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Juror Privacy in the Sixth Amendment Balance

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JUROR PRIVACY IN THE SIXTH AMENDMENT BALANCE

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Abstract

Some eight million citizens report for jury duty every year. Arguably, jury duty is one of the most significant opportunities to participate in the democratic process. For the accused, the jury acts as an indispensable safeguard against government overreaching. One might expect, therefore, that our justice system would treat potential jurors with care and tact. The opposite is true. During voir dire, prospective jurors are required to share insights into their own lives, quirks, proclivities, and beliefs. Litigants have probed jurors' sexual orientation, criminal histories, criminal victimization, health, family relations, and beyond. A few scholars have chided the system for abusing jurors, but courts and scholars alike have conceived of this invasion into juror privacy as a necessary part of protecting the accused's Sixth and Fourteenth Amendment rights to a fair trial and impartial jury and the media and public's First Amendment rights to observe the criminal process. This Article examines this overly simplistic view, which fails to account for the probability that by infringing on juror privacy, the justice system causes more jurors to lie and to withhold material information revealing their true biases, thus undermining the accused's constitutional rights. Ultimately, this Article argues that juror privacy is an imperative complement to the accused's rights and urges a procedural modification to the voir dire process—a juror voir dire strike, protecting both jurors and the accused without undercutting the public and media's First Amendment rights to observe criminal trials.

INTRODUCTION

Some eight million Americans report for jury duty every year.[1] Another three million are summonsed but never show up.[2] Jurors called for duty decide issues in

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[1] *See* David Schneider, *Jury Deliberations and the Need for Jury Reform: An Outsider's View*, 36 JUDGES J. 23, 25 (1997) (asserting that "[e]ach year, approximately 15 million Americans" are called to jury duty, but that "only about one-third report"); *Jury Management*, NAT'L CENTER FOR ST. CTS., http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Jury-management.aspx/ (last visited Jan. 19, 2013) ("Approximately 15

about 154,000 trials.[3] Of those 154,000 cases tried each year, about 102,000 are criminal cases (about 72,000 felonies).[4] The duty of a juror to decide the criminal case of someone she does not know is said to be part of each American's "exercise of responsible citizenship."[5] "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[6] And jurors are an indispensable part of the accused's right to a fair trial. The constitutional right to a jury trial[7] is among the rights the Founders considered most important because it gives the people a voice and provides a check on the government.[8] Describing the importance of the jury, former Chief Justice Taft wrote for the Supreme Court:

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percent of the adult American population is summonsed to jury service each year in state and federal courts. An estimated 8 to 10 million citizens report for jury service annually to courthouses across the country . . . ."). *See generally* GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007) (deriving estimates from the survey figures). As an example, in Connecticut about 550,000 potential jurors are summonsed for jury duty each year. *Jury Administration*, ST. CONN. JUD. BRANCH, http://www.jud.ct.gov/jury/faq.htm (last visited Sept. 24, 2012).

[2] MIZE ET AL., *supra* note 1; *see also* Ted M. Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. REV. 1813, 1814 (2001) (discussing how 13,027 summonses were mailed and another 585 potential jurors who had rescheduled jury duty to appear with those summonsed, resulted in only 2,214 people who actually appeared); Robert G. Boatright, *Why Citizens Don't Respond to Jury Summonses and What Courts Can Do About It*, 82 JUDICATURE, 156, 156–57 (1999) (asserting that "the number of citizens who merely ignore their summonses is increasing" and discussing juror non-response rates of "20 percent in state courts and 11 percent in federal courts").

[3] MIZE ET AL., *supra* note 1, at 6. About 149,000 trials are held in state court; another 5,000 or so happen in federal court. *Id.*

[4] *Id.* Jurors in civil cases also face probing questions during voir dire, but this Article is limited to the issue of juror privacy in criminal cases, where the accused's rights to a fair and impartial jury are constitutionally guaranteed.

[5] Powers v. Ohio, 499 U.S. 400, 402 (1991). The use of juries to sit in judgment of another citizen's guilt gives society confidence that the criminal justice system is working fairly and effectively. *See* HARRIS INTERACTIVE, JURY SERVICE: IS FULFILLING YOUR CIVIC DUTY A TRIAL? 5 (2004), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1272052715_20_1_1_7_Upload_File.pdf (reporting that 75% of 1,029 adults polled said they would want their criminal case heard by a jury, and 84% agreed that serving on a jury is an important civic duty, which is not to be avoided).

[6] *Powers*, 499 U.S. at 407; *see also id.* at 402 ("Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.").

[7] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

[8] *See* Balzac v. Porto Rico, 258 U.S. 298, 310 (1922); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (explaining how a jury provides the accused with a buffer from "the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"). Before the government may infringe the accused's liberty, twelve unbiased people consider the demeanor of the witnesses, review the tangible and other evidence, and deliberate about

> The jury system postulates a conscious duty of participation in the machinery of justice . . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.[9]

Because jurors play this critical role of deciding guilt and protecting the accused from government overreaching, during the voir dire stage of the case, potential jurors are asked to share information about their lives, quirks, proclivities and beliefs, and sometimes insights into the lives of their friends, relatives, and loved ones who influence them. Judges permit litigants to probe the influence of jurors' experiences and relationships to expose jurors' predispositions. In fact, the Sixth Amendment, which mandates a trial by an "impartial" jury,[10] implies the need for some voir dire inquiry to determine that seated jurors are minimally qualified. A future juror is not minimally qualified if she holds a bias that prevents her from abiding by her oath and following the judge's instructions in reaching a verdict.[11]

In addition to its guarantee of an impartial jury to decide guilt, the Sixth Amendment assures the accused that she will be tried publicly,[12] and the media and public enjoy separate First and Fourteenth Amendment rights to observe the trial of the accused.[13] Thus, when lawyers and judges evaluate jurors for partiality, the questioning usually takes place in public.[14] This intense public questioning of potential jurors into their personal thoughts and experiences sometimes has perverse consequences, leading litigants to seat biased and legally unqualified jurors.[15]

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whether the prosecutor has established guilt beyond a reasonable doubt. *See* HARRIS INTERACTIVE, *supra* note 5, at 5–6.

[9] *Balzac*, 258 U.S. at 310.

[10] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . .").

[11] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (clarifying that a juror is not minimally qualified if bias "substantially impair[s] the performance of his duties . . . in accordance with his instructions and his oath" (internal quotations omitted)).

[12] U.S. CONST. amend. VI.

[13] U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."); Presley v. Georgia, 130 S. Ct. 721, 723 (2010) (per curiam) (holding that the public trial protections of both the Sixth and First Amendments extend to the voir dire stage of a case); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580 (1980) (holding that that right to attend criminal trials is "implicit in the guarantees of the First Amendment").

[14] *Presley*, 130 S. Ct. at 723–24. Jurors are sometimes permitted to answer questions in limited privacy, but even then, the trial judge, the lawyers, the accused, and the court reporter are present. Those conversations are also documented in the record and accessible, later, to the media and public.

[15] *See* discussion *infra* Part I.B.1.

Outside the courthouse, jurors enjoy a right to be left alone and to keep their thoughts to themselves.[16] "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[17] So, for example, a citizen is under no obligation to answer questions posed by a demanding police officer on a public street.[18] But inside the courthouse, during voir dire, jurors' rights to control access to their thoughts and, correspondingly, to refuse to answer lawyers' questions, are less clear.[19] Because litigants seek to uncover juror bias and because jurors' privacy rights are imprecise, trial lawyers have become increasingly aggressive in their questioning of prospective jurors, covering topics from bumper stickers and movie preferences to sexual orientation, incest, and accusations of child molestation.[20] Ironically, this probing for more information sometimes produces less, if not

[16] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) ("[T]he protection afforded to thoughts, sentiments, and emotions . . . is merely an instance of the enforcement of the more general right of the individual to be let alone."); *see also* Illinois v. Andreas, 463 U.S. 765, 775 (1983) (Brennan, J., dissenting) ("[O]ne aspect of the privacy interest protected by the Fourth Amendment is the right to keep certain *information* beyond official scrutiny."); Payton v. New York, 445 U.S. 573, 589 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings."); Warden v. Hayden, 387 U.S. 294, 305 (1967) ("[T]he principal object of the Fourth Amendment is the protection of privacy rather than property . . . ."); Schmerber v. California, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."); Wolfe v. Schaefer, 619 F.3d 782, 784 (7th Cir. 2010) (acknowledging that the Fourth Amendment is relevant in cases involving "the right to conceal information about oneself").

[17] Warren & Brandeis, *supra* note 16, at 198.

[18] Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) (explaining that although nothing in the Constitution prevents the police from addressing questions to anyone on the streets, "[a]bsent special circumstances, the person approached . . . may refuse to cooperate and go on his way"); *see also* Dunaway v. New York, 442 U.S. 200, 210 n.12 (1979) (acknowledging that a person detained by police against her will "is not obligated to answer" questions directed at her).

[19] Although at one time the Supreme Court appeared to expressly recognize a potential juror's interest in privacy, *see* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510–11 (1984) and discussion *infra* Part II, modern courts routinely view jurors' rights as subordinate to the accused's right to a fair trial and impartial jury and the media's right of access to criminal trials. The legal bases for juror privacy rights may be vigorously debated. *Compare* United States v. McDade, 929 F. Supp. 815, 817 (E.D. Pa. 1996) (explaining that the general condition of one's health is an invasive topic and that jurors have "privacy rights . . . to be let alone"), *with* Ackley v. Goodman, 516 N.Y.S.2d 667, 670 (App. Div. 1987) (holding that juror had no constitutionally protected right to nondisclosure of information requested in juror questionnaire because government's interests outweighed any juror interests). This Article does not seek to resolve that debate. Instead, it outlines the legal ambiguity of juror privacy rights to frame the issue of how infringements on juror privacy undermine the accused's constitutional rights.

[20] *See infra* notes 48–50, 52–53, and accompanying text.

inaccurate, information about relevant juror biases.[21] Forcing jurors to respond to personal questions intensifies the pressure on jurors to lie and to withhold material facts, making it more likely that biased jurors will survive voir dire.[22] Although it is impossible to know how widespread jury deception reaches, stories are proliferating of jurors who have lied.[23]

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[21] The empirical evidence is sparse on how jurors perceive the way their privacy and that of other jurors is treated during voir dire. One study ("Rose Study"), targeting the privacy concerns of jurors, revealed that jurors feel uncomfortable about privacy invasions, including discomfort when other jurors are asked sensitive questions. *See* Mary R. Rose, *Expectations of Privacy?*, 85 JUDICATURE 10, 13 (2001); *see also* Lauren A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?*, 3 RUTGERS J.L. & URB. POL'Y 287, 299–300 (2006) (asserting that "[a] number of empirical studies have established that insensitivity to juror privacy is the primary cause of dissatisfaction with jury service. This dissatisfaction results in a number of consequences. First, jurors try to avoid the disclosure of personal information by evading service—many people are simply unwilling to serve on juries when disclosure of personal matters is required. Concerns about privacy also lead jurors to fail to disclose personal information even when directly questioned on voir dire."). *But see* Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451, 455 (1991) (finding that only 8% of 190 jurors, who were selected for jury service and later interviewed, believed that questions asked of them about their crime victimization during voir dire in the mid-1980s were "too personal"; however, 24.7% failed to reveal that they or someone close to them had been such a victim).

[22] *See* Commercial Printing Co. v. Lee, 553 S.W.2d 270, 273 (1977) ("Cases have been reversed . . . because of answers given by prospective jurors on *voir dire* which subsequent investigation established were false, or at least incorrect, and which might have well disqualified the prospective juror."); *see also* Rousseau, *supra* note 21, at 316–20 (discussing critiques of intrusive voir dire questioning aimed at information irrelevant to juror bias); Seltzer et al., *supra* note 21, at 455–56 (discussing possible explanations for empirical data demonstrating dishonest responses from prospective jurors during voir dire).

[23] *See, e.g.*, Williams v. Taylor, 529 U.S. 420, 440–42 (2000) (describing a juror who became foreperson but did not respond when asked about relationships with potential trial witnesses, even though she had been married to and divorced from one of the witnesses and failed to reveal that during her divorce she was represented by the prosecuting attorney); Williams v. Price, 343 F.3d 223, 233 (3d Cir. 2003) (discussing a juror who allegedly lied during voir dire when he denied racial prejudice and later used racial slurs and demonstrated strong racial animus); Fields v. Woodford, 309 F.3d 1095, 1101–02 (9th Cir. 2002) (discussing juror who, during voir dire, admitted that his wife had been the victim of a beating and robbery, but failed to disclose that his wife was also raped); United States v. Sandalis, 14 F. App'x 287, 288 (4th Cir. 2001) (remanding for a hearing on juror bias because juror did not disclose recent and adversarial contact with criminal defendants' company); Green v. White, 232 F.3d 671, 672–74, 678 (9th Cir. 2000) (discussing juror who lied about his criminal history and other misconduct during voir dire); United States v. Colombo, 869 F.2d 149, 150 (2d Cir. 1989) (describing juror who failed to disclose that brother-in-law was an attorney for the government); United States v. Scott, 854 F.2d 697, 698 (5th Cir. 1988) (discussing juror who failed to disclose during voir dire that his brother was a deputy sheriff in the office that conducted the investigation of the accused); United States v. Perkins, 748 F.2d 1519, 1529–32 (11th Cir. 1984) (discussing juror who failed to

Until now, courts and scholars have regarded jurors' interests in privacy as conflicting with the accused's constitutional rights to a fair trial and an impartial jury and the public's First Amendment right to observe criminal proceedings.[24] This Article argues that this conception is overly simplistic and, therefore, misguided. It fails to recognize that significant infringement of juror privacy increases the probability that partial jurors will decide guilt—thereby jeopardizing, not supporting, the accused's Sixth and Fourteenth Amendment guarantees. While juror privacy sometimes conflicts with First Amendment rights of the press and the public to watch a trial, such privacy is an imperative complement to the accused's rights.

