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## The Inadequacy of the Massachusetts Voir Dire

Debora A. Cancado

*Suffolk University Law School*

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# THE INADEQUACY OF THE MASSACHUSETTS VOIR DIRE

## I. INTRODUCTION

The United States Constitution provides Americans with the right to a fair and impartial trial by a jury of their peers.<sup>1</sup> The Sixth Amendment guarantees that criminal defendants will receive verdicts from indifferent and impartial jurors.<sup>2</sup> The Seventh Amendment serves as the counterpart of the Sixth Amendment, granting civil parties the same rights and guarantees.<sup>3</sup> Although the United States Constitution guarantees these fundamental rights, criminal and civil parties in Massachusetts are not receiving the rights because the jury selection process is ineffective at obtaining juror candor.<sup>4</sup>

To ensure that criminal defendants and civil parties receive a fair trial by an impartial and unbiased jury, each state has instituted the voir dire mechanism.<sup>5</sup> The term "voir dire" literally means "to speak the

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<sup>1</sup> See U.S. CONST. amend. VI, VII (noting fundamental right guaranteed by US Constitution).

<sup>2</sup> See U.S. CONST. amend. VI (specifying criminal defendants rights to jury trial); see also Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 No.2 LAW AND HUMAN BEHAVIOR 131 (1987) (noting US Constitution's Sixth and Fourteenth Amendments guarantee criminal defendant right to fair trial).

<sup>3</sup> See U.S. CONST. amend. VII. The Seventh Amendment of the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

*Id.*

<sup>4</sup> See *infra* notes 66-71, 80-89 and accompanying text (reasoning in support of alternative approach).

<sup>5</sup> See Jones, *supra* note 2, at 132 (noting goal of voir dire to obtain impartial and fair jury); see also MASS. GEN. LAWS ANN. ch. 234, § 28 (West 1996) (defining voir dire procedure).

truth" or "to see them talk."<sup>6</sup> More appropriately, however, voir dire is defined as the "preliminary stage of jury selection during which jurors are examined to determine their suitability to hear the case before the court."<sup>7</sup> The ability to effectively obtain juror candor during the voir dire may differ depending on each state's method.<sup>8</sup> The Massachusetts legislature has recently proposed to change the voir dire system in certain counties.<sup>9</sup> This new legislation would allow lawyers in civil and criminal cases to question jurors for thirty minutes.<sup>10</sup> Allowing attorneys to question jurors would result in more candid answers and would begin to resemble the more effective Connecticut voir dire system.<sup>11</sup>

This note examines the different processes that Massachusetts and Connecticut employ when conducting their voir dire, and advocates for Massachusetts' adoption of Connecticut's system. Part II traces the history of the Massachusetts voir dire system and its inherent problems. Part III examines the Connecticut voir dire system and explores its advantages over the Massachusetts system. Connecticut's system is more effective in obtaining juror candor because the system allows attorneys to individually question each juror out of the presence of the other jurors. Part IV concludes with a recommendation that Massachusetts adopt Connecticut's method of the voir dire as it is more effective in eliciting juror candor.

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<sup>6</sup> See David Suggs and Bruce D. Sales, *Juror Self Disclosure in Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 245 (1981) (defining literal translation of term voir dire); see also Jones, *supra* note 2, at 131 (noting literal translation).

<sup>7</sup> See Jones, *supra* note 2, at 131 (defining term "voir dire").

<sup>8</sup> See *infra* notes 66-71, 80-89 and accompanying text (discussing advantages of attorney conducted individual voir dire).

<sup>9</sup> See Martin F. Murphy, *Individual Voir Dire in Criminal Trials: Where is the SJC Headed?*, 42 BOSTON BAR J. 8, 24 (1998) (citing Massachusetts Lawyers Weekly, April 7, 1997) (noting that Middlesex County, Bristol County and Worcester County may allow attorneys to question jurors).

<sup>10</sup> See Murphy, *supra* note 9, at 24 (outlining potential changes certain counties may undergo).

<sup>11</sup> See *infra* notes 62-65, 76-78 and accompanying text (discussing Connecticut's voir dire system).

## II. A HISTORICAL BACKGROUND OF THE MASSACHUSETTS VOIR DIRE SYSTEM

Massachusetts has a very limited form of voir dire despite the broad language expressed in the statute.<sup>12</sup> The statute provides, in pertinent part:

[U]pon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case or has expressed or formed and opinion, or is sensible of any bias or prejudice therein. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead.<sup>13</sup>

In Massachusetts, the judge customarily acts as the sole conductor of the voir dire.<sup>14</sup> The judge asks general questions prescribed by statute to the

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<sup>12</sup> See MASS. GEN. LAWS ANN. ch. 234, § 28 (West 1999) (noting Massachusetts procedure for voir dire).

<sup>13</sup> See *id.* (noting either judge, attorney, or parties themselves may conduct voir dire). The Massachusetts Rules of Civil Procedure require the judge to ask the same questions that he is required to ask under Massachusetts General Laws ch. 234 § 28. MASS. R. CIV. P. 47. The rule states, in pertinent part:

The trial judge shall examine on oath all persons called as jurors, in each case, and shall ask: (1) whether any juror or any member of his family is related to any party or attorney therein; (2) whether any has any interest therein; (3) whether any has expressed any opinion on the case; (4) whether any has formed any opinion thereon; (5) whether any is sensible of any bias or prejudice therein; and (6) whether any knows of any reason why he cannot or does not stand indifferent in the case. The jurors shall respond to each question separately before the next is propounded. The trial judge may submit of his own motion on that of any party, such additional questions as he deems proper. The trial judge may also, on motion of any party, permit the parties or their attorneys to make such further inquiry of the jurors on oath as he deems proper.

