

VOIR DIRE IN CALIFORNIA CRIMINAL TRIALS: WHERE IS IT GOING? WHERE SHOULD IT GO?

The existence of the word "shall" does not in every instance require that the language be construed as mandatory.

People v. Crowe, 23 Cal. App. 3d 838, 857,
100 Cal. Rptr. 451, 456 (1972)

Absent unusual circumstances which make it apparent that the word "shall" is used in a directory rather than mandatory sense, it imports compulsory rather than permissive action . . . and when used in penal law, that construction which is more favorable to the offender will be adopted. . . .

People v. Adams, 21 Cal. App. 3d 972, 975,
99 Cal. Rptr. 122, 124 (1971)

INTRODUCTION

Within months of each other, two California appellate courts reached opposite conclusions as to the interpretation of the word "shall". This controversy arose and continues to arise in California in regard to voir dire at criminal proceedings, because of statutory language which seems to be contra to current judicial leanings. California's Penal Code Section 1078 provides:

It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He *shall* permit reasonable examination of prospective jurors by counsel for the people and for the defendant. [emphasis added].

Before the 1927 amendment of Section 1078, uncontrolled examination of prospective jurors by counsel resulted in much waste and criticism. Although the purpose of the amendment was to expedite the process of jury selection by giving the trial judge more authority to control the voir dire, criticism of the system still abounds. The reasons for this criticism are briefly stated later in this note.

Much of the dispute regarding voir dire is based on its alleged misuse, or use for improper purposes. Just what is the exact purpose of the preliminary examination of jurors has been an area of controversy, evidenced by several conflicting decisions in California alone. In 1912, a California court held that the sole purpose of voir

dire was to enable the court and counsel to exercise challenges for cause. Justice Shaw, in his opinion, declared that the interpretation of the voir dire statute existing at the time provided for no questioning for the sole purpose of exercising peremptory challenges.

There is no real necessity for giving either party this privilege. It tends to encourage inquiries into matters wholly collateral to the case in hand. The field of inquiry upon subjects properly involved in the endeavor to ascertain whether the juror is free from actual or implied bias is so broad that it will give each party ample opportunity to obtain information concerning the advisability of making peremptory challenges to the respective jurors.¹

The language of section 1078 does not expressly provide the right of examination for peremptory challenges. In 1928 and 1929, the right to question jurors solely for this purpose was implied in two cases.² Both cases specifically dealt with the statutory amendment of section 1078, holding that the intent of the legislature was to expedite the procedure, but not at the cost of depriving either the People or the defendants of the right to a reasonable examination of prospective jurors. This view was apparently not uniform throughout the state, for in 1956, a case reached the appellate court in which the trial court had only allowed counsel to conduct voir dire for the purpose of challenging for cause.³ Although the appellate court disapproved of such procedure, it is apparent that the strict holding in *Edwards* was still being applied in some districts.⁴

Until the decision in *Crowe*,⁵ California courts had consistently upheld the right of the accused to have his counsel personally conduct the voir dire of prospective jurors as commanded by the

1. *People v. Edwards*, 163 Cal. 752, 755, 127 P. 58, 59 (1912).

2. *People v. Estorga*, 206 Cal. 81, 273 P. 575 (1928); *People v. Barrett*, 207 Cal. 47, 276 P. 1003 (1929).

3. *People v. Moorman*, 142 Cal. App. 2d 85, 297 P.2d 741 (1956).

4. The federal attitude on voir dire for peremptory challenges has not been consistent, but leans in its favor. The United States Supreme Court, in *Swain v. Alabama*, 380 U.S. 202, 218-19 (1964), stated that voir dire is proper for the exercise of peremptory challenges, pointing out that the procedure in American trials tends to be extensive and probing as a matter of practice. In 1965, the Third Circuit delved even further into the right to examine for this purpose, reversing a trial court for failing to discharge its duty to protect the accused from bias. *United States v. Napoleone*, 349 F.2d 350 (3d Cir. 1965). In its opinion the court stated that the range of inquiry in the endeavor to impanel a jury should be liberal and should include a right to "probe for the hidden prejudices of the jurors" which prejudices might not be challengeable for cause, but for which peremptory challenges would be proper. *Id.* at 353, citing *Lurding v. United States*, 179 F.2d 7, 9 (7th Cir. 1944).

