VOIR DIRE IN NEW HAMPSHIRE: A FLAWED PROCESS

INTRODUCTION

The 1999 trial of Kenneth Munson on charges of first degree murder in the death of Brian McManis revealed a major inconsistency in the criminal justice system in New Hampshire. In the Munson trial, the attorneys questioned jurors individually, outside the presence of other potential jurors.[1] This procedure is the exception, rather than the rule, in New Hampshire. In all civil and criminal cases, except those involving first degree murder, the trial court has the exclusive responsibility for conducting the examination, or voir dire, of potential jurors.[2] Counsel has no right to directly participate in the examination. The exclusion of counsel from the voir dire process is inconsistent with the purpose of voir dire and creates serious constitutional concerns, including the use of peremptory challenges.

The literal translation of the term voir dire is "to speak the truth."[3] In the legal process, voir dire refers to the process of questioning potential jurors to determine if they are qualified to serve on a jury. It is the means by which counsel exposes potential biases on the part of jurors to ensure that biased jurors do not serve on the jury.[4] Although the United States Constitution does not expressly create the right to voir dire, the United States Supreme Court has long recognized that voir dire is an essential part of the jury selection process.[5] Today, the Supreme Court continues to recognize that "[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."[6] Although few members of the

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1. *See* Alec MacGillis, *Jurors Get Taste of Being on Stand*, CONCORD MONITOR (New Hampshire), Aug. 3, 1999, at A1.

2. *See* RICHARD B. MCNAMARA, 2 NEW HAMPSHIRE PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 914, 383 (1997).

3. BLACK'S LAW DICTIONARY 1569 (7th ed. 1999). For a discussion of the historical developments of voir dire in the American judicial system, see S. Mac Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 291-303 (1972). *See also* Jon Van Dyke, *Voir Dire: How Should It Be Conducted To Ensure That Our Juries Are Representative and Impartial?*, 3 HASTINGS CONST. L.Q. 65 (1976).

4. *See* McDonough Power Equip. v. Greenwood, 464 U.S. 548, 554 (1984).

5. *See* Pointer v. United States, 151 U.S. 396, 408 (1894). The *Pointer* Court held that:

> [The defendant] cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.

Id. at 408-09.

6. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). The Court when on to state that:

> 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. Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges . . . .

Id. (citation omitted).

legal profession question the need for voir dire, many question the appropriate method for conducting voir dire. A major concern in the American judicial system today is whether counsel should have the right to directly participate in the voir dire examination of potential jurors. Many judges argue that permitting counsel to conduct voir dire results in unnecessary trial delays, increased costs, and abuse on the part of counsel as they attempt to select a jury that is biased in their favor.[7] On the other hand, many attorneys argue that voir dire conducted by the court is inadequate because it often does not uncover information necessary for counsel to make intelligent use of challenges.[8] The goal in most jurisdictions is to find a balance between judicial economy and fair litigation.

In New Hampshire, the voir dire process balances in favor of judicial economy. The trial court has the exclusive right to conduct voir dire and neither party has the right to directly examine the potential jurors.[9] This Note argues that New Hampshire should change its voir dire system to allow counsel to directly participate in the voir dire examination of potential jurors. The Note further argues that such a change would be consistent with recent decisions by the New Hampshire Supreme Court.

Part I provides an overview of voir dire as practiced in New Hampshire. Part II analyzes why New Hampshire should change its jury selection process to give each party the right to directly participate in the examination of potential jurors. This Note considers the issue from three perspectives. First, it discusses the advantages and disadvantages associated with attorney participation in voir dire. Second, it considers voir dire in light of the United States Supreme Court's decisions in *Batson v. Kentucky* and its progeny.[10] Finally, this Note considers attorney participation in light of recent New Hampshire Supreme Court decisions concerning the use of supplemental questions in voir dire.

An analysis of the issue from these three perspectives reveals that New Hampshire should change its jury selection process and give each party the right to directly participate in the examination of prospective jurors. This right should not be unconditional, however. Part III addresses the appropriate method for facilitating attorney participation in voir dire in New Hampshire.

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7. *See* Stephan Landsman, *The Civil Jury in America*, LAW & CONTEMP. PROBS. 285, 292 (1999).

8. *See* Russel H. McGuirk & Stephen L. Tober, *Attorney-Conducted Voir Dire: Securing an Impartial Jury*, 15 N.H.B.J. 1, 6 (1973).

9. *See* State v. Colby, 116 N.H. 790, 793 (1976). *See also* State v. Goding, 124 N.H. 781, 783 (1984); State v. VandeBogart, 136 N.H. 107, 110 (1992).

10. Batson v. Kentucky, 476 U.S. 79 (1986).

I. VOIR DIRE IN NEW HAMPSHIRE

In New Hampshire voir dire is, and always has been, conducted by the trial court rather than counsel.[11] The jury selection process begins by assembling a group of prospective jurors at the county courthouse.[12] The trial judge then examines each member of the venire in an effort to uncover incompetency or bias. The judge begins the examination by asking the assembled jurors a series of questions mandated by statute. Before asking these questions, the judge informs the jurors that if they answer any of the questions in the affirmative then they should approach the bench when their name is called. The trial court then asks the following questions to the venire as a whole:

> 1. Do you expect to gain or lose upon the disposition of this case?
> 2. Are you related to either party?
> 3. Have you advised or assisted either party?
> 4. Have you directly or indirectly given your opinion or formed an opinion?
> 5. Are you employed by or do you employ any party involved in this case?
> 6. Are you prejudiced to any degree regarding this case?
> 7. Are the counsel appearing in this case employed by you in an action currently pending in the court?[13]

In criminal cases the court must also ask the following two questions to insure that the jurors understand that the defendant is presumed to be innocent and that the prosecution bears the burden of proof:

> 1. Do you believe that, because the defendant has been charged with a crime, he is probably guilty and must present evidence to prove that he is innocent?
> 2. If you have such a belief, would that belief prevent you from accepting from this court and applying to this case the correct formulation of law; that is, that a defendant is presumed innocent until proven guilty, that the state has the burden of proving guilt

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11. *See Colby*, 116 N.H. at 793. *See also* Patterson v. Corliss, 112 N.H. 480, 486 (1972). Although New Hampshire court rules do not specifically ban counsel participation in the examination of potential jurors, traditionally the courts have only allowed counsel to directly examine jurors in first degree murder cases. *See* MCNAMARA, *supra* note 2, § 916, at 390.

12. Jurors in New Hampshire are selected from a master jury list made up of licensed drivers and registered voters. *See* N.H. REV. STAT. ANN. § 500-A:1 (Supp. 1999).

13. *See* N.H. REV. STAT. ANN. § 500-A:12 (1997).

> beyond a reasonable doubt, and that the defendant need present no evidence whatsoever on his own behalf?[14]

In addition, the court may, at its discretion, include supplemental questions proposed by counsel.[15]

After the trial judge asks all questions, the clerk of the court randomly draws the name of one of the assembled jurors. If the juror states that he has answered all the questions in the negative and has no further questions, the court instructs the juror to take a seat in the jury box. If the juror has a problem or a question, he approaches the bench. At the bench, the juror explains his problem or asks the judge his question. The judge has the discretion to allow counsel to listen to the court's conversation with the juror.[16] During the conversation, the judge may ask additional questions. At this point either counsel may make a challenge for cause.[17] The judge then determines whether the juror is qualified to serve. If the judge grants the challenge for cause or concludes on his own that the juror is not qualified to serve on the current case, the court excuses the juror and asks the juror to return to the jury pool. If the judge concludes that the juror is qualified, the judge instructs the juror to take a seat in the jury box. This process continues until the court and counsel select twelve jurors plus a designated number of alternates.[18]

After the court seats the appropriate number of jurors in the jury box, counsel for both parties approach the clerk to make peremptory challenges.[19] In most cases, New Hampshire statutes permit each party to make three peremptory challenges.[20] After each peremptory challenge the clerk draws an additional juror. This continues until each party has exhausted or waived its peremptory challenges. The clerk removes the challenged jurors from the jury

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14. *See* State v. Cere, 125 N.H. 421, 425 (1984).

