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JURY SELECTION IN CRIMINAL CASES:
ILLINOIS SUPREME COURT RULE 431—
A JOURNEY BACK TO THE FUTURE AND
WHAT IT PORTENDS

Judge Michael P. Toomin*

INTRODUCTION

Illinois Supreme Court Rule 431 ("Rule 431") has significantly broadened the attorney's role in the jury selection process by restoring to counsel the right to personally question prospective jurors.1 Although the rule does not vest the prosecution or the defense with unbridled discretion in the exercise of this resurrected power, it nonetheless affords counsel the opportunity to have personal contact with the venire at the earliest stage of the trial.2 The rule, if used skillfully by thoughtful and well-prepared counsel, should further the ability of the parties to select jurors committed not only to fairness and impartiality, but also possessed of an understanding of the issues to be decided and the fundamental principles inherent in all criminal prosecutions.

Part I of this article initially will focus upon the historical background of attorney conducted voir dire to highlight the rather divergent views that have influenced its development.3 Part II will analyze Rule 431 in terms of the impact it will have in the jury selection process, touching upon some problematic areas likely to be visited by trial judges and, in turn, the courts of review.4 Finally in Part III, the author shall endeavor to articulate some practical suggestions to counsel in conducting voir dire, touching on procedural considerations as well

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2. Id.
3. See infra Part I.
4. See infra Part II.
as areas of permissible inquiry. These suggestions hopefully will be of some assistance to attorneys who may not have had any meaningful opportunity to personally question prospective jurors.

I. THE LONG MARCH — OR BACK TO THE FUTURE

Although many members of the trial bar, especially younger practitioners, may view their broadened power as a justified entitlement, others may validly perceive the change more as a long-overdue return to yesterday. Historically, the voir dire examination of prospective jurors has been regarded as a significant aspect of trial procedure, having the two-fold purpose of enabling counsel to challenge for cause, if cause exists, or to exercise peremptory challenges where deemed appropriate. The primary objective is to insure the selection of a juror who will be impartial to the parties who will be, as Lord Coke observed, a "liber homo . . . that hath such freedome of mind as he stands indifferent as he stands unsworne." To achieve this goal, it has long been the custom in this state to allow counsel "to make any reasonable and pertinent search to ascertain whether the minds of prospective jurors are free from bias and prejudice," a practice earlier courts viewed as inherent in the right to a fair and impartial trial.

Although the conduct of the voir dire understandably was vested in the trial judge and subject to reasonable limitation, in Donovan v. People the Illinois Supreme Court recognized that the right of challenge was so highly cherished that inferior courts were not authorized to prescribe rules which rendered it unavailing. In Donovan, the trial judge had curtailed defense counsel's participation, announcing, "except as you examine the jurors for cause through the mouth of the court, you can not examine them at all." In reversing the trial court, the Illinois Supreme Court adopted the Michigan rule enunciated in Stephens v. People, holding that the right to examine jurors was indeed personal to counsel.

Early in this century, the almost universal practice was to allow counsel to conduct the entire examination of the venire. That exam-

5. See infra Part III.
7. Coughlin v. People, 33 N.E. 1, 8 (Ill. 1893).
10. See, e.g., Lavin v. People, 69 Ill. 303, 304 (1873).
12. Id.
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Injunction was not limited to factual inquiries alone, for counsel had the right to advise the prospective jurors generally about the law of the case and to conduct a reasonable examination of the jurors on that subject.\textsuperscript{16} This was particularly true in criminal cases where specific inquiry was routinely made by both court and counsel as to whether the juror understood and accepted fundamental propositions such as: that the grand jury was simply an accusatory body;\textsuperscript{17} that the indictment it voted was merely a formality necessary to place the defendant on trial;\textsuperscript{18} that the accused was cloaked with the presumption of innocence which remained throughout the trial, unless and until the juror was convinced that the defendant had been proven guilty beyond a reasonable doubt;\textsuperscript{19} that the burden of proving the defendant's guilt was on the state and the defendant need not prove his innocence;\textsuperscript{20} and finally, that should the defendant elect not to testify, his cause could not be prejudiced, but should he choose to take the stand he was entitled to be heard as well.\textsuperscript{21}

Although these inquiries clearly were defense oriented, the right to examine as to matters of law was not limited to the defendant alone. The State also enjoyed this right, and prosecutors could avail themselves of the opportunity to make appropriate inquiries as a matter of general practice. Thus, prosecutors routinely asked venire members such questions as whether they maintained "conscientious scruples" against capital punishment;\textsuperscript{22} whether they would reject the death penalty where guilt rested upon circumstantial evidence;\textsuperscript{23} and whether they would refuse to convict upon the belief that the punishment was too severe.\textsuperscript{24}

As the volume of litigation increased, concerns over abuses perceived to result from attorney conducted \textit{voir dire} took hold.\textsuperscript{25} These concerns heralded a call to judicial control which, in turn, was answered by the Conference of Senior Circuit Judges of the United States. In October 1924, that body recommended that the examination of prospective jurors be by the court alone, with counsel given the

\begin{itemize}
\item \textsuperscript{16} People v. Kestian, 167 N.E. 786, 788 (Ill. 1929).
\item \textsuperscript{17} Coughlin v. People, 33 N.E. 1, 4 (Ill. 1893).
\item \textsuperscript{18} Id.
\item \textsuperscript{19} People v. Redola, 133 N.E. 292, 293 (Ill. 1921).
\item \textsuperscript{20} Coughlin, 33 N.E. at 5.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} People v. Winchester, 185 N.E. 580, 582 (Ill. 1933).
\item \textsuperscript{23} Gates v. People, 14 Ill. 433, 434-35 (1853).
\item \textsuperscript{24} Id.
\end{itemize}
opportunity to recommend additional areas of inquiry to the court.\textsuperscript{26} This recommendation was followed by a number of federal district courts,\textsuperscript{27} and eventually upheld in \textit{Falter v. United States},\textsuperscript{28} where Judge Learned Hand noted: “while it was the custom at common law to allow the parties to cross-examine, there is nothing in this essential to securing a panel free from bias. The length and particularity of the examination of jurors had become a scandal, and required some effective control.”\textsuperscript{29} With the adoption of the Federal Rules of Civil Procedure in 1938, court conducted \textit{voir dire} became the recognized practice of selecting juries in the United States District Courts.\textsuperscript{30}

Similar misgivings arose in Illinois, finding early expression in the case of \textit{Mithen v. Jeffery}.\textsuperscript{31} There, complaint was made that the “interminable examination of jurors, so often made as to different individuals and every conceivable relation to them, should not be indulged in.”\textsuperscript{32} Thus began a movement to adopt a uniform procedure of court control designed to shorten the \textit{voir dire} examination and to confine it to its true purpose. Proponents looked approvingly at the Federal Rules which had proved remarkably successful in reducing the time consumed by jury selection, as well as to a number of commentaries that had addressed what was perceived as a distortion of the \textit{voir dire} process.\textsuperscript{33}

These concerns were the impetus for a report emanating from the 1958 Illinois Judicial Conference considering the idea that trial judges be vested with the authority to conduct the \textit{voir dire} examination, with counsel being permitted a reasonable opportunity to supplement such

\begin{itemize}
\item 27. Kurczak v. United States, 14 F.2d 109, 110 (6th Cir. 1926); Bradshaw v. United States, 15 F.2d 970, 971 (9th Cir. 1926); Murphy v. United States, 7 F.2d 85, 87 (1st Cir. 1925); Ungerleider v. United States, 5 F.2d 604, 605 (4th Cir. 1925).
\item 28. 23 F.2d 420 (2d Cir. 1928).
\item 29. \textit{Id}. at 426.
\item 30. Rule 47(a) of the Federal Rules of Civil Procedure, as originally adopted, provided: The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.
\item 31. 102 N.E. 778 (Ill. 1913).
\item 32. \textit{Id}. at 780; see also \textit{Pennsylvania Co. v. Rudel}, 100 Ill. 603 (1881), where the court stated: “The unnecessary protraction of jury trials has come to be a great evil, and one thing which contributes thereto is the needlessly long drawn out examination of jurors.” \textit{Id}. at 608.
\end{itemize}
examination. The recommendation, in the format of a proposed rule, was based upon the report of the Committee on Limitation of Voir Dire Examination, which noted in its preamble: "Judges, throughout the State, faced with an ever expanding volume of litigation and in some sections scandalous delays, are increasingly concerned with the disposition on the part of trial counsel to prolong inordinately the voir dire examination. . . ."  