5. *People v. Crowe*, (Crim. No. 16261, Feb. 8, 1973). (Affirmed by a majority of 5 with a sole dissent by Justice Mosk). [Hereinafter cited as *Crowe*].

word "shall" in section 1078.⁶ The *Adams* and *Crowe* decisions are demonstrative of the divisiveness in the area of trial voir dire. Examination conducted by the judge alone is not favored by the United States trial bar, the feeling being that it does not provoke responses from veniremen.⁷ In 1924, the Conference of Senior Circuit Judges of the United States recommended examination by the judge alone.⁸ The varied procedures for the voir dire examination throughout the country also reflect the range of difference of opinions.⁹

BACKGROUND

The effect of the *Crowe* decision is to give the trial judge total freedom in determining how the voir dire will be conducted. Except for the unusual interpretation of the statutory language of Penal Code Section 1078, *Crowe* is not surprising, for the case reflects the trend of much state law by adopting federal procedural methods. Federal Rule of Criminal Procedure 24(a) authorizes the trial judge to conduct the entire voir dire, with the discretion to supplement his interviewing with questions provided by counsel.¹⁰ Although the judge has latitude to allow counsel to conduct direct voir dire whenever it is in the interest of fairness, in practice, this opportunity is seldom provided.¹¹

The United States Supreme Court has never ruled directly on counsels' right to conduct the voir dire, but has denied certiorari.¹²

Several lower courts have held that the federal rule does not violate a defendant's constitutional rights; accordingly these courts

6. See, e.g., *People v. Adams*, 21 Cal. App. 3d 972, 977, 99 Cal. Rptr. 122, 127 (1971).

7. See Justice Mosk's dissent in *Crowe* at 4-8, and Ball, *Trial by Jury*, 32 CAL. STATE B.J. 313, 321 (1957).

8. *Id.*

9. See Levit et al, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 928-930 (1971).

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

11. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, Standards Relating to Trial by Jury (Tentative Draft, 1971).

12. 29 F.R.D. 43, 114 (1962). In *Ungerleider v. United States*, 5 F.2d 604 (4th Cir. 1924), cert. denied 269 U.S. 574 (1925), the court found no error in a voir dire conducted under the federal rule, stating, "It not only saves much time, but has other manifest advantages." 5 F.2d at 605.

The Ninth Circuit Court of Appeals criticized the practice of a trial court in permitting counsel to conduct the voir dire examination because

have held that the test as to whether due process is met by providing an impartial jury depends on the extent and sufficiency of voir dire made by the trial judge.¹³ The courts apparently felt the need to justify this means of expediting the trial examination process, because voir dire "had become a scandal, and required some effective control."¹⁴

The federal method is not the only alternative to California's present voir dire practice. In the United States there are generally three methods of conducting jury examinations, with some variations in each jurisdiction. The three methods are: 1) the federal method, which consists of total judge control; 2) the state method, which consists of various combinations of voir dire by the court and counsel; and 3) the New York method, where the examination of veniremen is done completely by counsel out of the presence of the court.¹⁵

I seek here to set forth the possible effects of adoption of the federal method of voir dire by California. Emphasis is placed on the consequences to other aspects of the jury system, with consideration given to the movement toward overall reform of criminal trials. A brief summary of the merits and demerits of examination by counsel is set out as a basis for analyzing the suggestions and alternatives herein presented.

ARGUMENTS FOR AND AGAINST VOIR DIRE BY COUNSEL

Numerous articles have been written espousing the pros and cons of voir dire conducted by counsel versus an examination conducted solely by the trial judge. Essential to an understanding of these positions is an appreciation of the basic problem of juror selection common to most jurisdictions—obtaining willing, non-exempt and qualified persons to serve jury duty. As yet, no jurisdiction seems to have arrived at a selection process which guarantees a panel composed of a cross-section of its community. The blame has

of the resulting use of leading questions. *Frank v. United States*, 59 F.2d 670, 671 (9th Cir. 1932).

13. See, e.g., *Hamer v. United States*, 259 F.2d 274, 280 (9th Cir. 1958), cert. denied, 359 U.S. 916 (1959).

14. *State v. Manley*, 54 N.J. 258, 267, 255 A.2d 193, 202 (1969), citing *Faltec v. United States*, 23 F.2d 420, 426 (2d Cir. 1928) (L. Hand, J.); also see the justifications in the *Crowe* decision at 2 and 20-21.

15. It is not the purpose of this article to deal in depth with the various methods. Readers desiring a complete background in this area are referred to Levit, *supra* note 9. A good history of voir dire in the United States appears in *State v. Manley*, *supra* note 14, detailing the various abuses to which the system has been put and the failure of trial judges to exercise proper control.

been placed on several factors, but especially on the facility with which a citizen can avoid this task.¹⁶ The result of most present systems of selection is a venire made up to a large degree of retired persons, housewives, the unemployed, civil servants, and employees of some large corporations. Before the attorneys have an opportunity to evaluate potential jurors, they are denied the opportunity to select from a substantial part of the community.

The arguments favoring the federal method of voir dire rely primarily on the need for expediency of trial procedure and on the past abuses by trial attorneys in conducting the examination. Some of the merits of court-conducted questioning are said to be: 1) conserving the time and energy of the jurors; 2) eliminating embarrassing intrusions into jurors' personal affairs; 3) obviating the expense and waste of court time; and 4) serving the interest of other litigants by making court space available.¹⁷ Support for the federal method is based on the belief that the judge will be more likely to elicit responsible and truthful answers from veniremen¹⁸ and serve the interest of the judicial process by making jury duty a less odious task.¹⁹ Another consideration alleged is that preliminary questioning by the neutral judge is more likely to produce a truly impartial jury.²⁰ As far back as 1952, a strong proponent of California's adopting the federal rule said,

There can be no doubt that simplicity, fairness and speed result from the judge's examination of prospective jurors. . . .