15. *See Colby*, 116 N.H. at 793.

16. *See* MCNAMARA, *supra* note 2, § 914, at 384. Regardless of whether counsel is permitted to be present during the conversation, the New Hampshire Constitution requires that the meeting be recorded. *See* State v. Bailey, 127 N.H. 416, 421 (1985).

17. A challenge for cause is "[a] party's challenge [to a specific juror] supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror." BLACK'S LAW DICTIONARY 223 (7th ed. 1999).

18. *See* MCNAMARA, *supra* note 2, § 918, at 392.

19. A peremptory challenge is "[o]ne of a party's limited number of challenges that need not be supported by any reason, although a party may not use such a challenge in a way that discriminates against a protected minority." BLACK'S LAW DICTIONARY 223 (7th ed. 1999).

20. The defendant may peremptorily challenge twenty jurors in a capital murder case, fifteen jurors in first degree murder cases, and three jurors in any other cases. *See* N.H. REV. STAT. ANN. § 606:3 (Supp. 1999). The state may peremptorily challenge ten jurors in a capital murder case, fifteen jurors in first degree murder cases, and three jurors in any other cases. *See* N.H. REV. STAT. ANN. § 606:4 (Supp. 1999).

box and replaces them with newly-called jurors. The judge then declares the jury to be qualified.

II. WHY NEW HAMPSHIRE SHOULD CHANGE ITS VOIR DIRE PROCESS

This Note argues that the New Hampshire judicial system would be better served by a voir dire rule that gives counsel the right to participate directly in the voir dire examination of potential jurors. New Hampshire should make this change for three reasons. First, counsel participation in voir dire is a superior method for selecting a fair and impartial jury. Second, counsel participation is an effective means to ensure that juror challenges are not used in a discriminatory manner. Finally, direct attorney participation in voir dire is consistent with the holdings in several recent decisions by the New Hampshire Supreme Court.

A. The Case for Attorney Participation in the Voir Dire Process

Several commentators have suggested that attorney participation in the voir dire examination is a superior method to uncover information necessary to select a fair and impartial jury and, therefore, to protect the constitutional rights of all parties involved in the litigation.[21] These commentators argue that attorney participation is superior for four reasons. First, counsel is in a better position than the trial judge to conduct a thorough voir dire examination.[22] Second, active questioning is an essential element of an effective voir dire examination, and attorney participation permits counsel to engage in active questioning.[23] Third, attorney participation permits counsel to establish a rapport with the jury, eliminating potential problems as the trial progresses.[24] Finally, studies indicate that jurors are more candid when questioned by counsel rather than by the trial judge.[25] Open communication leads to a more fair and impartial jury.

Counsel is in a better position than the trial judge to conduct a thorough voir dire examination. The trial judge, as a neutral participant, may be

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21. *See generally* Barbra Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545 (1975); McGuirk & Tober, *supra* note 8; Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 2 LAW & HUM. BEHAV. 131 (1987) (arguing that limiting counsel participation in voir dire inhibits counsel's capacity to select a fair and impartial jury).

22. *See* Babcock, *supra* note 21, at 549. *See also* McGuirk & Tober, *supra* note 8, at 6.

23. Active questioning refers to the process in which the examiner's next question is dependent on the response given to the previous question. *See* Babcock, *supra* note 21, at 549. *See also* McGuirk & Tober, *supra* note 8, at 6.

24. *See* McGuirk & Tober, *supra* note 8, at 6.

25. *See* Jones, *supra* note 21, at 143.

unaware of certain facts, issues, or evidence that are crucial to the jury's determination of the case.[26] The trial judge may ask questions that are too general because of his lack of knowledge about the case.[27] The result is that counsel has insufficient knowledge on which to base a challenge for cause or a peremptory challenge.[28] In these situations only counsel can fully probe prospective jurors for prejudices and biases pertaining to those facts, issues, and evidence.[29] Supplemental questions are an inadequate means to overcome this problem because counsel cannot possibly submit all questions necessary to uncover biases. Furthermore, requiring counsel to submit and then justify these supplemental questions creates unnecessary time delays that defeat the goal of judicial economy upon which court-conducted voir dire is based. Because counsel has the most knowledge about the facts, issues, and evidence pertaining to the case, counsel should conduct the voir dire examination.

Additionally, counsel-conducted voir dire permits counsel to engage in active questioning. Active questioning is a keystone in the adversarial system of justice as evidenced by cross-examination rules.[30] Courts do not ask attorneys to script an entire cross-examination that the judge then submits to the witness. In essence, this is what occurs during court-conducted voir dire. The court requires counsel to submit a script to the court which the judge, at his discretion, reads to the jury. If the juror gives an unexpected answer, counsel cannot conduct a further inquiry. Instead, the court must pursue the answer and because the court may not be aware of all of the facts, issues, and evidence involved in the case, the court may be in a poor position to inquire. Voir dire is best conducted in an adversarial atmosphere. Active questioning is a key component of the adversarial process and is essential to an effective voir dire examination.[31]

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26. *See* McGuirk & Tober, *supra* note 8, at 6.
27. *See* JON VAN DYKE, JURY SELECTION PROCEDURES 164 (1977).
28. *See* Van Dyke, *supra* note 3, at 75.
29. *See* McGuirk & Tober, *supra* note 8, at 6.
30. *See* Gutman, *supra* note 3, at 304. Gutman states that:

> The attorney conducted examination of juror bias thus serves the same critical function as counsel's examination into any fact upon which a verdict may turn. Juror prejudice and preconception must be equally subject to the rigors of cross-examination set, of course, within the bounds of reason and propriety. . . . [D]efendant's right to have counsel examine jurors can be no less constitutionally imperative than his right to have examination at other stages of the trial conducted by counsel.

Id.

31. *See* Van Dyke, *supra* note 3, at 79.

Counsel-conducted voir dire also creates an opportunity for counsel to establish a rapport with the jury before presenting evidence.[32] Supporters of court-conducted voir dire argue that establishing rapport is inappropriate at this stage of the trial because the jury may be unduly influenced before counsel presents any evidence.[33] Actually, establishing a relationship between counsel and the jury prior to the introduction of evidence has two benefits. First, a good rapport increases counsel's ability to communicate effectively with the jury, thus ensuring that the jury decides the case on the merits rather than miscommunication.[34] Second, it gives counsel an opportunity to detect any personality conflicts between himself and a prospective juror and allows him to use a peremptory challenge to eliminate that juror.[35] The result is that the case is decided on the merits rather than a conflict between counsel and the jury. The establishment of a good rapport between counsel and the jury during voir dire is a benefit to the trial.

Finally, studies indicate that jurors tend to be less candid when the judge asks questions than when counsel asks the questions.[36] This is true for several reasons. First, the amount of information a potential juror is willing to disclose is closely related to the self-disclosure the juror receives from the questioner.[37] Counsel often discloses background information about himself at the beginning of the voir dire process.[38] Judges, on the other hand, often maintain a formal demeanor and generally do not offer personal information to the jury.[39] The result is that jurors tend to give more candid answers to questions posed directly by counsel. Second, jurors tend to disclose more information when the questioner appears to be "warm and friendly."[40] Counsel's role permits him "the flexibility to interact with the jurors in a more

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32. *See* McGuirk & Tober, *supra* note 8, at 6.

33. *See* Arthur J. Stanley & Robert G. Begam, *Who Should Conduct Voir Dire?*, 61 JUDICATURE 70, 72 (1977).

