Making the Case for Juror Privacy:

A New Framework for Court Policies and Procedures*

by Paula L. Hannaford

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Abstract

As access to personal information in public records, over the Internet, and through other sources has improved, prospective jurors across the country are beginning to demand that courts take steps to keep personal information that is provided during jury service confidential. Some courts have struggled with juror privacy issues for a substantial period of time and have modified their jury procedures to accommodate these concerns by sealing records, withholding certain information from litigants and attorneys, using "anonymous juries" and other techniques. Other courts have not yet confronted these issues or have only begun to seriously consider these matters. The result is a national hodge-podge of court procedures concerning public access to juror information – few of which adequately address all of the facets of juror privacy and many of which are of questionable legality given the strong statutory and constitutional policies in favor of open judicial records. What courts need at this time, and what this white paper attempts to provide, is a comprehensive framework for courts to use in formulating effective and legally defensible policies and procedures to protect the confidentiality of juror information.

The paper begins with a description of how multifaceted and nuanced the issue of juror privacy can be in the context of contemporary society. A brief overview of caselaw on this topic demonstrates a surprising lack of consensus about the importance that courts should ascribe to protecting the confidentiality of jurors' personal information. It then proposes a new framework in which the principle criteria for determining whether juror information should be publicly accessible is whether that information is relevant to the juror's ability to be fair and impartial in the context of a specific trial. The framework is illustrated with a detailed description of whether information collected during various stages of the pretrial and trial process – summoning and qualification, voir dire, post-verdict — should be protected or disclosed.

An early draft of the white paper was distributed at Jury Summit 2001, a national symposium that focused on all aspects of contemporary jury management and trial procedures held in New York City on January 31 to February 3, 2001. The final draft will be available on the National Center for State Courts website at http://www.ncsconline.org/ and on the Jury Summit 2001 website at http://www.jurysummit.com. It will be included in the course materials for the Institute for Court Management workshop on Jury Management (September 4-7, 2001 in San Francisco). A version of the white paper is expected to be published in the July/August 2001 issue of *Judicature*.

Acknowledgements

Like so many research projects at the National Center for State Courts, the idea for this white paper began with a slow trickle of telephone calls and e-mails from judges and court staff around the country asking for guidance on how to protect the privacy of the citizens who reported for jury service in their courts. Some of these cases stemmed from litigant requests for the names and addresses of prospective jurors, others from media requests for transcripts of the voir dire. Over time the trickle became a steady stream. With that stream came a growing recognition that although the details differed from case to case, the underlying issue was whether citizens have a legitimate expectation that the information they provide to the court in the course of jury service will be kept reasonably confidential. It was a question that didn't seem to have any clear answers, or at least any answers that easily encompassed more than the immediate situation.

Developing this white paper took a great deal of time, and was interrupted far too many times. But it would not be completed even now if not for the assistance and encouragement of a great many people. First, judges, court staff, lawyers, and reporters who are too numerous to mention by name took the time to describe the existing policies and procedures related to juror privacy in their jurisdictions, and to send me copies of relevant court opinions, newspaper clippings of illustrative cases, and drafts of proposed policies and briefing papers on this topic. So extensive is this collection of materials that it now occupies its own file drawer in my office. The State Justice Institute provided funding for this paper and I thank Mitch Michkowski, the SJI project monitor, for his long patience as it developed.

An Advisory Committee consisting of Judge James H. Chamblin (Loudoun County, VA), Prof. Nancy King (Vanderbilt School of Law), Judge Philip K. Mautino (California Judges' Association), Dr. Mary Rose (American Bar Foundation), and Timothy Shea (Utah Administrative Office of the Courts) reviewed an early draft of the paper and provided much needed commentary. A number of National Center colleagues were also invaluable sources of information and encouragement throughout the development of this white paper. Ann Keith provided extensive research and editing assistance, and the final draft of this paper is more coherent and complete as a result of her attentions. Judge B. Michael Dann, formerly of the Maricopa County Superior Court and now an NCSC Research Fellow and good friend, helped with insights, ideas, and much good humor. Finally, I owe the greatest debt to my colleague Tom Munsterman who first introduced me to the rich and rewarding field of jury research and offered unfailing encouragement that this paper would be a valuable contribution to it, now matter how long it took. Ultimately, I am responsible for any errors, misstatements or omissions in the substance of this paper, but it is my sincerest wish that his confidence will not, in the end, prove to be misplaced.

Introduction

Some time ago, I conducted a workshop on jury service for a local troop of Girl Scouts who were working on their "Law and Justice" badges. From my own upbringing (including many years of Girl Scout activities), I expected that most of these 14 to 17-year-olds would have a somewhat favorable picture of jury service from their middle school and high school civics classes and possibly from their parents' experiences as jurors. So I was surprised by the comment of one young woman who said that she would *never* want to be summoned for jury service. Wanting to get a worthwhile discussion going, I asked what her objection was.

"It's dangerous," she said, as many of the young women in attendance nodded their agreement. "Everyone gets to know everything about you – where you live, where you work, where your kids go to school. Even criminals get to know that information. You're not allowed to keep anything private."

