



Strategies for More Effective Voir Dire

By Ronald J. Matlon, Ph.D.

All potential jurors have biases and prejudices. Individual bias stems from all we experience, and shapes the perceptions we, as jurors, have of evidence. These perceptions can certainly influence final jury verdicts.¹ Identifying juror bias is critical. Yet, “the detection of juror bias is a serious challenge in contemporary jury trials.”²

Lifetime Experiences, Attitude Formation and Juror Bias

Some potential jurors say they can set aside their biases and personal experiences to arrive at fair and impartial decisions. But, is this possible? Supported by numerous social scientists, this author must answer this question in the negative. Experience (accumulated lifetime information) directly influences our attitudes (predispositions to act in a positive or negative way toward an attitude object). Sometimes, these attitudes produce biases (prejudice so strong that it actually causes one to act in a positive or negative way). These attitudes and biases deep within each and every one of us are extremely unyielding to even a very persuasive plea.³ It is almost impossible to think that anyone can disregard their experiences in life in any setting that taps into those experiences, including jury duty. “Indeed, research indicates that jurors’ prior experiences and attitudes are more likely to influence their verdict than the arguments presented to them at trial.”⁴

This means juror experiences and attitudes must be thoroughly probed in voir dire to identify jurors with unfortunate bias. Unfortunately, in many states and in federal court, voir

¹ Ellsworth, Phoebe C. (1984). Due Process vs. Crime Control: Death Qualification and Jury Attitudes. *Law and Human Behavior*, 8, 31-51.
² Hans, Valerie P. & Jehle, Alayna (2003). Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection. *Chicago-Kent Law Review*, 78, 1179-1201.
³ Wu, C. & Shaffer, D.R. (1987). Susceptibility to Persuasive Appeals as a Function of Source Credibility and Prior Experience with the Attitude Object. *Journal of Personality and Social Psychology*, 52, 677-688.
⁴ Bono, Randall A. (2000). A Former Judge’s Perspective on Voir Dire. www.illinoisbar.org.

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WHAT'S INSIDE

7
Debunking Neuropsychological Injury Litigation:

Get ideas for defense strategies in the complex world of brain injury litigation.

8
Quick Courtroom Tips:
See how witness testimony violates the rules of societal conversation.

9
Use Your Jury Research in Negotiation and Mediation:

Change the playing field by including valid conclusions from your jury research.

11
Commentary:
Natural De-selection: Peremptory Challenges Ensure Fair Juries

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dire is often so limited that attorneys are placed in the position of relying far too much on demographic stereotyping when exercising their peremptory challenges. Trial lawyers use this method because these characteristics are the primary information they receive about each juror. Important strikes are often based on demographic myth and lore.

Lifetime experiences and attitudes tend to be much more powerful predictors of verdict choices than demographic characteristics.⁵ In order to get at juror bias in the best possible way, attorneys must uncover the lifetime experiences and attitudes of all potential jurors.

Jurors' Limited Disclosure of Attitudes and Biases

Potential juror bias is not easily detected in jury selection for several reasons. Many jurors feel uncomfortable in court, which may inhibit their willingness to disclose their true feelings or opinions. Why are jurors inhibited?

1. The court setting is very formal, both structurally and behaviorally, causing jurors to feel intimidated and restricted in what they do and say.⁶
2. Jurors are hesitant to share personal information and beliefs in front of strangers.⁷
3. When in an unfamiliar environment, people look to others as a guide for

their behavior, causing many jurors to follow the crowd rather than express their own true feelings.⁸

4. Some potential jurors say what is expected of them because of the fear of rejection for jury duty.⁹
5. Jurors remain quiet because they think that speaking up in court is like public speaking—something many people fear.¹⁰

There are two important additional reasons jurors do not fully self-disclose in court. First, potential jurors do not recognize or want to admit they are biased. Second, they are being questioned by and are trying to please a judge. These reasons, combined with those above, provide us with discouraging, counterproductive results in voir dire.