To safeguard both juror privacy and the accused's Sixth Amendment interests, this Article proposes a procedural modification to the voir dire process, a modification that also avoids violating the First Amendment rights of the media and public. It advocates a strike for jurors to exercise during voir dire. Trial judges may implement this change in individual cases, or local rules, and legislation may effect this change to voir dire more broadly. When employed reasonably, this new juror strike will permit each juror to avoid overly intrusive and counterproductive questioning. Jurors who rely on their personal strike will invoke it on the public record but will then be permitted to protect themselves from embarrassment or discomfort by withdrawing from a particular case and returning to the jury pool for service in another matter. It will also motivate lawyers to critically cull their questions for relevance and necessity and will encourage trial judges to maintain careful control of voir dire, control that has grown scarce in recent years. At the same time, it will give lawyers more comfort to probe deeply when a particular issue in a given case warrants inquiry into a sensitive matter.

This Article develops in four parts. Part I discusses the public and increasingly intrusive nature of voir dire and its consequences for the integrity of the jury process and the Sixth and Fourteenth Amendment rights of the accused. Part II demonstrates that while potential jurors retain some legal protections

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disclose during voir dire that he had been a participant in prior civil and criminal litigation and that he knew the accused); Banther v. State, 783 A.2d 1287, 1289 (Del. 2001) (discussing jury foreperson who failed to disclose during voir dire that she had been the victim of a serious, violent crime); Young v. State, 720 So.2d 1101, 1102–03 (Fla. Dist. Ct. App. 1998) (describing juror who failed to disclose that he had been molested); State v. Dye, 784 N.E.2d 469, 471 (Ind. 2003) (discussing juror who, during voir dire, failed to reveal her family's criminal history and her own history as a rape victim); State v. Jenkins, 2 P.3d 769, 771 (Kan. 2000) (describing juror who failed to disclose that her son had been murdered); State v. Harris, 652 N.W.2d 585, 587–88 (Neb. 2002) (describing juror who failed to disclose that she previously had been convicted of a felony); Canada v. State, 944 P.2d 781, 782–83 (Nev. 1997) (describing juror who repeatedly lied during voir dire by saying that no one in his family had been victimized by violent crime when, in truth, his father had been murdered); State v. Hatcher, 568 S.E.2d 45, 47 (W. Va. 2002) (discussing juror who lied in voir dire about whether a family member had ever been the victim of a violent crime).

[24] *See infra* Part III.

throughout voir dire, the Supreme Court's murky privacy jurisprudence, as well as the Court's lack of clarity surrounding juror privacy, in particular, have left lower courts doubtful that juror privacy deserves more than a minor consideration in the balance of trial interests. Part III explains that lower courts and scholars have undervalued the importance of juror privacy when assessing the accused's constitutional rights to a fair trial and an impartial jury. In weighing the accused's rights, scholars and lower courts have considered the rights of the accused as competing against jurors' privacy rights, instead of recognizing that juror privacy is a necessary complement to the rights of the accused. Part IV then offers a practical solution, a voir dire strike for jurors, to protect both juror privacy and the accused's rights without jeopardizing the media and public's First and Fourteenth Amendment rights to access. This juror voir dire strike will alleviate the pressure on jurors to conceal information or to lie in response to voir dire questions that would prove embarrassing. Empowering jurors during voir dire will tend to give the litigants more reliable information on which to base their peremptory strikes and will promote integrity of the jury-trial system.

I. PUBLIC VOIR DIRE—ITS CONSEQUENCES FOR THE RIGHTS OF THE ACCUSED AND THE INTEGRITY OF THE CRIMINAL JUSTICE PROCESS

Part I.A. outlines the legal and historical grounds for public voir dire, explains how modern voir dire creates more risk of juror dishonesty, and highlights the risks to the accused of the modern trend of probing jurors' backgrounds and beliefs. Part I.B. demonstrates that intrusive voir dire encourages more jurors to lie and to withhold information relevant to juror partiality.

A. The Public Nature of Voir Dire and Its Historical Roots

In addition to providing the accused with a jury trial right, the Sixth Amendment guarantees that the accused in a criminal case will be tried publicly.[25] The First Amendment grants the press and the public a similar right to observe criminal trials.[26]

> [T]he public trial provision . . . is a "guarantee to an accused" designed to "safeguard against any attempt to employ our courts as instruments of

[25] The Sixth Amendment provides "the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI; *see also* Estes v. Texas, 381 U.S. 532, 538 (1965) ("We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused.'").

[26] "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I; *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (interpreting the First Amendment as guaranteeing the press access to criminal trials even when young witnesses are testifying on a sensitive subject, such as rape); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580 (1980) ("[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment.").

> persecution." Clearly the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately.[27]

Although the voir dire stage of a criminal case technically precedes the trial, the constitutional guarantees of public access extend to voir dire also.[28] According to the Supreme Court, "[B]eginning in the 16th century, jurors were selected in public."[29] The open jury selection process in England "carried over into proceedings in colonial America."[30] Although the Court has said that closed proceedings are "not absolutely precluded," it has warned that they "must be rare and only for cause shown that outweighs the value of openness."[31] Because the voir dire of potential jurors is a part of the public trial, the court reporter documents jurors' responses to questions, and those responses are typically available in the form of a transcript long after the trial ends.[32]

Although voir dire in this country has always been open to the public, the evidence is sparse on whether it has also traditionally required potential jurors to reveal private information as part of that public process. In 1976, Jon Van Dyke,[33] noting the history of voir dire in America, explained:

> During the early days of the Anglo-Saxon jury, litigants had no right to question prospective jurors about their prejudices. . . . Jurors could be challenged for specific bias, such as blood, marriage or economic

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[27] *Estes*, 381 U.S. at 583 (Warren, C.J., concurring) (citing In re Oliver, 333 U.S. 257, 266, 270 (1948)).

[28] Presley v. Georgia, 130 S. Ct. 721, 723 (2010).

[29] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 507 (1984).

[30] *Id.* at 508 ("Public jury selection . . . was the common practice in America when the Constitution was adopted.").

[31] *Id.* at 509; *see also* Waller v. Georgia, 467 U.S. 39, 45 (1984) (acknowledging that the right to an open trial "may give way in certain cases to other rights or interests, such as . . . the government's interest in inhibiting disclosure of sensitive information," but such circumstances "will be rare").

[32] A juror's answers are documented in the record and are typically available to the public even when the juror expects (or is told by the judge) that her answers will be kept private. *See Press-Enterprise*, 464 U.S. at 512–13 (rejecting the prosecutor's argument that jurors who were questioned out of the presence of the public on sensitive issues expected that their answers would be afforded confidentiality); Paula L. Hannaford, *Safeguarding Juror Privacy*, 85 JUDICATURE 18, 23 (2001) (stating that because jury disclosures are often "highly sensitive or embarrassing to jurors, case law is replete with examples of judges who have tried, usually unsuccessfully, to keep this information from public disclosure").

[33] At the time, Van Dyke was a professor of law at Hastings College of Law.

> relationship to a litigant; but a nonspecific bias, such as ill-feeling toward a litigant's class, race or religion, could not be the basis for a challenge for cause, and no questioning on such matters was allowed.[34]

By 1807, Chief Justice John Marshall, while presiding over the criminal case of Aaron Burr, declared that juror prejudice was a proper basis to challenge a juror for cause.[35] But even after Marshall's influential ruling, courts continued to constrain voir dire questioning. In *Press-Enterprise Co. v. Superior Court of California*, the Court noted that historically the accused was permitted to voir dire potential jurors about their "Interest in the Cause" and to ask "whether [they] be fitly qualified, according to Law by having a Freehold of sufficient Value."[36] In a decision dating back to 1813, appellate judges in South Carolina explained the narrow reach of such voir dire. Judge Colcock wrote:

> [H]ence originated the practice of examining jurors on their *voire dire*, merely to ascertain whether they were, in this respect qualified to sit. . . . "[T]he juror challenged, may, on his *voire dire* be asked such questions, as do not tend to disgrace; as, whether he has a freehold . . . ? Whether he has an interest in the case? Whether he has given an opinion before hand upon the right? [W]hich he might have done, as an *arbitrator* between the parties." . . . Even there, it will be observed, there is a limit beyond which the triors could not go. They were not permitted to ask questions tending to the disgrace or the dishonor of the juror on his *voire dire*.
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> . . . .
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> . . . That a man should be made to disclose his secret thoughts savours strongly of inquisitorial power, and is as much at war with my feelings as my judgment.[37]

Judge Nott, in the same case, added:

> The rule of law with regard to the examining of a juror on his *voir dire* is precisely the same as that relative to a wtiness [sic]. You may not ask a witness any question which goes to his disgrace . . . .

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[34] 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, 67 (1976).

[35] *Id.* at 68–69 (citing United States v. Burr, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g)).

[36] *Press-Enterprise*, 464 U.S. at 506 n.4 (quoting Peter Cook's Trial, 4 Har. St. Tr. 737, 738–40 (O.B. 1696)).

[37] State v. Baldwin, 6 S.C.L. (1 Tread.) 289, 291–93 (1813) (opinion of Colcock, J.) (quoting 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 267 (6th ed. 1793)). "Triors" were persons appointed by the court "whose duty it was to ascertain, whether the jury were all impartial and qualified to sit." *Id.* at 291–92; *see also id.* at 304 (opinion of Smith, J.) (explaining that jurors may be asked "such questions as do not tend to infamy and disgrace; such as, whether he hath a freehold, whether he had an interest in the cause").

> . . . .
> . . . [A] juror cannot be *compelled* to answer such questions, surely he may be *permitted* to do so. If *he* does not make the objection, no person can make it for him.[38]

Similarly, in 1823, the Virginia General Court,[39] reflecting on the role of "for cause" strikes in England, suggested that a juror may have enjoyed protection against questions calling for an answer that would tend to cause the juror "infamy, or disgrace."[40] The Georgia Supreme Court noted in 1897 that "neither the court nor counsel should ask any question which would involve a breach of the juror's privilege to refuse to answer on the ground that so doing would tend to incriminate, or otherwise disgrace, him . . . ."[41] In 1928, the Supreme Court of California rejected a criminal defendant's appellate argument that he was unduly limited in his voir dire questioning about jurors' affiliations with secret organizations, noting, "It is now well settled in this state that a juror may not be examined on voir dire solely for the purpose of laying the foundation for the exercise of a peremptory challenge."[42] In 1977, in *Commercial Printing Co. v. Lee*,[43] the Arkansas Supreme Court, sitting en banc, was asked to rule that the press and the public were entitled to attend voir dire of jurors. In deciding that the public should have access, the court explained the limited reach of voir dire at that time.

> Normally, lawyers ask prospective jurors if they know anything about the facts of the case[,] if they have talked with any person concerning the facts who purports to be a witness[,] if they are represented by one of the attorneys involved their feelings about the possible punishment that might be imposed[,] or if there is any reason why they could not give both the state and the defendant a fair and impartial trial. Facts of the case are not generally discussed in voir dire; of course, publicity about the circumstances of the crime itself any statements that had purportedly been made by witnesses, defendant, etc., were published when the crime happened or when the arrest was made.[44]

Thus, while voir dire enjoys a long tradition of openness, its history also reveals a long trail of restricting the scope and reach of counsel's questions. Voir dire in America has always been conducted publicly, but until more recently, jurors

[38] *Id.* at 297–98 (opinion of Nott, J.).
[39] Sprouce v. Commonwealth, 4 Va. (2 Va. Cas.) 375, 376 (1823).
[40] *Id.* at 378.
[41] Ryder v. State, 28 S.E. 246, 248 (Ga. 1897).
[42] People v. Ferlin, 265 P. 230, 235 (Cal. 1928).
[43] 553 S.W.2d 270 (Ark. 1977).
[44] *Id.* at 273.

were not expected to endure probing questions calling for embarrassing answers as part of a fishing expedition for ill feelings toward litigants.[45]

Intuition might suggest that protecting jurors from abusive questioning during voir dire would be a top priority for trial judges, prosecutors, and defense counsel.[46] After all, alienating the very people who will decide guilt seems unwise, both in the individual case and because jurors are a fundamental part of our criminal justice system. But protecting jurors from too many questions poses some risk of allowing a partial juror to survive voir dire. Because the Sixth Amendment guarantees the accused an impartial jury,[47] determining juror impartiality is a necessary component of every jury trial. Over time, litigants and trial judges have focused so much attention on probing jurors for bias that they have neglected juror privacy and its importance to juror honesty about those pertinent biases. In contrast to voir dire's historical roots, demonstrating restraint in the questioning of jurors, modern voir dire reaches far beyond basic questions of minimal juror qualification. Litigants regularly ask questions to determine the influence of jurors' relations with friends and loved ones, as well as the jurors' experiences and personal habits. Prospective jurors have been asked to reveal information about their victimization, their health and use of legal and illegal medications, their families and income levels, whether they have filed for bankruptcy, their religious and political beliefs, their intimate sexual relationships, their television habits, and many other potentially sensitive topics.[48]

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[45] JON M. VAN DYKE, JURY SELECTION PROCEDURES 144 (1977) (noting that by 1977, "questioning for nonspecific bias ha[d] been expanding" and that inquiry into prejudice against race, religion, ethnicity, or other group bias was "increasingly accepted by the courts"). A study of twenty-three consecutively tried jury trial cases in the Midwest found that voir dire was "devoid of the spectacular," and lasted on average about one half hour. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 503–04 (1965). During voir dire jurors were asked about their occupations: "Could the veniremen be fair and impartial? Did they have anything so pressing that they could not give their full attention to the trial? Would they follow the law?" and other benign questions. *Id.* at 507 (noting that "seldom did a lawyer probe . . . deeply" during voir dire).

[46] *See* VAN DYKE, *supra* note 45, at 163 ("Some jurors take offense at being asked highly personal questions aimed at discovering prejudices that attorneys believe cannot be discovered merely by direct questioning.").

[47] *See* U.S. CONST. amend. VI.

