

[NACDL](#)

---

[Home](#) > [News And The Champion](#) > [Champion Magazine](#)

---

## The Champion

July 2013 , Page 22

[Search the Champion](#) Looking for something specific?



### Reclaiming Voir Dire

By Ann M. Roan

Identifying jurors who are subject to challenges for cause is an indispensable component of due process.<sup>1</sup> Trial by an impartial jury is the most precious of the safeguards for “individual liberty and the dignity and worth” of every person.<sup>2</sup> In terms of securing this fundamental right, it is no exaggeration to say that voir dire is the most important part of trial. Too often, this process is frustrated in four ways. First, many courts impose time limits on lawyers during voir dire that impermissibly burden the process of seating fair jurors. Second, many courts improperly interfere with the form of questions and the topic matters they allow lawyers to introduce. Third, many courts engage in extremely aggressive “rehabilitation” of challenged jurors. Fourth, many lawyers do not object to these unfair practices. This article argues that these practices violate the right to a fair trial by an impartial jury, undermine public confidence in the criminal judicial system, and must be challenged by criminal defense lawyers.

### Judicial Limits on Time and Substance in Voir Dire

Jury service requires most jurors to make a significant conceptual shift in their views of the world and of human nature. Notions such as the presumption of innocence, the burden of proof, the right to remain silent, and the requirement of proof beyond a reasonable doubt do not have any analogs outside a courtroom. Most people cannot in good conscience swear a legally binding oath that they will be able to apply a set of principles in a courtroom that differs radically from the principles experience has taught them to apply in their own lives.

For example, few parents would presume their children innocent when, in the midst of a backyard baseball game, a chorus of denials follows the sound of shattering glass. Even fewer parents, when confronted with a child who refuses to explain how the window was broken, would stop short of drawing any conclusion except a renewed appreciation for the majesty of the Fifth Amendment. And no parent in the world would proceed from the position that it is the parent’s job to prove to an impartial third party beyond a reasonable doubt that the child did break the window, rather than the child’s job to exonerate herself to the parent’s satisfaction.

A qualified juror, however, must swear to do all of those things. Only jurors who can actually do so should serve on juries if the guarantee of a fair trial is to be realized. Voir dire should not be an exercise in leading (or, in some cases, bullying) jurors into saying they will follow these legal principles. Voir dire should involve listening to what jurors are saying in an effort to understand the bases of their beliefs and whether those beliefs are compatible with jury service. Within such a framework, voir dire becomes a great deal more respectful and more honest because it stops being a game of trying to browbeat jurors into promising to “follow the law” and instead turns into an honest discussion about what jurors believe, the reasons for those beliefs, and how those beliefs will operate in a courtroom. “Voir dire questioning is essential to choosing an impartial jury, and an impartial jury is as essential to a fair trial as is an impartial judge.”<sup>3</sup>

The purpose of voir dire is served if it permits the parties to determine “whether any potential jurors possess[] any beliefs that would bias them such as to prevent” the accused from receiving a fair trial.<sup>4</sup> Starting from the realistic perspective that most jurors have beliefs, based on their own circumstances and experiences in life, that are incongruent with the requirements of criminal jury service helps create an atmosphere in which the venire members are comfortable talking honestly about those beliefs. Lawyers and judges are obliged to conduct thoughtful, searching, and thorough voir dire. Lawyers “must be allowed considerable latitude in examining jurors in voir dire,” and should be “permitted to ask a juror [questions] concerning any ... matter that would tend to disclose the juror’s disqualification or make it undesirable to retain him as a juror[.]”<sup>5</sup> Of course, the trial court has “reasonable discretion in determining the scope of such examination.”<sup>6</sup>

In many state criminal trials, the court, the prosecution and the defense have the right to question prospective jurors.<sup>7</sup> Federal judges have discretion to allow lawyers to question (or propose questions for) prospective jurors.<sup>8</sup> Regardless of where the case is brought, the U.S. Supreme Court recognizes that “[v]oir dire examination serves to protect the right to an impartial jury by providing the parties a means of uncovering juror bias.”<sup>9</sup>

### **A. Implied Bias, Actual Bias, and Implicit Bias**

Voir dire has two purposes: to identify jurors who should be challenged for cause and to facilitate the intelligent exercise of peremptory challenges. There are two kinds of challenges for cause: those based on implied bias<sup>10</sup> and those based on actual bias. Implied bias is a disqualification created by an objective circumstance, usually having to do with the relationship between the juror and a party to the litigation. For example, if a juror is related by blood, marriage, or adoption within the third degree to the defendant or a lawyer in the case, many jurisdictions require the juror’s removal because of implied bias. In many jurisdictions, no rehabilitation is possible after implied bias has been established. “[I]mplied bias, once established, cannot be ameliorated by the juror’s assurances that she nonetheless can be fair.”<sup>11</sup>

