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Using Jury Questionnaires; (Ab)using Jurors

Joseph A. Colquitt

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Article

Using Jury Questionnaires; (Ab)using Jurors

JOSEPH A. COLQUITT

America's courts summons millions of our citizens to serve as jurors each year. The number of citizens responding to those summonses is dropping, and in some courts the number of non-responders is reaching a critical level. Task forces have been created to address this problem, but their reports rarely discuss the intrusive nature of, and over-reliance on, jury questionnaires.

The selection of a jury is, of course, an essential part of a trial, and jury questionnaires—when properly used—can make that process more effective and expeditious. This Article examines the use of juror questionnaires in the courts.

The Article identifies and separates the four approaches to the use of jury questionnaires and analyzes the pros and cons of those schemes. It focuses principally on the more expansive, intrusive form of questionnaires, which is directed more toward information gathering than jury qualification.

Questionnaires are used in virtually all high-profile cases such as the Exxon Valdez oil spill, and the criminal prosecutions of Robert Blake, Kobe Bryant, Michael Jackson, Timothy McVeigh, Zacarias Moussaoui, Scott Peterson, O.J. Simpson, and Martha Stewart, among many others. The practice of using questionnaires in both civil and criminal litigation, though, is not limited to high-profile cases. Some courts rather routinely use jury questionnaires, but the intrusive voir dire questioning and the highly discretionary use of jury questionnaires probably play a significant role in the reluctance of citizens to report for jury duty.

This Article suggests that questionnaires may not contribute as much as their proponents contend and may impose more costs than proponents tally. It also exposes some of the real, but under-recognized costs of the expansive use of jury questionnaires.

The Article argues that the use of jury questionnaires must be better controlled, and offers specific, concrete suggestions for mending the current system, such as discouraging the use of generic questionnaires, limiting their use to specific cases based on need, and properly protecting sensitive information about prospective jurors.

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Using Jury Questionnaires; (Ab)using Jurors

JOSEPH A. COLQUITT[*]

We would like the public to allow us to return
to our private lives as anonymously as we came.

Public Statement, Michael Jackson's Jury[1]

I. INTRODUCTION

The Michael Jackson jurors wanted anonymity, but they were unlikely to have it. It almost goes without saying that jurors in sensational trials are not destined to return to a truly anonymous existence. The jurors in the Michael Jackson case heard the evidence and decided a case that attracted public attention throughout the United States and the world. Moreover, they left tracks. Despite the fact that they served anonymously, during jury selection the jurors responded to questionnaires and voir dire interrogations. In doing so, they provided personal information to the court and parties. At least some of this information was provided—albeit without juror names—to the media. After the jury returned the verdict, some of the jurors chose to relinquish their anonymity, which, quite likely, would have been short-lived anyway. At that point, the media—and to some extent, the public—were able to connect individual jurors with voir dire or questionnaire responses.[2] The circle was closed, anonymity and

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[*] Jere L. Beasley Professor of Law, University of Alabama School of Law; senior circuit judge, State of Alabama. The author thanks the University of Alabama Law School Foundation for its generous support. I appreciate the assistance of Scott Dunnagan, Robert S. Elliott, Seth Gowan, Jon Macklem, and Chris Messervy, who provided research assistance and helpful comments. The statements and opinions in this Article are mine alone, and naturally, I alone remain responsible for any errors.

[1] *Reaction to Jackson Verdict*, CNN.COM, June 13, 2005, http://www.cnn.com/2005/LAW/06/13/jackson.reax/index.html. Most readers surely remember that Michael Jackson, a famous American entertainer, was charged with child molestation. He was acquitted in 2005 after a trial in a California court. John M. Broder & Nick Madigan, *Jackson Cleared After 14-Week Child Molesting Trial*, N.Y. TIMES, June 14, 2005, at A1, *available at* LEXIS, News Library, NYT File.

[2] For example, the *New York Times* reported on Thursday, June 9, 2005, that juror number 1 was a 62-year-old civil engineer. John M. Broder & Jonathan D. Glater, *Makeup of Jackson Jury Seems to Favor Prosecution*, N.Y. TIMES, June 9, 2005, at A24, *available at* LEXIS, News Library, NYT file. Immediately following the verdict, juror number 1 identified himself to the press as Raymond Hultman. *See Jurors Despised Accuser's Mom*, FOXNEWS.COM, June 14, 2005, http://www.foxnews.com/story/0,2933,159472,00.html.

privacy were breached, and identity and personal information could be joined.

This Article examines the use of juror questionnaires in the courts. Although the use of questionnaires in high-profile cases is apparent,[3] the practice is not limited to those cases. Some courts rather routinely use questionnaires,[4] and many of these questionnaires seek a wide range of personal data from prospective jurors,[5] despite the fact that many of these questionnaires will be treated as public records. Therein lies one of the principal problems with the general use of juror questionnaires: private matters unnecessarily become public.

Court proceedings and records, whether civil[6] or criminal,[7] are

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Within the month, six of the jurors appeared on ABC's "Good Morning America." *See 2 Jurors Say They Regret Jackson's Acquittal* (Aug. 9, 2005), *available at* http://www.msnbc.msn.com/id/8880663. Two jurors were interviewed on MSNBC's Rita Cosby show. *Id.* Those jurors have contracted to write books about their experiences as jurors. *Id.* Again, it should be possible to connect the jurors' names to their questionnaires.

[3] *See infra* notes 18–33 and accompanying text (listing a number of high-profile cases in which jury questionnaires were used).

[4] *See* Bellas v. Superior Court, 102 Cal. Rptr. 2d 380, 391 (Cal. Ct. App. 2000) (noting "[t]he burgeoning use of juror questionnaires in some courts"); CIVIL TRIAL PRACTICE STANDARDS § 1(b) cmt. (a)(i) (1998), *available at* http://www.abanet.org/litigation/civiltrialstandards/ctps.pdf (noting "increased reliance" by some courts on questionnaires "to permit expeditious, informed jury selection"); CATHY E. BENNETT & ROBERT B. HIRSCHHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS § 8.16, at 112 (1993) ("Questionnaires are becoming routine in some states and acceptable in others. It is your job to make sure that questionnaires become more the norm in your community than not."); V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 2.8, at 46 (2d ed. 1993) ("The use of [both types of] jury questionnaires has become quite common."). The U.S. District Court for the Middle District of Alabama maintains a website that includes a questionnaire along with a note to prospective jurors that "[i]t is important that you complete this entire questionnaire." United States Dist. Ct. Juror Questionnaire, *available at* http://www.almd.uscourts.gov/jurorinfo/docs/juror_questionnaire.pdf (last visited Sept. 22, 2007). Because of the dearth of appellate cases discussing the use of questionnaires in non-high-profile cases, it is difficult to determine just how frequently trial courts use questionnaires. But a number of states provide sample questionnaires and procedural rules which raise the likelihood of their use in ordinary jury trials. *See, e.g.*, ALA. R. CRIM. P. Sample Form 56 (2007) (Recommended Uniform Juror Questionnaire); ALA. R. CRIM. P. 18.2(b) (2007) (addressing the inclusion of questionnaire information in appellate records); COLO. REV. STAT. § 13-71-115 (2006) (providing that jurors shall be given questionnaires for completion and that, unless otherwise ordered by the court, counsel shall be supplied with copies of the "appropriate completed questionnaires"); CONN. GEN. STAT. ANN. § 51-232(c) (West 1958) (instructing that confidential questionnaires including "information usually raised in voir dire examination" shall be supplied to prospective jurors and completed copies shall be provided to counsel); FLA. STAT. ANN. § 1.431 (West 2004) (authorizing the use of approved form questionnaires to aid in jury selection); N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 2002) (authorizing the use of jury questionnaires in criminal cases). The Committee Comments to Alabama Rule 18.2 discuss the use of questionnaires pursuant to "local rule[s]" and encourage trial courts to obtain "basic biographical information" prior to voir dire. ALA. R. CRIM. P. 18.2. committee cmt.

[5] *See, e.g.*, ALA. R. CRIM. P. Sample Form 56 (Recommended Uniform Juror Questionnaire containing forty-eight questions plus six optional queries addressing such matters as jurors' affiliations, hobbies, reading and viewing practices, and opinions).

[6] *See, e.g.*, Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984) ("[I]t becomes clear that the public and the press possess a First Amendment and a common law right of access to civil proceedings . . . ."); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (applying presumption of openness to civil case in determining that "the policy reasons for granting public access to criminal proceedings apply to civil cases as well"); NBC Subsidiary (KNBC-TV), Inc. v. Superior

presumably accessible by the public and the press. This right of access may arise from the common law,[8] a statute,[9] a rule,[10] or constitutional law.[11] Voir dire, whether conducted orally or by the use of questionnaires, is also presumably open.[12] Thus, as private matters are aired during oral voir dire or in questionnaires, they potentially become public. This Article argues that the routine use of jury questionnaires unnecessarily increases the likelihood of publicizing jurors' private information at significant cost to the judicial system and to those citizens who serve as jurors.

Courts increasingly rely on jury questionnaires[13] for two purposes. First, questionnaires are used to qualify jurors for jury service.[14] Second, they are used to obtain information about jurors for jury selection.[15] These

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Court, 980 P.2d 337, 364 (Cal. 1999) ("[I]t is clear today that substantive courtroom proceedings in ordinary civil cases are 'presumptively open' . . . ."); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) (dictum) (noting that openness with regard to civil cases was not before the court, but observing "that historically both civil and criminal trials have been presumptively open").

[7] *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982) (noting as "firmly established . . . that the press and general public have a constitutional right of access to criminal trials"); *Richmond Newspapers*, 448 U.S. at 580 (holding that "the right to attend criminal trials is implicit in the guarantees of the First Amendment").

[8] *See, e.g.*, *Publicker Indus., Inc.*, 733 F.2d at 1071 ("[I]t becomes clear that the public and the press possess a . . . common law right of access to civil proceedings . . . .").

[9] *See, e.g.*, MICH. COMP. LAWS SERV. § 600.1420 (LexisNexis 2004) ("The sittings of every court within this state shall be public" unless otherwise ordered based on cause); MONT. CODE ANN. § 46-11-701(1) (2005) (providing that pretrial proceedings and their records are generally open to the public).

[10] *See, e.g.*, GA. UNIF. SUPER. CT. R. 22 (2006) (generally "representatives of the print and electronic public media may be present at and unobtrusively make written notes and sketches pertaining to any judicial proceedings in the superior courts"). "Reporters, photographers, and technicians will be accorded full right of access to court proceedings for obtaining public information within the requirements of due process of law . . . ." *Id.* at 22(L).

[11] *See, e.g.*, *Globe Newspaper*, 457 U.S. at 604; *Richmond Newspapers*, 448 U.S. at 580; Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1169 (6th Cir. 1983) (reversing the lower court's order placing documents under seal and holding "that under applicable legal principles [Freedom of Information Act, the First Amendment, and the common law] they should be released for public inspection as are other court records and documents").

[12] *See, e.g.*, Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505 (1984) ("[T]he process of selection of jurors has presumptively been a public process with exceptions only for good cause shown."); Copley Press, Inc. v. Superior Court, 278 Cal. Rptr. 443, 451 (Cal. Ct. App. 1991) ("It is clear that when the court distributed the questionnaires to the venirepersons with instructions to fill them out, voir dire had begun. The fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import."); State *ex rel.* Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180, 188 (Ohio 2002) ("[T]he First Amendment qualified right to open proceedings in criminal trials extends to prospective juror questionnaires. Consistent with our reasoning, we note that virtually every court having occasion to address this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness.") (footnote omitted). *But see* ALA. R. CRIM. P. Sample Form 56 (2007) (Recommended Uniform Juror Questionnaire stating in the instructions paragraph that the questionnaire "is not public information").

[13] *See* CIVIL TRIAL PRACTICE STANDARDS, *supra* note 4, § 1(b) cmt. (a)(i) (1998) (noting "increased reliance" by some courts on questionnaires "to permit expeditious, informed jury selection"); STARR & MCCORMICK, *supra* note 4, § 2.8, at 46 ("The use of jury questionnaires has become quite common.").

[14] *See, e.g.*, Office of the Clerk of Courts, Liberty County, Georgia, On-Line Jury Qualification Questionnaire, http://www.libertyco.com/juryquest.htm (last visited Aug. 28, 2007).

[15] STARR & MCCORMICK, *supra* note 4, § 2.8, at 46.

uses may seem innocuous—even beneficial—but the fact is that their use can be harmful, and even abusive.

