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FOREWORD – A VIEW FROM THE BENCH –

TOWARD A BETTER VOIR DIRE: ONE CASE AT A TIME

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Jury selection procedures were critical to me both when I was a trial lawyer and then a judge. As a trial lawyer, I saw what a difference a careful voir dire would make, as in a case involving battered women's syndrome, where prospective jurors disclosed that they had been the victim of domestic violence only when the judge questioned them in private; or in cases involving high-profile defendants, where jurors would disclose exposure to publicity during individual questioning but not when they were in the usual setting of the courtroom.

Indeed, one of my jury selections—my very first—was featured in *Mu'Min v. Virginia*.[1] In *Mu'Min*, the U.S. Supreme Court refused to require open-ended questioning about pretrial publicity; such questioning would have enabled potential jurors to describe in their own words the nature of the publicity to which they had been exposed. The Supreme Court held that the judge is under no obligation to ask any particular number of questions in any particular form.

The dissents were vituperative.[2] Both Justices Thurgood Marshall and Anthony Kennedy suggested that there was no way to evaluate the trial judge's findings of impartiality absent a voir dire that allowed the trial court to understand the nature of the information to which the prospective jurors had been exposed—what they remembered; what they gleaned from what they had read; how they had processed it; and how they had characterized it. Justice Marshall cited the following example of an open-ended questioning process and its effectiveness:

> The questioning of one prospective juror during the murder and bank robbery trial of Susan Saxe provides a particularly dramatic example of this phenomenon [the difference in response between open-ended versus closed-ended questions]. When initially queried, the prospective

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1. 500 U.S. 415, 419 n.2 (1991).
2. *Id.* at 433 (Marshall, J., dissenting); *id.* at 448 (Kennedy, J., dissenting).

> juror admitted to having read about the case but insisted that she was impartial. The following colloquy then ensued:
>
> Q: When you said that you have only read about what [the defendant] has done, what do you mean by that?
>
> A: Well, we all know what she has done. You know, we all know what she has done. So it is now up to the court to see if she is guilty or innocent, but you have to go through the whole trial, you can't just read something in the paper and say that girl is guilty, you know. You understand?
>
> Q: Well, I am not sure. I am not sure what you mean when you say we all know what she had done.
>
> A: Well, we all know the girl went in and held up the bank and the policeman was shot there.[3]

The juror was excused. I represented Susan Saxe.[4]

On the bench, I continued to invite careful voir dire, open-ended questions, individual questioning, and even lawyer-conducted voir dire if requested. (In truth, since Massachusetts did not have a tradition of voir dire, few defense lawyers knew how to do it.)

In *United States v. Wilkerson*,[5] the defendant was charged with drug trafficking. Wilkerson was a tall, African-American man who was facing a ten-year mandatory minimum sentence if convicted. I held individual voir dire in the jury deliberation room with the juror facing the defendant on opposite sides of the table, and with counsel present. The first juror was an older, white woman from one of Boston's white suburbs. In response to my opening question—about whether she was able to serve on a jury in a case that would take a week—she said, "I am afraid to come into Boston." I knew I could intone: "But of course you can set aside those feelings and be a fair juror," confident that she would say "yes," as most jurors would do. But I would not. I believed her comment reflected her visceral fear of the defendant. I excused her immediately with the thanks of the court. I am not certain whether group questioning in open court would have produced that response. In the interest of a fair trial, I would not take that risk.

And there were unintended consequences of individual voir dire. While Mr. Wilkerson was shocked by some of the answers given by

3. *Id.* at 443 n.4 (Marshall, J., dissenting).

4. *See* United States v. Tsarnaev, 142 S. Ct. 1024, 1028 (2022) (holding that a court of appeals cannot use its supervisory power to formulate a rule that supplants a district court's broad discretion to manage voir dire by prescribing specific lines of questioning).