Even when jurors are willing to reveal all that is on their minds, they may be unaware of or unwilling to admit their own biases.¹¹ They do not plan to deceive anyone in jury selection; they simply underestimate their own attitudes and biases. Research shows that many people are not conscious of some of the significant factors that shape their behavior.^{12,13} Or, they think what they know and believe is objective fact, not bias. I've heard Arizona jurors refer to Native Americans as "lazy" and "alcoholic" in voir dire. Yet, when asked if they might be prejudiced in some way

⁵ Saks, Michael J. (1997). What Do Jury Experiments Tell Us about How Juries (Should) Make Decisions. *Southern California Interdisciplinary Law Journal*, 6, 1-53.

⁶ Chaikin, A.L., Derlega, V.J., & Miller, S.J. (1976). Effects of Room Environment on Self-Disclosure in a Counseling Analogue. *Journal of Counseling Psychology*, 23, 479-481.

⁷ Diamond, Shari Seidman (1997). Realistic Responses to the Limitations of Batson v. Kentucky. *Cornell Journal of Law and Public Policy*, 7, 77-95.

⁸ Fargo, Marjorie S., Affidavit in Support of Motions for Specialized Jury Selection Procedures, United States District Court for the Eastern District of North Carolina New Bern Division (1989).

⁹ Starr, V. Hale and McCormick, Mark (1985). *Jury Selection* (Little, Brown).

¹⁰ Mize, Gregory E. (1999). On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room. *Court Review*, Spring, 10-15.

¹¹ Suggs, David & Sales, Bruce D. (1981). Juror Self-Disclosure in the Voir Dire: A Social Science Analysis. *Indiana Law Journal*, 56, 367-388.

¹² Nisbett, Richard E. & Wilson, Timothy DeCamp (1977). Telling More Than We Can Know: Verbal Reports on Mental Processes. *Psychological Review*, 84, 231-259.

¹³ Pearson, Robert W. (1992). Personal Recall and the Limits of Retrospective Questions in Surveys. In Tanur, Judith M., ed., *Questions About Questions: Inquiries in the Cognitive Bases o Surveys* (Russell Sage Foundation).

against Native Americans they frequently say: "Well, these are just facts; not my personal opinion." These jurors did not view their knowledge as prejudice.

Judge-conducted questioning exacerbates jurors' lack of self-disclosure in voir dire. Irrespective of judges' capability, it is their role or status that can greatly influence self-disclosure. A review of the research in this area shows that a questioner's status or role affects whether an individual will reveal information about himself or herself. Indeed, interviewers with very high status (like judges) produce limited self-disclosure.¹⁴ Judges are physically separated from everyone else in the courtroom: they wear robes, and attorneys and court personnel address the judge as "Your Honor."

Judge status fosters an increased sense of authority and detachment from jurors.¹⁵ Questioning from the bench minimizes juror candor, and in voir dire, jurors will actually alter their expressed attitudes when questioned by judges.¹⁶ When the court asks all the questions, a prospective juror is often influenced by social norms, providing "socially acceptable" answers he or she believes the judge wants to hear.¹⁷ Survey data shows jurors look upon judges as important authority figures and are reluctant to displease them.¹⁸ In fear of the court's disapproval, some jurors will offer acceptable responses without even considering their own honest responses.¹⁹ "The message communicated by the judge is that impartiality or lack of bias

is the desirable state of mind for a juror... The end result is that jurors give the judge the answers they believe the judge wants to hear."²⁰

Seminal research on this matter included post-trial interviews of 225 actual jurors and revealed a significant discrepancy between information jurors shared in voir dire compared to what they shared with interviewers following the trial. Many jurors withheld information during the group voir dire in an effort to appear "qualified" to perform their civic duty as jurors.²¹ Additional studies also demonstrate jurors' unwillingness to disclose information that may threaten their fitness to serve as jurors.²²

Judicial Practices Often Make Matters Worse

In addition to all of the elements preventing juror self-disclosure noted above, there are two additional factors connected to a judge-conducted voir dire that intensify the problem of uncovering juror bias. The first factor is

In order to get at juror bias in the best possible way, attorneys must uncover the lifetime experiences and attitudes of all potential jurors.

the establishment of a limited, rather than an expanded, voir dire. The second factor involves judicial attempts to rehabilitate jurors using ineffective question forms.

