Fixing Maryland's Current System of Judicially Imposed *"limited voir dire"* is Necessary to Protect the Constitutional Right to a Fair Jury

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A Call to Action

Strap in! Disclaimer: the views in this article are mine alone and I will take and embrace any and all heat that may come from its content. Spoiler alert, when you finish reading this article, you will see why I feel the need to add this disclosure.

I realize the theme of this issue of Trial Reporter is "Medical Malpractice: More than Medicine." This article is about implementing a system that will effectively ferret out juror bias. In medical malpractice cases, that bias could be in favor of healthcare providers because a doctor once saved the juror's life. Alternatively, the bias could be against healthcare providers because a hospital bill sunk the juror's family into debt. Either way, the best way to uncover those biases is through attorney-led *voir dire*. In every case – not just medical malpractice cases – attorney-led *voir dire* is necessary to protect the constitutional right to a fair and impartial jury.

In the words of Dave Matthews: "So much to say, so much to say, so much to say…" In the summer issue of the 2019 Trial Reporter, I had the opportunity to lay the foundation for this article by reviewing the historical importance our country's founders placed on the right of parties to have their lawyers directly question jurors during *voir dire*. Patrick Henry, an oft-quoted founder of our nation, argued that he would prefer to be tried by a judge alone than by a jury selected without the right to question and challenge.[1] The right of parties to have a fair jury was so important to our founders that no one balked when, in *United States v. Burr*,[2] Chief Justice Marshall endorsed the concept that extensive attorney-conducted *voir dire* was necessary to empanel a fair jury. Chief Justice Marshall's reasoning was so compelling that virtually every state that existed at the time adopted the practice of allowing attorneys to question jurors during *voir dire*. This new tenet of what was needed to ensure the right to a fair trial became a vital part of early America's ethos of justice despite being a "sharp departure from the practice of empaneling juries in England and Canada."[3]

In the modern day case of *Gentile v. State Bar of Nevada*,[4] the United States Supreme Court stated: "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by '*impartial*' jurors . . . ." Given this backdrop, the question that begs to be asked is whether Maryland's current system of jury selection adequately guarantees this Constitutional right of all Maryland citizens.

Maryland's System of *"Limited Voir Dire"*

Maryland's current approach relies upon what our appellate courts have termed "limited *voir dire*." Under this judicial doctrine, recently highlighted in the Maryland Supreme Court Case *Pearson v. State*,[5] "the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification.'"[6] Holding that bias would qualify as a specific cause for disqualification in *Dingle v. State*, the Supreme Court of Maryland held that, "[b]ias is a question of fact."[7] The *Dingle* Court then cited *Davis v. State*, which was in turn quoting *Borman v. State*, to explain: "[B]ias on the part of prospective jurors will never be presumed, and the challenging party bears the burden of presenting facts . . . which would give rise to a showing of actual prejudice.'"[8]

How can an attorney possibly determine whether a juror who has not responded to any of the judge's questions to the entire panel possesses a disqualifying bias without the ability to directly question that juror? Unfortunately, bias and prejudice are innate characteristics often deeply ingrained and concealed from a person's own self-examination.

A system that relies upon juror self-assessment to determine whether bias may be present will inevitably allow some disqualifying biases to make their way into the jury room, tainting the ability of the system to yield fair and impartial verdicts. This concept was identified and recognized by the U.S. Supreme Court nearly one hundred and fifteen years ago, well before modern day social science research and evidence-based analysis definitively proved it to be true.[9]

In the 1909 case of *Crawford v. United States*, the U.S. Supreme Court stated "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence."[10] In Maryland's system that initially relies upon juror self-assessment, without the ability to address specific members of the entire panel through attorney led *voir dire*, how can any attorney possibly meet his or her burden of presenting facts which would give rise to a showing of actual prejudice?

In his dissent in Davis v. State, Chief Justice Robert Bell recognized that Maryland's "limited *voir dire*" method of empaneling juries contains a fatal flaw which places any attorney who is attempting to challenge a juror for cause in an untenable position:

> Under the rationale underlying the majority's view of voir dire, taken to its logical conclusion, all that would be necessary to empanel a legally sufficient jury is that the trial court ask the prospective jurors whether they could be fair and impartial. Only those jurors who confessed that they could not would, or could, be challenged for cause. Because the voir dire has not produced any other information, the others would be absolutely insulated from challenge.[11]

In *Mu'Min v. Virginia*, the U.S. Supreme Court held that "*[v]oir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."[12] Despite this U.S. Supreme Court holding, perhaps burdened by the tenets of stare decisis, Maryland Appellate Judges have continued to adhere to the system of "limited *voir dire*" created by their predecessors. In *Collins v. State*,[13] the Supreme Court of Maryland reaffirmed that in Maryland, voir dire "does not exist, even partially, for the purpose of supplying information to trial counsel that may guide them in the strategic use of their peremptory challenges."[14]