Regrettably, her perception of jury service reflects the widespread, albeit extreme, concern of millions of Americans who are summoned for jury service every year in state and federal courts. Actual cases of retaliation against jurors are extremely rare, but they do occur occasionally and so concerns about that possibility by citizens are very real. Some of these concerns may be the result of excessive publicity about the lives of jurors that have served in high profile trials in recent years. But a large part stems from the actual experiences of citizens who serve as jurors in relatively routine criminal and civil trials. Numerous studies document that perceived insensitivity to the privacy concerns of prospective jurors is one cause of dissatisfaction with jury service.

If it were simply a matter of minor discomfort with the disclosure of personal information, many (perhaps most) trial judges and court staff might be inclined to dismiss these

concerns as an unpleasant, but unavoidable, byproduct of an otherwise invaluable institution of American democracy. But recent trends in citizen participation in jury service suggest that ignoring the privacy concerns of persons summoned for jury service actually undermines the integrity of that institution. Some reports describe citizens who intentionally refuse to register to vote as a way of keeping themselves off the jury source list[1] or who fail to respond to jury summonses.[2] Others report that some jurors fail to disclose personal information, even when directly questioned under oath, if it touches too closely on sensitive matters.[3] This behavior by prospective jurors presents more serious problems for courts in that venires may be unrepresentative of their communities or juries may include individuals who cannot serve fairly and impartially.

As a result of these considerations, many trial judges and court staff are becoming more sensitive and sympathetic to the privacy concerns of jurors and are modifying their jury procedures to accommodate citizens' privacy concerns. Among the techniques that courts often employ are sealed records, "anonymous juries", *in camera* voir dire, and restrictions on the specificity of information provided to the attorneys and on the scope of voir dire. Other courts have not yet confronted these issues or have only begun to seriously consider these matters. The result is a national hodge-podge of court procedures concerning litigant and public access to juror information – few of which adequately address all of the facets of juror privacy and many of which are of questionable legality given the strong statutory and constitutional policies in favor of open court proceedings and records.

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[1] *See* John Paul Ryan, The American Trial Jury: Current Issues and Controversies, Social Education Vol. 63, Issue 7, 458, (1999).

[2] *See generally* Robert G. Boatright, Why Citizens Don't Respond to Jury Summonses and What Courts Can Do About It, 82 Judicature, 156, (Jan/Feb 1999).

[3] *See G*regory E. Mize, On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room, 36 Court Review 10 (1999).

This Article briefly discusses the difficulty that courts face in their attempts to balance the privacy concerns of citizens summoned for jury service against the rights of litigants and the public to access information about those individuals. Caselaw provides some guidance about how and when courts can protect juror privacy, but the topics discussed in recent court opinions range from disclosure of juror names and addresses on the source list to disclosure of sensitive information revealed during voir dire, to post-trial contact with jurors by attorneys and the media. It is difficult to incorporate all of these aspects of trial management into a single, coherent policy on juror privacy.

I propose that focusing on the content of the information requested of prospective jurors, and purposes for which that information is used by the court, is a more helpful analysis than the legal framework traditionally employed in caselaw. Specifically, I argue that distinguishing between information that is relevant and information that is not relevant to the fairness or impartiality of prospective jurors should be the primary analytical framework for courts seeking to protect the legitimate privacy interests of prospective jurors. This approach is not only more likely to help those courts that recognize and wish to protect the legitimate privacy expectations of citizens summoned for jury service, but will also garner greater public support for and understanding of the legitimate purpose of voir dire questioning and the court's and litigants' needs for candid responses to those questions.

Increased Sensitivity to Issues of Juror Privacy

It is axiomatic that the American public holds the concept of personal privacy in very high esteem. Justice Brandeis perhaps articulated it best in his dissenting opinion in *Olmstead v. U.S.*: "the right to be let alone [is] the most comprehensive of rights and the right most valued by

civilized men."[4] In recent years, Americans are even more concerned about potential intrusions on personal safety and privacy. These concerns stem in part from increased public awareness of the amount of "personal" information that is publicly accessible. Financial institutions have access to credit information; insurance companies have access to medical information; retailers have access to information about personal buying habits. Advances in technology facilitate the compilation and exchange of personal information, making it more difficult for individuals to restrict access to personal information, or even to know who has access to that information and for what purposes. It is no surprise that citizens who are summoned for jury service are as concerned about public and litigant access to their personal information as they are about such access in other aspects of their lives.

Courts collect a great deal of personal information about the citizens who report for jury service, but most citizens understand and support the fact that the court has a legitimate purpose in soliciting personal information. Even those who would avoid jury service if they could are not troubled by the knowledge that courts must ensure that jurors are statutorily qualified to serve. Prospective jurors do not object to giving court staff a telephone number to contact them in the event of a trial cancellation or postponement. They recognize the need for the judge and litigants to screen prospective jurors to ensure a fair and impartial jury. What they do object to is the requirement to divulge personal information that does not appear relevant to these legitimate purposes or that might be used for illegitimate purposes.

[4] 277 U.S. 438, 478 (1928).

Caselaw on Juror Privacy

A detailed discussion of the caselaw concerning juror privacy issues is beyond the scope of this Article and would be superfluous given the large volume of legal commentary published on this topic in recent years.[5] Suffice it to say that the general rule underlying most cases is that jurors do have a qualified right to privacy. However, absent compelling circumstances, that right yields to the Sixth Amendment right of criminal defendants to a fair and impartial jury and to the First Amendment right of the public and press to open court proceedings. The compelling reasons articulated in caselaw generally consist of threats to the physical safety of jurors or to the integrity of the judicial process (e.g., jury tampering, intimidation, or harassment).