*Id.*

<sup>14</sup> See *Commonwealth v. Burden*, 15 Mass. App. Ct. 666, 671, 448 N.E.2d 387, 392 (1983) (noting judge shall question jurors about bias and prejudice). In *Burden*, the defendant was convicted of breaking and entering, armed assault in a dwelling, armed robbery, aggravated rape, and second-degree murder. *Id.* at 667. The appeals court held the trial court did not err in denying the defendant's motion to permit defense counsel to conduct the voir dire. *Id.* at 666, 448 N.E.2d at 387. The appeals court again stated, that "in this Commonwealth, the voir dire examination of prospective jurors is customarily conducted by the judge." *Id.* at 671, 448 N.E.2d at 392. The Commonwealth does not have to allow attorney conducted voir dire. *Id.* See also *Commonwealth v. Pope*, 392

entire jury pool collectively in order to identify jurors who have formed opinions about the case or have any bias or prejudice that will prevent them from rendering a verdict based on the evidence presented during the trial.<sup>15</sup>

Historically, this method of group questioning is commonly used in Massachusetts, although the statute does call for individual questioning.<sup>16</sup> The statute provides:

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Mass. 493, 504, 467 N.E.2d 1171, 117-125 (1984) (stating judge is sole conductor of voir dire and attorneys have no right to question). In *Pope*, the defendant was convicted of rape. *Id.* The Supreme Judicial Court (SJC) held "the judge acted within his discretion in refusing defense counsel's motion to conduct the voir dire and denial of the requested individual voir dire questions." *Id.* Additionally, the *Pope* court took up the issue of when an individual voir dire is warranted. *Id.* The court stated that they already decided that in rape cases involving black defendants and white victims a judge must grant the defendant's request for an individual voir dire. *Id.* The judge will satisfy the due process requirement for the individual voir dire as long as the judge asks questions on the subject of racial prejudice in a "clear and understandable manner with follow-up questions where needed." *Id.* at 505, 467 N.E.2d at 125. See *Commonwealth v. DiStasio*, 294 Mass. 273, 278, 1 N.E.2d 189, 193 (1936) (suggesting judge's duty consist of questioning potential jurors and determining if dismissal is required). In *DiStasio*, the defendant was convicted of first degree murder and appealed on the basis of the court's denial to allow his attorney to conduct the voir dire. *Id.* at 273, 1 N.E.2d at 189. The court reiterated the often stated rule that the examination of prospective jurors is under the court's discretion, whether conducted by counsel or by the judge as is customary. *Id.* at 280, 1 N.E.2d at 194. The *DiStasio* court clearly acknowledged the discrepancy between the language used in the statute and the actual practice of the court. *Id.* The court also emphasized that the questions asked rarely go beyond the statutorily required questions. *Id.*

<sup>15</sup> See *Commonwealth v. Sheline*, 391 Mass. 279, 290, 461 N.E.2d 1197, 1205 (1984) (holding judge ask jurors if interest in case, preconceived opinion, bias or prejudice); see also *Commonwealth v. Jones*, 9 Mass. App. Ct. 103, 114, 399 N.E.2d 1087, 1096 (1980), *aff'd in part, vacated in part on other grounds*, 382 Mass. 387, 416 N.E.2d 502 (holding collective questioning jurors to elicit bias or prejudice is not abuse by trial court). In *Jones*, a jury convicted the defendant, a police officer, of three counts of involuntary manslaughter, three counts of vehicular homicide and operating to endanger arising out of fatal automobile accident occurring while the defendant was off duty. *Id.* at 103, 399 N.E.2d at 1087. The appeals court held that the trial court did not abuse its discretion by asking questions collectively to jury on the issue of preconceptions in the absence of groundwork called for by statute in governing examination of jurors. *Id.* According to the *Jones* court, there is no requirement under the first paragraph of M.G.L. ch. 234, § 28, for a judge to individually question jurors about the topics listed in the first paragraph of the statute. *Id.* at 114, 399 N.E.2d at 1096. The first paragraph of the statute "gives the trial judge broad discretion whether to refine or improve on the subjects of the statute by going into more detail. *Id.*

<sup>16</sup> See MASS. GEN. LAWS ANN. ch. 234, § 28 (West 1996) (noting circumstances when individual voir dire should be conducted).

[W]hen it appears that, as a result of the impact of considerations which may cause a decision to be made in whole or in part upon issues extraneous to the case, including but not limited to, community attitudes, possible exposure to potentially prejudicial material of possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall, or the parties or their attorneys may with the permission and under the direction of the court examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the facts of the case. Such examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issue of such examination, and shall be conducted individually and outside the presence of other persons about to be called or already called.<sup>17</sup>

Ordinarily, however, the Supreme Judicial Court (SJC) allows the trial judge to determine when an individual voir dire is warranted.<sup>18</sup>

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<sup>17</sup> See MASS. GEN. LAWS ANN. ch. 234, § 28 (West 1996) (warranting individual voir dire in certain circumstances); see also Murphy, *supra* note 9, at 8-9 (discussing limited circumstances that require individual voir dire); Commonwealth v. Nickerson, 388 Mass. 246, 247, 446 N.E.2d 68, 70 (1983) (holding judge who questions juror's indifference must ask specific questions about problem he perceived); Commonwealth v. Hobbs, 385 Mass. 863, 871, 434 N.E.2d 633, 640 (1982) (listing extraneous factors that judge should consider in determining juror's indifference). According to *Hobbs*, when it appears that a prospective juror may not stand indifferent because of extraneous issues such as racial prejudice, the judge must examine the jurors individually asking specific questions about the problem perceived. *Id.* at 873, 434 N.E.2d at 641.

<sup>18</sup> See *Hobbs*, 385 Mass. at 871, 434 N.E.2d at 640 (holding judge will determine when extraneous issue to case arises). In *Hobbs*, the court stated "the judge's determination on whether a problem of extraneous influence has arisen will be upheld unless he has abused his discretion by refusing to examine jurors in the face of substantial risk of bias." *Id.* at 873, 434 N.E.2d at 641. See Commonwealth v. Shelley, 381 Mass. 340, 352, 409 N.E.2d 732, 740 (1980) (holding to warrant individual questioning, judge must determine juror is not indifferent due to extraneous issues). According to the *Shelley* court, the defendant may give the judge information showing the need for an individual voir dire, but ultimately it is left up to the judge's determination. *Id.* at 352, 409 N.E.2d at 740. Even if the defendant does not supply the judge with information, the judge may be able to determine on his own based on the facts of the case whether or not he should conduct an individual voir dire. *Id.* As the statute mandates, if a potential juror answers any of the general questions asked collectively to the jury pool in the affirmative that juror is brought to the sidebar and asked a few additional questions. MASS. GEN. LAWS ANN. ch. 234, § 28 (West 1996). When the potential juror is asked additional questions, the trial judge is allowed to rely on the testimony of the potential juror in determining

In 1981, the SJC changed its position on when an individual voir dire is warranted.<sup>19</sup> The court's initial change occurred in *Commonwealth v. Sanders*,<sup>20</sup> a case involving a black defendant who was convicted of raping and stabbing a white woman.<sup>21</sup> The trial judge refused defense counsel's request for an individual voir dire of prospective jurors concerning their racial prejudices.<sup>22</sup> On appeal, the SJC held that "there are some circumstances when the allegations about the crime, alone require an individual voir dire."<sup>23</sup> The court set new precedent, declaring that "as a matter of law interracial rape cases present a substantial risk that extraneous issues will influence the jury [and therefore] prospective jurors are to be interrogated individually in accordance with the statute rather than as a group."<sup>24</sup>

In 1982, the SJC further developed its position on the applicability of the individual voir dire when it extended the *Sanders* rule to other types of cases, including interracial child sexual abuse and interracial

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whether the juror is biased or prejudiced. See *Commonwealth v. Coleman*, 389 Mass. 667, 675 n.7, 452 N.E.2d 202, 207 (1983) (holding judge may look to juror's testimony in order to determine if bias exists). If the juror states that he will remain impartial despite his disposition it is up to the judge to determine whether or not the juror should be removed for cause. See *Ladetto v. Commonwealth*, 356 Mass. 541, 545, 254 N.E.2d 415, 417 (1969) (holding judge shall determine if juror can remain impartial). See also *Nickerson*, 388 Mass. at 248 (citing rule stated above in *Hobbes*).