Maryland's doctrine of "limited *voir dire*" is at odds with Federal caselaw, including the U.S. Supreme Court Holding in *Swain v. Alabama*, wherein the Court recognized that peremptory challenges are one of the most important rights an accused has in securing a fair trial.[15] The *Swain* Court reaffirmed its prior holdings in *Lewis*[16] and *Pointer*[17] by ruling that the denial or impairment of the right to peremptory challenges is reversible error, even without a showing of prejudice.[18] Recognizing the importance of attorney-conducted *voir dire*, the Court stated that "the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause ."[19]

In *Swain*, Justice White stated, "[t]he function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.'"[20] As the 5th Circuit Court of Appeals recognized in *U.S. v. Ledee*, "[p]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes."[21]

Under Maryland's current system, the trial judge questions the entire venire. If, and only if, a juror is able to adequately self-assess whether he or she has a bias, and then also has the courage to admit this bias in open court by standing and responding to a question in the affirmative, will that juror be asked to come up to the bench for additional *voir dire*. There is a plethora of research concluding that a juror's ability to assess his or her own bias is limited. The existence of this research was actually acknowledged by the Maryland Supreme Court in *Collins v. State*, in "A Note on Best Practices" which states: "Research has produced concerning findings regarding the *voir dire* process. Those findings support the adoption of procedures that encourage disclosure to the greatest extent practicable."[22] Although *Collins* cites four studies, there are numerous other studies that reach equally troubling conclusions regarding judicially conducted *voir dire*'s inability to ferret out disqualifying bias. These studies conclusively establish that attorneys have a better record of ferreting out bias than judges when they have the right to question the entire panel of jurors and follow up with those that they suspect may be biased. The conclusions of those studies included, among other things, the following:

1. Despite trying their best jurors are not adept at self-assessing their implicit biases.[23]

2. Jurors are unlikely to admit to biases when they know (and are told) they should not be biased, and people want to believe they can be fair.

3. Juror anxiety provides a disincentive to respond "yes" to a question which will require further individual questioning.

4. During judge conducted *voir dire* jurors attempted to report not what they truly thought or felt about an issue, but instead what they believed the judge wanted to hear.[24]

5. Since potential jurors look upon the judge as an important authority figure, many are reluctant to displease the judge and therefore tend to respond to the judge's questions with less candor than if the questions are posed by counsel.

6. Attorney participation in the questioning lessens the social distance between questioner and respondents, thus minimizing evaluation apprehension and minimizing the prospective jurors' tendency to try to please the interviewer.[25]

7. Attorneys are more effective than judges in eliciting candid answers from potential jurors and mock jurors change their minds more often when questioned by judges than attorneys.[26]

8. One reason why a short period of attorney conducted *voir dire* after the court's general *voir dire* will contribute to more complete information about the potential jurors is the attorneys' more in-depth knowledge of the case.[27]

9. Juror biases are not likely to be cured by judicial rehabilitation and might backfire by creating the illusion in jurors that they are unbiased.[28]

10. Asking jurors to express impartiality and awareness of their potential biases might have a "credentialing" effect, or a false sense of security that they have taken care of their biases.

11. Judges usually do not realize that they are seen by jurors as both powerful and fair, and that this attitude on the part of jurors creates an expectation in their minds that they should say they can be fair and impartial, whether or not this is true. Jurors desire to be accepted and approved of by the judge. They want to say the right things to the Judge.[29]

12. Judges do not attempt to warm up to jurors, nor should they, as it is not their role in the judicial process.[30] Lacking a black robe and the title your honor, attorneys are far closer to the social level of a juror. Consequently, not constrained by the formalities of their position, attorneys are able to speak to jurors on their level. Attorneys have the ability to positively reinforce juror self-disclosure during *voir dire* by a process of head nodding, mmhmming, eye contact, less physical distance, relaxed posture, and a direct orientation of the interviewers body toward the interviewer.[31] Each of these psychological techniques have been proven to help the comfort level of interviewees.[32] Comfort with their interviewer results in dramatic increases in the willingness of interviewees to accurately disclose their feelings.[33]

13. The non-verbal communication of a prospective juror (such as displays of tension, evasion or hostility) is much more revealing when questions are posed by advocates and not by the neutral judge.

14. Lawyers, as advocates who have acquired a thorough working knowledge of the details of the case, are in a better position to determine what questions should be posed to veniremen and are better equipped and more inclined to follow up the initial responses of a venireman with the type of probing, "individualized" questions needed to explore and expose prejudices.

15. Attorney conducted *voir dire* allows attorneys to share with jurors their own biases. By doing so they let jurors know that it's okay to have biases as they are a part of every human being's experience. They can then encourage the jurors to speak freely about their views without lecturing them for admitting their biases. This raises the level of juror comfort and thus juror candor and the prospect of revealing disqualifying biases that a Court can then evaluate.

I am unaware of a single study that has any data that would support the conclusion that judges are more capable of ferreting out bias than a process that includes attorney conducted *voir dire* of the entire juror panel.