Although jury questionnaires are a somewhat recent development,[16] written juror questionnaires are now used frequently in both state and federal courts.[17] In fact, juror questionnaires have been used in many—if not most—of the more notable cases of recent years, including, but certainly not limited to, the Exxon Valdez oil-spill[18] and "Jenny Jones Show"[19] civil cases, and the criminal prosecutions of Robert Blake,[20] Kobe Bryant,[21] Michael Jackson,[22] Kenneth L. Lay and Jeffrey K. Skilling[23] (former executives at Enron), Timothy McVeigh,[24] Zacarias Moussaoui,[25]

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[16] *See, e.g.*, JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY 122 (1995) (noting that, in 1995, juror questionnaires had "been in use for at least nineteen years").

[17] *See supra* note 4 and accompanying text.

[18] *See* Casey Bukro, *Alaskans Putting Their Own Imprint on Oil Spill Trial*, CHI. TRIB., Feb. 2, 1990, at 5, *available at* LEXIS, News Library, CHTRIB File (reporting the refusal of one juror to complete the questionnaire). In 1989, the Exxon Valdez, an oil tanker, ran aground in Alaska, resulting in an oil spill of about 11 million gallons of crude oil. *Id.*

[19] *See Jenny Jones Looking Forward to Testifying at TV Talk Show Civil Trial*, COURT TV ONLINE, Mar. 30, 1999, http://www.courttv.com/archive/trials/jennyjones/033099_ctv.html (discussing the case and the 100-question, fifteen page questionnaire submitted to 125 jurors). The show and other defendants were sued for negligence as a result of the shooting death of Scott Amedure, a show guest. On the show, Amedure professed a same-sex crush on Jonathan Schmitz, who later killed Amedure. *Id.*

[20] *See Potential Jurors Screened for Trial of Former TV Detective Robert Blake*, COURTTV.COM, Jan. 13, 2004, http://www.courttv.com/trials/blake/011204_questionnaire_ctv.html (discussing the seventeen page questionnaire containing 133 questions submitted to 156 jurors in the Blake case). Blake was charged in 2002 with the death of his wife. *Blake Found Liable in Wife's Slaying*, DAILY NEWS L.A., Nov. 19, 2005, at N1, *available at* LEXIS, News Library, LAD file. He was acquitted in 2005, but later lost a civil case arising out of the death. Associate Press, *Actor Is Ordered to Pay $30 million in Killing*, N.Y. TIMES, Nov. 19, 2005, at A12, *available at* LEXIS, News Library, NYT File.

[21] *See* Juror Quesetionnaire, People v. Bryant, Aug. 27, 2004, *available at* http://www.vortex.com/bt/KobeJuryQuestionnaire.pdf [hereinafter Kobe Bryant Questionnaire]. Bryant faced sexual assault charges. The charges eventually were dropped. Mike Bresnahan, *The Kobe Bryant Case; Ball Back in his Court*, L.A. TIMES, Sept. 2, 2004, at D1, *available at* LEXIS, News Library, LAT File.

[22] *See Michael Jackson Jury Questionnaire Probes Feelings on Race and Prior Allegations*, COURTTV.COM, Feb. 3, 2005, http://www.courttv.com/trials/jackson/020305_questionnaire_ap.html, (discussing questionnaire used in Jackson case). For a discussion of the Jackson case, see *supra* notes 1–2 and accompanying text.

[23] *See* Carrie Johnson, *Enron Executive Agrees to Plea Deal; Prosecutors Gain Witness Against Lay and Skilling*, WASH. POST, Dec. 28, 2005, at A01, *available at* LEXIS, News Library, WPOST File (mentioning that 400 potential jurors "completed extensive questionnaires" for the Lay-Skilling trial, which began on January 31, 2006).

[24] *See* United States v. McVeigh, 153 F.3d 1166, 1208 (10th Cir. 1998) ("[A]ll prospective jurors were asked to fill out an extensive questionnaire prior to voir dire."). McVeigh was convicted of murder and conspiracy arising out of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. 168 people died in the bombing. McVeigh was convicted, sentenced to death, and executed. Alex Rodriguez, *U.S. Executes McVeigh; Oklahoma City Bomber is 1st Federal Inmate Put to Death Since '63*, CHI. TRIB. June 11, 2001, at N1, *available at* LEXIS, News Library, CHTRIB File.

[25] *See* Jury Questionnaire, United States v. Moussaoui, Cr. No. 01-455 (LMB), *available at* http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/71295/0.pdf [hereinafter Moussaoui questionnaire]. Moussaoui, allegedly the "20th hijacker" and a self-professed member of Al Qaeda,

Oliver North,[26] Scott Peterson,[27] Eric Rudolph,[28] Richard Scrushy[29] (in connection with the HealthSouth debacle), former Alabama governor Don Siegelman (and Richard Scrushy, again),[30] O.J. Simpson,[31] and Martha Stewart.[32] The practice, though, is not universal; some courts do not use questionnaires even in unusually important, high-profile, or widely publicized cases.[33]

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was charged with six counts of conspiracy. Indictment, United States v. Zacarias Moussaoui (E.D. Va. 2001), *available at* http://www.usdoj.gov/ag/moussaouiindictment.htm. Moussaoui was tried, convicted, and sentenced to life in prison. *Moussaoui Verdict Draws Mixed Reaction*, CNN.COM, Apr. 3, 2006, http://www.cnn.com/2006/LAW/04/03/moussaoui.reax/index.html; *Was Justice Done in the Moussaoui Sentence?* (NPR radio broadcast May 4, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5382722.

[26] *See* United States v. North, 910 F.2d 843, 924 (D.C. Cir. 1990) (Wald, C.J., dissenting) (referring to the use of juror questionnaires). North was tried and convicted of crimes arising out of the Iran-Contra affair. His conviction was overturned on appeal and the charges ultimately were dismissed. Haynes Johnson & Tracy Thompson, *North Charges Dismissed at Request of Prosecutor*, WASH. POST, Sept. 17, 1991, at A1, *available at* LEXIS, News Library, WPOST File.

[27] *See Scott Peterson Introduced to Jury Pool*, CNN.COM, Mar. 4, 2004, http://www.cnn.com/2004/LAW/03/04/peterson.case.ap/ (mentioning thirty-page questionnaire distributed to nearly 100 jurors). A copy of the jury questionnaire posted online contains twenty-three pages. *See* Juror Questionnaire, http://images.ibsys.com/fran-structure/pdf/juror_questionnaire_03052004.pdf (last visited Sept. 22, 2007) [hereinafter Peterson Questionnaire]. Peterson was charged, tried for, and convicted of the murder of his wife. He was sentenced to death. He is on death row in California, and his case is on appeal. Dean E. Murphy, *Jury Says Scott Peterson Deserves to Die for Murder*, N.Y. TIMES, Dec. 14, 2004, at A20, *available at* LEXIS, News Library, NYT File.

[28] *See* Rhonda Cook, *Dynamite Stash Led to Deal*, ATLANTA J.-CONST., Apr. 10, 2005, at 1A, *available at* LEXIS, News Library, ATLJNL File (mentioning use of jury questionnaires in Rudolph case). Rudolph was charged with murder and other crimes involving bombings in Alabama and Georgia. He ultimately pled guilty. Jeffry Scott & Don Plummer, *Bomber Brags He Beat Death*, ATLANTA J.-CONST., Apr. 14, 2005, at 1A, *available at* LEXIS, News Library, ATLJNL File.

[29] *See* Ben White, *In Scrushy Trial, Jurors Chose Defense's Portrait; Ex-CEO Seen as Religious, Popular Figure in Birmingham*, WASH. POST, June 29, 2005, at D01, *available at*, LEXIS, News Library, WPOST File (discussing jurors' responses to questionnaires). Scrushy was charged along with others arising out the Healthsouth fraud case. He was acquitted. *Setback in Birmingham After . . .* , WASH. POST, July 3, 2005, at F02, *available at* LEXIS, News Library, WPOST File.

[30] *See* Phillip Rawls, *Siegelman and Scrushy Try to Gut Charges*, DECATUR DAILY NEWS, Mar. 15, 2006, *available at* http://www.decaturdaily.com/decaturdaily/news/060315/gut.shtml (reporting that "200 to 250 potential jurors will likely be called for the trial, and they will have to answer a questionnaire of 15 to 20 pages . . . .").

[31] *See* Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 519 (Cal. Ct. App. 2001) (discussing juror misconduct in failing to report material information on her questionnaire). Simpson was charged with the murders of his ex-wife and her friend. He was acquitted of the charges but later lost a civil case for damages arising out of the deaths. Stephanie Simon, *Simpson Verdict: $25 Million; Punitive Damages Bring Total to $33.5 Million*, L.A. TIMES, Feb. 11, 1997, at A1, *available at* LEXIS, News Library, LAT File.

[32] *See Martha Won't Get New Trial*, CBS NEWS, May 5, 2004, http://www.cbsnews.com/stories/2004/02/02/national/main597213.shtml (discussing the denial of a motion for new trial on the ground that a juror "lied about his arrest record" on his questionnaire). Stewart was convicted of several crimes arising out of an alleged insider trading transaction. She was convicted, and her conviction was affirmed on appeal. Michael Barbaro, *Court Rejects Appeal by Martha Stewart*, N.Y. TIMES, Jan. 7, 2006, at C3, *available at* LEXIS, News Library, NYT File.

[33] *See, e.g.*, Burgess v. State, 723 So. 2d 742, 761–62 (Ala. Crim. App. 1997) (capital murder case upholding trial court's denial of use of a jury questionnaire); State v. Mills, 582 N.E.2d 972, 981 (Ohio 1992) (same).

This Article focuses on questionnaires used for voir dire, although jury-service qualification questionnaires will be mentioned when their use potentially impacts juror privacy. It concludes that the routine, widespread use of those jury questionnaires that seek facts beyond the information needed for juror-qualification purposes is ill-advised and injurious.[34] The Article contains four parts. This section (Part I) introduces the topic. Part II identifies the purpose of, and three possible approaches to the use of, jury-selection questionnaires. It contrasts and evaluates those approaches, discusses the benefits and costs of jury questionnaires, and disagrees with the practice of routinely submitting invasive, general questionnaires to prospective venire-persons. I argue that the benefits of their use frequently are outweighed by the negative aspects of the practice. Additionally, I conclude that the benefits of expansive use of jury questionnaires may be overstated. In Part III, I contend that if jury questionnaires are used for jury-selection purposes, they should be used only in regard to particular trials that warrant their use. Moreover, they should be narrowly tailored to meet the needs of the court and parties, as well as to protect prospective jurors and their privacy. As the Article will demonstrate, jurors do have privacy interests that the courts should respect.[35] Unfortunately, the unbridled use of jury questionnaires jeopardizes those privacy interests. In Part IV, I propose a paradigm governing the use of questionnaires and the information gathered through their use and conclude that, without some guidance for trial courts, many questionnaires will continue to be ad hoc, inappropriate, invasive, and harmful.

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[34] I do not disagree with the practice of submitting qualification questionnaires to prospective jurors. *See, e.g.*, CAL. CIV. PROC. CODE § 196 (West 2006) (permitting jury commissioners or courts to verify qualifications of potential jurors by inquiring "orally or in written form" about venirepersons' "qualifications and ability to serve" as jurors); NEB. REV. STAT. § 25-1629.04 (2006) (authorizing jury questionnaires to be sent to jurors with the summonses in a single mailing); N.D. CENT. CODE § 27-09.1-07 (2006) (authorizing clerks of court to submit jury qualification forms to prospective jurors); JOHN E. SHAPARD, FEDERAL JUDICIAL CENTER, A COMPARATIVE STUDY OF JURY SELECTION SYSTEMS 2 (1981) (noting that juror-qualification questionnaires are mailed to prospective jurors).

[35] *See, e.g.*, Copley Press, Inc. v. Superior Court, 278 Cal. Rptr. 443, 449–51 (Cal. Ct. App. 1991) (discussing the proper balancing of juror privacy—an issue of "constitutional dimension"—and public access to questionnaires); State v. Pennell, 583 A.2d 1348, 1353 (Del. Super. Ct. 1990) ("Delaware has routinely recognized a juror's right to privacy as to personal information of a sensitive nature."); State *ex rel.* Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180, 189 (Ohio 2002) (concluding that trial judges should make a determination on the record whether a juror has a "legitimate privacy interest[]" and whether a juror can decline to disclose information).

II. USING QUESTIONNAIRES; PROS AND CONS

The jury, passing on the prisoner's life,
May in the sworn twelve have a thief or two
Guiltier than him they try;

William Shakespeare[36]

A. *Voir Dire*

To explore the use of jury questionnaires, it is first necessary to briefly review the purposes and practices of voir dire. Succinctly, we remind ourselves that the primary purpose of voir dire is to gather information from the venire so that the court and the attorneys can adequately address challenges for cause and peremptory strikes.[37] Properly done, in theory at least, voir dire reduces the chance that "a thief or two" will serve as jurors in a theft, or perhaps any other type, case. The scope of voir dire, though, falls within the trial judge's sound discretion.[38] Surely, most judges would inquire about, or permit inquiry about, whether jurors are thieves, but treks into other topics may be foreclosed.[39]

Regardless of whether the judge,[40] the attorneys,[41] or a combination of

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[36] WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 1, at lines 22–24 (W.J. Craig ed., The Oxford Shakespeare 1914), *available at* http://www.bartleby.com/70/1421.html.

