PRIVACY AND JURY SELECTION: DOES THE CONSTITUTION PROTECT PROSPECTIVE JURORS FROM PERSONALLY INTRUSIVE VOIR DIRE QUESTIONS?

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I. INTRODUCTION

The cover story of a recent issue of Newsweek Magazine was entitled "The Scary New World of Identity Theft" and asked the question, "Are You A Victim?"[2] The article informed an already concerned readership that identity theft is the "fastest-growing crime of this century" and that perpetrators steal approximately $53 billion per year through assuming the identities of millions of victims.[3] The article further confirmed what most of its readers already knew – that identity theft occurs through the thief's acquisition and use of personal information regarding his or her victims. Crooks are becoming increasingly creative in devising schemes that enable them to acquire such information.

Privacy has always been highly valued by Americans. As noted by Supreme Court Justice Brandeis, "The right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men."[4] In recent years, however, Americans' concern about keeping personal information private has become more urgent. The growing concern is a natural response to increased awareness of the vast amounts of private information now publicly available through legal and illegal means, as well as the numerous stories of scam artists and identity thieves profiting from these stores of information.[5] In today's world, people are required to produce significant quantities of personal information in order to acquire credit cards, obtain mortgages, receive medical services, and

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[2] Steven Levy & Brad Stone, *Grand Theft Identity*, NEWSWEEK, July 4, 2005, at 38.

[3] *Id*. at 42.

[4] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[5] Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18, 20 (2001).

participate in a wide variety of necessary transactions.[6] For the most part, that information is stored in computer databases that are not necessarily secure. Today's technology facilitates the compilation and exchange of information, making it virtually impossible to restrict access to personal data or to even know who has access to the information.[7]

At the same time that Americans' interest in keeping personal information private is growing, the American legal system is demanding ever more personal information from citizens selected to perform jury service. Prior to sitting on a jury, prospective jurors are questioned extensively through written questionnaires, by the court, and sometimes by attorneys in order to determine whether they meet statutory requirements for service and whether they harbor biases that might prevent them from impartially deciding the case. Over the years, this process of questioning jurors has expanded into areas of inquiry that arguably have little or no direct relevance to the case. Jurors are asked about their personal habits, the books they read, the television shows they watch, all in response to a pervasive belief that it is the attitudes of jurors, rather than the evidence presented, that determines how jurors decide a case.[8] Believing that the "bias of a juror will rarely be admitted by the juror himself,"[9] many courts have permitted broad inquiry far beyond the specific facts of the case being litigated in an effort to ferret out any possibility that a juror may be predisposed to view the evidence in a certain way.

This article explores the extent to which the privacy interests of prospective jurors should limit the amounts and types of information sought and disclosed during the jury selection process. At issue is the historical role of the jury, the constitutional right of litigants to trial by an impartial jury, and the public's right to open access to trial proceedings. Legal scholars do not agree on the question of whether prospective jurors have a constitutional right to privacy that must be balanced against such countervailing interests, and the Supreme Court has thus far failed to answer the question. The result is confusion and substantial variance in the courts as to the appropriate scope of voir dire and the extent to which privacy interests of prospective jurors should be considered in determining voir dire practices. This article argues that prospective jurors have no constitutional right to privacy with respect to matters directly related to the question of juror bias, although they may have a legitimate interest in limited disclosure of such information which should be accommodated to the extent

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[6] *Id.*

[7] *Id.*

[8] David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 19 (1997).

[9] McDonough Power Equip. v. Greenwood, 464 U.S. 548, 558 (1984) (Brennan, concurring).

practicable. Prospective jurors do, however, have a constitutional right to privacy with respect to matters not directly related to the question of bias, and the existence of this constitutional right should lead the trial court judge to limit the exploration of such matters during the jury selection process.

II. THE HISTORY AND ROLE OF THE AMERICAN JURY

The concept of a jury – defined as a group of people assembled to decide disputes between other people[10] – is of ancient lineage. Examples of juries can be found in archaic mythological stories deciding disputes between both gods and mortals.[11] Though not the primary method of dispute resolution in the ancient world, juries of various forms existed in Ancient Egypt, Mycenae, Druid England, Greece, Rome, Viking Scandinavia, the Holy Roman Empire, and Saracen Jerusalem before the Crusades.[12]

The United States inherited its use of the jury system from the English. Historical records suggest that trial by jury was first introduced into England by William the Conqueror during the Conquest.[13] In 1166, Henry II established the Assize of Clarendon, which created a system of juries known as "assizes" to decide disputes involving real property. This event has been recognized as the first important historical marker in the development of the English jury system.[14]

The medieval jury system was vastly different from the modern jury system. Most significantly, medieval jurors were chosen as jurors largely because of their familiarity with the parties and the facts of the dispute.[15] If they did not have sufficient familiarity, they were expected to find other persons who did to serve as jurors.[16] This is in sharp contrast to today's American jurors, who are chosen to serve in part because they have no knowledge of the parties or of the dispute. Medieval jurors were expected to rely on their own personal knowledge to resolve the case, while today's jurors are expected to consider only the evidence

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[10] Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 813 (1997).

[11] *Id.*

[12] *Id.*

[13] *Id.* at 816.

[14] *Id.* at 818.

[15] Nancy S. Marder, The Jury Process, 18 (2005).

[16] *Id.*

presented to them in the courtroom, rendering an uninformed juror the ideal juror.[17]

Medieval jurors were also required to engage in active, independent fact-finding as part of their role as jurors, going out into the community to interview neighbors and others who might have information concerning the case.[18] Fact-finding was not limited to the courtroom. Today, of course, it would be improper for a juror to engage in independent factual investigation. Instead, jurors are supposed to enter the courtroom without any preconceived ideas about the case and consider only the evidence presented by the parties.[19]

The jury system adopted by the American colonies omitted the out-of-court investigative fact-finding performed by medieval jurors.[20] However, inside the courtroom, jurors both found facts and interpreted the law.[21] Jurors were instructed that they were free to decide the facts and the law, and further, that their decision in the case should be consistent with their sense of what was right, even if that decision was in direct opposition to the instruction of the court.[22] In this way, the jury acted as a check against abuse of government power and ensured that the law was interpreted in a way that was consistent with community values.

In the mid-1800s, the American jury system evolved to more closely resemble its modern-day structure. The power of the jury to interpret and decide the law was curtailed. Instead, as is true today, the jury became a body authorized to decide the facts only, and to apply the law to those facts as given to it by the judge.[23] Jurors, chosen for their ignorance of the facts and parties, were required to rely on the presentations of the lawyers in the courtroom and the judge's explanation of the law. They were, as they are today, expected to reach a verdict based on what they heard and saw in court during the trial only.[24]

Today's juries serve a variety of roles. One such role is to operate as a check on potential abuse of government power. In criminal cases, juries provide a political buffer between the defendant and the government.[25] As stated by

[17] *Id.*

[18] *Id.* at 19.

[19] *Id.*

[20] *Id.* at 20.

[21] *Id.*

[22] *Id.* at 20-21.

[23] *Id.* at 22-23.

[24] *Id.* at 23.

[25] *Id.* at 10.

Justice White in Duncan v. Louisiana, the criminal jury provides an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[26] In criminal and civil cases alike, juries provide a counterbalance to the tremendous power wielded by judges, many of whom are unelected officials with lifetime tenure. Juries keep judges and, indirectly, legislatures in touch with ordinary citizens and their views of cases, thereby providing an antidote to concerns that judges are too distant from ordinary people.[27] In other words, the jury ensures that cases are decided in accordance with the commonsense values of the community, rather than in accordance with views and values of a particular judge.

Juries also serve as fact-finders with respect to the cases they are charged to decide. They are particularly skilled in this role. Studies show that groups perform better than individuals when it comes to solving problems and reaching correct answers.[28] Each juror contributes his or her own recollection of the evidence, and because different people remember different things, the group memory is greater and more complete than any single individual's memory could possibly be.[29] In addition, each juror brings to the deliberation a different mental framework from which he analyzes and weighs the evidence, shaped by each individual's unique experiences, attitudes and values. Cases are thus considered from many different viewpoints as a part of the deliberative process.[30] In this way, the system is calculated to produce an accurate and just verdict that is consistent with the values of the community.

III. THE CONSTITUTIONAL REQUIREMENT OF JUROR IMPARTIALITY

In order to ensure that the jury reaches a correct determination of the case before it, jurors are expected to approach their task in a fair-minded and impartial manner. This is the cornerstone of the American dispute resolution process – that questions of guilt or innocence, as well as questions of civil

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[26] 391 U.S. 145, 150 (1968).

[27] Marder, *supra* note 15, at 11.

[28] Marder, *supra* note 15, at 8, citing Ballew v. Georgia, 435 U.S. 223, 233 n.15 (1978) (referencing a study indicating that individual prejudice is more easily overcome in group situations); Reid Hastie et al., Inside the Jury 236 (1983) ("The group memory advantage over the typical or even the exceptional individual is one of the major determinants of the superiority of the jury as a legal decision mechanism").

[29] *Id.*

[30] *Id.* at 8, 15.

liability, will be resolved on the basis of evidence presented to an unbiased decision-maker.

The right to an impartial jury has been characterized as "one of the most sacred and important guarantees of the constitution."[31] The Sixth Amendment expressly provides that in criminal trials, the defendant "shall enjoy the right to a speedy and public trial by an impartial jury. . . ."[32] The Supreme Court has held that this right is also implicit in the Due Process Clause of the Constitution, and that the Seventh Amendment implies a right to an impartial jury in civil cases as well as criminal cases.[33]

How does one define the term "impartial juror"? According to the United States Supreme Court, an impartial juror is one who can "lay aside his opinion and render a verdict based on the evidence presented in court. . . ."[34] Impartiality is not defined by an absence of opinion on any related topic, nor by an absence of preconceived notions or beliefs.[35] Instead, an impartial juror is simply one with a "mental attitude of appropriate indifference,"[36] one who is able to "conscientiously apply the law and find the facts."[37]

It is important to note that with respect to jurors, a litigant is entitled only to impartiality.[38] He does not have a right to jurors of any particular predisposition, or who have possess any particular characteristics, or adhere to any particular value system – unless those predispositions or values rise to such a level that the juror cannot view the evidence or decide the case in an impartial manner.[39]

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[31] People v. Wells, 197 Cal. Rptr. 163, 167 (Cal. Ct. App. 1983).