<sup>19</sup> See *Murphy*, *supra* note 9, at 9 (documenting beginning of SJC's change in long standing precedent).

<sup>20</sup> 383 Mass. 637, 421 N.E.2d 436 (1981).

<sup>21</sup> See *Commonwealth v. Sanders*, 383 Mass. 637, 637, 421 N.E.2d at 436; see also *Murphy*, *supra* note 9, at 9 (discussing *Sanders* and its effect on voir dire).

<sup>22</sup> See *Sanders*, 383 Mass. at 638, 421 N.E.2d at 436 (noting trial judge's refusal to conduct individual voir dire); see also *Murphy*, *supra* note 9, at 9 (discussing trial court's decision in *Sanders* to deny defendant's request).

<sup>23</sup> *Sanders* 383 Mass. at 638, 421 N.E.2d at 436. See also *Murphy*, *supra* note 9, at 9 (discussing court's determination to move away from group questioning and insist on individual questioning).

<sup>24</sup> See *Sanders*, 383 Mass. at 640-41, 421 N.E.2d at 438 (citing new rule with regards to interracial rape cases); see also *Murphy*, *supra* note 9, at 9 (discussing *Sanders*). The determination of whether or not an individual voir dire is warranted is no longer left up to the trial judge if the case involves interracial rape. *Id.* A trial judge must now question jurors individually and outside the presence of other jurors regarding their racial views. *Id.* The SJC acknowledged that the group questioning method was ineffective when it came to interracial rape cases because such cases are a "catalyst of racial prejudice." *Id.* Interracial rape cases present one of the few instances in Massachusetts when an individual voir dire is required. *Id.* at 9.

murder cases.<sup>25</sup> In *Commonwealth v. Hobbs*,<sup>26</sup> prosecutors charged a black man with sexually abusing a white child.<sup>27</sup> The SJC acknowledged that racial prejudices would arise due to the sensitive nature of the case.<sup>28</sup> The court held that in future cases involving interracial sexual offenses against children, an individual voir dire of all potential jurors on the issue of race is required.<sup>29</sup>

Similarly, the SJC in *Commonwealth v. Young*<sup>30</sup> acknowledged the ineffectiveness of the group questioning method for eliciting juror bias.<sup>31</sup> The *Young* court convicted a black defendant of murdering a Hispanic man.<sup>32</sup> The court held "that questions directed to the discovery of racial prejudice be asked in certain circumstances in which such an inquiry is not constitutionally mandated."<sup>33</sup> The court, therefore, extended the principles of *Sanders* and *Hobbs* by requiring a trial judge to individually examine prospective jurors when the defendant is accused of murder and the defendant and victim are of different racial groups.<sup>34</sup>

The SJC, however, has refused to mandate an individual voir dire in a number of other types of cases.<sup>35</sup> In *Commonwealth v. Shelley*,<sup>36</sup> the

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<sup>25</sup> See Murphy, *supra* note 9, at 9 (discussing SJC's acknowledgment of ineffectiveness of collective questioning in cases involving racial issues).

<sup>26</sup> 385 Mass. 863, 434 N.E.2d 633 (1982).

<sup>27</sup> See *id.* at 873, 434 N.E.2d at 641 (noting different races of victim and defendant); see also Murphy, *supra* note 9, at 9 (discussing evolution of individual voir dire with regards to interracial child sexual abuse).

<sup>28</sup> See *Hobbs*, 385 Mass. at 873, 434 N.E.2d at 641 (discussing court's belief that racial prejudice would arise in cases of interracial child sexual abuse).

<sup>29</sup> See *id.* (holding individual voir dire necessary if case involved interracial child sexual abuse)

<sup>30</sup> 401 Mass. 390, 517 N.E.2d 130 (1987).

<sup>31</sup> *Id.* See also Murphy, *supra* note 8, at 9 (noting *Young* was next step for mandated individual voir dire)

<sup>32</sup> See *Young*, 401 Mass. at 390, 517 N.E.2d at 130 (noting defendant and victim were of different races).

<sup>33</sup> See *id.* at 398, 517 N.E.2d at 135 (noting extension of *Sanders* rule); see also Murphy, *supra* note 9, at 9 (documenting new rule with regards to interracial murder).

<sup>34</sup> See *Young*, at 398, 517 N.E.2d at 135 (stating application of new rule occurs when victim and defendant are of different races).

<sup>35</sup> See Murphy, *supra* note 9, at 9 (tracing history of extension of individualized voir dire). Murphy does state that even though it appeared that the SJC was extending the individual voir dire to a number of race related issues, the SJC was still leery of over-extending the requirement of such a time consuming venture. *Id.* During the 1980's and early 1990's, the SJC made sure that the mandated individual voir dire was applied in only a limited number of cases. *Id.* See *infra* notes 36-39 and accompanying text (discussing specific cases in which SJC denied extension of individual voir dire).



court wrote "it appears to us a doubtful proposition that questions (concerning juror bias about psychiatrists) need be asked in every case involving testimony by psychiatrists and the defense of insanity . . . [t]he present record contains nothing to make that proposition more plausible."<sup>37</sup> The SJC and the Appeals Court have also continuously rejected defendants' requests for an individual voir dire in cases involving homosexuals charged with sex crimes, defendant's disseminating obscene films, and cases where unpopular car dealers were accused of larceny and claimed to dislike a number of potential jurors in the area.<sup>38</sup>

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<sup>36</sup> 381 Mass. 340, 409 N.E.2d 732 (1980).