Actual bias is “the existence of a state of mind that leads to an inference that the [juror] will not act with entire impartiality.”<sup>12</sup> A juror who expresses actual bias may nonetheless sit on a jury if the court is satisfied that, notwithstanding the bias, he or she will decide the case based on the evidence and the court’s instructions.<sup>13</sup>

Questions about matters relating to the evidence the parties expect to be presented at trial are indispensable to identifying jurors who may have actual bias. Jurors with biases relating to certain types of evidence and/or charges must be excused unless the court is unequivocally satisfied that they are able to overcome these biases. Jurors with experience about crimes similar to those charged in the trial may also be impaired and thus unable to serve. Voir dire must be of sufficient scope and length so that these issues are explored sufficiently. If the promise of an impartial jury is to be realized, the court must not prevent the parties from asking about the topics that are central to a fair determination of the case to be heard.

The critical importance of securing the right to question prospective jurors thoroughly and carefully has been dramatically illustrated by recent scientific research about implicit bias.<sup>14</sup> Implicit bias is a product of “the plethora of fears, feelings, perceptions and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement.”<sup>15</sup> Implicit biases are pervasive among people throughout the United States and people are often unaware that they have such biases. A person’s implicit biases predict not just his behavior, but his perceptions of unfamiliar situations. People differ in their levels of implicit bias, and this type of bias is very difficult to ascertain because it operates at a subconscious level, beneath the individual’s conscious awareness. Implicit biases are “pervasive and powerful” influences on people’s decision-making processes.<sup>16</sup>

### **B. Unreasonable time limitations erode the constitutional right to a fair trial in a fair tribunal.**

A trial court has limited discretion to impose time limits on voir dire by counsel, just as it has limited discretion to establish time limits for opening statement and closing argument. Such time limits must be constitutionally reasonable in order to withstand scrutiny on appeal.<sup>17</sup> The tension between the court’s desire to move its docket and the accused’s right to a fair trial must always be resolved in favor of the latter. While the judge’s goal in voir dire “is to select an unbiased panel in the shortest time possible[,]” this goal needs to be balanced against the fact that “[t]o the lawyers and the litigants, voir dire is the most important aspect of the trial ... [and] must be afforded such time and attention that something this significant deserves.”<sup>18</sup>

Many courts have adopted rigid time limits on voir dire for every case. Lawyers are commonly given between 10 and 20 minutes to question 12 prospective jurors in misdemeanor cases.<sup>19</sup> District courts typically give litigants less than an hour to question jurors on all but the most serious cases.<sup>20</sup> In felony cases, often 50 or more potential jurors are called in, but voir dire is limited to between 45 and 60 minutes. Such one-size-fits-all approaches “do not flex with the circumstances, such as when a response to one question evokes follow-up questions.”<sup>21</sup> Error occurs when fixed time limits are set that do not respect “the variable latitude which may be reasonably necessary to accomplish fairly the purposes of the voir dire[.]”<sup>22</sup> If a court limits time, that limitation must reflect “regard for the time which might reasonably be required in the particular circumstances for the proper questioning” of prospective jurors in a criminal case.<sup>23</sup>

Reasonableness varies from case to case because it is determined “by examining the totality of the circumstances.”<sup>24</sup> Imposing a standard time limit on voir dire in every case does not take into account the different facts and contexts that each case inevitably presents.

Reasonableness is an objective standard.<sup>25</sup> When a court exercises its judicial discretion, it must do so by considering all relevant and material factors.<sup>26</sup> A time limit that gives each party approximately 60 seconds per juror is unreasonable on its face, given the purpose of voir dire. Making a record that includes all of the specific topics presented by a particular case that jurors need to be questioned about — race, guns, alcohol, drugs, sex assault, child witnesses, so-called expert testimony, etc. — is essential to success on appeal if the trial court persists in an unreasonable time limit on voir dire.

Unconscionably short time limits on jury questioning are incompatible with the court’s obligation to the Constitution and may also directly frustrate “the Court’s unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.”<sup>27</sup> When there is insufficient opportunity for meaningful questioning prior to exercising peremptory challenges, litigants must rely on their instincts because they have not been allowed to gather information to help them exercise peremptory challenges intelligently. Such instincts “may often be just another term for racial prejudice.”<sup>28</sup> This is so because lawyers’ instincts are every bit as shaped by implicit bias as those of jurors and judges.