[32] U.S. Const. amend. VI.

[33] Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946); McDonough Power Equip. v Greenwood, 464 U.S. 548, 549 (1984); Morgan v. Illinois, 504 U.S. 719, 727 (1992). *See also* Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976); Irvin v. Dowd, 366 U.S. 716, 722 (1961); Hamer v. United States, 259 F.2d 274, 279 (9th Cir. 1958). In Duncan v. Louisiana, the Supreme Court held that the Sixth Amendment provision for an impartial jury in criminal cases applies to the states as well as the federal government 391 U.S. 145 (1968).

[34] Patton v. Yount, 467 U.S. 1025, 1037, n.12 (1984).

[35] Michael Glover, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CAL. L. REV. 708, 716 (1982), citing Irwin v. Dowd, 366 U.S. 717, 723 (1961).

[36] United States v. Wood, 299 U.S. 123, 145-46 (1936).

[37] Lockhart v. McCree, 476 U.S. 167, 178 (1986).

[38] This assumes that all qualification requirements have been satisfied. Taylor v. Louisiana, 419 U.S. 522 (1975).

[39] *Id*.

Implicit in the Sixth Amendment's guarantee of an impartial jury is the requirement that the jury be drawn from a "fair cross-section of the community."[40] The Supreme Court has held that in accordance with our "democratic heritage", a jury must be drawn from a venire that includes all community groups.[41] As noted by the Court, the purpose of the jury is to provide a check against arbitrary governmental power, to "make available the commonsense judgment of the community. . . . This prophylactic vehicle is not provided if the jury pool is made up only of special segments of the populace or if large, distinctive groups are excluded from the pool."[42]

Although juries must be drawn from venires which represent a fair cross-section of the community, there is no requirement that the petit jury itself be representative of the community.[43] The Supreme Court has recognized that extending the fair cross-section requirement to petit juries would create an unworkable standard that would be impossible to satisfy, given the limited size of the petit jury.[44] As stated by the Court in Thiel v. So. Pacific Co.:

> The American tradition of trial by jury ... necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.[45]

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[40] The Supreme Court identified the fair cross-section requirement as "fundamental" to the right to an impartial jury in Taylor v. Louisiana. *Id.*

[41] *Id.* at 530.

[42] *Id.* *See also* Lynd, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231 (1998).

[43] *Taylor*, 419 U.S at 538.

[44] *Lockhart*, 476 U.S. at 174. *See also* Holland v. Illinois, 493 U.S. 474 (1990) (Fair cross-section requirement applicable to the jury venire need not be applied to the petit jury); Batson v. Kentucky, 476 U.S. 79, 85 n.6 (1986) ("[I]t would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society").

[45] 328 U.S. at 220 (1946), as cited by the Court in J.E.B. v. Alabama, ex. rel. T.B., 511 U.S. 127, 146 (1994).

Thus, while it may be impossible to ensure that a jury mathematically represents every social, economic, religious, political, and ethnic group, the jury is nevertheless expected to be generally representative of the community. As stated by the Supreme Court in Thiel, members of the various community groups should not be systematically excluded. In order to preserve the legitimacy of the jury as a fair and just body for resolving disputes, maintenance of its representative character is critical.[46]

IV. VOIR DIRE AND ITS IMPACT ON JUROR PRIVACY CONCERNS

There is no debate that in order for our legal system to function properly, a certain amount of information from prospective jurors is required. First, the state and federal judicial systems have basic qualification criteria that must be met in order for an individual to qualify for jury service.[47]

Second, information from prospective jurors is required in order to determine whether they are capable of deciding a particular case in an impartial manner. As noted, the Constitution guarantees litigants a fair and impartial decision-maker, and it is the responsibility of the judge to ensure that the jurors selected to serve are indeed unbiased.[48]

In order to gather the necessary information, courts generally employ two primary approaches. First, many courts send prospective jurors written questionnaires seeking basic information which the jurors are required to complete prior to appearing in court.[49] Some courts also send prospective jurors questionnaires seeking information specifically related to the case upon which the jurors may be called upon to serve.[50] The purpose of questionnaire is to

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[46] Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1317 (2000).

[47] For example, in order for a person to serve as a juror in the federal judicial system, he or she must be a United States citizen of at least 18 years of age, be able to read, write, understand and speak English to a specified degree of proficiency, have resided in the judicial district for at least one year, and be physically and mentally capable of rendering satisfactory jury service. In addition, the prospective juror must have no charge pending against him or her for the commission of, or have been convicted of, a crime punishable by imprisonment for more than one year. 28 U.S.C. §1865(b).

[48] Conners v. United States, 158 U.S. 408, 413 (1895); United States v. Padilla-Valenzuela, 896 F. Supp. 968, 970 (1995); *Wells*, 197 Cal.Rptr. 163 (Cal. Ct. App. 1983).

[49] Marder, *supra* note 15, at 79; American Bar Association, Principles for Juries and Jury Trials 69-70 (2005). *See, e.g.*, Bellas v. Super. Ct. of Alameda County, 85 Cal. App.4th 636, 102 Cal.Rptr.2d 380 (2000).

[50] In October 2005, the author conducted a survey of eighteen federal district court judges serving in eleven states. Every judge contacted verified the common practice of seeking qualification information of prospective jurors through written questionnaires. A majority of the judges also indicated that they occasionally send more specific, detailed questionnaires custom-made for a particular case upon which the jurors may be asked to serve.

shorten the length of time required for oral questioning of prospective jurors in open court prior to trial, thereby streamlining the process.[51]

The second means of gathering information regarding potential jurors is through the process known as "voir dire". Voir dire – which, literally translated, means, "to speak the truth" – involves oral questioning of prospective jurors prior to trial in order to collect information that may reveal the existence of actual or implied bias.[52] The questioning is usually done by the judge, or by a combination of judge and lawyers, or by the lawyers under the supervision of the judge.[53] Judges often ask standard questions supplemented by questions submitted to the judge by the attorneys prior to trial.[54] Based on the information obtained during this questioning process, the litigants may then seek to strike prospective jurors from the panel through the exercise of challenges "for cause" or peremptory challenges.[55]

A prospective juror will be dismissed for cause if the judge has reason to doubt, based on the information elicited, that the juror is capable of being impartial.[56] In many jurisdictions, grounds sufficient to support a challenge for

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[51] Principles for Juries and Jury Trials, *supra* note 49, at 70.

[52] People v. James, 304 Ill.App.3d 52, 58, 710 N.E.2d 484, 489 (1999).

[53] *See* Marder, *supra* note 15, at 74-75; Valerie P. Hans and Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179 (2003); Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHI-KENT L. REV. 1061. The majority of federal district court judges surveyed in October 2005 (*see supra* note 50,) utilize a combination of judge-led and attorney-led voir dire in civil cases. Voir dire questions are discussed during the pretrial conference and the litigants' attorneys present questions that they would like the judges to ask the prospective jurors. Usually, the judge conducts the bulk of the voir dire and attorneys are permitted 20 to 30 minutes to ask follow-up questions. In contrast to civil cases, many judges indicated that they do not permit attorney questioning of prospective jurors during voir dire in criminal cases, preferring instead to ask all questions themselves.

[54] *Id*. In the American Bar Association's recent publication, "Principles for Juries & Jury Trials", it is argued that voir dire should be conducted by a combination of the judge and the parties, not by the judge alone. The publication acknowledges the factors encouraging judge-only voir dire: unduly lengthy questioning by attorneys, intrusive questioning by attorneys, and attorneys attempting to "argue their cases" in their voir dire questions. However, the publication concludes that "voir dire by the judge, augmented by attorney-conducted questioning, is significantly fairer to the parties and more likely to lead to the impaneling of an unbiased jury than is voir dire conducted by the judge alone. A simple, perfunctory examination by a judge does not 'reveal preconceptions or unconscious bias'". Principles for Juries and Jury Trials, *supra* note 49, at 72, *citin*g Dingle v. State, 759 A.2d 819, 828-29 (Md. 2000), Darbin v. Nourse, 664 F.2d 1109, 1115 (9th Cir. 1981), State v. Ball, 685 P.2d 1055, 1058 (Utah 1984).

[55] Rose, *supra* note 53.

[56] *Id*. *See also* Swain v. Alabama, 380 U.S. 202, 220 (1965) (Challenges for cause are appropriately granted where the juror demonstrates a "narrowly specified, provable and legally cognizable basis for partiality").

cause are enumerated by statute.[57] Such grounds typically include an interest in the outcome of the case, a bias for or against one of the parties, a failure to meet the qualifications established by law for jury service, a familial relation to a participant in the trial, or an inability or unwillingness to hear the case fairly and impartially.[58]

Peremptory challenges, of which each party has only a limited number,[59] permit a party to dismiss a juror without explanation.[60] The purported purpose of the challenge is to permit parties to exclude jurors who they suspect of bias, but with respect to whom they lack sufficient proof of bias to sustain a challenge for cause.[61] A litigant may exercise a peremptory challenge to excuse a potential juror for any reason, except that a litigant may not excuse a juror based on race, gender or ethnicity.[62]

The trial judge has broad discretion to determine the scope and breadth of the voir dire process.[63] The judge may decide which questions may be asked, which may not, who will conduct the questioning, and in what manner.[64] The discretion of the trial judge is not without boundaries, however. The Supreme Court has held that, at a minimum, the judge must permit sufficient questioning of prospective jurors to ascertain whether the juror has any bias, opinion or prejudice that will prevent him from deciding the case in an impartial manner.[65]

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[57] Principles for Juries and Jury Trials, *supra* note 49, at 74.