Among the evils noted was the practice of indulging in tedious and repetitious examinations and propounding long rhetorical questions designed to ingratiate the lawyer with the jury rather than to elicit information. Equally objectionable were counsel's tiresome statements outlining the law, and the inquisitor's philosophy and ideas on various subjects, as well as his notion concerning the thought processes to be followed by jurors. The report was especially critical of the procedure of examining jurors concerning questions of law. Although the committee was mindful of the Illinois Supreme Court's earlier pronouncements that criminal defendants had the right to advise jurors concerning the law of the case, it noted that those cases were decided at a time when jurors were considered to be judges of the law as well as the facts. It was the view of the committee that such examinations were "without question one of the most pernicious practices indulged in by many attorneys." The usual procedure, as the committee noted, was to orally expound upon legal propositions that were "slanted, argumentative and often so clearly erroneous as to cause certain reversal if given by the court." The report further lamented that when an attorney is allowed to give his version of the law to the jury, his opponent is certain to retaliate by giving his version of the law, the inevitable result being that the court is required, in settling the dispute, to give oral instructions on questions of law that may not eventually be relevant to the jury's inquiry.

34. 1958 Illinois Judicial Conference, Executive Committee Annual Report 92. The members of the Committee on Limitation of Voir Dire Examination were Judge Alan E. Ashcraft, Chairman; Judge Robert E. English; Judge Henry J. Ingram; Judge Thomas E. Kluczynski; Judge Wm. C. Radliff; and Judge Roy J. Solisburg.
35. Id.
36. Id.
37. People v. Kestian, 167 N.E. 786, 788 (Ill. 1929); People v. Redola, 133 N.E. 292, 293 (Ill. 1921).
39. Id. at 96.
40. Id.
41. Id. at 97.
The Illinois Supreme Court acted upon the committee's recommendations in Rule 24-1.\textsuperscript{42} Promulgated on September 17, 1958, the Rule provided:

The judge shall initiate the voir dire examination of jurors in civil and criminal causes by identifying the parties and their respective counsel and he shall briefly outline the nature of the case. The judge shall then put to the jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination, but shall not directly or indirectly examine jurors concerning matters of law or instructions.\textsuperscript{43}

As apparent from its language, the Rule significantly changed the landscape of jury selection within the state. First and foremost, the trial judge was empowered not only to initiate the \textit{voir dire} by identifying the parties, counsel, and the nature of the case, but also to put to the jurors any questions believed necessary.\textsuperscript{44} Although the parties or their attorneys were afforded a reasonable opportunity to supplement the judge's examination, the use of the word "supplement" was meant to indicate that counsel's examination should complement rather than repeat the judge's examination.\textsuperscript{45} The prohibition as to matters of law was viewed by the drafters as "a most important element" of Rule 24-1.\textsuperscript{46} The drafters envisioned that the prohibition would end the practice of lawyers who, under the guise of eliciting information, attempted to impart to the jurors a conception of the law highly favorable to their side of the case.\textsuperscript{47}

The ink was hardly dry before the constitutionality of Rule 24-1 was brought before the Illinois Supreme Court in \textit{People v. Lobb}.\textsuperscript{48} The issue was framed in terms of whether the rule was consistent with the constitutional mandate that guaranteed the right of trial by jury "as heretofore enjoyed."\textsuperscript{49}

Faced with this challenge to its own rule-making power, the court did not do the unexpected. In upholding Rule 24-1, the \textit{Lobb} court reaffirmed earlier pronouncements that the only legitimate purpose of

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\item \textsuperscript{42} \textit{I.L. Rev. Stat.} ch. 110/101.24-1 (West 1959).
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} Letter from the Drafting Committee of the Judicial Conference to the Illinois Supreme Court (Sept. 15, 1958); see Smith-Hurd \textit{I.L. Ann.} ch. 110A, ¶ 234 (West 1985).
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} 161 N.E.2d 325 (Ill. 1959).
\item \textsuperscript{49} \textit{Id.} at 333-34; \textit{I.L. Const.} art. 2, § 5.
\end{itemize}
The voir dire examination was to secure an impartial jury. Additionally, the court reasoned that the “guarantee of trial by jury is not so inelastic as to render unchangeable every characteristic and specification of the common-law jury system.” The court specifically noted that at common law, the right of trial by jury meant the right to have the facts in controversy determined, under the direction and superintendence of a judge, by the unanimous verdict of twelve impartial jurors who possessed the qualifications and were selected in the manner prescribed by law. The court, however, found nothing in the constitutional guarantee that prevented “reasonable regulation of the manner in which jurors shall be selected.”

In substance, Rule 24-1 continued to govern jury selection in both civil and criminal cases for the next 16 years. In 1967, the Illinois Supreme Court revised the numbering nomenclature of the Rules with the result that Rule 24-1 was redesignated Rule 234. At the same time, the court adopted Rule 411, which provided that voir dire in criminal cases was to be conducted in accordance with Rule 234. Then, in 1971, Rule 411 was renumbered Rule 431, again providing that voir dire in criminal cases would be conducted in accordance with Rule 234.

Although implementation of these rules resulted in some improvement, Rule 234, by and large, failed to speed up the process of jury selection or remedy the other problems it was supposed to solve. Dissatisfaction in the judicial quarter became the impetus for renewed inquiry into the efficacy of voir dire procedures. In turn, a committee of the 1974 Illinois Judicial Conference found that “tedious, prolonged voir dire examinations still plagued the courts while the caseload increased at a rate four times faster than the population.”

Realization of these concerns led to a recommendation by the Conference that Rule 234 be amended to vest the trial judge with exclusive control over the conduct of the voir dire, with permissive participation by counsel at the court’s discretion. The Illinois

50. Lobb, 161 N.E.2d at 333.
51. Id. at 332.
52. Id. at 331.
53. Id. at 333.
54. ILL. REV. STAT. ch. 110A/234 (West 1967).
55. Id. ch. 110A/411.
56. ILL. REV. STAT. ch. 110A/431 (West 1971).
58. Id.
60. Id. at 136-37.
Supreme Court adopted that recommendation, effective July 1, 1975, with the result that Rule 234 was amended as follows:

The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, or may permit the parties to supplement the examination by such direct inquiry as the court deems proper. Questions shall not directly or indirectly concern matters of law or instructions.61

Legislative reaction to the curtailment of counsel's right to directly participate in the voir dire followed quickly on the heels of the amendment. In September 1975, the General Assembly amended Section 115-4 of the Code of Criminal Procedure, providing in subparagraph (f) that each opposing counsel have the right to personally examine prospective jurors for the purpose of determining each juror's qualifications, biases and prejudices, or freedom therefrom.62 The judicial response was predictable, with courts in several appellate districts finding that the enactment unduly infringed upon the judicial power of the courts, and the section was therefore invalid.63 An identical result obtained in People v. Jackson,64 when the issue was addressed by the Illinois Supreme Court, with the court holding that Section 115-4(f) indeed constituted a legislative infringement upon the powers of the judiciary and was therefore void.65 In Jackson, the court also rejected the claim that examination of prospective jurors by either the court or counsel was part and parcel of the right to trial by jury, reaffirming the principle that the voir dire was rather a matter of trial detail which courts indeed could regulate.66