[48] *See, e.g.*, Karen Monsen, *Privacy for Prospective Jurors at What Price?*, 21 REV. LITIG. 285, 285–86 (2002) (referencing a scenario where one juror was pressed to reveal for the first time that her stepfather had raped her, a secret she had withheld from everyone, including her husband); Lauren A. Rousseau, *Privacy and Jury Selection*, *supra* note 21, at 288 (noting that jurors are often asked about "the books they read, the television shows they watch" and much more); David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 2–3 (1997) (noting that jurors are subject to "intrusive questioning, disclosure of their answers to the news media, background investigations by counsel, release of their name and address to the defendant and the public, and repeated attempts by the press to obtain post-trial interviews"); *see also*

For example, in the criminal case charging NBA basketball player Kobe Bryant with sex crimes, potential jurors were asked eighty-two questions in a written questionnaire before they arrived in court. The questionnaire began with questions about where jurors grew up and with whom they shared their homes and extended to inquiries into whether jurors had ever contacted a rape crisis center or felt in danger of a sexual assault.[49] In a separate criminal case charging child molestation and first-degree rape of a child, jurors were recently asked whether they had been the victim of sexual abuse or accused of committing a sexual offense.[50] The eleven jurors who initially answered "yes" to either question were then asked follow-up questions in the judge's chambers. The trial judge, prosecuting attorney, defense counsel, and the accused were present for the follow-up.[51] From the lawyers' vantage, these and other probing questions may appear sensible. From the jurors' perspective, however, the inquiries often seem irrelevant and harassing.[52] Oral voir dire, either by itself or after completion of a written questionnaire, can quickly prove uncomfortable, exposing, and embarrassing.

Because the process of voir dire is often unfamiliar to jurors, it may seem to them as impersonal as a stranger asking questions of a passerby on a public sidewalk. Imagine the stranger approaches the passerby and asks in a polite voice: Have you ever been the victim of a sexual assault? Tell me the details. Have you been accused of sexual abuse or child molestation? Have the police investigated you for other inappropriate sexual behaviors? What do you think about abortion? Are you gay? What television shows do you watch? Tell me about your children and your hobbies. Are you taking any prescription medications? Why do you take those drugs? Do you belong to, or support, any political groups? Have you been treated for a drug addiction? Ever called a rape crisis line? Are you an only child?

United States v. Masat, 896 F.2d 88, 90 (5th Cir. 1990) (noting that jurors were asked about tax liens filed against them and audits of their taxes).

[49] *Bryant Jury Questionnaire Released*, VAILDAILY.COM (Aug. 30, 2004), http://www.vaildaily.com/article/20040830/NEWS/40830006/ (publishing the jury questionnaire used in *People v. Bryant*, No. 03-CR-204 (Colo. Dist. Ct. 2004)).

[50] Washington v. Strode, 217 P.3d 310, 312 (Wash. 2009) (explaining that these initial questions were asked in "a confidential juror questionnaire").

[51] *Id.* at 312–13. On appeal, the Supreme Court of Washington ruled that the trial judge committed a structural error in closing the proceedings without conducting a more intricate analysis of the need for closure. *Id.* at 316. The closure, the court said, denied the defendant the right to a public trial. *Id.* at 314. The court reversed the defendant's conviction and remanded for a new trial. *Id.* at 316.

[52] *See* Hannaford, *supra* note 32, at 18 ("Numerous studies document that perceived insensitivity to the privacy concerns of prospective jurors is one cause of dissatisfaction with jury service."); *see also* HARRIS INTERACTIVE, *supra* note 5, at 12 (finding that 17% of 1,029 adults polled revealed that they do not believe that jurors are treated well by the court system, and 30% had no opinion on the subject); Broeder, *supra* note 45, at 506, 510–21 (suggesting that prospective jurors often withhold the truth when questioned in voir dire); Rousseau, *supra* note 21, at 298 ("[T]rial attorneys' demands for increasing amounts of personal information from jurors . . . directly conflicts with the American population's increasing interest in keeping such information private.").

The youngest? How old are your children? Where do they live? Where do you work? In what religion were you raised? These questions and many like them have been asked of prospective jurors during voir dire.[53] Because voir dire covers so many topics, even jurors with no special sensitivity and nothing in particular to hide sometimes worry about exposing their private information.[54] Outside of the voir dire process, jurors' privacy is protected by various statutes[55] and by the

[53] *See, e.g.*, Jury Questionnaire at 14, 17, United States v. Sypher, No. 3:09CR-85-S, 2010 WL 2108460 (W.D. Ky. May 24, 2010); Watts v. Maine, No. 08-290-B-W, 2009 WL 249236, at *4 (D. Me. 2009) (asking about juror's sexual abuse and charges of sexual assault or abuse); Final Juror Questionnaire, United States v. Bonds, 580 F. Supp. 2d 925 (N.D. Cal. 2008) (No. C 07-00732), *available at* http://www.cand.uscourts.gov/filelibrary/596/304.pdf; Jury Questionnaire at 3, 7, People v. Jackson, No. 1133603 (Cal. Sup. Ct. June 13, 2005), *available at* http://jurylaw.typepad.com/Michael_Jackson_questionnaire.pdf (asking about placement among siblings and allegations of inappropriate sexual behaviors); United States v. O'Driscoll, No. 4:CR-01-277, 2002 WL 32063813, at *5 (M.D. Pa. May 28, 2002) (asking about television shows and religion); *see also* Joseph A. Colquitt, *Using Jury Questionnaires: (Ab)using Jurors*, 40 CONN. L. REV. 1, 6–7 (2007) (listing famous cases in which potential jurors were asked to complete a probing jury questionnaire, including in prosecutions of Richard Scrushy, O.J. Simpson, Martha Stewart, Zacarias Moussaoui, Michael Jackson, Scott Peterson, Eric Rudolph, and many others); *Bryant Jury Questionnaire Released*, *supra* note 49 (publishing voir dire questions from Kobe Bryant's trial).

[54] One study of 348 people who participated in voir dire in one North Carolina county revealed that about 27% of potential jurors felt "uncomfortable" during voir dire, and about 27% said that the questioning seemed "too private." *See* Rose, *supra* note 21, at 13. The empirical evidence on how jurors perceive the way their and other jurors' privacy is treated during voir dire is sparse. Some studies indicate that jurors often consider financial issues when deciding whether to appear or to ask to be excused from jury duty. *See, e.g.*, Boatright, *supra* note 2, at 162. The Rose Study reveals that at least some jurors experienced discomfort when other jurors were asked sensitive questions. *See* Rose, *supra* note 21, at 13; *see also* John Asbury, *Attack on Jurors Prompts Review of Court Safety*, PRESS-ENTERPRISE (Riverside, Cal.), May 29, 2010, at A1 (reporting that jurors who convicted a gang member of killing a sixteen-year-old boy were confronted by the defendant's angry family outside the courthouse after the verdict); Broeder, *supra* note 45, at 506 (noting that the results of an empirical study of Midwestern juries in the late 1950s revealed "numerous instances of conscious concealment and lack of candor" by prospective jurors during voir dire); Seltzer et al., *supra* note 21, at 456 (noting that 52% of jurors asked whether they had personally been the victim of crime did not reveal the information during voir dire); Adam Walser, *Juror in Lloyd Hammond Murder Trial Allegedly Threatened by Audience Member*, WHAS11.COM (Jun. 25, 2010, 7:18 PM), http://www.whas11.com/home/Juror-in-Lloyd-Hammond-murder-trial-felt-threatened-by-audience-member--97185784.html (describing a juror in the murder trial of a suspected gang leader who reportedly felt threatened by a person in the audience of the trial).

[55] *See, e.g.*, 42 U.S.C. § 1320d-6 (2006) (protecting patients against disclosures of their health information); 47 U.S.C. § 551 (2011) (protecting cable customers against collection and distribution of data without consent); FED. R. EVID. 412 (protecting from disclosure in civil or criminal proceedings evidence of victim's sexual behavior or sexual predisposition).

Constitution.[56] But once part of the jury pool, citizens are treated as though their rights evaporate. Jurors who refuse to answer questions on grounds of privacy may be held in contempt of court and jailed.[57]

Trial judges are expected to protect jurors and ensure the accused's rights of impartiality by exercising control over voir dire questioning. As the Supreme Court said in *Press-Enterprise*, "a trial judge must at all times maintain control of the process of jury selection."[58] Because the legal standard for juror impartiality is relatively easy to satisfy, the judge has significant latitude to protect jurors from oppressive questioning in most cases and under most circumstances. An impartial jury is one that "consists of nothing more than '*jurors* who will conscientiously apply the law and find the facts.'"[59] The Sixth Amendment guarantee of "an impartial jury" is breached only if potential jurors are predisposed to guilt and when they hold some extensive bias against the accused. Litigants may strike for cause those jurors who cannot decide the case on the facts presented and others who will not follow the judge's instructions about the law. "[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[60]

Of course, the litigants may also exercise a limited number of peremptory challenges to remove jurors for any reason, no matter how eccentric, so long as the party does not strike a potential juror on the basis of her gender, ethnicity, or race.[61] But, peremptory challenges "are not of constitutional dimension."[62] They are "part of our common-law heritage" designed to "reinforc[e] a defendant's [jury] right."[63] Because the peremptory strike is designed to give the parties *added* assurances about the ability and willingness of a sitting jury to hear the accused's case with an open mind and a clear conscience, the trial judge is empowered to

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[56] *See supra* note 16 and accompanying text.

[57] *See* Brandborg v. Lucas, 891 F. Supp. 352, 353–54 (E.D. Tex. 1995).

[58] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 512 (1984).

[59] Lockhart v. McCree, 476 U.S. 162, 178 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 423 (1985)).

[60] *Wainwright*, 469 U.S. at 424 (stated in the context of a capital punishment case); *see also* Irvin v. Dowd, 366 U.S. 717, 723 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.").

[61] *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986) ("[N]o citizen is disqualified from jury service because of his race."); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994) (holding that litigants may not strike potential jurors solely on the basis of gender); Hernandez v. New York, 500 U.S. 352, 371 (1991) (holding that peremptory challenges must be race neutral). The Supreme Court has not yet ruled on whether religion is a prohibited basis to strike.

[62] United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000) (citing Ross v. Oklahoma, 487 U.S. 81, 88 (1988)).

[63] *Id.* at 311.

limit inquiries that probe jurors' privacy too deeply or that are only marginally probative of bias.[64]

Perhaps because bias can be difficult to identify, trial judges have increasingly permitted litigants to ask expansive questions of jurors,[65] covering issues of their childhood, sexuality, relationships, health, and much, much more. Trial judges allow the parties to ask questions that may reveal the jurors' hidden leanings. As one scholar put it, "a certain amount of information from prospective jurors is required."[66] One cannot seat a fair and impartial jury to hear a case without having some information to suggest that each juror qualifies, at least minimally.[67] Nevertheless, when a judge permits the litigants to ask potential jurors questions that require embarrassing answers, the voir dire process may backfire and result in less, and inaccurate, information about juror biases.[68] Because they enjoy significant discretion during voir dire, judges across the country vary widely in how they manage the process. A few judges ask all of the questions. Many judges allow the lawyers to ask a majority of questions. Some judges preview the litigants' proposed voir dire. Many do not.[69] Judges also vary significantly in how

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[64] The voir dire process is "to ensure a fair impartial jury, not a favorable one." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 n.9 (1984).

[65] *See, e.g.*, VAN DYKE, *supra* note 45, at 168 (noting the reluctance of jurors to acknowledge bias, especially race bias); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 548 (1975) (asserting that "[i]ncreasingly judges are conducting voir dire examinations rather than allowing counsel" to do so and arguing that attorneys probe more deeply and uncover more information pertinent to exercise of the peremptory strikes).

[66] Rousseau, *supra* note 21, at 294.

[67] *See* Roseles-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion) ("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."); Connors v. United States, 158 U.S. 408, 413–15 (1895) (noting the trial court's broad discretion to conduct sufficient voir dire).

[68] *See* discussion *infra* Part I.B.1; *see also* Broeder, *supra* note 45, at 506 (noting that the results of an empirical study of Midwestern juries in the late 1950s revealed "numerous instances of conscious concealment and lack of candor" by potential jurors during voir dire); Hannaford, *supra* note 32, at 23–24 (arguing that failure to protect juror privacy can undermine the litigants' ability to elicit sufficient information to assess partiality).

[69] *See* Rousseau, *supra* note 21, at 309–10. In Rousseau's article, she notes:

> In October 2005, eighteen federal district court judges serving in eleven different states were surveyed regarding their voir dire practices. The survey responses demonstrate the lack of consensus regarding the appropriate scope of voir dire. When asked what standard they use to determine whether a voir dire question should or should not be asked, the judges' responses ranged from "I generally let the lawyers ask what they want" to "[I] require that the question be relevant to a showing of bias . . . or relevant to the issues in the case." Approximately one third of the federal judges surveyed indicated that they employ virtually no limitations with regard to the types of questions permitted, but that they limit the duration of lawyer questioning to 20 or 30 minutes.

much latitude they give lawyers to explore bias.[70] Many permit litigants to ask almost unlimited, open-ended questions. Because courts and scholars have undervalued the risk that pressuring jurors to reveal sensitive information publicly will encourage jurors to lie and withhold information pertinent to jurors' biases, judges have perceived few incentives to restrict lawyers from asking probing questions. The argument, repeated in different ways by courts and scholars, in favor of delving into jurors' privacy is captured by a quote from Barbara Babcock: "It is simply in the very nature of the peremptory that deeper, further-ranging questions are necessary for its meaningful exercise."[71] And because each litigant hopes to rid the pool of all unfavorable jurors, neither the prosecutor nor the defense may serve as "a motivated, effective advocate for the excluded venirepersons' rights."[72] Moreover, judges want to protect the record on appeal, so as long as litigants and judges remain convinced that probing questions will reveal biased and unsupportive jurors, voir dire will continue to infringe upon juror privacy.

B. The Consequences of Public Voir Dire

This section argues that courts, scholars, and litigants have failed to appreciate that infringing on juror privacy causes more jurors to lie and to withhold information, thus undermining the accused's constitutional rights to an impartial jury and fair trial and undercutting the integrity of the jury system.

1. Intrusive Questions Burden the Accused's Constitutional Rights

One underappreciated consequence of pressing jurors to answer personal and marginally relevant questions publicly is that prying questions can backfire, giving

> Another third was at the opposite end of the spectrum, indicating that they limit voir dire questions to those calculated to show bias and/or those directly relevant to the issues in the case.
>
> The final third fell somewhere in between these two extremes. Some in this group said that the sole substantive limitation that they employ relates to the "argumentative" nature of the question. Others said that they permit questions going beyond those relevant to a showing of bias, allowing attorneys to inquire regarding the backgrounds, attitudes and cultures of the potential jurors.

Id. (citations omitted).

[70] *See, e.g.*, Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 14–15, 25–26 (2001). Eisemann provides numerous examples of differences among trial judges' treatment of the issue of homosexuality. *Id.* Eisemann also notes that some jurors in California formed negative impressions from negative experiences, including one juror who was asked if he had "more straight friends or gay friends." *Id.* at 8 n.55.