Some commentators criticize the limited circumstances in which juror privacy interests prevail over demands for disclosure from litigants or the press, arguing that the appellate courts have not given sufficient weight to the purely instinctive desire of jurors to keep personal information private.[6] Others contend that the purely legal framework in which these issues are considered underestimates the risk to the integrity of the judicial process inherent in *failing* to protect juror privacy (e.g., by falsely assuming that jurors willfully, albeit begrudgingly, disclose personal information when ordered to do so). One of the limitations of caselaw, generally, is that it tends to focus narrowly on the precise questions framed by the appellants, few of which are the actual jurors whose privacy rights are at stake. A cursory reading of these cases gives the

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[5] *See*, e.g., David Weinstein, *Protecting A Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMPLE L. REV. 1 (1997); Nancy A. Novak, *Note, Jury on Trial: Juror's Constitutional Right to Privacy Falls Under Scrutiny of the Courts*, 3 SAN DIEGO JUST. J. 215 (1995); Marc O. Litt, *"Citizen-Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors,* 25 COLUM. J. L. & SOC. PROBS. 371 (1992); Susan L. Greenberg, *Note, Spotlight on the Jury: Trial Publicity and Juror Privacy*, 6 COMM/ENT. L. J. 369 (1983-84); Jennifer S. Buckley, *Note,* Press-Enterprise Co. v. Superior Court: *A Juror's Right to Privacy*, 2 DETROIT COLL. L. REV. 649 (1985); Michael R. Glover, *Note, The Right to Privacy of Prospective Jurors During Voir Dire,* 70 CAL. L. REV. 709 (1982).

[6] *See* Marc O. Litt, "Citizen Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media, and the Privacy Right of Jurors, 25 Col. J.L. & Soc. Prob. 371, 412 (1992).

impression that juror privacy rights must always yield to the litigant and media rights of access, except in the most extreme circumstances (e.g., extraordinarily dangerous defendants or high profile trials). It is on this basis that many trial courts, although sympathetic to juror privacy rights, feel powerless to protect those rights.

As a practical matter, however, balancing the competing Sixth Amendment, First Amendment, and juror privacy rights is a complex calculus. Critical factors in the outcome include who is requesting access to juror information (media or litigant); of whom the information is requested (the entire jury pool, the venire, or the empanelled jury); when the information is requested (pre-empanelment, during trial, or post-verdict); and the nature of the information requested (e.g., mundane information such as names and addresses, or more sensitive, personal information revealed during voir dire). Other factors are the existence or absence of state statutes, court rules, or local court practices concerning how juror information is collected, processed and stored.

It is clear from the opinions articulated in caselaw that no national consensus yet exists about the importance that courts should ascribe to juror privacy. But even if clear guidance could be easily discerned from recent court opinions, the development of coherent, comprehensive policies and procedures regarding juror privacy would still be preferable to adopting an ad hoc, case-by-case approach. An established policy is not only less likely to be challenged, but also more likely to survive a legal challenge if made. Moreover, in developing comprehensive court policies to address juror privacy issues, court leaders can consider the potential impact of disclosing jurors' personal information beyond the immediate context of a single trial – something that appellate opinions only rarely do. The most important step in formulating comprehensive policies on jury privacy is to reconsider the purpose(s) for which

juror information is collected by the court. Doing so necessarily requires us to define very carefully the objectives of the jury selection process and the respective roles of the court, the parties and their lawyers in that process.

Rethinking Juror Privacy

Perhaps the strongest argument articulated in caselaw favoring disclosure of juror information is that disclosure provides a mechanism to satisfy both the litigants' and the public's concern that justice is fair and impartial. From this argument, it is possible to discern the proponents' beliefs about the core objective of the jury selection process – namely, that the purpose of jury selection is to ensure that the jurors selected for trial are capable of serving in a fair and impartial manner. It is a statement against which few in the American justice system would argue, but it does lend itself to the possibility of a false syllogism – that is, that *all* juror information is relevant to the question of the juror's ability to be fair and impartial and thus is subject to disclosure.

Qualification and Administrative Information

Although we know that courts routinely collect a great deal of juror information, only a portion of that information is actually useful for determining juror bias or prejudice. Courts use the remaining information for two additional purposes – to qualify prospective jurors according to statutory criteria for jury service and to manage the various administrative tasks associated with the jury system such as summoning, payment of juror fees and expenses, and routine communications. One of the first steps that courts can take to protect juror privacy, therefore, is to segregate juror information that is used for qualification and administrative purposes from that

used for examining fairness and impartiality. The former, which does not further the objective of satisfying litigant and public confidence in the fairness and impartiality of jurors, should not be disclosed with the latter. Several states restrict public access to administrative information as a matter of policy. In New York State, for example, juror qualification questionnaires are exempt from public disclosure under the state's Freedom of Information Law.[7] Other jurisdictions have implemented court rules that require summonses to be designed in such a way that qualification and administrative information is segregated from information that is provided to the litigants during voir dire.[8]

But why should qualification and administrative information be withheld from public scrutiny? The answer is not obvious for those familiar with in the importance of open government to the functioning of a healthy democracy. But the question inherently confuses the ends (public confidence in the fairness and impartiality of jurors) with the means (public disclosure of juror information) without considering the utility of disclosing all juror information or the potential misuse of that information. The whole issue of juror fairness and impartiality is only meaningful in the context of a particular trial, not in jury service generally. Thus, the qualification process is not a determination of fairness and impartiality, but rather of competency to sit in judgment of one's fellow citizens.