. . . The be-all and end-all of jury selection is to obtain jurors who have integrity and intelligence enough to impartially listen to and retain in their minds the evidence presented. Thus it is that the selective process should rest principally in the hands of one who is himself impartial.²¹

The concern with the time consumed in selecting a jury seems to be foremost in the minds of the critics.^{21a} A trial may be extended

16. See Knox, *Jury Selection*, 22 N.Y.U.L.Q. REV. 433 (1947) and Comment, *Jury Selection in California*, 5 STAN. L. REV. 247 (1953).

17. See *The Jury System in the Federal Courts*, 26 F.R.D. 409, 467 (1961).

18. See Comment, *Voir Dire Examination—Court or Counsel*, 11 ST. L.U.L.J. 234, 242-43 (1967).

19. *Id.*

20. See *The Jury System in the Federal Courts*, *supra* note 17 at 467.

21. Goodman, *Should California Adopt the Federal Rules of Civil Procedure?*, 40 CALIF. L. REV. 184, 189 (1952) (footnote omitted).

21a. Crowe at 15 and 20.

for several days just to select a jury.²² The process is boring for the veniremen, and, to some, an unpleasantry to be avoided even at the cost of shirking jury duty altogether.²³

Voir dire by counsel has also been criticized for several abuses which tend to distort its purpose. These distortions are evident in nearly all trial manuals written for practicing lawyers.²⁴ In practice, trial lawyers have employed the examination as an opportunity to do much more than select an unbiased jury for their clients. Voir dire has been used for developing rapport with jurors, educating the jurors on the issues in the case and on the law to be applied, creating prejudices in the minds of the jurors, and making the veniremen commit themselves to a matter in controversy.²⁵ More than one observer believes that the voir dire is useless to counsel for *any* legitimate reason.²⁶ In a study of twenty-three voir dire examinations in a federal court in the Midwest during the late 1950's, Dale Broeder concluded that the voir dire is an ineffective mechanism for screening jurors, but that it may be used quite advantageously for indoctrination.²⁷ Although the results of Broeder's study are inconclusive,²⁸ some valid observations were made. Broeder interviewed hundreds of persons who had served as jurors, and the general consensus was that the examination was a very unpleasant experience for most jurors; the fear of being challenged, with its implication of prejudice, caused many jurors to conceal their true beliefs.²⁹ One skeptic on the value of examination by counsel believes that since most attorneys are not trained psychologists, they are not qualified to infer certain states of mind held by jurors merely by observing jurors' reactions to the questioning. He contends that the nervous habits and mannerisms which might emerge when a person is being publicly examined in a strange place would counter any possibility of accurate observation by an attorney.³⁰

22. See, e.g., *United States v. Mesarosh*, 116 F. Supp. 345 (W.D. Pa. 1953).

23. See *Voir Dire Examination*, *supra* note 18 at 243.

24. See II AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES (1971) §§ 326-340 *passim* (1971); *Crowe* at 16-17.

25. See *Crowe* at 1; see also Comment, *The Jury Voir Dire: Useless Delay or Valuable Technique*, 11 S. DAK. L. REV. 306 (1966).

26. The legitimate reason for conducting voir dire is to insure the selection of a fair and unbiased jury as guaranteed by the United States Constitution, Amendments VI and XIV.

27. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 528 (1965).

28. The study was performed under very limited conditions with little participation by the attorneys who conducted the voir dire.

29. Broeder, *supra* note 27, at 526.

30. *Voir Dire Examination*, *supra* note 18, at 246.

Louis Katz, holding that this may well be the case, states that he and

The most avid proponents of counsel's right to conduct the voir dire are practicing trial lawyers.

Any one who has had experience in selecting a jury where the judge interrogates the panel must realize what a futile gesture this is. Wherever the judge permits counsel to suggest to him the questions which he should ask, there is not anything even approaching the result where counsel himself asks that question.³¹

The effect upon the jury of having an interested party conduct the questioning cannot be measured in cases won or lost; but several authors assert that the voir dire examination is the stage at which a great number of outcomes are actually determined.³² These proponents contend that an unbiased judge cannot possibly convey to the jurors the importance of each question and of a truthful answer. Nor, they say, can the judge be so familiar with each case as to permit him to understand the import of the questions submitted by the attorneys³³ so as to enable him to properly decide which questions should be asked in the interest of justice.

The most significant advantages of voir dire by counsel are said to be the attorneys' knowledge of their own cases and their ability to perceive prejudice by observing jurors.

Only if counsel is allowed to face the jury, and to size up a juror by the way he responds, the look in his eyes, and his evasiveness or frankness in answering can he decide whether or not to peremptorily challenge the juror.³⁴

other trial attorneys meet this problem by bringing to court a qualified psychiatrist or psychologist to observe jurors in important cases and make recommendations. Katz, *Jury Selection*, 5 TRIAL 39, 40 (Dec./Jan. 1968-69).