34. *See* Van Dyke, *supra* note 3, at 74.

35. *See id.* at 74-75. *See also* VAN DYKE, *supra* note 27, at 164.

36. *See* Jones, *supra* note 21, at 131. This study involved 116 randomly selected jurors who participated in eight voir dires. *See id.* at 135, 137. The study concluded that:

> Subjects changed their answers almost twice as much when questioned by judges as they did when interviewed by an attorney. Essentially subjects were considerably more candid in disclosing their attitudes and beliefs about a large number of potentially important topics during attorney-conducted voir dire. Importantly, in none of the cases were judges more effective than attorneys, a finding that contradicts previous assertions that a judge-conducted voir dire will elicit greater juror candor than an attorney conducted voir dire.

Id. at 143.

37. *See id.* at 133.

38. *See id.*

39. *See id.*

40. *Id.*

open and personal manner, thereby influencing perceived familiarity, liking and warmth."[41] Conversely, communication with judges is inherently formal.[42] Again, the result is less disclosure. Third, jurors are more candid with those they consider to be of a similar social status.[43] "Although attorneys' social status may be higher than that of most jurors, there is less discrepancy between jurors and attorneys than between jurors and judges."[44] For these three reasons, jurors respond with more candor to questions by counsel than to questions by the court during the voir dire examination. More candid answers lead to greater information upon which to base a challenge for cause or a peremptory challenge. This, in turn, creates a more effective voir dire process.

Proponents of exclusive court control over the voir dire examination make two major arguments concerning attorney participation in the process. First, they argue that counsel participation inherently increases the time and cost of conducting a trial.[45] The result is more court congestion, lengthier trials, and greater time commitments for the members of the venire panel. Loss of time also translates into increased costs for the court and the litigants. Court personnel are no longer free to work on other projects and the courts must compensate jurors for the increased time they spend at court. The cost to litigants is even greater as they must pay counsel for work during a protracted voir dire examination. The second criticism is that counsel may abuse his right to participate by using the voir dire examination as a means to try the case before a jury has been selected.[46] The fear is that counsel will attempt to indoctrinate the jury by explaining the elements of the crime to the jury in a sympathetic manner during the examination. This, proponents of court conducted voir dire argue, creates an unfair advantage. For these reasons, proponents of court-conducted voir dire believe that attorney participation in the voir dire process is unnecessary and even detrimental to the judicial process.

Attorney participation in the voir dire process undoubtedly affects the efficiency of the judicial process. The Supreme Court has recognized, however, that judicial economy alone cannot justify a practice that affects the exercise of constitutional rights.[47] Instead, the court must balance the need for

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41. *Id.* at 133-34.

42. *See id.* at 134 ("The judge, cloaked in a long black robe, sits elevated and apart from the rest of the courtroom, looking down upon the jurors. He or she is addressed as 'Your Honor' rather than with a more personal address.").

43. *See id.*

44. *Id.*

45. *See* Van Dyke, *supra* note 3, at 83. *See also* Jones, *supra* note 21, at 132.

46. *See* Van Dyke, *supra* note 3, at 78.

47. *See* Baldwin v. New York, 399 U.S. 66, 73-74 (1970).

judicial economy against the infringed right. The question then becomes whether the time increase is too great when weighed against the infringed right to a fair trial. Opponents of attorney participation leave the impression that allowing counsel to participate dramatically increases the time necessary to complete a trial. The increase may not be as dramatic as critics have alleged.[48] Jon Van Dyke analyzed several studies comparing the amount of time spent on voir dire when attorneys conducted the voir dire to the amount of time spent when the court conducts voir dire.[49] The result was that attorney-conducted voir dire, on average, takes forty-eight minutes longer than court-conducted voir dire.[50] In California, judge-conducted voir dire actually took two minutes longer.[51] While forty-eight minutes certainly has an impact on the efficiency of the judicial system, the impact is insufficient to justify an infringement of each party's right to a fair trial by an impartial jury.

Furthermore, the courts can address the time concern through means less drastic than prohibiting counsel from participating in the voir dire examination. Courts can adopt rules that limit the time available to question potential jurors. The court may also use its authority at the voir dire examination to discourage or prevent counsel from asking non-germane questions that extend the length of voir dire.[52]

It must be conceded that attorney participation in voir dire creates an opportunity for counsel abuse. Undoubtedly counsel will be tempted to circumvent the intended purposes of voir dire and instead use the process as a means to argue his case to the jury before the jury is selected. Such abuse is intolerable but does not automatically create the need to eliminate attorney participation in voir dire. Attorney participation creates the potential for abuse but at the same time creates a valuable opportunity to build a rapport with the jury. As mentioned previously, establishing rapport is an important element of the voir dire process because it facilitates effective communication and reveals personality conflicts that may affect the juror's ability to remain impartial. Abandoning attorney participation means abandoning an important opportunity to eliminate potential problems during the trial. Thus the need for rapport outweighs the potential for abuse. Additionally, the concern for counsel abuse is easily addressed via an active court. Again, an active court

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48. Van Dyke, *supra* note 3, at 88-89 (arguing that the difference in time between attorney-conducted voir dire and court-conducted voir dire is minimal).

49. *See* Van Dyke, *supra* note 3, at 84-88.

50. *See id.* The author calculated these averages based on the times in the charts included on pages 84-88.

51. *Id.* at 88.

52. *See* discussion of possible court rules *infra* Part III.

can discourage or prevent counsel from asking non-germane questions and misusing his right to participate in voir dire.[53]

The foregoing analysis reveals that attorney participation is a better method for conducting an effective voir dire examination. Attorney participation is better because it results in a more thorough examination, involves active questioning, builds a rapport between the jurors and counsel, and leads to more candid answers by potential jurors. Additionally, the courts can overcome concerns about increases in time and abuse on the part of counsel through new and innovative court rules. The benefits associated with attorney participation in voir dire lead to the conclusion that New Hampshire should change its voir dire system and grant counsel the right to directly participate in the voir dire examination.

B. Batson *and Its Progeny: The Discriminatory Use of Peremptory Challenges*

The United States Supreme Court has considered the issue of racial discrimination in jury selection on several occasions. Soon after the ratification of the Fourteenth Amendment, the Court held that counsel may not use race as a means to deprive citizens of their right to serve on a jury.[54] The Court was careful to point out, however, that this did not give a defendant the right to a "petit jury composed in whole or in part of persons of his own race."[55] Counsel could still use challenges for cause and peremptory challenges to remove black citizens from the jury.[56] Because peremptory challenges could be used with no explanation, they became a tool for excluding black citizens from serving on juries.

The Supreme Court first addressed the issue of the discriminatory use of peremptory challenges in *Swain v. Alabama*.[57] In *Swain*, the plaintiff, a black man, alleged that he was denied equal protection because the state used its peremptory challenges to exclude members of his race from the jury.[58] The Court recognized that a "[s]tate's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause," but found that the prosecutor's use of peremptory challenges did not violate the Equal Protection Clause in this

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53. *See* discussion of the benefits of an active court *infra* Part III.

54. *See* Strauder v. West Virginia, 100 U.S. 303, 312 (1879).

55. *Id.* at 305.

56. In 1935, the Court held that black jurors could not be removed for cause based on the false assumption that members of his race as a group are not qualified to serve as jurors. *See* Norris v. Alabama, 294 U.S. 587, 599 (1935).

57. Swain v. Alabama, 380 U.S. 202 (1965).

58. *See id.* at 209.

case.[59] The defendant failed to demonstrate that the peremptory challenges were purposeful or deliberate discrimination on the part of the state.[60] In making its decision, the Court also recognized the crucial role that peremptory challenges play in the selection of a qualified and unbiased jury, concluding that "peremptory challenge[s] [are] a necessary part of trial by jury."[61] Proof of purposeful discrimination continued to be the standard for judging whether peremptory challenges violated the Equal Protection Clause until the Court decided *Batson v. Kentucky* twenty-one years later.

