A HISTORY OF JURY SELECTION

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It is widely reported and readily accepted that the numbers of jury trials held in this country have been in rapid decline in the last several decades. *See e.g.*, Patricia Lee Refo, *The Vanishing Trial*, ABA Journal of the Section of Litigation, Vol 30 No. 2, Winter 2004. As such, it would come as no surprise if most current law school curricula does not include extensive instruction in the area of *voir dire*. Even those who regularly engage in trial work probably do not give much thought to the process beyond the rules as they exist today. For those who have given the process more thought, the modern trends towards using social media, professional jury consultants and other social science to influence the jury selection process are common focuses of attention. However, as President Harry Truman well recognized during the often forgotten period of great political and social upheaval under which he served, “the only new thing in the world is the history we do not know.” To fully understand and appreciate the role of the modern jury in American jurisprudence, it is both important and fascinating to review the changing role of juries, and how jurors are selected, from their earliest use through the founding of our country during the American Revolution.

The term, *Voir Dire,* comes from the French and is literally interpreted as “to speak the truth.” Black’s Law Dictionary, 3rd Ed. (1933). Other translations interpret the term to mean, “to see to speak.” In modern practical parlance, the term simply means to question prospective witnesses or jurors to determine whether their biases or other disqualifications preclude them from service. Surprisingly, however, the search for an impartial jury is a comparatively recent trend in the context of world history.

There has been much debate during the last several centuries as to the origin of the concept of impaneling a jury to bring about justice by determining the innocence, guilt or liability of another. *See* William Forsyth, *History of Trial by Jury* (1875). There are many historical accounts of law courts in ancient Athens in which “Jury Courts” were employed. The smallest of such Juries contained 201 members and sometimes had as many as 1501 members. Terry Buckley, *Aspects of Greek History 750-323BC: A Source-Based Approach*, 2nd Ed., Routledge (2010). Similarly, the ancient Romans employed a number of *judices* which were chosen according to class to perform similar functions to those of modern-day juries. *Forsyth*, supra. One important difference between the two however, is that judices were permitted, without any legal breach of duty, to acquit in spite of the most conclusive of evidence of guilt. *Id.* Under Roman law, the judices expressly exercised the prerogative of mercy since they were seen as representatives of the sovereign people. *Id.* In such cases, their verdict was a pardon. *Id.* Interestingly, using the modern day view of exercising mercy in this way would surely be labeled as jury nullification. *Gregg v. Georgia*, 428 U.S. 153, fn 50 (1976).

In fact, when we review the complete history of the jury, we find that selecting jury members as a means to decide disputes is as old as civilization itself. Michael L. Neff, *Voir Dire: Ancient Foundations and Early Developments*, Georgia Bar Journal, August 2011. Juries in some form were utilized in ancient Egypt, Mycenae, Druid England, Viking Scandinavia and Jerusalem before the crusades. *Id.*

Although the concept of jury selection as a means to adjudicate disputes is not new, the methods of selecting juries, the composition of the jury and the particular functions served by jury members has been extremely dynamic throughout history. To fully appreciate the advances that have led to our modern systems of dispute resolution and the establishment of a system of jury trials, it is important to understand from where we have come. Prior to the creation of the English jury system, after which our American system is patterned, there were three primary forms of dispute resolution in England. James J. Gobert, §1:2 *Jury Selection: The Law, Art and Science of Selecting a Jury*, 3rd Ed. West (1990). They were trial by battle, trial by ordeal, and trial by Compurgation. Id. All of these early dispute resolution processes were based on the expectation of divine intervention to protect the righteous. *Id.*

Trial by battle pitted the disputants against each other in combat to determine the merits of their controversy. Again the theory was that God would enable the right party to prevail. *Id.* While it is easy to see that non-believers may have had a hard time swallowing this form of resolution, apparently believers also required some equalization since this form of trial was later changed to allow for recruitment of "champions" to fight in the place of a party to the dispute. *Id.*

Trial by ordeal took numerous forms, but examples include carrying a hot iron for a set distance and then wrapping the hands in a bandage for three days. If the wounds healed in that time, the person was exonerated, and if not, then they were deemed guilty. In other forms of trial by ordeal, the accused was immersed in water and if they floated (the water rejected the body) then they were guilty. If the water consumed them, and they drowned, the accused was conclusively presumed innocent. A pyrrhic victory to be sure. A third form of ordeal available primarily to clergy was the ordeal of the accursed morsel. The defendant was required to swallow a piece of bread while praying that he might choke on the morsel if guilty. If the defendant did not choke and was able to swallow the bread, the fact that hid did not choke was taken as divine declaration of guilt since the prayer was not granted. *Id.*