Especially in cases involving controversial issues, “criminal defendants have both the right and the duty to secure an impartial jury through ‘diligent inquiry’ into potential jurors’ ... bias.”<sup>29</sup> However, counsel can only exercise this duty of reasonable diligence if he is permitted “to avail[] himself of an opportunity to ascertain the disqualification” of the juror.<sup>30</sup> This is especially important in light of Federal Rule of Evidence 606(b), which prohibits impeaching a verdict with evidence of jury deliberations that were tainted by bias for or against the defendant or the prosecution. Because FRE 606(b) has been interpreted to waive “both a later challenge to the juror and an attack on the verdict based on information that diligent voir dire would have uncovered,”<sup>31</sup> securing sufficient time for voir dire is a constitutional imperative. Defense counsel’s constitutional duty to her client requires exploring “known areas of potential bias with a prospective juror” during voir dire in order to avoid waiving the client’s right to an impartial jury.<sup>32</sup> The prosecution has a similar duty to ensure that a fair jury is impanelled.<sup>33</sup> The court must afford a meaningful opportunity for the diligent inquiry that due process demands. At least one court has recognized that a biased juror may be even more poisonous to due process than a biased judge.<sup>34</sup> “[O]nce biased jurors are seated, the effect of their bias is essentially undiscoverable and irremediable.”<sup>35</sup> Although a biased judge’s rulings can be addressed because they are “usually made on the record, are subject to the objections of counsel, and are reviewable by an appellate court[,] [t]hose same safeguards do not exist with respect to jurors’ decisions.”<sup>36</sup>

### **C. Judges do not have unfettered power to dictate the topics or form of voir dire questions by the parties.**

In many jurisdictions, judges inject themselves into the form and content of questions that lawyers ask during voir dire. Some judges prohibit leading questions. Some judges prohibit hypothetical questions. Some judges refuse to allow lawyers to talk about relevant legal principles. Some judges warn lawyers not to “trick” jurors, although what sorts of questions the bench perceives as trickery are not defined clearly or consistently or — sometimes — defined at all.<sup>37</sup> The common thread running through all of these limitations is a desire to reduce the number of challenges for cause that lawyers develop in voir dire by rendering the questions themselves spurious. This creates the impression that a court is more concerned about seating a jury quickly than about seating a fair jury. Creating this impression inevitably decreases public confidence in the judiciary. “Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubious legality.”<sup>38</sup>

Although the court has some authority to limit certain types of questions in voir dire, most jurisdictions recognize only a few specific instances that justify such interference: “[t]he court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive, or

otherwise improper examination.<sup>39</sup> Notably, the list does not include leading questions, questions about hypothetical situations, or questions about relevant principles of law. Questions that are designed to identify jurors who should be challenged for cause are, by definition, both proper and relevant and the court does not have the authority to forbid them. The law will not countenance such judicial interference because the overriding purpose of voir dire is "to ascertain the existence of cause for disqualification. ... [Q]uestions should focus on issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered."<sup>40</sup>

Part of the defendant's constitutional guarantee to an impartial jury "is an adequate voir dire to identify unqualified jurors."<sup>41</sup> As a result, the trial court's ability to limit inquiry is "subject to the essential demands of fairness."<sup>42</sup> The trial court's discretion in limiting voir dire examination must be "liberally exercised *in favor* of allowing counsel to elicit necessary information in ferreting out bias, whether for a for-cause or a peremptory challenge."<sup>43</sup>

An apt comparison is to trial counsel's obligation to object contemporaneously to alert the trial court to a potential error so that the court has the opportunity to correct it. If trial counsel fails to make a timely objection, the issue may be waived on appeal. A trial judge has no authority to forbid lawyers from making contemporaneous objections because doing so is part of the constitutional guarantee to effective assistance of counsel. Preventing counsel from conducting diligent, complete questioning of potential jurors designed to identify challenges for cause is similarly repugnant because such a prohibition fails to alert the trial court of the possibility of error.<sup>44</sup> The "core purpose of voir dire ... is to determine whether any prospective jurors are possessed of beliefs that would cause them to be biased in such a manner as to prevent the defendant from obtaining a fair and impartial trial."<sup>45</sup> When courts prevent parties from conducting diligent voir dire, the result is a decrease in finality and reliability of verdicts because errors that could have been corrected in the trial court go unaddressed until appeal. Moreover, the public rightly sees a trial where each lawyer has less than 60 seconds per juror to fulfill the constitutional promise of a fair and impartial jury as a sham. Jurors are not only called to determine the facts, they also serve as citizen witnesses to the procedures inside the courtroom. Public confidence in the judiciary requires that processes in court are fair ones, in both appearance and in fact. "Justice must not only be done, it must be seen to be done."<sup>46</sup> The Supreme Court recognizes that "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias."<sup>47</sup> Judges must accord fairness, thoughtfulness and professional gravity to trial proceedings, in order to merit the public's trust in the judicial process. As the Supreme Court has recognized, "[j]ustice must satisfy the appearance of justice."<sup>48</sup>