31. Hobson, *Voir Dire Examination of the Jury*, 3 DEF. L.J. 137, 140 (1958).

32. See, e.g., AMSTERDAM, *supra* note 24, at § 326.

33. See the dissent in Crowe at 4-5 and Carr, *Voir Dire Examination of Jurors: An Appraisal by an Attorney*, 1963 U. ILL. L.F. 653, 659-60.

34. *The Jury Voir Dire*, *supra* note 25, at 317, citing GAZAN, ENCYCLOPEDIA OF TRIAL STRATEGY AND TACTICS, 75 (1962); see also *State v. Guidry*, 160 La. 655, 657, 107 So. 479, 481 (1926):

A good counsellor in criminal cases studies the book of man as thoroughly as the statute books, and by that study qualifies himself to aid his client in the selection of the jury to try him as much as by the discharge of his other duties. His better knowledge of men, and better acquaintance with the character, feelings, pursuits, connections, and other relations of those whom chance places on the panel, is an advantage of which his client should have the benefit in making his challenges, since no law prohibits it.

State v. Cummings, 5 La. Ann. 330, 332 (1850).

Since attorneys are most aware of the evidence to be introduced, they alone are in a position to search the jury for bias toward such evidence and issues.³⁵ As prejudices are usually hidden,³⁶ only pointed questioning by counsel with a specific end in mind is deemed sufficient to meet the needs of his client. In defense of questioning by an interested party, opponents of the federal procedure point to the neutralizing effect of challenge from both sides.

Naturally both parties desire a jury favorable to their cause, and this produces a conflict which by its very nature achieves a just result. For as each party weeds out jurors unfavorable to his individual side, a state of neutrality is accomplished, assuring a fair and impartial jury.³⁷

A common complaint of trial attorneys is that the examination by the judge is merely perfunctory,³⁸ and fails to elicit any valid response from veniremen, so that although "[i]t serves a useful purpose of impressing the jury with the seriousness of the obligation that they are to discharge, . . . [it] makes it much more difficult to elicit . . . grounds for challenge. . . ."³⁹ The attorney's knowledge of his own case makes him sensitive to bias among the jurors and allows him to formulate the appropriate questions to bring out such bias. Personal knowledge and interest in the case permit the effective attorney to ask questions, giving proper emphasis to words, in such a tone of voice as to result in a more personal and thoughtful reply from the venireman.

But even if the proper question or series of questions is asked by the court, there is still the possibility that the prospective jurors will be so awed by the surroundings, including the interrogating judge, that timidity will keep them from answering satisfactorily.⁴⁰

Implicit in this statement is another drawback to examination by the judge. An individual being questioned by what is, in essence, a symbol of justice in our society, may feel that in such an environment he can overcome his prejudice. If this feeling is induced, the venireman naturally will not bother to mention anything about his prejudice and take the chance of being challenged.

Another major criticism of the federal method deals with the

35. See *The Jury Voir Dire*, *supra* note 25, at 317.

36. See Hafif, *A Right and Necessity—Adequate Voir Dire*, 44 CAL. STATE B.J. 858 (1969).

37. Brill, *Voir Dire I—Examination of Jurors*, 29 MO. L. REV. 259, 260 (1964).

38. See the Crowe dissent at 6-7 and Carr, *supra* note 33, at 659.

39. *Id.* at 656.

40. *Voir Dire Examination*, *supra* note 18 at 240, citing 1959 *Institute for California Judges—Panel Discussion, Part II: Selecting the Jury*, 47 CALIF. L. REV. 872, 873 (1959) (remarks by Joseph Ball, Past President, State Bar of California).

judge's role as an impartial party. One alleged abuse of voir dire by counsel is its use to develop rapport with the jurors.⁴¹ The alternative, however, cannot be deemed to be within the bounds of justice if it means that the judge develops rapport with the jurors to the extent that he protects them against valid challenge by counsel. Yet, several observers have concluded that this is often the result where the judge conducts the entire examination.⁴² This may be true for two reasons: first, the judge becomes "friendly" and "personal" with the veniremen because of the questions he must ask them; and, second, a challenge by an attorney, after the judge has supposedly screened all challenges for cause, is an attack upon the court's ability to conduct a proper and fair examination.

Again, it is essential to keep in mind the limited selection from which unbiased persons must be chosen to determine the fate of an accused. The obstacles to impaneling an impartial jury should not be multiplied by preventing close scrutiny of the veniremen. "It seems to be clear that jurors who are to function in any such instance [decisions regarding the life and property of another], should be selected, and be selected with utmost care."⁴³

POSSIBLE EFFECTS OF THE ADOPTION OF THE FEDERAL VOIR DIRE METHOD

It appears that the federal method, or something very close to it, has been adopted in California.⁴⁴ The decision in *Crowe* may be a judicial attempt to adopt the rule sooner than the legislature had intended. Exactly what the specific effects of the all-court voir dire will be cannot be determined, and there seems to be very little comparative analysis in those jurisdictions presently using the method. The demand for reform of trial procedure reaches several aspects of the jury system, and it is these features which will be considered in speculating what the change in method of examination will mean.