[37] *See, e.g.*, PRINCIPLES FOR JURIES AND JURY TRIALS, princ. 11(B)(3) (2005), *available at* http://www.abanet.org/jury/ (follow "Download the Principles with Commentary" link) [hereinafter AMERICAN JURY PROJECT] ("Voir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges."); STARR & MCCORMICK, *supra* note 4, § 9.0, at 319 ("Voir dire provides the attorneys' only opportunity to obtain information directly from members of the jury panel concerning their qualifications."). Although some debate persists regarding the propriety of peremptory challenges, the topic is beyond the scope of this Article. *See, e.g.*, Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice, and What, If Anything, to Do About It*, 1999 WIS. L. REV. 441, 483 ("One of the most common trial reform proposals is to reduce or eliminate peremptory challenges."); *see also* Bellas v. Superior Court, 102 Cal. Rptr. 2d 380, 382 (Cal. Ct. App. 2000) ("[T]he raison d'etre of juror questionnaires is to assist both sides and counsel in the selection of a fair and impartial jury . . . .").

[38] *See, e.g.*, Yarborough v. United States, 230 F.2d 56, 63 (4th Cir. 1956) (noting that it is "well settled" that trial judges decide what questions will be permitted during voir dire); Curtin v. State, 903 A.2d 922, 934 (Md. 2006) (holding that trial court did not abuse discretion in limiting voir dire); State v. Johnson, 207 S.W.3d 24, 40 (Mo. 2006) ("The trial judge is given wide discretion in conducting voir dire and determining the appropriateness of specific voir dire questions."); Commonwealth v. Ellison, 902 A.2d 419, 424 (Pa. 2006) (stating that scope of voir dire is committed to discretion of trial judge); Taylor v. State, 156 P.3d 739, 758 (Utah 2007) (holding the same as the *Ellison* court).

[39] *See, e.g.*, *Yarborough*, 230 F.2d at 63 (upholding denial of voir dire queries about the religious affiliations of prospective jurors).

[40] *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415, 419–20 (1991) (describing the judge-conducted voir dire process used in the case); *see also* 32 N.J. PRAC. & PROC. § 19.11 (2007) (noting that New Jersey judges conduct the voir dire; "rarely are the attorneys permitted to directly question the jurors").

[41] *See, e.g.*, ALA. R. CRIM. P. 18.4(c) (2007) ("The court shall permit the parties or their attorneys to conduct a reasonable examination of prospective jurors."); Fields v. City of Alexander City, 597 So.

the two[42] conduct the voir dire, the objective is to identify those prospective jurors who should not serve on the trial jury. The selection process actually is one of elimination.[43] The parties remove unwanted potential jurors through challenges for cause or peremptory strikes.[44] The six or twelve remaining jurors become the trial jury.[45] Jury questionnaires simply support the jury-selection effort.[46]

Although some courts and writers view the principal purpose of voir dire is to empanel an impartial jury,[47] most attorneys seek to empanel a jury favorable—or, at least, receptive—to their client's case.[48] Moreover, some practitioners and writers seek to maximize the utility of voir dire, not only by seeking information, but also by educating, indoctrinating, and courting the venire.[49] Thus, despite losing some of the personal contact

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2d 242, 243 (Ala. Crim. App. 1992) (holding that the "trial court committed reversible error" by refusing to permit defense counsel to directly voir dire venire).

[42] *See, e.g.*, ALA. R. CIV. P. 47(a) (authorizing the court to conduct voir dire itself or to permit the parties or their attorneys to voir dire the panel, but providing that if the court conducts the voir dire, the parties or their attorneys shall be permitted to "supplement the examination as may be proper"); ARIZ. REV. STAT. ANN. § 18.5(d) (1998) (instructing the court to conduct a thorough voir dire, then upon request, permit counsel reasonable time to further examine the panel); Carver v. Niedermayer, 920 So. 2d 123, 124 (Fla. Dist. Ct. App. 2006) (describing voir dire process that encompassed preliminary voir dire by the trial judge, followed by questioning by counsel).

[43] *But see* VA. CODE ANN. § 8.01-359(D) (2000) (allowing each party in a civil case, upon the consent of the other, to select a juror, and the two jurors so named to select a third juror who then serves as a three-person jury). Obviously, this is not the "struck jury" approach commonly used in many American courts.

[44] LISA BLUE & ROBERT B. HIRSCHHORN, BLUE'S GUDE TO JURY SELECTION § 30:1 at 376 & § 30:6 at 382 (2004).

[45] *See, e.g.*, KAN. STAT. ANN. § 22-3411(a) (1995) (providing for twelve jurors in felony cases). In many cases, alternates also are seated. These jurors remain throughout the trial for the purpose of replacing any jurors who may be excused for any reason. *Id.* § 22-3412(c). It should be noted that in some jurisdictions, jury panels may consist of some other number, such as three, five or seven jurors. *See, e.g.*, VA. CODE ANN. § 8.01-359(A), (D) (2000) (providing for trial by five or seven—or by agreement of the parties—three jurors, in civil cases); *id.* § 19.2-262(B) (establishing twelve as the number for felony cases and seven for misdemeanor cases).

[46] *See In re* South Carolina Press Ass'n, 946 F.2d 1037, 1041 (4th Cir. 1991) ("The completed questionnaires were used extensively by the attorneys in conducting the *voir dire* of the venire persons."); Copley Press, Inc. v. Superior Court, 278 Cal. Rptr. 443, 451 (Cal. App. 1993) ("It is clear that when the court distributed the questionnaires to the venirepersons with instructions to fill them out, voir dire had begun."); *In re* Newsday, Inc. v. Goodman, 159 A.D.2d 667, 669 (N.Y. App. Div. 1990) (noting "that the questionnaires completed by the petit jurors in this criminal action were an integral part of the voir dire proceeding"); State *ex rel.* Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180, 188 (Ohio 2002) ("Consistent with our reasoning, we note that virtually every court having occasion to address this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness.") (citation omitted); STARR & MCCORMICK, *supra* note 4, § 11.6.3, at 474–78 (noting that supplemental jury questionnaires shortens voir dire, prolongs jury interrogation and provides sensitive and other private information).

[47] STARR & MCCORMICK, *supra* note 4, § 10.0, at 351; *see also* Commonwealth v. Ellison, 902 A.2d 419, 423 (Pa. 2006) (observing that purpose of voir dire is "to secure a competent, fair, impartial and unprejudiced jury").

[48] *See, e.g.*, BLUE & HIRSCHHORN, *supra* note 44, § 6:24, at 94 ("Remember, what you are looking for is a juror who has a strong personality, is a leader, and is on your side.").

[49] *See, e.g.*, STARR & MCCORMICK, *supra* note 4, § 9.1.8, at 329–30. *Cf.* Stevens v. State, 770 N.E.2d 739, 751 (Ind. 2002) (addressing jury questionnaires, rather than voir dire: "Their proper

with jurors if questionnaires supplement the voir dire, attorneys continue to educate, indoctrinate, and court jurors through their questions.[50]

Whichever process is followed, voir dire will likely be an open, public process.

> *[S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause . . . .*[51]

In *Press-Enterprise Company v. Superior Court*, the United States Supreme Court held open-trial guarantees in criminal trials applicable to voir dire examination of prospective jurors.[52] In balancing the access interests of the public and the press against the fair trial right of criminal defendants, the Court observed that "[n]o right ranks higher than the right of the accused to a fair trial."[53] In *Press-Enterprise*, the parties proffered several reasons for limiting public access to the voir dire proceedings. The prosecution argued that juror candor would be adversely affected by the presence of the press.[54] After the trial judge closed portions of the voir dire proceedings, Press-Enterprise intervened and moved for release of the transcript of the voir dire process. Defense counsel objected and both the defense and the prosecution argued that releasing the transcript would offend the jurors' right of privacy.[55] Furthermore, the prosecutor noted that the jurors had answered voir dire questions under an "'implied promise of confidentiality.'"[56] The trial court refused to release a complete transcript both after the jury was empaneled and after the trial was complete.[57] The California appellate courts also refused to order the release of the transcript, and Press-Enterprise sought relief in the U.S. Supreme Court.[58]

Press-Enterprise provides some rules. The Court noted that the public and the press generally cannot be barred from criminal proceedings,

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purpose is not to condition or indoctrinate prospective jurors with the parties' contentions, notwithstanding attempts of some counsel to the contrary."). Indoctrination of the jury is not a proper objective of voir dire. *See, e.g.*, Gasiorowski v. Homer, 365 N.E.2d 43, 45 (Ill. App. Ct. 1977) (noting that a trial court may commit error if it fails to curtail a voir dire that constitutes an attempt to indoctrinate or pre-educate jurors).

[50] *See, e.g.*, BLUE & HIRSCHHORN, *supra* note 44, § 5:5, at 61 (mentioning that questionnaires may present "another opportunity to show the panel members that you are a warm and caring person"); TED A. DONNER & RICARD K. GABRIEL, JURY SELECTION STRATEGY & SCIENCE § 16:1 (2006) (noting that questionnaires may be used as "a means of educating prospective jurors").

[51] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505 (1984).

[52] *Id.*

[53] *Id.* at 508.

[54] *Id.* at 503.

[55] *Id.* at 503–04.

[56] *Id.* at 504.

[57] *Id.*

[58] *Id.* at 504–05.

including the jury voir dire process.[59] A presumption favors openness. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[60] There are circumstances, however, in which some "compelling interest," such as examination of a juror about "deeply personal matters," may warrant closure.[61] Generally, though, before the proceedings can be closed, the trial court must perform a balancing test.[62] By preserving open proceedings, according to the Court, the public will be more confident that the courts are adhering to standards of fairness.[63] To overcome the presumption of openness, a litigant must advance a more compelling interest and show that closure is required to preserve the overriding interest.[64] The litigant must also show that the closure is narrowly tailored.[65] The trial court must consider alternatives and make a record of the proceedings for possible appellate review.[66] Having reviewed voir dire, we turn to the use of questionnaires.

B. *Four Approaches to Jury Questionnaires*

Courts use questionnaires—which appear in different forms—in various ways, and for diverse purposes. This Article principally addresses the more expansive, intrusive form of questionnaires, which is directed more toward information gathering than jury qualification. For ease of discussion, these will be referred to as voir dire or supplemental questionnaires. First, though, qualification questionnaires are addressed.

1. *Qualification Questionnaires*

Courts must determine whether potential jurors are eligible to serve,[67] but jury qualification is a relatively easy task. Many statutes or court rules state the qualifications for jury service,[68] and judges routinely conduct a qualification voir dire to ensure that those called for jury service are qualified to serve. Qualification questionnaires may reduce, somewhat, the amount of court time necessary for the qualification voir dire, although that

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[59] *Id.* at 508.
[60] *Id.* at 510.
[61] *Id.* at 511.
[62] *Id.* at 512.
[63] *Id.* at 508.
[64] *Id.* at 510.
[65] *Id.*
[66] *Id.* at 512.
[67] *See, e.g.*, ALA. CODE § 12-16-6 (2007) (declaring "imperative" the statutory duty of judges to determine whether jurors are qualified to serve); TEX. CODE CRIM. PROC. ANN. art. 35.21 (Vernon 2007) ("The court is the judge, after proper examination, of the qualifications of a juror, and shall decide all challenges without delay and without argument thereupon.").
[68] *See, e.g.*, ALA. CODE § 12-16-150 (establishing grounds for disqualification or challenges for cause); COLO. REV. STAT. ANN. § 13-71-105 (West 2007) (same); NEB. REV. STAT. § 29-2006 (2007) (same).

process even without questionnaires is not necessarily time-consuming or cumbrous.

In earlier times, questionnaires, if used, probably were limited to jury qualification.[69] These questionnaires simply provide an efficient method of obtaining the information necessary to determine whether or not persons are qualified and available for jury service.[70]

The information legitimately sought in qualification questionnaires is rather limited.[71] Generally, statutes governing jury service require that prospective jurors be citizens of the United States and a resident of the county (in state courts) or district (in federal courts).[72] The jurors must be of legal age,[73] and may need to be able to read and understand the English language.[74] Potential jurors may be disqualified if they have been convicted of certain criminal offenses.[75] Some statutes or rules may require that any physical or mental impairment not interfere with their ability to serve as jurors.[76] Other statutes may require that potential jurors be honest and of good character.[77]

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[69] *See, e.g.*, State *ex rel.* Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180, 190 (Ohio 2002) (noting that "certain questions will invariably elicit personal information that is relevant only to juror identification and qualification rather than for the selection of an impartial jury" and that such information should be redacted prior to disclosure); SHAPARD, *supra* note 34, at 2 (stating that, by mailing jury-qualification questionnaires to prospective jurors, the courts are able to classify prospective jurors as "not qualified, exempt, excused, or qualified").