Lawyers owe their clients diligent voir dire. This means lawyers have a duty to challenge proposed time limits and substantive hindrances that frustrate the exercise of this obligation in order to provide constitutionally effective representation to the client by ensuring that an impartial jury hears the case.<sup>49</sup> "Trial counsel should be given considerable latitude in asking voir dire questions, especially in view of the fact that only counsel will, at the beginning, have a clear overview of the entire case and the type of evidence to be adduced."<sup>50</sup> Many judges believe that their own inquiry, which is typically extremely general, is so effective that limiting counsel's voir dire to a literal matter of seconds per juror still produces a constitutionally sufficient result. In fact, because judges do not know the case and the issues nearly as well as the lawyers, they are unable to ask useful questions, much less realistically evaluate whether a juror's answers indicate bias. "Thus, permitting judges to dominate the initial jury selection causes more biased jurors to remain on a case and exacerbates the role of implicit bias in jury trials."<sup>51</sup>

As impartial arbiters sworn to uphold the Constitution and the laws of their jurisdictions, judges should never impose procedural roadblocks to securing a fair and impartial jury. Providing lawyers with sufficient time and latitude to conduct diligent voir dire is critical to seating an impartial jury. Just as important is a deliberative, measured, and cautious approach to questioning jurors once a challenge for cause based on actual bias has been made.

### **Rehabilitation by the Court**

The due process guarantee to a fair trial compels the court to grant a challenge for cause to a potential juror who is biased against the defendant.<sup>52</sup> "The right to challenge a potential juror for cause is an integral part of a fair trial."<sup>53</sup>

When a juror is challenged based on actual bias, opposing counsel is traditionally afforded the opportunity to re-question the juror. The court also typically re-questions the juror before ruling on the challenge for cause. These post-challenge inquiries are colloquially known as "rehabilitation" of the juror. This term is a misleading one, "suggesting the goal of getting a juror to change a biased attitude. The questioning should actually be for the purpose of clarification or elaboration."<sup>54</sup> The justification for such questioning is the court's power

to deny a challenge for cause based on actual bias "if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at trial[.]"<sup>55</sup>

Appellate courts often conceive of this questioning as a realization of the court's statutory obligation "to satisfy itself" that jurors who express an opinion about the guilt or innocence of the accused "would, nevertheless, render an impartial verdict."<sup>56</sup> Although appellate courts envision these questions as purely investigative in nature, in practice many trial judges are startlingly tenacious — and usually successful — in their efforts to get jurors to renounce their beliefs and "follow the law." These courts seem to be incredulous of the notion that people can, based on their own experiences and values, be unable to follow the principles of law that govern a criminal trial. This attitude echoes that of Galileo's interrogators during the Inquisition, one of whom observed that "[f]reedom of belief is pernicious. It is nothing but the freedom to be wrong."<sup>57</sup>

An aggressive and intimidating approach to rehabilitation is fatal to seating a fair and impartial jury. Two examples from recent trials in Colorado state courts show how a trial judge can (perhaps unwittingly) misuse the public's respect and fear for judicial power to frustrate the constitutional guarantee to an impartial jury. In the first case, a judge told the entire jury panel that "at the end of the day, we have to follow the law, even if we don't understand it, or we don't agree to it. If we don't, we have chaos. So does anyone have a problem with the idea that — of following the law as the court gives it to you, even if you don't agree with it or you don't understand it or like it? Anyone? No one raises their hand."<sup>58</sup> In the second case, in which the charge was sexual assault on a child, defense counsel challenged a potential juror who said he was concerned about his ability to be fair because, as a middle school teacher, he feared he would sympathize with and believe the complaining witness based on her age. In response, the trial court stated, "No one likes [sex assault on a child] cases. I have grandchildren. I don't like them."<sup>59</sup> But that isn't the question. The question is that everyone in America deserves a fair trial. Do you agree with that?"<sup>60</sup> In each case the challenge for cause was denied after the jurors agreed with these sweeping statements, neither of which addressed specific potential impairments. These examples, while extreme, are hardly isolated.