[58] *Id*. at 74 ("The general grounds are designed to exclude the prospective juror who, consciously or unconsciously, is unable to act impartially as required by law").

[59] In federal civil trials, each party has only three peremptory challenges; in federal felony trials (except death penalty cases), the defendant has ten peremptory challenges and the prosecution has six; in death penalty cases, both sides are permitted 20 peremptory challenges. 28 USC §1870; Fed Rule of Crim Proc 24(b). State courts vary with respect to the number of peremptory challenges provided to litigants. All fifty states currently permit the use of peremptory challenges, generally allocating an equal number to each party and in criminal cases, increasing the number as the severity of the charge increases. *See* Rose, *supra* note 53; Principles for Juries and Jury Trials, *supra* note 49, at 77.

[60] Swain 380 U.S. at 220 ("The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control…[It] permits rejection for a real or imagined partiality that is less easily designated or demonstrable.").

[61] Principles for Juries and Jury Trials, *supra* note 49, at 76, citing *Swain*, 380 U.S. 202(1965).

[62] *Batson*, 476 U.S. 79 (1986); *J.E.B.* 511 U.S. 127 (1994); Georgia v. McCollum, 505 U.S. 42 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Powers v. Ohio, 499 U.S. 400 (1991).

[63] Aldridge v. United States, 283 U.S. 308, 310 (1931); Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981); Mu'Min v. Virginia, 443 U.S. 415 (1991); *Padilla-Valenzuela*, 896 F. Supp. 968 (1995).

[64] Deghand v. Wal-Mart Stores, 980 F.Supp. 1176, 1179-80 (1997).

[65] Conners v. United States, 158 U.S. 408, 413 (1895).

In so doing, the trial judge must consider that the juror may not admit that he is biased, even if he is in fact biased.[66] As noted by Justice Brennan in McDonough Power Equipment, Inc. v. Greenwood, "[T]he bias of a juror rarely will be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. . . .'"[67]

To the extent permitted by the judge, most trial attorneys will seek large amounts of information from prospective jurors.[68] The more information that an attorney can obtain, the happier he will be, as he intuitively assumes that the information he acquires will provide insight into whether or not the prospective juror will be favorably disposed toward his client's case.[69] A trial attorney will generally seek information that is logically related to establishing bias in a particular case, and he will also seek information which, based on his own sometimes illogical hunches, prejudices, and psychological theories, he believes might be indicative of a predisposition that is either favorable or unfavorable toward his client's case.[70] The information sought does not have to be reasonably calculated to support a challenge for cause to satisfy the attorney's appetite for knowledge. Because attorneys are permitted to exercise peremptory challenges without stating a reason, they may act on theories that others might find

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[66] Mary Rose's empirical study of jurors' views concerning voir dire supports the conclusion that not only are jurors frequently reluctant or unwilling to admit even a little partiality, but they sometimes cannot accurately assess their own bias. She writes, "In all likelihood, it is not only psychologically difficult or embarrassing to refer to oneself as biased, but also may seem wrong in a moral sense when so many others accept their duty." Rose, *supra* note 53, at 1097.

[67] 464 U.S. 548, 558 (1984) (Brennan, J., concurring).

[68] *See, e.g.*, United States v. McDade, 929 F. Supp. 815, 816 (E.D. Pa. 1996) (considering 106 proposed voir dire questions); Brandborg v. Lucas, 891 F.Supp. 352, 353 (E.D. Tex. 1995) (110 questions on questionnaire plus questions regarding associations with 115 potential witnesses);); *Wells*, 197 Cal.Rptr. 163 (Cal. Ct. App. 1983).

[69] As the famous trial attorney Clarence Darrow once said,

> Choosing jurors is always a delicate task ... in this undertaking, everything pertaining to the prospective juror needs to be questioned and weighed: his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads, and many more matters that combine to make a man; all of these qualities and experiences have left their effect on ideas, beliefs and fancies that inhabit his mind.
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> Clarence Darow, *Attorney for the Defense: How to Pick a Jury*, Esquire, May, 1936.

[70] Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178 (1990) ("The active attorney, attempting to achieve control, culls his or her store of knowledge for useful counsel, some of it based on experience and logic, and some of it based on folklore, superstition and magic").

irrational – such as "avoiding bald men and people with green socks."[71] The bases for the exercise of peremptory challenges can be as individualized as the attorney himself, based on stereotypes, peculiar theories, and arbitrary hunches.[72]

The advent of social scientists and jury consultants as participants in the jury selection process beginning in the 1970s has only increased the amount of personal information sought from prospective jurors – much of it seemingly unrelated to the facts of the case at hand and instead focused on attitudes, prior experiences and predispositions of the jurors.[73] Attorneys want to know which television shows the jurors watch, the bumper stickers they have on their cars, the hobbies they enjoy, to which organizations they belong.[74] Such questioning is based on a pervasive belief that it is the attitudes of jurors, not the evidence, which determine how a jury decides a case.[75]

Obviously, trial attorneys' demands for increasing amounts of personal information from jurors in the courtroom directly conflicts with the American population's increasing interest in keeping such information private. Exacerbating the privacy concern is the fact that trials, including voir dire, have historically been open to the public.[76] In Press Enterprise Co. v. Superior Court, the Supreme Court expressly acknowledged the constitutional right to open access in criminal trials, noting that the ability of the public to observe trial proceedings, including voir dire, "enhanced public confidence."[77] In concurrence, Justice Marshall observed that "the constitutional rights of the public and press to access to all aspects of criminal trials are not diminished in cases in which 'deeply personal matters' are likely to be elicited in voir dire proceedings."[78]

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[71] Valerie Hans & Alayna Jehle, *supra* note 53.

[72] *See, e.g.*, Lynd, *supra* note 42, in which the author identifies a criminal attorney who claims to use a "Jimmy Buffett theory of jury selection." The attorney believed that fans of the singer best known for the song "Margaritaville" were more likely to have experienced bad treatment at the hands of police and therefore were likely to be sympathetic to his clients' claims of abusive police behavior.

[73] Shari Seidman Diamond, *supra* note 70; *see also* Monsen, *Privacy for Prospective Jurors At What Price? Distinguishing Privacy Rights From Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases*, 21 REV. LITIG. 285 (2002) (The use of trial consultants exposes prospective jurors to lengthy and intrusive voir dire); United States v. Padilla-Valenzuela, *supra* note 48, at 971 (1995) ("The relatively recent entry of social scientists assisted by computer analysis has undoubtedly expanded the scope of matters attorneys find useful in selecting prospective jurors").

[74] *See, e.g.*, *McDade*, 929 F.Supp.815 (E.D. Pa. 1996); United States v. Phipps, 999 F.2d 1053 (1993).

[75] Hannaford, *supra* note 5.

[76] Monsen, *supra* note 73.

[77] 464 U.S. 501, 505 (1984).

[78] *Id*. at 520 (Marshall, J., concurring).

While the Supreme Court has not expressly found a constitutional right of access to civil trials, several Circuit Courts of Appeals have held that the First Amendment requires open access in civil cases, as well, because it fosters an appearance of fairness, increases public respect for the judicial process, and helps prevent error and misconduct on the part of the courts.[79] Thus, juror responses to voir dire questions are open not just to the court, lawyers and litigants, but to the press and any member of the public who might be interested in attending the proceedings or reading the trial transcripts.[80]

Juror response to this unwelcome invasion of privacy is largely predictable. Consider first the fact that in being summoned for jury duty, jurors have already been inconvenienced. They have had to rearrange their schedules to appear in court; they often lose pay from their jobs while serving; and they often must wait for hours in the juror "holding room" until the judge is ready to begin the selection process. Finally, they are expected to honestly answer questions from the judge and the lawyers about their personal lives and privately held opinions in open court, in front of fellow jurors, the litigants, criminal defendants, and anyone else in the courtroom, including the press. The jurors did not initiate the case on which they are asked to serve. Presumably, they have no interest in the case – they do not stand to gain anything by appearing in court for the duration of the trial. And yet they must endure the inconvenience and the invasion of privacy inherent in jury service. Imagine having to reveal, perhaps for the first time in this very public forum, that you were raped by a family member.[81] Or that you were once fired from a job for alleged sexual harassment. Or that you had had an extramarital affair some years ago that to this day your wife does not know about. Would you reveal this information if questioned about it on voir dire?

A number of empirical studies have established that insensitivity to juror privacy is the primary cause of dissatisfaction with jury service.[82] This

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[79] Monsen, *supra* note 73.

[80] Lynd, *supra* note 42, at 268 ("A disclosure in voir dire becomes an irretrievable part of the public domain, known by anyone present in the courtroom (possibly including the press) and available to anyone who reviews the trial record.").

[81] Monsen, *supra* note 73, *citing* an article appearing in the June 27, 2001 edition of the Wall Street Journal. The article described attorney-led voir dire questioning in a state court trial during which a distraught prospective juror was forced to disclose that she had been raped by her stepfather, a secret she had never before told anyone. Jerry Markon, *Judges Pushing For More Privacy Of Jurors' Names*, Wall St. J., June 27, 2001, at B1.