The first, and perhaps most obvious, aspect of the trial involves the defendant's decision whether to demand a trial by jury at all.

41. See *The Jury Voir Dire*, *supra* note 25.

42. See, e.g., Carr, *supra* note 33, at 660-61.

43. Knox, *supra* note 16, at 438.

44. *Crowe* at 17.

Several trial lawyers have indicated that the voir dire is so important that it can make or break a case;⁴⁵ the denial of an effective right to examine may be enough to convince attorneys that the best alternative would be no jury at all. This is especially true in light of the make-up of the venires offered in courts today.⁴⁶ Waiver of trial by jury would conserve judicial time and expense, but at the cost of surrendering an historically valued Constitutional right. The continuous criticism of the jury trial⁴⁷ reflects a trend to waive this right in less serious cases, and there are those who argue that the concept of trial by jury is outdated altogether. However, as long as trial by jury is a guaranteed right, it is incongruous to hold that it may not be effectively exercised.

Another aspect of the jury trial which is undergoing review is the requirement for unanimity of verdict. The consideration of expediency involved in the change of voir dire methods, is also one of the grounds for holding that a less than unanimous verdict would serve the interests of justice. The Oregon Constitution, which provides for conviction by ten out of twelve jurors, serves as a guidepost for future change.⁴⁸ One author believed the provision to be on "shaky" Constitutional grounds, primarily because of its implied erosion of the requirement that guilt be determined "beyond a reasonable doubt."⁴⁹ However, the provision was upheld by the Supreme Court in 1972.⁵⁰ This obvious dilution of the protection of an accused, when coupled with an ineffective right to select an impartial jury, nears the point of superficial justice. The Supreme Court has never held that Constitutional rights are expendable for the sake of saving time. Surely it is reasonable that adoption of the federal voir dire method precludes the adoption of an Oregon type verdict rule, or vice versa.

The size of juries also has a consequential relation to the limitation of counsel's right to examine jurors. Reduction in the number of jurors per case, from twelve to six for instance, has been suggested as a solution to congestion, delay, and mounting court costs.⁵¹ Wiehl, a Washington State superior court judge, has

45. See note 32, *supra*.

46. See Knox, *supra* note 16.

47. See, e.g., Newman, *Jurors are Selected by Outmoded Procedures*, 45 A.B.A. J. 224 (1959).

48. ORE. CONST. art. I, § 11.

49. See Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 ORE. L. REV. 417, 423 (1968).

50. *Apodaca v. Oregon*, 406 U.S. 404 (1972). A similar Louisiana provision (verdict by nine out of twelve) was approved in *Johnson v. Louisiana*, 406 U.S. 356 (1972).

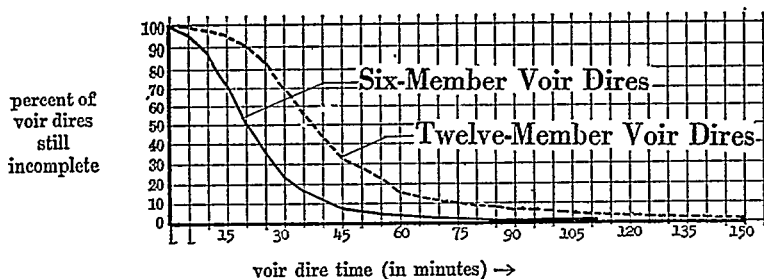
51. Wiehl, *The Six Man Jury*, 4 GON. L. REV. 35 (1968).

stated that “. . . there is no evidence that deliberation requires twelve people or that a smaller number would in any way hinder the decision making process.”⁵² The use of smaller juries is aimed at curing the same ills purported to be the result of attorneys’ abuse of voir dire. Certainly, there is an interplay between these two aspects of the jury trial, as a selection of fewer jurors will logically result in less time consumed in the selection process.⁵³ If the problems which create the need for expediency can be alleviated by the reduction of jury size, this step should be taken instead of the limitation of counsels’ right to conduct the voir dire; better to be judged by six unbiased jurors than by twelve with hidden prejudices. However, if the federal method is narrowly applied, the twelve man jury would presumably be a better safeguard for the rights of the accused than would the six man jury, if only due to the greater likelihood of finding more unbiased persons in a group of twelve, than in a group of six.

One very real, and already felt, result of the federal method of voir dire is the problem of setting guidelines for the trial judge. When the judge conducts the entire examination he “. . . should

52. *Id.* at 39.

53. A recent study comparing voir dire times was made in New Jersey. By a state supreme court rule adopted in September, 1971, all civil jury cases are tried to six-member juries unless a specific request is made for a jury of twelve. The results of the study indicate a clear reduction in time spent examining for a smaller panel.



