VOIR DIRE IN MASSACHUSETTS STATE AND FEDERAL COURTS:
COMMENTARY AND SUGGESTIONS FOR REVISION

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I. Introduction

In October 2011, Chief Judge for the United States District Court for the District of Massachusetts, Mark L. Wolf, issued an order overturning the death penalty sentence of Gary Lee Sampson. Judge Wolf’s order has elicited outrage from the victims’ families and from the press who feel the sentence was overturned on a technicality or to preserve the judge’s image. However, the Sampson order should also make us consider the effectiveness of jury voir dire in Massachusetts state and federal courts.

A jury sentenced Sampson to death in 2004 for torturing and murdering three victims in New Hampshire and Massachusetts in 2001 during a week-long killing spree. After the conviction Sampson filed a motion for a new trial alleging that he had been “deprived of his right to have his sentence decided by an impartial jury” because three jurors had answered voir dire questions inaccurately. The court held a hearing, finding that two jurors had unintentionally...

3 “I’m extremely disappointed and phenomenally outraged at the fact that one man with the ego the size of Judge Wolf’s tried to overturn the good work done by so many people in coming to the right decision many years ago.” Johnson & Zaremba, supra note 2.
4 Shelley Murphy, Death for Sampson, BOSTON GLOBE, Dec. 24, 2003, http://www.boston.com/news/local/articles/2003/12/24/death_for_sampson/. Sampson had been hitchhiking and was picked up by cars driven by Jonathan Rizzo, Philip McCloskey, and Robert Whitney. Id. Sampson then “forced [Rizzo, McCloskey and Whitney] at knifepoint to drive to secluded areas, where he tied them up and repeatedly stabbed them.” Id.
5 Order on Jury Claim, Cr. No. 01-10384-MLW (Oct. 20, 2011), 5 [hereinafter Wolf Order].
answered voir dire questions inaccurately (these errors did not entitle Sampson to a new trial), and that one juror “intentionally and repeatedly answered a series of questions dishonestly.” The dishonesty of the one juror compelled Judge Wolf to “vacate Sampson’s death sentence and grant him a new trial.”

Despite the outrage at Wolf’s order, the right to a fair and impartial jury is deeply ingrained in our judicial system and is a piece of the adversarial process that should not be downplayed or made light of. The right to an impartial jury is guaranteed in two places in our constitution, and yet jury selection is not a process that receives much press in the majority of cases. With the right to an impartial jury holding such prominence in the constitution, one would think there would be a well-settled best practice for jury empanelment, but this is not the case. Instead, voir dire, the process through which the court examines the venire (jury pool) to determine the competence of potential jurors, differs depending on the state that you are in and whether it is federal or state court. For example, the judge primarily conducts voir dire in Massachusetts state and federal courts, a practice used by eight other states.

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6 Id. at 6.
7 Id. at 9.
8 U.S. CONST. art. III § 2; U.S. CONST. amend. VI, VII.
9 See infra, section IV at 19. See also 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, 158 (2010) (stating that most courts “provide that the questioning of prospective jurors may be conducted by the judge, the attorneys for the parties, or both”) (internal citations omitted); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 245 (1980-1981) (“The term ‘voir dire’ has been translated as ‘to speak the truth’ or ‘to see them talk.’”).
In light of the recent *Sampson* order, and our own experiences with jury duty,\(^\text{11}\) we decided to take a closer look at the voir dire process. The purpose of this paper is to consider the state of judge voir dire in Massachusetts and discuss which forms of voir dire may best preserve impartiality and guide us to fair outcomes. Over the course of three months we attended six jury empanelments in the Massachusetts federal and state courts and read transcripts from a number of other empanelments.\(^\text{12}\) While not intended to be a comprehensive review of different judicial practices, we use our experiences to explore the benefits and limitations of judicially controlled jury empanelments.\(^\text{13}\) Given that we made observations primarily from public seating, our analysis focuses entirely on voir dire leading up to preemptory challenges, but does not consider the preemptory challenges themselves. It is our belief that many of the problems that occur at the preemptory challenge stage, such as race or gender stereotyping, can be improved by allowing for more searching questioning of jurors at the causal challenge stage.

Observing jury empanelment in Suffolk Superior Court and the United States District Court for the District of Massachusetts, we placed ourselves in the position of potential jurors in order to understand what aspects of the voir dire raised thoughts or questions in our mind. In Part II we outline the doctrinal and theoretical concerns of impartiality, efficiency and juror privacy that inform voir dire. Understanding how voir dire practices bear on these considerations is essential to arriving at the best practices for voir dire, i.e., those that best harmonize the

\(^{11}\) On September 12, 2011, Julia Mirabella served on the venire for two cases at the Suffolk Superior Court: the first was a first-degree murder case with Judge O’Connor; the second was a civil suit with Judge Troy.

\(^{12}\) Since none of the judges on the United States District Court for the District of Massachusetts or the Suffolk Superior Court perform lawyer voir dire we looked to past transcripts from a judge who performed attorney voir dire while on the bench, Judge Nancy Gertner of the United States District Court for the District of Massachusetts. Our discussion of lawyer voir dire is informed entirely by transcripts from Judge Gertner’s empanelments.

\(^{13}\) Note that this paper does not provide a doctrinal argument, rather here we present our opinions formed through our experiences.
competing considerations with few trade-offs. In Part III we consider the current state of judge voir dire in Massachusetts, first reviewing different forms of jury empanelment and then critiquing a few of the essential procedures and their variations. Part IV analyzes lawyer voir dire, an alternative to judge voir dire, which has its own problems but which also may have benefits that could inform the current Massachusetts system. Finally in Part V we discuss a few areas of the voir dire process we believe need minor modifications or revisions and provide recommendations on ways the process could be adjusted.

II. Theoretical and Doctrinal Considerations in Jury Empanelment: Impartiality, Efficiency, and Juror Privacy

Voir dire provides judges and counsel with information to make intelligent for cause and preemptory challenges.\(^{14}\) The constitutional basis for voir dire procedures - and for cause challenges in particular - rests in the notion of “impartiality” mentioned in the Sixth Amendment\(^{15}\) and “due process” in the Fourteenth Amendment.\(^{16}\) There are few appellate cases

\(^{14}\) See Mu’Min v. Virginia, 500 U.S. 415, 431 (1991) (“Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising preemptory challenges.”). See also Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding that right to impartiality requires “adequate” voir dire to identify unqualified jurors); Holland v. Illinois, 493 U.S. 474, 480 (1990) (linking impartiality to the Sixth Amendment); Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion) (“Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.”); Dennis v. United States, 339 U.S. 162, 171-72 (1950) (holding that impartiality requires an opportunity to probe bias of prospective jurors). But see Lockhart v. McCree, 476 U.S. 162, 178 (1986) (holding jurors can be predisposed but still impartial if they can decide the case based solely on the evidence); Wainwright v. Witt, 469 U.S. 412, 423-24 (1985) (holding that the parties may only excuse a juror for cause if the juror cannot be impartial); Smith v. Phillips, 455 U.S. 209, 217 (1982) (holding impartiality satisfied if juror assures the court that she will decide the case solely on the evidence).

\(^{15}\) U.S. CONST. amend VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”). The Sixth Amendment applies to state court criminal prosecutions through the Fourteenth Amendment. Because the prosecution is not “the accused,” the government cannot invoke the Sixth Amendment right to an impartial jury. But see Stephen R.
concerning voir dire because United States District Court judges have broad discretion to
24(a).18 These procedures’ rules are broad enough that they do not constrain the choices a judge
makes in fashioning a best practice of voir dire in his or her courtroom. However, when
structuring voir dire, judges must grapple with “where to draw the line between the rights of the
parties, on the one hand, and the privacy of jurors and the public’s interest in expedition, on the
other.”19 Judges attempt to balance these concerns when they construct a process of
empanelment in their chambers. They might choose to allow lawyers to conduct individualized
voir dire, conduct the examination of individual jurors themselves, or distribute a questionnaire
to the venire.

