might be preferred over questions directed to the panel as a whole.

50. This should not be a difficult task since only limited categories of crimes are tried in the federal courts. Thus, questions about experiences with stolen cars would be appropriate in prosecutions under the Dyer Act, 18 U.S.C. §§ 2311-13 (1970), while questions about experiences with the Internal Revenue Service would be appropriate in tax prosecutions.

51. The Supreme Court has directed that questions about racial prejudice must be asked when a black person is on trial. *Aldridge v. United States*, 283 U.S. 308 (1931). The Seventh Circuit has suggested that where the defendant has an unusual political belief, appearance, or life style, questions should probe juror attitudes towards such nonconformity. *United States v. Dellinger*, — F.2d —, 12 Crim. L. Rep. 2193, 2194-95 (7th Cir. Nov. 21, 1972). *But cf.* *Ham v. South Carolina*, — U.S. —, 93 S. Ct. 848 (1973) (attitudes towards defendant's beard need not be probed in state prosecution).

the extent of the voir dire and to predetermine which portions of the questioning should be done by the court and which by the parties. Where informality is most likely to induce candor, attorney questioning can be used. Counsel are probably also better suited to handle the voir dire where probing, follow-up questions may be needed. If a case demands either questioning of a personal nature which might tend to offend a juror or unusually lengthy questioning which might irritate a juror, it is better for the judge to do the questioning. Where the guidelines are clearly understood in advance, the voir dire procedure should be considerably expedited and the danger of counsel abuses considerably minimized.

Where appropriate, trial judges should also consider substituting sworn questionnaires for oral examination.⁵² Written questionnaires could cover many of the same areas of inquiry, be more comprehensive and point out areas where further in-court questioning would be useful. Questionnaires have the added advantages of not requiring the use of court time and the possibility of inducing greater candor where jurors are not under the pressure of oral interrogation. Completed questionnaires should be made available to the attorneys for inspection prior to the beginning of the oral voir dire so that counsel may suggest more probing questions. Juror privacy can be protected by destroying the questionnaires once they are no longer needed and by prohibiting the attorneys from making any permanent record of information obtained from them. However, any portions of the questionnaire which might be relevant on appeal should be preserved for *in camera* use by the appellate court. Adoption of these reforms will enable courts to achieve the constitutional goal of impartiality without placing undue burdens of time or expense upon the judicial system.

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52. While questionnaires are currently required in many jurisdictions, they average only one page in length and seek relatively little information. Existing questionnaires are only designed to obtain information about physical, mental and legal qualifications for jury service, rather than information which could indicate a juror's suitability for a particular case. Okun, *supra* note 7, at 845-46.