The average time of the challenging process for the six-member jury was 12.7 min., compared with 24.0 min. for the twelve-man jury. Under New Jersey rules of voir dire the court interrogates the veniremen and the parties or their attorneys may supplement the court’s interrogation in its discretion. THE INSTITUTE OF JUDICIAL ADMINISTRATION, A COMPARISON OF SIX- AND TWELVE-MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS, 27-28 (1972).

also submit to the prospective jurors such additional questions by the defendant or his attorney and the prosecuting attorney as he deems proper."⁵⁴ Exactly what kind of questions the judge *must* ask in the interest of fairness will probably have to be determined by case law. Appellate courts are extremely reluctant to reverse a conviction on the grounds of improper or insufficient voir dire. In almost every case they refuse to do so unless actual prejudice is discovered, and even then, only when the prejudice can be shown to have affected the verdict.⁵⁵ The fact that appellate courts may protect the right of an accused to a fair trial when there has been a blatant abuse of discretion by the trial judge, is little justification for the trial and error procedure which will result from the lack of guidelines. There should be a better way to develop law in this area without such likelihood of forfeiture of the rights of defendants. Even when the appellate court determines that the trial judge did ask sufficient questions of the prospective jurors, it would be impossible for the circumstances of the trial to be reenacted for the judges in order to allow them to review the manner in which the questions were asked. Here, again, the problems of perfunctory questioning, monotonic and rambling phrasing, and a general lack of personal interest by the trial judge, can never be assessed by the appellate court.⁵⁶

SUGGESTIONS AND ALTERNATIVES

Some suggestions for insuring against unfairness in jury selection are: 1) that attorneys be allowed to ask a limited number of questions under close scrutiny of the judge, after the judge has completed his voir dire;⁵⁷ 2) that more time be spent improving the caliber and process of selection of jurors, so that the venire offers a more likely chance of impartiality;⁵⁸ 3) that questionnaires be used for jurors prior to service to obtain background information which may be helpful to attorneys;⁵⁹ and 4) that extensive pre-

54. ABA STANDARDS, *supra* note 11, at 9.

55. See Moore, *Voir Dire Examination of Jurors—II The Federal Practice*, 17 GEO. L.J. 13 (1928), and Vance, *infra* note 58 at 89 & n.72. See also *Brundage v. United States*, 365 F.2d 616 (10th Cir. 1966), and *United States v. Rabb*, 394 F.2d 230 (3d Cir. 1968). This problem arises in *Crowe* at 25-28 and is not recognized by the majority as a substantive issue.

56. *State v. Guidry*, 160 La. at 657, 107 So. at 481: "By repetition the questions lose their force and value, and the examination becomes as unsatisfactory as the examination of a foreign witness by the aid of an interpreter." Justice Mosk clearly states the problem in his dissent in *Crowe* at 13-14.

57. See Comment, *The Streamlined Jury System*, 36 S. CAL. L. REV. 89, 97 (1962).

58. See Vance, *Voir Dire Examination of Jurors in Federal Civil Cases*, 8 VILL. L. REV. 76, 91 (1962); and Knox, *supra* note 16, at 443.

59. Levit, *supra* note 9.

trial investigation be employed.⁶⁰ Presented here are further suggestions and alternatives which should improve the result of the voir dire, whichever method is used.

1. *Questionnaires should be used to facilitate and expedite the preliminary examination of veniremen.*

Questionnaires are currently used to qualify citizens for jury duty.⁶¹ A logical extension of this use would be the application of more specific questions geared to the individual case. These would include questions ordinarily asked by the judge to determine whether a prospective juror is challengeable for cause. Veniremen would complete the questionnaire a few days before trial in order to allow the judge and counsel to examine the results and dismiss those who are not qualified for that particular case. The advantage of the extra work prior to trial is the time and money spared which normally would be taken up by interviews in court for the same purpose. The time involved in answering the questionnaires would not interfere with the court's business, thus allowing other matters to be litigated.⁶² Use of this procedure would alleviate the need to deny attorneys the opportunity to conduct the voir dire thoroughly and responsibly.⁶³ Of course, this suggestion

60. See Heyl, *Selection of the Jury*, 40 ILL. B.J. 328, 333-34 (1952). Pre-trial investigation is also discussed in AMSTERDAM, *supra* note 24, at § 325. The fact that lists of prospective jurors are not always available to attorneys in advance of trial, and the expense of such investigation, necessarily limit its practical usefulness in most cases.

There is no requirement in Rule 24(a) that lists of prospective jurors be made available to the defendant. The only requirement seems to be in capital cases where the defendant is entitled to a list at least three days before trial. 18 U.S.C. § 3432 (1970).

Additionally, it has been noted that counsel for the government has available records on jurors not available to private attorneys. Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839, 852-53 (1968).

61. See, e.g., the questionnaire used in San Diego County, in *Jury Selection in California*, *supra* note 16, at 272.

62. Levit, *supra* note 9, points out that one advantage of the New York method of voir dire is that it frees the judge to litigate "short cause" cases while the examination is being conducted by counsel. Such utilization of court time could feasibly be scheduled while prospective jurors complete questionnaires.