[70] *See, e.g.*, SHAPARD, *supra* note 34, at 2–3 (describing the practice of filtering out unqualified or unavailable prospective jurors before summoning a venire, and noting the "direct summoning" approach used by some state courts in which both the questionnaire and summons is mailed in a single mailing).

[71] *See, e.g.*, CAL. CIV. PROC. CODE § 205(a) (West 2007) (limiting questionnaires to "only questions related to juror identification, qualification, and ability to serve as a prospective juror"). *But see* COLO. REV. STAT. ANN. § 13-71-115(1), (2) (West 2005) (providing for a broad collection of information concerning jurors' family, employment history, and previous court experience as well as "such other information as the jury commissioner deems appropriate after consulting with the judges in the judicial district").

[72] *See, e.g.*, ALA. CODE § 12-16-60(a)(1) (2007) ("resident of county"); CAL. CIV. PROC. CODE § 203(4); N.J. STAT. ANN. § 2B:20-1 (West 2007) (same); N.C. GEN. STAT. ANN. § 9-3 (2007) (same).

[73] *See, e.g.*, CAL. CIV. PROC. CODE § 203(2) (fixing minimum age at 18); N.J. STAT. ANN. § 2B:20-1 (same); N.C. GEN. STAT. ANN. § 9-3 (same).

[74] *See, e.g.*, ALA. CODE § 12-16-60(a)(2) (prospective juror must be able to "read, speak, understand and follow instructions given by a judge in the English language"); N.J. STAT. ANN. § 2B:20-1(b) (juror must "read and understand the English language"); N.C. GEN. STAT. ANN. § 9-3 (juror must be able to "hear and understand the English language").

[75] *See, e.g.*, ALA. CODE § 12-16-60(a)(4) (disqualifying individuals who have lost the right to vote by reason of a conviction for a crime involving "moral turpitude"); CAL. CIV. PROC. CODE § 203(5) (excepting those who have been convicted of "malfeasance in office" or "a felony"); N.J. STAT. ANN. § 2B:20-1(e) (disqualifying a juror who has been convicted of an "indictable offense"); N.C. GEN. STAT. ANN. § 9-3 (disqualifying those convicted of "a felony"); TENN. CODE ANN. § 22-1-102 (West 2007) (holding incompetent those convicted of "certain infamous offenses" or theft).

[76] *See, e.g.*, ALA. CODE § 12-16-60(a)(3) (qualifying those who are mentally capable); N.J. STAT. ANN. § 2B:20-1(f) (disallowing mental or physical disability that would prevent jury service); N.C. GEN. STAT. ANN. § 9-3 (juror must be "physically and mentally competent").

[77] *See, e.g.*, ALA. CODE § 12-16-60(a) (qualifying jurors who are "honest and intelligent" and are "esteemed . . . for integrity, good character . . . ."); TEX. CODE CRIM. PROC. ANN. art. 19.08 (Vernon 2007) (qualifying those of "good moral character").

Most of the information necessary to determine whether or not a person is qualified for jury duty can be readily obtained through the use of a qualification questionnaire. Additionally, because the information obtained is used by the trial court for qualification purposes only, private data such as names, addresses, and Social Security and driver's license numbers can be more readily protected by the court.[78]

Sometimes efficiency alone is viewed as the justification for qualification questionnaires. That efficiency may well be "clerical efficiency"[79] rather than jury-selection efficiency. Yet, because of their simplicity, ease-of-use, generally non-invasive nature, and limited dissemination, courts should use qualification questionnaires when they deem their use advisable.

2. *Voir Dire Questionnaires*

Voir dire or supplemental questionnaires are quite a different matter. These questionnaires may arise at any of three stages. First, questionnaires may be mailed to prospective jurors along with the jury summonses. Mailed questionnaires may take either of two forms. Qualification questions accompanying juror summons may also serve as voir dire questionnaires.[80] By expanding the scope of the qualification questionnaire to include common voir dire queries, the nature of the questionnaire has changed. In this expanded form, the questionnaire may seek personal information well beyond any qualification needs.[81]

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[78] *See, e.g.*, N.Y. JUD. LAW § 509(a) (McKinney 2007) (providing that jury qualification questionnaires are confidential, to be disclosed only to the jury board or as authorized by the appellate court); State *ex rel.* Beacon Journal Publ'g Co., N.E.2d 180, 190 (Ohio 2002) (concluding that, under a per se exemption, personal information "relevant only to juror identification and qualification," such as Social Security, telephone, and driver's license numbers "are not properly part of the voir dire process and should be redacted from the questionnaires prior to disclosure"). Some courts, though, disseminate the information to litigants unless cause is found to protect the information in the questionnaires. *See, e.g.*, KY. REV. STAT. ANN. § 29A.070 (West 2004) (requiring dissemination of jury qualification form contents to trial judges and parties or attorneys unless chief judge or designee orders confidentiality in whole or in part "in the interest of justice").

[79] *See, e.g.*, SHAPARD, *supra* note 34, at 4 ("The efficiency that we are principally concerned with is clerical efficiency.").

[80] *See, e.g.*, FLA. STAT. ANN. § 1.431(a)(2) (West 2007) (authorizing trial judges to require clerks to submit jury questionnaires to prospective jurors, which are to be returned to the clerks and made available in court for use during voir dire); The Confidential Juror Questionnaire, *available at* http://www.mass.gov/courts/jury/confiden.htm (last visited Sept. 22, 2007) (follow "Click here to view an image of the Questionnaire suitable for printing" hyperlink); 7 KIMBERLY C. SIMMONS, STANDARD PA. PRAC. § 47:24 cmt. (2d ed. 2006) (stating that judges possess "wide discretion" to permit submission of questionnaires before jury selection date); *see also* BLUE & HIRSCHHORN, *supra* note 44, § 5:2, at 55 ("Ideally, the judge will allow you to send the questionnaires out with the summonses."). *But see* CAL. CIV. PROC. CODE § 205(a) (providing that jury questionnaires utilized by jury commissioners shall be limited to information relevant to jury qualification).

[81] *See, e.g.*, CAL. CIV. PROC. CODE § 205(b), (c) (providing that qualification questionnaires are not intended to support voir dire unless otherwise ordered by the court and authorizing the court to utilize "such additional questionnaires" as may be relevant and necessary); COLO. REV. STAT. ANN. § 13-71-115(1)–(2) (West 2007) (providing for a broad collection of information concerning a juror's

Alternatively, questionnaires developed for a particular case may be mailed in advance to the venire.[82]

Second, courts may circulate questionnaires during the venire-empanelling process. As potential jurors assemble for the particular term of court to which they are summoned, they may be asked to complete a questionnaire before they are actually placed on the trial venire.[83]

Third, true voir dire questionnaires may be distributed to the potential jurors for a specific trial after the panel is formed for that trial, and before the voir dire begins.[84] In these instances, the trial venire will have been identified and the questionnaires will constitute the first step of the jury selection process for that trial.

C. *The Benefits of Jury Questionnaires*

Questionnaires clearly can be useful aids during the jury selection process. Proponents of voir dire questionnaires commonly assert that these questionnaires accomplish much more than mere clerical efficiency.[85] For example, some supporters of extensive use of questionnaires assert that jurors are more likely to pay attention to, and answer, written rather than oral questions (i.e., questionnaires are superior to voir dire in obtaining answers to questions).[86] They also maintain that jurors will answer queries about sensitive personal matters more readily if the questions are written rather than asked orally.[87] Proponents also contend that questionnaires lessen the harm caused to litigants when judges limit voir dire by either restricting the number of questions, the subject matter of, or the time available for voir dire.[88] Additionally, they assert that questionnaires serve

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family, employment history, and previous court experience as well as "such other information as the jury commissioner deems appropriate after consulting with the judges in the judicial district").

[82] *See, e.g.*, *In re* S.C. Press Ass'n, 946 F.2d 1037, 1041 (4th Cir. 1991) (reporting that an eighteen-page, sixty-six-section questionnaire was mailed to the venire "well in advance of the trial"); Kim Chandler, *Siegelman Seeks Dismissal of Some Charges*, BIRMINGHAM NEWS, Feb. 22, 2006, at 2B, *available at* LEXIS, News Library, BIRMNW File (reporting efforts of former Alabama governor Don Siegelman to have "a questionnaire mailed to the homes of potential jurors"); Interview with Fran Brazeal, then-Circuit Clerk, 6th Judicial Cir. of Ala., in Tuscaloosa, Ala. (July 21, 2005) (on file with Connecticut Law Review) [hereinafter Cottrell Questionnaire] (mentioning that the questionnaire for the Cottrell case, discussed *infra*, note 251, was mailed to jurors before trial week).

[83] *See, e.g.*, COLO. REV. STAT. ANN. § 13-71-115(1)–(2) (requiring jury commissioners to provide copies of jury questionnaires completed "[o]n or before the first day of the term of trial" to trial judges and counsel "for use during jury selection").

[84] *See, e.g.*, CAL. CIV. PROC. CODE § 205(d) (authorizing judges to use additional questionnaires to assist in voir dire).

[85] *See supra* note 79 and accompanying text.

[86] *See, e.g.*, SEVENTH CIRCUIT BAR ASS'N AM. JURY PROJECT COMM'N, PROJECT MANUAL, at II-1 (2005), *available at* http://www.7thcircuitbar.org/associations/1507/files/01ProjectManual.pdf ("The judges who use questionnaires believe they streamline the jury selection process for several reasons . . . prospective jurors may be more willing to disclose sensitive information in writing than they would be if asked to do so in open court . . . .").

[87] *Id.*; BENNETT & HIRSCHHORN, *supra* note 4, § 8.11, at 110.

[88] *E.g.*, FREDERICK, *supra* note 16, at 122.

to supply the court, attorneys, and parties with useful background, case-awareness, and bias information about the prospective jurors.[89]

Risk-averse judges probably like questionnaires. Because the questionnaires are prepared beforehand, the judge potentially can resolve legal issues about voir dire in advance of trial. Furthermore, in criminal cases, a risk-averse judge will want to avoid the pitfalls of balancing a criminal defendant's right to a fair trial against the efficiency demands of the court. The judge in either a civil or a criminal case may allow an expansive voir dire examination rather than risk the chance of reversal because the court frustrated a litigant's jury-selection process.[90] By shifting emphasis from voir dire to questionnaires, the judge can permit sweeping examination of potential jurors while also limiting the time expended on voir dire.

Proponents also argue that the questionnaires support the jury selection process in other ways. In some courts, the judge conducts the voir dire and may or may not incorporate some (or even most) of the questions proffered by counsel.[91] In such situations, questionnaires give counsel more opportunity to propound their questions. Some courts conduct voir dire before the entire venire,[92] and individual jurors may remain somewhat disengaged, uninvolved, and unresponsive. On the other hand, each juror must respond to a questionnaire. Moreover, juror responses to questionnaire queries may be more complete and thus helpful to counsel. Thus, jury questionnaires support (or to some extent even supplant the need for expansive) voir dire.

D. *The Costs of Jury Questionnaires*

Widespread use of jury questionnaires leads one to believe that they are useful components of the trial process; however, usefulness alone does

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[89] *See, e.g.*, *id.* at 123 (listing "basic elements" of questionnaires).

[90] *See, e.g.*, Carver v. Niedermayer, 920 So. 2d. 123, 123–25 (Fla. Dist. Ct. App. 2006) (reversing a trial court because the judge limited counsel's voir dire to thirty minutes); Gasiorowski v. Homer, 365 N.E.2d 43, 45 (Ill. App. Ct. 1977) (limiting voir dire may constitute error if it effectively denies a party a fair opportunity to inquire into bias or prejudice among jurors); Wappler v. State, 183 S.W.3d 765, 769, 775 (Tex. Ct. App. 2005) (reversing a trial court because the judge limited counsels' voir dire to 15 minutes). Of course, judges can impose reasonable restrictions on voir dire. *See, e.g.*, People v. Carter, 117 P.3d 544, 568–71 (Cal. 2005) (capital case upholding trial judge's imposition of time limits for voir dire despite vociferous objections by both the State and defense counsel); People v. Augustine, 235 A.D.2d 915, 919 (N.Y. App. Div. 1997) ("County Court may in its discretion limit the scope of voir dire, as long as counsel is given a fair opportunity to ask potential jurors relevant and material questions.").