Citizenship, residency, age, and legal status are not, by themselves, indications of bias or prejudice. They do, however, offer some indication of a person's familiarity with the American justice system, with local community norms of behavior, and with the developmental and intellectual maturity to make informed judgments. The qualification process, over which the court has virtually exclusive authority, is a *pretrial* screening process intended to produce a pool

[7] NY JUD. LAW § 509(a). *See also* Newsday v. Sise, 71 N.Y.2d 146 (1987).

of qualified, legally competent prospective jurors from which jurors may be selected. Disqualified, exempted, and excused jurors do not report for jury service, and therefore their personal information, including the precise reason they were disqualified, exempted or excused, is not relevant to the question of their fairness or impartiality to serve in a particular trial.

Nevertheless, some critics have argued that juror qualification information should be subject to public disclosure to ensure that the court conducts the qualification process in a consistent and effective manner.[9] It is doubtful, however, that the disclosure of individual juror records enhances public confidence. Indeed, that confidence may even be harmed by the apparent disregard for the privacy rights of citizens. Instead, public confidence in the justice system is more likely enhanced by knowledge that *procedures* to summon and qualify prospective jurors (e.g., random selection, excusal and deferral policies) are consistently and even-handedly implemented by the courts. At appropriate intervals, the court should conduct internal audits of its procedures to determine whether they secure a jury pool that accurately reflects the demographic characteristics of the community, and the aggregate results of those audits should be made publicly available.[10]

Another argument often made in favor of the disclosure of qualification and administrative information about prospective jurors is that much of this information is already in the public domain, and thus the court does not violate juror privacy by disclosing it to the public. But that argument overlooks the degree to which public information is *conveniently* accessible. A telephone book typically lists a person's name, address, and telephone number, but it does not ordinarily link this limited information to the names of spouses, children, or employers.

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[8] *See, e.g.,* ARIZ. R. CIV. PROC. Rule 47(a)(4); ARIZ. R. CRIM. PROC. Rule 18.3.

[9] *See* Gannett Co. v. State, 571 A.2d 735 (Del. 1989).

Information collected by the courts for jury service, however, links many aspects of a person's life – home, family, work, citizenship and residency status, criminal history, and finances – in a single, convenient record and no effort is made to place restrictions on public access to information that is not ordinarily in the public domain.

Moreover, individuals have the right in most circumstances to place limitations on how personal information can be distributed, and many exercise that right. For example, many individuals request that the telephone company not publish their telephone numbers, or limit the listing (e.g., surname and first initial only, no address). Federal legislation places restrictions on the ability of financial institutions to disclose financial information without the expressed consent of the individual to whom the information pertains.[11] Similar requirements to protect the privacy of medical records are currently under consideration.[12] Citizens have no corresponding right to place limitations on disclosure of personal information collected by the court or to withhold that information from the court because of the court's inability to protect juror privacy.

Recent increases in the incidence of identify theft and other forms of financial fraud make the potential harm to citizens much more severe than the mere discomfort of excessively private citizens. The Superior Court of Los Angeles County, for example, reported several instances of scam artists impersonating court staff and telephoning recently summoned jurors to request their Social Security numbers "for payroll purposes". Later these jurors discovered that the scam artists had established fraudulent lines of credit in their names. Some Wisconsin jurors experienced a difference form of financial harassment from local militia groups who,

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[10] AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Standard 2(c) and (d) (1993).

[11] 12 USC §§ 3403-3404.

[12] Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82461-82510 (proposed Dec. 28, 2000).

unbeknownst to targeted jurors, fraudulently report to the Internal Review Service (IRS) that they have paid income to those jurors. Failing to report the bogus income on their tax returns triggers an automatic IRS audit.

These isolated cases highlight the potential risks to citizens of making juror information easily accessible to the public. Even without such risks, the question remains whether disclosure of administrative information about jurors promotes public confidence in the fairness and impartiality of jurors under the framework I have proposed. I maintain that it does not. Knowledge of a prospective juror's name, address, employer, home and work telephone numbers, and Social Security number are highly unlikely to reveal juror bias or prejudice. Although it is true that a name might reflect a person's gender or ethnicity or even religious affiliation, none of these characteristics are permissible to infer bias or prejudice under *Batson v. Kentucky*[13] and its progeny. One who lives at the corner of Fifth and Main Streets may have lived there her whole life, or moved there quite recently from another part of town or even another part of the world. Similarly, knowledge of a prospective juror's employer or street address is not a reliable indicator of that individual's attitudes or opinions about issues relevant to the trial. Knowledge that a prospective juror works for IBM does not indicate whether that individual is a computer engineer, a salesperson, a secretary, or a janitor. A far more effective method of identifying bias in prospective jurors is to ask them directly during voir dire, "Do you know any of the lawyers or parties in this case?" "Do you live or work near such-and-such location, where the crime/accident took place?" rather than attempt to infer bias based on limited information.