<sup>37</sup> See *id.* at 353, 409 N.E.2d at 740 (noting SJC's refusal to extend individual voir dire to psychiatric testimony and insanity). In *Shelley*, the defendant was convicted of first degree murder. *Id.* at 340, 409 N.E.2d at 732. The defendant alleged that his male friend made homosexual advances toward him. *Id.* at 342, 409 N.E.2d at 734. The defendant used a meat cleaver and a fork to kill his male friend. *Id.* In conducting the voir dire, the judge asked the potential jurors the questions required by statute and a group question submitted by counsel. *Id.* at 352, 409 N.E.2d at 739. The Commonwealth's questions related to the defendant's age, the fact that the crime involved several stab wounds, and the victim's sexual preference. *Id.* The defendant's questions related to the pretrial publicity and the juror's opinions about psychiatrists and their field of study. *Id.* Three of the potential jurors were excused. *Id.* at 352, 409 N.E.2d at 739. At trial, the defense presented three expert witnesses to assess the defendant's state of mind. *Id.* at 344, 409 N.E.2d at 735. One of the psychiatrists concluded that the defendant suffered paranoid illusions focusing on homosexuality. *Id.* The defendant, on appeal, stated that M.G.L. ch. 234, § 28 required the trial judge to conduct an individual voir dire. *Id.* at 351, 409 N.E.2d at 739. The defendant emphasized that jurors would not speak freely about their views of homosexuality, nor about their biases concerning the field of psychiatry. *Id.* at 352-53, 409 N.E.2d at 740. The SJC held that the trial judge was not required to conduct an individual voir dire because there was not a substantial risk that jurors would be influenced by the extraneous issues emphasized by the defendant. *Id.* at 353, 409 N.E.2d at 740. The SJC reasoned that they were not even sure if psychiatrists fell in the category of a "class" according to the statute and secondly stated that an individual voir dire is not required in every case where there is a shocking and gruesome crime. *Id.* Finally, the court ruled that, as to the role of bias against homosexual behavior, there was no testimony at trial from any homosexual witness and, therefore, any preconceived opinions about homosexuality would not have influenced the jury. *Id.* In a footnote, however, the SJC did admit that collective questioning on sensitive issues may not elicit a response from some jurors who would respond if asked the same question in private. *Id.* at 353, n.12, 409 N.E.2d at 740, n.12. See also *Murphy*, *supra* note 9, at 9 (noting no extension of individual voir dire in psychiatric cases and insanity cases).

<sup>38</sup> See *Commonwealth v. Boyer*, 400 Mass. 52, 56, 507 N.E.2d 1024, 1027 (1987) (holding individual voir dire would not be extended to homosexual prejudice). In *Boyer*, the defendant was convicted of three complaints of common night walking. *Id.* The defendant requested the jurors be questioned individually on the following:

- (1) The defendant in the case is a homosexual. Do you have feelings about homosexuals that might make it difficult for you to be impartial in deciding the case?
- (2) Do you believe homosexuality should be illegal?
- (3) Are you a member of a religion that regards homosexuality as a sin?

Similarly, the court has refused to extend the mandatory individual voir dire to cases involving both interracial armed robbery and ethnography.<sup>39</sup>

In 1993, the SJC revisited its criticism of the group questioning method.<sup>40</sup> In *Commonwealth v. Flebotte*,<sup>41</sup> the court promulgated a new

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If so, might your religious beliefs influence you in deciding the defendant's guilt or innocence? (4) Do you believe homosexuals are more likely to engage in illegal sexual acts than other people?

*Id.* The court denied the defendant's request to mandate as a matter of law that individual voir dire is necessary in all cases involving homosexuality. *Id.* The court noted that it already rejected the notion that the mere presence of issues related to homosexual activity requires an individual voir dire of all potential jurors in *Shelley*. *Id.* at 56, 507 N.E.2d at 1026. The court found that there was no basis in the record to require the judge to conduct a voir dire. *Id.* The court also noted that if it did set new precedent, it would only apply to future cases and would not help this individual defendant. *Id.* See also *Commonwealth v. Duddie Ford*, 409 Mass. 387, 390-392, 566 N.E.2d 1119, 1122 (1991) (holding individual voir dire not extended to car dealers convicted of larceny). In *Duddie Ford*, the Commonwealth charged the defendant, car dealer, with larceny. *Id.* at 388, 566 N.E.2d at 1120. The defendant wanted the jury to be individually questioned as to their opinions about car salesman and car dealers. *Id.* The Court refused the defendant's request. *Id.* See also *Murphy*, *supra* note 9, at 9 (stating SJC refused to extend individual voir dire to certain types of cases).

<sup>39</sup> See *Commonwealth v. Grice*, 410 Mass. 586, 590, 574 N.E.2d 369, (1991) (holding armed robbery was not type of crime requiring individual voir dire). In *Grice*, the defendant argued that the principles of *Sanders*, *Hobbs*, and *Young* should be applied to his case. *Id.* at 589, 574 N.E.2d at 369. See also *supra* notes 19-34 (discussing *Sanders*, *Hobbs*, and *Young*). In response the court noted that armed robbery was not the type of issue that was so likely to inflame passion or invoke racial prejudice as to require a judge, as a matter of law, to conduct individual voir dire of prospective jurors. *Id.* The court further held that even though armed robbery is a serious offense and may result in significant harm to the victim, there is nothing inherent in the crime that will inflame the racial prejudice of jurors. *Id.* The court did note that there may be cases involving interracial armed robbery which require an individual voir dire, but the SJC decided to leave that determination up to the trial judge's discretion. *Id.* See *Commonwealth v. De La Cruz*, 405 Mass. 269, 269, 540 N.E.2d 168, 168 (1989) (denying Hispanic man charged with rape of white girl individual voir dire). In *De La Cruz*, the Commonwealth convicted the defendant of indecent assault and battery of a child under 14. *Id.* at 270, 540 N.E.2d at 168. The defendant argued that the court should follow the *Young* ruling that mandated an individual voir dire when the defendant and victim were of different race and the defendant was convicted of murder. *Id.* at 273, 540 N.E.2d at 171. The court denied the defendant's request ruling that "*Young* does not stand for the proposition that a crime committed by a Hispanic defendant against a white victim is interracial." *Id.*

<sup>40</sup> See *Murphy*, *supra* note 9, at 22 (noting SJC continued to extend individual voir dire as matter of law).