The most recent amendments to the rules governing voir dire examination have their genesis in a 1989 report prepared by the Illinois Supreme Court Committee on Implementation of Jury Standards,67 and from a 1996 proposal of the Criminal Rules Subcommittee.68 Although both committees advocated permissive attorney voir dire,

61. ILL. REV. STAT. ch. 110A/234 (West 1975).
62. Id. ch. 38/115-4(f).
64. 371 N.E.2d 602 (Ill. 1977).
65. Id. at 606.
66. Id.
the Supreme Court Rules Committee later approved a proposal allowing counsel to directly participate in the examination of jurors, subject to limitations based on the length and complexity of the case.\(^6\) The Criminal Rules Subcommittee recognized that some criminal court judges, including this author, were allowing attorney \textit{voir dire} and others were not. The subcommittee decided to leave the question of attorney participation to the discretion of the trial judge depending upon the facts and circumstances of the case.\(^7\) The subcommittee's primary focus was upon seeking compliance with the requirement established in \textit{People v. Zehr} that prospective jurors be examined concerning their understanding and acceptance of fundamental principles, such as the presumption of innocence and the standard and burden of proof in criminal cases.\(^8\) Both proposals were placed on the public hearing agenda of the full Rules Committee on January 27, 1997 and thereafter were recommended for adoption.\(^9\) The Illinois Supreme Court concurred in that recommendation and effective May 1, 1997, Rule 431 was amended. Rule 431(a) provides:

\begin{quote}
The court shall conduct \textit{voir dire} examination of prospective jurors by putting to them questions it thinks appropriate, touching upon their qualifications to serve as jurors in the case at trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges. Questions shall not directly or indirectly concern matters of law or instructions. The court shall acquaint prospective jurors with the general duties and responsibilities of jurors.\(^{10}\)
\end{quote}

Analyzing the rule in terms of its essential components, the trial court continues to be vested with the overall conduct of the \textit{voir dire} by examining jurors as to their basic qualifications. Permissive inquiry is then afforded to counsel to submit additional questions for the court to ask if it believes them to be appropriate. Both of these provisions

\(^{6}\) Illinois Supreme Court Rules Committee Minutes 2 (Oct. 1996).

\(^{7}\) Report of the Criminal Rules Subcommittee, \textit{supra} note 68, Attach. A.

\(^{8}\) \textit{Id}; \textit{People v. Zehr}, 469 N.E.2d 1062, 1063-64 (Ill. 1984). In \textit{Zehr}, the court reversed defendant's convictions of home invasion, burglary, and aggravated battery. \textit{Id.} at 1065. It held that the trial court's refusal to ask questions submitted by the defense in its \textit{voir dire} examination resulted in prejudicial error. \textit{Id.} at 1064. The court reasoned that jurors must be made aware of a defendant's basic guarantees prior to their qualification, for an instruction about these guarantees at the end of trial would do little to ensure these rights. \textit{Id.}

\(^{9}\) Illinois Supreme Court Rules Committee, Recommendations to the Supreme Court of Illinois 3-4 (Mar. 1997).

\(^{10}\) \textit{ILL. Sup. Ct. R. 431(a)} (West 1998).
were contained in former Rule 234 and represent no change from the former practice.\textsuperscript{74} Supplemental direct inquiry by counsel is mandated to the extent the court deems proper, limited to a reasonable period of time depending upon the length of the court's examination, the complexity of the case, and the nature of the charges.\textsuperscript{75} This provision is entirely new, and as viewed in its evolutionary context, represents a return back to the future. Rule 431 also continues the prohibition against inquiring directly or indirectly as to matters of law or instructions,\textsuperscript{76} a position that has not been uniformly followed. Lastly, the court is directed to acquaint prospective jurors with their general duties and responsibilities.\textsuperscript{77} This last grant of authority was given in 1983,\textsuperscript{78} and although the rule provides no guidance to judges in fulfilling this requirement, it does not represent a significant change. Recognizing that the vast majority of trial judges traditionally have addressed the subject in their opening remarks to the venire, it is likely that they would continue the practice even in the absence of the Rule's mandate.

Rule 431(b) provides:

If requested by the defendant, the court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects. The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section.\textsuperscript{79}

This provision is new and is intended to ensure compliance with the requirements of \textit{Zehr}.* As the Committee Comment reflects, this

\begin{itemize}
  \item 74. \textit{See supra} notes 60-61 and accompanying text.
  \item 75. \textsc{Ill. Sup. Ct. R.} 431(a).
  \item 76. \textit{Id.}
  \item 77. \textit{Id.}
  \item 78. \textsc{Ill. Rev. Stat.} ch. 110A/234 (1983).
  \item 79. \textsc{Ill. Sup. Ct. R.} 431(b) (West 1998).
  \item 80. \textsc{People v. Zehr}, 469 N.E.2d 1062, 1063-64 (Ill. 1984). In \textit{Zehr}, the supplemental questions tendered by the defendant were:
    \begin{enumerate}
      \item If at the close of all the evidence and after you have heard arguments of counsel you believe that the State has failed to sustain the burden of proof and has failed to prove the defendant guilty beyond a reasonable doubt, would you have any hesitation whatsoever in returning a verdict of Not Guilty?
      \item If the defendant . . . decides not to testify in his own behalf, would you hold it against him?
      \item Do you understand that the
    \end{enumerate}
provision "seeks to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law."81 Interestingly, the proposal originating in the Criminal Rules Subcommittee mandated the trial judge to ask each potential juror, individually or in a group, each of the pertinent Zehr inquiries.82 Moreover, the Rules Committee concurred in this approach in its recommendation to the Illinois Supreme Court,83 presumably of the opinion that by requiring the trial court to ask the appropriate questions, Zehr's mandate would be satisfied. The Supreme Court, however, modified the proposal with the result that the rule is permissive; the Zehr questions are required only where they are requested by the defense.84

Rule 431(b) further provides that when the defendant objects, "no inquiry of a prospective juror shall be made into the defendant's failure to testify . . . ."85 Both the Criminal Rules Subcommittee,86 and the Rules Committee,87 included this provision in their recommendations. The limitation, moreover, mirrors the view of the Illinois Supreme Court directing that the jury instruction which cautions jurors that the defendant's failure to testify must not be held against him is only to be given at the request of the accused.88

II. PROBLEM AREAS LIKELY TO BE VISITED

Recognizing that Rule 431 has been in force for a relatively short period of time, there are no reported cases construing or interpreting its provisions. Nonetheless, based upon what has been experienced by some trial judges to date, coupled with observations from earlier practices, there are problem areas that predictably will be visited. Anticipating some potential areas of concern, attention will first focus upon Rule 431(b) and its announced purpose, to ensure compliance with Zehr's mandate. As noted, because the language adopted by the Illinois Supreme Court is clearly permissive, a legitimate question which may arise is whether the result intended will be realized. What posi-

defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proven guilty beyond a reasonable doubt by the State?

Id.
81. ILL. SUP. CT. R. 431(b) (committee comment).
82. See Report of the Criminal Rules Subcommittee, supra note 68.
83. See Illinois Supreme Court Rules Committee, supra note 72, at 3-4.
84. ILL. SUP. CT. R. 431(b).
85. Id.
86. See Report of Criminal Rules Subcommittee, supra note 68.
87. See Illinois Supreme Court Rules Committee, supra note 72.
tion is the trial judge to take when, if because of design, inadvertence or ignorance, defense counsel fails to pose or fails to request that the judge ask the pertinent Zehr questions to prospective jurors? Should such a result obtain, it not only would render the objective of the rule illusory, but would also conflict with Zehr's avowed purpose. As Zehr and its progeny dictate, jurors in a criminal case must be aware that a defendant is presumed innocent, that he is not required to present evidence, that the State must prove him guilty beyond a reasonable doubt, and that the defendant's failure to testify cannot be used against him.\(^8\)\(^9\) Such knowledge, as Zehr proclaims, is essential to the qualification of jurors in a criminal case.\(^9\)\(^0\) Yet, there is no assurance that this requisite degree of awareness will be manifested where the inquiry is left solely to the discretion of defense counsel.