The first consideration is a fairness one, the jury must be impartial. The proper method of
voir dire—individual vs. group questioning, open-ended vs. closed-ended questioning, and
lawyer vs. judge voir dire—is irrelevant so long as the jury empanelled is “impartial.”20 A judge

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1 Diprima, Note, Selecting a Jury in Federal Criminal Trials After Batson and McCollum, 95
COLUM. L. REV. 888, 891 n.25 (1995) (forwarding the policy argument that the government
should have a constitutional right to an impartial jury).
10 U.S. CONST. amend XIV (“[N]or shall any state deprive any person of life, liberty, or property,
without due process of law . . . .”).
17 “Examining Jurors. The court may permit the parties or their attorneys to examine prospective
jurors or may itself do so. If the court examines the jurors, it must permit the parties or their
attorneys to make any further inquiry it considers proper, or must itself ask any of their
additional questions it considers proper.”
18 “Examination. (1) In General. The court may examine prospective jurors or may permit the
attorneys for the parties to do so. (2) Court Examination. If the court examines the jurors, it must
permit the attorneys for the parties to:
(A) ask further questions that the court considers proper; or
(B) submit further questions that the court may ask if it considers them proper.”
20 See Mu’Min, 500 U.S. at 425 (finding that a trial judge is only obligated to “cover” issues
relating to impartiality and under no constraints regarding how to structure voir dire toward that
end). See also Rosales-Lopez, 451 U.S., at 188 (finding that the adequacy of voir dire is not
easily the subject of appellate review); Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879, 885
need not ask more probing questions about an issue during voir dire unless the failure to do so would render the defendant’s trial “fundamentally unfair.”

Furthermore, appellate courts review the impartiality determinations of trial court judges under a deferential “manifest error” standard. Death penalty cases are the only narrow pigeonhole in which common law rules constrain the judge’s discretion over voir dire. However, defendants’ efforts to impose constitutional requirements for voir dire in non-capital cases have been unsuccessful.

In 1961, the Supreme Court defined impartiality by reference to Lord Edward Coke, stating that the goal of voir dire is to discover jurors who are “indifferent as [they] stand [] unsworn.” A Virginia court in 1807 defined impartiality as “strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will

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(8th Cir. 2006) (“District courts have broad discretion to determine the scope of voir dire.”); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 323 (5th Cir. 1998) (“A district judge generally has broad discretion in determining how best to conduct voir dire . . . but that discretion is abused if the scope of voir dire is inadequate to discover bias or deprives a party of an opportunity to make reasonably intelligent use of his peremptory challenges.”) (internal citation omitted); Smith v. Vicorp, Inc., 107 F.3d 816, 818 (10th Cir. 1997) (“We therefore hold that the content of voir dire in federal courts is controlled by FED. R. CIV. P. 47(a) and is not subject to the dictates of any contrary state.”); Snyder v. Phelps, 533 F. Supp. 2d 567, 582-84 (D. Md. 2008), rev’d, 580 F.3d 206 (4th Cir. 2009), aff’d, 131 S. Ct. 1207 (2011).

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21 See Mu’Min, 500 U.S. at 425.
22 See id. at 428 (“[A] trial court’s findings of juror impartiality may be overturned only for ‘manifest error’”) (internal citations omitted). See also Patton v. Yount, 467 U.S. 1025, 1038 (1984) (quoting Murphy v. Florida, 421 U.S. 794, 799 (1975)) (holding that the trial judge’s finding that a potential juror had a “fixed opinion that could not be set aside” was entitled to “special deference”).
23 See, e.g., Morgan, 504 U.S. at 735-36 (1992) (rejecting as inadequate closed-ended questioning about whether potential jurors would “follow the law” in death penalty cases).
24 See, e.g., Mu’Min, 500 U.S. at 419 (holding that the trial judge is not obligated to ask open-ended questions or to ask questions with a particular content/form); Gacy v. Welborn, 994 F.2d 305 (7th Cir. 1993) (upholding trial judge’s rejection of defendant’s motion for open-ended voir dire questioning because “[t]o do more would have extended the jury selection process . . . .”).
combat the testimony, and resist its force.”

Modern “impartiality” is the basis of a challenge for cause when the potential juror has (1) a connection to the case or parties, (2) a disability, or (3) a fixed attitude or bias; bias can be actual or implied. Actual bias exists when the potential juror’s statements indicate that he or she is not “capable and willing to decide the case solely on the evidence before [him or her].” Implied bias exists when a close connection between the juror and the case makes it “highly likely that the average person could remain impartial in his deliberations under the circumstances.”

A second and important consideration is efficiency; efficient voir dire procedures have long been a concern of judges who often have overloaded dockets. Trials need to move as quickly as possible and “ineffective voir dire results in lost time, redundant and irrelevant questions, abuse of the process, and ineffective use of strikes.” However, efficiency concerns can also limit the parties’ ability to gather all of the information about the potential jurors’

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28 See, e.g., Hernandez v. New York, 500 U.S. 352, 375 (1991) (upholding a cause challenge against a Spanish-speaking potential juror because the interpreter would not allow the potential juror to perform the duties of jury service).

29 See, e.g., Irving, 366 U.S. at 727-28 (finding an entire community presumptively biased because of pretrial publicity of inadmissible evidence such as the defendant’s criminal record as a juvenile).


31 See, e.g., Sanders v. Norris, 529 F.3d 787, 792 (8th Cir. 2008) (internal citations omitted).

32 See Diprima, supra note 15, at 893 (citing a 1924 report of the Judicial Conference Senior Circuit Judges recommending that the “dispatch of business” guide voir dire). See also People v. Crowe, 8 Cal. 3d 815, 825 (1973) (“We approve this method of curtailing the inordinate time consumed in the process of the selection of jurors.”); People v. Semone, 140 Cal. App. 318, 326 (3d Dist. 1934) (“It is not only the privilege but it is also the duty of the court to restrict the examination of jurors within reasonable bounds so as to expedite the trial.”).

33 See Rachel Harris, Questioning the Questions: How Voir Dire is Currently Abused and Suggestions for Efficient and Ethical Use of the Voir Dire Process, 32 J. LEGAL PROF. 317, 320 (2008).
impartiality and often are in tension with impartiality considerations. Some scholars argue that
a judge’s focus on efficient voir dire is not only a matter of judicial administration but also a
result of the fact that judges know little about the case to be tried before them. Appellate courts
have approved of trial judges’ attempts to impose efficiency via strict time limits. Efficiency is
therefore an important component of any search for best practices in voir dire.

The last consideration is an important public policy one; juror privacy. Juror privacy
augments the conventional tradeoff between efficiency and impartiality because some voir dire
practices are less likely to produce honest responses from potential jurors. While jurors do not
possess an affirmative privacy right that would allow them to decline to answer voir dire
questions, this should not minimize the importance of privacy concerns. Jurors, protective of
their privacy, are often reluctant to expose their identities to the venire during group questioning
if it means that the court security officer will announce their name out loud. In rare
circumstances, trial judges have exercised their discretion to exclude certain lines of questioning

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34 Many courts curtail individual questioning or open-ended questioning in the interest of
efficiency. As Judge Gertner notes, “[t]o judges, impartiality in a more abstract, less concrete
concept; efficiency concerns may lead the court to accept a jury that the parties would not.”
GERTNER & MIZNER, supra note 19, at 101 (citing National Jury Project, Jury Work: Systematic
Techniques at § 2.05 at 2-17).
35 Barbara Allen Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 STAN. L. REV. 545,
548 (1975) (stating as follows:
The reason for the time saving is that judges are neither inclined nor as able to ask
the appropriate next question when answers are evoked from the prospective
jurors. Thus, for instance, when a potential juror responds that she has been the
victim of a crime, the judge will typically ask whether this would tend to
prejudice her in evaluating the testimony to be given in the case. An attorney
conducting the voir dire would probe the nature of the crime, her evaluation of the
police investigation and conduct toward her, whether she made an identification
and testified in court.)
36 See, e.g., Harold v. Corwin, 846 F.2d 1148, 1153 (8th Cir. 1988); Hicks v. Mickelson, 835
F.2d 721, 727 (8th Cir. 1987).
37 See GERTNER & MIZNER, supra note 19, at 106-08.
in the interest of juror privacy. Therefore, any best practices of voir dire ought to account for a potential juror’s general preference for anonymity.