<sup>41</sup> 417 Mass. 348, 630 N.E.2d 265 (1994).

rule that jurors must be polled individually about their experience with child sexual abuse.<sup>42</sup> The SJC reasoned that:

[A]s the present case well illustrates, adult victims of childhood sexual offenses may be reluctant to come forward from a venire and discuss such a private and highly emotional event with a judge; they may be embarrassed about it, they may feel that it would not affect their objectivity, or they may just not want to discuss it. Individual voir dire of these individuals would further assist the judge in uncovering signs of impaired objectivity.<sup>43</sup>

The SJC continued extending the use of the individual voir dire through by adding the insanity defense to the list of instances requiring an individual voir.<sup>44</sup> In *Commonwealth v. Seguin*,<sup>45</sup> the Commonwealth accused the defendant of murdering his wife, daughter and son.<sup>46</sup> The defendant asked the judge to conduct an individual voir dire of all prospective jurors about certain aspects of their backgrounds and their views on the insanity defense.<sup>47</sup> The trial judge refused the defendant's extensive request but told the jury collectively that if they could not remain impartial because of the defendant's plea of not guilty by reason of in-

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<sup>42</sup> See *id.* at 353, 630 N.E.2d at 268 (discussing extension of individual voir dire to minor sexual abuse cases); see also Murphy, *supra* note 9, at 22 (noting SJC extended individual voir dire beyond race). In *Flebotte*, the trial judge refused defense counsel's request to poll jurors individually concerning their views on child sexual abuse. *Flebotte*, 417 Mass. at 353-54, 630 N.E.2d at 268-69. The judge instead polled the jurors collectively on the issue. *Id.* at 354, 630 N.E.2d at 269. During deliberations, one of the jurors disclosed that someone had sexually violated him as a young child. *Id.* The trial judge dismissed the biased juror and polled the remaining members to ensure impartiality. *Id.* During the individual questioning stage, the judge dismissed another juror because the juror could not remain impartial. *Id.* The SJC found that the trial judge acted properly in refusing the defendant's individual voir dire request. *Id.* at 353, 630 N.E.2d at 268.

<sup>43</sup> See *Flebotte*, 417 Mass. at 355-56, 630 N.E.2d at 269-70 (reasoning individual voir dire necessary in child sexual abuse cases because of embarrassment); see also Murphy, *supra* note 9, at 22 (documenting reason SJC extended individual voir dire to child sexual abuse cases).

<sup>44</sup> See Murphy, *supra* note 9, at 22 (tracing extension of individual voir dire to insanity defense).

<sup>45</sup> 421 Mass. 243, 656 N.E. 2d 1229 (1995).

<sup>46</sup> See *id.* at 244, 656 N.E.2d at 1230.

<sup>47</sup> See *id.* at 244, 656 N.E.2d at 1231 (discussing defense counsel's attempt to obtain individual voir dire); see also Murphy, *supra* note 9, at 22 (commenting on Seguin's attempt to individually question each juror on view of insanity defense).

sanity they should excuse themselves from the case.<sup>48</sup> The judge later questioned each juror individually, and discovered that ten of the jurors who previously remained silent when asked collectively about their view of the insanity defense actually opposed the use of the insanity defense.<sup>49</sup> The SJC ruled that the questioning at trial ensured the jurors were not biased based on the defendant's insanity plea.<sup>50</sup> The court ruled that in future cases where the defendant's sanity is called into question, the trial judge must question each of the jurors individually on their view of the insanity defense.<sup>51</sup>

The SJC in *Seguin* offered various reasons for changing long standing precedent.<sup>52</sup> First, based on the jurors' responses to the trial judge's individual questioning, a majority of the population did not be-

<sup>48</sup> See *Seguin*, 421 Mass. at 245, 656 N.E.2d at 1231 (discussing trial judge's attempt to impanel jury free of bias and prejudice).

<sup>49</sup> See *id.* (noting judge conducted individual voir dire as well as collective voir dire). The trial judge told prospective jurors the following:

[T]he Commonwealth has the burden of proving beyond a reasonable doubt that this defendant was both guilty of the alleged crime and was criminally responsible: that is, legally sane. If the Commonwealth fails in its burden to prove he was legally sane, have you any opinions that would prevent you from returning a verdict of not guilty by reason of insanity?

*Id.* Some of the reasons the ten jurors gave for being opposed to the insanity defense were: "(1) I would have a hard time being objective with an insanity plea." (2) "I just think if there's a crime committed someone should pay for what they've committed. (3) "I do not believe in that verdict." (4) "I have a problem with guilty or not guilty due to reason of insanity." *Id.* at 246, n.3, 656 N.E.2d at 1231. Five other jurors stated "that the defendant had to be insane to do what he did." *Id.* at 246, n.4, 656 N.E.2d at 1231. See also Murphy, *supra* note 9, at 22 (revealing different results of individual voir dire versus collective voir dire).

<sup>50</sup> See *Seguin*, 421 Mass. at 245, 656 N.E.2d at 1231 (discussing court's decision that trial judge acted properly).

<sup>51</sup> See *id.* at 249, 656 N.E.2d at 1232 (mandating individual voir dire for insanity defense cases). Justice Wilkins, writing for the court, noted:

[I]n all future cases in which a defendant indicates that his or her lack of criminal responsibility may be placed in issue and so requests, the judges shall inquire individually of each potential juror, in some manner, whether the juror has any opinion that would prevent him or her from returning a verdict of not guilty by reason of insanity, if the Commonwealth fails in its burden to prove the defendant criminally responsible. It will be in the judge's discretion to ask more detailed questions concerning a juror's view of the defense of insanity.

*Id.*

<sup>52</sup> See *id.* at 248, n.5, 656 N.E.2d at 1232 (discussing reasons for extension of individual voir dire); see also Murphy, *supra* note 9, at 23 (noting reasons SJC changed its mind finding individual voir dire necessary for insanity defense).

lieve in the insanity defense.<sup>53</sup> In order to validate this argument, the court examined outside empirical studies.<sup>54</sup> The studies showed that people viewed the insanity defense with great skepticism because it allowed defendants to escape without accepting responsibility for their crimes.<sup>55</sup> Finally, the studies showed that the public viewed a psychiatrist's testimony at trial as a hoax.<sup>56</sup>

Six months after *Seguin*, the SJC decided *Commonwealth v. Plunkett*.<sup>57</sup> In *Plunkett*, the Commonwealth charged the defendant with murdering a man who allegedly made homosexual advances toward him.<sup>58</sup> The court, in reversing the defendant's conviction on other grounds, suggested that an individual voir dire may have been applicable given the facts of this case.<sup>59</sup> Specifically, the court reasoned that only eight out of eighty jurors stepped forward to voice bias when questioned collectively, despite the reality of the majority's bias.<sup>60</sup> The court did not, however, declare that all cases involving homosexual issues require an individual voir dire.<sup>61</sup>

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<sup>53</sup> See *Seguin*, 421 Mass. at 248, 656 N.E.2d at 1232 (discussing jurors answers to judge's questions on insanity); see also Murphy, *supra* note 9, at 23 (citing SJC's reasoning for requirement of individual voir dire in insanity cases).