One might also conjecture as to how the reviewing courts will appraise claims of attorney incompetence which may follow in the wake of trial counsel's failure to make the appropriate Zehr inquiries. Under the prevailing Strickland \(v.\) Washington\(^9\)\(^1\) standard, will the courts of review conclude that counsel's performance in this regard fell below an objective standard of reasonableness? Or will they likely reason that but for such deficient performance there is a reasonable probability that a different result would have followed?\(^9\)\(^2\) Had the Illinois Supreme Court chosen to adopt the position of the drafting committee that the trial judge bear the onus of ensuring Zehr's compliance, this inquiry and resulting conjecture would be unnecessary. What is apparent is that the court might have better accom-

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89. People v. Zehr, 469 N.E.2d, 1062, 1064 (Ill. 1984); see also People v. Emerson, 522 N.E.2d 1109, 1114 (Ill. 1987) (holding that there is no precise formula for the court to follow in ascertaining jurors' attitudes and that the trial judge satisfied the Zehr requirements when he made a general admonition to the jury and later discussed the presumption of innocence with them); People v. Carson, 606 N.E.2d 363, 371 (Ill. App. Ct. 1992) (finding no error when the trial court admonished the jury, on four separate occasions, of the Zehr standards to which they must adhere); People v. Dale, 545 N.E.2d 521, 534 (Ill. App. Ct. 1989) (finding substantial compliance with Zehr where prospective jurors were instructed as a group as to defendant's right not to testify and were asked individually whether they would follow the law); People v. Starks, 523 N.E.2d 983, 988-91 (I11. App. Ct. 1988) (finding prejudicial and reversible error when the trial court failed to pose to the venire on voir dire, or otherwise broach the subject matter sufficiently, to secure prospective jurors' responses to questions tendered by defendant that addressed the Zehr concerns).

90. Zehr, 469 N.E.2d at 1064.

91. 466 U.S. 668, 687 (1984) ("[T]he proper standard for attorney performance is that of reasonably effective assistance.").

92. See, e.g., People v. Stack, 470 N.E.2d 1252, 1257 (Ill. App. Ct. 1984) (holding that the trial court abused its discretion in refusing to ask prospective jurors questions submitted by the defendant concerning any biases or prejudices with respect to the insanity defense, where the court could not with certainty conclude that the verdict would not have changed had the tendered questions on insanity been asked on voir dire).
plished its avowed purpose by vesting trial judges with the responsibility of ensuring that Zehr inquiries be made rather than leaving this to the discretion of defense counsel.

Another area of potential controversy is likely to stem from the rule's continued prohibition against inquiry concerning matters of law or instructions. Although the origin and rationale of this prohibition are now apparent to the reader, it is a proscription that is so riddled and plagued by exceptions that one might well conclude that it has been honored more in its breach than in its observance. A starting point in this regard again is Zehr, where the State unsuccessfully argued that the trial court had correctly refused to ask the tendered questions because they pertained to matters of law or instructions. The incongruity of the result was clearly recognized by the dissent, observing that while the trial court clearly was precluded by Rule 234 from entertaining the questions tendered, the majority nonetheless concluded that the judge erred by conducting the voir dire examination in the very manner provided by the rule.

Notably, in addition to the traditional Zehr inquiries, the courts of review have countenanced inquiry into matters of law on a garden variety of subjects. Even before the advent of Rule 24-1, counsel was allowed to probe a prospective juror's views on abortion, the rationale being that abortion was a "particularly fertile field for preconceived notions and prejudices." Moreover, since the proscription was imposed, the appellate process has upheld the right to ascertain whether jurors are opposed to capital punishment or whether they favor the death penalty in all murder cases; whether jurors could follow the law of accountability in cases where the evidence failed to reveal that the defendant actually did the shooting; and whether they could find a defendant guilty without requiring that the State produce the victim's body. Questions concerning jurors' views on the insanity defense have been determined to be an appropriate area of inquiry given the court's recognition that laypersons may regard the defense

94. Zehr, 469 N.E.2d at 1066.
95. Id. at 1066 (Ryan, C.J., dissenting).
with some suspicion. Additionally, inquiry to ascertain whether jurors entertain a bias against the intoxication defense has been upheld, as well as counsel's right to determine whether they would be able to follow the law regulating obscenity.

Curiously, over the same period our reviewing courts have rejected similar types of inquiry in other law related areas, reasoning that voir dire questioning may not be used as a means of indoctrinating a jury to a particular theory or defense or impaneling a jury with a particular predisposition. Under this rationale, the courts have found no error in the trial judge's refusal to ask a juror's views on fetal life and abortion in a prosecution for intentional homicide of an unborn child; whether the defendant's mere presence at the crime scene would create a presumption of guilt in a case involving the doctrine of accountability; the jurors' viewpoints as to the defense of compulsion; or their experiences regarding mistaken identity. In a number of cases, the defendant's right to question jurors regarding their attitudes about self-defense has also been rejected, the rationale being that justifiable use of force touches upon a matter of law and does not qualify as a controversial defense. Additionally, in capital murder prosecutions the courts have found no error in refusing to inform the jurors of the range of possible imprisonment to which the defendant might be sentenced if he were not sentenced to death.

102. People v. Cloutier, 622 N.E.2d 774, 781 (Ill. 1993); see also Stack, 493 N.E.2d at 344 ("Although the insanity defense upon which the defendant relied is a well-recognized legal defense, it remains a subject of intense controversy.").
104. People v. Sequoia Books, Inc., 513 N.E.2d 1154, 1159-60 (Ill. App. Ct. 1987) (holding that defense counsel's question was designed primarily to indoctrinate the jury into believing that the legislature should not be regulating obscenity, and therefore was improper, whereas prosecution's question was designed to determine whether a prospective juror would be able to follow the law).
110. Bowel, 488 N.E.2d at 998-99. In Bowel, the Illinois Supreme Court adopted the reasoning earlier expressed in People v. Witted, 398 N.E.2d 68 (Ill. App. Ct. 1979), where the court found "no basis for assuming that a person may harbor a bias or prejudice toward the essentially innocuous defense of mistaken identity." Id. at 76.
by not allowing questioning concerning any preconceived opinions they might have regarding parole laws and the defendant's eventual release.\textsuperscript{114} The appellate court has also upheld the refusal to allow defense inquiry concerning jurors' views where the evidence was entirely circumstantial in nature.\textsuperscript{115}

The litany of decisions that demonstrate adherence to or rejection of the prohibition against inquiry as to matters of law serves to undermine the guarantee of a fair and impartial jury and is unsettling to both trial judges and counsel. It must be assumed that the Illinois Supreme Court was aware of these conflicting opinions, but nonetheless chose to ignore the realities of the situation. Whatever the reason, it is apparent that the proscriptions of the rule clash with well-reasoned and controlling precedent. A more realistic approach would have been to delete the prohibition against examining jurors regarding matters of law and to allow such inquiry where the trial court deems it appropriate in light of the issues to be resolved and the particular circumstances of the case. This approach, moreover, would be consistent with the practices of many trial judges who permit inquiry into matters of law in instances where, while there may be no legal entitlement, there is no express prohibition.