Under Maryland's system, attorneys are forced to rely upon the limited information they can actually obtain from the jury in order to exercise their peremptory challenges. For jurors, who are incapable of accurate self-assessment and remain silent during the judge's group *voir dire*, the only information available to an attorney is that which appears on the jury form. For the minority of the jurors who actually come up to the bench for further examination, the judge does most of the questioning with some judges allowing attorneys some brief follow-up questions. An attorney's ability to obtain vital information that is specific to their client's case is usually limited to a few short questions that the attorney must come up with on the fly.

Maryland's Current System Encourages Unconstitutional Racial and Gender Profiling and Discrimination

Let's all recognize the existence of a blue elephant that resides in every Maryland courtroom during jury selection. Given the dearth of information at their disposal, many attorneys rely upon stereotypes and blind guesses in exercising their peremptory challenges. As anyone that tries cases knows, though few would admit, many trial lawyers routinely walk on the razor's edge of violating *Batson v. Kentucky*,[34] which prohibits using peremptory strikes on racial grounds and *J.E.B. v. Alabama ex rel. T.B.*,[35] which does the same for gender-based strikes during every jury selection. The fact that this can and does occur is not a surprise. After all, what other information do attorneys have about jurors who have not approached the bench to answer a follow up question other than their address and their occupation?

Research on implicit racial bias has found demonstrable differences as to how members of racial groups view and prefer, or disprefer, members of other racial groups.[36] Other research has examined the role of implicit bias in tort cases in which the race of the plaintiff and the race of the defendant were varied to be either Black or White.[37] Along with many other conclusions, this research has demonstrated that Caucasian jurors had significantly lower implicit bias against Caucasian litigants than jurors who identified themselves as belonging to other racial groups. In the same way, Black jurors had significantly lower implicit bias against Black litigants than jurors who identified themselves as belonging to other racial groups. Without the right to elicit meaningful information about the entire jury panel from attorney conducted *voir dire*, the availability of this research will tempt attorneys to use race as a factor in exercising strikes in violation of *Batson*.[38]

Lest you scoff at this and conclude that I am overreaching, this is not theoretical, it is happening. The existence of this type of racially based research and its use in jury selection was recognized by Supreme Court Justice Breyer in his concurring opinion in the 2005 case of *Miller-El v. Dretke*[39] as follows:

> [T]he use of race – and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before. See, *e. g.*, Post, A Loaded Box of Stereotypes: Despite `Batson,' Race, Gender Play Big Roles in Jury Selection., Nat. L. J., Apr. 25, 2005, pp. 1, 18 (discussing common reliance on race and gender in jury selection). For example, one jury-selection guide counsels attorneys to perform a "demographic analysis" that assigns numerical points to characteristics such as age, occupation, and marital status – in addition to race as well as gender. See V. Starr & M. McCormick, Jury Selection 193-200 (3d ed. 2001). Thus, in a hypothetical dispute between a white landlord and an African-American tenant, the authors suggest awarding two points to an African-American venire member while subtracting one point from her white counterpart. *Id.*, at 197-199.[40]

The next thing that Supreme Court Justice Breyer cites as an example of stereotype-usage in jury selection is not surprising given Maryland's system of "limited *voir dire*." It should, however, be deeply troubling to anyone who reads this because he cites to the Maryland Bar Journal:

> For example, a bar journal article counsels lawyers to "rate" potential jurors "demographically (age, gender, marital status, etc.) and mark who would be under stereotypical circumstances [their] natural *enemies and allies*." Drake, The Art of Litigating: Deselecting Jurors Like the Pros, 34 Md. Bar J. 18, 22 (Mar./Apr. 2001).[41]

Wow! Let's all pause to consider the gravity of that quote. A Supreme Court Justice noticed that our own bar association educates Maryland Lawyers to rate potential jurors on "demographic[s]" including age and gender, and found that fact striking enough to include in a written opinion.

In Maryland, all that a lawyer knows about jurors who choose to remain silent during judge-controlled group *voir dire* is their: race; gender; age; education; address; occupation; marital status; and if married the occupation of their spouse. Given the limited amount of information Maryland's system of "limited *voir dire*" provides them, it is not surprising that some lawyers have come to believe that it is "okay" to use race and gender considerations when exercising peremptory strikes. It should be further noted that even more research on utilizing "demographics" to exercise peremptory strikes has been developed in the eighteen years since Justice Breyer's opinion in *Miller-El v Dretke*. This type of research is clearly unconstitutional forbidden fruit under *Batson* and *J.E.B.* A system that is predicated on expecting lawyers to refrain from the temptation of using it is fraught with hazard.