The foundations of trial by ordeal were eroded by declaration of Pope Innocent III in 1215 whereby he forbade clergy from further involvement in trial by ordeal. With the loss of its religious underpinnings, trial by ordeal fell into disfavor. *Id.* As a result, the third pre-jury dispute resolution process emerged in the form of compurgation. In the same year, 1215, a group of barons exacted from King John, in the Magna Carta, the promise that no free man could be taken, imprisoned, or dispossessed, outlawed or exiled except by lawful judgment of his peers and the law of the land. Walter E. Jordan, *Jury Selection*, Shepards (1980). This was the precursor to the modern held belief that the right to a trial by jury of one's peers is a most important right of self-governance which is necessary to prevent tyranny and abuse of power by governments.

Compurgation was a strange precursor to modern day jury trials. In this form, Compurgators were citizens who swore not to the facts of a dispute, but to credibility. *Id*. If enough compurgators, usually twelve, vouched for a party's truthfulness, the party prevailed, unless more compurgators vouched for the other party. *Id*. Despite the fact that the compurgators took an oath to tell the truth, perjury was rampant under this system. *Id*.

From compurgation, and these other primitive forms of decision making the modern jury system evolved. Originally, jurors were selected because of their knowledge of the facts of a controversy. Like compurgators, these next set of jurors gave testimony under oath based on personal knowledge. However, the prospective juror's personal knowledge related to the facts of the case and not truthfulness of the parties. Over time, the procedure changed significantly from forming a jury of members with knowledge of the facts, to selecting members that were purposefully ignorant of the facts. *Id*. The principal recurring problem which facilitated this change the roll of the jury was simply that it was often difficult to find twelve people to serve who had adequate knowledge of the facts of a particular dispute. *Id*; see also Gober, *supra* at 275.

It is also interesting to note that while English jurors were independent in theory, the Crown held great influence over them in practice. In early jury selection the jurors were selected by the Crown and it was relatively easy to select persons who could be expected to render a verdict favorable to the Crown. Additionally, in those days, if the King was dissatisfied with a verdict, a second jury could be empaneled for second bite at the apple. This was known as a jury of attaint. Id.

The landmark decision establishing jury independence and outlawing attaint in England was handed down in *Bushell's Case* in 1670. *Bushell's Case*., 124 Eng. Rep. 1006 (CP 1670). One of the defendant's in that case was a Quaker activist who later founded Pennsylvania in the new world. His name was, of course, William Penn. *Id*. In that case, Penn and his associate were charged with unlawful assembly. The jury, led by Bushell, refused to convict. Depite the return of a not guilty verdict, the judge ordered the jury to reconvene their deliberations without food, drink or heat. When the jurors still refused to return a guilty verdict, they were fined and sentence to prison until their fines were paid. After the judge's ruling was overturned on appeal, it was established that a jury verdict must be accepted even if contrary to the views of the trial judge and that jurors could not be punished for rendering a verdict.

Although our modern system of selecting jurors is patterned after those practices founded by our English ancestors, the importance of the sanctity and independence of the jury and the desire to form a body free from bias and preformed notions seems distinctly an American idea. That may be because today, 90 percent of all jury trials in the world occur in the united states. Fred Graham, *American Juries*, eJournal USA Vol. 14/No. 7, July 2009. So although the prevalence of jury trials is on the decline in our country today, it is still seen as an important tool for preventing abuse and providing for fair process. It is no accident that the citizens of our country feel strongly about the impartiality of jurors. The right to empanel an impartial jury of one's peers was a catalyst for the founding of our republic.