III. Judge Voir Dire

Judge voir dire involves judges conducting all of the voir dire examination of prospective jurors, with attorneys playing little or no role until the preemptory challenge stage. All judges on the United States District Court for the District of Massachusetts engage in judge voir dire, however the different steps of the voir dire process vary depending on the judge. This section endeavors to explore some of the different options judges have when engaging in judge voir dire and considers whether some procedures may provide more efficiency and fairness than others. In this part we first review the three general forms of judge voir dire from the least popular to the most popular. Second we look at the version of judge voir dire that we observed the most and consider the different ways in which judges can exercise their discretion to tailor the voir dire process at each step of the process, along with the pros and cons of each choice.

A. Three Types of Judge Voir Dire – A Broad Review

Generally there are three common empanelment techniques employed during judge voir dire. Each option begins with the judge bringing in the venire and introducing the case, the parties, and providing some explanation on what the court expects of the jurors. From here the options diverge.

See U.S. v. Barnes, 604 F.2d 121, 140 (2d Cir. 1979) (holding that “reasonable limitations on the questioning” based on juror privacy “should not be disturbed on appeal”). But see GERTNER & MIZNER, supra note 19, at 108 (“Given the constitutional support for conclusory questions, it is unlikely that juror privacy would ever be regularly threatened by constitutional voir dire requirements. If there were such a collision, the constitutional right to a fair and impartial jury must trump the policy concerns of juror privacy.”).

The first option is one that is statutorily approved in Massachusetts. The judge fills the jury box and then asks the seated jurors questions they can answer affirmatively or negatively. If a juror answers in the affirmative the judge will determine if the juror should be excused for cause. When jurors are excused for cause, the judge asks a new juror to take the open seat and the judge asks that juror the same questions. The cycle continues until the jury box is filled with “indifferent” jurors. Once the judge has a full jury box the parties may make their preemptory challenges. A new juror replaces every challenged juror, and the questioning process begins again. This process is inefficient and can be redundant - none of the empanelments we observed followed this procedure.

The second option for judge voir dire is the “struck” system. The judge brings the venire into the courtroom, introduces them to the case and parties, and then asks a series of questions they can answer in the affirmative or negative. If a juror answers in the affirmative they are brought up to sidebar where the judge decides whether to excuse the juror for cause or not. Once the judge has amassed enough indifferent jurors to exceed the total number of preemptory challenges held by the parties (including alternates) the parties may exercise their challenges. We also did not observe the struck system at any of the empanelments we attended.

In the final form of judge voir dire the judge brings in the venire as a group and asks a series of general questions. If a juror has answered one of the judge’s questions affirmatively, the

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41 Id. at 81.
42 As the Massachusetts Jury Trial Benchbook notes, this option is the form of voir dire statutorily approved, however “this method is often slow and awkward for all concerned, and better approaches have been developed.” Id.
43 Class Notes for Advanced Trial Advocacy, JD945 (Oct. 26, 2011) [hereinafter Class Notes, 10/26/2011]; See MASS. BENCHBOOK, supra note 40.
44 Class Notes, 10/26/2011.
judge will call them up and examine them at sidebar. At sidebar the judge will decide if a juror should be excused for cause “or [may find] the juror indifferent and seat[] him or her in the jury box.” Once the judge has gone through all the jurors who responded to his general questions the jury box is filled and the potential jurors may be asked to provide some more information through individual questioning.

Judges will vary the amount and depth of individual questioning, often based on the importance of questions that the attorneys suggested before voir dire. Sometimes a juror who did not answer a question affirmatively will not provide any additional information and may be seated in the jury box as an indifferent juror. Whether a juror who has not answered a question will be brought up to sidebar is dependent on the judge and his or her propensity for individual voir dire. Several of the empanelments that we observed in the United States District Court for the District of Massachusetts involved no individual questioning at sidebar or privately in the jury room. Individual voir dire addresses topics such as the potential juror’s occupation, place

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45 MASS. BENCHBOOK, supra note 40, at 81 (discussing the Official, Practical Method with or without Individual Voir Dire).
47 See infra section IV at 19 (noting the benefits of individual voir dire vis-à-vis group voir dire). Not questioning jurors who respond negatively to the general questions poses its own host of problems. Studies show that misrepresentation or the withholding of relevant information often happens due to “an overestimation or underestimation of juror attitudes or biases . . . [m]ost people are unaware of how much influence certain experiences can have over the decisions they will make in the future.” Rachael A. Ream, Limited Voir Dire, Why it Fails to Detect Juror Bias, CRIMINAL JUSTICE, Winter 2009, 25.
of work and the occupation and place of work of their spouse.\textsuperscript{49} Following individual voir dire (if
the judge chooses to pursue individual questioning at all), the attorneys for the parties then
exercise preemptories and court officers replace each challenged juror until all challenges are
exhausted.\textsuperscript{50} This empanelment option was the one most used by judges in the empanelments we
observed or in the empanelments we participated in as jurors.\textsuperscript{51}

B. A Closer Look at Judicial Variations on Judge Voir Dire

In order to consider some of the different mechanisms judges may use in personalizing
judge voir dire we will consider the third, most popular empanelment procedure discussed above.
In particular we will consider judicial options and variations on (1) the judge’s introduction to
the venire, (2) the questions the judge poses to the venire, and (3) how the venire must respond to
the judge’s questions.

1. The Judge’s Introduction to the Venire

The judge’s introduction to the venire is a critical time when lay jurors learn about the
importance of jury service for perhaps the first time. When court officers bring the venire into
the courtroom, the judge addresses the jury, which provides an introduction and some
background about the case. The length of the introduction varies by judge. For example, Judge
Saris’ introduction in the \textit{United States v. Lyons} empanelment was short and to the point.\textsuperscript{52} Judge
Saris introduced herself and then described what was about to happen; she was going to
introduce the venire to the case, introduce the attorneys, and read a list of questions.\textsuperscript{53} Judge
Saris explained the process of excluding jurors and underscored the importance of an impartial

\textsuperscript{49} Transcript in Dehertogh, \textit{supra} note 48.
\textsuperscript{50} MASS. BENCHBOOK, \textit{supra} note 40, 81; Class Notes, 10/26/2011 \textit{supra} note 43 (on file with
author).
\textsuperscript{51} See Ovando Notes, \textit{supra} note 46; Lyons Notes, \textit{supra} note 48; Mehanna Notes, \textit{supra} note 48.
\textsuperscript{52} Lyons Notes, \textit{supra} note 48.
\textsuperscript{53} \textit{Id}.
jury before the court clerk swore in the venire. A short introduction has the benefit of efficiency, it is quick, on point, and demonstrates to the jurors that the court understands they do not want to be there all day and will not waste their time.