[13] 476 U.S. 79 (1986).

Criminal Background Checks and Independent Investigations of Jurors

In reality, neither litigants nor the media are so naïve as to think that qualification or administrative information about prospective jurors is particularly helpful on its face to reveal juror bias. Rather, that information is sought as a means to inquire further into a juror's personal information. As one lawyer once told me, quite candidly, about his desire for access to prospective jurors' home addresses, "you can learn a lot about a juror by driving by their house and checking out their home environment – are there children's toys in the yard? How many cars in the driveway? What make and model? What bumper stickers?" Simply driving by a juror's house seems an old-fashioned and highly inefficient method of obtaining juror information given the amount of information that may be gleaned from on-line databases. Nonetheless, the ability to conduct criminal background checks and independent investigations of prospective jurors is why lawyers and media press so hard for continued access to juror qualification and administrative information.

The practice of independent investigations of prospective jurors has disturbing ramifications not only in terms of juror privacy, but also in terms of judicial oversight of the jury selection process. In their most common form, independent investigations tend to involve criminal background checks of prospective jurors by prosecutors. The ABA Standards Relating to the Administration of Criminal Justice recognizes that prosecutors may investigate prospective jurors, but cautions that the investigation should normally be restricted to existing records and should not be used to harass, unduly embarrass, or invade the privacy of potential jurors.[14] The regulations governing the use of the federal NCIC database explicitly condone this practice, but do not require prosecutors to share this information with the court or defense counsel. Indeed,

[14] ABA Stand. Relating to the Admin. Of Crim. Just. R3-5.3(b)(1996).

the court and defense counsel often are unaware that such an investigation has even taken place. This was the case in a hotly contested ruling by a Virginia Circuit Court judge who, after discovering the practice, prohibited local prosecutors from conducting criminal background checks on prospective jurors on grounds that it usurped the duty of the court to oversee jury selection and violated jurors' expectations of privacy.[15]

It is certainly understandable that prosecutors would find such information helpful in determining, for example, whether a prospective juror has any experience with the criminal justice system that might affect his or her attitudes about the police or law enforcement officials. But recognition of that fact does not explain why such an examination should be conducted in addition to or independently of the questioning that takes place during voir dire. Nor does it explain why the results should be kept from the court or from defense counsel, particularly if they pertain directly to the issue of the jurors' ability to be fair and impartial.

More to the point, it does not explain why the fact that a criminal background check has been conducted should be kept from the jurors themselves. Indeed, knowledge that a criminal background check has been done might reduce much of the awkwardness and dissembling that routinely takes place during voir dire when questions concerning prior criminal records are raised. Why ask the question if the judge and lawyers already know the answer? At best, it wastes valuable court time that could be spent more productively. And from the jurors' perspective, it breeds suspicion and cynicism that the judge and lawyers are merely playing a game of "gotcha", waiting to pounce if a juror fails to disclose some involvement with the criminal justice system, regardless of how minor the offense might have been or how long ago it occurred. Jurors harbor similar concerns about the civil justice system, although those concerns

[15] *See* Order, In re: Use of Jury Lists (Cir. Ct. Loudoun Cty., Va., June 2, 1998) *and* Memorandum re: Use of Jury Lists (Cir. Ct. Loudoun Cty., Va., June 2, 1998).

may be exacerbated by Grisham-esque fictional accounts and media reports in high profile trials; few civil litigants have the resources to conduct extensive background checks on the entire venire before trial.

The point is that these practices are a far departure from the ABA Standards on Juror Use and Management, which state that "[n]o independent investigation by attorneys or any others is contemplated nor should it be countenanced by the court."[16] The sentiment underlying the standards clearly favors a jury selection process that takes place only in the courtroom, on the record, and under the direct supervision of the trial judge. Many judges and court staff are aware of and tacitly disapprove of independent investigations of jurors, but they rarely take overt steps to prevent them. Two approaches are somewhat helpful in deterring these intrusive and unregulated investigations of jurors. First, restricting the amount of information disclosed to lawyers (e.g., name and zip code only; no Social Security number, street address or date of birth) makes it difficult to conduct background checks with any accuracy. Second, holding identifying information about the venire until shortly before the trial date effectively impedes the ability to lawyers to conduct background checks, especially on large panels.

Juror information revealed during jury selection (voir dire)

The jury selection process involves the disclosure of information that is generally more sensitive than that revealed for summoning and qualification purposes. The questions posed by the judge and lawyers during voir dire are used to screen for bias based on jurors' actual knowledge of the parties, the lawyers, the witnesses, the facts of the case, or of attitudes related to issues that are likely to arise during trial. Precisely because such information can be highly

[16] ABA Stand on Juror Use and Mgmt Rule 7(a) cmt. (1993).

sensitive or embarrassing to jurors, caselaw is replete with examples of judges who have tried, usually unsuccessfully, to keep this information from public disclosure. But under the conceptual framework proposed in this Article, juror information revealed during jury selection is directly relevant to the prospective juror's ability to be fair and impartial and should be publicly accessible.