Even judges who do not go this far typically end up asking jurors some variation of what has been described as the magic question:

After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?"<sup>61</sup>

As any criminal practitioner can attest, "[n]ot so remarkably, jurors confronted with this question from the bench almost inevitably say, 'yes.'"<sup>62</sup> In many instances, trial courts do not even wait until counsel has made a challenge for cause. Instead, the court interrupts counsel as soon as a juror's answers suggest a possible challenge for cause is in the offing to ask some version of the loaded question. This practice is impossible to square with the goal of seating a fair and impartial jury. Voir dire cannot degenerate into a game of cat and mouse between the court and counsel with the members of the venire caught in the middle. It is impermissible for a court to "cut off inquiry and rely on an affirmative answer to a rehabilitative question from the bench as a talisman to show that the juror has magically, suddenly become unbiased and impartial."<sup>63</sup> In fact, it is during so-called rehabilitative questioning that the court must be very careful to prevent opposing counsel and restrain itself from "browbeat[ing] the juror into affirmative answers to rehabilitative questions by using multiple, leading questions."<sup>64</sup> The danger of this is reinforced by the fact that jurors are much less likely to be honest about their biases when questioned by a judge than when questioned by a lawyer.<sup>65</sup>

Such conduct — interrupting counsel and demanding of a juror whether she will "follow the law" — runs contrary to the requirement that a judge must act "at all times" in a manner that "promotes public confidence in the ... impartiality of the judiciary" and "avoid[s] impropriety and the appearance of impropriety."<sup>66</sup> By using leading questions that telegraph to the juror that the answers she has given to counsel are the "wrong" answers, the court runs the risk of appearing biased against the party who made the challenge. As it is often practiced, rehabilitation is nothing more than a judge trying to talk a juror out of the position that has been established by counsel's questions and exploiting the juror's fear and respect for the judiciary to do so. This necessarily implies that the judge thinks counsel was wrong for asking the questions in the first place. Taking a role that runs the risk of compromising judicial impartiality is contrary to the goals of retaining "public respect and secur[ing] willing and ready obedience to [the court's] judgments."<sup>67</sup> In voir dire, as in every other aspect of litigation, "courts must meticulously avoid any appearance of partiality."<sup>68</sup>

Moreover, such judicial conduct is at odds with the constitutional requirement of an impartial jury. Jurors want to please judges, and jurors are intimidated by being questioned by a judge in a courtroom full of strangers about their willingness to follow the law.<sup>69</sup> These

two facts require the court to tread lightly once a challenge for cause has been made, in order to facilitate meaningful appellate review. "A record laden with leading questions by the trial court can leave a reviewing court uncertain about the sincerity of the prospective juror's answers."<sup>70</sup> Although such questions may create the impression of agreement with the trial court's insistence on juror neutrality, "bias remains if the prospective juror tells the court only what it wants to hear, while covertly holding on to the previously articulated views that precipitated the challenge."<sup>71</sup> This is the reason many courts have concluded that "there is no 'magic' in the 'magic question'." ... [It] does not provide a device to 'rehabilitate' a juror who should be considered disqualified by his personal knowledge or his past experience, or his attitude as expressed on voir dire."<sup>72</sup>

Once a challenge for cause is made, the trial court should not seek to "rehabilitate" the juror, but "should act only as a neutral arbiter."<sup>73</sup> When a trial court denies a challenge for cause because it has succeeded in getting the juror to say he can be fair, despite the contrary responses the juror furnished during the preceding questioning, justice is not being done. Over a century ago, Chief Justice Marshall recognized the indefensible nature of such an approach by the trial court:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. *He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him.* ... He will listen with more favor to that testimony which confirms, than to that which would change his opinion[.]<sup>74</sup>

The most common characteristic of bias is the inability of the biased person to appreciate its pervasive nature. Asking a juror if she can "set aside" bias is as useful as asking her if she can sprout wings and fly, just for purposes of trial. She may say she can, or that she will try, or that she will do what the judge tells her, but the bias will be there in deliberations as surely as the wings will not.

Voir dire turns into a constitutionally repugnant "stark little exercise" when the court wields the metaphorical brickbat of "you can follow the law, can't you?" "and then tak[es] a prospective juror's affirmative answer as dispositive of the issue of bias."<sup>75</sup> The law does not require the party making the challenge for cause to show the juror's bias with absolute certainty. "This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism."<sup>76</sup> When done properly, voir dire functions as "a tool for counsel and the court to carefully and skillfully determine, by inquiry, whether biases or prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves on it."<sup>77</sup>

Once a party makes a challenge for cause, justice demands that the judge and opposing counsel confine themselves to questions designed to clarify anything ambiguous in a challenged juror's answers and refrain from intimidating the juror into agreeing to "follow the law." If the challenge for cause is based on information that further questioning shows to be "the product of mistake, confusion, or some other factor that will have no effect on the juror's ability to render a fair and impartial verdict," the challenge should be denied.<sup>78</sup> However, when it "appears doubtful" that a juror will follow the instructions of law given by the court, the juror must be excused.<sup>79</sup>

Overemphasizing the worth of a juror's affirmative response to the "can you follow the law" question after questioning establishes actual bias creates the impression that the court's goal is to hurry things along, rather than to seat a fair and impartial jury. "By what sort of principle is it to be determined that the last statement of the [challenged juror] is better and worthy of more belief than the former?"<sup>80</sup> When a juror relates experiences or attitudes that suggest a significant possibility of bias, accepting a later statement by the juror that he can nonetheless be fair "creates the great risk of seating biased jurors, and a clear appearance of prejudice to a party."<sup>81</sup>