Rulings governing inquiry into factual matters involved in criminal prosecutions are equally conflicting and will inevitably provide yet another area of foreseeable concern. Rule 431 places no limitation upon such inquiry, nor could it do so without defeating the purpose of the \textit{voir dire} examination. Nonetheless, decisions addressing the scope of factual inquiry are as varied as those touching upon questions of law. For example, the courts have ruled that it is proper for defense counsel to ask prospective jurors to relate their experiences as crime victims and the effect they might have upon them if selected as jurors,\textsuperscript{116} whether they would be more likely to believe the testimony of a police officer simply because of his status or occupation,\textsuperscript{117} and whether the defendant's gang affiliation would affect the jurors' ability to be fair.\textsuperscript{118} Also, in cases involving extensive press coverage, it is incumbent upon the trial court to conduct a meaningful examination to determine whether media reports have created a disposition in the

\begin{itemize}
\item \textsuperscript{114} People v. Thomas, 561 N.E.2d 57, 77-78 (Ill. 1990).
\item \textsuperscript{115} People v. McMullin, 486 N.E.2d 412, 417 (Ill. App. Ct. 1985).
\item \textsuperscript{116} People v. Oliver, 637 N.E.2d 1173, 1178 (Ill. App. Ct. 1994).
\item \textsuperscript{117} People v. Taylor, 601 N.E.2d 1305, 1306 (Ill. App. Ct. 1992).
\item \textsuperscript{118} People v. Jimenez, 672 N.E.2d 914, 917 (Ill. App. Ct. 1996). However, in the absence of a specific request, the trial judge is under no obligation to inquire as to a prospective juror's gang bias. People v. Williams, 692 N.E.2d 723, 730 (Ill. App. Ct. 1998).
\end{itemize}
minds of the jurors\textsuperscript{119} that they would be unable to lay aside.\textsuperscript{120} And, defense counsel may also be entitled to question jurors regarding racial prejudice if "special circumstances" exist suggesting a "constitutionally significant likelihood that racial prejudice might infect a defendant's trial."\textsuperscript{121} Likewise, the prosecution may properly inquire as to whether any jurors would be unable to be fair and impartial because witnesses are involved in interracial relationships.\textsuperscript{122} However, where racial overtones are absent, the defense has no right to ask whether the jurors believe that blacks are more likely than whites to commit crimes or otherwise probe for racial animosities.\textsuperscript{123}

Questions that address the credibility of certain types of witnesses may or may not be proper. For instance, in a case involving conversations which occurred in a correctional center, the prosecution could properly ask whether prospective jurors would automatically disbelieve a person because he was incarcerated.\textsuperscript{124} Conversely, where the evidence will not necessarily reveal the criminal background of the principal witnesses, a defendant has no right to ask the jurors whether they would be prejudiced against him because of his prior felony convictions.\textsuperscript{125} Likewise, in cases involving sexual abuse of children, the defense has no right to ask whether the jurors "would find children to be more believable and sympathetic witnesses than adults."\textsuperscript{126} So too, in a case where the victims were nuns, the court could properly refuse any inquiry as to whether the jurors would avoid giving greater credibility to the testimony of a nun than of any ordinary citizen.\textsuperscript{127}

\begin{thebibliography}{9}
\bibitem{People v. Taylor} People v. Taylor, 462 N.E.2d 478, 484 (Ill. 1984). In Taylor, the court relied upon \textit{Irvin v. Dowd}, 366 U.S. 717, 723 (1961), which stated: "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." \textit{Id.} As to the nature of the inquiry there is no requirement that the specific content of what the juror has read or heard be asked. People v. Gacy, 468 N.E.2d 1171, 1182 (Ill. 1984).
\bibitem{People v. Peeples} People v. Peeples, 616 N.E.2d 294, 311 (Ill. 1993). Special circumstances exist where "racial issues are inextricably bound up with the conduct of the trial." \textit{Id.} at 311 (quoting \textit{Ristaino v. Ross}, 424 U.S. 589, 596-97 (1976)). "The sole fact that the defendant is black and the victim is white does not constitute a "special circumstance" of constitutional proportions." \textit{Id.} (quoting \textit{Turner v. Murray}, 476 U.S. 28, 33 (1986)). \textit{See, e.g., People v. Watson}, 635 N.E.2d 795, 800 (Ill. App. Ct. 1994). However, in capital cases a defendant "accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." \textit{Turner}, 476 U.S. at 36-37 (1986).
\bibitem{People v. Dallas} People v. Dallas, 405 N.E.2d 1202, 1210-11 (Ill. App. Ct. 1980).
\end{thebibliography}
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The reviewing courts have also rejected the claim that in a prosecution for murder and attempted armed robbery, the defendant is entitled to ask prospective jurors if they have any strong feelings about handguns that would affect their decisions.\(^\text{129}\) Similarly, where the defendant was charged with aggravated battery, he had no right to ask the jurors whether evidence of serious physical injuries would hamper their consideration of all the other evidence in the case.\(^\text{130}\) Additionally, where the defendant claimed that when he shot his wife he was under the control of a pernicious spirit, there was no entitlement to ask whether the prospective jurors believed that a spirit can manipulate a person to do its desires.\(^\text{131}\) Nor may the prosecutor inquire as to whether jurors believe that "people have a natural impulse to confess their wrongdoings."\(^\text{132}\)

The rationale underlying rejection of the types of questions taken from the foregoing decisions is that they improperly tend to highlight aspects of the case rather than expose bias.\(^\text{133}\) Inquiries such as those discussed do not advance the objectives of *voir dire*, for the essential purpose of the *voir dire* examination is to select a fair and impartial jury.\(^\text{134}\) As the courts have instructed, *voir dire* is not to be used as a means of pre-educating or indoctrinating a jury or as a means of impaneling a jury with particular predispositions.\(^\text{135}\) The purpose of *voir dire* is to "filter out prospective jurors who are unable or unwilling to be impartial,"\(^\text{136}\) and Rule 431 places no limitations or restrictions upon counsel's right to achieve this result. Predictably, the law in this area will continue to develop, especially so given counsel's mandated opportunity personally to participate in the *voir dire* process. As a consequence, trial judges increasingly will be called upon to rule upon the sort of factual inquiries noted herein and the reviewing courts inevitably will continue to redefine and shape the contours of permissible *voir dire*.

Addressing a final area of potential concern, were one to be capable of prediction, it is doubtful that the advent of the new rule will allow

\(^{134}\) People v. Seuffer, 582 N.E.2d 71, 78 (Ill. 1991).
\(^{135}\) Pope, 486 N.E.2d at 356.
the wheels of justice to grind any faster, or for that matter, more smoothly. What is more likely is that the *voir dire* process will pit the court against counsel, each intent on preserving their perceived prerogatives. Trial judges, in adhering to the long-standing pronouncements of the reviewing courts, will endeavor to confine the examination to its accepted purpose of insuring the selection of a fair and impartial jury and predictably will resist any efforts by counsel to tread the forbidden waters of pre-education or indoctrination of jurors. Conversely, most trial lawyers who are worth their salt will continue to be imbued with the philosophy that indoctrination is very much a part and parcel of jury selection, a position long championed by well respected commentators on trial advocacy.

A cursory examination of the treatises and articles reflects widespread acceptance of the proposition that persuasion is a legitimate aspect of jury selection. The primary goal of persuasion, as its proponents stress, is to influence potential jurors to adopt the perspective of the case that the lawyer advocates. Trial lawyers are counseled to focus on the advocacy purpose of *voir dire* by using it to begin the process of persuading the jurors that counsel's position is correct. In criminal cases, this means that counsel is urged to educate jurors as to the merits of the defense position while they diffuse the prosecutor's case.

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138. 3 Melvin M. Belli, Modern Trials § 51.42 (2d ed. 1982) ("Voir dire of the prospective panel should be used to accomplish two purposes: first, the excusing or striking of unfavorable prospective jurors; and second, the opportunity to meet and impress those who will become the 'triers of facts' with the justiciableness of one's cause.") *Id.* See Francis X. Busch, Law and Tactics in Jury Trials, § 85 (1949); Irving Goldstein, Trial Technique § 240 (1935); Joseph P. Carr, Voir Dire Examination of Jurors: An Appraisal by an Attorney, 1963 U. Ill. L.F. 653, 653; Clarence W. Heyl, Selection of the Jury, 40 Ill. B.J. 328, 337 (1952).