<sup>54</sup> See *Seguin*, 421 Mass. at 248, n.5, 656 N.E.2d at 1232 (discussing SJC's use of empirical studies to aid in decision to mandate voir dire); see also Murphy, *supra*, note 9, at 23 (noting SJC examined empirical information in *Seguin*). Accordingly, the use of empirical evidence suggests that the SJC will consider social science evidence in determining whether or not to mandate an individual voir dire in the future. *Id.*

<sup>55</sup> See *Seguin*, 421 Mass. at 248, n.5, 656 N.E.2d at 1232 (discussing results of empirical studies); see also Murphy, *supra*, note 9, at 23 (noting SJC's findings). The SJC also stated that the general public felt that when the insanity defense is raised it is far more successful than it really is. *Id.*

<sup>56</sup> See *Seguin*, 421 Mass. at 248, n.5, 656 N.E.2d at 1232 (noting additional findings of SJC); see also Murphy, *supra*, note 9, at 23 (discussing public's view of psychiatrists and their testimony at trial).

<sup>57</sup> 422 Mass. 634, 664 N.E.2d 833 (1996).

<sup>58</sup> See *id.* at 636-37, 664 N.E.2d at 835.

<sup>59</sup> See *id.* at 641, 664 N.E.2d at 838 (discussing SJC's hint that individual voir dire concerning homosexuality may be next step); see also Murphy, *supra*, note 9, at 23 (discussing *Plunkett* decision).

<sup>60</sup> See *Plunkett*, 421 Mass. at 641, 664 N.E.2d at 838 (discussing jurors willingness to come forward when asked collectively about feelings toward homosexuality).

<sup>61</sup> See *id.* at 641, 664 N.E.2d at 838 (noting SJC's refusal to mandate individual voir dire on homosexuality); see also Murphy, *supra* note 9, at 23 (noting SJC did not add homosexuality to mandatory individual voir dire list).

### III. CONNECTICUT'S VOIR DIRE SYSTEM AND ANALYSIS OF ITS EFFECTIVENESS USING SOCIAL SCIENCE RESEARCH

#### *A. Attorney Conducted Voir Dire v. Judge Conducted Voir Dire*

The Connecticut voir dire system allows attorneys to the conduct the voir dire rather than the judge.<sup>62</sup> The civil and criminal judge's duties usually consist of making an initial statement to the jury, explaining the voir dire process and then excusing himself from the bench.<sup>63</sup> The judge generally remains away from the courtroom while the attorneys question the jurors unless a problem arises which requires the judge's clarification on an issue.<sup>64</sup> Thus, the attorneys are responsible not only for the questioning of each juror but also for determining a juror's bias.<sup>65</sup>

Numerous scholars and legal commentators support the effectiveness of the attorney conducted voir dire in eliciting juror candor.<sup>66</sup> Pro-

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<sup>62</sup> See CONN. GEN. STAT. ANN. §§ 51-240 (West 1999) (noting voir dire procedure in civil cases). The statute provides, in pertinent part:

In any civil action tried before a jury, either party shall the right to examine, personally, or by his counsel each juror outside the presence of other perspective jurors as to his qualifications to sit as a juror in the action. If the judge before whom the examination is held is of the opinion from the examination that any juror would be unable to render a fair and impartial verdict the juror shall be excused by the judge from any further service upon the panel, or in the action, as the judge determines. The right of examination shall not be abridged by requiring questions to be put to any juror in writing and submitted n advance of the commencement of the action.

*Id.* See also CONN. GEN. STAT. ANN. §§ 54-82f (West 1999) (explaining voir dire procedure in criminal cases). The criminal statute reads exactly the same as the civil statute. *Id.*

<sup>63</sup> See CONN. GEN. STAT. ANN. §§ 51-240 (West 1994) (noting no requirement that judge remain on bench while attorneys are questioning jurors). See also CONN. GEN. STAT. ANN. § 52-84f (West 1994) (noting same as civil statute).

<sup>64</sup> See CONN. GEN. STAT. ANN. §§ 51-240 (West 1994) (providing judge may leave courtroom during voir dire to tend to other matters).

<sup>65</sup> See CONN. GEN. STAT. ANN. §§ 54-82f, 51-240 (West 1994) (discussing responsibilities of attorneys).

<sup>66</sup> See Jones, *supra* note 2, at 131 (testing juror candor when questioned by judge and juror candor when questioned by attorney). In Jones' study, 116 jury eligible community residents were tested. *Id.* at 135. There were 42 males involved in the study and 69 females. *Id.* Jones paid each resident twenty dollars for their participation. *Id.* The panel size ranged from 13 to 16 jurors. *Id.* Eight voir dire were conducted over four days and alternated judge and attorney conducted voir dire each night. *Id.* at 137. The actors who played the role of the judge assumed the role of both a personable judge and a

ponents note that attorneys are better suited to conduct the voir dire because their familiarity with the facts allows them to sense where the potential bias may arise and to probe that area more effectively than a judge.<sup>67</sup> The evidence also shows that jurors relate more easily to attorneys than judges because the potential juror feels closer on the social scale to the attorneys.<sup>68</sup> Therefore, the potential juror will be more candid when responding to inquiries from an attorney rather than a judge.<sup>69</sup> The proponents of attorney conducted voir dire believe that attorneys must conduct the voir dire in order to establish a rapport with the jury.<sup>70</sup>

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formal judge. *Id.* at 136. The results from the study support the contention that attorneys are better at eliciting honest answers from jurors. *Id.* at 143. The subjects involved changed their answers almost twice as much when questioned by a judge. *Id.* The judge never elicited more candid answers than the attorneys in this study. *Id.* See also National Center for State Court's, *Jury Trial Innovations*, Ch III-1, 53-54 (1997) (comparing arguments for attorney conducted voir dire and arguments for judge conducted voir dire); Suggs and Sales, *supra* note 6, at 252 (focusing on social science analysis to explain benefit of attorney rather than judge conducted voir dire).