However, there are also drawbacks to the short introductions because the court makes an assumption that the jurors know and understand the role they must play. For example, Suffolk Superior Court Judge Christine M. Roach’s empanelment did not include any language about jury service, the role of jurors in the justice system, or the tasks facing jurors. This approach fails to account for the reality that many members of the venire have never before been called for jury service.

In sharp contrast to the short introduction of Judge Saris are introductions made by judges like Judge William G. Young of the United States District Court for the District of Massachusetts. Judge Young’s typical introduction is long and robust, beginning with a

54 Id.
55 See Notes from empanelment in Suffolk Superior Court Judge Christine M. Roach’s courtroom (Nov. 15, 2011) [hereinafter Judge Roach Notes] (on file with author). Judge Roach conducted voir dire in a criminal case. Id. Judge Roach first discussed the voir dire process with a venire of 45 potential jurors and read the facts of the case verbatim from a pre-approved statement. Id. Judge Roach invited counsels to introduce themselves to the venire and then distributed a jury questionnaire. Id. She made no mention of the jury’s role or the tasks facing jurors. Id. The questionnaire contained the pre-approved factual statement, the prototypical impartiality questions, and questions about involvement with sexual or violent crimes. Id. Following the venire’s completion of the questionnaire, Judge Roach conducted individual voir dire of each potential juror’s responses at counsel table. Id. Judge Roach seated the potential juror if the juror’s questionnaire provides no grounds for a cause challenge and the juror affirms his or her impartiality during individual voir dire. Id.
56 For example Suffolk Superior Court Judge Raymond J. Brassard asked the venire during voir dire whether they had ever before been called for jury duty. See Notes from empanelment in Suffolk Superior Court Judge Raymond J. Brassard’s courtroom (Nov. 15, 2011) [hereinafter Judge Brassard Notes] (on file with author). That informal poll revealed that at least four out of five jurors in the venire had never before been called for jury duty. Id.
57 See, e.g., Transcript in Dehertogh, supra note 48. Judge Brassard also engages in a lengthy introduction similar to Judge Young. See Judge Brassaerd Notes, supra note 56. Judge Brassard first discussed the difference between civil and criminal cases and the charges against the
question to the venire about their experiences with direct democracy and then expanding into a broad overview of the three branches of government, and a juror’s place in that government. The introduction builds on the symbolism and importance of the jury system in America and then Judge Young briefly explains the voir dire process. This lengthier introduction also has its own benefits, namely that it educates the jurors on their role in the court and impresses on jurors the important job they are being asked to do. However, the downside to a lengthy introduction, such as Judge Young’s, is that it is inefficient. A judge who engages in a lengthy introduction may ramble and seem to be wasting time. Even if the speech, such as Judge Young’s speech, is streamlined and appears fresh and relevant, the time spent on the introduction could still detract from time spent conducting individual voir dire and uncovering actual or implied biases.

defendant. Id. He then explained the dual obligations of jury service: (1) a willingness to judge this case based only on the evidence, and (2) a willingness to keep one’s mind open throughout the trial, deliberating only at the conclusion of the trial. Id. Judge Brassard discussed the burden of proof and the concept of beyond a reasonable doubt, before explaining the voir dire procedure. Id.

58 See, e.g., Transcript in Dehertogh, supra note 48 (“I’m going to explain exactly how we’re going to proceed here. But before I do, let me just ask you this one question informally. How many of you come from towns where they have direct town meeting, everyone can go to town meeting and vote? [sic] . . . That’s always my first question . . . [b]ecause you people have the experience of direct democracy. Direct democracy, the people themselves ruling directly.”). See also Ovando Notes, supra note 46.

59 See Transcript in Dehertogh, supra note 48, at 5-12.

60 Id. at 9 (“Only a jury of the American people can [make findings of facts in a case]. And as they do it, they are exercising a constitutional office equal to any representative or senator, Chief Justice of the United States, equal to the President of the United States, because under the constitution only a jury can do it.”).

61 The introduction which describes the jury’s place in the United States government spans seven pages, while the details of the voir dire process cover one and a half pages. See id. at 10-11.

62 In our experience with jury duty, a judge who had a long introduction but who did not seem to be alert was not viewed favorably. Instead, jurors, who were antsy after a long day of sitting in court rooms, did not fully appreciate what the judge had to say – the thoughts at the forefront of their mind were instead “when are we going to get going with the questions?” and “can we leave soon?” See supra note 11 (describing Julia’s jury duty on Sept. 12, 2011).

63 For example, in the Dehertogh transcript, Judge Young spends seven pages discussing the role of the jury, but only two sentences are spent on explaining the allegations at issue. Without a
2. The Questions a Judge Poses to the Venire

In judge voir dire, the judges are in control of asking the venire questions; it is the judge who decides how many questions to ask and at what level of specificity. All of the judges in the Massachusetts District Court allow the parties to submit proposed voir dire questions, but in the empanelments we observed, the judges rarely incorporated the parties’ questions into the voir dire.\(^{64}\) Instead, the judges tended to ask a similar set of questions to each venire, none of them particularly tailored to the current defendant.\(^{65}\)

While streamlined venire questions are efficient, when questions are too general it inhibits the fairness of the voir dire process. Research indicates that the problem with jurors misrepresenting or withholding relevant information results from “limited voir dire [that] does

deeper understanding of the case, it may be difficult for the venire to honestly answer whether they have read or seen anything about the case, or whether they have already formed an opinion of the case. See Transcript in Dehertogh, supra note 48, at 12-13, 14-15 (describing the case as “[t]he charges in this case are to try to collect a loan by extortion, shake someone down in order to collect a loan. And conspiracy to do that,” and then asking the jurors whether they had read or seen anything about the case or formed an opinion about the case). See also Ream, supra note 47, at 25 (“The primary reasons that voir dire seems ineffective is that attorneys and judges utilize voir dire mainly as a teaching exercise to educate the jury pool, or venire, about their potential role as jurors. This educational and “socialization” to the unique role of a juror is important; however, it appears to take up a large portion of voir dire when substantive questions concerning prospective jurors’ life experiences, expectations, prejudices and biases should be the greater focus.”).

\(^{64}\) Note that in the higher profile cases we observed, the judges seemed more open to tailored questions to the jury. Thus, in United States v. Mehanna, Judge O’Toole asked questions about Arabic speakers and about military service, while in United States v. Lyons, Judge Saris asked the venire about their thoughts on internet gambling and gambling addictions. Mehanna Notes, supra note 48; Lyons Notes, supra note 48.

\(^{65}\) For example questions that were often repeated were: Are you related to or do you know any of the parties?, do you or any member of your family work for the USAO in Boston?; Do you know any of these witnesses? (court reads a list of witnesses); Are you, or is any member of your immediate family, now or have they ever been, employed by a law enforcement agency, state or federal?; Do you understand that every defendant is presumed innocent until proven guilty?; Do you think that police officers are more credible than other people simply because of their line of work? See Ovando Notes, supra note 46; Judge Roach notes, supra note 55; Judge Brassard notes, supra note 56.
not facilitate the full disclosure of relevant information.”

In general, limited voir dire is composed of closed-ended rather than open-ended questions. More than race or gender, a juror’s opinions are shaped by their individual experiences. As studies have shown, “[a]ttitudes tend to be more powerful predictors of verdict choices than demographic characteristics,” however, when the questions are general, relevant information about juror’s backgrounds is not elicited. Without information on a juror’s background attorneys will instead rely on “stereotypes based on a juror’s demographic characteristics.”

3. How the Venire Must Respond to the Judge’s Questions

When the judge poses the series of questions to the venire as a group and asks for a response we witnessed three ways jurors were required to respond, each option has its own benefits and drawbacks. The first option, one observed in Judge O’Toole’s courtroom for the empanelment in United States v. Mehanna, No. 09-10017, is for potential jurors to identify themselves by name when answering a question asked by the judge. For example, in the Mehanna case, Judge O’Toole asked jurors if they had ever worked in law enforcement or had close family or friends who worked in law enforcement. Twenty-one people responded to the law enforcement question and each person was required to provide their full name for the attorneys, the courtroom clerk, and the judge.