139. See, e.g., Jeffrey T. Frederick, Mastering Voir Dire and Jury Selection 4 (1995):

The primary goal of persuasion during voir dire is to influence potential jurors to adopt the perspective of the case that the lawyer advocates. By doing so early in the trial process, jurors filter the evidence and arguments made at trial through the lens of the lawyer's viewpoint. This filtering process subsequently makes the opposing lawyer's job that much more difficult.

*Id.*


As you interrogate the jurors you meet them personally for the first time. You are given a chance to start selling them your defense. Your questions should educate each prospective juror as to the legal principles of your defense, thereby helping them to understand the legalistic jargon of the court's charge. Their answers to your questions
From defense counsel's standpoint, the reality of the situation is that indoctrination is pervasive in our criminal justice system. Very early in their careers counsel become schooled in the belief that indoctrination begins well before the jurors are summoned, generated by the deluge of media accounts of crime which cause jurors to harbor concerns for individual and family safety. Counsel surmise that this indoctrination has already taken its toll by the time the jurors enter the courthouse, many of them believing that the defendants would not be there unless they were a little guilty.\textsuperscript{142} The process continues as the prospective jurors witness the unsettling spectacle of sheriffs searching litigants, witnesses, and spectators who enter the building as well as the jurors themselves, and is compounded from the videotapes, pamphlets or other visual aids employed to acquaint the jurors with the functions and responsibilities of jury service. In the defense psyche, the media indoctrination, the constant presence of security, and the martial shepherding of jurors in and out of courtrooms are factors that must be addressed and countered. The \textit{voir dire} examination has come to be recognized as a legitimate method of neutralizing those factors and to humanize the defendant in the eyes of the jurors.\textsuperscript{143}

Prosecutors, on the other hand, are hardly likely to have much quarrel with the subliminal trappings of indoctrination that plague the defense. Jurors who are cognizant of their surroundings and mindful of their position as keepers of the community's conscience are viewed as being better able to do what is expected of them by signing a guilty verdict. The prosecution has little incentive to dispel the notion that defendants would not be brought to trial unless they were guilty of something. The inevitable result is that prosecutors will routinely continue to align themselves with the court in resisting defense efforts to educate and indoctrinate prospective jurors. Viewed in this perspective, the rather conflicting philosophies of the prosecution and the defense are likely to insure that the \textit{voir dire} examination will require trial judges to maintain a vigilant eye.

\footnotesize{may be effectively used in your summation; you argue that each answer is in reality a promise.}

\textit{Id.}

\textsuperscript{142} 1 \textsc{Elissa Krauss & Beth Bonora, Jurywork} § 2.04(2)(a) (1997). "Attitudinal surveys conducted by the National Jury Project in jurisdictions throughout the country reveal that a substantial proportion of persons eligible for jury service: ---agree that a person who is brought to trial is probably guilty . . . ." \textit{Id.}

\textsuperscript{143} Cathy E. Bennett et al., \textit{How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases}, 46 SMU L. Rev. 659, 674-76 (1992).
III. SOME SUGGESTIONS TO PRACTITIONERS

While it is recognized that the nature and extent of the *voir dire* will be defined generally by the charges and the relevant aspects of the case on trial, there are nonetheless some basic observations and caveats that may be of some value to those who lack extensive exposure to the processes of jury selection. The observations and suggestions that follow are based upon the experiences of the author as well as some fellow jurists.144

A starting point to consider is the appropriate situs of the examination, for in some cases there may be compelling reasons for conducting the *voir dire* of each juror individually and outside the presence of the other prospective jurors. Although the courts do not recognize any right to sequestered *voir dire*, either in capital cases or in cases involving controversial defenses, trial judges in their discretion, may allow the examination to be conducted in this fashion.145 Some judges have been receptive to such requests, particularly where the jurors' responses might tend to educate other members of the venire as to what would constitute an acceptable or good answer, or would otherwise taint the panel. Sequestered *voir dire* has been the practice routinely followed by this author in proceedings involving the death penalty, high profile media cases, the insanity defense, and where defendants claim entitlement to justifiable use of deadly force against assaults by peace officers. The rationale for conducting the *voir dire* in this manner is that some jurors may have apprehensions which cause them to be reticent in providing the full and truthful answers called for, perhaps fearing embarrassment before their fellow jurors.

Lawyers who have participated in jury selection recognize that the process begins well before the venire is summoned to the courtroom. Depending upon the issues, the evidence, and other aspects of the case, prosecutors and defense counsel alike generally have a pretty good picture of the jurors they are seeking before the trial begins. From the prosecutor's standpoint the ideal juror might likely be a steadily employed blue collar worker, possessing traditional family values and having strong ties to the community. State's attorneys tend

144. To date, the author has presided over 245 jury trials in which he has had the practice to meet with jurors after the verdict to discuss any unusual or bothersome aspects of their service. Additionally, as an attorney, the author served as trial counsel in nearly 100 felony cases wherein the former practice of attorney-conducted voir dire was followed.
147. Neal, 489 N.E.2d at 852.
to look favorably upon individuals who are politically conservative and authoritarian in nature, who will respond well to the notion that the prosecutor represents the "legitimate authority of the state and society," and who will be more likely to view the defendant as a social nonconformist.\footnote{148} The state hopes to select jurors who exhibit a willingness to judge others, while they themselves follow the law, and who demonstrate that they will be able to work together in arriving at a verdict.\footnote{149} Defense counsel, on the other hand, generally are receptive to professional or white collar employment which requires analytical skills, and to mental health, pastoral, or social workers whose occupations might denote an acceptance of and concern for those less fortunate than themselves. Defense counsel might well look for jurors who exhibit personality traits that demonstrate a dislike for unfairness or inequity.\footnote{150}

The literature on trial advocacy and practice is also instructive on jury selection practices. Much of it is stereotypical in approach, some current and some dated. For example, defense counsel are cautioned that retired police officers and military personnel as well as their spouses are undesirable since their professional life has required adherence to a strict line of conduct.\footnote{151} Similarly, defense lawyers are told that bankers, bank employees, and low salaried white collar workers have been trained to either take or to give orders and have been forced to tow the line and usually expect others to do the same.\footnote{152} Conversely, salespersons, actors, artists, and writers are said to be highly desirable for the defense as "[t]hey tend to accept life more readily," "are not easily shocked by a crime," and require more evidence of guilt before voting to convict.\footnote{153}

The stereotypical approach traditionally has extended to ethnic and racial considerations as well, although these concerns understandably were of greater significance when venires were composed of a first or second generation citizenry. From a defense standpoint, the teaching was that persons of Irish, Italian, Jewish, or Southern European extraction were more desirable than those of British, German, or Scandinavian heritage.\footnote{154} The view was that the latter were presumed to be more law abiding, conservative, and strict, and that they possessed
more rigid standards of conduct. According to some commentators, even physical characteristics are of significance to defense counsel. "Generally speaking, the heavy, roundfaced, jovial-looking person is the most desirable. The undesirable juror is quite often the slight, underweight, and sharp-featured type." The stereotypical approach to jury selection, while more prevalent in days past, continues to be utilized in some quarters. However, more recent literature is likely to look more favorably upon the scientific approach to jury selection which has been adopted and employed by attorneys where economically feasible. The scientific approach entails the use of trial consultants, who generally have backgrounds in the social sciences, to provide systematic assessments of juror characteristics in hopes of predicting juror behavior. From the issues and the evidence anticipated, the consultants attempt to draw a composite of the ideal juror for the case by compiling lists of character traits desired and not desired. They are also present in the courtroom during the voir dire and assist in evaluating the prospective jurors as they are observed and questioned. Although cost considerations generally will render the talents of jury consultants unavailable to both prosecutors and defense counsel, their approach and methodology no doubt has been utilized by practitioners routinely over the years.