[82] Weinstein, *supra* note 8, at footnote 14. Mary R. Rose, a research fellow at the American Bar Foundation, conducted an empirical study of 209 jurors in an effort to understand juror impressions of the voir dire process. Fully 53 percent of the sample reported that one or more questions during voir dire appeared either unnecessary, made them uncomfortable, or seemed too private. Predominant among such questions were those seeking information regarding prior experience with the courts or with crime. Mary Rose, *Expectations of Privacy?,* 85 Judicature 10 (2001). *See also*

dissatisfaction results in a number of consequences. First, jurors try to avoid the disclosure of personal information by evading service – many people are simply unwilling to serve on juries when disclosure of personal matters is required.[83] Concerns about privacy also lead jurors to fail to disclose personal information even when directly questioned on voir dire.[84] Often, it is easier for a juror to lie in response to a sensitive question than to call attention to himself and the issue by objecting to the question or asking the court to provide a more private setting within which to communicate the answer. After all, with regard to most matters, how are the judge and litigants to know if a juror is responding dishonestly?[85]

Of course, rather than providing dishonest responses to voir dire questions or trying to evade jury service, one might expect a prospective juror to proactively voice objections to overly intrusive questions. This expectation is not particularly realistic, however. The juror is a stranger in a strange legal land – he does not know how the game is played, and he does not want to appear ignorant nor be subjected to public embarrassment. As the only one on unfamiliar ground, the juror will most likely be too intimidated to protect his own privacy by objecting to excessively personal questions. Even if he does so, such action is not without risk. In Brandborg v. Lucas, a prospective juror refused to answer several questions on a juror questionnaire, asserting that questions regarding her income, religion, television and reading habits, political affiliations, and health were "very private" and irrelevant. The trial court judge issued a contempt sanction against her.[86] Similarly, a juror in Texas objected to answering

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Padilla-Valenzuela, 896 F.Supp. at 971 (1995) ("As the scope of inquiry during voir dire has relentlessly expanded, resistance has been expressed by or on behalf of prospective jurors.").

[83] Monsen, *supra* note 73; United States v. Barnes, 604 F.2d 121, 140 (1979) ("[A]s counsel seek more and more information to aid in filling the jury box with persons of a particular type whom they believe to be well disposed toward their clients, prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed.").

[84] In her article, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, *supra* note 5, Paula L. Hannaford cited a number of empirical studies finding that prospective jurors often fail to disclose sensitive information when directed to do so in open court during voir dire. These included a 1991 study finding that 25% of jurors failed to disclose prior criminal victimization by themselves or family members and a 1991 study finding that 28% of prospective jurors failed to disclose information relevant to their ability to serve fairly and impartially. *See also,* Seltzer, Venuti & Lopez*, Juror Honesty During the Voir Dire,* 19 CRIM JUST 451 (1991) and Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room,* 36 COURT REVIEW 10 (1999).

[85] The majority of the 18 district court judges responding to the October 2005 survey (footnote 50) indicated that they had had some experience with juror dishonesty during voir dire, but that the issue comes up rarely. When it does, the most popular remedy is to excuse the juror from service. However, it is impossible to determine the prevalence of juror dishonesty. As noted by Judge James Gritzner, Chief Judge of the U.S. District Court for the Southern District of Iowa, "No doubt dishonest responses have been provided in circumstances I have been unable to detect."

[86] *Brandborg*, 891 F.Supp. 352 (E.D. Tex.1995*)* (trial court held prospective juror in contempt for refusing to answer numerous personal questions).

questions that she deemed too personal and was ordered jailed as a result.[87] It is unlikely that the majority of jurors would be willing to risk jail time in order to protect their privacy interests.

Courts collect a great deal of personal information about citizens who report for jury service, and prospective jurors are reasonably concerned that court procedures are not adequate to protect their personal information.[88] Apart from the embarrassment factor inherent in the compelled disclosure of personal information, there is a safety concern. As noted earlier, Newsweek Magazine recently showcased the issue of identity theft, an increasingly common form of theft affecting millions of Americans.[89] The courts are not exempt from this crime, and inadequate protection of juror information can provide a wealth of opportunity for enterprising crooks. For example, the Superior Court of Los Angeles County reported several instances of scam artists impersonating court staff and telephoning recently summoned jurors to request their social security numbers "for payroll purposes." These scam artists subsequently established fraudulent lines of credit in the jurors' names.[90]

Jurors in criminal trials also fear the potential consequences of their private information falling into the hands of criminal defendants who may seek retribution for an unfavorable jury verdict. Courts have recognized that jurors' fears of retaliation from a convicted defendant or relative are real.[91] Moreover, empirical studies support that this is a legitimate concern of jurors. Jurors are understandably uncomfortable knowing that a criminal defendant has access to information such as home addresses, employers, employer addresses, identities of family members, and other personal data.[92]

Privacy concerns of prospective jurors are exacerbated by the fact that jurors often fail to see the relevance of many personal questions asked during voir dire. In a recent empirical study of jurors' impressions of voir dire, a significant percentage of jurors said that questions concerning their families, hobbies, religious affiliations, and organizational ties gave rise to stereotyping and unfounded assumptions about their ability to be fair.[93] These jurors resented the

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[87] Nita Thurman, *Woman Wins Battle Over Juror's Right to Privacy, She Was Ordered Jailed Last Year For Refusing to Answer Questions*, Dallas Morn. News, June 18, 1995, at A37.

[88] Hannaford, *supra* note 5, at 20.

[89] Steven Levy & Brad Stone, *supra* note 2.

[90] Hannaford, *supra* note 5.

[91] United States v. Scarfo, 850 F.2d 1015, 1023 (3d Cir. 1988).

[92] Rose, *supra* note 82.

[93] *Id*.

fact that such questions were asked, and further resented the implication that their activities, affiliations and ties were viewed as a measure of their ability to be impartial.

In light of these many concerns regarding disclosure of personal information during the jury selection process, is there any legal basis upon which a juror may seek protection from unwanted disclosure of such information? Is there a constitutional right to privacy that protects prospective jurors from this wholesale invasion of their private views and personal lives?

V. DEVELOPMENT OF THE RIGHT TO PRIVACY AND ITS APPLICATION TO JURY SELECTION

The question of whether a person has a constitutional right to privacy that protects against compelled disclosure of private information was first addressed by the Supreme Court in Whalen v. Roe.[94] There, a group of patients and physicians challenged the constitutionality of a New York statute that required disclosure to the state government of the identities of patients who had been prescribed certain drugs with a potential for abuse. The plaintiffs argued that the statute invaded a "constitutional zone of privacy" because the disclosed information could become public, which would result in damage to the patients' reputations. The Supreme Court denied the plaintiffs' claims, but nevertheless found that individuals have a constitutional privacy right that protects them from compelled disclosure of certain personal matters.[95]

In Nixon v. Adm'r of Gen. Servs., the Court refined the privacy right identified in Whalen.[96] There, former President Nixon challenged the constitutionality of a statute that permitted the Administrator of General Services to take custody of his papers and tape recordings and to create regulations for public access to these materials. Nixon argued that the statute violated his constitutional right to privacy. The Court confirmed the existence of such a privacy right, but added that the privacy right attaches only when the person asserting it has a reasonable expectation of privacy. Because Nixon was a public figure, his expectation of privacy was less than that of a private citizen. Ultimately, the Court found that Nixon had a reasonable expectation of privacy in some information, but that his privacy interest was outweighed by the public's interest in the disclosures required by the statute.[97] The Court thus indicated

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[94] 429 U.S. 589 (1976).

[95] The Whalen Court said that the "right to privacy" is founded on the Fourteenth Amendment's concept of personal liberty and encompasses an individual's right not to have his private affairs made public by the government. *Id*. at 599.

[96] 433 U.S. 425 (1977).

[97] *Id*.

that one's constitutional right to privacy is not absolute, but is a right that must be balanced against countervailing interests and may give way where those interests are sufficiently strong.

The question of privacy rights for prospective jurors was first explored in depth by the Second Circuit in United States v. Barnes.[98] There, the Court of Appeals affirmed a trial court's refusal to permit questioning of potential jurors regarding their religious and ethnic backgrounds on the grounds that such questioning constituted an inappropriate intrusion into the personal lives of the jurors and their families. The court said that "[i]f Darrowesque questioning of prospective jurors were allowed, namely 'religion, politics, social standing, family ties, friends, habits of life and thought', any semblance of juror privacy would have to be sacrificed."[99]

The Barnes case was followed by the publication of an influential law review article written by third-year law student Michael Glover[100]. Relying on Whalen and Nixon, Glover argued that "unless by becoming prospective jurors people lose their reasonable expectations of privacy or unless there are good reasons for making an exception to the constitutional protection normally accorded those expectations, jurors should have a constitutional right to privacy protecting them from disclosure of personal information during voir dire."[101] Glover noted that "prospective jurors do not seek out the public forum; they are summoned, often unwillingly, to fulfill a public duty in the justice system" and consequently, "it would be harsh injustice to strip them of the constitutional right to privacy."[102] Glover concluded that prospective jurors should be deemed to have the same reasonable expectations of privacy in information sought during voir dire that they have in such information as ordinary citizens.[103]

In 1984, the Supreme Court directly addressed the question of juror privacy. In Press Enterprise Co. v Superior. Court. of California,, the trial court closed to the public all but three days of a six-week jury selection proceeding in a criminal death penalty case involving the rape and murder of a teenage girl.[104]

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[98] 604 F.2d 121 (2d Cir. 1979).

[99] *Id*. at 143. The court's use of the term "Darrowesque" refers to the expansive voir dire tactics recommended by celebrated trial attorney Clarance Darrow. *See supra* note 69.

[100] Glover was a student at University of California at Berkeley Boalt Hall School of Law when he wrote the referenced law review article.

[101] Glover, *supra* note 35.

[102] *Id*. at 712.

[103] *Id*.

[104] 464 U.S. 501 (1983).