The benefit of such a detailed process of documenting jurors’ answers is that it provides the parties with information upon which to base their preemptory challenges later on in the voir

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66 See also Ream, supra note 47, at 25.
68 Id.
69 Id. at 1190.
70 See Mehanna Notes, supra note 48.
dire process, thus advancing fairness. Second, it prevents a juror from changing his mind or his answer to avoid speaking with the judge. However, despite some benefits, the name process has quite a few negatives. First, it is inefficient because saying each name, understanding the pronunciation of each name, and finding the name on a list takes time and could significantly extend the length of the jury empanelment. Additionally, jurors with privacy concerns may be less inclined to answer questions. As Valerie P. Hans and Alayna Jehle have noted:

Prospective jurors are hesitant to share embarrassing experiences and beliefs because of the broad audience that can learn of their responses. The lawyer, the judge, and other prospective jurors would hear their responses, in addition to the rest of the public and the court reporter who records their words into official documentation that can be seen by others in the future.\(^\text{71}\)

Juror privacy concerns are significant and these fears are put to the test by a process that requires jurors to stand up in front of strangers and say their name. For example, the hesitation in the Mahenna venire was visible during Judge O’Toole’s questions. The Mahenna venire was particularly unsure of whether to stand or sit with two of Judge O’Toole’s questions: the first was whether anyone in the venire had ever been the victim of a crime, and the second was whether anyone in the venire had been accused of a crime.\(^\text{72}\) Thus, while announcing names may provide the parties with additional information, it may simultaneously discourage jurors from standing and truthfully answering the question.

The second, and most efficient way to question the venire is to ask the jurors to raise their hands in response to a question. The court does not attempt to take count of the venire’s

\(^{71}\) Hans & Jehle, supra note 67, at 1194.

\(^{72}\) See Mehanna Notes, supra note 48. When we say the jurors were hesitant we mean that a few of the jurors stood up and then sat down or searched the room to find others standing before they did the same. \(\text{Id.}\) While only two of Judge O’Toole’s questions made people uncomfortable, it is foreseeable that in a different case more personal questions could be put to the venire. For example, in the Lyons case, Judge Saris asked the venire about their internet gambling habits and gambling addictions. See Lyons Notes, supra note 48.
responses to the questions nor does it attempt to document which of the venire responded affirmatively. Instead of recording who in the venire is responding to the questions, the judge relies on a form of honor code with the potential jurors. Once the judge completes asking all of the general questions, he or she then asks anyone who raised their hand to come speak to him.

The assumption is that people are not going to be inclined to lie if they raised their hand during group questioning because they want out of jury duty for the trial. Thus, the court is relying on good faith that the jurors will get in line when asked.

The benefit of the hand-raising system is efficiency. The judge is able to ask questions of the venire and receive answers very quickly, answers which do not need to be recorded by any courtroom employee. Furthermore, the hand-raising system protects juror anonymity – jurors are not required to say their name or provide any other identification that will connect them to the questions until they speak privately to the judge at bench-side. Thus, jurors may feel more at ease raising their hands and identifying with the questions the judge is asking. The negatives of the hand-raising system is a fairness concern insofar as hand-raising makes it much more difficult for the parties to track who answers the questions and thus the parties are required to make less informed preemptory challenges.

73 We observed this practice in empanelments conducted in Judge Young and Judge Saris’s courtrooms. Ovando Notes, supra note 46; Transcript in Dehertogh, supra note 48; Lyons Notes, supra note 48.

74 Interview with United States District Court Judge Young, in Boston, Ma. (Oct. 24, 2011) (on file with author).

75 Professor Nancy Marder has argued that “a preference for limited voir dire may reflect the ‘reasonable person’ view of jurors; that is, the notion that jurors are predominantly reasonable and impartial,” and this view seems to be reflected in courts that do not record the responses of the venire. Hans & Jehle, supra note 67, at 1183 (citing Nancy S. Marder, September 11th: A Catalyst for Changing the Voir Dire Process?, Presentation at the Association of American Trial Lawyers Annual Convention (July 20, 2002)).
A final option is the use of numbered cards that are associated with jurors’ names. This option was not one we saw utilized at the district court level but was often used in state court.76 With this option the court provides each member of the venire with a numbered card that corresponds to a court list with the potential juror’s name. When the judge asks a question the venire may respond by simply raising the card.

The numbered card option provides a happy medium between the name and hand-raising options. While not as efficient as the hand-raising system, numbers are much easier to call out and record than hard to pronounce names, thus making it much more efficient than the name option. Furthermore, the numbered card system provides the same information to the parties as the name option, allowing the parties and court to track who responds to questions and promoting fairness, while providing more anonymity for the jurors to respond truthfully.

IV. Lawyer Voir Dire

Lawyer voir dire involves attorneys conducting all or part of the voir dire examination of prospective jurors. A recent survey of state and federal courts nationwide revealed that 23 states use lawyer voir dire predominantly, 18 states share voir dire questioning between the judge and

76 See Judge Roach notes, supra note 47 (describing Judge Roach’s empanelment in which jurors held-up a numbered jury card in response to general questioning). In addition, we observed Suffolk Superior Court Judge Regina J. Quinlan conduct voir dire in a criminal case. See Notes from empanelment in Suffolk Superior Court Judge Regina J. Quinlan’s courtroom (Oct. 25, 2011) [hereinafter Judge Quinlan Notes] (on file with author). To a venire of 59 potential jurors, Judge Quinlan first explained the charges against the defendant and the indictment process generally. Id. She took additional time to explain the presumption of innocence and the civic importance of jury service. Id. Judge Quinlan invited counsels to introduce themselves to the venire. Id. Judge Quinlan then asked the venire to answer generic questions by raising a numbered jury card. Id. The questions included the prototypical impartiality questions and two questions about involvement in crimes of violence and narcotics prosecutions. Id. Judge Quinlan then brought every juror in the venire to sidebar for additional individual voir dire in the order of his or her jury numbers. Id. Judge Quinlan asked each potential juror if they raised their hand and whether they could “keep an open mind and listen objectively to the evidence.” Id. Judge Quinlan seated the potential juror if he or she answered affirmatively. Id.
lawyers, and nine states use judge voir dire predominantly. Federal court practices do not reflect those of the state in which the court is located; federal district courts overwhelmingly use judge voir dire. Massachusetts state and federal courts use judge voir dire predominantly, although state law affords the judge discretion to choose the method of voir dire.

One example of judicial discretion over voir dire in Massachusetts is former United States District Court judge Nancy Gertner. Judge Gertner used both lawyer voir dire and traditional judge voir dire while on the bench. However, the breadth of voir dire procedures used by Judge Gertner illustrates that judges can make small or even large adjustments to procedures based on factors such as the nature of the case and their intuition that lawyer voir dire will or will not be beneficial.

This portion of the paper proceeds by explaining Judge Gertner’s.