Notwithstanding the importance of public access to voir dire, failing to provide appropriate protections for juror privacy has definite consequences for the integrity of the jury selection process. A number of empirical studies have found that prospective jurors often fail to disclose sensitive information when directed to do so in open court as part of the jury selection process. A 1991 study of juror honesty during voir found that 25% of jurors questioned during voir dire failed to disclose prior criminal victimization by themselves or their family members.[17] In a more recent study of the effectiveness of individual voir dire, Judge Gregory Mize (D.C. Superior Court) found that 28% of prospective jurors failed to disclose requested information during questioning directed to the entire jury panel.[18] During individual voir dire, a number of those jurors revealed information that Judge Mize believed was relevant to their ability to serve fairly and impartially. Thus, failure to protect juror privacy can actually undermine the primary objective of voir dire – namely, to elicit sufficient information about prospective jurors to determine if they can serve fairly and impartially.

Part of the reluctance to reveal sensitive information may be related to jurors' lack of understanding about how the information is relevant in the context of that trial. A brief description of the case, for example, does not reveal all the potential nuances of evidence and

[17] Richard Seltzer, Mark A. Venuti & Grace M. Lopes, *Juror Honesty during the Voir Dire,* 19 CRIM. JUST. 451 (1991).

[18] *See* Mize, *supra*, at 15.

testimony about which the attorneys may be probing for indications of jurors' attitudes and opinions. In fact, one technique designed to make the focus of voir dire questions more apparent to prospective jurors, and thus increase juror willingness to reveal relevant information, is to permit the attorneys to present a brief, objective opening statement to the entire jury panel. Judges who have tried this technique report that it often prompts jurors to reveal information that they might not otherwise reveal with a less clear understanding of the context of the trial.[19] In her study of jurors' views of privacy, Rose found that citizens who had the opportunity to serve as jurors in an actual trial felt that the questions posed during voir dire were less intrusive and uncomfortable compared to citizens who participated in voir dire but were later excused from jury service and thus did not have the opportunity to see why certain questions were asked during voir dire.[20]

Even when it is obvious that a candid answer to a question posed during voir dire is relevant to the issue of juror bias, many individuals will choose to withhold personal information for perfectly understandable reasons. After being summoned for jury service in a recent drug trial, for example, a friend confided to me that he declined to identify himself (as did everyone else on the jury panel) when the judge asked whether anyone had ever used illegal drugs. "After all," he explained, "I don't know what else they might use that information for. Isn't there still a Fifth Amendment right not to incriminate yourself?" Similar omissions occur every day in state and federal courts as prospective jurors hedge their answers concerning not only drug and alcohol use, but also criminal victimization, financial and credit status, marital or family difficulties, and other sensitive topics.

[19] *See* Elizabeth Amon, *Shaking Up Juries, State by State,* NAT'L L. J. 1 (Feb. 5, 2000).

[20] *See generally* Rose, *supra.*

As judges and lawyers have become more aware of the reluctance of citizens to disclose sensitive information, they have developed a number of fairly successful techniques to encourage prospective jurors to be candid in their responses to voir dire questions. Juror questionnaires, for example, permit jurors to respond to voir dire questions in writing, thus avoiding the discomfort of revealing sensitive information orally before a large group of strangers in the courtroom. Another technique is to inform the jury panel that they can decline to answer any question aloud that they feel intrudes excessively on their privacy and instead discuss their answers with the judge and attorneys in the privacy of the judge's chambers or out of the presence of the jury panel and other courtroom observers. A related technique is to conduct the entire voir dire individually or in small groups (3 to 5 people) of prospective jurors, which tends to make the procedure somewhat less intimidating. None of these techniques provides an atmosphere of true intimacy, as they all necessarily involve the participation of the judge, the attorneys, often the litigants, and a court reporter and other court staff. Nevertheless, they are somewhat less intimidating than discussing one's private affairs before an audience of dozens of onlookers.

As in oral voir dire, jurors' answers to questions become part of the court record. Thus, they are not truly "private" in that the written responses or a transcript of individual or *in camera* must be made available to the press or public upon request, which may be a concern in very high profile cases. In those instances, however, the judge has the opportunity to redact information in the transcript or seal the court record if he or she determines that the juror has a legitimate privacy interest that should be protected. The vast majority of cases, however, do not involve such high public scrutiny. The audience to which prospective jurors are most reluctant to reveal information consists of other people assembled in the courtroom for that trial. In such cases, the techniques described above will alleviate much of the discomfort associated with providing

sensitive information about themselves and their families. Moreover, explicitly acknowledging the privacy concerns of prospective jurors may actually decrease jurors' perceptions about the intrusiveness of certain types of questions.

Finally, some courts have adopted the practice of referring to jurors by number rather than name during both voir dire and trial. In the Los Angeles Superior Court, for example, most criminal judges do this as a regular practice and report that jurors are very pleased with this procedure.[21] The practice first originated for criminal trials in which retaliation from defendants for an unpopular verdict or in which the possibility of jury tampering were major concerns. Later it became a popular technique for preventing (or at least inhibiting) media contact with jurors during high profile trials, such as the O.J. Simpson murder trial and the Oklahoma City bombing trial. In early uses of this technique, juror names or other identifying information were protected from the litigants and their attorneys as well as from the public and media. Absent a significant risk to juror safety, however, litigants and their attorneys are now usually given a list of juror names and corresponding juror numbers for jury selection purposes.