[91] *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415, 423–24 (1991).

[92] *See, e.g.*, State v. Hutter, 307 S.E.2d 910, 911 (Ga. 1983) (noting that trial judges exercise discretion during voir dire and "may require that questions be asked once only to the full array of the jurors, rather than to every juror"); Smith v. State, 667 S.W.2d 836 (Tex. Ct. App. 1984), *rev'd*, 703 S.W.2d 641 (Tex. Crim. App. 1985) (holding that trial court's requirement that portion of voir dire be conducted before entire venire did not violate defendant's right to counsel).

not justify their employment. The true utility of questionnaires is measured by both how well they contribute to their objectives, and the costs they impose on the process. I suggest that questionnaires may not contribute as much as their proponents contend[93] and may impose more costs than proponents tally.[94]

Although questionnaires, used correctly, can be helpful, they also can be costly. Because significant costs attend their use,[95] courts should use supplemental questionnaires sparingly, and only after an appropriate showing has been made by a requesting party that written questionnaires are needed[96] and that juror privacy can be adequately protected despite their use. Furthermore, the courts should closely control the contents of such questionnaires (i.e., they should be narrowly drafted). This Part discusses the costs that accompany the use of questionnaires.

1. *Inefficiency*

Although proponents of using questionnaires assert that they are efficient aids to voir dire, efficiency should be viewed expansively. Questionnaires may provide information, but they are costly. A true gauge of questionnaire-efficiency must include other costs such as undesirable consequences.[97] It is not enough to weigh the utility of a questionnaire solely with regard to its cost in dollars and time, although that cost alone is

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[93] *See, e.g.*, UPDATED CIVIL TRIAL PRACTICE STANDARDS § 1(a)(i) (2007), *available at* www.abanet.org/litigation/standards/docs/0107_updated_civil_standards.pdf (touting the use of questionnaires "in appropriate cases" to "expedite and enhance voir dire"); 4 ELAINE A. GRAFTON CARLSON, MCDONALD & CARLSON TEX. CIV. PRAC. § 21.17[a] (opining that detailed, specific questionnaires are efficient and will shorten the voir dire process); Gerald T. Wetherington, Hanson Lawton & Donald I. Pollock, *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425, 436 (1999) (suggesting that "effective use of jury questionnaires" may eliminate undesirable jurors, thereby saving "time and effort").

[94] *See, e.g.*, UPDATED CIVIL TRIAL PRACTICE STANDARDS, *supra* note 93, § 1 cmt. (a)(i) (noting that increased use of jury consultants has led to increased reliance on jury questionnaires). I would suggest, alternatively, that the increased complication of jury selection caused in part by use of expansive jury questionnaires may lead to the need for increased use of jury consultants. As mentioned in this Article, an expert in one or more of the social sciences may be needed to truly grasp the meaning of the collection of answers to some detailed questionnaires, particularly in the short time period frequently available to counsel during jury selection. Furthermore, the increased use of both questionnaires and jury consultants may lead to more incursions into jurors' privacy interests. *See, e.g.*, Strier & Shestowsky, *supra* note 37, at 480 ("All trial attorneys want to make the most informed and effective use of their peremptory challenges. To this end, they employ trial consultants who may suggest voir dire interrogations that might violate privacy.").

[95] *See, e.g.*, STANDARDS FOR JURY SELECTION std. 1 (2006), *available at* www.judiciary.state.nj.us/directive/2006/dir_21_06.pdf (noting the "time . . . and administrative burdens").

[96] *See id.* ("The use of written questionnaires—i.e., those answered in writing by prospective jurors—is a permitted practice but should be used only in exceptional circumstances.").

[97] In other arenas, such as organizational management, efficiency is measured expansively. *See, e.g.*, HAROLD KOONTZ & CYRIL O'DONNELL, PRINCIPLES OF MANAGEMENT: AN ANALYSIS OF MANAGERIAL FUNCTIONS 67 (2d ed. 1959) ("An organization is efficient if it meets its objectives (this is, is effective) with the minimum unsought consequences or costs, going beyond the usual thinking of costs entirely with such measurable items as dollars or man-hours.").

significant. Some jurisdictions summons tens to hundreds of thousands of prospective jurors annually.[98] Printing and mailing multi-page comprehensive questionnaires to so many prospective jurors would be prohibitively expensive. If the questionnaire process causes prospective jurors to choose either not to serve, not to respond, or not to answer questions fully or truthfully, the cost to the system is tremendous, not only with regard to the case at trial, but also to the system as a whole. If prying questionnaires spawn negative views among jurors of the courts and their role as jurors, our judicial system pays a high price for the use of questionnaires. Efficiency cannot be measured solely by clerical efficiency or reduced voir-dire time.

Although questionnaires are intended to expedite the process and better enable the litigants to make educated juror selections, the latter objective has the potential to swallow the former goal. Thus, for example, one prominent treatise on jury selection advises litigants that "[y]ou should re-ask as many of the questions [on the questionnaire] as the court will tolerate."[99] It is difficult to see efficiency arising from questionnaires that will simply lead to repetition—possibly to the limits of court tolerance—during voir dire. In response, some jurisdictions prohibit redundancy during voir dire.[100] Moreover, even without such rules, judges exercise discretion to curtail repetitive questioning.[101] Otherwise, the promised

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[98] *See, e.g.*, Table J-2, U.S. District Courts—Petit Juror Service on Days Jurors Were Selected for Trial During the 12-Month Period Ending March 31, 2002, http://www.uscourts.gov/caseload2002/tables/j02mar02.pdf (last visited Sept. 22, 2007) (reporting 313,685 jurors were present for jury selection or orientation in federal courts during the 12 months ending March 31, 2002); *see also* Administration of the Massachusetts Jury System, http://www.mass.gov/courts/jury/introduc2.htm (last visited Aug. 28, 2007) (stating that the state courts issue "approximately 1.2 million summonses" annually); Juror Information, http://www.nyjuror.gov/home/ (last visited Aug. 28, 2007) (reporting that in New York, over 600,000 people serve as jurors each year). *See also* Division of Judicial Operations, http://www.19thcircuitcourt.state.il.us/bkshelf/overview/1996/div_jo.htm (last visited Aug. 28, 2007) (noting that approximately 21,500 jury summonses are issued annually by the 19th Circuit); Fifth Judicial District of Pennsylvania, Court of Common Pleas, http://www.alleghenycourts.us/jury/ (last visited Aug. 28, 2007) (reporting that the courts in Allegheny, Pennsylvania, use approximately 30,000 jurors each year); The Seventh Judicial Circuit Court, http://www.co.genesee.mi.us/circuitcourt/website2/admin.htm (last visited Aug. 28, 2007) (stating that "[o]ver 28,000 juror questionnaires and summons are sent out annually").

[99] BENNETT & HIRSCHHORN, *supra* note 4, § 8.22, at 115.

[100] *See, e.g.*, GA. CODE ANN. § 10.1 (West 2007) ("The court will exclude questions which have been answered in substance previously by the same juror."); IND. R. TRIAL P. 47(D) (2007) (authorizing courts to prohibit repetitive voir dire); MO. MODEL LOCAL CT. R. 52.1 ("Attorneys shall not, as part of the voir dire examination, examine a member of the jury panel as to any matter contained on the jury questionnaire without permission of the court . . . ."); TENN. LOCAL R. 9.02, 9.03 (16th Jud. Dist. 2004), *available at* http://www.tncourts.gov/geninfo/courts/LocalRules/16Local/Rules16.pdf ("During voir dire, counsel may not ask prospective jurors questions which are covered by the questionnaire absent a showing that the repetition is necessary . . . . [I]t is presumed that counsel . . . will not specifically re-ask [questionnaire] questions.").

[101] *See, e.g.*, ARIZ. REV. STAT. ANN. 18.5(d) (2007); CAL. CIV. PROC. CODE §§ 222.5, 223 (West 2007) (civil and criminal); MICH. COMP. LAWS ANN. § 6.412(c) (West 2007).

efficiency of questionnaires is diminished or lost.[102]

2. *Reduced Interaction and Observation*

In many state courts, the attorneys are authorized or allowed to conduct voir dire.[103] In those courts, the process not only provides litigants with an opportunity to interrogate potential jurors, but it also allows counsel to interact with the jurors and observe their demeanor. In most instances, voir dire provides counsel with the first opportunity for direct communications with the venire, and attorneys frequently use the process to introduce their case and parties to the prospective jurors.[104] Much of this opportunity is lost in those courts in which the judge conducts the voir dire, but even in those courts, the parties still have the opportunity to observe the venire during the impaneling and voir dire process.

The opportunity to interact, educate, and observe[105] is likely reduced if expansive jury questionnaires are used. Once a judge approves the use of questionnaires and expends court time by having jurors complete the questionnaires, and attorneys compile and peruse the information, the court

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[102] STANDARDS FOR JURY SELECTION std. 4 (2006), *available at* www.judiciary.state.nj.us/directive/2006/dir_21_06.pdf (discussing "undue consumption of time" by attorneys during voir dire). The efficiency of jury questionnaires is also questionable where even after extensive inquiry is made by a sixteen-page, sixty-two question questionnaire into the qualifications of potential jurors, the process of jury selection still takes forty-two days and requires the examination of 388 candidates. Marian Gail Brown, *Decision Time for Peeler Jury: Life or Death*, CONN. POST ONLINE, Sept. 10, 2007, *available at* LEXIS, News Library, CTPOST File. The fact that voir dire took so long despite the use of jury questionnaires would indicate that the questionnaire process does not necessarily shorten the time frame for voir dire.

[103] In some jurisdictions, counsel have the right to conduct voir dire. In other jurisdictions, the court conducts voir dire, but possesses the discretion to permit counsel to voir dire the jury or to ask supplemental questions of the venire. *See, e.g.*, ALA. R. CIV. P. 47(a) (2007) (court discretion; right to supplement); ALA. R. CRIM. P. 18.4(c) (right to supplement); ARIZ. R. CRIM. PRO. 18.5(d) (right to supplement); CAL. CIV. PROC. CODE §§ 222.5, 223 (civil and criminal cases) (right to supplement); FLA. STAT. ANN. 3.300 (West 2007) (right to supplement); GA. SUP. CT. R. 10.1 (2007) (court discretion); ILL. SUPERIOR CT. R. 234 (2007) (court discretion; right to supplement); IND. R. TRIAL P. 47(D) (2007) (right to supplement); IOWA R. CIV. P. 1.915(2) (2007) (right to supplement); MD. R. CIV. P. 2-512(d) (2007) (court discretion); MICH. COMP. LAWS § 6.412(C)(2) (court discretion); N.M. R. CIV. PROC. 1-047 (2007) (court discretion); N.Y. C.P.L.R. 4107 Practice cmts. (McKinney 2007) ("The attorneys do the questioning . . . ."); OHIO R. CRIM. P. 24(B) (West 2007) (court discretion); PA. R. CIV. P. 220.1(b) (West 2007) (court discretion); PA. R. CRIM. P. 631(D) (West 2007) (same); WASH. REV. CODE ANN. § 6.4(b) (West 2007) (court and counsel "may then ask the prospective jurors questions . . .."); W.VA. TRIAL CT. R. 23.03(a), 42.03(a) (West 2007) (right to supplement); *see also* FED. R. CRIM. P. 24 (2007) ("The court may examine prospective jurors or may permit the attorneys for the parties to do so."); STANDARDS FOR JURY SELECTION std. 4 (court discretion; if requested, "at least some participation by counsel in the questioning of jurors should be permitted").

[104] *See, e.g.*, N.H. REV. STAT. ANN. § 500A:12a(II) (2006) (authorizing counsel reasonable time to address prospective jurors to explain the "claims, defenses, and concerns in sufficient detail to prompt jury reflection, probing, and subsequent disclosure of information, opinion, bias, or prejudices . . . ."); 1 ANN FAGAN GINGER, JURY SELECTION IN CIVIL AND CRIMINAL TRIALS § 8.20(K) (2d ed. 1984) ("One purpose of voir dire is to reveal the attorney and the client to each juror individually . . . ."); BENNETT & HIRSCHHORN, *supra* note 4, § 12.1, at 162 (discussing voir dire and advising to "[u]se this opportunity to humanize yourself, your client and your case strategy, to capture the jurors' interest"); *see also supra* notes 47–50 and accompanying text.

[105] *See supra* note 104.

almost certainly will abbreviate the voir dire process.[106] The court may impose time limits[107] and restrict voir dire to inquiries in explanation of responses to the questionnaire.[108] In fact, courts, where permissible, may question the prospective jurors themselves rather than permit the attorneys to voir dire the panel.[109] Furthermore, suggestions to counsel to "re-ask as many of the [questionnaire] questions as the court will tolerate,"[110] and compliance by attorneys to such suggestions, do not help convince judges that using questionnaires truly will be efficient. Thus, on balance, attorneys likely will have less opportunity to interact with, and query, the panel.