By contrast, when facts establish that the impartiality of a judge might reasonably be questioned, recusal is required.<sup>82</sup> The law does not give a judge the ability to "rehabilitate" himself by stating that he can set aside an actual or reasonably perceived conflict and follow the law. This reflects the belief that public confidence in the judiciary is of higher value than the consumption of resources necessary to assign a matter to a different judge. The same policy argument supports a measured, cautious, and modest judicial mindset when circumstances warrant questioning a juror who has been challenged for cause. Once a prospective juror has described a disqualifying prejudice or bias, he "is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair."<sup>83</sup>

In most courtrooms, the court's "rehabilitation" questions are asked in front of the entire venire except in rare circumstances in which a juror is questioned individually in chambers. Thus, the entire venire experiences the intimidating act of being "rehabilitated." This

decreases the willingness of the other jurors to talk honestly and thoughtfully about their own possible biases and increases the likelihood a fair and impartial jury will not be seated. Ambiguous, leading questions — such as “Have you developed any opinions that would make you an unfair juror?” — are “framed to lead jurors to the conclusion that they could be impartial.”<sup>84</sup> When a court lectures jurors who volunteer that they have formed opinions about the case, “these ‘lectures,’ heard by the entire venire sen[d] a strong message that the court did not approve of those who volunteer[] that they [are] biased.”<sup>85</sup> When the court behaves in this manner, it is unsurprising that “as the questioning [goes] on, fewer and fewer jurors” volunteer information about bias.<sup>86</sup>

In most cases, appellate courts are unwilling to reverse a denied challenge for cause if the record contains the juror’s affirmative answer to the court’s “can you be fair” demand. This superficial appellate review emboldens trial courts to continue to do “nothing more to assess bias than to ask the jurors themselves whether they could be fair.”<sup>87</sup> Often, when jurors merely say they will “try” to follow the law, the trial court’s refusal to grant the challenge for cause is affirmed on appeal.<sup>88</sup> Counsel can complete the record in such a situation by following up with the juror who says he will “try” to follow the law with a series of questions to establish that people say they will “try” to do things when they are not completely certain that they will do those things. Such a record will illuminate the constitutional insufficiency of letting a person who will “try” to follow the law sit on a criminal jury.

When a judge rehabilitates a juror with the magic question and then denies the challenge for cause, reviewing courts often accept the juror’s response without any analysis of its reliability. For example, in a case involving the defense of voluntary intoxication, three jurors reported that they had “negative feelings associated with alcohol consumption.”<sup>89</sup> Denying the challenges for cause to these jurors was affirmed because “the trial court asked each of [the jurors] whether he or she would apply the law to the facts as he or she determined them to be” and the jurors all said they would.<sup>90</sup> Based on this, the reviewing court concluded that “the record contains support for the trial’s court’s decision that they were capable of appropriately applying the law to the facts.”<sup>91</sup>

This superficial analysis misses two points. First, if the juror arrives at the “facts as he or she determine[s] them to be” based upon a bias that impermissibly favors one party or another, the juror is not fulfilling the duty of impartiality. “The impartiality of the adjudicator goes to the very integrity of the legal system.”<sup>92</sup> Second, the court’s rehabilitative question carries a high potential for distortion and intimidation: when a judge asks a juror if she will follow the law, the answer is not always truthful but it is usually very predictable. This approach does a disservice to litigants who are guaranteed an impartial jury. In most cases, a judge so inclined will be able to pressure a prospective juror into agreeing that she will follow the law as instructed by the court. The reliability of such a response, however, is nugatory.

## Conclusion

Defense lawyers are constitutionally obligated to engage in diligent voir dire in order to secure a fair and impartial jury for their clients. Judges and prosecutors have the same obligation to make sure a fair and impartial jury is selected. By allowing litigants sufficient time to question jurors in order to identify actual bias and facilitate the intelligent exercise of peremptory challenges, trial courts will better meet that obligation. Establishing practices that frustrate the purpose of voir dire (refusing to allow leading questions or imposing unreasonably short time limits, for example) cannot be harmonized with the court’s duty to ensure that biased jurors do not serve. Finally, abandoning aggressive “rehabilitation” questioning in favor of questions that serve to clarify an ambiguous answer instead of intimidating jurors into promising to “follow the law” will increase the public’s confidence in the integrity of the trial process and its outcomes.