Maryland's System Restricts Litigants' Ability to Pursue *Batson* and *J.E.B.* Challenges

It is unconstitutional to strike jurors for race or gender. However, in order to make a challenge pursuant to *Batson*[42] or *J.E.B.*,[43] a litigant must:

1. Demonstrate that the opposing party has exercised peremptory challenges with intent to exclude members of a cognizable racial group or other protected class;[44] and
2. Provide the Court with facts and other relevant circumstances that raise an inference that opposing counsel used peremptory strikes to exclude members of the group in question.[45]

In deciding whether the litigant has made a *prima facie* showing to support a *Batson* or *J.E.B.* challenge, the trial court may consider all relevant circumstances, including the attorneys' questions and statements during the *voir dire* examination.[46]

How can an attorney evaluate the intention behind opposing counsel's strikes when opposing counsel does not even speak to or make statements to the entire juror panel? Compounding this problem is that in Maryland, parties are not provided with each other's peremptory strikes. Accordingly, it takes a second person at trial table just to keep track of who is on the ultimate jury and compare the list to the entire venire to even identify jurors stricken by opposing counsel in an effort to lodge a constitutional challenge grounded in *Batson* or *J.E.B.*

Seemingly prescient as to how a "limited *voir dire*" system may be problematic in the context of Batson or J.E.B., the U.S. Supreme Court recognized in J.E.B.:

> If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.[47]

One might argue that coupling the above analysis regarding *Batson* or *J.E.B.* with Supreme Court Justice Breyer's observations in *Miller-El v Dretke*, Maryland's current "limited *voir dire*" system is actually unconstitutional… *hint hint* to my brethren and sistren trial lawyers and appellate counsel.

Under Maryland's current system, attorneys may easily disguise the role that race or gender plays in their strikes by choosing to keep one racially diverse and/or one member of a particular sex on the jury. Not hearing opposing counsel make a statement to the jury or ask questions of the entire jury panel during attorney-led *voir dire* robs an attorney's client of the constitutional right to evaluate whether opposing counsel's use of strikes violates *Batson* or *J.E.B.* This is something I have experienced firsthand in more than one trial. Allowing attorney-

conducted *voir dire* will aid attorneys in in making sure that their client's jury is empaneled in accordance with the U.S. Constitution. If anyone really believes that unconstitutional peremptory strikes are not routinely made in Maryland Courts, they live in one of Stephen Hawkings' string theory alternate universes.

Conversely, when attorneys are accused of violating *Batson* or *J.E.B.* in the use of peremptory challenges, attorney led *voir dire* can also help rebut that accusation. The court in *Burks v. Borg*,[48] stated that "the stronger the objective evidence of discrimination, the more we will require by way of verifiable facts" to rebut a *Batson* or *J.E.B.* challenge.[49] An attorney who addresses questions to the entire jury panel during attorney-led *voir dire* is more likely to be able to point to the "verifiable facts" that caused him or her to strike a juror.

Allowing attorneys to directly address the entire juror panel through attorney-conducted *voir dire* will maximize the information they obtain, thereby enabling them to avoid the temptation of relying on generalizations and stereotypes which, if gender or race based, are clearly unconstitutional.

Attorney-Led *Voir Dire* is Already Allowed in Maryland

To the surprise of some trial lawyers, Maryland Rule 2-512(d) actually enables a judge to permit the parties to conduct an examination of qualified jurors. Nevertheless, trial attorneys, who believe that they can convince a trial judge to afford them the opportunity to ask questions of the entire jury panel are living in another one of Stephen Hawkings' alternate universes. Despite an exhaustive search, I am aware of no Maryland case in which attorneys were given the opportunity to examine the entire jury panel. Suffice it to say, Maryland's trial judges and appellate courts have not exercised the discretion provided to them, but rather, have concluded that the way it is done in Maryland is adequate to assure parties that they are litigating their case in front of a fair jury.

Attorney-Led *Voir Dire* in Other Jurisdictions

The conclusion of Maryland's judiciary is at odds with nearly every other state in the country. Currently, thirty-eight states guarantee attorneys the right to directly question jurors during the *voir dire* process in all civil cases.[50] The overwhelming majority of the eleven remaining states who do not explicitly give attorneys this right, still enable attorneys to directly pose questions to the entire jury panel. In Missouri, Arkansas, and Rhode Island, *voir dire* is conducted primarily by attorneys. In Michigan, Kentucky, and Nevada, judges and attorneys are equally involved in the questioning of jurors during *voir dire*.

In 1976 there were sixteen states that did not allow direct attorney participation in questioning every juror either collectively or individually.[51] Armed with the evidence gleaned from numerous studies on the subject concluding that less biased juries can be achieved by allowing attorneys to directly question every juror, states that did not previously give attorneys this right began to enact laws and rules that do. This trend has continued up to today. New Hampshire established the right of attorney-conducted *voir dire* in 2004, Massachusetts did so in 2015, California reinstituted this right in 2018, and New Jersey instituted a pilot program to allow attorney-conducted *voir dire* in criminal cases in 2022. At present, two thirds of the states that did not permit attorney-conducted *voir dire* in 1976 now afford attorneys with the right to participate in *voir dire*. Sadly, Maryland remains one of only five states,[52] which, despite judges having the discretion to do so, do not allow any meaningful direct attorney interaction with the entire jury panel. Over the past 50 years, surely there has been at least one case that would have benefited from the ability to ferret out juror bias by allowing attorney-conducted *voir dire*.