Regardless of whether the lawyer employs the stereotypical or scientific approach to jury selection, the juror’s family, employment history, and general background will aid in furnishing meaningful predictions as to the juror’s attitudes, interaction with fellow jurors, and the likelihood of reaching a favorable decision. In gaining that knowledge, at least in Cook County, attorneys routinely begin their examination with the juror cards that provide the basic information for each prospective juror. While some may view the cards in a name, rank, and serial number fashion, there is a good deal more that provides some basic insights into the juror’s background. From the cards, lawyers will acquire information concerning the juror’s family; residence; employer and occupation; prior jury service; relationships with judges, lawyers, and police; prior involvement in the criminal justice

155. Id.
156. Id. § 39:44.
158. Id.
159. BELLI, supra note 138, § 51.82.
160. Id.
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system as complainants, witnesses, or defendants; and whether the juror or family member has been a victim.

There are, of course, subsidiary areas of inquiry that counsel may wish to pursue depending on the facts and circumstances of the case. For instance, prior military service might be a relevant concern to ascertain familiarity with handguns or explosives, involvement in court martial proceedings, or perhaps service as a military policeman or prison guard. Casual pursuits and hobbies or participation in activities such as hunting, target shooting, martial arts, survival training, or other endeavors could also be revealing. Further insight into the jurors' makeup may be gleaned from membership in particular clubs, groups, or associations. Individuals who belong to the National Rifle Association or who participate in the activities of CAPS (Chicago Alternative Policing Strategy) present themselves quite differently than, say, dues paying members of the American Civil Liberties Union, the Coalition Against the Death Penalty, or some similarly oriented group. Counsel may also wish to learn something about how the jurors acquire their news, as for example through newspaper or periodical subscriptions. A juror who subscribes to *The American Spectator* or *The National Review* will justifiably be viewed in a different light than one who routinely reads *The Progressive* or *The Atlantic Monthly*. Although each juror need not be asked the same identical questions, enough information should be obtained to enable counsel to interpose intelligent challenges.

In today's setting, counsel must also be mindful of *Batson* considerations and glean sufficient knowledge from the prospective jurors to support or oppose claims of racial,162 ethnic,163 or gender164 discrimination. The principles enunciated in the context of claims of racial discrimination clearly apply in cases involving ethnic discrimination165 as well as gender discrimination.166 Counsel should take heed that when *Batson* motions are interposed, one of the factors courts may consider in determining whether the movant has made a *prima facie* case of purposeful discrimination is whether the excluded persons are "a heterogeneous group sharing race as their only common character-

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161. Batson v. Kentucky, 476 U.S. 79, 96 (1986). In *Batson*, the court held that the prosecution is prohibited by the Equal Protection Clause from challenging prospective jurors solely based on their race. *Id.* at 97.

162. *Id.* at 96-97.


166. Hernandez, 500 U.S. at 358.
istic."\textsuperscript{167} It is, therefore, incumbent upon opposing counsel to elicit enough meaningful information to enable the court to find that there are valid distinguishing factors present other than the forbidden one. This is likewise true during the second stage of the hearing where the burden has shifted to require the party justifying the challenge to offer a race neutral explanation of why the particular juror is objectionable.\textsuperscript{168} The subject of race or gender neutral explanations has been amply covered elsewhere, and it is not the purpose here to broaden that coverage. Suffice it to say that when recognition is given to factors that have been accepted as race neutral, such as employment,\textsuperscript{169} residence\textsuperscript{170} or political philosophy,\textsuperscript{171} counsel's role in obtaining sufficient data is readily apparent.

Some cautions are advisable. First, when conducting voir dire, counsel should refrain from placing on record a juror's residence or work address, as many jurors harbor concerns that reprisals may result from a verdict adverse to the defense. To alleviate such concerns many judges also routinely instruct defense counsel to refrain from exhibiting the juror cards to the defendant or to allow them to be otherwise accessible. In those limited cases involving pro se representation, as a general practice, the cards simply are not given to either side. Second, in the case of prior arrests or convictions, it is not unusual to discover a conflict between the juror's card and criminal background information which has been obtained by the prosecution and hopefully tendered to the defense. Care should be taken to phrase the question with such certainty as to allow for a challenge for cause if the deception is apparent, because the juror cards simply ask whether the juror has been an "accused." Also, although not required by case law,\textsuperscript{172} it may be preferable in those situations to request an in camera hearing to avoid the possibility of embarrassment to the juror as to the correctness of their background information.

Juror embarrassment is definitely a factor to be considered and counsel should be mindful that prospective jurors indeed have a zone of privacy which judges will endeavor to protect. Reference has already been made to residence and work addresses, but there are other areas as well. Even before the supreme court mandated attorney voir dire, judges witnessed many intrusions into this zone for no apparent

\begin{itemize}
  \item \textsuperscript{167} People v. Blackwell, 665 N.E.2d 782, 786 (Ill. 1996).
  \item \textsuperscript{168} People v. Harris, 544 N.E.2d 357, 380-86 (Ill. 1989).
  \item \textsuperscript{169} People v. Hope, 658 N.E.2d 391, 399 (Ill. 1995); People v. Kitchen, 636 N.E.2d 433, 442 (Ill. 1994).
  \item \textsuperscript{170} People v. Andrews, 614 N.E.2d 1184, 1193 (Ill. 1993).
  \item \textsuperscript{171} People v. Harris, 544 N.E.2d 357, 380-81 (Ill. 1989).
  \item \textsuperscript{172} People v. Smith, 604 N.E.2d 858, 876 (Ill. 1992).
\end{itemize}
purpose, serving only to pry into personal matters or otherwise embarrass the juror. For example, asking a young woman whether she lives alone or with her boyfriend may likely cause her embarrassment, particularly if she does not have a boyfriend or even desires one, or may compel her to announce before a body of assembled strangers that she is a single women living alone. Likewise objectionable are efforts to root out what counsel may perceive to be the juror's ethnicity or background by asking: "What kind of name is that?" One attorney, perhaps thinking she was complimenting a juror rather than patronizing her, tried this approach: "That's an interesting and lovely accent you have; where were you born?" Her chagrin was justified when the juror with some trace of annoyance replied: "Chicago." While asking a juror to name the last biography he read might provide a history professor with the opportunity to expound upon his literary endeavors, the same question put to a streets and sanitation worker is more likely to be greeted with dismay. Judges also view with disapproval questions that seek to probe jurors' feelings on a myriad of subjects; for example, "whether [prior jury service] left them 'with any prejudices or cynicism regarding the judicial system,'"173 or, as in the trial of John Wayne Gacy, their feelings about homosexuals.174 Although these types of questions may provide interesting answers and reveal rather divergent views, they may also anesthetize or offend the venire rather than enlighten the court and counsel.175

In fashioning questions to be asked, counsel should be mindful that even before the advent of amended Rule 431, trial judges generally gave opening statements to the venire introducing the attorneys and the accused, and informing the jurors of the fundamental principles governing the trial. As previously noted, the new rule now mandates that the court acquaint prospective jurors with their general duties and responsibilities.176 It might behoove counsel to use those opening remarks as a prelude to further inquiry; that is, to "play-off" or use the judge's comments as a springboard in fashioning counsel's questions. This technique may have a two-fold benefit, for counsel is likely to avoid the objection of misstating some general proposition already ar-

174. See Gacy v. Welbourn, 994 F.2d 305, 314-15 (7th Cir. 1993), where the trial judge asked whether the jurors could put aside any feelings they might have regarding homosexuality in rendering their verdict, but declined to ask the jurors to describe their feelings about homosexuals. Id. The Seventh Circuit recognized that "[t]o do more would have extended the jury-selection process considerably and left many jurors flustered and resentful, which in the end may have worked against the defendant." Id. at 315.
175. Id. at 315.
176. See supra text accompanying note 77.
ticulated by the judge and the practice may also serve to ally counsel with the court in the eyes of the jurors. Even where the judge makes no opening statements, reference to the introductory video or juror pamphlets, where such materials are used, may provide a basis for following up on general principles.