Underlying this technique is the theory that "anonymous jurors" will feel less intimidated by litigants, by the potential for subsequent media contact, and by each other. Therefore, they will be more likely to disclose potential bias during jury selection and be more willing to engage in deliberations without fear of external consequences. To date, no empirical research has been conducted to substantiate these claims, although anecdotal reports from jurors in courts employing this technique are generally favorable. Severing the link between a juror's identity and his or her role in the context of the trial appears to be a reasonable method to protect juror privacy from threats of retaliation from defendants or post-trial intrusions from the media. It is

[21] *See* Hon. Jacqueline Connor, *Jury Innovation Pilot Study, Los Angeles Superior Court* 1, 7, 10-13 (Nov. 1999); CAL. CIV. PROC. § 237 (2001).

not clear, however, that such efforts are a particularly useful tool for encouraging shy individuals to be more forthcoming in a courtroom crowded with strangers.

Examining the scope of voir dire

The techniques discussed above are designed to encourage greater candor by prospective jurors concerning sensitive or private matters. Yet another method of protecting juror privacy is arguably more effective than any of those described: the trial judge restricts the scope of voir dire to those questions that are *reasonably* related to a determination of a prospective juror's ability to be fair and impartial. While it is abundantly clear that information disclosed by jurors during jury selection becomes part of the public record, it should also be clear that courts are not required to solicit all possible personal information from jurors. Information that is not disclosed during jury selection does not become part of the public court record and does not violate jurors' expectations of privacy.

It should not be surprising that many citizens take offense at being compelled to answer questions that appear only marginally relevant, if at all, to the issue of their ability to serve fairly and impartially. In the Rose study, for example, 53% of jurors reported that they found questions that were unimportant to voir dire to be offensive.[22] In one widely publicized case, a Texas juror preferred to face contempt charges rather than answer questions concerning her religious affiliation, family income, and other matters that she believed were irrelevant and unduly intrusive of her privacy.[23] That juror was a notable exception in that she openly refused to disclose the information. Other jurors may simply fail to disclose the information without calling attention to their refusal to do so.

[22] *See* Rose, *supra*

Why do judges permit such questioning to take place? Part of the answer is a lack of consensus within the justice community about the purpose of questioning jurors during voir dire. Although it is widely agreed that its central purpose is to remove individuals form the jury panel who could not serve fairly and impartially, there is much less agreement concerning the legitimacy of a secondary purpose: assisting lawyers in the intelligent exercise of their peremptory challenges. Peremptory challenges are a legal procedure that permits lawyers to remove individuals from the jury panel without having to state a reason, or even for no reason at all. The number of peremptory challenges allotted to each side varies considerably from state to state.

While a debate is growing in this country over the use of the peremptory challenge as a legitimate tool of litigation, few jurisdictions have taken active steps to reduce or eliminate them. The debate itself is beyond the scope of this Article, but the ongoing disagreement about whether the purpose of voir dire extends to the use of peremptory challenges appears to explain much of the variation in the length of jury selection from jurisdiction to jurisdiction. Maryland, for example, formally recognizes only the detection of juror bias or partiality as a legitimate purpose of voir dire.[24] In general, jury selection in Maryland tends to be fairly brief, lasting only a couple of hours for an average felony trial. In contrast, jury selection in Minnesota, which recognizes information to be used in the exercise of peremptory challenges as a legitimate objective of voir dire,[25] typically lasts as long as the actual trial. Notwithstanding the lack of consensus over the legitimate purpose(s) of voir dire, it is increasingly clear that permitting extensive interrogation of jurors on matters unrelated to the trial not only heightens juror mistrust of the process and

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[23] *See* Brandenborg v. Lucas, 891 F. Supp. 352, 353 (E.D. Tex. 1995).

[24] *See* Dingle v. State, 759 A.2d 819 (Md. 1999).

[25] *See* State v. Davis, 504 N.W.2d 767 (Minn. 1993).

creates unnecessary opportunities for the disclosure of private information to the public, but also is also ineffective for achieving the objectives of jury selection.

The practice of permitting an expansive scope of voir dire questioning is based on the pervasive belief that the attitudes of jurors, rather than the evidence presented at trial, determine the outcome of the trial. Yet a great deal of social science research demonstrates repeatedly that the primary factors that influence jury verdicts are evidentiary. In her seminal article on this topic, Visher found that only two percent of the variation in jury verdicts could be attributed to juror characteristics.[26] Victim and defendant characteristics accounted for only eight percent of the variance. Because the study examined juror decision making in sexual assault trials, in which victim characteristics may play a heightened role, Visher concluded that the "impact of extralegal issues on these jurors' decisions is likely an upper bound for the effects of these factors in other serious criminal trials."[27]

In addition to being largely ineffective at identifying actual juror bias, encouraging false assumptions about the importance of marginally relevant information about jurors introduces an unnecessary degree of adversarialness to the process of jury selection rather than confining it to the presentation of evidence where it belongs.[28] In theory, the scope of inquiry for voir dire should be at least as stringent as that for civil discovery.[29] The standard should be questions that are reasonably calculated to lead to the discovery of actual juror bias or partiality, not a free flowing and unrestricted inquiry into jurors' private lives. To meet this standard, however,

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[26] *See* Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUMAN BEHAV. 1, 13 (1987).