Some Maryland judges, who have denied motions for attorney-conducted *voir dire* have privately expressed concern that allowing Maryland lawyers to do something that they have not been trained to do could be fraught with problems. That is a fair point. Fortunately, with Maryland set to finally align itself with the other forty-six states that require attorneys to obtain continuing legal education, ample opportunities will exist for every trial attorney in Maryland to be educated and trained. Massachusetts' recent experience at implementing attorney conducted *voir dire* for the first time and New Jersey's current pilot program can act as models to learn from, thus avoiding or minimizing these legitimate concerns.

After the Revolutionary War, at the time of the founding of our country, attorney-conducted *voir dire* was considered to be a fundamental constitutional right.[53] That remained the case, even in most federal courts, until 1944 when Federal Rule of Criminal Procedure 24(a) was adopted: "The court may examine prospective jurors or may permit the attorneys for the parties to do so." This rule change began a trend of limiting attorney participation in *voir dire* process. Over the decades that have passed, however, citizens through the legislatures, attorneys serving on rules committees, and sitting judges in forty-five states have corrected the misguided trend started by the adoption of Federal Rule of Civil Procedure 24. These states have returned to the original vision of our country's founders of giving attorneys the ability to conduct *voir dire* that was endorsed and amplified by Chief Justice Marshall in the infancy of our country.

Lest any of my readers conclude that attorney-conducted *voir dire* is only being advocated by members of the trial bar, this cause has been embraced and adopted by numerous federal judges who have engaged in research and studied the issue at length. As a result, by 1994 attorney involvement in *voir dire* in federal court had doubled in the decades that preceded it.[54]

Not surprisingly, given the overwhelming research that supports it, the American Bar Association has also recognized the superiority of direct attorney involvement with the jury panel during *voir dire*. ***"[V]oir 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."***[55] Principle 11 of the

American Bar Association's (ABA) Principles for Juries and Jury Trials allows attorney-conducted *voir dire* with "reasonable time limits and avoidance of repetition."[56]

I have been fortunate enough to try cases in states where attorneys are entrusted with conducting *voir dire*. In my experience, *voir dire* in these jurisdictions takes about the same amount of time as it takes in Maryland. In fact, on two such occasions it actually took less time to empanel the jury than it did in similar cases I tried in Maryland. Don't take my word for it. There has been a significant amount of research on this subject which supports my anecdotal experience. The time that is allegedly saved by judicially conducted *voir dire* without attorney participation was studied extensively in the late 1960s and early 1970s.[57] The data from the study included the time of jury selection in courts that used each of three methods: attorney conducted *voir dire*; judicially conducted *voir dire*; and a hybrid that contains both. The study concluded that time differences among the various methods are not dramatic.[58]

More recently, this was studied in 2007 comparing judicially conducted voir dire in federal courts with attorney conducted *voir dire*, and again, the research determined that attorney conducted voir dire takes no more time than judge conducted *voir dire*.[59] The National Center for State Courts and the State Justice Institute recently published a comprehensive survey of trial practices, including *voir dire*. This study concluded that *voir dire* conducted primarily by judges with some attorney involvement did not significantly increase the time of *voir dire* as compared to *voir dire* divided equally between judges and attorneys.[60]

Given the demonstrated gains in ferreting out disqualifying bias, even if a small amount of time can be saved by curtailing or eliminating participation by counsel are we willing to live with having a jury that is demonstrably more susceptible to bias? If time is a real concern, there are ways of dealing with it by rule or statute. In many jurisdictions where the right to attorney-conducted *voir dire* exists, the rule or statute that establishes it does not abrogate the trial judge's role of making sure the attorney's examinations are on point. Some of these jurisdictions enable the judge to place a time limit on attorney-conducted *voir dire*. This is especially true in jurisdictions that use a hybrid approach with the judge asking the entire panel questions before turning the panel over to counsel for the parties. This is the approach endorsed by the ABA.

Subjecting Maryland's System to a "*Daubert*" Analysis

I have no doubt that the overwhelming majority of Maryland's Judges are doing their absolute best to act as honest brokers during the jury selection process. As set forth above, Maryland's long history of cases affirming "limited *voir dire*" has led to the mistaken belief that the way Maryland trial courts conduct *voir dire* is the best way to ferret out bias that would disqualify a juror from serving.

In *Rochkind v. Stevenson*,[61] the Supreme Court of Maryland replaced the Frye-Reed general acceptance test with the U.S. Supreme Court's *Daubert v. Merrell*[62] standard. As an interesting exercise, let's use the magic of surplus reality to apply the Daubert factors to Maryland's current system of "limited *voir dire*" to determine whether the system is reliable and acceptable:

(1) whether a theory or technique can be (and has been) tested;

Yes, as noted above, it has been thoroughly tested by judges, lawyers, and social scientists.