The traditional limited voir dire includes a minimal number of trial-specific questions, many of which are close-ended, prompting either a show of hands or a yes/no response. A judge conducts much of the questioning addressing the group rather than individuals, and conducts limited follow-up with those jurors not recognized by affirmative responses.

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¹⁴ Jones, Susan E. (1987). Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor. *Law and Human Behavior*, 11, 131-146.
¹⁵ Fargo (1989).
¹⁶ Williams J. Allen (1968). Interviewer Role Performance: A Further Note on Bias in the Information Interview. *Public Opinion Quarterly*, 32, 287-294.
¹⁷ Padawer-Singer, Alice M., Affidavit in re Antitrust Actions, No. 4-71 Civ. 435 (C.D. Minn.).
¹⁸ Motion to Permit Counsel to Question Jurors During Voir Dire and Memorandum to Support, United States of America v. Deric Frank, United States District Court for the Southern District of New York, No. 97-CR-269(DLC).
¹⁹ Bonora, Beth & Krauss, Elissa (1979). *Jurywork: Systematic Techniques* (National Jury Project).
²⁰ Broeder, Dale W. (1965). Voir Dire Examinations: An Empirical Study. *Southern California Law Review*, 38, 503-528.
²¹ Bush, Neal (1976). The Case for Expansive Voir Dire. *Law and Psychology Review* 2, 9-26.
²² Seltzer, Richard, Venutti, M., & Lopes, G. (1991). Juror Honesty During the Voir Dire. *Journal of Criminal Justice*, 19, 451-462.

Expanded voir dire contains a larger number of questions, a broader range of questions, a combination of close-ended and open-ended questions, individual (perhaps sequestered) follow-up questions asked by the attorneys and/or the judge, and, quite often, a pretrial juror questionnaire.

There is overwhelming evidence that a limited voir dire is “not effective in identifying and vetting jurors with relevant experiences and attitudes.”²³ There is little opportunity to obtain full disclosure of relevant information.²⁴ Results of a study in the District of Columbia Superior Court demonstrate jurors disclose less in limited voir dire than in expanded voir dire. When experimenters followed up with jurors in expanded voir dire, they learned a great deal of information. Some of jurors’ responses included:

- “I was frightened to raise my hand, but I do take blood pressure medication.”
- “I was on a hung jury before, and it dealt with a gun offense. I’m not sure I can be fair in this gun possession case.”
- “My grandson was killed with a gun.”
- “I’m the defendant’s fiancée—is that okay?”

Expansive voir dire is “an indispensable way of ferreting out otherwise unknown juror qualities.”²⁵

Some judges use forms of questioning that exacerbate the problem of juror non-disclosure. Too many judges ask leading questions of the jurors. One of the most common question types goes something like this: “In spite of the fact that the defendant was admittedly intoxicated when the incident took place, would you make every effort

to be fair and impartial to him?” This leading question is weak because it does not allow any description of the juror’s experiences, impressions and opinions. It yields little information because no one likes to think he or she would intentionally be unfair to someone just because that person was intoxicated.²⁶

When a judge poses this kind of question to rehabilitate a juror, the “correct” answer is obvious. The juror wants to please the judge by saying: “Yes, I will be fair.” Leading questions are of minimal value in weeding out jury bias and, by their nature, elicit only the prospective jurors’ own perceptions of their biases which are generally not accurate information. Fortunately, there are ways to combat these problems.

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²³ Hans & Jehle (1986).

²⁴ Matlon, Ronald J. & Facciola, Peter C. (1986). Voir Dire by Judges and Attorneys: A Study of the Role Expectations of Potential Jurors. Paper presented at the Speech Communication Association Convention (Chicago).

²⁵ Heaney, Lois (2003). Jury Selection in the Era of Tort Reform. National Jury Project unpublished paper.

²⁶ American Bar Association American Jury Project, *Principles for Juries and Jury Trials*.

Recommendations for Improving Voir Dire

A substantial body of relevant jury research supports two recommendations for improving your ability to uncover juror bias. First is the use of expanded voir dire and second is the use of supplemental juror questionnaires.

Expanded voir dire, defined above, should be implemented in all trials. There should be more questions asked over a broader scope of subject matter in order to better reveal juror bias. Both judges and attorneys should ask follow up questions to create an environment that makes it easier to identify juror prejudice.