<sup>67</sup> See National, *supra* note 66, at 54 (stating lawyers familiarity with facts of case make them more effective conductors of voir dire). Proponents of the lawyer conducted voir dire argue that because a lawyer knows the facts and legal issues of the case better than the judge attorneys are more effective questioners of the jurors. Suggs and Sales, *supra* note 6, at 252. It is important to note that those in favor of attorney-conducted voir dire also recognize that the trial judge should not have as much knowledge about the case as the attorney and therefore the attorney is a much better solicitor of the truth. *Id.* Judges have been accused over the years of not asking enough questions to elicit juror's attitudes because they are trying to keep the system moving quickly. *Id.*

<sup>68</sup> See National, *supra* note 66, at 54 (noting jurors less intimidated by attorneys and thus more honest). Researchers found that "since veniremen look upon the judge as and important authority figure, the veniremen are reluctant to displease him and therefore tend to respond to his questions with less candor than if the questions are posed by counsel." Neal Bush, *The Case for Expansive Voir Dire*, 2 LAW AND PSYCHOLOGY REVIEW 9, 17 (1976). The difference in status of the judge versus the attorney is also evidenced by the judge's location in the courtroom. Suggs and Sales, *supra* note 6, at 253. He is placed high above everyone in the courtroom and is spoken to by all who enter the court as "your honor." *Id.* at 253. Researchers also found that too great a status differential between those involved will reduce the possibility of a candid dialogue. *Id.* at 254. One study of 116 community residents found that the jurors were more candid with attorneys rather than judges. Jones, *supra* note 2, at 143. The Jones study conducted indicates that those tested changed their answers almost twice as much when they were questioned by a judge than when questioned by an attorney. *Id.* When questioned by a judge, the participants felt pressured to conform their ideas to the judge's belief. *Id.* at 144. When questioned by the attorneys to whom they felt closer on a social scale, the jurors felt less pressure to conform their answers to what they thought the attorneys wanted to hear. *Id.*

<sup>69</sup> See Bush, *supra* note 68, at 9 (noting difference in social status between judge and attorney). See also Suggs and Sales, *supra* note 6, at 254 (noting judge's status emphasized by location in courtroom and its effect on juror's response).

The attorney-conducted voir dire also allows the litigants in the case to feel as though they are directly participating in the jury selection process via their attorney.<sup>71</sup>

Despite the support for the attorney conducted voir dire, states such as Massachusetts continue to insist on the judge conducted voir dire.<sup>72</sup> Proponents of the judge conducted voir dire argue that the attorney conducted voir dire takes too long.<sup>73</sup> Further, proponents assert that attorneys, if given the authority to conduct the voir dire, will use the process for improper purposes such as the pre-trying of their case.<sup>74</sup> Despite such arguments, Massachusetts should allow attorneys to question potential jurors because of the social science data showing jurors feel more comfortable and honest when questioned by attorneys.<sup>75</sup>

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<sup>70</sup> See Bush, *supra* note 68, at 15-16 (noting establishing rapport as reason in favor of attorney conducted voir dire). Other researchers have, however, noted that, although a minimum level of rapport is necessary to allow the jurors to feel comfortable there may come a time when rapport crosses the line and becomes ingratiating. Suggs and Sales, *supra* note 6, at 250. Ingratiation can occur through what has been described as the "grandstand play" which involves an attorney telling the jurors that he has the utmost faith in the system and therefore he will not question them. *Id.* Another instance in which an attorney may attempt to ingratiate himself with the jurors is by extending a tremendous amount of courtesy to the panel, including questions about the health of the older panel members. *Id.* Thus, Ingratiation is strongly discouraged and should be viewed as unacceptable. *Id.*

<sup>71</sup> See National, *supra* note 66, at 55 (noting when attorneys conduct voir dire parties have more faith in justice system).

<sup>72</sup> See MASS. GEN. LAWS ANN. ch. 234, § 28 (West 1996) (allowing judge as conductor of voir dire).

<sup>73</sup> See National, *supra* note 66, at 55 (acknowledging efficiency as benefit of judge conducted voir dire). Time efficiency is the most frequently mentioned justification for maintaining the judge conducted voir dire. Bush, *supra* note 68, at 17. Minimization of congestion is a legitimate reason to have a judge conducted voir dire, but this goal must be balanced against the need to have the most effective jury selection process. *Id.* "If a hasty judge-interrogated voir dire is permitted to predetermine the outcome of the trial, the slight time saving that might result would not justify the result of a potentially biased jury." *Id.* at 18. See also Jones, *supra* note 2, at 132 (noting proponents of judge conducted voir dire claim time and money savings).

<sup>74</sup> See National, *supra* note 66, at 54 (proposing attorneys may use voir dire as part of adversarial process to try their case). The National Center for State Courts recommends that judges set limits during the pre-trial conference on what attorneys may disclose to the jury in order to avoid this problem. *Id.*

<sup>75</sup> See *supra* notes 66-71 (emphasizing effectiveness of attorney conducted voir dire).



*B. Group Questioning v. Individual Questioning*

Connecticut takes a different approach than Massachusetts by allowing attorneys to pose questions to each potential juror outside the presence of the other jurors.<sup>76</sup> The setting in which questions are posed to potential jurors can often affect jurors' abilities to answer the questions candidly.<sup>77</sup> Researchers have accepted that individual questioning of jurors promotes candor where as the collective questioning is ineffective at obtaining juror candor.<sup>78</sup>

The issue to determine, thus, is whether the collective group questioning method in Massachusetts would yield the same results as Connecticut's individual sequestered questioning method.<sup>79</sup> Social science research supports individually questioning jurors outside the presence of other jurors as the most effective method to obtain candid answers to all questions, especially the more difficult questions.<sup>80</sup> Researchers noted that "studies about conformity have demonstrated that to avoid calling attention to themselves, panel members subjected to col-

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<sup>76</sup> See CONN. GEN. STAT. ANN. §§ 51-240, §§ 54-82f (West 1999) (discussing individual, sequestered voir dire). The statute provides, in pertinent part: "[E]ither party shall have the right to examine, personally or by his counsel each juror outside the presence of other prospective jurors as to his disqualification to sit as a juror in the action." *Id.*

<sup>77</sup> See Bush, *supra* note 68, at 20 (noting court is intimidating to potential jurors and not conducive to jurors speaking out). Individual juror questioning can make them feel more comfortable. *Id.*

<sup>78</sup> See *id.* (recognizing individual voir dire is most effective).

<sup>79</sup> See *id.* at 11 (reasoning that different methods yield different results).