In every case, defense lawyers must plan and execute persistent and consistent pretrial litigation surrounding the court’s proposed voir dire process if it thwarts their obligations to identify and remove jurors who are subject to a challenge for cause and to exercise peremptory challenges intelligently. The defense lawyer who fails to object to procedures that frustrate the constitutional objective of fairness waives the most fundamental right a criminal defendant has in the United States: the right to a fair trial. Turning the tide and reclaiming voir dire as the only tool defense lawyers have to secure an impartial jury for their clients begin in the trial court. When one lawyer acquiesces to an unreasonable time limit, the stage is set for an unconstitutional pattern of voir dire in other cases. Fifty years ago, in *Gideon v. Wainwright*, the Supreme Court recognized that excellent legal representation for people accused of crimes is a necessity, not a luxury.<sup>93</sup> Reclaiming voir dire for clients is an eloquent way to mark *Gideon’s* anniversary.

*The author thanks Professor Monroe Freedman, Hofstra University School of Law, for being gracious and generous enough to edit a previous draft of this article. The scholarship reflected in endnotes 33, 47, 48 and 66 are the products of his knowledge. Any errors or omissions are entirely the author’s responsibility.*

## Notes

1. U.S. Const. amends. VI, XIV.
2. *Irvin v. Dowd*, 366 U.S. 717, 721 (1961).
3. *State v. Saunders*, 992 P.2d 951, 961 (Utah 1999).
4. *People v. O'Neill*, 803 P.2d 164, 169 (Colo. 1990).
5. *Rains v. Rains*, 46 P.2d 740, 744-745 (Colo. 1935).
6. *Id.*
7. *See, e.g.*, Colo. Crim. P. 24(a)(3).
8. Fed. R. Crim. P. 24(a)(1), (2).
9. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994).
10. Some states only recognize challenges for cause based on implied bias in "extreme" situations. *See, e.g., Holt v. State*, 772 N.W.2d 470, 477-78 (Minn. 2009). Other states have codified the grounds for challenges for cause on the basis of implied bias. *See, e.g., Colo. R. Crim. P. 24.*
11. *People v. LeFebvre*, 5 P.3d 295, 300 (Colo. 2000).
12. *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997).
13. *LeFebvre*, *supra* note 11.
14. *See generally* <https://implicit.harvard.edu>.
15. Judge Mark W. 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 (2010).
16. *Id.*
17. *See, e.g., Simmons v. State*, 753 So. 2d 700, 702 (Fla. App. 2000) (arbitrary time limit on closing argument constitutes abuse of discretion and reversible error).
18. *State v. Allen*, 800 So. 2d 378, 386 (La. App. 2001).
19. This information comes from the author's extensive interactions concerning voir dire with criminal defense lawyers across the country.
20. *Id.*
21. *Williams v. State*, 424 So. 2d 148, 149 (Fla. Dist. Ct. App. 1982).
22. *State v. Anthony*, 374 A.2d 156, 158 (Conn. 1976).
23. *Id.*
24. *People v. Mendoza-Balderama*, 981 P.2d 150, 157 (Colo. 1999), quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).
25. *Mendoza-Balderama*, *supra* note 24 (discussing "reasonableness" in the context of the Fourth Amendment).
26. *People v. Busch*, 835 P.2d 582, 583 (Colo. App. 1992).
27. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).
28. *Id.* at 106 (Marshall, J., concurring).
29. *People v. Pena-Rodriguez*, case no. 11CA0034at ¶ 51 (Colo. App. 11-8-12) (involving voir dire on race).
30. *People v. Crespín*, 635 P.2d 918, 920 (Colo. App. 1981) (finding defense counsel waived the right to complain about a juror who was not a resident of the county where trial was held because he did not inquire about the issue sufficiently during voir dire).
31. *Pena-Rodriguez*, *supra* note 29, at ¶ 8.
32. *Id.*, n.6.
33. ABA Std. 2-1.2, Commentary, para. 2 ("It is fundamental that the prosecutor's obligation is to ... guard the rights of the accused. ...", *accord, Connick v. Thompson*, 131 S. Ct. 1350, 1362 (2011)).
34. *State v. Saunders*, 992 P.2d 951, 961 (Utah 1999).
35. *Id.*
36. *Id.*
37. Again, these examples are the product of working with lawyers across the country and reviewing voir dire transcripts from across the state of Colorado as State Training Director for the Colorado Public Defender system since 2004.
38. *United States v. Vanderwerff*, No. 12-CR-00069, 2012 WL 2514933 (D. Colo. June 28, 2012).
39. Colo. R. Crim. P. 24.
40. *State v. Thomas*, 798 A.2d 566, 569 (Md. 2002).
41. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).
42. *Id.* at 730 (internal quotation omitted).
43. *Saunders*, *supra* note 34, at 961 (internal quotation marks omitted) (emphasis in original).