A more effective blend of close-ended and open-ended questions will help ensure as much juror candor as possible. Close-ended, yes/no questions can precede open-ended questions. Close-ended questions can identify juror experiences. For example, "Have you, or has anyone close to you, ever been on kidney dialysis?" Note that this is a lifetime experience question. For those who respond affirmatively, the open-ended request to ask of them is: "Please tell us about that experience."

Or, in another kind of case, one might ask: "How do you feel about the dissemination of sexually explicit videos to adults?" Even if the answer is: "I have no strong feelings," an appropriate probe would be: "Well, then, what are your feelings even though they are not strong?"

Open-ended questions such as those above allow prospective jurors to do most of the talking, giving the court and counsel a good opportunity to learn what they need to know. "Open-ended questions require jurors to think about the issues involved in the question and to describe in their own words their thoughts on the topic."²⁷ Listening to the jurors reply to the open-ended request is the best way to detect juror bias in oral voir dire. As jurors are allowed to talk, their attitudes will be on display. Additional

follow-up open-ended questions beginning with "how," "why," and "what" can go far in helping judges and attorneys identify bias (e.g., "Why did you find the services received by your mother's home health care provider to be insufficient?"). A good series of questions follows the experience-attitude-bias continuum identified at the beginning of this article.

Consider this list as a series of well-constructed close-ended (experience) and open-ended (attitude/bias) questions:

- Have you or has anyone close to you ever been seriously injured or killed in a vehicle accident?
- If yes, please describe the circumstances. (Follow-up probes may be necessary.)
- Was a complaint, lawsuit, or claim of some sort made about this?
- If yes, please explain. (Follow-up probes may be necessary.)
- How was the complaint or claim resolved?
- How did you feel about this resolution?
- Is there any reason why any of you who remained silent during this last set of questions chose to do so? (Follow-up probes may be necessary.)

Second, *supplemental juror questionnaires* should be used whenever possible and appropriate because they allow prospective jurors to answer voir dire questions in writing. "Well-formulated juror questionnaires can provide counsel with a substantial amount of information about prospective jurors ... especially in jurisdictions where the scope of attorney-conducted voir dire is limited or judge-conducted questioning is the mainstay."²⁸ Supplemental juror questionnaires provide counsel many advantages:

1. Lawyers can get an overview of possible bias from the entire venire, not just the people seated in the box.
2. Because answers are provided in writing rather than orally, there is more candor

²⁷Frederick, Jeffrey T. (1987). *The Psychology of the American Jury* (Michie).

²⁸Heaney (2003).

and more assurance of identifying bias with questionnaires than having voir dire be entirely an open court oral experience.

3. Questionnaires actually save court time inasmuch as judges and lawyers need not be present when this information is gathered. They need only be present for follow-up oral questions based on the questionnaire answers.
4. Jurors appreciate the privacy of this activity.
5. Questionnaires “can quickly pinpoint for the court and attorneys the specific areas that require individual follow-up questioning.”²⁹

Effective supplemental juror questionnaires require careful thought and preparation. However, they have recently received some ringing endorsements. The American Bar Association has asked that courts consider using a specialized questionnaire addressing particular issues and permitting the parties to submit proposed questionnaires.³⁰ In Maryland, the Council on Jury Use and Management concluded: “Advance written questionnaires for jury panels should be utilized. Questionnaires can provide information in a more efficient form and with less invasion of juror privacy.... Advance written questionnaires can be especially useful in protracted or complex cases where jury selection will require prospective jurors to answer many questions. They may also be useful in more routine cases where jurors are asked certain standard questions.”³¹

While expanded voir dire and supplemental juror questionnaires do not solve all the problems inherent in voir dire in many states, they can go a long way toward doing a better job of uncovering juror bias. Since the goal of voir dire is to help both judge and counsel identify bias that can taint jury deliberations, consider these two recommendations the next time you have the opportunity to learn about your potential jury pool.

²⁹Hans & Jehle (2003).

³⁰American Bar Association American Jury Project (2004).

³¹Council on Jury Use and Management, Maryland Administrative Office of the Courts (2000).