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78 See Otto G. Obermaier, Judge Conducted Voir Dire, 340 PLI/LIT 151, 154 (1987) (finding federal courts use judge voir dire regardless of the practice of the state in which the federal court is located).
79 See Mass. G.L. ch. 234, § 28 (“Upon 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 . . .”).
80 In the transcripts we read, she did not explain her decision to conduct individual questioning herself, nor did the counsel request an explanation. See Transcript of Jury Impanelment [sic] at 21, Chao v. Ballista, 630 F. Supp. 2d 170 (D. Mass. 2009) (No. 07-10934) [hereinafter Transcript in Chao] (explaining briefly to the venire, “I’ll ask questions of you initially as a group, and then we’ll question people individually in my lobby, in my jury room.”); Transcript of Jury Impanelment [sic] at 3, Limos v. Electrolux, No. 03-12238 (D. Mass. September 5, 2005) [hereinafter Transcript in Limos]. A judge’s decision to not conduct individualized voir dire is within her discretion and not reversible error so long as she empanels an “impartial jury.”
81 In a product liability action, Judge Gertner employed a bare bones judge voir dire consisting of general questioning with individual voir dire that only addressed affirmative responses to the general questions. See Transcript in Limos, supra note 80, at 3 (“[W]e’ll ask questions of you as a group. Because of the nature of the case, I can ask questions of you as a group. If your answers are yes . . . we could question you individually. It should not take a very long time . . . ”) (emphasis added). Judge Gertner’s language here reflects that she is exercising her discretion under Mass. G.L. ch. 234, § 28 based on the facts of the case.
lawyer voir dire procedure as well as discussing its benefits, drawbacks, and potential lessons for judge voir dire.

A. Lawyer Voir Dire in Practice

Judge Gertner’s lawyer voir dire in Sony BMG Music Entm’t v. Tenenbaum began with the judge questioning the venire on matters of exposure to publicity and trial scheduling. She then conducted individual lawyer voir dire of the remaining jurors in her private jury room. She explained the lawyer voir dire to the venire in this way: “The reason why we question jurors individually, there may be things people are not happy to say in open court in front of other jurors but would be willing to say to the lawyers when we are next door in another courtroom. It’s an open proceeding as well, but you’re talking only to the lawyers in the case.” Judge Gertner believes that lawyer voir dire and individual questioning protect juror privacy and allow jurors to speak candidly.

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In a civil rights action against police officers brought by plaintiffs using 42 U.S.C. § 1983 (2006) as a right of action, Judge Gertner conducted a probing individual voir dire of every potential juror in the privacy of the jury room. See, e.g., Transcript in Chao, supra note 80, at 11 (explaining,

In terms of your voir dire questions, I’ll ask whether they’ve served on a jury before and what the verdict was. I’ll ask if they’ve been a plaintiff or a defendant or a witness. I’ll ask if there are too many lawsuits against police or other law enforcement officials. I won’t ask the question about lawyers making too much money.) (emphasis added).

The attorneys submitted proposed questions before trial and Judge Gertner chose which questions to ask based on her experience with the subject matter of the case. Id.


82 See Transcript in Tenenbaum, supra note 81, at 26-27.
83 Id. at 27.
84 See GERTNER & MIZNER, supra note 19, at 102 (citing Michael T. Nietzel & Ronald C. Dillehay, The Effects of Variations in Voir Dire Procedures in Capital Murder Trials, 6 LAW &
Judger Gertner’s lawyer voir dire then proceeded in a fashion similar to individual judge voir dire at bench side. Judge Gertner summarized for counsel before the venire arrived: “we’ll go into individual lawyer voir dire five minutes per side per juror, shorter if you think you know what you’re doing, then once we have cleared 16 jurors, which is the amount we would need for the final jury plus peremptory challenges for each side, we come back here, each side exercises their peremptory challenges.”

Once in the jury room awaiting potential jurors from the venire, Judge Gertner explained the “rules” of her lawyer voir dire process as follows:

[T]he rules here are that you don’t preview the legal questions with the jury. I am confident that I can instruct jurors about the law, so the issue is only a question of attitudes, factual issues and that’s it, and if there’s an inappropriate question, someone can object, and I would rule on the objection right there. I will keep the time and I think it will be more than adequate.

…

[W]e’ll understand what the challenges for cause are … If there is an issue, when the juror leaves, you’ll tell me to ask her to wait or him to wait. [The Courtroom clerk] will hold the juror outside the door, we’ll talk about it.

These rules emphasize the burden on lawyers to object and participate in a collective discussion regarding challenges for cause; lawyers are encouraged to voice the basis for their causal challenge at any time.

Additionally, Judge Gertner allowed the lawyers significant room to maneuver outside of the list of questions that they submitted before trial. During the individual voir dire, defense counsel asked Judge Gertner to allow a question about civil vis-à-vis criminal penalties for marijuana possession, a topic seemingly unrelated to copyright infringement. Judge Gertner

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HUM. BEHAV. 1, 1 (1982)) (finding a greater number of successful cause challenges under lawyer voir dire than judge voir dire because jurors were open and sharing with lawyers).

85 See Transcript in Tenenbaum, supra note 81, at 15

86 Id. at 44.

87 See id.
allowed the question, stating “it’s not an argument you’ll make to the jury … but as a general attitude, yes, I will allow that in jurisdictions that have robust voir dire, lawyers can go anywhere, so this is a version of that.”

Under this laissez-faire scheme, counsel may ask questions bearing on juror attitudes because such material allows counsel to make intelligent for cause exclusions on the basis of actual or implied bias. Questioning that seems astray from impartiality may later become relevant to causal challenges on the basis of bias. Like a deposition that covers far more material than is admissible at trial, Judge Gertner’s lawyer voir dire includes questioning not directly related to the prototypical impartiality questions such as knowledge of the parties, case, etc. This is similar to Judge Brassard’s attempt to have a colloquy with each potential juror about his or her employment and family.

B. The Benefits of Lawyer Voir Dire

Some argue that lawyer voir dire naturally pushes courts in the direction of more individual questioning and thus theoretically, more impartiality. Individual questioning is preferable for uncovering impartiality because “[g]roup questioning discourages jurors from answering questions that require them to disclose confidences or reveal their ‘private selves,’ and specifically their biases, to a room full of strangers.” Lawyer voir dire leads to more individual questioning because lawyers may be more motivated than judges to elicit specific information

88 Id.
89 See id. at 51-52.
90 See Judge Brassard notes, supra note 56.
91 See GERTNER & MIZNER, supra note 19, at 102.
about juror attitudes rather than generic information where jurors self-assess their own impartiality.\textsuperscript{92}

Furthermore, judges “know little about a case in advance”\textsuperscript{93} and therefore may have difficulty formulating questions that probe actual or implied bias.\textsuperscript{94} Lawyers, conversely, know how they plan to formulate their arguments and therefore understand which aspects of the potential juror’s experience deserve more scrutiny in the voir dire process. Attorneys also have a stronger incentive to uncover the abstract preferences of potential jurors that can advantage or disadvantage their client because they will be better able to make informed objections and preemptory challenges.\textsuperscript{95}

This line of defense for lawyer voir dire also points to an efficiency defense. If lawyers are better able to focus on important individual voir dire issues than judges, then the voir dire has the potential to include less extraneous discussion such as the potential juror’s family situation, their place of employment, their studies, etc. Judge Brassard, for example, probed general topics during individual judge voir dire,\textsuperscript{96} whereas the lawyers in \textit{Tennenbaum} probed topics such as

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\begin{itemize}
  \item \textsuperscript{92} \textit{See id.} at 96 (“Judges [ ] are not taught how to ask questions as would a neutral interviewer … What they are not taught is to ask questions to elicit answers not distorted by the questions, the setting, or the questioner.”).
  \item \textsuperscript{93} \textit{See id.} at 100.
  \item \textsuperscript{94} \textit{See} Obermaier, \textit{supra} note 78, at 152.
  \item \textsuperscript{95} \textit{See} Babcock, \textit{supra} note 35, at 548 (“[The judge] does not have the advocate's awareness that soon he will be making peremptory challenges based on inferences from what prospective jurors have said, and partly because the judge does not know the case of either party in detail, so that he cannot realize when responses have opened areas for further inquiry.”).
  \item \textsuperscript{96} Judge Brassard notes, \textit{supra} note 56. Judge Brassard first asked the prototypical impartiality questions of the whole venire and then followed-up with individual voir dire. \textit{Id.} More so than the other judges we observed, Judge Brassard engaged in a longer and more sustained colloquy with the potential juror at bench side during individual voir dire. \textit{Id.} He asked questions about work and family to get the potential juror talking. \textit{Id.} Judge Brassard seated the potential juror if, after the colloquy, he was satisfied that the juror was impartial. \textit{Id.}
\end{itemize}