[71] Babcock, *supra* note 65, at 558.

[72] Powers v. Ohio, 499 U.S. 400, 414 (1991) (stating that the criminally accused shares an interest with jurors to avoid race-based peremptory strikes).

litigants less information and even incorrect information about juror biases.[73] In all cases in which jurors lie to avoid embarrassing answers, the justice system risks that empanelled jurors are partial in ways that violate the accused's right to an impartial jury and fair trial.[74] Because there are few studies on jury dishonesty,[75] there is no way to quantify how many jurors lie during voir dire to protect information they deem embarrassing or fail to disclose information responsive to lawyers' questions that they believe is too personal.

Scholars have explored in great depth the incentives for police to evade the exclusionary rule[76] and for cooperating witnesses (typically accomplices) to lie on the witness stand and point the finger at the accused to reduce their own criminal liability.[77] Scholars have also written extensively about the harm to the criminal justice system from prosecutors who overreach and engage in deceit and those who fail to comply with their *Brady* and other obligations, to "do justice."[78] But the literature has neglected the intensifying pressure on jurors to lie and to actively conceal responsive and material information during voir dire.[79] Consider the jury

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[73] Although some scholars have noted this risk in passing, none, to my mind, have acknowledged the severity (and growing pervasiveness) of the problem. *See, e.g.*, Broeder, *supra* note 45, at 510–13 (noting several specific examples of venireperson deception during voir dire); Stephen A. Gerst, *Balancing the Rights of the Public with the Jurors' Right to Privacy During the Jury Selection Process*, 46 CRIM. L. BULL. 1278, 1287 n.39 (citing studies of jurors who failed to disclose that they or family members had been victims of crime); Hannaford, *supra* note 32, at 23; Rousseau, *supra* note 21, at 300–01.

[74] "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." Estes v. Texas, 381 U.S. 532, 543 (1965) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

[75] The Rose Study was not directed at juror dishonesty, but it did reveal relevant information about juror discomfort during voir dire. *See* Rose, *supra* note 21. Juror discomfort about disclosing information seems to explain why most jurors withhold or lie to avoid such disclosures. *See* Broeder, *supra* note 45 (recounting specific instances of juror dishonesty discovered during a 1950s empirical study); Seltzer et al., *supra* note 21 (recounting prior studies).

[76] *See, e.g.*, Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1315 (1994); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 365–66.

[77] Monroe H. Freedman, *The Cooperating Witness Who Lies*, 7 OHIO ST. J. CRIM. L. 739, 739 (2010).

[78] *See generally* ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007) (discussing widespread prosecutorial noncompliance with *Brady* obligations); R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1431 (2011) (recounting several cases in which prosecutors engaged in misconduct by failing to disclose *Brady* material).

[79] In *Voir Dire: Preserving "Its Wonderful Power,"* Barbara Babcock touched on the psychology of potential jurors who decide they want to be selected for a jury. "[S]uch people will evade or misconstrue, unconsciously or deliberately, general voir dire questions [directed to the whole venire] in order to avoid answering and possibly being struck."

questionnaire sent in advance of oral voir dire in the Barry Bonds criminal case charging the professional baseball player with lying and obstruction of justice. The questionnaire began by asking jurors for their names, community, age, gender, and whether they rented, owned a home, or lived in someone else's home.[80] Even these seemingly innocuous questions may be embarrassing to some prospective jurors; for example, a juror who lost his house in a foreclosure, or the juror who is temporarily living in a hotel or a homeless shelter, and the one who seeks to conceal his lost employment, her domestic abuse, or victimization. The Bonds questionnaire also inquired into jurors' marital status, asking each juror to choose between single and never married; divorced, not remarried; widowed, not remarried; married; divorced and remarried; single but living with nonmarital partner.[81] Again, these questions may seem innocuous to many potential jurors, but what about the gay juror who will lose her job if her employer finds out that she is living with a same-sex partner? That juror may be unlikely to tell the truth and expose herself to possible loss of employment for the sake of jury duty.

As with other forms of dishonesty, jury deceit is difficult, if not impossible, to quantify, but the number of anecdotal accounts of jurors who distort and withhold material information is growing.[82] A practicing lawyer, Elliott Wilcox, says that he has proof of the growing problem. In an essay on jury dishonesty, he reports that in five cases he recently tried, he was armed with a criminal history check on every potential juror.[83] The jurors were unaware of the report. In all five cases, jurors were asked if they had ever been arrested or charged with a crime. "[I]n almost every single case, at least one of [the jurors] lied."[84] Once confronted with the record of arrest or conviction, the jurors conceded the truth. One claimed to have forgotten the arrest, even though the arrest landed the juror in jail. Another, who had been convicted of a crime of violence and sentenced to a lengthy jail term, admitted that he did not want to tell the lawyers about his conviction.[85] Wilcox notes that he is not the only one who has uncovered juror dishonesty. He reports that earlier in the year, a multimillion-dollar damages award in a civil case was thrown out and a new trial ordered after the litigants uncovered that three different jurors engaged in dishonesty during voir dire. Two failed to disclose that they had been involved in lawsuits. A third disclosed that she had been involved in a lawsuit

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Babcock, *supra* note 65, at 547; *see also* Broeder, *supra* note 45, at 511 (describing failure of jurors to answer questions during voir dire).

[80] *See* Final Juror Questionnaire at 4, United States v. Bonds, 580 F. Supp. 2d 925 (N.D. Cal. 2008) (No. C 07-00732), *available at* http://www.cand.uscourts.gov/filelibrary/596/304.pdf.

[81] *Id.*

[82] *See supra* note 23 (listing various cases in which jurors lied or withheld material information).

[83] Elliott Wilcox, *Are Jurors Lying to You During the Jury Selection Process?*, TRIALTHEATER.COM, http://www.trialtheater.com/jury-selection/jury-selection-jurors-who-lie.htm (last visited Feb. 23, 2012).

[84] *Id.*

[85] *Id.*

but withheld that she had been a defendant in nine other cases.[86] Indeed, court decisions and newspaper reports are replete with examples of juror dishonesty.[87]

To the extent jurors are engaging in dishonesty, the deception threatens both the perception and the reality of fair criminal prosecutions. Consider the 2006 trial of Christopher McCowen, a black man accused of raping and murdering a white fashion writer on Cape Cod. Following McCowen's conviction, two jurors reported that a fellow juror had made racial comments during deliberations revealing his bias.[88] The juror allegedly said that he "did not like blacks because they cause trouble and that he considered himself white and preferred to socialize with whites."[89] The juror denied making such comments, but a subsequent interview with the juror's great aunt revealed that the juror had made similar comments many times prior to his jury service. According to the aunt, "Billy has

[86] *Id.* Although these instances of dishonesty occurred in a civil case, there is no reason to believe that jurors engage in dishonesty less frequently in criminal cases. In fact, given that criminal cases regularly involve the probing of sensitive topics, it is likely that the pressure on jurors is greater in criminal cases than in civil cases.

[87] *See supra* note 23; *see also* Broeder, *supra* note 45, at 510–15 (noting numerous examples of juror deception, including a juror in a car accident case who had "only recently been disfigured in an auto accident, said nothing" when asked about prior involvement with accidents because she became "too nervous"; another juror, who had previously been compensated by the defendant's company "sat mute when plaintiff's counsel inquired whether anyone had ever had any business . . . dealings with defendant"; another "remained silent when asked whether he had ever been involved in a serious auto accident," although he had been in an accident in which his wife "was hospitalized for weeks and his car totally demolished"; another juror promised to try the case solely on the law and then "spent most of his deliberation time arguing that the 'jury is a law unto itself'"); Steve Gonzalez, *Carr Claims Juror Lied in Motion for New Med Mal Trial*, MADISON ST. CLAIR REC. (Mar. 13, 2007, 12:18 PM), http://madisonrecord.com/issues/305-med-mal/191880-carr-claims-juror-lied-in-motion-for-new-med-mal-trial/ (reporting a lawyer claiming his clients were denied an impartial jury because a juror lied and failed to disclose that he was a defendant in a lawsuit alleging he ran a stop sign and injured others); Annie Sweeney, *Juror Dropped from Federal Civil Trial After Allegations He Lied About His Arrest History*, CHI. TRIB. (Mar. 22, 2011), http://articles.chicagotribune.com/2011-03-22/news/ct-met-jury-background-checks-20110322_1_juror-jury-selection-civil-trial/ (juror removed in the middle of a civil trial seeking damages against the city of Chicago based on allegations of false arrest and police abuse after evidence surfaced that the juror withheld his arrest record during jury selection); *Attorneys: Cop Skipped Jury Duty, Lied on Form*, KDBC.COM (Aug. 18, 2011, 17:13), http://www.kdbc.com/news/attorneys-cop-skipped-jury-duty-lied-on-form/ (alleging that a police officer failed to appear for jury duty after lying on his jury questionnaire when he answered "no" to the question, "Have you ever been party to a lawsuit excluding divorce?" and failed to indicate that he had been recently sued for alleged rape of an arrestee).

[88] Jonathan Saltzman, *Juror's Kin Says He Lied About Bias*, BOS. GLOBE, Jan. 19, 2008, at B1.

[89] *Id.*

talked about black people. . . . He doesn't like black people."[90] She added that he had called them "lazy" and had suggested that "[a]ll they do is rob people, kill them, and deal drugs."[91]

Jurors engage in deception for at least three reasons. Some, like the juror in the McCowen case, lie because they want to be seated and serve on a jury. A second group lies to avoid appearing in response to the jury summons or, after appearing and realizing that jury duty may involve some hardship, tells the trial court of work or family obligations or some other difficulty that requires release from duty. Finally, at least some jurors lie once subject to voir dire out of embarrassment, fear, or nervousness, attempting to protect their privacy and the privacy of those they care about.[92] When litigants aggressively question this third group, they increase the risk that these jurors will hide their true experiences, beliefs, and leanings to avoid discomfort. Unlike lies told by members of group two, lies told by those in groups one and three pose a danger to the accused's constitutional rights. The accused's rights are not jeopardized when jurors deceive to avoid duty altogether, as there is no constitutional right to a particular jury composition.[93] But when jurors fail to disclose information that reflects the jurors' predispositions toward or against guilt in a particular case, the defendant's Sixth Amendment right to an impartial jury is jeopardized. As explained more in Part IV, the juror strike proposed in this Article ameliorates the risks posed by group one and group three's deception.

Juror dishonesty, even if infrequent, is an egregious problem. In fact, lack of juror candor was precisely the prosecutor's concern in *Press-Enterprise*—the Supreme Court's sole pronouncement on juror privacy. There, the State opposed the media's motion to keep the jury voir dire open, "arguing that if the press were present, juror responses would lack the candor necessary to assure a fair trial."[94]

And juror dishonesty is not always grounded in animus. Jurors may withhold relevant and responsive information because they are caught off guard by surprising questions. Although in a slightly different context, in July of 2005, a juror declared that she "c[ould]n't explain why she lied" to a trial judge about buying two newspapers on a morning that she would be part of jury deliberations in a murder case.[95] Lindy Heaster, a retired Pentagon secretary, was found in contempt of court and ordered to pay over $21,000 in restitution after the trial judge declared a mistrial upon learning that Heaster lied about the newspaper purchase.[96] The lawyer for the accused in the underlying criminal case had seen Heaster at a 7-Eleven near the courthouse on the day of jury deliberations and

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[90] *Id.*

[91] *Id.*

[92] *See, e.g.*, *supra* note 23.

[93] Mallett v. Missouri, 494 U.S. 1009, 1011 (1990) (Marshall, J., dissenting) (emphasizing that a defendant has "no right to a jury of any particular racial composition").

[94] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 503 (1984).

[95] Stephanie McCrummen, *Juror Panicked, Lied to Virginia Judge*, WASH. POST, July 6, 2005, at B8.

[96] *Id.*

noticed a newspaper under her arm.[97] Once in court, the judge asked Heaster about the newspaper, but Heaster denied buying a paper, claiming that she bought coffee. The lawyer for the accused later obtained a video from the 7-Eleven and a receipt showing that Heaster had bought *The Washington Post* and *Potomac News*.[98] Heaster's lawyer explained later that Heaster "is not someone who was familiar with the system or sophisticated enough to know that the purchase of the newspapers in and of itself was not the real issue."[99] Before the newspaper lie, Heaster had seemingly been a model citizen. She had retired after thirty-one years serving the Pentagon, the United States Army, and the United States Department of Housing and Urban Development.[100] As far as anyone could tell, Heaster had never violated a law. Arguably, Heaster lied because she was put on the spot in a public courtroom by a judge, and she did not think carefully about the importance of telling the truth and the consequences of telling a lie.

The pressure Heaster faced when asked about buying newspapers pales in comparison to the pressure some jurors feel when asked to answer a question that, when answered candidly, exposes an embarrassing secret, like rape, incest, criminal conviction, or bankruptcy.

Despite the personal (and sometimes incriminating) nature of many voir dire questions, such probing questions are asked every day in courtrooms across the country. Although judges retain wide discretion to limit the breadth of voir dire, they typically permit litigants wide-ranging latitude in choosing questions. Reluctant jurors are sometimes directed to answer under oath and on the record or face contempt charges, which may involve fines and jail.[101] Jurors are not told that they may skip questions, even when the jurors perceive the questions to be too personal, emotionally traumatic, or embarrassing.[102] When citizens enter the courthouse to take part in our criminal justice system, they are treated as if they leave their rights at the courthouse steps.[103] When trial courts fail to respect juror privacy, jurors are pressured to lie and withhold embarrassing facts. That deception, in turn, undermines the accused's ability to learn about juror partiality.

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[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *See* Brandborg v. Lucas, 891 F. Supp. 352 (E.D. Tex. 1995) (hearing a writ of habeas corpus issue in which a potential juror of a capital murder case was held in contempt of court after refusing to answer questions about her income, religious affiliations, and entertainment and media preferences); Bobb v. Mun. Court, 192 Cal. Rptr. 270, 274 (Ct. App. 1983) (hearing appeal of a potential juror who refused to answer questions about her husband's occupation because similar questions were not posed to men in the jury pool).

[102] *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). Jurors are usually told that they may ask for a "private" conference with the judge, the defendant, and the attorneys, if their answers deserve a more private setting. The "private" conference is documented by the court reporter, nonetheless.