5. 189 F.R.D. 14 (D. Mass. 1998).

prospective jurors, he told me the process made him feel valued and respected.[6] And many times after a trial was over, jurors would tell me how good they felt at being "selected" to serve on the jury. I wondered whether a careful jury selection process made them feel "selected," rather than a process that seemed perfunctory, even random, and further, whether that affected their decision making. One thing was clear, notwithstanding what critics may say, my approach did not enable lawyers to handpick the jury. At most, it allowed lawyers to identify the most problematic jurors.

I let lawyers ask in-depth questions about racial bias, even though that questioning was sometimes uncomfortable. I became a judge in 1994, following the passage of a particularly onerous federal crime bill, the Violent Crime Control and Law Enforcement Act of 1994,[7] which was animated by the "super predator" myth about a generation of "radically impulsive, brutally remorseless youngsters,"[8] repeated in a speech by Hillary Clinton and linked to young, Black men. Boston juries, drawn from the Boston metropolitan area and the surrounding suburbs of eastern Massachusetts, were overwhelmingly white. It seemed fair—as in the *Wilkerson* case—that their prejudices be examined. I also worked to diversify the jury pool in *United States v. Green*.[9] Although that effort was reversed by the First Circuit[10] because I had not sought to formally amend the district's jury selection plan, the District of Massachusetts subsequently adopted the approach for all cases.[11]

I was an outlier. Federal courts in general, and the District of Massachusetts in particular, seemed to compete for the shortest and most perfunctory voir dire. In a regular presentation of the District of Massachusetts trial court, "The District Court Speaks," each judge described his or her jury selection. As I recall, one judge bragged that he picked juries in under a half hour; many judges only questioned jurors in a group; some would allow individual, follow-up questions (typically whispered at side bar, which is hardly a setting in which fulsome answers

6. In a book project after I left the bench, INCOMPLETE SENTENCES (forthcoming), I have interviewed many of the men that I sentenced, including Mr. Wilkerson.

7. 42 U.S.C. § 13701.

8. John J. DiLulio, Jr. coined the term for a November 1995 cover story in the *Weekly Standard*. John DiLulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), *reprinted in* WASH. EXAMINER, https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators [https://perma.cc/ZWL8-DVG2].

9. 389 F. Supp.2d 29 (D. Mass. 2005). For a more detailed description, see Nancy Gertner, 12 Angry Men *(and Women) in Federal Court*, 82 CHI.-KENT L. REV. 613 (2007).

10. *In re* United States, 426 F.3d 1 (1st Cir. 2005).

11. *See* U.S. DIST. COURT FOR THE DIST. OF MASS., PLAN FOR RANDOM SELECTION OF JURORS (2022), https://www.mad.uscourts.gov/resources/pdf/RevisedJuryPlan.pdf [https://perma.cc/ZPR6-KEW8].

are encouraged); some did not allow follow-up questions.[12] I could not understand why judges wanted such a quick voir dire. Ninety-seven percent of federal cases were pleas of guilty.[13] Jury trials were few and far between. We surely had the time to eliminate the risk of an unfair jury.

Perhaps the pendulum will swing to a different, and more in-depth, selection process over time. Change is possible. In *United States v. Nieves*,[14] Nieves challenged the manner in which the district court conducted jury selection. He argued that the court neglected to adequately screen prospective jurors for bias against gang members and that the voir dire process was too abbreviated to allow for informed peremptory and for cause challenges. The trial court questioned prospective jurors in a group and allowed follow-up questions. The group questioning could not have been more general; it was a "high-level overview of the charges," with no mention of gangs.[15] And the judge asked the prospective jurors another general question—whether any jurors had any doubts about their ability to be fair. None answered.

In an extraordinary decision, the Second Circuit vacated the district court judgment. The Second Circuit explained: "[D]istrict judges are afforded broad discretion in conducting voir dire. That discretion, however, is not boundless."[16]

Finally—an improvement in voir dire, one case at a time.

12. DIST. OF MASS., DIRECTORY OF FEDERAL COURT GUIDELINES (2022 Supp.).

13. *See, e.g.*, NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018).

14. 58 F.4th 623 (2d Cir. 2023).

15. *Id.* at 629.

16. *Id.* at 613.