This lack of interaction with the jury is a substantial loss to trial attorneys. It reduces the opportunities to see the potential jurors before they enter the jury box. It deprives counsel of observations of personal attributes, interactions, and possibly even idiosyncratic tendencies. The attorneys to some extent are left with a limited view of how jurors see themselves. The information provided in questionnaires is given by the jurors. An individual may see himself or herself as a leader but an attorney may see that person quite differently. The lack of personal interaction also may lead attorneys to rely on sets of questions that they have used before in an attempt to gauge the different personalities in the venire. Thus, the reliance on written responses could lead to the formulation of generic and overly broad questionnaires that try to elicit as much information as possible, whether or not relevant or, perhaps, even useful.

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[106] *See, e.g.*, Douglas F. Motzenbecker, *Lawyers from Lay and Skilling Trial Debate Adequacy of Jury Selection*, LITIG. NEWS, Sept. 2007, at 1, 1 (mentioning that the trial court "impaneled a jury in a single morning without permitting any voir dire and relying entirely on juror questionnaires").

[107] *See, e.g.*, GA. UNIFORM SUPER. CT. R. 10.1 (2007) (placing time limits within court's discretion); IND. TRIAL PROC. R. 47(D) (authorizing court to impose time limitation); MISS. UNIFORM R. CIR. & COUNTY PRAC. 3.05 (2007) ("The court may set a reasonable time limit for voir dire.").

[108] *See, e.g.*, MO. S. CT. OPERATING R. 52.1 (2007) ("Attorneys shall not, as part of the voir dire examination, examine a juror as to any matter contained on the jury questionnaire without permission of the court . . . .").

[109] Practices vary amongst the states. Some jurisdictions grant attorneys the right to voir dire the venire. *See, e.g.*, ALA. R. CRIM. PROC. 18.4(c) (2007) ("The court shall permit the parties or their attorneys to conduct a reasonable examination of prospective jurors."); CAL. CIV. PROC. CODE § 223 (West 2007) ("[C]ounsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors."). Judges in some jurisdictions conduct the voir dire without participation by counsel. *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415, 419-20 (1991) (describing the judge-conducted voir dire process used in the case); LEONARD N. ARNOLD, CRIMINAL PRACTICE AND PROCEDURE § 19.11 (2006) (noting that New Jersey judges conduct the voir dire: "rarely are the attorneys permitted to directly question the jurors"). Other jurisdictions favor judicial voir dire, but give discretion to the trial judge to permit counsel to inquire further about relevant issues. *See, e.g.*, DEL. SUPER CT. CRIM. R. 24 (2007) ("The court shall itself conduct the examination of prospective jurors."). However, Delaware judges may require the attorneys to submit their questions to the court and conduct the examination themselves. *Id.*

[110] BENNETT & HIRSCHHORN, *supra* note 4, § 8.22, at 115. *See also id.* § 8.23, at 116 ("Jurors should be probed in-depth on case-specific questions on the questionnaire because some people are oral responders and others respond better in writing.").

3. *Overly Broad Questionnaires – Irrelevant and Intrusive*

If the court utilizes a generic questionnaire (or a specially crafted expansive questionnaire for general use), many questions will be rather broad and likely unrelated to particular cases.[111] Ergo, attorneys will gain access to information for which they have no real need. Consider, for example, this scenario. A court regularly uses questionnaires, which the court distributes to all individuals summoned for jury duty. To increase the utility of the practice, the court has crafted a rather extensive questionnaire that incorporates not only the usual qualification queries, but also many of the frequently occurring voir dire issues, such as potential bias.[112] One line of questions propounded may be: "Has any member of your family ever been convicted of a crime involving drugs or alcohol? If so, state who, when and the nature of the charge." Obviously, that question might be relevant if a case involves drugs or an alcohol-related crime or accident, because bias is always relevant during jury selection. But why would the attorneys involved in a breach-of-contract suit between two corporations need that information? Hence, generic questionnaires potentially provide information for which no need has been shown,[113] at least as to particular lawsuits or prosecutions. Need and relevance, it would seem, should be the minimum threshold for questionnaire queries.

Generic questionnaires may be borrowed from other courts,[114] cases,[115] rules,[116] or form books.[117] Many were probably developed originally for a particular case, but over time they circulated amongst courts and attorneys until they became commonly borrowed goods.[118] Unfortunately, they may be ill-fitted for the particular case. They may seek irrelevant information, or omit necessary topics. Attorneys may not be equipped to properly

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[111] Two examples of such questions are: "What is your political preference?" and "Have you ever actively participated in a political campaign?" *See, e.g.*, ALA. R. CRIM. P. Form 56, Questions 52, 54 (2007).

[112] *See, e.g.*, United States Dist. Ct. Juror Questionnaire, *supra* note 4 (containing eighty-eight questions, many with subparts).

[113] *See, e.g.*, United States Dist. Ct. Juror Questionnaire, *supra* note 4, at Questions 11 (inquiring about veteran's, Social Security, welfare, unemployment or other types of governmental benefits, scholarships, or grants); *id.* at Question 28 (asking about "home schooling"); *id.* at Question 79 ("Do you have a Personal Digital Assistant (PDA)?"), *id.* at Question 80 ("Do you have a cell phone?").

[114] *See, e.g.*, ALA. R. CRIM. P. Sample Form 56 (2007).

[115] See, for example, the juror questionnaires used in *People v. Peterson*. *See* Peterson Questionnaire, *supra* note 27; *see also* Ortiz v. State, 869 A.2d 285, 317–18 (Del. 2005) (App. B, Defendant's Proposed Supplemental Questionnaire).

[116] *See, e.g.*, ALA. R. CRIM P. Sample Form 56.

[117] *See, e.g.*, CATHY E. BENNETT & ROBERT B. HIRSCHHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION §§ 8-8III (1995 Appendices vol.) [hereinafter BENNETT & HIRSCHHORN, Appendices vol.] (containing a generous supply of sample questionnaires).

[118] *See, e.g.*, State v. Taylor, 944 S.W.2d 925, 939 (Mo. 1997) (noting that trial judge used a questionnaire from another capital murder case after trial counsel failed to submit a proposed questionnaire in a timely manner).

gauge the significance of jurors' responses.[119] Their queries and responses sometimes are better deciphered by experts. Consider, for example, the ubiquitous bumper-sticker question.[120] Many jurors may report having bumper stickers on their automobiles, but interpreting the significance (if any) of various stickers may require some expertise that litigators do not necessarily possess.[121] Lacking the ability to properly evaluate the meaning or relevance of the stickers, attorneys may default to stereotyping or some other potentially harmful approach. For example, in *Stewart v. State*, the defendant, an African-American, was charged with aggravated sexual assault.[122] During voir dire, one African-American juror reported having a bumper sticker on his car.[123] This information, and the fact that he had been employed by his present employer for only two months, was used to justify the prosecution's peremptory strike during a *Batson* hearing.[124] Both the trial and appellate courts upheld the grounds as "non-racial reasons," and the defendant's conviction was affirmed.[125]

On the other hand, bumper-sticker information also has proved helpful to criminal defendants. In *United States v. Blanding*, an African-American defendant was tried and convicted on two charges of extortion.[126] During jury selection, defendant's counsel sought to strike a white male juror based on a jury questionnaire response to the query: "Have you displayed any bumper stickers on your automobile in the last twelve months?" The prospective juror reported that he had three stickers "concerning southern heritage and/or the Confederate flag, however I did not place them on the automobile."[127] The prosecutor objected to the defense strike as

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[119] *See* Strier & Shestowsky, *supra* note 37, at 466 ("Even with questionnaires and liberal voir dire, the attorney knows how limited the insight is that one can glean from any prospective juror. Without external information, attorneys almost inevitably rely upon stereotypes and intuitions.").

[120] *See, e.g.*, Peterson Questionnaire, *supra* note 27, at Question 45 ("Do you have a bumper sticker on your car? . . . If yes, please describe[.]"); Juror Questionnaire, United States v. Richard M. Scrushy, No. CR-03-BE-0530-S (2005), Question 47, *available at* http://images.ibsys.com/2005/0107/4062513.pdf [hereinafter Scrushy Questionnaire] ("Do you, or does anyone in your household, have any bumper stickers or decals on your vehicle, or a personalized license plate? . . . If yes, what does each say?").

[121] As of August 2007, Café Press alone offered over 25,000 designs. *See* http://www.cafepress.com.cp/browse/allproducts.aspx?CMP=KNC-G-EF (follow Stickers, Buttons & Fun link, then follow the Stickers link) (noting that there are over two million sticker designs).

[122] Stewart v. State, 748 S.W.2d 543, 543, 545 (Tex. Ct. App. 1988).

[123] The bumper sticker read "Same day, same bullshit." *Id.* at 545.

[124] *Id.* A "*Batson* hearing" is so-named for Batson v. Kentucky, 476 U.S. 79, 82, 89 (1986) (holding that prospective African-American jurors cannot be peremptorily struck from an African-American defendant's jury based solely on their race). The *Batson* holding has been expanded by subsequent cases to include white defendants, *see, e.g.*, Powers v. Ohio, 499 U.S. 400, 402 (1991), peremptory strikes in civil actions, *see, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616, 618 (1991), preemptory strikes by defendants in criminal cases, *see, e.g.*, Georgia v. McCollum, 505 U.S. 42, 59 (1992), and peremptory challenges based on gender, *see, e.g.*, J.E.B. v. Alabama *ex rel* T.B., 511 U.S. 127, 128–29 (1994).

[125] *Stewart*, 748 S.W.2d at 545–46.

[126] United States v. Blanding, 250 F.3d 858, 859 (4th Cir. 2001).

[127] *Id.*

impermissible under *Batson* and its progeny.[128] The prosecutor also argued that the juror had not placed the stickers on his automobile and that "[h]e disclaimed anything having to do with the sentiment."[129] The trial court overruled the peremptory strike and the juror was seated on the ground that the reason asserted for the strike was race-neutral but that it was "a pretext for purposeful racial discrimination."[130] On appeal, the conviction was vacated and the case remanded for a new trial.[131] The appellate court was aware that a boycott by the NAACP was on-going in South Carolina, that the defendant had "vehemently opposed the flying of the confederate flag over the South Carolina State House during his term as a legislator" and that in the instant case, the defendant "argued that he was a victim of racial targeting by government agents and prosecutors."[132] The court concluded that it was permissible for the defense to draw a race-neutral inference that "one who displays the confederate flag *may* harbor racial bias against African-Americans."[133]

It is easy to see the relevance of the bumper stickers in the two cases, but in many cases the significance of responses about bumper stickers and many other subjects may not be so evident. Because attorneys may not be able to quickly and adequately digest the information, the use of a questionnaire, particularly a probing, exhaustive one, may require the association of a jury selection consultant. Jury consultants develop and market questionnaires;[134] they also help interpret the answers developed by questionnaires and voir dire.[135] By creating a demand for their product, they create a demand for their consulting services (i.e., scientific jury selection).[136] And, at least in criminal cases, the failure to use them and

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[128] *Id.*

[129] *Id.* at 860.

[130] *Id.* The defense attorney had "used each of his peremptory challenges to strike white jurors" but this challenge was the only one not sustained by the trial court. *Id.* at 859 n.1.

[131] *Id.* at 858.

[132] *Id.* at 859, 860–61 & n.3.

[133] *Id.* at 861.

[134] *See, e.g.*, BENNETT & HIRSCHHORN, Appendices vol., *supra* note 117, §§ 8-8III (containing a generous number of sample questionnaires); JURY SELECTION: SAMPLE VOIR DIRE QUESTIONS (Starr Litig. Services, Inc. ed., 2002) [hereinafter JURY SELECTION] (containing a number of supplement questionnaires). Mr. Hirschhorn "is a jury and trial consultant with Cathy E. Bennett and Associates, located in Lewisville, Texas." He also is an attorney. BLUE & HIRSCHHORN, *supra* note 44, at xii. Dr. Starr holds a Ph.D., and in 2001, she "had an additional 12 years' worth of experience in helping attorneys structure, design, test, and analyze effective voir dire questions." *Id.* at xiii–xiv.

[135] *See* Strier & Shestowsky, *supra* note 37, at 466 (noting the limited understanding attorneys can develop from jurors' responses to questionnaires and voir dire, and observing that "it is here that the consultants' tools are superior. The consultants' social science approach offers clear advantages over the lawyers' 'lay person' techniques").