The stated purpose for the closure was to protect juror privacy and to ensure a fair trial. The trial court also refused to release the complete transcript of the voir dire proceedings after the jury was impaneled and after trial, again for purposes of protecting juror privacy. The Supreme Court granted certiorari in the case and reversed the trial court, holding that the presumption of openness in trial proceedings, including jury selection, can be overcome only by an overriding interest.[105] The Court acknowledged that the preservation of juror privacy is a valid concern, but said that the trial court erred by failing to consider less drastic alternative measures to protect juror privacy.[106]

Writing for the Court, Chief Justice Burger deliberately avoided characterizing a prospective juror's privacy interest as a "constitutional right". However, he recognized that the jury selection process "may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that a person has legitimate reasons for keeping out of the public domain."[107] The Court held that the privacy interest of the juror must be balanced against the defendant's right to a fair trial and the need for openness in trial proceedings.[108] The Court further said that the burden is on the trial judge to preserve fairness and to protect the legitimate privacy interests of prospective jurors. The Court acknowledged that a valid privacy interest may rise to such a level that part of the voir dire transcript should be sealed. In the case before it, however, the trial judge had not offered sufficient justification for its closure of the proceedings.

In concurrence, Justice Blackmun agreed that "a juror has a valid interest in not being required to disclose to all the world highly personal or embarrassing information simply because he is called to do his public duty"[109] and that a trial court should properly weigh that interest in determining whether the public may be denied access to portions of a voir dire proceeding. However, he expressly noted that the Court was not holding that this privacy interest rose to the level of a constitutional right, and suggested that such a holding would "unnecessarily complicate the lives of trial judges attempting to conduct a voir dire proceeding."[110] Instead, he noted that "the Court does not decide" whether a prospective juror's privacy interest rises to the level of a constitutional right, such that a prospective juror might legitimately refuse to answer a highly personal but

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[105] *Id*. at 510.

[106] *Id*. at 513.

[107] *Id*. at 512.

[108] Weinstein, supra note 8, at 7.

[109] *Press Enter*.,464 U.S. 501 (1983) at 514.

[110] *Id*. at 515.

relevant question on the grounds that his privacy right outweighs the defendant's need to know.[111]

Since Press Enterprise, legal scholars and judges have disagreed on the question of whether prospective jurors have a constitutional right to privacy or merely a privacy interest,[112] and the extent to which this right (or interest) should be balanced against the countervailing interests of litigants and the public in fair trials and open access.[113] Although consensus on this issue has not been established, there is growing awareness on the part of courts, legal scholars and the legal community that juror privacy is a legitimate concern that should be accommodated in appropriate circumstances. Courts have begun with greater frequency to identify privacy concerns as a legitimate basis for limiting expansive voir dire questioning.[114] For example, in the recent criminal trial of Martha Stewart for violation of federal securities laws, the New York federal district court judge barred public access to jury selection proceedings, saying that the presence of reporters and others during voir dire might prevent prospective jurors "from giving full and frank answers to questions posed to them."[115] United States attorney David N. Kelley, who requested the closure with the consent of the defendants, said, "We need to do what we can to protect the privacy of the jurors, to ensure their responses to voir dire questions will be candid and won't be impeded by the fear that private or personal information will be released."[116]

Similarly, in Bellas v. Sup. Ct. of Alameda County, the California Court of Appeals said, "[W]e recognize that the reticence of private citizens to serve on juries is exacerbated by the need to disclose, if not in questionnaires, then during the oral questioning phase of jury selection, the most intimate details of their lives."[117] Other courts have followed suit, noting that "there must be a balancing

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[111] *Id*. at 514.

[112] *Compare, e.g*., Monsen, *supra* note 73, in which Karen Monsen argues that there is no constitutional right to privacy for prospective jurors, with Weinstein, *supra* note 8, in which David Weinstein argues that Press Enterprise and subsequent Supreme Court cases establish the Court's recognition of a constitutional right to privacy for prospective jurors. Also, *compare, e.g*., *Brandborg* , 891 F.Supp. 352 (E.D. Tex 1995) and *James*, 304 Ill.App.3d 58 (1999), with Ackley v. Goodman, 131 A.D.2d 360, 516 N.Y.S.2d 667 (1987).

[113] At least one legal scholar has suggested that a juror's privacy interest should be given less deference in criminal trials than in civil trials because a criminal defendant has more at stake than a civil defendant and because open access guards against governmental abuse of power. Monsen, *supra* note 73.

[114] Weinstein, *supra* note 8, at n. 117.

[115] Constance L. Hays, *Judge Closes Doors on Selection of Stewart Jury*, Jan. 16, 2004, N.Y. Times C8, *available at* 2004 WLNR 5782596.

[116] *Id*.

[117] *Bellas* , 89 Cal.App.4th at 651-52.

between the defendant's right to a fair and impartial jury and the venire member's rights."[118]

> Just as the lawyers have a right to learn something about the prospective jurors, the jurors, who find themselves suddenly beckoned by a quirk of the computer and other concatenations of coincidence, to sit on an important trial, a trial which our Constitution commands be held in public, soup to nuts, voir dire to verdict, have a right not to be unduly stripped of their personal privacy before, theoretically, the world.[119]

A number of state legislatures have followed suit, amending their constitutions, statutes or court rules to incorporate respect for juror privacy. For example, the California Constitution includes a right to privacy, and this right has been held to extend to jurors being questioned on voir dire.[120] In addition, Ohio's local court rules expressly provide that the judge should protect the privacy of prospective jurors, and that voir dire in civil cases should not be held on the record unless requested by the parties.[121] Similarly, Minnesota's Supreme Court amended the state's court rules in 2003 to require the trial court to "balance the privacy interests of the juror, the defendant's right to a fair and public trial and the public's interest in access to the courts…"[122] The new rules add restrictions on which identifying information about jurors may be made public, and provide that when sensitive questions are asked during voir dire, jurors must be advised that they may request an opportunity to address the court in camera with counsel present.[123]

In August 2005, the American Bar Association ("ABA") published a book entitled "Principles Relating to Juries and Jury Trials." In a letter addressed to "Members of the Judiciary, Bar Leaders, Law Professors and Jury Experts," Patricia Lee Refo, Chair of the ABA's American Jury Project, described the book as the culmination of efforts "to create a national set of comprehensive principles to encourage state and federal courts across the country to review their jury procedures and to provide guidance concerning 'best practice' procedures."[124]

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[118] Jackson v. State of Texas, 931 S.W. 2d 957, 960 (1996).

[119] *McDade*, 929 F.Supp at 817.

[120] *Wells*, 197 Cal.Rptr. 163, (1983).

[121] Monsen, *supra* note 73, at 306.

[122] Barbara L. Jones, *Rule Changes By Supreme Court to Impact Criminal and Family Law, Legal Education Credits*, Jan. 5, 2004, MINN. LAW., *available at* 2004 WLNR 5227116.

[123] *Id.*

[124] The letter, dated August 2005, also describes the method whereby the draft principles were finalized. Ms. Refo indicated that comments were received and discussions had with "judges,

The book includes 19 "Principles" focused on the management of the jury system. Principle 7 expressly addresses the issue of juror privacy, recommending that it be balanced by the court against the litigants' interest in a fair and impartial jury and the public's constitutional right of access to court proceedings.[125] The Principle recognizes that jurors have a legitimate interest in protecting their privacy, and the Comment to the Principle notes that the court's accommodation of that interest where practicable will foster juror participation and candor during the jury selection process.[126]

The ABA's Principle 7 suggests a number of methods for protecting juror privacy. One suggestion is the use of questionnaires or private questioning at the bench when sensitive matters must be disclosed.[127] Another is the closure of voir dire proceedings from public access, but this approach has constitutional implications that confine its use to limited circumstances, such as where the disclosure of jurors' identities places them at risk of physical harm or where there is evidence of attempts to intimidate or influence the jury.[128] The Comment to Principle 7 recognizes that information is collected from jurors for different reasons, and that these different reasons may warrant different treatment with respect to disclosure.[129]

Finally, Principle 7 recommends that the court protect juror privacy by ensuring that the questioning of prospective jurors is consistent with the purpose of voir dire.[130] Specifically, the court should ensure that personal information solicited during voir dire is relevant to the selection of a fair and impartial jury, and should proactively inform prospective jurors that once the nature of a sensitive question is made known to them, they may properly request an

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lawyers, academics, jury experts, court administrators, bar leaders, and others interested in the health of our nation's jury system", including "leading legal organizations."

[125] Principles for Juries and Jury Trials, *supra* note 49, at 35.

[126] *Id*. at 36.

[127] *Id*. at 35.

[128] *Id*. *See also* National Center for State Courts, Jury Trial Innovations §III-8 (G. Thomas Munsterman et. al. eds., 1977).

[129] Specifically, juror information is collected to determine whether the prospective juror meets statutory requirements for service ("qualification" information); for purposes of efficient management of the jury system ("administrative" information, such as address, telephone number, and Social Security number); and for purposes of determining whether the prospective juror can be fair and impartial in the context of a particular trial ("jury selection" information). Since qualification and administrative information is generally not necessary to the determination of whether the juror can be fair and impartial, such information may reasonably be subject to greater restrictions with regard to public and party access. Principles for Juries and Jury Trials, *supra* note 49, at 37.