1. The *Batson* Analysis

In *Batson* the court tried a black defendant in Kentucky on charges of second-degree burglary and receipt of stolen goods.[62] The judge conducted voir dire and removed several jurors for cause.[63] Both the prosecution and the defense then exercised their peremptory challenges.[64] The prosecution removed all four black persons on the venire with its challenges.[65] An all-white jury tried and convicted the defendant on both counts.[66] The defense appealed the conviction and the Supreme Court granted certiorari to consider whether the discriminatory use of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court remanded the case to the trial court, holding that the prosecutor's use of peremptory challenges to exclude all four black members of the venire may have violated the defendant's rights under the Equal Protection Clause.[67] In doing so, the Court changed the standard for determining whether counsel has used peremptory challenges in a discriminatory manner. The Court instituted a three-step process to determine if counsel has used his peremptory challenges in a discriminatory manner. First, the defendant must establish a prima facie case of purposeful

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59. *Id.* at 203-04, 221.

60. *See id.* at 221. The Court held that a defendant must offer proof beyond the facts of his own case to demonstrate purposeful discrimination. *See id.* at 223-28. For example, the defendant can make a prima facie case by showing that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.* at 223.

61. *Id.* at 219.

62. *See* Batson v. Kentucky, 476 U.S. 79, 82 (1986).

63. *See id.* at 83.

64. *See id.* The defendant was charged with a felony so the defense was entitled to nine peremptory challenges and the prosecution was entitled to six. *See id.*

65. *See id.*

66. *See id.*

67. *See id.* at 100.

discrimination.[68] Unlike *Swain*, however, a defendant may base his prima facie case "solely on evidence concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial.*"[69] Once the defendant makes a prima facie case, the state must come forward with a neutral explanation for challenging the black jurors.[70] Finally, the court must determine whether the defendant has proven purposeful racial discrimination.[71] In *Batson*, the State failed to produce a neutral explanation, so the Court remanded the case to the trial court.

The Supreme Court has extended the *Batson* analysis in four significant ways over the last decade. First, the defendant and the challenged jurors no longer have to be of the same race.[72] Second, *Batson* challenges may now be made in civil litigation.[73] Third, the prosecution (or plaintiff in a civil action) may now challenge a defendant's use of peremptory challenges.[74] Finally, *Batson* now applies to cases involving gender discrimination as well as racial discrimination.[75] The expansion of the *Batson* standard beyond the racial context has led many commentators to conclude that other groups, such as organized religions, may legitimately challenge the use peremptory challenges as being discriminatory.[76]

a. Establishing a Prima Facie Case Under *Batson*

Under *Batson*, the objecting party must first establish a prima facie case that opposing counsel has used peremptory challenges in a discriminatory manner. This initial step is not very difficult. Originally, the defendant needed only to show that he was a member of a "cognizable racial group" and

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68. The Court stated that, "[t]o establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised to remove from the venire members of the defendant's race." *Id.* at 96 (citation omitted).

69. *Id.* (emphasis added).

70. *See id.* at 97.

71. *See id.*

72. *See* Powers v. Ohio, 499 U.S. 400, 402 (1991). In *Powers*, a white defendant successfully challenged the State's use of peremptory challenges to remove six black venire persons from the jury under the *Batson* analysis. *See id.* at 403.

73. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991).

74. *See* Georgia v. McCollum, 505 U.S. 42, 59 (1992).

75. *See* J.E.B. v. Alabama, 511 U.S. 127, 146 (1994).

76. *See generally* Benjamin Hoorn Barton, Note, *Religion Based Peremptory Challenges After* Batson v. Kentucky *and* J.E.B. v. Alabama*: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191 (1995) (arguing that because the United States Supreme Court has recognized religion as a suspect classification it is probably entitled to *Batson* protection.). *But see* A.C. Johnstone, *Peremptory Pragmatism: Religion and the Administration of the* Batson *Rule*, U. CHI. LEGAL F. 441 (1998). The United States Supreme Court has thus far refused to address the question of whether religion may form the basis for a *Batson* challenge. *See* Davis v. Minnesota, 511 U.S. 1115 (1994) (Thomas, J., dissenting) (denying writ of certiorari).

"that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[77] The defendant may rely on the assumption "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" [78] In other words, peremptory challenges are presumed to be discriminatory if it appears counsel has used them in a discriminatory manner. Under *Batson*, the defendant could make a prima facie case for discrimination simply by showing a pattern of strikes against members of the defendant's race or by finding racial overtones in the prosecutor's questions and statements during voir dire.[79]

The extension of *Batson* has made it even easier for an objecting party to establish a prima facie case of the discriminatory use of peremptory challenges. Today, either party in a criminal or civil trial may make a *Batson* challenge.[80] Since the Supreme Court has extended the protection to gender discrimination as well, the objecting party need no longer be a part of a cognizable racial group.[81] Furthermore, the removed jurors no longer have to be of the same race or gender as the objecting party.[82] As it stands today, an African-American, male plaintiff could conceivably establish a prima facie case of discrimination if the defense counsel removes two white females from the jury. The burden for establishing a prima facie case of discrimination is minimal. Once the objecting party establishes a prima facie case of discrimination, the burden shifts to the challenged party to provide a neutral explanation for the use of the peremptory challenges.

b. A Neutral Explanation Under the *Batson* Analysis

The most controversial aspect of the *Batson* decision is the requirement that the prosecution articulate a neutral explanation once the objecting party establishes a prima facie case of discrimination. Exactly what constitutes a neutral explanation is the subject of much debate, however.[83] Courts can draw a working definition of a neutral explanation from an analysis of three

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77. *Batson*, 476 U.S. at 96.
78. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
79. *See id.* at 97.
80. *See Edmonson*, 500 U.S. at 619; *McCollum*, 505 U.S. at 59.
81. *See J.E.B.*, 511 U.S. at 146.
82. *See* Powers v. Ohio, 499 U.S. 400, 402 (1991).
83. *See generally* Kirk Pittard, Comment, *Withstanding* Batson *Muster: What Constitutes a Neutral Explanation*, 50 BAYLOR L. REV. 985 (1998) (describing treatment of the neutral explanation in Texas).

Supreme Court cases that have considered the neutral explanation issue: *Batson v. Kentucky*,[84] *Hernandez v. New York*,[85] and *Purkett v. Elem*.[86]

An explanation must satisfy three requirements for the court to classify it as neutral. First, the explanation must be "related to the particular case to be tried."[87] Second, "[t]he prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenge."[88] Finally, the explanation must be "based on something other than the race of the juror."[89] In addition, the court has expressly stated that a neutral explanation need not be "persuasive, or even plausible," so long as it satisfies the previous requirements.[90]

Counsel cannot satisfy these requirements by merely denying that he had a discriminatory motive or claims that his challenges were in good faith.[91] Such statements lack clarity and reasonable specificity. Furthermore, an explanation is not neutral if it is based on the assumption—or intuitive judgment—that a jury will be impartial because of the juror's race or gender.[92]

Simply because an explanation is related to the case, clear and reasonably specific, and based on something other than race does not mean that the challenges are valid under the *Batson* analysis, however. In the final step the court must determine whether the challenges are the result of discrimination despite the presence of a neutral explanation.

c. The Court's Determination of Purposeful Discrimination

The final step of the *Batson* analysis requires the court to determine whether discriminatory intent motivated counsel to exercise his peremptory challenges. At this step, the court must consider the challenge in the context of the proceedings and determine whether counsel's neutral explanation is merely a pretext for a discriminatory purpose.[93] One factor the court may look

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84. For an explanation of the facts involved in *Batson*, see *supra* Part II.B.1.