[136] *See, e.g.*, People v. Bemore, 996 P.2d 1152, 1169 (Cal. 2000) (noting defense counsel's use of an in-court jury consultant); Saylor v. State, 765 N.E.2d 535, 549 (Ind. 2002) (favorably noting defense counsel's use of a jury consultant in reviewing a post-conviction claim of ineffective assistance of counsel); BENNETT & HIRSCHHORN, *supra* note 4, § 1.2, at 2 (1993) ("[T]he need for someone to assist

their products potentially becomes an issue of ineffective assistance of counsel.[137]

4. *Privacy Concerns*

[T]he truth is what we are trying to find.
If we have to go into a closed room to find it, then we find it there.[138]

Questionnaires routinely seek personal information. Obviously, some personal information almost always is pertinent and necessary for either jury qualification or jury selection purposes. But some questionnaires reach far beyond what is either pertinent or necessary.

Although identification information, such as names and addresses, is virtually always sought,[139] other identifying information, such as telephone, Social Security, and driver's license numbers, probably should never be included in voir dire questionnaires. That information is unnecessary and potentially quite problematic. Lifestyle information spans from relatively benign topics, such as marital status, to more disquieting issues, such as drinking habits, and sexual practices or orientation. Belief information embraces religious, political and social information. Questionnaires frequently include at least some coverage of each of these topics.

In 1890, Warren and Brandeis asserted that "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[140]

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lawyers in jury selection and other emotional parts of a case has become paramount. . . . [T]rial consultants are no longer a frivolous luxury . . . .").

[137] *See, e.g.*, Jones v. State, 753 So. 2d 1174, 1199 (Ala. Crim. App. 1999) (capital murder case denying post-conviction claim of ineffective assistance of counsel based on alleged failure to use jury questionnaires); State v. Taylor, 944 S.W.2d 925, 925, 938–39 (Mo. 1997) (capital murder case rejecting claim of ineffective assistance of counsel based on counsel's untimely submission of proposed questionnaire); Phillips v. State, No. W2004-01626-CCA-R3-PC, 2005 WL 1123612, at *1, *5 (Tenn. Crim. App. May 12, 2005) (capital murder case rejecting appellant's "single claim" of ineffective assistance of counsel based on counsel's failure to develop a jury-selection questionnaire or employ a jury consultant).

[138] *See In re* The South Carolina Press Ass'n, 946 F.2d 1037, 1043–44 (4th Cir. 1991) (noting that the district judge made oral findings from the bench in support of closure of the voir dire proceedings).

[139] As mentioned, though, some courts seat anonymous juries. *See supra* notes 1–2 and accompanying text (discussing Michael Jackson's "anonymous" jury). In those courts, attorneys and judges probably must eschew identification queries in their questionnaires. For a discussion of anonymous juries, see Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 125 (1996) (encouraging "judges and legislators to consider the routine use of anonymous juries in criminal cases") (internal citations omitted); Kory A. Langhofer, Comment, *Unaccountable at the Founding: the Originalist Case for Anonymous Juries*, 115 YALE L.J. 1823, 1823 (2006) (noting that "[t]he 'anonymous jury' is quickly emerging as a powerful tool to protect jurors") (citation omitted); Molly McDonough, *Private Lives: More Judges Are Keeping Juries Anonymous, but Others Are Worrying About Accountability*, 92 A.B.A. J. 14–15 (May 2006); *Judicious Use of Juror Anonymity*, JUDICATURE, Jan.–Feb. 2003, at 180, 180.

[140] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

And although Warren and Brandeis did not see it,[141] what one may ordinarily decide about communicating *vel non*, his or her most private thoughts is greatly impacted by the arrival of a jury summons.

Jurors are not volunteers. They come to court under summons and answer questionnaires under court order.[142] The sharing of private information is compelled under threat of contempt of court. Therefore, it can be expected that jurors may be reluctant participants in unveiling their personal data. Moreover, much of the personal data obtained through the use of jury questionnaires is considered public record and, therefore, potentially available to public scrutiny. In sum, as intimated before, perhaps the most effective way to protect juror privacy is to limit questions to matters that are truly relevant and necessary for either jury qualification or selection in the particular case at trial.

Admittedly, when a person is called for jury duty, society takes from him "the right 'to be let alone.'"[143] Yet courts should minimize the intrusion into the personal lives of the venire-persons by prying only when prying is necessary. At least three types of personal information sought by questionnaires not only (perhaps unnecessarily) invade the privacy interests of jurors but also have the potential to be particularly damaging. Those types are identification, lifestyle, and belief information. These categories are broad and sometimes overlapping, but they should embrace most of the more troubling types of personal information sought in supplemental questionnaires.

Questionnaires are viewed by some courts as part of a public trial, and thus public records,[144] although some jurisdictions disagree.[145] The courts

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[141] *See id.* (observing that under our system, a person "can never be compelled to express" his or her thoughts except when on the witness stand).

[142] Jurors also serve for nominal pay, are forced to hear stories that sometimes they would rather forego hearing, and must reach decisions about which they may be most uncomfortable. In short, jury duty may not be the most pleasant of their life experiences. I have served on venires on two occasions. On one occasion, I served on a trial jury and was selected foreperson by the other jurors. On neither occasion did we encounter jury questionnaires. The events were interesting experiences for me, a retired judge, but I can understand why some people would consider jury duty invasive, unpleasant, burdensome, and in some cases, rather boring.

[143] *See* Warren & Brandeis, *supra* note 140, at 195 (crediting Judge Cooley's treatise on torts as the origin of the right to be let alone).

[144] *See, e.g.*, Copley Press, Inc. v. Superior Court, 278 Cal. Rptr. 443, 450 (Cal. Ct. App. 1991) ("[T]he venirepersons shall be expressly informed the questionnaires are public records. . . . [T]he superior court shall provide access to the questionnaires of individual jurors when the individual juror is called to the jury box for oral voir dire. Public access shall not be provided to questionnaires filled out by venirepersons who are not called to the jury box."). *But see* State *ex rel.* Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180, 187 (Ohio 2002) (concluding that answers to questionnaires were not "public records" but the blank questionnaire form was a public record).

Recently, this sentiment was echoed by the editor of a Connecticut newspaper who defended his decision to print the names of jurors in a high-profile death penalty case. Martha Neil, *Furor Over Presentence Story About Jurors*, A.B.A. J., Sept. 14, 2007, *available at* http://www.abajournal.com/weekly/furor_over_presentence_story_about_jurors (quoting editor James H. Smith as saying, "The Sixth Amendment calls for 'a speedy and public trial, by an impartial jury.' How can you have a public trial with a secret jury? How do you know if the jury is impartial if you

in those jurisdictions continue to assert that questionnaires can be treated as confidential documents.[146] Nevertheless, decisions of United States Supreme Court and a number of state courts lead to a prudent conclusion that, by law, the public and the press have access to at least portions of the questionnaires.[147] As discussed elsewhere in this Article,[148] *Press-Enterprise Company v. Superior Court* suggests that once personal information becomes part of a public trial, any party who seeks to prevent media and public access to that information carries a significant burden.[149] Thus, the public and the news media potentially can access the information jurors disclose to the courts. Therein lies an ominous potential. This information, much of it personal, some quite private, becomes available to individuals and thus usable for purposes quite apart from jury selection.

The information may find its way into the "digital dossier"[150] of the juror, and this dossier may be available to employers, creditors, family members, investigators, the media, or members of the public. Thus, information that need not be disclosed when applying for a job—such as marital status, sexual orientation, and criminal records or employment histories of a spouse, child, or sibling—may become available to prospective employers (or anyone else) via supplemental questionnaires.

5. *Juror Reluctance*

Jurors are less willing to serve than in times past.[151] In fact, some courts report that jurors' poor response rates to summons have reached a critical level.[152] Some courts routinely summon many more jurors than needed in order to have enough jurors present for trial.[153] Many reasons

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don't know who they are?").

[145] *Beacon Journal Publ'g. Co.*, 781 N.E.2d at 187.

[146] *See id.* (finding that questionnaires with answers, because they are "completed by individual jurors," are not "public records").

[147] *See, e.g.*, *Copley Press*, 278 Cal. Rptr. at 449–50 (citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (holding that questionnaires are subject to public scrutiny)).

[148] *See supra* notes 52–67 and accompanying text; *infra* notes 168–75 and accompanying text.

[149] *Cf. Press-Enterprise*, 464 U.S. at 505 (noting that jury selection is presumed to be "a public process with exceptions only for good cause shown").

[150] I borrow the term from DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 1 (2004). Solove explains that in today's information age, dossiers (or collections of detailed data about individuals) "are being constructed about all of us." *Id*. at 2.

[151] Nat'l Ctr. for State Cts., CIVIL ACTION, Spring 2005, at 6, *available at* www.ncsconline.org/projects_Initiatives/Images/CivilActionSpr05.pdf ("The willingness of citizens to serve as jurors has been steadily declining for years."); *see also* BLUE & HIRSCHHORN, *supra* note 44, at 55 ("[T]here is a high no-show rate among jurors.").

[152] Victor E. Schwartz et al., *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens*, THE STATE FACTOR, Apr. 2003, at 1, 1 n.7, *available at* http://www.alec.org/meSWFiles/pdf/0309.pdf (citing reports of responses as low as 25% in several courts).

[153] *See, e.g.*, State v. Pennell, 583 A.2d 1348, 1353 n.8 (Del. Super. Ct. 1990) (noting that over 600 individuals were summoned for jury service in the case, but less than 150 appeared. Of those who reported for jury duty, only 106, or about 16% of those subpoenaed, were subjected to voir dire; noting further that "this percentage of participation was "not uncommon").

exist, but the perceived invasion of privacy probably factors into the equation.

A number of jurisdictions have attempted to address the decline in juror participation. Their efforts have included using more inclusive source lists for jurors,[154] eliminating many of the exemptions available to potential jurors,[155] requiring employers to pay all or part of the jurors' pay during their service,[156] eradicating discrimination in jury selection[157] and educating the public on their duty to serve as jurors.[158]

Responding to the continuing decline in citizens willing to serve as jurors,[159] several national and local organizations[160] are sponsoring a National Program to Increase Citizen Participation in Jury Service Through Jury Innovations.[161] Among the innovations mentioned in a recent publication are technical assistance to courts to increase citizen response to court summons, further protections for jurors' employment and salaries,

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[154] N.J. L. REVISION COMM'N, REPORT AND RECOMMENDATIONS RELATING TO JURIES 4–5 (1992), *available at* http://www.lawrev.state.nj.us/rpts/jury.pdf (proposing the expansion of source lists in New Jersey in order to increase "the percentage of eligible persons being considered for jury service").

[155] Booklet, N.Y.S. Unified Ct. Sys. Office of Pub. Affairs, *Democracy in Action* 4 (reporting the repeal in 1996 of "[a] New York law that automatically excused individuals from a range of professions and occupations"), *available at* http://www.courts.state.ny.us/admin/publicaffairs/democracyinaction.pdf; Press Release, Supreme Court of Indiana, Removal of Jury Service Exemptions Increases Fairness (May 1, 2006), *available at* http://www.in.gov/judiciary/press/2006/0501.html (discussing a legislative decision "to drop all exemptions from jury service" in the state); Memorandum from Anne Skove for the Nat'l Cent. for State Courts, Jury Management: Exemptions from Jury Duty (May 2, 2006), *available at* http://boards.ncsc.dni.us/WC/Publications/Memos/JurManExemptionsMemo.htm (reporting that no qualified prospective jurors are exempt from service under the laws of Alabama, Idaho, Massachusetts, and West Virginia).

[156] N.Y. State Unifed Ct. Sys., *Employers Nationwide Polled on Jury Service*, JURY POOL NEWS, Fall 2005, at 4, *available at* http://www.nyjuror.gov/general-information/jpn-pdfs/jpnfall05.pdf. (reporting that Alabama, Colorado, Connecticut, the District of Columbia, Massachusetts, Nebraska, and Tennessee require employers to pay employees during their jury service, and noting that almost half of the employers responding to a nationwide survey reported that they continue to pay jurors' salaries for at least a portion of their jury service).

[157] ALA. CODE § 12-16-56 (2007) ("A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin or economic status"); VT. STAT. ANN. tit. 4, § 952(a) (2007) (stating that lists of prospective jurors "shall be representative of the citizens of its county in terms of age, sex, occupation, economic status, and geographical distribution"); J.E.B. v. Alabama *ex rel* T.B., 511 U.S. 127 (1994) (extending *Batson*'s proscription of race-based peremptory challenges to gender-based peremptory challenges); Batson v. Kentucky, 476 U.S. 79, 79–80 (1986) (prohibiting race-based discrimination in peremptory challenges of prospective jurors).

[158] *See, e.g.*, Booklet, State of Conn. Judicial Branch, *Your Guide to Jury Duty* (2004), *available at* http://www.jud.ct.gov/publications/ja005.pdf; New York State Unified Judicial System, *Democracy in Action*, *supra* note 154.