Lawyers should also take care to insure that the questions put to prospective jurors are procedurally correct and conform to the principle encompassed in the inquiry. For example, counsel is clearly entitled to ask jurors whether they will act upon the presumption of innocence and give their client the benefit of it in considering the evidence. However, asking jurors if they can start the trial believing the defendant is innocent is something more than a semantical distinction, for it clearly misstates the law. Although a defendant has the right to ascertain whether jurors will follow the presumption of innocence, there is no right to have jurors who have a present belief that he indeed is innocent. Nor, of course, is there any requirement that the State prove its case beyond all reasonable doubt.

Similarly, some attorneys assume that the opportunity to personally question carries with it the right to extract commitments from the jurors as to how they will act or, even more objectionably, how they will vote. This is likely to occur in high profile cases involving, for example, people such as the El Rukn leader Jeff Fort tried before this author. Although Fort had acquired considerable media notoriety, the reviewing court determined that his attorney had no right to have the jurors promise that they could “completely put aside anything [they had] read or heard about the defendant.” Counsel may also run afoul of controlling precedent by asking a juror how he or she would decide the case based upon certain assumptions stated in a hypothetical question. Questions such as these, which attempt to obtain a pledge from the juror as to what the verdict would be, have long been deemed improper. The same rationale applies where counsel fo-

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177. People v. Redola, 133 N.E. 292, 294 (Ill. 1921).
178. Id. at 293 (rejecting the question: “[I]f you should be selected as a juror, can you start out on a trial of this case believing the defendant is innocent?”).
180. See, e.g., People v. Taylor, 678 N.E.2d 358, 363-64 (Ill. App. Ct. 1997) (rejecting the state’s use of hypothetical questions concerning identification, finding that such hypotheticals were an attempt to indoctrinate the jury).
181. People v. Robinson, 132 N.E. 803, 804 (Ill. 1921). Here, defense counsel’s question was more in the nature of a summation:

The prosecuting witness may appear to be an elderly white lady who may have parted with various sums of money, and it may develop that this defendant received this money and that she had not received any part of the money back, and she entered into an obligation with this defendant by which she expected to receive large returns for the
cuses upon a single piece of evidence such as descriptions, handguns, or the like with the aim of getting some prior commitment as to how the juror will view the assumed evidence. And it is also improper for counsel to attempt to ferret out how jurors, during deliberations, would allow the fact that they were in the minority influence them in reaching their verdict.\textsuperscript{182} Such inquiry is objectionable for the reason that it could be interpreted as "suggesting that a juror's position upon the question of a verdict should be unchanging."\textsuperscript{183} Jurors clearly have the duty to reconsider their initial impressions and the right to change their minds.\textsuperscript{184}

Lastly, but significantly, trial counsel should be mindful of the teaching that establishing and maintaining juror rapport is a recognized goal of jury selection.\textsuperscript{185} Lawyers establish rapport in numerous ways which may include treating jurors with respect, showing interest in them as individuals, and making them feel comfortable.\textsuperscript{186} Jury trials are stressful events for court and counsel and this is likewise true of jury service. Receipt of a jury summons is hardly a harbinger of great joy in the minds of the rank and file citizenry.

Lawyers, because of their education and background, perhaps unwittingly may conduct the *voir dire* in a manner that undermines or defeats the goal of rapport. One objectionable feature of attorney *voir dire* apparent to most trial judges is the lawyer's practice of literally exhausting the patience of each juror through what is perceived as a comprehensive examination, but in reality is a rather boring and tiresome dialogue. Lawyers who selected jurors when attorney *voir dire* was the rule came to recognize that "a prolonged examination usually works to their detriment and to the detriment of their client's interests."\textsuperscript{187} Suffice it to say that each juror need not be asked the same routine questions.\textsuperscript{188} Needless repetition is not only time-consuming, but is also unnecessary and frankly boring to the venire. In some situations less may be better. For example, there is little to be gained by asking a hod carrier about his educational background and

\begin{itemize}
  \item[182.] People v. Dukett, 308 N.E.2d 590, 597 (Ill. 1974).
  \item[183.] Id.
  \item[184.] Id.
  \item[185.] FREDERICK, supra note 139, at 3.
  \item[186.] Id.
  \item[187.] Max E. Wildman, Selection and Examination of Jurors, 5 DePaul L. Rev. 32, 33 (1955).
  \item[188.] BAILEY & FISHMAN, supra note 141, § 39:27; see GOLDSTEIN, supra note 138, § 249.
\end{itemize}
it may be embarrassing as well. Similarly, it is doubtful that asking a college student about her military experiences would in any way be beneficial. Simply put, specific inquiry should be tailored to the particular juror with the aim of culling out an experience, trait, or viewpoint that is either positive or negative in the mind of the examiner.

Another objectionable practice is the tendency of some attorneys to use the *voir dire* as a means of honing their skills at cross-examination. In the vast majority of cases this simply is a mistake, for the conventional wisdom is that one should not cross examine a juror. Not only will the relation between counsel and juror become strained but also it will likely antagonize and offend fellow jurors who witness this spectacle. The resulting bias that inevitably inures to the attorney will surely defeat the objective of rapport desired.

Lawyers who exhibit undue familiarity with prospective jurors is another practice to be avoided. Although we have been conditioned to expect this from sales personnel and telecommunicators whom we have never laid eyes upon, few judges subscribe to the belief that a prospective juror may be referred to as “John” or asked: “Mrs. Smith, do you mind if I call you Mary?” Approaches like these will do little to establish the rapport desired by counsel.

These are examples of just some of the things judges take notice of; there are no doubt many others. Attorneys need not have had extensive experience in jury selection to avoid these pitfalls as common sense alone would seem to dictate a recognition that the lawyer is on trial before the jury as much as the client.

**Conclusion**

In the course of this article the first focus of attention was upon the history and evolution of *voir dire* practices in Illinois. From that discussion, it should be apparent to the reader that judicial policy works in mysterious and perhaps unusual ways. The end result in this case, of course, is that the clock has been turned back to an earlier more permissive era when counsel was afforded the opportunity to personally participate in the processes of jury selection. That opportunity, however, was not unbridled in the past, nor will it be so now. Rather, the conduct and control of the *voir dire* will remain subject to the discretion of the trial judge, as indeed it must.

The foreseeable problematic areas are not, for the most part, new concerns; rather, they are a continuation of what we have experienced. As demonstrated, some problematic areas, such as the prohi-

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bition against inquiry concerning matters law or instructions, have have been visited with some degree of regularity in the past. This is likewise so regarding the rather conflicting decisions dealing with the practice of making factual inquiries. Zehr concerns have also been addressed by the reviewing courts and in all likelihood will continue to be an area of appellate focus.

Practitioners hopefully will not minimize or overlook the significance of what has been accomplished at the Illinois Supreme Court’s direction. What the court has done is to provide the criminal bar with the means to conduct a meaningful and effective examination of prospective jurors, an objective long sought by experienced practitioners, a quest now realized. Hopefully, trial lawyers will seize upon this opportunity to insure that the legitimate objects of voir dire are realized, while at the same time promoting the interests of their client most advantageously. Given that the new rule has been operative for only a brief pause of legal history, the jury is still out on how counsel will adapt to this resurrected power. It is hoped that those who have taken the time and effort to suffer through this article will come away with a better understanding of the voir dire process as we have come to know it, and be cognizent of the benefits as well as the possible pitfalls that may lay ahead.