(2) whether a theory or technique has been subjected to peer review and publication;

Yes, every peer review article I am aware of has concluded that of the three methods of *voir dire* used by courts in America, Maryland's system has been repeatedly found it to be the least effective way of ferreting out bias that would disqualify a juror.

(3) whether a particular scientific technique has a known or potential rate of error;

Yes and Maryland's system's error rate has been extensively reported in study after study.

(4) the existence and maintenance of standards and controls;

The discretion afforded Maryland judges under the current Maryland Rules provides for variability that may limit the ability of the system to maintain standards and controls.

(5) whether a theory or technique is generally accepted;

Maryland's system is not generally accepted by scientists, who have studied it. Furthermore, forty-five of the fifty states have rejected it and adopted systems that provide attorneys with the ability to conduct voir dire.

(6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;

Admittedly, this one may pass scrutiny as the testing of any of the three methods inextricably involves litigation.

(7) whether the expert [or State employing limited voir dire] has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

In light of the research cited to in this article along with the U.S. Supreme Court rulings in Batson[63] or J.E.B.[64] the answer is yes.

(8) whether the expert [or State employing limited *voir dire*] has adequately accounted for obvious alternative explanations;

Hard to say because of the inability to depose those who devised the current system.

(9) whether the expert is being as careful as he or she would be in his or her regular professional work outside his or her paid litigation consulting; and

This one is not really applicable.

(10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Yes, credentialed scientists, as well as lawyers, and judges with practical experience have studied the issue and have concluded that not allowing attorney participation is far less reliable at ferreting out disqualifying bias than a system that relies upon attorney conducted *voir dire*.

Would Maryland's current system survive a *Daubert*[65] challenge? Sadly, we will never have the opportunity to find out.

How Do We Fix It?

In *Davis v. State*[66] the Court stated that it will continue to adhere to the principles its predecessors adopted over one hundred years ago in *Handy v. State*[67] and the progeny of cases that have followed it until "the General Assembly wishes to expand or contract those statutory rights or the manner in which they are exercised."[68] The view of the *Davis* Court has been repeatedly cited to and adhered to in every appellate court holding since. The practical effect of these holdings and their progeny is that it is likely that a statute will be required to untie what Judge Harrell referred to in his concurring opinion in *Collins v. State*,[69] as the "twisted pretzel" *stare decisis* has saddled upon Maryland Jurisprudence on the issue of "limited *voir dire*."

Once the legislature is educated about the disparate impact that Maryland's system of "limited *voir dire*" has upon citizens of color and women, perhaps a groundswell will be created like the groundswell in California in 2017. The California law that reestablished the right of attorney-conducted *voir dire* garnered bipartisan support initially passing in the California general assembly on a floor vote with 62 ayes and 12 nays. By the time it was voted on by the Senate it had unanimous support of both political parties and passed in a floor vote with 38 ayes and zero nays. It was signed into law by California's governor on September 26, 2017.

Hope for a legislative solution springs eternal. Of course, that does not mean that the trial bar should abandon the judiciary entirely and attempts to seek a Rules change that provides attorneys with a right to question the entire jury panel during *voir dire*. Even if a rule change is not made, I am hopeful that the contents of this article may cause some judges to reconsider the way that they conduct *voir dire* and perhaps be more open to adopting a method for jury selection in which attorneys play a greater role. The reality is that the current Rules give them the discretion to do this. Although appellate courts have weighed the decisions that trial judges have made under the judicial lens of limited *voir dire*, I am aware of no appellate case in which a trial judge has been admonished for allowing *voir dire* questions that are beyond the scope of "*limited voir dire*."

In the meantime, one other potential stop gap or supplemental solution may be the use of pre-trial questionnaires. I am aware that Baltimore Circuit Court Judge Fletcher-Hill has successfully used juror questionnaires to help him ferret out potential juror bias. I'm hopeful that I will be given the opportunity to address this possible supplement to our current system of selecting juries in a future article. Signing out David.

Suggested reading

1. Salerno, J. M., Campbell, J. C., Phalen, H. J., Bean, S. R., Hans, V., Spivack, D., & Ross, L. (in press). The impact of minimal versus extended *voir dire* and judicial rehabilitation on mock jurors' decisions in civil cases. *Law and Human Behavior*.
2. U.S. District Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated voir dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HAVARD LAW & POLICY REVIEW 149 (2010)
3. Valerie P. Hans & Alayna Jehle, Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection, 78 Chi.-Kent L. Rev. 1179 (2003). (Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss3/11)
4. John Campbell, Jessica Salerno, et. al., An Empirical Examination of Civil *voir dire*: Implications for Meeting Constitutional Guarantees and Selected Best Practices
5. Gregory E. Mize, On Better Jury Selection: *Spotting UFO Jurors Before They Enter the Jury Room, CT*. REV., Spring 1999.
6. Judge Mark Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated voir dire, The Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 160 (2010).
7. Anything written by Daniel Kahneman's and Amos Tversky's on biases in judgment and decision making (which was recognized with the 2002 Nobel Prize in Economics)