85. Hernandez v. New York, 500 U.S. 352 (1991). In *Hernandez*, a prosecutor used four of his peremptory challenges to remove Latino jurors. *Id.* at 356. After a *Batson* challenge was made, the prosecutor claimed that he removed the jurors because they were bilingual and he was "uncertain that they would be able to listen and follow the interpreter." *Id.* The Court found the prosecutor's explanation to be neutral even though it had a disproportionate effect on Latino jurors. *See id.* at 375.

86. Purkett v. Elem, 514 U.S. 765 (1995). For an explanation of the facts involved in *Purkett*, see *supra* Part II.A.2.

87. Batson v. Kentucky, 476 U.S. 79, 98 (1986).

88. *Id.*

89. *Hernandez*, 500 U.S. at 360.

90. *Purkett*, 514 U.S. at 767.

91. *See Batson*, 476 U.S. at 98.

92. *See id.* at 97.

93. *See Hernandez*, 500 U.S. at 363.

at is whether the explanation has a disproportionate effect on a particular group.[94] Disproportionate effect alone is not sufficient to prove discriminatory intent, but it may lead the court to consider the legitimacy of the offered explanation in greater detail.[95] A second factor is the plausibility or persuasiveness of the explanation. While an explanation need not be plausible or persuasive to be neutral, the judge is not under an obligation to accept all neutral explanations as true.[96] Another factor that the court may consider is whether counsel based his challenge on an assumption or intuition about the juror because of the juror's race or gender.[97] Although counsel may have produced a neutral explanation, the court may still reach the conclusion that the actual basis for the challenge was discriminatory. The second and third factors are of particular concern to individuals practicing law in New Hampshire.

2. The Problem *Batson* Poses in New Hampshire

The *Batson* analysis causes particular problems in a jurisdiction such as New Hampshire where the court has the exclusive responsibility for conducting voir dire. It is fairly easy for the objecting party to establish a prima facie case of discrimination.[98] Due to New Hampshire's low percentage of minorities, it is conceivable that striking a single minority from the jury could constitute a "pattern" if the struck juror was the only minority empaneled. Once a prima facie case is established, the burden shifts to the opposing counsel to produce a neutral explanation.

The burden on counsel to produce a neutral explanation is very heavy in New Hampshire. Attorneys in New Hampshire have very little information available on which to base a peremptory challenge. The limited information comes from three sources: jury questionnaires, the mandatory court questions, and supplemental questions submitted by counsel and propounded to the venire by the court.[99] The purpose of both the jury questionnaires and the mandatory court questions is to elicit information relevant to making challenges for cause and are of little value in producing a neutral explanation for a peremptory challenge. The primary purpose of the supplemental questions is also to elicit information to make challenges for cause. A well written supplemental question may provide some information useful in

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94. *See id.* at 375.

95. *See id.*

96. *See Purkett*, U.S. 765 at 768.

97. *See* J.E.B. v, Alabama, 511 U.S. 127, 130-31 (1994).

98. *See supra* Part II.B.1.a.

99. *See generally* RICHARD B. MCNAMARA, 2 NEW HAMPSHIRE PRACTICE, CRIMINAL PRACTICE AND PROCEDURE (1997).

justifying the use of a peremptory challenge, but the mechanism in which it is delivered makes this doubtful. The judge asks the questions, and does not permit counsel to ask follow up questions. Furthermore, the court generally requires that the question be in the form of an affirmative or negative response. It is difficult for counsel to uncover potential biases through a simple yes or no.[100] With limited information available, court-conducted voir dire forces counsel to make peremptory challenges based on assumption and intuition,[101] a practice which the Supreme Court found to be an inadequate foundation for a neutral explanation in *Batson*.[102]

Allowing counsel to participate directly in voir dire would increase the amount of information available for counsel to make intelligent and nondiscriminatory use of peremptory challenges. Direct participation allows counsel to ask penetrating questions aimed at uncovering biases, both known and unknown, on the part of the potential jurors.[103] Counsel can follow up on unclear answers and make ambiguous questions more clear to uncertain jurors. Counsel can also observe the demeanor and mannerisms of the prospective jurors for signs of hidden biases. By utilizing these mechanisms for uncovering potential biases, counsel can better articulate a neutral explanation for a peremptory strike if challenged under *Batson*. More importantly, counsel is no longer forced to rely on his assumptions and intuition to make a peremptory challenge. Instead, he has a valid basis for making a strike resulting in a jury selection process that is less subject to prejudice and stereotyping.

Furthermore, the court has a better context in which to evaluate counsel's neutral explanation. Lack of counsel participation makes it difficult for the court to determine if an explanation is truly neutral. The court cannot use such factors as counsel's line of questioning, demeanor, or tone of voice when evaluating whether the offered explanation is merely a pretext for purposeful discrimination if counsel does not directly participate in the examination. The end result is a subjective judgment by the court based on the persuasiveness and plausibility of the explanation. The judge may have to guess whether the real reason for the strike was an assumption about the juror based on race or gender. In making the decision that an explanation is a pretext for purposeful

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100. *See* Stanley & Begam, *supra* note 33, at 77 ("[W]hen prospective jurors collectively shake their heads in answer to a judge's questions, it doesn't really give a clue about their biases.").

101. *See* Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the "Batson Function" to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147, 151 (1989-90). "A conflict arises, however, because attorneys often have insufficient information to make individual judgments about the unconscious and hidden prejudices of prospective jurors. Consequently, attorneys tend to act on the basis of stereotypes and presumptions." *Id.*

102. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986).

103. *See* Van Dyke, *supra* note 3, at 75.

discrimination the court may be forced to rely excessively on the discriminatory effect of the offered explanation. The United States Supreme Court has held, however, that discriminatory effect alone cannot serve as a basis for the conclusion that the state has acted with purposeful discrimination.[104]

The facts in *Purkett v. Elem* provide a good example for the dangers of a *Batson* challenge in New Hampshire. In *Purkett*, the defendant established a prima facie case that the prosecution had used its peremptory challenges to strike two black men from the jury panel in a discriminatory manner.[105] The prosecution then offered the following as a neutral explanation:

> I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me not to be a good juror for that fact, the fact that he had long curly hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury . . . with facial hair . . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.[106]

The Supreme Court held that the prosecutor's reasons constituted a neutral explanation because they were not based on race or gender; however, this did not mean that the strikes were not a *Batson* violation.[107] The Court remanded the case with instructions that the trial court determine whether the offered explanation was merely a pretext for purposeful discrimination.[108]

In a jurisdiction that allows counsel to participate in voir dire, the court has several factors to consider in determining whether the prosecutor's explanation is merely a pretext. The court might consider the type of questions asked by counsel, counsel's demeanor when dealing with jurors of different races and gender, and counsel's tone of voice and body language throughout the examination. The court might also consider the demeanor and mannerisms of the jurors and conclude that the actions of the jurors constitute a neutral basis for the use of a peremptory challenge that does not rise to the

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104. *See* Washington v. Davis, 426 U.S. 229, 248 (1976).

105. *See* Purkett v. Elem, 514 U.S. 765, 766 (1995).

106. *Id.*

107. *See id.* at 769.

108. *See id.* at 770. On remand, the Eighth Circuit Court of Appeals held that the "trial court's finding of no racial motive [was] fully supported by the record, and the petitioner is not entitled to habeas relief on his *Batson* claim." Elem v. Purkett, 64 F.3d 1195, 1201 (8th Cir. 1995).

level of a challenge for cause. The court may also consider the persuasiveness and plausibility of the offered explanation. Finally, the court may consider the discriminatory effect of the explanation. All of these factors may lead the court to conclude that the long, unkempt hair and a mustache and goatee are merely a pretext for purposeful racial discrimination.