[130] *Id*.

opportunity to present the answer to the court in camera, on the record, and in the presence of counsel.[131]

The ABA's recommendation that the trial judge raise the issue of privacy in the first instance and provide jurors with an alternative to answering sensitive questions in open court is in accordance with the Supreme Court's position in Press Enterprise.[132] There, the Court said that trial judges should inform prospective jurors of the general nature of sensitive questions to which they will be subjected and advise them that they may properly request an in camera discussion with the judge, on the record and with counsel present, concerning any question to which they object on privacy grounds.[133]

VI. CONFUSION REGARDING THE APPROPRIATE SCOPE OF VOIR DIRE AND PRIVACY'S ROLE IN SHAPING THAT SCOPE

In Press Enterprise, the Supreme Court said that the burden is on the trial judge to maintain control of the voir dire process and to balance jurors' privacy interests against countervailing considerations.[134] Because prospective jurors may feel constrained to object to an overly intrusive question, the court must, without request from the jurors or the parties, scrutinize the proposed voir dire questions and disallow questions that are too intrusive.[135] As noted by Judge Gawthrop in U.S. v. McDade, "[W]hen hard-charging counsel are in hot pursuit of every little empirical nugget they get their eyes on, it is the trial judge who must, sua sponte, reign (sic) them in and give the jurors some protection."[136]

Unfortunately, the trial judge often has reasons of his own for being lax in fulfilling this responsibility:

> [W]hen it comes to prying into matters personal to a juror, the interests of counsel on either side of the aisle are not necessarily antagonistic. All the lawyers want to learn just about all they can about all the prospective jurors. Thus, the court is confronted with no objections that require a

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[131] *Id*. at 39.

[132] *Press Enter*., 464 U.S. 501 (1983).

[133] *Id*. at 510.

[134] *Id*. at 511-12. *See also Brandborg*, 891 F.Supp. at 356 ("While the parties have attorneys to champion their rights, the court must protect the privacy rights of the prospective jurors.").

[135] Lynd, *supra* note 42; *Padilla-Valenzuela*, , 896 F.Supp at 972 ("Prospective jurors may find that unless the trial judge monitors the scope of inquiry, no one will be concerned about their privacy").

[136] 929 F. Supp. 815, 818 (E.D. Pa. 1996).

> ruling; and a trial judge is well aware that . . . no ruling means no opportunity for reversible error. The easy, irreversible course is to say and do nothing and let the lawyers do their thing.[137]

These competing pressures on the trial judge, coupled with a lack of national consensus regarding the importance that courts should ascribe to juror privacy, has resulted in a "national hodge-podge" of practices and procedures concerning the appropriate scope of voir dire, methods to protect juror privacy, and access to juror information.[138]

In October 2005, eighteen federal district court judges serving in eleven different states were surveyed regarding their voir dire practices.[139] The survey responses demonstrate the lack of consensus regarding the appropriate scope of voir dire. When asked what standard they use to determine whether a voir dire question should or should not be asked, the judges' responses ranged from "I generally let the lawyers ask what they want"[140] to "[I] require that the question be relevant to a showing of bias. . . or relevant to the issues in the case."[141] Approximately one third of the federal judges surveyed indicated that they employ virtually no limitations with regard to the types of questions permitted, but that they limit the duration of lawyer questioning to 20 or 30 minutes.[142] Another third was at the opposite end of the spectrum, indicating that they limit

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[137] *Id*. at 817; Weinstein, *supra* note 8 ("Because jurors' interests are not adequately represented by litigants, courts continue to permit open-ended voir dire questions of marginal relevance").

[138] Hannaford, *supra* note 5, at 19.

[139] *See supra* note 50. The survey was conducted in the form of a written questionnaire, to which eighteen federal district court judges responded. The responding judges serve on the following courts: Southern District of Alabama, Eastern District of Arkansas, Western District of Arkansas, Northern District of California, Middle District of Florida, Northern District of Florida, Southern District of Iowa, Eastern District of Michigan, District of New Mexico, District of North Dakota, Northern District of Ohio, Middle District of Pennsylvania, Western District of Washington, and Western District of Wisconsin.

[140] Federal judges giving this or a similar response serve on the following district courts: District of North Dakota, Middle District of Florida, Northern District of Ohio, Northern District of California, and Eastern District of Michigan.

[141] Some of these courts permit questions only to the extent that they are directly relevant to the issue of bias, while others also permit questions that are relevant to the issues in the case or to a showing of specialized knowledge or expertise. Federal judges who limit voir dire questions in this manner serve on the following district courts: Middle District of Pennsylvania, Southern District of Alabama, District of New Mexico, Western District of Wisconsin, Western District of Arizona, and Eastern District of Arkansas.

[142] *See supra* note 140,. Many of the judges surveyed permit attorneys to conduct "follow-up" voir dire questioning limited by specified time restrictions. Generally, these judges allow attorneys 20 to 30 minutes to ask questions of the prospective jurors after the judge has questioned them.

voir dire questions to those calculated to show bias and/or those directly relevant to the issues in the case.[143]

The final third fell somewhere in between these two extremes.[144] Some in this group said that the sole substantive limitation that they employ relates to the "argumentative" nature of the question.[145] Others said that they permit questions going beyond those relevant to a showing of bias, allowing attorneys to inquire regarding the backgrounds, attitudes and cultures of the potential jurors.[146]

Interestingly, only judges falling into the final third category[147] said that the intrusiveness of a voir dire question impacts the judge's determination as to whether or not the question should be asked. Every one of the judges in this category indicated that he or she does not permit personally intrusive questions to be asked unless they are directly relevant to the question of bias. In contrast, virtually all of the judges in the first two categories indicated that the intrusiveness of a potential voir dire question does not affect their decision to permit or disallow the question. Instead, the intrusive nature of the question affects only the judge's consideration of the manner in which it should be asked and answered.[148]

There are certain voir dire questions that, though highly personal in nature, are clearly relevant to the question of juror bias. For example, when a criminal defendant is being tried on charges of rape, a prospective juror's own experience with rape may well affect her ability to be impartial. In such circumstances, a juror's interest in keeping her experience with rape private

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[143] *See supra* note 141.

[144]Federal judges falling into this category serve on the following courts: Southern District of Iowa, Northern District of Florida, Middle District of Florida, Western District of Arkansas, and Western District of Washington.

[145] A judge from the Southern District of Iowa allows the attorneys to ask "any 'non-argumentative' or 'non-preconditioning' question." A judge from the Western District of Washington indicated, "I don't ask argumentative or slanted questions".

[146] Judges from the Southern District of Iowa and Western District of Arkansas fell into this category. A trial judge serving on the federal district court for the Southern District of Iowa said, "I do not limit requested voir dire questions to those that are relevant to a showing of bias. I will allow questions that are more tailored to an understanding of the background, attitudes and culture of a potential juror… I do not incorporate questions that are prejudicial, argumentative, or likely to elicit unnecessarily personal information."

[147] The text refers to those listed in note 144, *supra.*

[148] Published and unpublished cases reflect that courts continue to allow voir dire questions of limited or no apparent relevance to the proceedings. For example, prospective jurors in the O.J. Simpson criminal trial were required to answer broad questions concerning their religious beliefs, political affiliations, reading habits, charitable contributions and organizational memberships. Similarly, prospective jurors in the Mike Tyson rape trial were questioned regarding the number of times per week that they attended religious services. *See* Weinstein, *supra* note 8 at 19.

conflicts with the compelling constitutional interest of the litigants in ensuring that the case is tried by a fair and impartial jury. Courts grappling with this issue have employed a number of techniques to maximize juror privacy while still obtaining the necessary information from the juror. These techniques include written juror questionnaires,[149] sealed records,[150] the use of "anonymous juries,"[151] and in camera voir dire.

The eighteen federal judges surveyed in October 2005 were asked what measures they employ to address the privacy concerns of potential jurors when a highly intrusive voir dire question is also highly relevant to a determination of juror bias. Many of the judges indicated that this situation frequently occurs in criminal trials, especially those involving rape, child sexual abuse, or other sex crimes. For example, one judge noted that on several occasions in sexual abuse cases, potential jurors revealed for the very first time that they had been sexually victimized as children.[152] Virtually all of the judges surveyed said that they instruct the prospective jurors before or during the voir dire process that they may inform the judge if they find a question to be personally intrusive or embarrassing. In such circumstances, the judge will permit the juror to answer the question privately at the bench or in chambers, with only the judge, the court reporter, and the opposing counsel present.

Courts and commentators appear to agree that when a highly intrusive question is also highly relevant to the issue of bias, the interest of the juror in

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[149] Juror questionnaires allow jurors to respond privately in writing, thus affording the juror more privacy than would be had in responding to questions orally before a courtroom full of strangers. In theory, this results in greater juror candor. Hannaford *supra* note 5, at 19.

[150] *But see Press Enter.*, 464 U.S. at 508-509 (Because "[o]penness … enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system … [c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.").

[151] The term "anonymous jury" refers to the practice employed by some courts of referring to jurors by number rather than by name during voir dire and trial as a means of reducing juror intimidation by litigants, the media, and each other. The use of anonymous juries has become widespread in both federal and state courts as a means of protecting jurors from the possibility of threats and intimidation. Generally, their use has been limited to circumstances where there is a strong reason to believe that the jury requires protection and where the court has taken precautions to minimize the impact of anonymity on jurors' views of the defendant. *See* Weinstein, *supra* note 8. In its book entitled Principles for Juries and Jury Trials, the American Bar Association proposed that the use of anonymous juries should be limited to compelling circumstances, such as when the safety of the jurors is an issue or when there is a finding by the court that efforts are being made to intimidate or influence the jury's decision. Principle 11, Principles for Juries and Jury Trials, *supra* note 49, at 69. The practice should be limited in this way because "[a]n anonymous jury raises the specter that the defendant is a dangerous person from whom jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence." *Id.* at 85, citing United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994).

[152] This was reported by a judge serving on the federal district court for the Western District of Washington.

nondisclosure must give way to the interest of the litigants in seating an impartial jury. But what about voir dire questions that are not directly related to the issue of bias? At what point should the judge seek to protect juror privacy by refusing to allow the question to be asked? It is this issue that has divided legal scholars[153] and the courts, resulting in the great divergence in voir dire practices reflected in the October 2005 federal district court judge survey.[154] The conflicting views stem in part from the existence of the peremptory challenge and confusion regarding its role in jury selection.