Biography

David A. Harak earned his bachelor's degree from Randolph-Macon College in 1994. He received his law degree from the University of Maryland School of Law in 1997. After graduation from law school, Mr. Harak hung a shingle and practices in a firm known as The Harak Law Firm, LLC. He is also a graduate of Gerry Spence's Trial Lawyers College as well as fellow of the American Association for Justice's National College of Advocacy. He is one of Maryland's State Delegates to the American Association for Justice. He has been a member of the Board of Governors for the Maryland Association for Justice for over 20 years. He has been licensed to practice law in Maryland, in State and Federal Court since 1997 and has handled cases in Pennsylvania,

California, Oregon, Washington State, New York, West Virginia, Virginia, Florida and the District of Columbia. His practice areas include Motor Vehicle Accidents, Personal Injury, Product Liability, Medical Negligence, Maritime Negligence, and Sexual Abuse.

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[1] Max Gutman, The Attorney-Conducted Voir Dire Of Jurors: A Constitutional Right, 39 BROOKLYN L. REV. 290, 296-297 (1973); see also https://www.ojp.gov/ncjrs/virtual-library/abstracts/attorney-conducted-voir-dire-jurors-constitutional-right; https://archive.csac.history.wisc.edu/Patrick_Henry_in_the_Virginia_Convention(2).pdf.
[2] 25 F. Cas. 2 (No. 14, 692a) (C.C.D. Va. 1807).
[3] Gutman, supra note 1 at 308.
[4] 501 U.S. 1030, 1075, 111 S.Ct. 2720 (1991) (emphasis added).
[5] 437 Md. 350, 356-57, 86 A.3d 1232 (2014).
[6] Id. at 356-357 (quoting Washington v. State, 425 Md. 306, 312, 40 A.3d 1017 (2012)). The conclusion of the Pearson Court is based on the following line of cases: Handy v. State, 101 Md. 39, 43, 60 A. 452 in 1905 which was expressly reaffirmed in Whittemore v. State, 151 Md. 309, 315-16, 134 A. 322 in 1926 which was, in turn, definitively affirmed in Davis v. State, 333 Md. 27, 39-43, 633 A.2d 867 in 1993.
[7] 361 Md. 1, 14, 759 A.2d 819 (2000).
[8] 361 Md. at 15 (quoting Davis v. State, 333 Md. 27, 38, 633 A.2d 867 (1993), in turn quoting Borman v. State, 1 Md. App. 276, 279, 229 A.2d 440 (1967).
[9] See Gordon J. Chelune, Self-disclosure: Origins, Patterns, and Implications of Openness in Interpersonal Relationships (1979); R.L. Archer, Role of Personality and the Social Situation (1979); H.J. Erhlich & D. B. Graeven, Reciprocal Self-Disclosure in a Dyad, J. EXP. SOC. PSYCH., Vol. 7, 389-400 (1971); S.M. Jourard, The Effects of Experimenters' Self-Disclosure on Subjects' Behavior (1969); C. Speilberger, Current Topics in Community and Clinical Psychology (1969); N.R. Simonson, The Impact of Therapist Disclosure on Patient Disclosure, J. COUNS. PSYCH., Vol. 23, 3-6 (1976); S.M. Jourard, Self-Disclosure and Other Cathexis, J. ABN. AND SOC. PSYCH, Vol. 59, 428-431 (1959); L. D. Goodstein & V. M. Reinecker, Factors Affecting Self-Disclosure: A Literature Review (1974): B. A. Maher, Progress in Experimental Personality Research, 49-77 (1974); Valerie P. Hans & Alayna Jehle, Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection, 78 CHI. KENT L. REV. 1179, 1196 (2003).
[10] 212 U.S. 183, 196, 29 S. Ct. 260 (1909).
[11] Davis, 333 Md. at 64 (dissenting opinion of J. Bell).
[12] 500 U.S. 415, 432, 111 S. Ct. 1899 (1991).
[13] 463 Md. 372, 205 A.3d 1012 (2019).
[14] Id. at 404 (quoting Collins v. State 238 Md. App. 545, 559, 192 A.3d at 928 (2018)).
[15] 380 U.S. 202, 219, 85 S.Ct. 824 (1965), overturned on other grounds by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).
[16] Lewis v. U.S., 146 U.S. 370, 13 S. Ct. 136 (1892)
[17] Pointer v. U.S., 151 U.S. 396, 14 S. Ct. 410 (1894).
[18] Swain, 380 U.S. at 219.
[19] Id. at 219-220.
[20] Id. at 219.
[21] 549 F.2d 990, 993 cert. denied, 434 U.S. 902 (1977)
[22] 452 Md. 614, 629, 158 A.3d 553 (2017) (citing Richard Seltzer et al., Juror Honesty During the Voir Dire, 19 J. CRIM. JUST. 451 (1991)); see, e.g., Dale W. Broeder, Voir Dire Examinations: An Empirical Study, 38 S. CAL. L. REV. 503 (1965); Neal Bush, The Case for Expansive Voir Dire, 2 L. & PSYCHOL. REV. 9, 13-14 (1976); Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL 5 (1989).