This article was derived from an affidavit Dr. Matlon prepared for the Maryland Defense Counsel, Inc. where he was asked to render an opinion concerning jury selection procedures in Maryland.

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Debunking Neuropsychological Injury Litigation

by Peter R. Reilly, M.S.

Complex injury litigation often involves allegations of organic brain injury secondary to blunt head trauma, hypoxic/anoxic compromise, electric shock, or whiplash. The purported foundation for these claims is that a change in the neuro-anatomy, electrophysiology, metabolism or neurochemistry of the brain has occurred. Commonly, the results of diagnostic studies such as MRI, CT or EEG are presented as objective evidence of acute damage. Increasingly, however, plaintiffs are pursuing allegations of brain injury without objective test data or examination findings that correlate with their subjective reports of pathology and dysfunction. Many times these plaintiffs have been evaluated by a neuropsychologist who administered and interpreted a battery of neuro-cognitive and intelligence tests, inventories, and self-report measures.

Brain injury litigation which relies heavily or solely on neuropsychological testimony is often countered by the defendant with contradictory neuropsychological testimony. This approach commonly results in further confusion, not clarity, as neuropsychology can be highly subjective and speculative in forensic cases. While neuropsychological tests can identify areas of neuro-cognitive or other deficit, weakness, or impairment, they cannot establish the cause of the performance variation. There is no proven objective method to determine whether the data represents acquired neuropsychological impairment or if it represents the effect of other non-organic factors also known to alter neuropsychological performance.

An alternate defense strategy to consider in this situation is to forego cognitive re-testing and prepare aggressive cross-examination material to discredit the validity of the plaintiff's neuropsychological evidence as it pertains to a proximately caused brain injury with cognitive residua.

Along with cognitive dysfunction, plaintiffs commonly report depression, anxiety, pain, poor sleep, fatigue, and the use of a host of medications, all of which negatively affect test performance and clinical condition.

Additionally, the defendant's neuropsychological expert witness should administer psychological tests, personality inventories, and measures of effort, manipulation, and malingering to underscore the non-organic nature of plaintiff's pathology. The following guidelines can be used as foundation to cross-examine the credibility and accuracy of the plaintiff's neuropsychological evidence:

While neuropsychological tests can identify areas of impairment, they cannot establish the cause of the performance variation.

- Did the plaintiff's neuropsychologist confirm plaintiff's baseline by reviewing pre-morbid medical, pharmaceutical, psychological, vocational and academic records? This data is imperative to determine authentic functional changes.
- Did he/she review the medical records from the day of the alleged injury to confirm the type and severity of the initial injuries?
- Did he/she discuss the impact of other factors that may have negatively affected plaintiff's test performance? Medical conditions, psychological overlay, medications, illicit substances, and manipulation all impact test performance.
- Did he/she discuss plaintiff's differential diagnosis using the multi-axial diagnostic

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system (MADS) to confirm that other influencing factors were considered?

- How did he/she control for the accepted statistical problems with the neuropsychological tests which limit their reliability and validity?
- Are the neuropsychological interpretations consistent with the plaintiff's ability to function in the community setting and with the neurological examination results?

Plaintiff's data typically results in a gross over-interpretation and overstatement of accident-related pathology.

Litigants alleging cognitive and psychological harm often use neuropsychological testimony in an attempt to objectify damages. However, plaintiff's data typically results in a gross over-interpretation and overstatement of accident-related pathology. These cases are commonly fueled by clinical confusion, manipulation, and longstanding, underlying psychiatric conditions. Aggressive defense strategies are worth exploration and employment in these high-risk cases.

Peter R. Reilly, M.S., is a complex injury analyst who evaluates neuropsychological, medical and psychiatric litigation for defendants. His "work product" reports demystify medical issues, develop defense and cross-examination strategy, and consider contemporary research and medical literature. He may be reached at (800) 630-8606 or visit his websites: www.PeterRReilly.com and www.DynamicClaimsSolutions.com.