In New Hampshire, lack of attorney participation in the examination limits the number of factors the court may consider. The court can only consider the persuasiveness and plausibility of the explanation and the potential discriminatory effect. Persuasiveness and plausibility are very subjective considerations, and, again, discriminatory effect alone is not sufficient to prove purposeful discrimination. Therefore, the judge may not be confident that counsel has used the peremptory challenge in a discriminatory manner and may reject the *Batson* challenge. In *Purkett*, the trial judge may have felt that the lack of plausibility and the potential for a discriminatory effect were an insufficient basis for concluding that the prosecutor had engaged in purposeful discrimination against the black jurors. The result is that the court may accept an explanation that is pretextual and that discrimination is unnecessarily injected into the jury selection process.

The lack of attorney participation in voir dire creates major problems in the jury selection process in New Hampshire. First, it reduces the effectiveness of peremptory challenges by forcing counsel to articulate a neutral explanation for a challenge when the information necessary to make a neutral explanation is inherently difficult to obtain in this system. Thus, the rule severely undercuts an important tool for protecting each party's right to a fair trial. Second, it makes it more difficult for the court to determine whether counsel has used a peremptory challenge for purposeful discrimination. The court often lacks adequate information to evaluate whether an explanation is merely a pretext for purposeful discrimination. These two problems suggest that the courts would better serve the citizens of New Hampshire if counsel had the right to directly participate in the voir dire of potential jurors.

C. An Analysis of New Hampshire Supreme Court Cases Involving Counsel Requests for Supplemental Questions

1. An Historical View of Supplemental Question Requests in New Hampshire

The New Hampshire Legislature established the court's dominant role in the examination of jurors by statute in 1830.[109] The Jury Selection Statute of 1830 provided that "the justices of the respective courts . . . [are] to put a juror to answer upon oath" questions relating to the juror's qualifications to serve as a competent and unbiased juror.[110] The statute included certain mandatory questions.[111] The statute did not address counsel participation in the examination, however. Thus New Hampshire's trial courts have had exclusive control over the voir dire examination since 1830.

Thirteen years later, the New Hampshire Supreme Court expanded the court's role in voir dire in *Pierce v. State*.[112] In *Pierce*, the trial court asked a series of questions outside the scope of the mandatory questions listed in the 1830 statute.[113] The issue before the court was whether a trial court had the authority to expand the scope of voir dire. The court held that a trial court may ask additional questions at its discretion.[114] The court's conclusion was based on three principles. First, the plain language of the statute does not indicate that the legislature intended to confine the trial court's power to inquire into each juror's qualifications.[115] Second, courts commonly asked additional questions in several counties throughout the state.[116] Finally, the legislature unquestionably designed the statute to secure competent and unbiased jurors and the courts often need to ask additional questions to achieve this goal.[117] After the court's decision in *Pierce*, trial courts had the discretion to expand the scope of voir dire.

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109. *See* 1830 N.H. LAWS TIT. C, § 9.

110. *Id.*

111. *See id.* The court is required to make inquiries into the following subjects: Whether he [the juror] expects to gain or lose by the issue of the cause then pending? Whether he is in any way related to either party? and whether he has been of counsel to either party, or directly or indirectly given his opinion, or is sensible of any prejudice in the cause?

Id.

112. Pierce v. State, 13 N.H. 536 (1843).

113. *See id.* at 537.

114. *See id.* at 556.

115. *See id.* at 554-55.

116. *See id.* at 555.

117. *See id.* at 556.

Trial attorneys were quick to take advantage of the new discretion in the voir dire process. Counsel routinely submitted questions to the court that they believed to be necessary to supplement the examination and uncover incompetent or biased jurors. The language of the 1830 statute did not forbid the court from considering counsel's request for supplemental questions; however, the statute implicitly required the judge, not counsel, to deliver the questions to the jury.[118] Trial courts now faced the difficult task of deciding when counsel's requests for supplemental questions should be granted. In this context, the New Hampshire Supreme Court articulated the rule that would govern the issue of supplemental requests for the next 130 years: the decision as to whether to grant or deny counsel's request for supplemental questions lies "wholly within the discretion of the trial courts."[119] This language dominated the court's opinions concerning supplemental question requests until 1980.

The status of voir dire in New Hampshire remained consistent from 1830 until 1980. The court bore the sole responsibility for examining potential jurors. State law required the judge to ask the questions proscribed by statute, but permitted him to expand the scope of the examination when necessary.[120] Counsel could submit supplemental questions for the court to ask to the jury panel. The decision as to whether to actually ask those questions, however, lay solely within the court's discretion. Under this system, counsel had no right to participate in the examination of the jurors.

2. Attempts to Alter the Voir Dire Process Fail

On two occasions, the people of New Hampshire have attempted to alter the voir dire process and grant counsel the right to participate in the examination. First, the New Hampshire General Assembly introduced legislation designed to change the voir dire process in 1953.[121] House Bill 275 was titled an Act Providing for a Voir Dire Examination of Jurors by Attorneys in Criminal and Civil Cases.[122] The legislature submitted the bill

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118. The statute declared that the "justices of the respective courts" are required to put questions before the jury. 1830 N.H. LAWS TIT. C § 9.

119. *See* State v. Colby, 116 N.H. 790, 793 (1976).

120. *See* N.H. REV. STAT. ANN. § 500-A:12 (1997).

121. *See* THE FIFTH REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW HAMPSHIRE 9, 12 (1954).

122. *See id.* This bill provided that:

> Attorneys for the plaintiff and defendant in both criminal and civil cases, trial by jury, shall have the right to conduct a voir dire supplemental examination of each juror presented within the discretionary limits prescribed by the Court for the purpose of obtaining competent and impartial jurors.

Id.

to the Judicial Council which responded that court examination of the jurors "has been generally satisfactory to the bar of this state."[123] The Council seemed particularly concerned that counsel participation would greatly increase the time necessary to conduct a trial.[124] The Council concluded that the current practice is "believed to be both flexible and fair and to permit necessary examination by attorneys . . . ."[125] The Council released the bill with a negative recommendation and the bill never passed the full house.

The second attempt to change the voir dire procedure in New Hampshire was at the 1984 New Hampshire Constitutional Convention. Proponents of counsel participation in voir dire introduced Resolution 115, "[p]roviding that any party to a civil or criminal trial shall have the right individually or through an attorney to conduct a voir dire examination."[126] After limited debate a majority of the delegates rejected the resolution and the state missed another opportunity to include counsel in the voir dire process.

3. Recent New Hampshire Supreme Court Decisions: Less Trial Court Discretion

The language of several New Hampshire Supreme Court decisions after 1980 indicates a willingness on the part of the court to increase counsel participation in voir dire despite the failure of legislative action and constitutional amendment. Through a series of cases, the court has greatly reduced the trial court's discretion in deciding whether to accept supplemental requests by counsel. In *State v. Gullick*, a jury convicted the defendant of felonious sexual assault.[127] During voir dire, his attorney requested the court's permission to ask the jurors five questions on the subject of racial discrimination.[128] The trial court denied counsel's request for the

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123. *Id.*

124. *See id.* "The proposed bill would conceivably result in a situation involving up to a week or more of judicial time in the selection of a particular jury panel in civil or criminal cases. Such time-consuming procedure is believed to be inconsistent with the practice in this state." *Id.*

125. *Id.* at 13.

126. JOURNAL OF CONSTITUTIONAL CONVENTION, Res. 115, 214 (Wed., June 20, 1984).

127. *See* State v. Gullick, 120 N.H. 99, 100 (1980).