[23] The United States Supreme Court recognized this when it said that "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence." Crawford v. United States, 212 U.S. 183, 196, 29 S. Ct. 260 (1909).
[24] Frank P. Andreano, Voir Dire: New Research Challenges Old Assumptions, 95 ILL. B. J. 474, 476 (2007).
[25] Jurywork Systematic Techniques § 2:10 (2016).
[26] Jones, S. E., Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, L. & HUM. BEHAV., 11 (2), 131-146 (1987), available at https://doi.org/10.1007/BF01040446.
[27] United States v. Cleveland, Crim. A. No. 96-207, 1997 WL 2554 at *3 (E.D. La. Jan. 2, 1997).
[28] See, e.g., Macrae, C. N., et al., (1994), Out of Mind but Back in Sight: Stereotypes on the Rebound J. PERSONALITY & SOC. PSYCHOL., 67(5), 808; Payne, B. K., et al., (2002),Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions of Weapons, J. EXPIRIMENTAL SOC. PSYCOL, 38(4), 384-96.
[29] Bennett, Psychological Methods of Jury Selection in the Typical Criminal Case, 4 CRIM. DEF. 11, 13 (No. 2, April 1977).
[30] See Suggs and Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 IND. L.J. 245, 255 (1981). at 255 (Citing Mehrabian, A Semantic Space for Nonverbal Behavior, 35 J. CONSULTING & CLINICAL PSYCH. (1970)).
[31] Id.
[32] Id.
[33] Id.
[34] 476 U.S. 79, 106 S. Ct. 1712 (1986).
[35] 511 U.S. 127, 114 S. Ct. 1419 (1994).
[36] Greenwald, A. & Krieger, L., Implicit Bias: Scientific Foundations, CAL. L. REV. 94(4), pp. 945-967 (2006).
[37] Cardi, J., Hans, V.P. & Parks, G., Do black injuries matter?: Implicit bias and jury decision making in tort cases, S. CAL. L. REV. 93(3), pp. 507-570 (2020).
[38] 476 U.S. 79, supra.
[39] 545 U.S. 231, 125 S. Ct. 2317 (2005).
[40] Id. at 270.
[41] Id. at 271 (emphasis in original).
[42] 476 U.S. 79, supra.
[43] 511 U.S. 127, supra.
[44] 476 U.S. 79 at 96.
[45] Id.
[46] Id. at 96-97
[47] 511 U.S. at 143; see, e.g., Nebraska Press Assn. v. Stuart, 427 U.S. 539, 602, 96 S.Ct. 2791 (1976) (Brennan, J., concurring in the 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.) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges.").
[48] 27 F.3d 1424 (9th Cir. 1994).
[49] Id. at 1429-30.
[50] Alabama, Alaska, California, Colorado, Connecticut, Flor Ida, Georgia, Hawaii, Illinois, Indiana, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, North Carolina, New Mexico, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming provide either a statutory or civil rule of procedure right to direct questioning of jurors by attorneys during the voir dire process. Nebraska recognizes this as a common law right.
[51] Jon Van Dyke, Voir Dire: How Should it Be Conducted to Ensure That Our Juries are Representative and Impartial, 3 HASTINGS CONST. at Table II pages 95-97 (1975).
[52] Arizona, Delaware, Maine, Maryland, and South Carolina. South Carolia guarantees the right of direct questioning of jurors during voir dire in capital cases.
[53] Gutman, supra note 1 at 90.
[54] John Shapard & Molly Johnson, Memorandum From the Federal Judicial Center, to the Advisory Committee on Civil Rules and Advisory Committee on Criminal Rules (Oct. 4, 1994).
[55] Principles for Juries and Jury Trials, Am. Jury Project, at 72 (2005).
[56] American Bar Association, Principles for Juries and Jury Trials, Principle 11(B)(2) (2005).
[57] Van Dyke, supra note 73.
[58] Id. at 84-88.
[59] Vidmar & Hans, American Juries: The Verdict (New York: Prometheus Books, 2007), ch. 4 at p. 89; Mogill & Nixon, A Practical Primer on Jury Selection, 65 MICH. B. J. 52, 54 (1986).
[60] Mize, Hannaford-Agor & Waters, The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report, p. 30, available at <http://www.ncsconline.org/ D_Research/cjs/pdf/SOSCompendiumFinal.pdf> (accessed October 21, 2011).
[61] 471 Md. 1, 33-34, 236 A.3d 630, 649 (2020).
[62] 509 U.S. 579, 113 S. Ct. 2786 (1993).
[63] 476 U.S. 79.
[64] 511 U.S. 127 (1994)
[65] 509 U.S. 579 (1993).
[66] Davis v. State, 333 Md. 27, 633 A.2d 867, (1992).
[67] 101 Md. 39, 60 A. 452 (1905)
[68] Id. at 46, 633 A.2d at 876.
[69] 452 Md. 614 (2017)