[27] *Id.* at 14.

[28] *See* Morris Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective,* 64 U. Chi. L. Rev. 809, 865-870 (1997).

[29] FED. R. CIV. P. 23

judges must be willing to assert control of lawyer questioning during voir dire to a much greater extent than is typically the case now in many jurisdictions.

Records retention

The discussion above focuses on the method and scope of voir dire as a contemporaneous activity. Many of the concerns about juror privacy, however, stem not from the fact that the limited number of people in the courtroom may hear juror information, but from the fact that the information becomes a permanent part of the court record and is therefore available for public dissemination in perpetuity. Few courts have sufficient staff to monitor all the people who might ask to review the court file to ensure that their objectives are appropriate. And indeed, it would be antithetical to the concept of open government records for a court to engage in that level of monitoring.

The question, therefore, is whether and under what circumstances it is appropriate for courts to limit the amount of time juror records are available for public inspection. In the area of records retention, courts have perhaps the most discretion to protect jurors' expectations of privacy. It is certainly one of the areas in which there is the most variation in court practice. In Minnesota, for example, civil voir dire is not even conducted on the record unless the parties affirmatively move to do so, which happens only infrequently. Members of the public or the press have the right to attend voir dire, but if they fail to do so, there is simply no permanent record of the jurors' verbal responses to questions.

A similar process is employed in civil cases in New York State. New York jurors complete a four-page carbonless jury questionnaire with standard voir dire questions. At the beginning of jury selection, the judge and the attorneys are each given one copy of the

questionnaire; the juror also retains a copy. The judge then asks the jurors under oath if the answers they have provided on the jury questionnaire are true and accurate to the best of their knowledge, and the answer to that question is made part of the court record. The judge and attorneys may pose additional questions to individual jurors and those answers become part of the court record. But the answers to the written questionnaires are not individually made part of the trial record. At the end of jury selection, all copies of the questionnaires are returned to those panel members who were not selected for jury service. Unless they are later selected for another trial, the questionnaires are destroyed at the end of the day. Questionnaires of individuals selected as jurors are destroyed after the trial is over. By employing these procedures, the New York courts drastically reduce the scope of juror information available to the public over time without violating the principles of public access to court proceedings. Criminal trials, of course, have traditionally required a higher level of documentation. This is certainly true in both Minnesota and New York where voir dire is conducted on the record and the responses to routine jury questionnaires are retained as part of the court file.

The apparent lack of concern about retaining information about the minutia of jurors' lives in civil cases highlights a possibility that few courts have considered. If one accepts the basic premise of this Article – that the purpose of making juror information publicly accessible is to ensure that the individuals who are selected as jurors are capable of serving fairly and impartially – there is little justification for retaining information about members of the venire who are not selected for jury service and whose ability to be fair and impartial is therefore irrelevant.[30] Moreover, most jurisdictions require litigants to raise objections to the composition of the jury at trial or forever waive those objections as a basis for appeal. So courts might

[30] An exception can easily be made if an objection were made to excusing a member of the venire (e.g., pursuant to a *Batson* challenge).

consider destroying information about all jurors after the period for appeal has expired. If it is clear from the absence of an appeal that the litigants have accepted the jury's verdict as the product of a fair and impartial tribunal, is there any reason why juror information should be retained in perpetuity? Rather than inspiring public confidence in the jury system, such unregulated retention of private information at best wastes valuable court storage space, and may actually invite the very type of intrusive misuse of juror information that the average citizen fears.

Conclusions

If anything is clear from this discussion of juror privacy, it is that concerns about how courts treat the private information of citizens summoned for jury service are multifaceted. None of the individual techniques or procedures currently employed to protect juror privacy are adequate for addressing all of these concerns in every instance. An anonymous jury may relieve jurors' concerns about the ability of litigants or the media to contact them after the trial, but it does little to encourage the bashful juror to reveal personal information before a crowd of courtroom onlookers. Individuals who would not hesitate to reveal their names, addresses, and marital status in open court may still be reluctant to disclose sensitive information about their criminal history or experience as a crime victim. Most citizens understand the importance of revealing personal information in the context of a specific trial, but are less convinced that the court should permit unrestricted public access to that information forever.

I have argued in this Article that the balance between respecting juror privacy and public access to court records will be more easily achieved if courts rethink the objectives of the jury selection process and make disclosure of juror information consistent with those objectives. If

the objective of jury selection is to ensure the individuals selected as jurors are capable of serving fairly and impartially, the only information that should be disclosed is that which is relevant to the question of juror bias and partiality. Qualification and administrative information, which is relevant to a juror's legal competence to serve, should not be disclosed. Juror information that is revealed during voir dire should be disclosed, but subject to the protections outlined in *Press-Enterprise*[31] to protect particularly sensitive information that individuals might otherwise decline to reveal without those protections. Finally, after the litigants accept a verdict as the product of a fair and impartial process, personal information about the jurors should be destroyed or sealed from further public scrutiny to protect the privacy of those citizens from intrusions unrelated to the trial.

[31] 104 S. Ct. 819 (1984).