128. *See id.* at 102. The five questions were:

1. Have you ever gotten black people mixed up?
2. Do you think you would have an easier time differentiating from among white people than among black people?
3. Have you ever heard the phrase 'all black people look alike'?
4. Are you willing to view with particular care, even with caution, eyewitness testimony when it stands alone; in other words there will be nothing else, no proceeds, no fingerprints, nothing else to tie the defendant down to the case except the word of some witnesses?
5. Are you open to the possibility that a person will say they're 'positive that's the

supplemental questions.[129] On appeal, the New Hampshire Supreme Court upheld the trial court's decision not to submit the requested questions to the jury panel, again stating that the decision to accept supplemental questions lies completely within the discretion of the trial court.[130] The court then added a subtle hint to the trial court for future cases when it stated, "[n]othing in this opinion should be construed to limit the trial court, in the exercise of its sound discretion, from broadening the scope of its voir dire beyond the minimum suggested by statute."[131] Later that same year, the court more boldly announced its new emphasis on acceptance of requests for supplemental questions when it stated, "[i]n the future, however, the granting of similar requests [for supplemental questions] might reduce the potential for mistrials or appeals."[132] A new theme for the court had emerged: trial courts should be more open to counsel requests for supplemental questions.

Over the next several years, this theme grew stronger as the court began to enunciate rules for the proper exercise of discretion by the trial courts. In 1984, the court found a trial judge had abused his discretion in applying a "blanket prohibition" to all supplemental questions submitted by defense counsel.[133] The implicit rule that emerged is that the trial court must now consider the necessity of each proposed question individually rather than refuse to ask any supplemental questions requested by counsel. The court further stated that the jury examination statute "is skeletal and *must* be supplemented, because our courts do not generally permit counsel to conduct voir dire directly, by questions targeted to the particular bias that might be involved in a given case."[134] Later in 1984, the court announced that the trial court has a "special duty to act on its own when counsel has alerted the court to special problems."[135] This language suggests that the trial court must ask counsel's supplemental questions if counsel submits a supplemental question and establishes sufficient reasons for why the court should ask the question.

Finally, in 1985, the court removed the trial court's discretion altogether in certain situations. In *State v. Wright*, the supreme court found that counsel has "an entitlement to supplemental questions when there is an articulable factual basis, specific to a venire panelist or to the circumstances of the case, for concluding that one or more members of the venire panel may be

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man' when in fact they are honestly mistaken?

Id.

129. *See id.*
130. *See id.*
131. *Id.* at 103.
132. Soucy v. Koustas, 120 N.H. 381, 383 (1980).
133. State v. Goding, 124 N.H. 781, 784 (1984).
134. *Id.* at 783 (emphasis added).
135. State v. Cere, 125 N.H. 421, 423 (1984).

prejudiced or otherwise incompetent."[136] The court again reminded the trial courts to be receptive to requests for supplemental questions in future cases stating that even if "the need for extra inquiry may not seem insistent, in a close call a few extra questions are better than the risk of appellate litigation."[137] After *Wright*, the decision to submit supplemental questions to the jury no longer lies "wholly" within the discretion of the trial court. The theme of greater counsel participation in voir dire is now closer to reaching its fruition. One further step is necessary, however: direct attorney participation in the voir dire process.

4. The Next Step: Direct Participation by Counsel

The court's stated purpose for the expansion of voir dire is to "reveal the surface information necessary to furnish an intelligent basis for counsel's exercise of challenges."[138] Increasing counsel participation through supplemental questions is the first step in meeting that purpose. Direct counsel participation in voir dire is a better method for uncovering information necessary to make intelligent and constitutional use of challenges.[139] Additionally, direct participation effectively addresses many of the problems associated with the discriminatory use of peremptory challenges under the *Batson* analysis. Finally, New Hampshire courts currently permit counsel to directly participate in the examination of jurors in first degree and capital murder cases.[140] By doing so, the judicial system implicitly recognizes that attorney participation in voir dire protects each party's right to a fair trial by an impartial jury. Litigants in all civil and criminal procedures in New Hampshire deserve that same protection. The next logical step in New Hampshire jurisprudence is to grant counsel the right to directly participate in the voir dire examination in all civil and criminal trials.

III. A PROPOSAL FOR A NEW VOIR DIRE SYSTEM IN NEW HAMPSHIRE

New Hampshire should change its voir dire system to give counsel the right to directly participate in the voir dire examination. This section presents three alternatives for accomplishing this goal. An evaluation of the

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136. State v. Wright, 126 N.H. 643, 648 (1985).

137. *Id.*

138. *Goding*, 124 N.H. at 783. This statement also implicitly recognizes that court-conducted voir dire is often incapable of producing information necessary for the valid exercise of a peremptory challenge, and thus lends itself to a *Batson* challenge.

139. *See supra* Part II.A.

140. *See* MCNAMARA, *supra* note 2, § 916, at 390.

alternatives leads to the conclusion that New Hampshire should implement a modified form of court-conducted voir dire. The section concludes by describing modified court-conducted voir dire and the way it should be implemented in New Hampshire.

A. Alternatives

Three major alternatives exist for changing the voir dire system in New Hampshire to permit counsel to participate directly in the voir dire examination. The first alternative is to transfer the responsibility for conducting voir dire from the court to the attorneys. At first glance, attorney-conducted voir dire appears to be an ideal solution. Counsel is able to use its superior knowledge of the facts, evidence, and issues to ask active questions and create a rapport with the jury. Pure attorney-conducted voir dire is the least effective option, however. This system places too much power in the hands of counsel. Without proper court supervision, counsel will be tempted to use voir dire not to select an impartial jury, but instead as a means to select a jury biased in favor of his client. This is an improper and impermissible use of the voir dire process. The lack of court supervision makes pure attorney-conducted voir dire a dangerous alternative to replace the current system in New Hampshire.

The second alternative is to adopt the rules established in the federal court system. Under the federal rules, the court has the option of either conducting the voir dire itself or permitting counsel to conduct the voir dire.[141] If the court decides to conduct the examination itself, it may permit counsel to directly examine the jurors at its discretion. This alternative is inadequate to solve New Hampshire's problems because counsel still has no right to participate. If the court chooses to conduct the voir dire itself and also exercises its discretion to deny counsel's request for direct participation, then the situation is identical to what New Hampshire has now, and the examination is likely to reveal insufficient information. Alternatively, if the court instead chooses to permit counsel to conduct the voir dire, the potential for abuse discussed in the previous paragraph becomes problematic. The

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141. Voir dire in federal courts is governed by Rule 47 of the Federal Rules of Civil Procedure and Rule 24(a) of the Federal Rules of Criminal Procedure. These rules are essentially the same and state:

> The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

FED. R. CIV. P. 47.

federal system only works if the court chooses to conduct the examination itself and permits counsel to directly participate. The federal voir dire system is inadequate because it does not give counsel an absolute right to participate in the voir dire examination.

The third option is a modified form of court-conducted voir dire endorsed by the American Bar Association (ABA).[142] Under this system, the court conducts the initial examination and then permits counsel to question the panel for a reasonable period of time. This is the best option for creating a fair voir dire process in New Hampshire. It gives counsel the right to participate in the examination, while still allowing the court to maintain control by conducting the initial examination, limiting counsel's questions to relevant matters, and placing time restrictions on counsel's examination.