44. *Pena-Rodriguez*, *supra* note 29, at ¶ 55.
45. *Id.* (internal quotations and citations omitted).
46. *Rex v. Sussex Judges ex parte McCarthy*, 1 KB 256 (1923).
47. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), *citing Tumey v. Ohio*, 273 U.S. 510, 523 (1927). At the oral argument in *Caperton*, "When Massey's counsel argued ... that Due Process cannot rest on appearances, Justice Kennedy replied, 'but our whole system is designed to ensure confidence in our judgments. ... And it ... seems to me litigants have an entitlement to that under the Due Process Clause.'" *Caperton* Transcript, quoted in James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 NYU Annual Survey of American Law 727, 770 (2011).
48. *Offutt v. United States*, 348 U.S. 11, 14 (1954). *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (noting the importance of "preserv[ing] both the appearance and reality of fairness," which "generate[s] the feeling, so important to a popular government that justice has been done," *quoting Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).
49. ABA Model Rules of Prof'l Conduct R. 1.1
50. *Saunders*, *supra* note 34, at 962.
51. Bennett, *supra* note 15, at 150.
52. U.S. Const. amends. VI, XIV.
53. *People v. Rhodus*, 870 P.2d 470, 473 (Colo. 1994).
54. *O'Dell v. Miller*, 565 S.E.2d 407, 412 (W. Va. 2002), *quoting* Daniel J. Sheehan, Jr. and Jill C. Adler, *Voir Dire: Knowledge Is Power*, 61 Tex. B.J. 630, 633, n.11.
55. *See, e.g.*, Colo. Rev. Stat. § 16-10-103(1)(j).
56. *People v. James*, 981 P.2d 637, 639 (Colo. App. 1998).
57. Robert Bellarmine (1542-1621), one of Galileo's interrogators, who was later canonized by the Catholic Church.
58. *See* note 37, *supra*.
59. Presumably the judge was referring here to not liking sex assault cases, rather than not liking his grandchildren.
60. *See* note 37, *supra*.
61. *Walls v. Kim*, 549 S.E.2d 797, 798 (Ga. App. 2001), *aff'd sub nom. Kim v. Walls*, 563 S.E.2d 847 (2002).
62. *Id.*
63. *Remillard v. Longstreet Clinic*, 599 S.E.2d 198, 200 (Ga. App. 2004).
64. *Id.*
65. Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 Law & Human Behav. 131 (1987), *cited in* Bennett, *supra* note 15.
66. ABA Model Code of Judicial Conduct R. 1.2 (2011). "A judge shall ... perform all the duties of judicial office fairly and impartially."  
*Id.*
67. *People v. Hrapski*, 718 P.2d 1050, 1054 (Colo. 1986).
68. *Id.*
69. *See, e.g.*, *Price v. State*, 538 So. 2d 486, 489 (Fla. Dist. Ct. App. 3d 1989).
70. *People v. Merrow*, 181 P.3d 319, 323 (Colo. App. 2007) (Webb, J., specially concurring).
71. *Id.*
72. *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991).
73. *People v. Merrow*, 181 P.3d 319, 323 (Colo. App. 2007) (Webb, J., specially concurring).
74. *United States v. Burr*, 25 Fed.Cas. 49 (1807) (emphasis added).
75. *Saunders*, *supra* note 34, at 962.
76. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). The Court in *Witt* specifically stated that its holding was not limited to capital cases because it was grounded in the Sixth Amendment, not the Eighth Amendment. *Id.* at 423.
77. *Ball v. State*, 685 P.2d 1055, 1058 (Utah 1984).
78. *People v. Russo*, 713 P.2d 356 (Colo. 1986).
79. *Morgan v. People*, 624 P.2d 1331, 1332 (Colo. 1981).
80. *Johnson v. Reynolds*, 121 So. 793, 796 (Fla. 1929).
81. *O'Dell*, *supra* note 54, at 411, *citing* Patterson & Neuffer, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, 7 Cornell J.L. & Pub. Pol'y 97, 106 (1997).
82. ABA Code of Judicial Conduct R. 1.2.
83. *O'Dell*, *supra* note 54, at 412.
84. *People v. Tyburski*, 518 N.W.2d 441, 451 (Mich. 1994) (footnotes omitted).
85. *Id.*

86. *Id.*
87. *Id.*
88. *See, e.g., People v. Lucas*, 232 P.3d 155, 164 (Colo. App. 2009).
89. *Id.* at 165.
90. *Id.* at 164-165.
91. *Id.*
92. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987).
93. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

---

1660 L St. NW • 12th Floor • Washington, DC 20036 • Phone: **(202) 872-8600** / Fax: **(202) 872-8690**  
© 2013, National Association of Criminal Defense Lawyers (NACDL), All Rights Reserved.