[103] *See infra* Part II.

In addition to the threat intrusive voir dire questions pose for the accused's fair trial rights, such questions also risk alienating large numbers of citizens as they participate in the justice process.

2. Intrusive Questions Burden Jury Service

Pressing jurors to answer too many personal questions also burdens the privilege of serving on a jury. Jurors who experience negative feelings about jury service may not appear the next time they are summonsed, and given the large number of jurors called for duty each year, society may lose confidence that the system is fair and workable.[104] As the Supreme Court noted in the context of holding that race-based peremptory strikes violate the Equal Protection Clause:

> [An] overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court . . . . The *voir dire* phase of the trial represents the jurors' first introduction to the substantive factual and legal issues in a case. The influence of the *voir dire* process may persist through the whole course of the trial proceedings.[105]

Because jurors play a key role in our democratic process, it makes no sense to treat them with *less* respect, giving them fewer legal protections than we give other participants in the justice process. If police patrolling a public street posed probing questions like those discussed in Part I.A., to a pedestrian or cyclist, the passerby should feel comfortable walking (or riding) away without saying one word.[106] If the police lawfully arrested someone, reasonably believing that she had committed a crime, the accused would have the added protection of *Miranda* warnings before police asked *any* questions, let alone questions like those posed to many potential jurors.[107] If intrusive questions were put to a witness during a criminal trial or

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[104] One of the reasons given by the Supreme Court in *Press-Enterprise* for public voir dire was to enhance public confidence in the fair operation of government. *See Press-Enterprise*, 464 U.S. at 507–10.

[105] Powers v. Ohio, 499 U.S. 400, 412 (1991) (quoting Gomez v. United States, 490 U.S. 858, 874 (1989)) (internal quotation marks omitted).

[106] *See* Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (holding that a police officer who stops a car on the highway "may ask the detainee a moderate number of questions . . . [b]ut the detainee is not obliged to respond"); Terry v. Ohio, 392 U.S. 1, 33 (1968) (Harlan, J., concurring) (declaring that ordinarily a citizen has a right to "ignore his interrogator and walk away"); *Terry*, 392 U.S. at 34 (White, J., concurring) ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way.").

[107] Miranda v. Arizona, 384 U.S. 436 (1966) (requiring that before a statement is admissible to prove guilt, police must warn a suspect subjected to custodial interrogation that she has a right to remain silent and to the presence of an attorney).

pretrial hearing, one of the litigant-adversaries in the proceeding would be poised to timely "object" to the questions as argumentative or irrelevant and to assert other protective arguments before the witness would be expected to answer.[108] Moreover, the accused in a criminal trial cannot be forced to testify, let alone answer questions.[109] The criminal justice system treats jurors differently. Jurors are simply offered fewer procedural and substantive legal protections than other criminal justice participants. Jurors must answer questions without the benefit of counsel, sans *Miranda* warnings, and with no protective objection from a litigant's attorney.

As Albert Alschuler argued in his article criticizing peremptory challenges, the American criminal justice system has "captured the worst of two worlds, creating burdensome, unnecessary and ineffective jury controls at the front end of the criminal trial while failing to implement badly needed controls at the back end."[110] In explaining the beginning of the trial, Alschuler said: "[W]e subject jurors to lengthy, privacy-invading voir dire examinations, requiring them to answer questions that would be considered inappropriate and demeaning in other contexts."[111] Alschuler is right. As citizens outside the courthouse jurors are protected from such demeaning inquiries, but once inside, both witnesses and suspects enjoy more rights.

Like jurors, witnesses are sometimes summonsed to court—to give testimony linking (or distancing) the accused to (or from) the crime charged. And witnesses, especially victim witnesses, are occasionally asked to reveal embarrassing information. One extreme example occurred in *LaChappelle v. Moran*,[112] a case charging the defendant with attempted rape of his sixteen-year-old daughter. On cross-examination of the daughter, the defense lawyer asked the girl for a definition of the words orgasm and climax.[113] The judge instructed the girl "of her obligation to answer the questions posed by defense counsel."[114] When the girl repeatedly said nothing in response to the questions, the judge called the girl into his chambers for an ex parte conference and, after learning that she did not want to answer the lawyer's questions because of her embarrassment, warned the girl that

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[108] *See* FED. R. EVID. 611(a)(3) (giving the trial judge the power to protect witnesses from "harassment or undue embarrassment"); FED. R. EVID. 402 (declaring that "[i]rrelevant evidence is not admissible"); FED. R. EVID. 403 (stating that when probative value of evidence is "substantially outweighed" by unfair prejudice or similar concerns, trial judge may exclude the evidence).

[109] The Fifth Amendment protects against compelled self-incrimination and prevents the government from forcing the accused to testify. *See* U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . .").

[110] Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 154–55 (1989).

[111] *Id.* at 155.

[112] 699 F.2d 560 (1st Cir. 1983).

[113] *Id.* at 562.

[114] *Id.*

he would dismiss the case if she did not respond in open court.[115] "If you fail to testify—if you fail to give that answer or give an answer, then you leave the Court no alternative but to dismiss the case."[116] Eventually, the witness explained her reluctance to answer: "I meant he come'd."[117] The defense lawyer then concluded his cross-examination of the girl.[118]

Although witnesses are occasionally questioned on such sensitive subjects as in *LaChappelle*, most are not. Moreover, witnesses who are "friendly" to one litigant or the other enjoy tips about the process and how to testify effectively. When the friendly witness testifies, the lawyer for that side leads the witness through her testimony with a direct examination that gives the witness sign posts to help tell her story in a logical and believable way. The justice system even treats "snitch" witnesses—those who agree to testify against the accused in exchange for some sentencing benefit—better than most jurors. The prosecution thoroughly prepares these witnesses. Prosecutors may spend hours or even days rehearsing the tough questions with the snitch witness so that she will be ready to explain her prior crimes, her pending sentence, and refute her incentives to lie about the accused's involvement in the crime. At trial, neither the prosecutor nor the defense attorney's questions are surprises. And even the snitch witness is rarely asked to talk about her sexual orientation, her past sexual abuse, her favorite television shows, her political contributions, bumper stickers, or the like.

Unlike jurors, witnesses also enjoy some protection from the rules of evidence, which bar lawyers from abusive and argumentative questions.[119] For instance, when one lawyer probes deeply with a leading question of "Isn't it true," followed by a demand to reveal an embarrassing fact, the opposing lawyer is usually quick to her feet to stop the witness's answer with, "Objection!" And when a litigant calls a witness to give testimony, there is good reason to believe that the witness will help that litigant's case. Because of the adversarial push and pull of the evidence, the lawyer representing one side or the other has a strong incentive to protect the witness from the disclosure of confidential or privileged communications. Protecting the witness, in turn, protects the lawyer's client.

The adversarial nature of trial gives no comparable protection for juror privacy. Neither the accused nor the prosecutor has a strong incentive to protect a juror from talking too much or from offering information that will give insight into the juror's leanings. One of the only protections jurors enjoy from the adversarial proceedings rests in the lawyer's concern that jurors who are treated badly during voir dire or who watch as others are mishandled will hold a grudge, if seated on the jury. Justice Blackmun relied on this theory in *Press-Enterprise*, arguing that "in most cases, [a juror's interest in privacy] can be fully protected through the interests of the defendant and the State in encouraging his full cooperation."[120]

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[115] *Id.* at 562–63.
[116] *Id.* at 563.
[117] *Id.*
[118] *Id.* at 564.
[119] FED. R. EVID. 611(a).
[120] 464 U.S. 501, 516 (1984) (Blackmun, J., concurring).

Nevertheless, any incentive for lawyers to treat jurors cautiously is lessened substantially because only a few jurors will survive voir dire. If a juror exhibits hostility or dissatisfaction with either side, that juror is virtually certain to be removed from the panel with a peremptory strike. Jurors enjoy no other representation of their rights through the adversarial process. The many examples in Part I.A, in which jurors have been asked exceedingly personal questions, demonstrate this point.[121]

The probing questioning of jurors is perhaps most conspicuous when compared to the justice system's handling of criminal suspects. When the police take a suspect into custody to question her, police are obligated to warn the suspect that anything she says may be used against her to prove her guilt. The suspect is told that she has the right to a lawyer and that she has the right to remain silent.[122] Even suspected criminals who are never arrested enjoy more rights and protections than jurors. These suspects are not entitled to *Miranda* warnings, which are triggered by "custodial interrogation,"[123] but they remain free to tell the police that they think the questioning is too personal. The government may not legally force such suspects to talk.[124]

Similarly, when police believe that they have good reason to invade someone's home or car to search for contraband, or to listen in on a private conversation via a wire tap, the police are forced to seek prior judicial approval for their intrusions with a written application supported by sworn law enforcement testimony explaining why the intrusion is reasonable.[125] Granted, in the voir dire situation, the trial judge is present to screen questions that become too intrusive, but the process is more laissez-faire, often developing as the lawyer thinks of follow-up questions. Additionally, the standard the judge uses to evaluate the propriety of a question is relevance, meaning that the question is appropriate if it bears "any tendency" to show juror bias—a heavily discretion-dependent standard that favors any and all questions.[126] The trial judges' virtually unbridled discretion is also subject to no real appellate review. Although a juror technically could appeal from a judge's ruling on the propriety of a question, the juror would have to be unusually sophisticated to mount such an appeal and would win nothing of substance should she prevail. By the time the appellate court declared that the trial judge should have protected the juror from a question, the trial would have concluded.

Like a juror excluded because of her race, a venireperson excluded after having been forced to reveal intensely personal and sensitive information may

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[121] *See supra* notes 48–53 and accompanying text.

[122] Miranda v. Arizona, 384 U.S. 436, 467–68.

[123] *Id.* at 439, 444.

[124] *See* Dunaway v. New York, 442 U.S. 200, 210 n.12 (1979); Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring).

[125] Omnibus Crime Control and Safe Streets Act of 1968, tit. 3, 18 U.S.C. §§ 2516–18 (2006).

[126] FED. R. EVID. 401.

"suffer[] a profound personal humiliation heightened by its public character."[127] Also like the juror struck for her race, the juror who is embarrassed before her removal from the venire "may lose confidence in the court and its verdict."[128] But unlike the juror who suffers a race-based peremptory strike, who may find an advocate in the opposing counsel, the juror who seeks to protect her privacy will be left to assert her own rights and pursue her own appeal or seek other legal protection.

As the Supreme Court has recognized, "The barriers to a suit by an excluded juror are daunting."[129] Jurors have little or no chance to be heard on objections to the lawyers' voir dire questions during the questioning period.[130] They cannot easily obtain declaratory or injunctive relief when they are treated improperly or forced to answer abusive or irrelevant questions, because it will be virtually impossible for the juror to show that the abuse will recur.[131] There are numerous "practical barriers" to such a suit too.[132] A juror would have to represent herself or hire a lawyer. Because of the small financial stake, it is unlikely that she would convince a lawyer to take the case on a contingency fee basis. And because the parameters of jurors' rights to privacy are debatable,[133] lawyers might well decide that the low likelihood of any recovery weighs against taking the case. As with the juror who is struck for race-based reasons, a juror whose privacy has been infringed during voir dire will probably "leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights."[134] As Alschuler said of jurors who suffer race and gender-based peremptory strikes:

> Although an unusually assertive juror might demand a hearing on the propriety of his or her exclusion, the predictable judicial response would be one of rejection—probably one of astonished rejection. The court would reply that a juror may not interrupt an ongoing criminal proceeding to demand a hearing simply because the juror's own rights may have been violated. In accordance with customary practice, jurors should speak only when spoken to.[135]

Aschuler has also argued, "Once a jury has been empaneled, the violation of an excluded juror's rights is complete, and no remedy can prevent the wrong. In the

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[127] Powers v. Ohio, 499 U.S. 400, 413–14 (1991).
[128] *Id.* at 414.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 415 (citing Los Angeles v. Lyons, 461 U.S. 95, 105–10 (1983)).
[132] *Id.*
[133] *See* discussion *infra* Part II.
[134] *Powers*, 499 U.S. at 415; Alschuler, *supra* note 110, at 193–95.
[135] Alschuler, *supra* note 110, at 194.

unlikely event that an excluded juror sought a remedy . . . she would fail. It plainly would be too late . . . ."[136]

While jurors play a critical role in our system of criminal justice, the current voir dire process poses significant risks to our constitutional scheme, including the jury's civic right to participate in our democratic process. Jurors are treated as though their rights are left behind at the courthouse door. Thus, increasingly, public, probing voir dire burdens the constitutional protections afforded the accused and alienates some citizens who participate in the democratic process of justice.

II. JURORS ENJOY LEGAL RIGHTS

This Part first establishes that jurors retain some legal protections during voir dire before turning to the more debatable subject of privacy rights and, in particular, the privacy rights of jurors. Although the harsh treatment some jurors receive during voir dire might suggest otherwise, potential jurors do retain legal rights throughout the voir dire process. *Batson v. Kentucky*[137] and its progeny establish undeniably that jurors keep their equal protection rights,[138] for example. In *Batson*, the prosecutor used his peremptory strikes to remove all four black jurors on the venire, and an all-white jury was selected.[139] The defendant in the case objected.[140] The Supreme Court held that jurors suffer a violation of equal protection when excluded from the privilege of jury service because of race.[141] Subsequent decisions extended the *Batson* holding to gender and national origin.[142] Jurors subjected to such discriminatory exclusion "have the legal right to bring suit on their own behalf."[143] As the Court noted in condemning such race-based strikes,

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[136] *Id.*

[137] 476 U.S. 79 (1986).

[138] *Id.* at 84.

[139] *Id.* at 82–83.

[140] *Id.*

[141] *Id.* at 88; Powers v. Ohio, 499 U.S. 400, 406 (applying the holding in *Batson*, and explaining, "[A] prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large") (citing *Batson*, 476 U.S. at 87).

[142] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128–29 (1994) (prohibiting gender discrimination in peremptory strikes); Hernandez v. New York, 500 U.S. 352, 355 (1991) (applying the three-step *Batson* process to determine whether jurors were struck because they were Latino).