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music downloading habits, artist preferences, and fluency with music technology. The case-specific questions in *Tenenbaum* may be more likely to elicit relevant information quickly because jurors cannot dodge the question.\(^97\)

Scholars also defend lawyer voir dire on the basis that it allows for more open-ended questioning. “Open ended questions permit the juror to answer in her own words in any way she pleases.”\(^99\) A potential juror makes a personal choice of which words to use without the influence of the questioner’s terminology.\(^100\) As the potential juror explains the answer to an open-ended question, the court and counsel both gather much more information than a closed-ended question.\(^101\) Also, open-ended questions allow jurors to speak about their life experiences and associates.\(^102\) Such probing questioning touches on formative topics that are more relevant to impartiality than the generic group questions.

A third argument for lawyer voir dire is that we ought to trust the adversary system to mitigate the effects of any improper lawyer questioning.\(^103\) Lawyer voir dire will not skew results because, “although each side may be manipulating the presentation, the premise of the adversary

\(^97\) Transcript in *Tenenbaum*, *supra* note 81, at 77-78.
\(^98\) We do not intend to criticize Judge Brassard’s individual voir dire in this regard. To the contrary, he took great pains to conduct a thorough and probing voir dire at side bar with each potential juror. *See* Judge Brassard notes, *supra* note 96. His tactic of asking family and work related questions seems simply to get the juror talking which is one way to learn about a juror’s potential biases. *Id.* We thus observe merely that lawyer voir dire, such as that in *Tenenbaum*, may probe a juror’s potential biases in a more efficient manner.
\(^99\) *See* GERTNER & MIZNER, *supra* note 19, at 96.
\(^100\) *See id.* (“The summary terms often used could not be more value-laden—are you biased against blacks? These are questions that foreordain the answer, that mimic a civics lesson, making clear what the ‘correct answer’ is.”).
\(^102\) *Id.* at 1185.
\(^103\) *See* GERTNER & MIZNER, *supra* note 19, at 69 (“In trials, we believe that the adversary system brings out the relevant facts. We assume that lawyers are the best questioners. We allow them to question witnesses about bias by indirection, not the dispositive question, ‘isn’t it the case that you are biased,’ but questions that bear on that conclusion . . . .”).
system is that truth will ultimately emerge when each is as effective an advocate as he or she can be.”

Balanced against the potential for skewed results during lawyer voir dire is the attorney’s ability to “fram[e] their examination of witnesses” through techniques such as “the kinds of questions asked, their order, [and] the tone of voice.”

Some scholars believe that litigants are best served when their attorneys are able to draw on these techniques. If we truly believe that adversarial cross-examination is the best way to arrive at truth, then courts should consider allowing it both during voir dire and during witness examinations because both processes are a search for truth. Adversarial procedures left unchecked would present inefficiency, but judges are not without the ability to provide structure and limits to lawyer voir dire. For example Judge Gertner capped attorney question a five minutes per side, per juror. Even stricter time limits are appropriate depending on the number of questions the judge pre-approves.

Finally, some argue that lawyer voir dire serves juror privacy concerns. Scientists believe that speaking with lawyers rather than a judge tends to make potential jurors more candid. This may occur because the “[j]udge’s approval is important to a lot of prospective jurors and

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104 See id. at 95.
105 Id.
106 Judge Gertner also argues that trends favoring judge voir dire “must be seen in contrast with the law underscoring the significance of zealous advocacy, and the adversarial process in the examination of witnesses.” See id. at 99. Judge Gertner cites fair trial and confrontation clause cases as evidence of judicial reliance on the adversarial process in other areas of law. See, e.g., Pointer v. Texas, 380 U.S. 400, 404 (1965) (“Probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehoods and bringing out the truth in the trial of a criminal case.”); U.S. v. Welliver, 602 F.2d 203, 209 (5th Cir. 1979) (holding that judge’s usurpation of defense counsel’s questioning denied the defendant the right to a fair trial). In her view, a client’s best interests are served through adversarial cross-examination of witnesses and potential jurors alike.
107 See GERTNER & MIZNER, supra note 19, at 15.
many will alter their responses or hide certain attitudes in order to be perceived favorably.”  

Some judges are aware of the distorting effect, for example during colloquy in Chao, Judge Gertner remarked that “[i]t’s not as easy to stand up and say what you feel in open court or even whispering at sidebar.” However, while potential jurors might give “distorted” answers to a judge because of “the setting,” it is unclear that speaking with attorneys during voir dire makes potential jurors comfortable. The potential jurors still know that they are being recorded and the judge remains present. Therefore any benefit to juror privacy is small. 

C. The Drawbacks of Lawyer Voir Dire

Some scholars criticize lawyer voir dire as inefficient because the attorneys will naturally conduct a more searching inquiry of each potential juror than a judge. Lawyers are not burdened with a concern for judicial administration and court efficiency in the same way as judges because their only immediate goal is advocating on their client’s behalf. As such, some scholars argue that lawyer voir dire will always involve too much unnecessary attorney

109 Hans & Jehle, supra note 67, at 1194. Hans and Jehle argue further that “The judge may [] elicit false responses that [are] more in line with the desirable answer. If a judge asks if the prospective juror could be impartial and the prospective juror replies no, the judge may continue that it is the juror’s duty to follow the law and ask the question again. Prospective jurors may give in to the pressure to comply and say they can be impartial, even though their real feelings have not changed.” Hans & Jehle, supra note 67, at 1194.

Recall that in her explanation of lawyer voir dire to the venire in Tenenbaum, Judge Gertner explicitly framed lawyer voir dire as a private conversation between the lawyer and potential jurors. See Transcript in Tenenbaum, supra note 81, at 27.

110 See Transcript in Chao, supra note 80, at 35.

111 See GERTNER & MIZNER, supra note 19, at 96.

112 See id. at 101-102 (noting “the more obvious problems” including time constraints).

113 See id. at 101 (citing National Jury Project, Jury Work: Systematic Techniques at § 2.05 at 2-17) (finding that efficiency is the most concrete concern on judges’ minds during voir dire whereas efficiency does not even cross a lawyer’s mind). Additionally, lawyer voir dire may not even be possible in state court where backlogged dockets demand quicker judicial administration.
questioning, whereas judges know how much questioning is necessary to prove impartiality based on experience.\textsuperscript{114}

In addition to being criticized as inefficient, lawyer voir dire also suffers from the characterization that it allows attorneys to charm and indoctrinate potential jurors in the venire. The Supreme Court voiced this concern in \textit{Patton v. Yount} when it stated:

\begin{quote}
It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed …. Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this.\textsuperscript{115}
\end{quote}

This sentiment rebuts the arguments justifying lawyer voir dire on the basis of the adversarial process.\textsuperscript{116} A downside of injecting the adversarial process into voir dire is that jurors are not prepared for it and may therefore be less willing to provide honest information when facing the rigors of cross-examination.\textsuperscript{117} It is therefore incumbent upon attorneys conducting voir dire to avoid antagonizing potential jurors and to have a positive conversation that improves the potential juror’s perception of the attorney.