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Quick Courtroom Tips

By
Bob Gerchen

To Better Help Your Witnesses: Remember That Testifying Is an Unnatural Act

Let's say you are at a cocktail party and you are having a conversation with two other people. Person 1 asks you, "So, what do you do for a living?" And you have to turn to the person on the other side of you, Person 2, and answer him. Person 2 just stares at you and doesn't say a thing. Then Person 1 asks you, "Do you enjoy what you do?" and someone else in the circle, Person 3, says, "I don't think you should answer that." But Person 4, who was standing off to the side, chimes in: "Go ahead, you can tell us if you enjoy what you do." So again, you turn to Person 2 and tell him why you do or don't enjoy what you do, and Person 2, just stands there, mute.

In our society, there are certain rules of conversation. The act of testifying violates them all. For those who are unaccustomed to testifying, it's a weird experience. Going into witness prep sessions with this simple truth in mind will make you more empathetic and better prepared to guide your witness to a level of comfort in testifying.

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For more information about Bob Gerchen's book, 101 Quick Courtroom Tips for Busy Trial Lawyers, visit www.CourtroomPresentationTips.com.

Use Your Jury Research in Negotiation and Mediation

by **Richard P. Matthews, J.D.**

A great way to leverage your investment in pre-trial jury research (such as focus groups and mock trials) is to have your trial consultant appear with you at the mediation. By the time you get to a mediation, you have lived with the case for a couple years, and have beaten opposing counsel over the head with the same list of facts and legal interpretations that you can probably recite each other's lines. So mediation is where you can repeat the same thing to an outsider and have that person do it for you—great, right? Well, what if you could change the playing field altogether?

You can achieve really beneficial results for your clients by making a 30-45 minute presentation that includes:

- A 10-minute piece explaining the methodology used in designing the focus group; describing the recruiting process for participants (that they mirror what you expect to see in the jury in that venue), etc.
- A summary of THE OTHER SIDE'S argument, assuring them that they were well represented. Obviously, this will be the first point of serious resistance on the part of your opponent— "You guys didn't tell them this... nor that." Well, yes, you did. Tell them how.
- Then a summary of the key findings that favor you: things you learned about YOUR case, strengths you might have discovered, weaknesses you learned how to address, decision paths, and so forth. (Avoid discussing verdicts, as they are dangerously unpredictable of outcome.)
- Show a selection of video excerpts. This is a great moment. Opposing counsel gets to see laypeople discussing his or her baby for the first time. It's a nice bolt of reality therapy.

Does opposing counsel swoon at your feet and offer to settle at whatever result you name? Well, maybe it will happen some time, but it hasn't happened yet. Rather, what does tend to happen is that opposing counsel is moved from the "facts & law" debate into the mindset of getting serious about predicting what the verdict is likely to be. That is what makes outcomes calculable at that stage of the game, and that starts moving the process. The next week or two after the mediation will bring much better results.

Same goes for negotiation. Prepare some talking points of valid conclusions from the research for counsel to share with the other side. Again, it shifts the debate from "they think/you think" to "you've done your research, and here's what forms the foundation of your conviction." It also sends the tacit message of "You see no reason to change your position until they show you some better research."

Give it some thought.

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Commentary

Natural De-selection: Peremptory Challenges Ensure Fair Juries

by Douglas A. Green, Ph.D.

On March 7, 2006, Morris Hoffman published an opinion piece in *The New York Times* calling for an end to peremptory challenges entitled *Unnatural Selection*. Like many others who have embraced the elimination of peremptory challenges of late, Hoffman ignores decades of psychological research on juror decision-making. The sources of bias and prejudice are various and subtle and are often unrecognized even by the prospective juror. When a juror says he or she can be fair, but has numerous attitudes and experiences that would suggest bias, fairness demands that attorneys have some recourse in order to protect their clients and preserve the fairness of the system. Elimination of peremptory challenges undermines the very essence of the American jury by vesting all control over jury selection in the court.

The job of a juror is to reach a decision based on the evidence presented in the courtroom. Jurors bring to bear their own individual backgrounds and life experiences, but the ideal of a fair and impartial jury requires that jurors not have a predisposition about the outcome of the case before they hear any evidence. If peremptory challenges are eliminated, the only way to remove jurors who may have a bias or prejudice will be to convince the court that objective evidence of the bias or prejudice exists. Based on jurors' answers during the voir dire process, attorneys

will often have very good reasons for suspecting bias in situations that do not rise to the level of a removal for cause.