[143] *Powers*, 499 U.S. at 414. Nevertheless, the barriers to such a suit are "daunting." *Id.* Similarly, a prospective juror who refuses to participate in voir dire because of a sincere religious belief that she may not sit in judgment of others may not be held in contempt. *In re* Jemison, 375 U.S. 14, 14 (1963) (vacating a Supreme Court of Minnesota opinion affirming a contempt charge for a juror who refused to participate in voir dire because of her religious beliefs); *see also* Bobb v. Mun. Court, 192 Cal. Rptr. 270, 277 (Ct. App. 1983) (concluding that in California a juror may not be held in contempt of court for refusing to give her spouse's occupation when male prospective jurors were not asked to

practices that "cast[] doubt on the integrity of the judicial process" simultaneously "place[] the fairness of a criminal proceeding in doubt."[144] Because all too often the parties in criminal cases unduly invade prospective jurors' privacy while attempting to uncover potential bias, this probing, in the aggregate, pressures jurors to lie and to withhold information about their beliefs and prejudices, also casting doubt on the fairness of criminal proceedings. As with peremptory strikes that rest on the color of a juror's skin or her gender, unduly infringing on juror privacy "damages both the fact and the perception" of the jury's role—that of "a vital check against the wrongful exercise of power by the State and its prosecutors."[145]

Perhaps because protecting juror privacy protects the integrity of the justice system, in *Press-Enterprise* the Supreme Court described jury privacy as a "compelling interest."[146] But, the dicta from that same decision, as well as the Supreme Court's privacy jurisprudence generally, leave a juror's privacy rights uncertain.[147] The next section addresses the Court's privacy jurisprudence generally before considering juror privacy.

A. Privacy Rights, Generally

The uncertain status of juror privacy begins with the Supreme Court's reluctance to define such rights in contexts outside of voir dire. Recently, in *National Aeronautics & Space Administration v. Nelson*,[148] a majority of the Court declined to confirm that *anyone* can claim constitutional protection for private information.[149] In *Nelson*, the Court was asked to declare that a government background check of federal contractors violated the employee's constitutional rights to privacy.[150] The federal contractors of NASA's Jet Propulsion Laboratory were not subjected to background checks when hired, but then-President George W. Bush directed that uniform policies be adopted for federal employees and federal civil servants.[151] As part of the new policy, contract employees were required to undergo an extensive background check.[152] The Court refused to decide

give their spouses' occupations). Courts have yet to decide if jurors may refuse to answer voir dire questions on nonreligious grounds, such as "principle."

[144] *Powers*, 499 U.S. at 411 (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)).

[145] *Id.*

[146] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511 (1984).

[147] *Id.* at 514 (Blackmun, J., concurring) ("We need not decide . . . whether a juror, called upon to answer questions posed to him in court during voir dire, has a legitimate expectation, rising to the status of a privacy right, that he will not have to answer those questions.") (citing Nixon v. Adm'r of Gen. Servs, 433 U.S. 425, 458 (1977), and Whalen v. Roe, 429 U.S. 589, 599 (1977)).

[148] 131 S. Ct. 746 (2011).

[149] *See id.* at 751. Justice Alito wrote for the majority. Joining him were Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Justices Scalia and Thomas concurred in the judgment. Justice Kagan took no part in the decision.

[150] *Id.*

[151] *Id.* at 752.

[152] *Id.* at 752–53.

the employees' claim that they held a constitutionally protected right to information responsive to questions asked in the background check, stating: "In two cases decided more than 30 years ago, this Court referred broadly to a constitutional privacy 'interest in avoiding disclosure of personal matters.' . . . We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*."[153]

The Court raised doubts about informational privacy in *Nelson*, but the doubts are not new. There has been a long-running debate on the Court about privacy rights. Because a "right to privacy" is not expressly mentioned in the Constitution, for decades members of the Court and constitutional law scholars have questioned the source and reach of such a right.[154] The Court's decision in *Griswold v. Connecticut*[155] is often a starting point for the discussion. That decision suggests at least six potential constitutional sources for privacy. Writing for the Court, Justice Douglas identified five.[156] In his words, "Various [constitutional] guarantees create zones of privacy."[157] Justice Douglas noted the First,[158] Third,[159] Fourth,[160] Fifth,[161] and Ninth Amendments[162] as creating some privacy protection. Justice Goldberg, concurring, suggested that rather than originating with any one particular

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[153] *Nelson*, 131 S. Ct. at 751. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Court recognized an individual's interest in avoiding the disclosure of personal matters but did not find the rights of the plaintiffs' privacy infringed. *Id.* at 599–600, 605. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), former President Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act in an effort to protect from disclosure papers and tape recordings created during his presidency, but the Court denied protection. *Id.* at 605. While the Court's majority in *Nelson* skirted the informational privacy issue, Justices Scalia and Thomas were ready to deny such privacy rights outright. *See Nelson*, 131 S. Ct. at 763–64. They wrote separately, "A federal Constitutional right to 'informational privacy' does not exist." *Nelson*, 131 S. Ct. at 764 (Scalia, J., concurring).

[154] *See, e.g.*, *Whalen*, 429 U.S. at 598 (debating and discussing "two different" privacy interests); Roe v. Wade, 410 U.S. 113, 129, 152 (1973) (discussing the historical, individual right of privacy in the context of a woman's choice to terminate her pregnancy).

[155] 381 U.S. 479 (1965).

[156] *Id.* at 484–85. The numerous concurring opinions showed a wide divide in the Court's reasoning.

[157] *Id.* at 484.

[158] *Id.* ("The right of association contained in the penumbra of the First Amendment is one . . . .").

[159] Prohibiting the quartering of soldiers in any house "is another facet of" privacy. *Id.*

[160] *Id.* at 485. The Fourth Amendment creates a right of privacy "no less important than any other right carefully and particularly reserved to the people." *Id.* (citing Mapp v. Ohio, 367 U.S. 643, 656 (1961)).

[161] *Id.* at 484 ("The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.").

[162] *Id.* (internal quotation marks omitted) (citing U.S. CONST. amend IX) ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

constitutional source, "the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'"[163] Justice Harlan, on the other hand, pinpointed the Due Process Clause as the substantive source of privacy protection.[164] Justice White looked to the Due Process Clause too, but believed that protection for privacy turned on procedural, rather than substantive, process.[165]

Although the *Griswold* decision demonstrates disagreement about the specific constitutional source of a right to privacy, it expressly recognized privacy protection. But *Griswold* offers only limited insights for the juror privacy debate. *Griswold* considered married couples' rights to make decisions about the use of contraceptives, a matter related to personal decision making in the bedroom. Although truthful answers to voir dire questions may expose the use of contraception or similar practices bearing on jurors' sexual intimacy, the voir dire process requires a post-hoc review of such practices. Discussing such practices after the fact arguably does not burden a personal choice as heavily or directly.

Perhaps in recognition of the material differences in types of privacy, in cases following *Griswold*, the Court has divided the issues into two broad categories: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[166] The Court has never categorized juror privacy using those terms, but given the options, privacy for jurors during voir dire fits most comfortably within the first category, informational privacy.

The model precedent for informational disclosure privacy is *Whalen v. Roe*,[167] cited with some skepticism in *Nelson*. In *Whalen*, the Supreme Court expressly recognized an individual's "interest in avoiding disclosure of personal matters," but, as in the decision-making and jury-privacy contexts, it failed to define the coverage of such rights.[168] In fact, although it specifically acknowledged such a

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[163] *Id.* at 494 (Goldberg, J., concurring).

[164] *Id.* at 500 (Harlan, J., concurring).

[165] *Id.* at 502 (White, J., concurring).

[166] Whalen v. Roe, 429 U.S. 589, 598–99 (1977) (citation omitted). As Justice Stevens noted in *Whalen*, Philip Kurland identified three facets of a constitutional right of privacy: (1) "the right of the individual to be free in his private affairs from governmental surveillance and intrusion," (2) "the right of an individual not to have his private affairs made public by the government," and (3) "the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." *Id.* at 600 n.24 (citing Philip B. Kurland, *The Private I: Some Reflections on Privacy and the Constitution*, U. CHI. MAG. 7, 8 (1976)); *see also* Nat'l Aeronautics & Space Admin. v. Nelson, 131 S. Ct. 746, 755 (2011) (citing *Whalen*, 429 U.S. 589) (noting that cases characterized as protecting privacy involve at least two kinds of interests: an interest in avoiding disclosure of personal matters and an interest in making certain kinds of important decisions).

[167] 429 U.S. 589.

[168] *See id.* at 599–602. Justice Stewart, concurring, asserted that "there is no 'general constitutional right to privacy.'" *Id.* at 607–08 (Stewart, J., concurring) (quoting Katz v. United States, 389 U.S. 347, 350 (1967)); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 977 (7th ed. 2004) ("The Supreme Court has not yet

privacy interest, the Court did not extend privacy protection to the plaintiffs—physicians and patients who challenged a New York statute requiring doctors to give a copy of prescriptions for certain drugs to the state's department of health.[169] In addition to revealing other information, the prescriptions identified the prescribing doctor, the drug, and the name, address, and age of each patient.[170] The Court in *Whalen* was convinced that privacy was not infringed too much because the statute required the government recipients to protect the information from further disclosure, including keeping the prescriptions in a locked room.[171]

As in *Nelson* and *Griswold*, the *Whalen* decision exposed disagreement within the Court about the origin of a right of privacy. A majority in *Whalen* said, but did not hold, that a right to protect information from disclosure "arguably has its roots in the Constitution."[172] Where exactly that right can be found in the Constitution was left unanswered. Justice Brennan, concurring in *Whalen*, agreed that the Constitution offered protection for individual privacy against extensive governmental data collection.[173] On the other hand, Justice Stewart[174] said that aside from Fourth Amendment privacy, the Constitution provides no such right.[175]

Thus, over thirty years ago, the Supreme Court started an intense debate about whether the Federal Constitution provides privacy protection and if so, the reach of the protection. That debate is ongoing and has implications for protecting jurors from questions probing their biases and beliefs.

B. Juror Privacy

The Court's ongoing debate about privacy rights leaves jurors' privacy in doubt. The one Supreme Court decision addressed to jury privacy did little to clarify the area of law. Though the Court has recently reiterated that "sometimes there [will be] exceptions to [the] general rule" of public voir dire,[176] a Court majority has failed to explain whether juror privacy can provide such an exception and, if so, when. In dicta, the Court has made reference to jurors' important, indeed "compelling," privacy interests. In *Press-Enterprise*, the majority opinion stated: "The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal

held that the right to privacy limits governmental powers relating to the collection of data concerning private individuals.").

[169] *Whalen*, 429 U.S. at 593–95, 599–600.

[170] *Id.* at 593.

[171] *Id.* at 593–94, 605.

[172] *Id.* at 605.

[173] *See id.* at 606–07 (Brennan, J., concurring).

[174] *Id.* at 607–09 (Stewart, J., concurring).

[175] *Id.*; *see also* NOWAK & ROTUNDA, *supra* note 168, at 978 n.13, 979 n.14 (describing the Supreme Court's failure to decide issues of "privacy regarding personal data" and citing specific examples such as *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974)).

[176] *See* Presley v. Georgia, 130 S. Ct. 721, 724 (2010).

matters that person has legitimate reasons for keeping out of the public domain."[177] The Court explained further:

> [A] prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode. The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.[178]

Although the Court in *Press-Enterprise* appeared to accept that jurors hold a compelling interest in privacy, as Justice Blackmun indicated in his concurring opinion, the Court did not delineate "the asserted 'right to privacy of the prospective jurors.'"[179] In fact, *Press-Enterprise* did not require *any* analysis of juror privacy. The Court granted certiorari on the limited issue of whether the guarantees of public proceedings in criminal trials extend to the voir dire stage of a case.[180] The majority assumed that jurors "had protectible privacy interests in some of their answers."[181]

Unlike the majority, Justice Blackmun was concerned that protecting juror privacy would disrupt trial court proceedings. On this point, he wrote:

> I am concerned that recognition of a juror's privacy "right" would unnecessarily complicate the lives of trial judges attempting to conduct a *voir dire* proceeding. Could a juror who disagreed with a trial judge's determination that he had no legitimate expectation of privacy in certain information refuse to answer without a promise of confidentiality until some superior tribunal declared his expectation unreasonable? Could a juror ever refuse to answer a highly personal, but relevant, question, on the ground that his privacy right outweighed the defendant's need to know?[182]

Justice Blackmun concluded that in most cases, a juror's interest in privacy will be "protected through the interests of the defendant and the State in encouraging [the

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[177] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511 (1984). *Press-Enterprise* did not require analysis of juror privacy. The Court granted certiorari on the limited issue of whether the guarantees of public proceedings in criminal trials extend to the voir dire examination of potential jurors. *Id.* at 503. The Court majority assumed that jurors "had protectible privacy interests in some of their answers," probably because the trial court had relied, in part, on that justification in closing a significant portion of the voir dire proceedings. *Id.* at 513.

[178] *Id.* at 512.

[179] *Id.* at 514 (Blackmun, J., concurring).

[180] *Id.* at 503 (majority opinion).

[181] *Id.* at 513; *see id.* at 510.

[182] *Id.* at 515 (Blackmun, J., concurring).

juror's] full cooperation."[183] The Court has never returned to this issue of protecting juror privacy and has never rejected Justice Blackmun's view. But modern voir dire establishes that whatever privacy rights a juror has during the voir dire stage of a public trial, those rights are rarely guarded by the adversarial nature of the proceedings or by the litigants' interests in encouraging juror cooperation.[184]

Like Justice Blackmun, Justice Marshall wrote separately in *Press-Enterprise* "to stress that the constitutional rights of the public and press to access to all aspects of criminal trials are not diminished in cases in which 'deeply personal matters' are likely to be elicited in *voir dire* proceedings."[185] In Justice Marshall's view, "Only in the most extraordinary circumstances can the substance of a juror's response to questioning at *voir dire* be permanently excluded from the salutary scrutiny of the public and the press."[186] Justice Marshall did not provide an example of sufficiently extraordinary circumstances. But Justices Blackmun and Marshall did not express these doubts about juror privacy in a case with benign facts. The *Press-Enterprise* case involved "the rape and strangulation killing of a fifteen year old white schoolgirl on her way to school, by a black man twenty-six years of age, with a prior conviction of forcible rape on an adolescent [C]aucasian girl."[187]

One writer argued when analyzing *Press-Enterprise*:

> [T]he Court has placed not merely its finger, but its entire weight on the scales to tip the balance in the direction that will best preserve the defendant's right to a fair trial. This bias in favor of the defendant's sixth amendment right is firmly established by the Court's language in the line of decisions culminating in *Press-Enterprise* and by the policy underpinnings for protection of the public right of access to criminal proceedings.[188]

The author concluded, "[T]he Court implies that any privacy interest [of jurors] will be subordinated in deference to the defendant's right to a fair trial."[189] This idea that juror privacy competes with an accused's right to a fair trial and impartial jury, and is necessarily subordinate, may have begun with the dicta from *Press-Enterprise*, but it continues to permeate the scholarly literature and decisions from the lower courts. Trial courts routinely require jurors to answer probing

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[183] *Id.* at 516.