63. By "responsibly," I refer to voir dire conducted for the purpose of selecting a fair jury, rather than for educating or influencing the panel.

is not meant to preclude the right to challenge for cause at trial should the need arise.

2. *The voir dire should be conducted individually rather than collectively.*⁶⁴

In *People v. Estorga* the court expressly disapproved of the practice of collective examination. It pointed out that in many cases such practice goes hand in hand with a series of questions by the judge which may be answered by silence (presumptive of a negative answer).⁶⁵ Collective voir dire has the effect of allowing each venireman to shield himself from attack (i.e. from more personal and intruding questions which might lead to challenge) by remaining an anonymous part of the panel. This not only deprives the attorneys of the opportunity to observe the reactions and responses of the individual panel members; it also prevents the prospective juror from becoming personally involved with the questioning. This, in turn, does not promote thoughtful or truthful answers.

It is a recognized fact that upon individual examination jurors will often yield information sufficient to cause their disqualification; and yet, when they are asked the same questions generally, as a member of a total panel, they do not respond.⁶⁶

3. *Each venireman should be examined in private, rather than in open court.*

The New York method utilizes private examination of veniremen.⁶⁷ This procedure prevents the jurors from remaining anonymous in the group being questioned. It also avoids problems not solved merely by individual examination in open court, one being the fear of admitting bias in front of fellow veniremen,⁶⁸ and another, the tendency to copy the answers given by the veniremen who have been previously questioned and remain unchallenged.⁶⁹

64. *People v. Estorga*, 206 Cal. 81, 273 P. 575, and *The Streamlined Jury System*, *supra* note 57, at 97.

65. Examples of questions which can be answered by silence are: "Do you know any reason why you cannot be fair?" and "Is there any reason that you may not be able to follow the law as instructed?"

66. *The Jury Voir Dire*, *supra* note 25, at 318, citing GAIR & CUTLER, NEGLIGENCE CASES—WINNING STRATEGY 80 (1957).

Examination in private has been recommended for cases where there has been extensive pre-trial publicity. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, § 3.4(a) (Approved Draft, 1968). This position was recommended in *Silverthorne v. United States*, 400 F.2d 627, 644 (9th Cir. 1968).

67. See *Levit*, *supra* note 9, at 934.

68. See *Broeder*, *supra* note 27, at 526.

69. See *Hobson*, *supra* note 31, at 143.

It is understandable that the average person would be hesitant in admitting his prejudices, and especially in admitting that he does not believe that he can overcome them in order to give the accused a fair trial. The dignity of the courtroom adds to this feeling. Questioning in a small room with the judge, defendant, attorneys, and reporter present, should allow more freedom of expression to the nervous venireman, and at the same time afford the judge and attorneys an adequate opportunity to "feel out" the prospective juror.

4. *At the pretrial conference the attorneys should submit questions for voir dire, and then should ask the same questions at the examination.*

There is no practical reason why the attorney, rather than the judge, cannot direct the questions to the jury. A skilled trial lawyer can turn what would otherwise be a meaningless motion into a psychological study.⁷⁰ Much time would be saved at trial if the attorneys and the trial judge could agree at the pretrial conference as to the questions to be asked by each party. This would avoid the consumption of time usually encountered by spontaneous objections and bench conferences. Along this line, it should also be feasible for a maximum number of questions per juror to be imposed upon counsel.⁷¹ The limit, being flexible to deal with cases involving complex issues, would force attorneys to narrow their questioning to matters which would bring out hidden prejudices, rather than questions which attempt to educate or influence the jurors.

5. *The attorneys should submit their challenges in private to the judge, who should then excuse the panelist.*⁷²

An attorney is usually reluctant to challenge a prospective juror for cause during the voir dire, due to the likely impact that the challenge will have on the other members of the panel. The remaining members may develop a prejudice against the challenging party, since one of their fellow panelists has been impliedly, or ex-

70. AMSTERDAM, *supra* note 24, at §§ 326-340.

71. See *The Streamlined Jury System*, *supra* note 57, at 97.

72. See Note, *Selection of Jurors by Voir Dire Examination and Challenge*, 58 YALE L.J. 638, 644 (1949).

pressly, deemed unqualified to serve. Further, the remaining veniremen will be wary of giving any answers similar to those given by the person dismissed, for fear of being excused themselves. Although no reasons are given when a peremptory challenge is exercised, the implication of bias is the same, and is not diminished by the judge's explanation to the contrary. Since voir dire is the time for eliminating bias among the panel, it is paradoxical to create prejudice during the same procedure. An alternative, in use by some courts, is a procedure whereby both attorneys submit their challenges on paper to the judge after a certain number of veniremen have been questioned. It is then the judge's duty to excuse the panel members who have been challenged, never revealing which side exercised the challenge.