<sup>80</sup> See *id.* (discussing ineffectiveness of collective questioning). Bush gives various reasons for his support of the individual sequestered questioning of the potential jurors. *Id.* Bush states that one of the basic assumptions of the voir dire process is that jurors do not speak. *Id.* The conductor of the voir dire usually asks the potential jurors a number of close-ended questions which the jurors give limited response to and the conductor continues questioning without determining whether one of the jurors may be hesitant to answer any of the questions differently than the jurors. Bush, *supra* note 68, at 11. One reason jurors do not speak out is that they are surrounded by a group of strangers. *Id.* Secondly, many jurors do not have a job or other type of activity that allows them to speak out in public, so they are less likely to speak out in a courtroom. *Id.* Jurors only feel comfortable speaking out in this context when one of two of the other members have already raised their hands. *Id.* at 12.

lective questioning do not willingly volunteer information about themselves or reveal opinions that deviate from the other panel members."<sup>81</sup>

In the group questioning method, the entire group of prospective jurors is asked a question such as "would any of you be unable to be fair and impartial toward the defendant because of the media coverage which surrounded this case? If no one from the group responds to this question, the interviewer moves on to other areas."<sup>82</sup> Based on evidence showing that people need to conform, the group setting is an inappropriate atmosphere for eliciting honest responses to questions.<sup>83</sup> This method of questioning is completely ineffective because it places jurors in an awkward, and at times, embarrassing position.<sup>84</sup>

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<sup>81</sup> See National, *supra* note 66, at 68 (noting results of human nature in group atmosphere). Researchers have noted that when people are called for jury service, they experience an increased anxiety level. Suggs and Sales, *supra* note 6, at 259.

A variety of investigators find that anxious individuals have an increased need for affiliation while they are awaiting a threatening event. Many perspective jurors perceive interrogation in a public forum to determine their suitability as jurors to be such a threatening event. In addition, conformity increases as the need for affiliation increases. Thus even before the voir dire begins, there are socio-psychological factors at work which encourage group cohesiveness and conformity of response, thereby militating against honest self-disclosure.

*Id.* at 259-60. See also Michael T. Nietzel, Ronald C. Dillehay, & Melissa J. Himeleing, *Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 No.4 BEHAVIORAL SCIENCES AND THE LAW 467, 476 (1987) (studying effects of setting on juror candor). One study examined a sample of 18 capital cases and defense attorneys' success at obtaining candid answers in both the group setting and the individual setting. *Id.* The results showed that a defense motion for cause produced more sustained challenges for cause under sequestered, individual voir dire rather than the group voir dire. *Id.* These results reveal that the individual voir dire is more effective in producing information relative to juror bias. *Id.*

<sup>82</sup> See Suggs and Sales, *supra* note 6, at 260 (noting this is type of questioning utilized by those states that use group mode of questioning). See also Bush, *supra* note 68, at 22-23 (stating it is essential to ask jurors open-ended questions requiring more than yes or no answer). Judges tend to favor asking close-ended questions. *Id.*

<sup>83</sup> See Suggs and Sales, *supra* note 6, at 260 (discussing ineffective nature of group questioning).

Even when relatively mundane questions are addressed to the prospective jurors as a group, researchers have observed that they squirm in their seats and look around to see if anyone else is going to volunteer information; if they discover that no other hands are raised, they settle back in their chairs and refuse to respond.

*Id.*

<sup>84</sup> See Bush, *supra* note 68, at 19 (noting individual private voir dire is appropriate if juror might give an embarrassing answer). See also Suggs and Sales, *supra* note 6, at 260 (noting when jurors are asked very simple questions, they get nervous and want to conform).

In states that allow group questioning for general topics and individual questioning within smaller groups, juror candor improves but it is still ineffective.<sup>85</sup>

It was found that when an individual was called upon to state his opinions in public after hearing the opinions stated by the majority of the group over one-fourth of the minority of individuals covertly changed their private opinions and stated their public opinions so that they matched those of the majority. When an individual was not required to state an opinion in front of the group, the degree of conformity was markedly lower.<sup>86</sup>

Research reveals that the most effective method for obtaining a candid response from a juror is through individual questioning outside the presence of the other jurors.<sup>87</sup> Individual voir dire is most effective because it usually takes place in a less formal setting and the conductor uses a less formal tone.<sup>88</sup> Furthermore, it is also more effective than other methods because it removes people from big groups and makes it less likely for them to feel self conscious.<sup>89</sup> Opponents of the individual voir dire often cite time conservation as their main argument against this more thorough process.<sup>90</sup> While time is an important consideration for

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<sup>85</sup> See Suggs and Sales, *supra* note 6, at 260 (noting smaller size fails to alleviate need to conform). The conformity studies show that when individuals are required to state their opinions in front of members of a group, "even under such non-threatening conditions as requesting each individual to judge a line length" they still feel the need to conform. *Id.* at 260. Furthermore, studies have shown that a juror is less likely to change his opinion when questioned outside the presence of other potential jurors. *Id.* at 260.

<sup>86</sup> Suggs and Sales, *supra* note 6, at 260.

<sup>87</sup> See *id.* at 261 (noting individual voir dire is best system). According to the article, "if the goal of the voir dire is honest self-disclosure, the most effective ways to facilitate the achievement of that goal is to interview prospective jurors out of the presence of their fellows, thus eliminating the conformity-generating aspects of the group voir dire." *Id.*

<sup>88</sup> See National, *supra* note 66, at 69 (noting individual voir dire as best method for juror candor); see also Bush, *supra* note 10, at 20 (noting courtroom and its proceeding not conducive to obtaining juror candor).

<sup>89</sup> See National, *supra* note 66, at 69 (noting individual voir dire prevents fear of humiliation).

<sup>90</sup> See *id.* at 69 (noting judicial economy is central argument against individual voir dire).

the courts, the right to an impartial jury should be weighted as significantly more important than mere time conservation.<sup>91</sup>

#### IV. CONCLUSION

The selection of an impartial jury is an essential element of a fair trial, and yet Massachusetts continues to employ a process that is ineffective at obtaining an impartial jury. Massachusetts should adopt Connecticut's voir dire system that allows attorneys to individually question jurors because it is more effective at obtaining juror candor. The effectiveness of the attorney conducted voir dire is evidenced by the abundance of social science research. The research details that potential jurors relate better to attorneys, attorneys are better able to establish a rapport with the jurors, and attorneys are more familiar with the facts of the case. The effectiveness of the individual voir dire is also evidenced by the abundance of social science research. The research details that the individual voir dire is the most effective setting to obtain honest answers from jurors. The individual voir dire prevents feelings of embarrassment and prevents the need to conform. Further, evidence in support of the individual voir dire can be derived from the findings of the SJC consistently recognizing the inadequacy of the group questioning method. Clearly, Connecticut's system is more conducive to juror honesty and, thus, should be implemented in Massachusetts.

*Debora A. Cancado*

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<sup>91</sup> See *supra* notes 78-89 (discussing reasons in favor of individual voir dire).