\textsuperscript{114} See Emily F. Moloney, \textit{As Good As It Gets: Why Massachusetts Should Not Adopt an Attorney-Conducted Voir Dire Process for Civil Trials}, 39 \textit{Suffolk U. L. Rev.} 1047, 1063 (2006) (“The judge's duty of impartiality, coupled with the broad discretionary authority granted by statute, enables the judge to determine the necessity of additional voir dire on a case-by-case basis.”). \textit{But see} Babcock, \textit{supra} note 35 at 549 (“[The judge] does not have the advocate's awareness that soon he will be making peremptory challenges based on inferences from what prospective jurors have said, and partly because the judge does not know the case of either party in detail, so that he cannot realize when responses have opened areas for further inquiry.”). Attorneys are on-balance more knowledgeable about how they plan to formulate their arguments and therefore more knowledgeable about which aspects of the potential juror’s experience deserve more scrutiny in the voir dire process. \textit{Id.}

\textsuperscript{115} 467 U.S. 1025, 1039 (1984).

\textsuperscript{116} See GERTNER & MIZNER, \textit{supra} note 19, at 101 (noting the issues raised in \textit{Patton}).

\textsuperscript{117} See, \textit{e.g.}, Nietzel & Dillehay, \textit{supra} note 84, at 9-10.
Some psychology scholars argue that attorneys perform poorly in lawyer voir dire and therefore the tradeoff in efficiency is not worth any benefit in probing impartiality.\textsuperscript{118} Few lawyers are taught voir dire in law school or in practice.\textsuperscript{119} Taking this view, lawyers “are presented during voir dire with an extremely difficult judgment task and that the best current prediction methods provide only slightly more accuracy than the attorneys' judgments.”\textsuperscript{120} Even though attorneys know about their case and the attitudes best suited to the arguments they plan to make, studies have found that attorneys rarely employ their arguments effectively.\textsuperscript{121} Given the proven difficulty of attorneys garnering any benefit for the client, lawyer voir dire’s inexpediency may not be worth its incremental benefit of better questioning.\textsuperscript{122}

Former Chief Justice Rehnquist description of judge voir dire in \textit{Mu’Min} also throws cold water on the hypothesis that attorneys ask better questions:

\begin{quote}
Despite its importance, the adequacy of voir dire is not easily subject to appellate review. The trial judge’s function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions.\textsuperscript{123}
\end{quote}

A judge’s conclusions, as former Chief Justice Rehnquist describes them, are based on credibility determinations and demeanor evidence. The judge or counsel can make credibility and demeanor determinations without reference to any subjective knowledge about the case or its particular facts. While Rhenquist’s observation is correct, it overlooks the small but important benefit that attorneys derive from humanizing themselves in front the jury. In each voir dire we

\textsuperscript{118} See Hastie, \textit{supra} note 108, at 722 (“[S]tatistical models also demonstrates comparatively low levels of success in forecasting juror verdict preferences.”).
\textsuperscript{119} See \textit{GERTNER & Mizner, supra} note 19, at 100 n.7.
\textsuperscript{120} Hastie, \textit{supra} note 108, at 722.
\textsuperscript{121} \textit{Id.} at 724 (finding there is not “even one convincingly demonstrated success of this type, and these methods frequently suggest the use of completely invalid, as well as valid, predictors”).
\textsuperscript{122} \textit{Id.} at 725.
observed at Suffolk Superior Court, the judge asked the attorneys to introduce themselves to the venire in a matter of seconds. Attorneys have only this small window of time to communicate with the venire that it does not allow them to meaningfully advance their client’s interests. The attorney cannot make a substantial positive impression with the venire during this window but they can certainly make a negative one.\textsuperscript{124}

V. \textbf{Concluding Suggestions For Revision and Modification to Judge Voir Dire in Massachusetts State and Federal Courts}

Whether a judge allows lawyer to participate in individual questioning during voir dire or conducts the entire empanelment, a judge must carefully balance the litigants’ interest in impartiality, the juror’s interest in privacy, and society’s interest in efficient judicial management. It is not easy for judges to re-work and improve their voir dire processes because judges cannot easily place themselves in the perspective of a potential juror sitting in the venire. This paper has attempted to fill that gap with first-hand observations of voir dire. We do not believe that Massachusetts state and federal courts will change from judge voir dire anytime soon. However, lawyer voir dire can inform minor methodological changes to the predominant judge voir dire system that would better harmonize the three principal concerns: impartiality, efficiency, and juror privacy.

A strong case may be made for the need for increased lawyer participation in judge voir dire, which stems from the benefits of the adversarial system upon which our judiciary relies in other contexts.\textsuperscript{125} Even judges who tightly control the voir dire process can find ways to increase attorney participation without necessarily allowing lawyers to conduct individual voir dire themselves. We observed that lawyer participation in judge voir dire is very limited. Within this

\textsuperscript{124} See Judge Quinlan notes, \textit{supra} note 127 and accompanying text.

\textsuperscript{125} See \textit{supra} note 106 (describing Judge Gertner’s doctrinal discussion of the adversarial process in other constitutional contexts).
limited interaction between lawyer and potential juror, the few seconds that a lawyer has to introduce himself or herself to the venire are critically important. Simply allowing them to state their name to the venire is insufficient and creates a strong possibility that potential jurors may form biased snap-judgments. For example, we observed a defense counsel for an alleged serial rapist grin ear-to-ear when introducing herself and her client by his first name. This attorney’s smile and the tone of her introduction were incongruous with the violent crimes that her client was accused of committing and that the judge had just read aloud to the jury. Potential jurors would be less likely to make snap judgments about attorneys if they were able to have more meaningful interaction with them. We think that judges ought to look for ways to incorporate the party’s lawyers into the introductory portion of voir dire.

Judges could also channel lawyer voir dire’s adversarial model by having a more robust consideration of proposed voir dire questions before trial. By paying closer attention to attorneys’ proposed voir dire questions, judges allow attorneys to become more involved in the voir dire process by explaining why a certain question must be asked in the interest of impartiality. We observed several judges who included no questions submitted by counsel and asked only the prototypical “follow the law” questions. Judges should be more willing to accept proposed questions consistent with their preferences for efficiency.

Beyond the lessons of lawyer voir dire we also believe the variations on judge voir dire can inform best practices. Thus, the judge’s introduction to the venire may be adjusted so that it both educates potential jurors about their civic duties and also introduces the case itself without

See supra note 11. For example, Julia observed an attorney wearing cowboy boots with his suit, which led her to question his reliability, his judgment, and his fashion sense. See supra note 11 (describing Julia’s jury duty before Judge Troy in Suffolk Superior Court); see also Judge Quinlan notes, supra notes 76.

See Judge Quinlan NMotes, supra note 76.

See id.
detracting from individual questioning. While a comprehensive introduction to jury service serves both civic and practical functions, the need for a lengthy introduction must balance against the importance of individually questioning of each potential juror. Both the introductory civics lesson and individual questioning serve the same goal of impartiality and judges need apportion time to both aspects of the voir dire process.

Finally, we recommend that judges employ the number-card system that is used often in state court but rarely in federal court. The number system, as opposed to the name and hand-raising systems does two things well: it promotes fairness and efficiency. By allowing the parties to track juror responses, attorneys may more properly prepare for preemptory challenges. Meanwhile the numbered cards promote efficiency by offering a relatively speedy way to record the venire’s answers.

Creating an efficient and fair voir dire process requires judges to engage in a difficult balancing act. No perfect voir dire procedure exists, thus it is up to judges to create the best imperfect process they can manufacture. Each difference in procedure we discussed in this paper reflects a judge’s personal belief that their voir dire process provides the most justice and efficiency. Thus, convincing judges to make changes in their voir dire process is no easy task. However, we hope this paper offers considerations such as juror privacy and attorney involvement that judges may consider in future empanelments.