The Supreme Court has said that the purpose of voir dire is to provide a means of discovering actual or implied bias and to enable the parties to exercise their peremptory challenges intelligently.[155] As stated, the standard suggests that something more is required beyond information relevant to the issue of bias in order to enable litigants to intelligently use their peremptory challenges. However, the nature and extent of that "something more" is unclear, resulting in confusion and lack of consensus among the courts as to the appropriate scope of voir dire. Two of the federal district court judges surveyed in the October 2005 study[156] directly commented on this issue. One said that he does not limit voir dire questions to those relevant to a showing of bias but rather allows questions that are tailored to an understanding of the background, attitudes and culture of a potential juror "[b]ecause lawyers are seeking information for peremptory challenges as well as bias. . . ."[157] Another said, "The peremptory challenge does afford attorneys a broader range of voir dire questions. I permit such questions but try to insure it's (sic) relevant (somehow) to [the] issue being tried."[158]

What does it mean to "enable the parties to exercise their peremptory challenges intelligently"? The answer to this question should be driven by an

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[153] For an example of opposing views, *compare* Hannaford, *supra* note 5 (voir dire should be limited to questions that are reasonably calculated to lead to the discovery of actual juror bias) with Valerie P. Hans & Alayna Jehle, *supra* note 53 (Arguing for expansive voir dire).

[154] *See supra* note 139

[155] *J.E.B.*, 511 U.S. at 143-144. *See also* Nebraska Press Assn. v. Stuart, 427 U.S. 539, 602 (1976) (Brennan, J., concurring in judgment) (voir dire "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); United States v. Whitt, 718 F.2d 1494, 1497 (10th Cir. 1983) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges").

[156] *See supra* note 139.

[157] Judge James E. Gritzner of the U.S. District Court, Southern District of Iowa.

[158] This response was provided by a federal district court judge serving on the Western District of Arkansas. Similarly, a federal judge sitting on the district court for the Northern District of Florida said, "I allow any questions reasonably designed to elicit information that might be useful in deciding whether to exercise a peremptory strike or challenge for cause", thus implying that the standards applicable to the two types of challenges are not the same.

understanding of the purpose of the peremptory challenge. Presumably, its purpose is to ferret out prospective juror bias and enhance the likelihood of seating an impartial jury. However, this is also the purpose of challenges for cause. So what does the peremptory challenge add to the equation?[159]

One purported benefit of the peremptory challenge is that it enhances the appearance of fairness because it gives litigants some level of control over jury selection.[160] The peremptory challenge also serves as a "shield for the exercise of the challenge for cause".[161] That is, it protects litigants from jurors who may become biased through the voir dire process as a result of aggressive questioning. If a challenge to such a juror for cause fails, the litigant has the option to remove the juror through use of a peremptory challenge.[162]

The Supreme Court has held that the peremptory challenge is not a constitutionally necessary component of the right to an impartial jury.[163] In fact, the Court has characterized the peremptory challenge as an "arbitrary and capricious species of challenge."[164] Nevertheless, the Court has found value in the peremptory challenge, saying that it helps produce fair and impartial juries.[165] The peremptory challenge, "by enabling each side to exclude those jurors it believes will be most partial toward the other side, [provides a] means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury."[166] As noted by Justice O'Connor in J.E.B. v.

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[159] Many commentators, judges and legal scholars have argued for the elimination of the peremptory challenge. Critics argue that the peremptory challenge has been systematically used to dismiss jurors on the basis of race, gender, and other such characteristics, and has been a tool to prevent impartial juries rather than ensure them. In his article *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, *supra* note 10, Judge Morris Hoffman argued that the peremptory challenge conflicts with basic notions of an impartial jury because it (1) reflects an inappropriate distrust of prospective jurors; (2) improperly shifts the focus of jury selection from individuals to groups; and (3) injects an inappropriate level of adversariness into the jury selection process. Ironically, Great Britain, the country from which we inherited the peremptory challenge, has seen fit to eliminate it from its jury selection procedure. *See* Weinstein, *supra* note 8.

[160] Barbara Allen Babcock, *Voir Dire: Preserving 'Its Wonderful Power*,' 27 STAN. L. REV. 545, 552 (1975).

[161] *Id*. at 554; Rose, *supra* note 53; *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring).

[162] *Id*.

[163] Ross v. Oklahoma, 487 U.S. 81, 88 (1988); Weinstein, *supra* note 8.

[164] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633(1991) (O'Connor, J., dissenting).

[165] *Swain*, 380 U.S. at 218-219 (1965).

[166] Holland v. Illinois, 493 U.S. 474, 484 (1990).

Alabama, ex rel. T.B., "[T]he essential nature of the peremptory challenge is that it is one exercised without a reason stated."[167]

> Indeed, often a reason for it cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's 'bare looks and gestures' (citation omitted). That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous.[168]

Thus, the purpose of the peremptory challenge is at bottom the same as the purpose of the challenge for cause and of the voir dire process as a whole – to ensure the seating of an impartial and unbiased jury. The only difference, theoretically, between the challenge for cause and the peremptory challenge is the quantum of proof that is required in order to exercise them. With regard to the former, the litigant must establish to the court's satisfaction that the prospective juror is indeed likely to be biased. With regard to the latter, the litigant need present nothing at all. Instead, he may act on a "gut feeling" that the juror may be biased. The "gut feeling" does not have to be based on anything rational, so long as it is not based on something illegal, such as race or gender.[169]

VII. TOWARDS CONSENSUS: THE LIMITS OF THE PROSPECTIVE JUROR'S CONSTITUTIONAL RIGHT TO PRIVACY AND ITS NECESSARY IMPACT ON THE SCOPE OF VOIR DIRE.

As noted earlier in this article, a necessary component of the constitutional right to privacy is the existence of a reasonable expectation of privacy in the matter sought to be disclosed.[170] Thus, in order to determine if a prospective juror has a constitutional right to privacy in the nondisclosure of information sought during voir dire, one must first determine if the juror has a reasonable expectation of privacy with respect to such information.[171]

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[167] 511 U.S. 127, 147 (O'Connor, J., concurring).

[168] *Id*. at 148.

[169] *Batson*, 476 U.S. 79 (1986); *J.E.B.,* 511 U.S. 127 (1994); Georgia v. McCollum, 505 U.S. 42 (1992); *Edmonson*, 500 U.S. 614, (1991); Powers v. Ohio, 499 U.S. 400 (1991).

[170] *Nixon*, 433 U.S. 425 (1997).

[171] *Id*.

A reasonable expectation of privacy exists when two criteria are met. First, a person must have an actual (i.e., subjective) expectation of privacy in certain personal matters, and second, this expectation must be one that society is prepared to recognize as "reasonable."[172]

This article has reviewed the history and tradition of the American right to trial by a fair and impartial jury. This right is preserved by the federal Constitution and is a basic democratic entitlement understood and valued by the nation's citizens. It is equally basic to the American democratic heritage that this impartial jury be drawn from a fair cross-section of the community. As previously noted, the Supreme Court has found this requirement to be inherent in the concept of an impartial jury, and the requirement is imposed through federal statutes which provide for a jury pool drawn from the American populace with very limited exclusion. With the privilege of the jury trial right comes obligation, and thus, Americans must carry the burden of jury service in order to effectuate the intent and purpose of the constitutional right to trial by jury.

In order to ensure that the constitutionally-required standard of juror impartiality is met, the court must obtain information from jurors sufficient to allow a determination regarding bias. Voir dire provides the means of gathering such information. Prospective jurors, as American citizens, know or reasonably should know that litigants have a right to a fair and impartial jury. Therefore, the court has an obligation to ensure that the prospective jurors are indeed "fair and impartial" before they can serve. Given the long history of the "fair and impartial jury" requirement, it cannot be said that prospective jurors have a reasonable expectation of privacy in information directly relevant to the question of bias. Consequently, there exists no constitutional right to privacy with respect to such matters.

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[172] Glover, *supra* note 35. *See also* Katz v. United States, 433 U.S. 347, 360-61 (1967) (Harlan, J., concurring); *Whalen*, 429 U.S. 589 (1976) and *Nixon*, 433 U.S. 425 (1997). It is important to note that the mere fact that information is personal and may subject a person to embarrassment or harm if disclosed is insufficient by itself to give rise to a reasonable expectation of privacy. The precedence of disclosure of such matters in the particular situation bears on the question, as well. In Nixon v. Adm'r of Gen. Servs., the Supreme Court said that the reasonableness of President Nixon's expectation of privacy in the records arising from his presidency was impacted by his "public figure" status and by the historical practice of prior presidents concerning information permitted to be withheld and that requiring disclosure. The Court said, "Appellant concedes that when he entered public life, he voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public spotlight… [However], public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life… Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening. … [T]his pattern of de facto Presidential control and congressional acquiescence gives rise to appellant's legitimate expectation of privacy in such materials." *Id*. at 455, 457-458.

This theory has been suggested in broader form by Justice Blackmun in his concurring opinion in Press Enterprise.[173] In a footnote to the opinion, Blackmun said:

> [I]t is difficult to believe that when a prospective juror receives notice that he is called to serve, he has an expectation, either actual or reasonable, that what he says in court will be kept private. Despite the fact that a juror does not put himself voluntarily into the public eye, a trial is a public event … [and] voir dire, like the trial itself, is presumptively a public proceeding. The historical evidence indicates that voir dire has been conducted in public and most prospective jurors are aware that they will be asked questions during voir dire to determine whether they can judge impartially.[174]

Blackmun's words imply that prospective jurors may have no reasonable expectation of privacy with respect to *any* questions asked on voir dire. However, this interpretation goes too far. Given the stated purpose of voir dire – to identify potential juror bias – there is no reason for potential jurors to anticipate that they will be questioned regarding matters that are not clearly relevant to the issue of bias. Therefore, there is no reason to conclude that a constitutional right to privacy is presumptively inapplicable to information sought by such questions.