B. The Implementation of Modified Court-Conducted Voir Dire in New Hampshire

New Hampshire's best option is to adopt a voir dire process similar to the one endorsed by the ABA. Under this modified court-conducted system, the first stage of the voir dire system remains the same as it is now. The court conducts an initial examination of the assembled jurors. The examination would consist of the same questions as are currently required by statute as well as any additional questions that the court considers relevant.[143] The court would inform the jurors that if they answer any of the questions in the affirmative, they must approach the bench when the clerk calls their name. After the juror has disclosed his concerns, counsel may make a challenge for

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142. *See* ABA COMM. ON JURY STANDARDS, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 73 (Oct. 1992) [hereinafter ABA Standards]. Standard 7 states:

> VOIR DIRE EXAMINATIONS SHOULD BE LIMITED TO MATTERS RELEVANT TO DETERMINING WHETHER TO REMOVE A JUROR FOR CAUSE AND TO EXERCISING PEREMPTORY CHALLENGES.
> (a) TO REDUCE THE TIME REQUIRED FOR VOIR DIRE, BASIC BACKGROUND INFORMATION REGARDING PANEL MEMBERS SHOULD BE MADE AVAILABLE IN WRITING TO COUNSEL FOR EACH PARTY ON THE DAY ON WHICH JURY SELECTION IS SCHEDULED TO BEGIN.
> (b) THE TRIAL JUDGE SHOULD CONDUCT A PRELIMINARY VOIR DIRE EXAMINATION. COUNSEL SHOULD THEN BE PERMITTED TO QUESTION PANEL MEMBERS FOR A REASONABLE PERIOD OF TIME.
> (c) THE JUDGE SHOULD ENSURE THAT THE PRIVACY OF PROSPECTIVE JURORS IS REASONABLY PROTECTED, AND THAT QUESTIONING IS CONSISTENT WITH THE PURPOSE OF THE VOIR DIRE PROCESS.
> (d) IN CRIMINAL CASES, THE VOIR DIRE PROCESS SHOULD ALWAYS BE HELD ON THE RECORD. IN CIVIL CASES, THE VOIR DIRE PROCESS SHOULD BE HELD ON THE RECORD UNLESS WAIVED BY THE PARTIES.

Id.

143. *See* N.H. REV. STAT. ANN. § 500-A:12 (1997).

cause and the court must make a determination of whether that juror is qualified. If the judge concludes that the juror is qualified, the court should instruct the juror to take a seat in the jury box. After the court has seated twelve jurors and the required number of alternates, the second stage of the voir dire begins.

During the second stage of the voir dire, counsel conducts the questioning under the close supervision of the court. Counsel may question each juror individually, outside the presence of all other jurors.[144] Each counsel has a maximum of ten minutes to question each juror, which reasonably limits the time necessary to conduct the voir dire. Ten minutes is a reasonable amount of time to question a single juror and forces counsel to ask only the most relevant questions in the most organized manner possible. Additionally, the court should actively monitor the content of counsel's questions carefully. The court "should prevent improper, argumentative, repetitive, or irrelevant questioning" to insure that counsel does not use this stage to improperly influence jurors.[145]

Immediately following the examination of each juror by both attorneys, counsel may exercise its discretion and use one of its peremptory challenges. Peremptory challenges should be made on a rotating basis.[146] If either or both counsel choose not to exercise a peremptory challenge, the court should seat the juror and prohibit that juror from a future peremptory challenge. After each side has exhausted its peremptory challenges, counsel may continue to question the remaining jurors individually. Continued examination is necessary because counsel may still uncover information that leads to a challenge for cause.[147]

After the court and counsel have examined each juror, the clerk of the court must call new jurors to replace the jurors successfully challenged.[148] Counsel then individually examines each of the new jurors. If counsel has any peremptory challenges remaining, he may exercise them on the newly called jurors. If no peremptory challenges remain, the sole purpose of further examination is to uncover biases that substantiate a challenge for cause.

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144. This practice helps maintain the privacy of the jurors as suggested by the ABA. *See* ABA Standards, *supra* note 142, at 73. The court must, however, permit the public to be present at the voir dire to meet the demands of due process. *See* Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505 (1984).

145. *See* ABA Standards, *supra* note 142, at 75.

146. Rotating basis means that after the first juror has been examined, the prosecution or plaintiff has the first opportunity to strike the juror peremptorily. Defense counsel has the first opportunity for the second juror.

147. A challenge for cause may be made at any stage of the voir dire process, even after counsel has ended the examination of a particular juror.

148. The clerk must call a number of jurors from the venire equal to the number of jurors successfully challenged.

When the sole purpose of the examination is a challenge for cause, the court may place further limitations on the scope of counsel's examination. Once the court has accepted the required number of jurors, the judge qualifies the jury, and the voir dire process ends.

C. Justification for Modified Court-Conducted Voir Dire in New Hampshire

Modified court-conducted voir dire is ideal for a state like New Hampshire that values judicial economy and court control over the voir dire examination, yet needs to facilitate counsel participation to insure a fair, impartial, and constitutional jury selection process. Modified court-conducted voir dire maintains court control over the voir dire examination. By conducting the initial examination, the court establishes its dominant role in the process. Additionally, the court has complete control over the scope of counsel's direct examination; thus, an active bench can effectively control the direction of counsel's examination and eliminate concerns that counsel may misuse his opportunity to question the jurors.

Modified court-conducted voir dire also maintains judicial economy. First, the rules accomplish this via the ten-minute time limitation. Because counsel may only question a single juror for a maximum of ten minutes, the rules automatically reduce the potential length of the process. Furthermore, the statutory limitations on the number of peremptory challenges available to each counsel also reduces the likelihood that the voir dire will take an excessive amount of time.[149] In most cases, counsel only has three peremptory challenges at his disposal. At a maximum, counsel can only peremptorily challenge six jurors. If the trial requires that fourteen jurors be seated (twelve jurors plus two alternates) the maximum number of jurors counsel will question individually is twenty.[150] The fact that counsel has more peremptory challenges available in first degree murder and capital murder cases is irrelevant because the courts already permit counsel to directly examine the jurors in first degree and capital murder cases.[151]

Finally, modified court-conducted voir dire is beneficial because it gives counsel the right to directly participate in the voir dire examination. This eliminates many of the concerns associated with *Batson* challenges. During

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149. *See supra* note 20.

150. The number may increase if the court grants challenges for cause during the individual voir dire. This is unlikely, however, because the judge's initial examination is designed to uncover challenges for cause and most successful challenges for cause will be based on affirmative answers to the court's questions before counsel's examination begins.

151. *See supra* note 20.

direct examination, counsel can gather information necessary to make a neutral explanation for the use of a peremptory challenge.[152] The court also benefits by having a more substantial basis to determine if the offered explanation is merely a pretext for purposeful discrimination.[153] Ultimately, it is less likely that purposeful discrimination will enter the jury selection process if the courts permit counsel to directly participate in the voir dire examination. Furthermore, attorney participation under modified court-conducted voir dire is consistent with the New Hampshire Supreme Court's recent emphasis on greater attorney participation in the voir dire process.[154]

CONCLUSION

New Hampshire should change its voir dire process to give counsel the right to participate in the voir dire examination. New Hampshire should make this change for three reasons. First, attorney participation in voir dire is a superior means to secure a fair and impartial jury. Second, attorney participation is necessary in light of the United States Supreme Court's decision in *Batson v. Kentucky* concerning the discriminatory use of peremptory challenges. Third, allowing counsel to directly question potential jurors is consistent with the New Hampshire Supreme Court's decisions since 1980, which indicate a desire to increase counsel's role in the voir dire process. For these three reasons, New Hampshire should change its voir dire process to give counsel the right to participate in the voir dire examination.

The best alternative for New Hampshire to adopt is a modified version of court-conducted voir dire. This alternative breaks the voir dire process down into two stages. First, the trial court conducts an initial examination of the jury to evaluate whether jurors should be dismissed for cause. During the second stage, the court permits counsel ten minutes to individually question the jurors under the court's supervision. Modified court-conducted voir dire is the best alternative available because it secures judicial economy and court control over the voir dire process while still giving counsel the absolute right to participate in the voir dire examination.

Lee Smith

152. *See supra* Part II.B.
153. *Id.*
154. *See supra* Part II.C.