Judge Hoffman raises legitimate concerns about "celebrity trials, with 24-hour pundits constantly barraging us with their tactical and strategic views as if trials were procedural wars unrelated to any underlying truth." But, the concerns associated with such punditry do not stem from the effort to "de-select" potential jurors whose attitudes may interfere with their ability to fairly evaluate the evidence. The jury selection process is typically a relatively small part of the entire trial. The truth is that about 20,000 juries reach verdicts every year in this country. On average, 75 juries are selected each day, all with the use of peremptory challenges—all out of the inquisitive eye of the media. Celebrity trials and the media

attention they receive are at the very outer edge of the mainstream of all jury trials and are not the measure by which the system should be judged.

*Elimination of peremptory challenges
undermines the very essence of the
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Justice Stephen Breyer's endorsement of the elimination of peremptory challenges in the recent Supreme Court decision in *Miller-El v. Dretke*¹ was of some note, but adds nothing new to this debate on peremptory challenges. In the course of robbing a Holiday Inn in Dallas, Texas in late 1985, Miller-El and his accomplices bound and gagged two hotel employees, whom Miller-El then shot, killing one and severely injuring the other. During jury selection in Miller-El's trial for capital murder, prosecutors used peremptory challenges against 10 black, prospective jurors. The trial ended with a conviction and death sentence for capital murder. While an appeal on the Miller-El case was pending, the Supreme Court decided the case of *Batson v. Kentucky*,² which redefined the threshold requirement to prove systemic discrimination and is today the controlling case on the issue.

The Supreme Court issued its *Miller-El* decision

¹ 545 U.S. 231

² 476 U.S. 79

in June, 2005—20 years after the trial. The decision simply stands for the proposition that the Supreme Court really meant what is said in *Batson* and it chastised the lower courts for not taking that decision seriously and dealing appropriately with the conduct of the Dallas County District Attorney. The *Miller-El* decision and Justice Breyer's comments highlight the need for adequate examination of prospective jurors to allow attorneys to make determinations about their suitability without the need to resort to the "home-grown stereotypes" to which opponents of peremptory challenges so object.

When your life, your property, or your freedom is at stake, it is not too much to ask the court to spend a few minutes allowing attorneys to determine whether prospective jurors will judge you before they even hear any evidence.

As social scientists, members of the American Society of Trial Consultants (ASTC) reject demographic stereotypes of occupation, gender, race, and ethnicity that have often been used to guide the exercise of peremptory challenges. We advocate using procedures designed to help attorneys learn more about jurors' attitudes and increase candor. We encourage attorneys to focus on case specific factors that could cause jurors to prejudge the case. The goal of our professional efforts is to promote the gathering of more reliable information in order to make informed jury selection decisions. It is the absence of meaningful information that often forces counsel to exercise challenges in a way that seems to be based on stereotypes.

The ASTC stands with the American Bar Association and its *Principles for Juries and Jury Trials*³ in support of the continued use of peremptory challenges. But, we also strongly endorse continued improvements in the jury system that create a better environment in which citizens serve. Such improvements include the One Day/One Trial jury system and use of written questionnaires, such as Judge Sim Lake used to select a jury in the criminal trial of two former Enron executives, Kenneth Lay and Jeffrey Skilling.

³ www.abanet.org/juryprojectstandards/principles.pdf

Opponents of peremptory challenges, such as Judge Hoffman, often lament the amount of time spent in jury selection. There is no evidence to support the notion that eliminating peremptory challenges would speed up jury selection. Indeed, if lawyers were required to convince the court that every juror they believed should be removed objectively demonstrated bias, the process

would take even longer. We believe that when your life, your property, or your freedom is at stake, it is not too much to ask the court to spend a few extra minutes allowing attorneys to determine whether prospective jurors' life

experiences will cause them to judge you *before* they even hear any evidence.

The American jury is the very essence of democracy, as we know it. It is a system as robust as the spirit of the American people. Members of the American Society of Trial Consultants have worked for 30 years to preserve and improve the jury system. A cornerstone of a fair trial is an impartial jury, an end promoted by the use of peremptory challenges that help weed out those with biases and prejudices that may otherwise become a factor in a verdict.

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