Although prospective jurors do not have a *constitutional right* to privacy regarding information relating to potential bias, the Supreme Court in *Press Enterprise* recognized that a prospective juror may have a *legitimate privacy interest* in limiting disclosure of such information when it is highly personal, embarrassing, or potentially damaging.[175] The court and litigants share this interest, as ignoring it is likely to lead to dishonest responses to voir dire questions or evasion of jury service. The jurors' interest in privacy with respect to such matters can never trump the litigants' right to access to information sufficient to allow a reasoned determination regarding bias. However, the court can certainly employ protective measures designed to permit disclosure only to the extent necessary to achieve that objective. This article has reviewed different methods that courts can and do employ in order to provide such protection to jurors, such as the use of written questionnaires, private questioning at the bench or in chambers, and the use of anonymous juries.

Voir dire questions that are not directly relevant to the issue of juror bias stand on a very different footing. Prospective jurors have no basis to reasonably expect that information not directly relevant to the question of bias will be sought

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[173] *Press Enter.*, 464 U.S. 501 (1983).

[174] *Id.* at 514.

[175] *Id.*

during the jury selection process, given that the only legitimate purpose of voir dire is to ensure the selection of an impartial jury.[176] However, this fact alone does not give rise to a constitutional right to privacy. In addition, both the juror and society must view the information sought as personal in nature and that which should reasonably be kept private.[177] In determining whether these criteria have been met, consideration must be given to the degree of publication that is likely to result from the information being disclosed and the nature of the publication audience.[178] The extent to which voir dire questions invade juror privacy is a function not only of the fact of disclosure, but also of the breadth of disclosure.

There are a number of reasons why a court should broadly construe a juror's constitutional right to privacy regarding information not directly relevant to bias. First, the publication audience is vast. As noted by the Supreme Court in *Press Enterprise,* trials, including voir dire, have historically been open to the public and are to be closed only for compelling reasons. Even if jurors are permitted to answer questions privately before only the judge and litigants at the bench or respond to sensitive questions through responses to written questionnaires, *Press Enterprise* makes clear that their responses must be included in the trial transcripts absent exceptional circumstances. Thus, the entire world will have access to the information – if not at the moment of its revelation, then later through the trial transcripts.

Second, in this age of identity theft and scam artists, the unfettered disclosure of even seemingly innocuous personal information may have consequences unforeseen at the time of juror selection. Even if the disclosure of the information is not obviously embarrassing or damaging to the juror's reputation, and even if the juror saw fit at some prior point to disclose the information to persons known to the juror, these facts should not strip the information of its personal and private nature when disclosure to a "host of persons whom [the juror] does not know and did not select, and in whom he has no reason to place his confidence"[179] is contemplated.

Finally, the countervailing interests militating in favor of disclosure of personal information not directly related to bias are weak and driven largely by misconceptions concerning the purpose of the peremptory challenge. Scholars and judges alike have recognized that voir dire, particularly the use of the peremptory challenge, has in many circumstances become less of a tool for selecting an impartial jury and more a tool for assembling a jury that is fairer to

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[176] *Id*. at 511, fn. 9 ("The [voir dire] process is to ensure a fair impartial jury, not a favorable one.").

[177] Whalen, 429 U.S. 589 (1976).

[178] Glover, *supra* note 35, at 720.

[179] *Nixon*, 433 U.S. at 460-61 (1977).

one side than to the other.[180] Rather than trying to impanel an impartial jury, the litigant is attempting to excuse jurors who may be sympathetic to the other side, leaving as jurors only those who are sympathetic to him.

The practice of permitting expansive voir dire is based on the pervasive belief that the attitudes of jurors, rather than the evidence presented, determines how jurors decide cases.[181] Empirical studies have not conclusively demonstrated this[182], but even if they had, what is the likelihood that an attorney can identify every attitude and experience had by every juror that might influence his view of the case? Even to the extent that an attorney can identify certain attitudes and experiences, how can the attorney presume to know what impact those attitudes and experiences might have on the juror's assessment of the evidence presented at trial?[183] Psychiatrists have attempted for years to determine the manner in which attitudes and experiences shape behavior, and most will concede that it continues to be a very imperfect science.[184] How much less can an attorney achieve this objective based on twenty minutes of questioning each perfect stranger? The little empirical research that is available on this topic does indeed show that attorneys have difficulties assessing bias and predicting its effects.[185]

Moreover, to the extent that attorneys seek personal information regarding the attitudes, values and characteristics of jurors in an attempt to fashion a jury sympathetic to their clients' cases, such behavior threatens the very

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[180] Glover, *supra* note 35.

[181] Hannaford, *supra* note 5.

[182] Diamond, *supra* note 70, at 179.

[183] Mary Rose's empirical study of juror impressions of voir dire establishes that jurors are annoyed by questions that seem to invite speculative assumptions about their ability to be fair. In response to questions concerning experiences of family members, one juror said,

> The questions they asked had nothing to do with how a person would be as a juror. Your family isn't going to be on the jury, you are. If it's my [criminal] record, OK, but [a family member] could die in the gas chamber, and it's not you. They dig too much into the family, and that's why some don't want to be on the jury.

Another juror said, "I wasn't offended by the fact of having to give the information, but I was offended by the fact that they thought it mattered." Rose, *supra* note 82, at 15, 16.

[184] Jeffrey Abramson, We, The Jury 145-46 (1994)("In the end, we all belong to so many overlapping groups that science cannot forecast whether a juror will respond to the evidence more as, say, a woman, a white, a thirty-year-old, a Lutheran, a Norwegian, a college graduate, a member of the middle class, a Republican, or whatever").

[185] Rose, *supra* note 53, citing M.O. Finkelstein & B. Levin, *Clear Choices and Guesswork in Peremptory Challenges in Federal Court*, 160 J. ROYAL STAT. SOC'Y 275 (1997); C. Johnson & Craig Haney, *Felony Voir Dire: An Exploratory Study of its Content and Effect*, 18 LAW AND HUM. BEHAV. 487 (1994); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 STAN. L. REV 491, 528-529.

basis upon which our jury system is premised. As noted earlier in this article, the purpose of the jury is to ensure that individuals are judged against the commonsense values of the *community* – not the community minus certain persons possessing characteristics which the attorneys believe might predispose them to view the evidence in a certain way. Predisposition is not bias,[186] and sympathies falling short of prejudice do not form a proper basis for exclusion from jury service.[187] Although the peremptory challenge may be exercised without giving a reason, this does not change the fact that its purpose is essentially the same as that of the challenge for cause – to "eliminate extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury."[188] While a jury cannot possibly be representative of all community groups, it is supposed to be selected "without systematic or intentional exclusion of any of these groups."[189] Thus, use of the peremptory challenge to eliminate persons based on suspected predispositions or sympathies, rather than suspected bias in favor of or against one of the litigants, is a misuse of the challenge.[190]

Finally, the questionable value of extensive interrogation into personal matters not related to bias may well be outweighed by juror resentment engendered by such questioning. In being summoned for jury service, jurors already have been inconvenienced. Invasion into their personal matters, particularly when they do not understand how the questions they are being asked relate to the issue of bias, may in itself prejudice the jurors against one or both parties and may increase juror disenchantment with the entire system.[191]

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[186] United States v. Phibbs, 999 F.2d 1053, 1071 (1993) (While information concerning personal habits and activities of jurors, such as what books they read or what television shows they watch, might aid the defendant in identifying sympathetic jurors, it is not necessary to compose a fair-minded jury.).

[187] As stated by the First Circuit in Schlinsky v. United States, "[I]n our opinion the purpose of voir dire is to ascertain disqualifications, not to afford individual analysis in depth to permit a party to choose a jury that fits into some mold that he believes appropriate for his case." 379 F.2d 735, 738 (1967).

[188] *Holland*, 493 at 484. *See also Wells*, 197 Cal.Rptr. at 166 (1984) ("The purpose of the challenges also dictates their scope: they are to be used to remove jurors who are believed to entertain a specific bias, and no others"). The Wells court added that a party should use a peremptory challenge "only when he believes that the juror he removes may be consciously or unconsciously biased against him, or that his successor may be less biased." *Id*.

[189] *Thiel*, 328 U.S. at 220.

[190] "All jurors' experiences have shaped their values and attitudes, and these, in turn, are likely to shape jurors' perceptions of the trial evidence and hence their votes. In this sense, 'prejudice' is not only ineradicable but often indistinguishable from the very values and attitudes of the community that we expect the jurors to bring to the trial." Hoffman, *supra* note 10, at 859.

[191] Lynd, *supra* note 42; Rose, *supra* note 82, at 15, 16.

In summary, trial courts should not feel constrained to permit voir dire questions seeking personal juror information not directly relevant to the question of bias, as any interest in such information is weak and arguably illegitimate, particularly when weighed against the juror's constitutional right to privacy in such information.[192] The court should, however, permit questions directly relevant to the issue of bias, even when such questions are highly intrusive. While a juror may have a legitimate interest in shielding such information from disclosure, he has no constitutional right to privacy in such information that must be weighed against the litigants' constitutional right to a fair and impartial jury or the requirement of open access to the proceedings. The court should, in its discretion, employ measures to protect the juror's privacy interest in such information in order to encourage juror candor and participation in jury service. However, any such protective measures cannot be permitted to infringe upon the stronger interest of the litigants in obtaining information sufficient to a determination of juror bias, nor can they trump the public's right to open access to trial proceedings, absent compelling circumstances.

[192] One legal scholar has argued that courts should apply a blanket prohibition on voir dire questions not reasonably calculated to lead to the discovery of actual juror bias as a solution to the privacy question. Hannaford, *supra* note 5. This may be too heavy-handed a solution, and is not one that is required by the prospective juror's constitutional right to privacy.