As America began carving out its independence, England enacted the Massachusetts Jury Selection Law of 1760. Under this law, the Crown prohibited the questioning of jurors once the sheriff had chosen them for duty. Neff, *supra*. This inability to verify juror impartiality outraged colonists and served as a strong justification for independence. *Id*. Thomas Jefferson further opined on the subject in writing to his friend Colonel William Stephen Smith. In his letters, Jefferson described his view that he considered the right to a fair trial and impartial jury was "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." *Id*. It should then come as no surprise that the Declaration of Independence was expressly justified on its own terms by King George III depriving the colonists of the right to an impartial jury. *Id.*

The Sixth and Seventh Amendments to the U.S. Constitution were introduced by James Madison as part of the original bill of rights which were ratified by the states in 1791. Library of Congress Web Guide, *Primary Documents in American History; The Bill of Rights, available at* www.loc.gov/rr/program/bib/ourdocs/billofrights.html. The Sixth amendment provides the right to a speedy and public trial heard by impartial jurors in all criminal cases. The Seventh Amendment also preserves the right to jury trial in civil suits and further instructs that no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. This rule of law was purposefully designed as a balance of power meant to avoid the tyrannous actions the colonists received at the hands of the English Court system, where judges were seen as predatory creatures that only served the King without regard to individual liberties and fairness.

Legal historians now credit our first Supreme Court Chief Justice, John Marshall as cementing the modern right of parties to question individual jurors about their preconceptions of a case. Neff *supra*, citing *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807). In Burr, Justice Marshall sat as the trial judge for Aaron Burr's trial for treason. During a persuasive ruling in the case, Marshall first recognized that an impartial jury was required by the common law and the U.S. Constitution. *Id*. "Jefferson's and Justice Marshall's vision on *voire dire* are bedrocks of our judicial system." Neff, *supra*.

Since the Founding, the U.S. Supreme Court has regularly recognized the importance of questioning jurors during *voir dire*. Id. Every party is entitled to bring his case with the assurance that the fact finder is not predisposed to find against him. *Marshall v. Jerrico*, Inc., 446 U.S. 238, 242 (1980). By preserving both the appearance and reality of fairness, this requirement of neutrality by judges and juries fosters ***the feeling*** that justice has been done. Id. Assurance of this feeling of justice is critical to the survival of a popular government. *See id*.

Our nation's highest Court has also recognized that fundamental fairness in jury selection requires not just "an absence of actual bias", but also endeavors to "prevent even the probability of unfairness." *In re Murchison,* 349 U.S. 133, 136 (1955). One of the most important mechanisms for ensuring impartiality is voir dire, which enables the parties to probe potential jurors for prejudice. *Dyer v. Calderon*, 151 F3d 970, 973 (9th Cir. 1998). Modern day *voir dire* is the quintessential tool for protecting an individual's right to an impartial jury. Neff, supra, citing McDonough Power Equip., Inc., v. Greenwood, 464 U.S. 548, 554 (1984).

Although the distinctly American view that the right of the parties to question potential jurors as a means to ensure impartiality was borne in Massachusetts during the American revolution, lawyers in the State of Massachusetts only recently gained that right. Mark D. Smith, *The Introduction of Attorney-Conducted Voire Dire in Massachusetts*, Boston Bar Journal, April 2015. Ironically, the Massachusetts Legislature did not allow lawyers or self-represented parties to question individual jurors or even a panel of jurors until 2014. From the founding of our country through 2014, only Judges were allowed to question jurors with respect to their qualifications or biases. Even now, the right to question individual jurors in Massachusetts is still left to the discretion of trial judges who may or may not decide to extend that right to the parties. Under the Massachusetts system, a lawyer must file a motion and seek leave to conduct *voir dire*. The motion must identify general topics for questioning and then reasonable follow up questions on that subject will be permitted, if *voir dire* is granted. The guidelines for the new rules suggest that Courts should approve questions that seek factual information about a perspective Juror's background and pertinent experience and those that may elicit pertinent preconceptions or biases. Those Court's should generally disapprove questions that seek information about a juror's political views. Massachusetts Courts should also disapprove those questions that ask the juror to speculate about facts or law. General Laws of Massachusetts chapter 254, §2 *et seq*.

The role of the Jury and the methods for selecting its members have evolved greatly over time and continues to evolve. Although the present system we use for selecting jurors is not fool proof, humankind has not devised another method of dispute resolution that equally safeguards individual liberty and prevents against tyranny and abuse. The role of *voir dire* is fundamentally important to democracy as our founding fathers recognized when establishing the Bill of Rights. Although it is fundamentally important, there are competing interests which must be considered. *Voir dire* can be time consuming, and parties' methods of questioning jurors can at times be puzzling and inept. However, Winston Churchill summed it up best when he mused that Democracy was the worst form of government, except for all the rest. In that vein, we should all remember that *voir dire* is more than the thing we accomplish prior to opening statements. *Voir dire* is also an opportunity for each of us to play an important part in our tradition of preserving power in the People.