[184] *See* discussion *supra* Part I.B.1.

[185] *Press-Enterprise*, 464 U.S. at 520 (Marshall, J., concurring).

[186] *Id.* at 520–21.

[187] *Id.* at 521 n.1.

[188] Michael P. Malak, Note, *First Amendment—Guarantee of Public Access to Voir Dire*, 75 J. CRIM. L. & CRIMINOLOGY 583, 600–01 (1984).

[189] *Id.* at 601.

questions, concluding that the rights of the accused and the public require the subordination of the privacy interests of jurors.[190]

A majority of the Supreme Court has never suggested that either Justice Blackmun or Justice Marshall was correct—that recognizing juror privacy would unduly complicate the smooth trial process or that jurors should be protected only in the most extraordinary circumstances. But neither has the Court specifically held that jurors enjoy privacy rights during voir dire or that jurors' rights are on the same footing as the accused's rights or the rights of the public. As a consequence of the Court's failure to delineate the privacy rights of prospective jurors, trial courts have stressed the interests of the litigants (especially the rights of the accused) and the interests of the public, at the expense of jurors' privacy interests.[191] This litigant-focused analysis burdens the democratic privilege of jury service, a significant cost to justice. But more importantly, it encourages jurors to engage in dishonesty by pressuring them to answer personal questions on the record, in front of other jurors and spectators. Encouraging juror dishonesty has the perverse result of burdening the accused's Sixth and Fourteenth Amendment rights, rather than supporting them. Juror dishonesty during voir dire creates a significant risk that the accused will glean a distorted view of juror biases, undermining the likelihood that she will select an impartial jury. Thus, jeopardizing jurors' interests in privacy not only harms the individual juror and the integrity of the jury selection process, but it also tends to compromise the accused's constitutional rights.

III. REENVISIONING JURORS' PRIVACY AS A COMPLEMENT TO THE ACCUSED'S RIGHTS

Despite the Supreme Court's failure to delineate a juror's privacy rights and the Court's murky privacy jurisprudence generally, a majority of legal scholars have concluded that jurors enjoy privacy "interests," if not rights, during voir

[190] *See* discussion *supra* Part I.B.1; *see also* Presley v. Georgia, 130 S. Ct. 721, 724 (2010) ("The right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." (quoting Waller v. Georgia, 467 U.S. 39, 45 (1984))); United States v. Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991) (showing that as long as the trial court protects the defendant's fundamental rights, it may use anonymous jury to protect jurors); Commonwealth v. Angiulo, 615 N.E.2d 155, 171 (Mass. 1993) (finding that trial court erred by closing voir dire for sensitive questions); State v. Strode, 217 P.3d 310, 316 (Wash. 2009) (same); Weinstein, *supra* note 48, at 16 (noting that trial courts have "frequently upheld questioning on . . . sensitive matters," such as "religious affiliation").

[191] *See Press-Enterprise*, 464 U.S. 501; *Strode*, 217 P.3d 310; State v. Banks, No. 60153-9-I, 2010 WL 5464742 (Wash. Ct. App. Dec. 20, 2010). Not uncommonly, a convicted defendant later wins a new trial based on such closure. *See, e.g.*, *Banks*, No. 60153-9-I, 2010 WL 5464742.

dire.[192] In addition to legal scholars who believe that jurors enjoy constitutional or other legal protections for their privacy, a few courts have found such protection.[193] Courts and scholars alike have, nevertheless, uniformly viewed the juror's interest in privacy and the accused's interest in a fair trial and impartial jury as conflicting. While most scholars concur that prospective jurors are entitled to some privacy, they also agree that privacy requires further analysis of the interplay between the defendant's right to a fair trial and the juror's need for protection.[194]

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[192] Although not directed to juror privacy, Samuel Warren and Louis Brandeis argued in a *Harvard Law Review* article in 1890 that the common law gave each individual a right to privacy to "determin[e], ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." Warren & Brandeis, *supra* note 16, at 198; *see also* Michael R. Glover, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708, 711 (1982) ("*Whalen* and *Nixon* thus establish that an individual has a constitutional right to privacy that protects him from the compelled disclosure of personal matters with respect to which he has a reasonable expectation of privacy."); Hannaford, *supra* note 32, at 20 (noting that while a detailed discussion of case law of juror privacy is outside the article's scope, "[s]uffice it to say that the general rule is that jurors do have a qualified right to privacy"); Marc O. Litt, *"Citizen Soldiers" or Anonymous Justice: Reconciling the Sixth Amendment Right of the Accused, the First Amendment Right of the Media and the Privacy Right of Jurors*, 25 COLUM. J.L. & SOC. PROBS. 371, 372 n.8 (1992) (asserting that the Supreme Court first recognized privacy rights of jurors in *Press-Enterprise*, 464 U.S. 501); Weinstein, *supra* note 48, at 9 (concluding after a discussion of *Whalen v. Roe*, 429 U.S. 589 (1977), *Press-Enterprise*, 464 U.S. 501, and *Batson v. Kentucky*, 476 U.S. 79 (1986), that "jurors have a constitutionally protected right against disclosure of private information"); Sara Zweig, *Medical Privacy and Voir Dire: Going Beyond Doctor and Patient*, DCBA BRIEF (April 2010), http://www.dcbabrief.org/vol220410art1.html (citing Michael Glover's comment and asserting that an individual has a right to privacy under the Fourteenth Amendment and that jurors do not lose their reasonable expectation of privacy when serving as jurors). *But see* Karen Monsen, *Privacy for Prospective Jurors at What Price? Distinguishing Privacy Rights from Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases*, 21 REV. LITIGATION 285, 288, 291, 295 (2002) (asserting that there is no constitutional right to privacy and describing Michael Glover's assertion that there is such a right as "flawed," but arguing that "jurors have privacy interests in certain matters").

[193] Brandborg v. Lucas, 891 F. Supp. 352, 356 (E.D. Tex. 1995); People v. James, 710 N.E.2d 484, 498 (Ill. App. Ct. 1999).

[194] *See, e.g.*, Glover, *supra* note 192, at 712–23 (arguing that courts should balance the rights of jurors against the rights of parties); Litt, *supra* note 192, at 373–74 (analyzing how the competing interests interact); Malak, *supra* note 188, at 601 (arguing that the Court in *Press-Enterprise* implied that "any privacy interest will be subordinated in deference to the defendant's right to a fair trial"); Zweig, *supra* note 192, at 16 ("Protection of juror privacy is important. But it must be balanced against a defendant's Sixth Amendment rights."); *North Dakota Supreme Court Review*, 85 N.D. L. REV. 503, 513 (2009) ("[T]he public and media have a presumptive right of access to juror questionnaires that is not absolute and that must be balanced against both a defendant's right to a fair trial and jurors' privacy interests.").

Because the Supreme Court has failed to explain how juror rights fit together with the accused's rights and the public's rights to an open proceeding,[195] trial courts—like scholars—have uniformly viewed the rights of jurors as subordinate to, and competing against, the other sets of rights.[196] The *Press-Enterprise* decision is probably responsible for this misguided conclusion. In *Press-Enterprise*, the government sought to exclude the public and press from voir dire of potential jurors, concerned that voir dire with the media present would result in juror responses that "lack the candor necessary to assure a fair trial."[197] The trial judge closed the voir dire to the public except for approximately three days.[198] When the media sought the transcript of the voir dire, counsel for the defense argued against release, citing juror privacy.[199] The government joined the defense's argument, noting that jurors had answered questions "under an 'implied promise of confidentiality.'"[200]

In the Supreme Court's later reversal of the California appellate court's denial of the media's writ of mandate to compel the trial court to release a transcript of voir dire, the Supreme Court emphasized the rights of "adversaries"—the accused and the prosecution—as well as the rights of the public to access public trials over the rights of the prospective jurors.[201] The Court explained further:

> [H]ow we allocate the "right" to openness as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial. No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.[202]

Elsewhere in *Press-Enterprise*, the Court said, "Where the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and

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[195] At best, the Court's decision in *Press-Enterprise* suggested that jurors' privacy interests should be evaluated in comparison to the public and accused's rights. *See Press-Enterprise*, 464 U.S. at 512 (stating that interests of prospective jurors "must be balanced against" other values).

[196] *See, e.g.*, Galjour v. Rodrigue, No. 10-704, 2011 WL 1750677, at *6–7 (E.D. La. 2011); *Brandborg*, 891 F. Supp. at 356 ("The search for an impartial juror is a balancing effort by the court between the competing parties, the public and the potential juror."); State v. Applegate, 259 P.3d 311, 317 (Wash. Ct. App. 2011) ("[T]he [court has a] constitutional obligation to balance a defendant's right to a public trial and a juror's privacy interest[s] . . . .").

[197] *Press-Enterprise*, 464 U.S. at 503.

[198] *Id.*

[199] *Id.* at 504.

[200] *Id.*

[201] *Id.* at 505.

[202] *Id.* at 508.

is narrowly tailored to serve that interest."[203] Even though the trial judge had closed voir dire to protect juror privacy and the defense had argued against release of a transcript of the closed portions, the Supreme Court focused on the public's right to access and on the litigants' right to information.[204]

> The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters . . . . [but] [t]he privacy interests of such a prospective juror must be balanced *against* the historic values we have discussed and the need for openness of the process.[205]

While the Court's reference to jurors' privacy interests has led trial courts to conduct a multi-interest balancing analysis to determine whether and how to protect juror privacy, the Supreme Court's subsequent cases and the lower courts' interpretation of *Press-Enterprise* have also resulted in the perception that juror privacy necessarily and consistently competes against, and becomes subordinate to, the accused's interests in a fair trial and an impartial jury.[206] This approach fails to account for the impartial jury's critical role in a defendant's fair-trial right. As the Court has acknowledged in other contexts, the guarantee of a public trial is "created for the benefit of the defendant."[207]

Scholars, too, have viewed juror privacy as a minor factor of several in a balance of pertinent interests. For example, Professor Joseph Colquitt has argued that:

> There are four facets to an appropriate balancing of the rights and interests [of jurors]. First, the court's action is limited by its authority. Second, the court must address and uphold the rights of the parties . . . . Third, the court must consider and protect the rights of the public and the press. Fourth, the court must weigh and preserve the rights of the jurors.[208]

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[203] *Id.* at 510 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–07 (1982)).

[204] *See id.*

[205] *Id.* at 511–12 (emphasis added).

[206] *See supra* notes, 190–191, 195–196 and accompanying text.

[207] *See* Waller v. Georgia, 467 U.S. 39, 46 (1984) (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)) (considering whether the accused's rights under the Sixth Amendment extended to the closure of a suppression hearing); *see also* Sheppard v. Maxwell, 384 U.S. 333, 333–34 (1966) (pervasive and prejudicial publicity that accompanied accused's prosecution for wife's murder violated his right to a fair trial guaranteed by the Due Process Clause); Litt, *supra* note 192, at 375 (noting that the accused's right to a fair trial "outranks the media's First Amendment right of access").

[208] Colquitt, *supra* note 53, at 46.

David Weinstein has said that "jurors have a constitutionally protected right against disclosure of private information," adding that the "scope of this right can only be gauged . . . when viewed in conjunction with other interests at stake during trial."[209] According to Weinstein, "The right to trial by an impartial jury and the public's First Amendment right of access to the courts narrow the protections that can be given to jurors against inquiry into, and dissemination of, information on their personal lives."[210]

Similarly, Scott Sholder argues that when courts decide whether the press may access the names, identities, and addresses of potential and seated jurors, they "weigh and balance the First Amendment rights of the press, the Sixth Amendment rights of the defendant, the privacy concerns of the jurors, and numerous policy considerations."[211] Sholder views the weight of each interest differently, depending on the stage of the case. Before the trial starts, Sholder gives the press's interests less significance and the accused and jurors' rights more weight.[212] According to Sholder, the relative interests shift during the trial.

Like Sholder, Marc Litt views the weight of the balance of interests differently pretrial than during trial. Litt sees the rights as flexible, not stagnant: "[T]he accused's right to a fair trial reigns supreme prior to trial, the media's right of access to the identities of jurors increases in weight as the trial progresses."[213] As with other scholars and the courts, Litt has also described the various interests as in tension with each other: "Over the past twenty-five years, the Sixth Amendment right of an accused to a fair criminal trial, the First Amendment right of the media to gather and publish news and the privacy right of jurors have come into increasing conflict."[214]

Although courts and scholars alike have typically viewed the accused's constitutional rights and jurors' privacy rights as an either-or proposition, the growing risk of juror dishonesty during voir dire reveals the flaw in this understanding. As Weinstein noted in *Protecting a Juror's Right to Privacy*, "[T]he protection of a defendant's right to an impartial jury is not always in conflict with a juror's privacy rights."[215] Indeed, this Article contends that

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[209] Weinstein, *supra* note 48, at 9 (penning his article, as a law clerk to United States District Court Judge Charles S. Haight, Jr.); *see also* Litt, *supra* note 192, at 389 (noting that while the public has a "qualified right of access to such basic information about the administration of justice, this right may sometimes be overcome by a defendant's Sixth Amendment right to a fair trial, or even by a juror's right to privacy").

[210] Weinstein, *supra* note 48, at 50.

[211] Scott J. Sholder, *"What's in a Name?": A Paradigm Shift from* Press-Enterprise *to Time, Place, and Manner Restrictions When Considering the Release of Juror-Identifying Information in Criminal Trials*, 36 AM. J. CRIM. L. 97, 99 (2009). When he authored this article, Mr. Sholder was a law student at Seton Hall Law School.

[212] *Id.* at 106–09.

[213] Litt, *supra* note 192, at 373. Mr. Litt was a student at Columbia Law School when he authored this article.

[214] *Id.* at 371.