6. *The trial judge must take a firm stand to prevent abuse of the voir dire procedure.*

Before the bar concerns itself with speeding up justice by eliminating an aspect of the jury trial which constituted one of the essential elements of its development, it should, perhaps, more thoroughly investigate . . . the manner in which jury trials are guided by the judges.⁷³

Several authors have placed the blame for the present state of the voir dire system on trial judges who have allowed the abuses to get out of control.⁷⁴ One commentator recommends reform from within, starting with the judges' insistence upon highest professional conduct. He states that it is the duty of the trial judge to keep attorneys in line by reminding them of the purpose and rules of voir dire whenever the questioning begins to hint at abuse. That such abuse exists has not been denied, but

[T]he remedy for such disgraceful proceedings is not a reversion to an outgrown procedure which makes the right of challenge of slight value but the installation of trial judges with the character and energy to exercise their discretion sanely and courageously.⁷⁵

Trial procedure would also be expedited if judges would discontinue their practice of attempting to rehabilitate jurors who have been properly challenged for cause. When the judge conducts the entire voir dire he develops rapport with the panel which often results in his defending veniremen against the interests of the parties.⁷⁶ The defendant, or the State, is then forced to excuse the juror by using one of his few peremptory challenges.

73. *The Jury Voir Dire*, *supra* note 25, at 315.

74. See Crowe dissent at 1 and *Voir Dire Examination*, *supra* note 18, at 248-49.

75. Comment, *Examination of Jurors Prior to Challenge*, 31 *YALE L.J.* 514, 518 (1922).

76. See Carr, *supra* note 33.

7. *Trial attorneys must develop more responsible and professional attitudes toward voir dire.*

Many attorneys have come to take for granted the several abusive uses to which the voir dire procedure has been put.⁷⁷ In their books on trial tactics, some authors suggest strategy for employing the voir dire to influence the jury in one's favor.⁷⁸ If the "right" to conduct the preliminary examination is to remain with the trial bar, such misuse must cease. The public's antipathy toward jury duty is partially a result of this abuse.⁷⁹ It is not surprising that a person who has been confronted with personal, and perhaps embarrassing questions, only to be excused at the end of the day, should be somewhat disenchanted with the judicial process. If voir dire is as important to trial attorneys as they contend, they must preserve their prerogative to use it by handling it with care.

CONCLUSION

Expediency is the major justification for the adoption of the federal method of voir dire.⁸⁰ Learned Hand, who criticized the abuses of voir dire and called for effective control, also said, "[s]peed and hurry ought to be antipodes of judicial behavior."⁸¹ It is contrary to the concept of the American judicial system that Constitutional rights should fall in favor of expediency. "Always to be remembered is that the end result of our legal system is not speed but justice, and justice necessarily requires a most carefully selected jury."⁸² In *Estorga* the court was concerned with Penal Code Section 1078 and its effect on the right of counsel to conduct voir dire. The court stated that although the purpose of section 1078 was to expedite, this expedition was not to come about by depriving either the People, or the defendants, of the right to a reasonable examination of prospective jurors; and the legislature was particular to provide for that right by using the word "shall" in its mandatory sense.^{82a}

77. See *AMSTERDAM*, *supra* note 24, at §§ 333-35.

78. *Id.* at §§ 326-340.

79. See Knox and *Jury Selection in California*, *supra* note 16.

80. See *The Jury System in the Federal Courts*, *supra* note 17, 465-66, and *United States v. Mesarosh*, 116 F. Supp. at 348-49; *Crowe*, *Passim*.

81. *The Jury Voir Dire*, *supra* note 25, at 315, citing *California Apparel Creators v. Wieder of California, Inc.*, 162 F.2d 893, 903 (2d Cir. 1947).

82. Hafif, *supra* note 36, at 861.

82a. See Justice Mosk's dissent in *Crowe*, especially fn. 1.

The Supreme Court has not yet considered the right of a defendant, through his counsel, to conduct the examination of jurors. The fundamental right to a fair and impartial trial, upon which the process and right of voir dire is based, is so essential to our judicial system that any erosion of it must eventually pass the test of the highest court.⁸³ The critics of the federal system of voir dire claim that its effect is just such an erosion. "Streamlining the process carried to its ultimate degree would simply involve a lotteried selection of twelve people without any questions."⁸⁴ The movement for the adoption of the federal rule has behind it a confidence in the ability of judges. Perhaps this confidence is misplaced in view of the inadequate job that trial judges have done in controlling abuses by attorneys.⁸⁵ Whether the present faults of the examination system were created by judge, attorney, or both, attempts to reform the system from within must be made before resorting to the denial to the accused of his lawful and meaningful challenge.

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83. This must be based on the assumption that the Supreme Court, in adopting rule 24(a), did not intend that the rule be interpreted as a prohibition against voir dire by counsel, but only as a means of regulation. The assumption is supported by the fact that the drafters of the rule were themselves divided on the issue and purposely refrained from including mandatory language to that effect. 29 F.R.D. 43, 47-48 (1962).

84. Hafif, *supra* note 36, at 861. As Justice Mosk stated in his dissent in *Crowe*:

Paying obeisance to the gods of expediency and temporal economy, the people would reduce jury selection in criminal cases to a wooden process, ritualistic in form, ineffectual in practice, hazardous in result.

85. *Voir Dire Examination*, *supra* note 18, at 241.