[215] Weinstein, *supra* note 48, at 11.

jurors' privacy interests are a necessary complement of the defendant's Sixth Amendment rights.

When scholars and courts view the rights of the accused and the rights of jurors as in conflict, jurors' interests in privacy are necessarily treated as subordinate. Weinstein explained: "An individual's right to refrain from revealing personal information is well-entrenched in constitutional jurisprudence . . . . [but] in current jury selection practice, this right is often made secondary to the parties' desire for information from prospective jurors . . . ."[216] Weinstein acknowledged that "the constitutional rights of jurors on voir dire are intertwined with the rights of the public and criminal defendants to be present at the proceedings or to be able to obtain information disclosed therein."[217] This Article takes an even stronger position, arguing that respecting juror privacy is a necessary component of protecting the defendant's right to an impartial jury and fair trial.

The accused's Fourteenth Amendment right to a fair trial and her Sixth Amendment guarantee to an impartial jury are undermined when jurors are pressured to lie or withhold information: "[T]he chief function of our judicial machinery is to ascertain the truth."[218] As the Court noted in *Estes v. Texas*,[219] when evaluating the impact of televising criminal trial proceedings, "[e]mbarrassment may impede the search for the truth."[220] Although the Court in *Estes* was referring to the quality of witness testimony, the same holds true when potential jurors are embarrassed by voir dire questions. When jurors feel nervous or embarrassed, they often withhold information or provide false responses material to their biases.[221] When jurors withhold and deceive during voir dire, rather than striking jurors based on their actual and perceived biases, criminal defendants may select jurors whose real biases are hidden and distorted.[222] Thus, an accused's right to an impartial jury is thwarted when she is prevented from posing questions that will reveal relevant juror bias but also when the judge allows the litigants to probe a juror's secrets so aggressively that the juror hides or distorts her true leanings. In both instances, the accused's constitutional rights are placed in doubt, as is the integrity of the jury system. Accordingly, protecting juror privacy also protects the accused's constitutional rights; therefore, courts should make greater efforts to ensure such privacy. The accused in *Press-Enterprise* implicitly

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[216] *Id.* at 15.

[217] *Id.* at 19.

[218] Estes v. Texas, 381 U.S. 532, 544 (1965).

[219] *Id.*

[220] *Id.* at 547.

[221] This assertion is based on common sense but also supported by the limited empirical evidence of voir dire dishonesty. *See supra* note 54. It is also true in other contexts. *See, e.g.*, Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 918–19 (2006) (arguing that the government tends to overclassify information to withhold embarrassing facts and reveal only information that reflects well on its operations).

[222] *See* Broeder, *supra* note 45, at 510–21.

(if not explicitly) acknowledged the importance of juror honesty to his own fair-trial rights when he argued for closure of the voir dire proceedings.

IV. A PROPOSAL TO PROTECT JUROR PRIVACY WHILE PROMOTING THE ACCUSED'S RIGHTS

Scholars have often chided the justice system for abusing jurors, but no one has offered a workable solution to protect jurors' privacy and the accused's rights, while respecting the constitutional demands for a public trial. This Part offers a procedural change to voir dire that will serve all of these interests—a juror strike. And the solution may be adopted by individual judges or on a broader scale.

A. A Juror's Own Strike

Jurors are an imperative and constitutional part of our criminal justice system. Yet it is growing more and more difficult to ensure that jurors appear in sufficient numbers to sit for criminal cases.[223] When jurors do appear ready to serve, they are often confronted with attorneys who aggressively probe their lives and experiences, and challenge their beliefs. Many jurors may not mind; others find the experience humiliating, embarrassing, even maddening.[224] Usually, jurors who suffer embarrassment will be struck for cause because of their experiences, the same experiences that create discomfort and humiliation in the first place.[225] Thus, it is common for a litigant to strike a juror from a venire only after the juror has suffered the personal indignity of revealing a secret, making the process unpleasant.[226] If, for example, a potential juror has been the victim of rape or incest, and the defendant is on trial for rape or any other violent crime, when the juror reveals her past, she is virtually certain to be struck, either for cause or with a peremptory challenge.[227] The strike occurs only after the juror has relived the victimization on the public record and in front of the accused and other onlookers.

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[223] *See supra* note 1–2 and accompanying text.

[224] Since posting a copy of this Article on the *Social Science Research Network* and after a radio interview on Public Radio, *Up to Date: The American Judicial System: Is It Abusing Potential Jurors?* (Kansas City Public Media radio broadcast May 2, 2010), *available at* http://kcur.org/post/american-judicial-system-it-abusing-potential-jurors/, I have received numerous anecdotal accounts from Kansans of such embarrassment.

[225] *See, e.g.*, State v. Rennaker, 150 P.3d 960, 965 (Mont. 2007) (excusing five jurors from the venire in incest prosecution after they admitted in voir dire that they or their family member had suffered from a sexual crime); Seltzer et al., *supra* note 21, at 454–55 (noting that only jurors who actually served on a jury were interviewed, thus, potentially underrepresenting the number of jurors who found jury service to involve questions that were "too personal").

[226] *See supra* note 21.

[227] *See* Seltzer et al., *supra* note 21, at 453–55 (noting that their study of juror dishonesty revealed that "many of the potential jurors who responded affirmatively" to the question, "Have you, any of your close relatives, or friends ever been a victim, or a witness to, or charged with, a crime?" were "excused for cause or with peremptory challenges").

At least some jurors lie to avoid such public embarrassment.[228] When the embarrassed juror is subsequently struck, the accused's trial rights are honored, but the juror's interests are neglected. In the second instance, when the juror lies, neither the accused nor the juror's interests are served. To protect both sets of rights, every juror should hold the power to avoid such uncomfortable and unproductive rituals. Each juror should be permitted to exercise her own jury strike, if a question is asked that will result in her disgrace, humiliation, or embarrassment, when answered honestly. Empowering a juror to remove herself from the venire and avoid the public disclosure of intensely personal information allows the juror to protect her privacy, avoids tainting other jurors on the same venire, and better conforms to the historical protections afforded American juries.[229] It also reduces the risk that jurors will distort facts pertinent to their biases. In other words, allowing a juror the right to exercise her own strike during voir dire makes it increasingly likely that a criminal defendant's guilt will be judged by a fair-minded jury. After all, jurors with secrets in their past may be the most biased and yet the least likely to talk honestly about their biases. If they do reveal their embarrassing secrets, the litigants are very likely to rely on the embarrassing information to strike the jurors from the venire.

Because a defendant has no right to a particular jury composition,[230] there is no constitutional or other legal prohibition against increasing jurors' rights. The prohibition rests in systematically excluding a protected class of persons from the venire[231] and from seating a partial juror.[232] The juror strike proposed here promotes both jury impartiality and juror privacy. A further benefit of the jury strike is that it increases the incentives for the lawyers in the litigation to treat jurors politely and with patience and dignity, understanding that if they push too hard, jurors have recourse. As a result, lawyers will give more thought to what questions they ask and how they word those questions. No longer will jurors be a captive audience, powerless to extract themselves from an unduly aggressive voir dire. At the same time, when a lawyer deems even a very probing question important, she will know that by asking it, she is likely to find the answers to her question, either inferred (from the juror exercising her personal juror strike) or express by an oral or written response. In either event, the purposes underlying for-cause and peremptory strikes are advanced. The juror strike thus reduces the incentives for jurors to lie or withhold information out of embarrassment or privacy concerns, and it gives litigants more space to probe deeply when

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[228] *See id.* at 455–56.

[229] *See* Rose, *supra* note 21, at 14–15 (suggesting that jurors who observe other jurors' discomfort come away experiencing their own discomfort about voir dire).

[230] Ross v. Oklahoma, 487 U.S. 81, 88 (1988) ("We have long held that peremptory challenges are not of constitutional dimension.").

[231] *See* Holland v. Illinois, 493 U.S. 474, 477–79 (1990) (equal protection prohibits a racial group from being excluded from the venire from which a jury is selected).

[232] U.S. CONST. amend. VI. ("[T]he accused shall enjoy the right to . . . an impartial jury . . . .").

they believe a juror may be withholding information in an effort to be seated on the jury.

Also, the juror strike will encourage judges to protect jurors (so that they do not perceive the need to exercise their personal strike) with more thoughtful rulings on relevance during voir dire. Judges can protect both defendants' rights and jurors' privacy interests by limiting the litigants to relevant questioning. In *Press-Enterprise*, the Supreme Court expressly noted the importance of the trial judge in ensuring a fair trial and protecting jurors from abusive voir dire:

> To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.[233]

And the solution has few practical barriers. An individual judge may implement the jury strike, or legislation or a local rule may effect the procedural change. Furthermore, because each juror will be required to exercise her juror strike in open court, this new procedure poses no threat to the media and public's rights to observe criminal trials.

B. The Mechanics of the Juror Strike

This final section explains how the juror strike might work in practice and addresses a few of the potential arguments against such a change to the typical voir dire procedure.

Under this proposal, when potential jurors are summonsed to a courtroom as part of a jury venire, much of the usual process will remain the same. The judge will read the indictment to the pool of potential jurors and explain in plain language the issues in the case. For instance, in a bank robbery case, the judge will read the formal indictment and tell the potential jurors that the case will require them to decide whether the government has proven beyond a reasonable doubt that the named defendant robbed the specified bank. The judge will warn the jurors that the lawyers (or the judge) will ask several questions of the jurors designed to make sure that nothing in their experience and beliefs disqualifies them to sit on this specific jury. The judge will also tell the pool of prospective jurors that if, for reasons too personal to explain in public, they feel uncomfortable to decide the accused's guilt in this particular case, or to hear about criminal activity related to these particular charges, (which might, for example, in a bank robbery case, include allegations that weapons were fired or people were shot), then each juror

[233] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 512 (1984).

holds the power to remove herself from this case and return to the jury pool to serve as a potential juror in some other case. The judge would explain further that each juror's right to strike herself from the venire would continue throughout voir dire until a jury is empanelled but caution that the right is restricted to reasonable, not unlimited, use. The judge might also impress upon the jury the importance of jury service and the expectation that each juror will exercise her voir dire strike thoughtfully. The judge could then give an example of when the strike might be appropriately exercised. For instance, the judge might explain:

> Sometimes criminal cases touch on issues that are very personal and sensitive. For some jurors this is not a problem. Others may find it difficult to share information with the parties because of an experience personal to them. This might happen, for instance, if one of you has been the victim of a violent crime and find it painful to talk about the experience. If you find yourself in this situation or one similar and you find it painful to answer the litigant's voir dire questions honestly and fully, then you may exercise your right to exclude yourself from this pool of jurors and return to the jury room for potential service on a different case. You must, nevertheless, speak up and let us know that you are exercising your strike.

Should a juror ask to exercise her strike, she would make the request publicly. The judge would (also publicly) make a general inquiry to satisfy herself that the juror was making reasonable use of the strike. This inquiry might proceed: "Juror X, you say you wish to exercise your right to forgo service as a juror in this case and return to the jury room for service on another panel. Can you, without giving us specifics, explain why this case raises difficult or sensitive issues for you?" Provided the juror offers a reasonable (albeit general) explanation, such as, "My family has had to deal with some difficult issues in the last two years surrounding allegations of criminal wrongdoing, and this case strikes too close to home for me," the judge would grant the juror's request to return to the jury pool for possible service in another matter. The juror would not be excused from jury duty but would be included in another venire.[234]

The biggest objection to the juror strike is, perhaps, that it creates an incentive for a juror to attempt to avoid duty altogether, traveling from courtroom to courtroom exercising her personal strike. This concern is overblown. Jurors are already familiar with the excuses for avoiding jury duty. Indeed, millions fail to report for duty in the first place, even when summonsed.[235] And this concern can be lessened, in any event, provided the trial judge makes a limited inquiry into the

[234] In some jurisdictions, where a juror is called for one case or one day rather than a week or two-week period, the juror who exercises her personal strike could be expected to return for similar jury service at a designated interval, perhaps two weeks or one month later.

[235] *See supra* notes 1–2 and accompanying text.

reasonableness of each juror's strike, and the jury clerk records each juror's use of her strikes, making a record of cases a juror has avoided. As outlined above, the right to exercise a juror strike is not a pass out of jury service. Jurors exercising a personal strike pretextually could be denied the right going forward, just as litigants, even criminal defendants, are prevented from exercising peremptories based on invalid grounds, such as race. Moreover, to the extent that providing jurors some individual protections during service raises a risk that a small number will abuse these rights does not outweigh the benefits of giving the protections. The goal of any jury trial is to seat a qualified jury to impartially and fairly weigh the evidence for and against guilt. Seating jurors who survive a sifting voir dire and are willing to sit and hear the case better serves this goal than does seating jurors who are hostile to service or who refuse to reveal information relevant to bias during voir dire. And trial judges are already intimately familiar with deciding between jurors' excuses to avoid jury duty as well as between many other competing arguments requiring the sound exercise of discretion and judgment.

Another argument against the juror strike might be that it does not eliminate the incentives for a juror to lie in hopes of avoiding a for-cause or peremptory strike, if her goal is to be seated to decide the case. If jurors are slanting their answers in voir dire in hopes of reaching a jury, giving them the chance to remove themselves from the venire will do little to lessen their deception. This shortcoming should not defeat the proposal, nevertheless. The risk of jury distortion exists with or without a juror strike because the strike is not designed to prevent a juror's intentional subversion of voir dire. Rather, the strike limits the selection of jurors whose biases are concealed because of their discomfort about probing questions. Although intentional juror deception remains a threat to an impartial jury, it is precisely this type of bias that probing questions are designed to uncover. And the proposal frees lawyers to probe for these biases more expressly. Additionally, giving jurors some freedom to avoid such intensive probing reduces the offensiveness of such probing questions.

CONCLUSION

Jurors are a crucial, indeed constitutional, component in our criminal justice system. In modern times, despite their importance, jurors have been asked to reveal intensely private information during voir dire. Litigants and trial judges have allowed such probing questions under the guise of protecting the accused's rights to a fair and public trial and to an impartial jury. This Article has demonstrated that giving prospective jurors greater privacy protection in the way of their own voir dire challenge better serves the accused's rights without jeopardizing the interests of the media and public to observe these public proceedings. The added protection for jurors also promotes faith and integrity in our criminal jury system, and it is truer to the historic roots of voir dire.