[159] "The response rate to jury summons is about 20% in many large urban court systems." Nat'l Ctr. for State Cts., CENTER COURT, Summer 2004, at 3, *available at* http://www.ncsconline.org/D_Comm/Images/CenterCtSum04.pdf.

[160] The sponsoring organizations are the National Center for State Courts, the Council for Court Excellence and the Trial Court Leadership Center of Maricopa County, Arizona. *Id.*

[161] *Id.*

and expansion of the one-day, one-trial paradigm.[162] The Program also will address judicial management of the selection process, but the examples given in the announcement of the project are "reducing abuses of peremptories and taking for-cause challenges more seriously."[163] Absent from the innovations is a thoughtful response to juror concerns about invasion of privacy by, and time-consuming response to, jury questionnaires.

We must treat jurors better. How the jurors perceive their experience as jurors eventually affects public support of the jury system. One-day, one-trial is an improvement,[164] but the scheme requires many more prospective jurors because jurors who are not seated on juries within a day are discharged and must be replaced with other prospective jurors. If all summonsed jurors must complete a questionnaire, one-day, one-trial can be quite expensive and time-consuming. Moreover, most—perhaps as high as eighty percent[165]—of the jurors may be quite frustrated by the fact that they reported to jury duty only to fill out a comprehensive, probing questionnaire only to be discharged shortly thereafter without serving on a trial jury.[166]

Jurors may understand the need for queries about their personal affairs, but they also feel uncomfortable about disclosing or discussing some personal matters, particularly if they fail to see the need for imparting that information. When they are called to do so unnecessarily, it is not only the jurors who are harmed, but also the litigants and the court system as well.

Addressing these concerns may help accomplish the goal of increased participation in the jury process. Expansive questionnaires should be used only when they will unequivocally expedite the empaneling process while appropriately balancing juror privacy interests against the need of litigants to obtain the information necessary for jury selection.

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[162] *See id.*; *see also* CAL. R. CT. 2.1002(c) (West 2007) (mandating one-day, one-trial scheme for all California courts).

[163] *See* Nat'l Ctr. for State Cts., CENTER COURT, *supra* note 151, at 6.

[164] The California one-day, one-trial provision is intended to address "the problem of potential jurors refusing to appear for jury duty . . . ." CAL. R. CT. 2.1002(a). *See also* OJC Introduction, http://www.mass.gov/courts/jury/introduc.htm (last visited Aug. 28, 2007) (noting the use of the one-day, one-trial scheme throughout Massachusetts); Brochure, Colo. Judicial Branch, Answers to Your Questions About Your Colo. Jury Sys. (April 2006), *available at* http://www.courts.state.co.us/exec/pubed/brochures/jurysystem.pdf (reporting use since 1990 of the one-day, one-trial system in Colorado).

[165] *See, e.g.*, Brochure, The State Bar of Cal., What Should I Know About Serving on a Jury?, *available at* http://calbar.ca.gov/calbar/pdfs/publications/Serving-on-a-Jury.pdf ("Of those who show up at court, four out of five prospective jurors are excused after just one day of service, according to the state's administrative office of courts.").

[166] See, e.g., PAULA L. HANNAFORD-AGOR & NICOLE L. WATERS, EXAMINING VOIR DIRE IN CALIFORNIA 12 (2004), *available at* http://www.ncsconline.org/juries/CAVOIRREP.pdf (noting that 29% of prospective jurors served as trial jurors or alternates in the courts examined; "[t]he individuals remaining were excused pursuant to hardship, a challenge for cause, or a peremptory challenge, or were not questioned during the voir dire").

III. LIMITING THE USE OF AND NARROWLY TAILORING JURY QUESTIONNAIRES

Part II discusses the pros and cons of the questionnaire process. It also argues against the routine use of juror questionnaires for other than qualification purposes. Any other questionnaires, if allowed, should be narrowly tailored to meet the needs of the court and to protect prospective jurors and their privacy.[167] This Part focuses on the process of limiting the use of, and narrowing, questionnaires.

A. *Balancing Fair-Trial Rights and Juror Privacy Interests*

As discussed earlier in this Article,[168] *Press-Enterprise Company v. Superior Court* instructs that once personal information becomes part of a public trial, any party who seeks to prevent media and public access to that information carries a significant burden.[169] Because it was a criminal case, and did not address questionnaires, *Press-Enterprise* does not directly govern questionnaire practice, particularly in civil cases. Nevertheless, it does provide guidance.[170]

Under the *Press-Enterprise* test,[171] a party who seeks to keep information confidential must overcome a presumption of openness by showing a compelling interest in keeping the information private.[172] The court then must perform a balancing test, weighing the public's right of access against the juror's privacy interest.[173] But if the information now potentially public is personal to the juror, and is neither relevant to, nor necessary for, the jury selection process, why should the juror bear the heavy burden of a balancing test merely because the query appeared in a generic questionnaire? Instead, an attorney who proffers a questionnaire should bear the initial burden of showing that the questionnaire would be helpful, and that each question in the document is relevant to the case.

Although, as previously noted, the Court in *Press Enterprise* did not address questionnaires, the case provides guidance for their use. Several state courts have ruled that because juror questionnaires are used as part of the voir dire process, the presumption of openness reaches juror questionnaires.[174] Thus, once questionnaires are used, public and press

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[167] *Cf.* AMERICAN JURY PROJECT, *supra* note 37, at princ. 7 ("Courts should protect juror privacy insofar as consistent with the requirements of justice and the public interest.").

[168] *See supra* notes 51–66 and accompanying text.

[169] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 504–05 (1984).

[170] *See, e.g.*, *supra* notes 52–66 and accompanying text.

[171] *See supra* notes 59–66 and accompanying text.

[172] *Press-Enterprise Co.*, 464 U.S. at 510.

[173] *Id.* at 512.

[174] *See, e.g.*, Copley Press, Inc. v. Superior Court, 278 Cal. Rptr. 443, 449-50 (citing *Press-Enterprise*, 464 U.S. at 511–13, holding that questionnaires are subject to public scrutiny); *In re* Newsday, Inc. v. Goodman, 159 A.D.2d 667, 669 (N.Y. App. Div. 1990) (noting "that the

access to those questionnaires is presumed.[175] To prevent access to the questionnaires, the court must identify a value higher than openness (such as juror privacy), and then must determine that preventing access is essential to protection of that higher interest. The closure must be narrowly tailored to protect only the higher interest, such as sensitive information central to a juror's privacy.

Despite the presumption of openness, some judges promise confidentiality,[176] possibly because they use standard-form questionnaires that contain such guarantees.[177] Others probably sincerely believe that their actions are justified and that they can seal the record simply by court order or with the agreement of the parties.[178] These courts, perhaps, promise what they cannot deliver. Other courts are more attuned to the issues and are candid. They inform members of the venire that their answers are a part of the trial and therefore constitute part of a public record that the media may access.[179]

Consider, for example, the assurance of confidentiality made to the venire in *In re South Carolina Press Association*. The extensive questionnaire distributed to the summonsed jurors well before the trial stated: "The information you provide in this questionnaire will be provided to the court and the attorneys for both sides in this case. It is confidential;

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questionnaires completed by the petit jurors in this criminal action were an integral part of the *voir dire* proceeding" and observing that "the presumption of openness applies to all *voir dire* proceedings . . . . [T]he questionnaires . . . were an integral part of the *voir dire* proceeding"); State *ex rel.* Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180, 188–89 (Ohio 2002) (holding that "[c]onsistent with our reasoning, we note that virtually every court having occasion to address this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness" and concluding "that the First Amendment guarantees a presumptive right of access to juror questionnaires . . . .").

[175] *See* United States v. Antar, 38 F.3d 1348, 1360 (3d Cir. 1994) ("True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source."); *Copley Press, Inc.*, 278 Cal. Rptr. at 451 ("The fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import.").

[176] *See, e.g.*, *State ex rel. Beacon Journal Publ'g Co.*, 781 N.E.2d at 185 (noting that the trial judge informed the jurors that "they would be identified only by number and that their responses to the questionnaires would not be made public . . . . ").

[177] *See, e.g.,* ALA. R. CRIM. P. Sample Form 56 (2007) (Recommended Uniform Juror Questionnaire stating in the instructions paragraph that the questionnaire "is not public information."); United States Dist. Ct. Juror Questionnaire, *supra* note 4 ("This questionnaire is only provided to attorneys and their agents who are actually involved in cases scheduled for trial. Those persons shall not disclose the information you provide, nor may they provide the information to anyone not involved as an attorney or authorized representative."). The latter form seemingly promises that not even litigants will see the questionnaires. *But see* Bellas v. Superior Court, 102 Cal. Rptr. 2d 380, 387–88 (Cal. Ct. App. 2000) ("[A]part from the question of public access, . . . defendant and defense counsel had a separate and independent right both to know the content of the questionnaires and to preserve them in their confidential files.").

[178] *E.g., cf.* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 504 (noting that both the defense attorney and the prosecutor argued that a "release of the voir dire transcript would violate the jurors' right of privacy" and an "'implied promise of confidentiality'").

[179] *See, e.g.*, *Copley Press, Inc.*, 278 Cal. Rptr. at 451.

and when the case is concluded, the questionnaire will be destroyed."[180] This commitment is not unique. Many judges or questionnaires state that the information sought from the jurors will be confidential, accessible only by the attorneys and court officials, and usable only for jury selection purposes.[181] But that, simply put, is not always the case. For example, in *State ex rel. Beacon Journal Publishing Company v. Bond*, the trial judge promised the venire that their responses to the sixty-seven-question questionnaire would not be made public.[182] On review, though, the Supreme Court of Ohio held that the responses were presumptively subject to disclosure and that the presumption in favor of disclosure had not been rebutted.[183] Moreover, the court was not impressed by the argument that the jurors' answers should be protected against disclosure "because they were compelled pursuant to a promise of confidentiality."[184] The court observed that "[c]onstitutional rights are not superseded by the mere promise of a trial judge to act contrary to those rights.[185]

In sum, a party who proffers a comprehensive questionnaire should be burdened to show the need for its use and the relevancy of the questions it contains. The court should be prepared to balance the rights and needs of the litigants, the public, and the jurors. Courts should not casually embrace expansive questionnaires and rely on hollow promises of confidentiality.

B. *Discouraging the Widespread Use of Generic Questionnaires*

Although some jurisdictions have crafted and promulgated generic questionnaires,[186] judges should use such devices cautiously. In fact,

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[180] *In re* The S.C. Press Ass'n, 946 F.2d 1037, 1041 (4th Cir. 1991).

[181] *See, e.g.*, *Bellas*, 102 Cal. Rptr. at 383 (quoting in all capital letters, the questionniare's cover-sheet promise that "YOUR ANSWERS WILL BE USED ONLY IN THE SELECTION OF THIS JURY AND NOT FOR ANY OTHER PURPOSE."); Moussaoui Questionnaire, *supra* note 25, at 1 ("All information contained in this questionnaire will be kept confidential and under seal."); *see also* John Coté, *Judge Indicates He Will Keep Juror Questionnaires Sealed*, MODBEE.COM, Mar. 11, 2004, http://www.modbee.com/reports/peterson/trialupdates/v-print/story/8262517p-9106801c.html (reporting that the trial judge informed the jury that "their answers on the 23-page questionnair*e would remain c*onfidential unless he is overturned by a higher court") (emphasis added). The questionnaire, though, states in all capital letters that "YOUR WRITTEN RESPONSES ARE NOT CONFIDENTIAL BECAUSE THE QUESTIONNAIRES ARE PUBLIC RECORDS." Peterson Juror Questionnaire, *supra* note 27. *Compare* JURY SELECTION, *supra* note 134, at 485 (Supplemental Jury Questionnaire III-5 noting that "[t]his information will be destroyed after the jury selection process is completed and will not be used for any other purpose"), *with* JURY SELECTION, *supra* note 134, at 433 (Jury Questionnaire III-1 holding that "[t]he information in this questionnaire will become part of the court's permanent record. . . . [T]he questionnaire . . . , at the conclusion of the jury selection process, will be sealed by the court, not to be unsealed and seen by anyone without prior court approval.").

[182] State *ex rel.* Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180, 185 (Ohio 2002).

[183] *Id.* at 189 (concluding that the jurors' privacy interests "were not sufficiently compelling to rebut the presumption of openness").

[184] *Id.* at 190.

[185] *Id.*

[186] *See, e.g.*, ALA. R. CRIM. P. Sample Form 56 (2007); FLA. R. CIV. P. 1.431 (authorizing the use of approved form questionnaires to aid in jury selection); United States Dist. Ct. Juror Questionnaire,

appellate courts should discourage the widespread use of such questionnaires. As previously mentioned, these generic questionnaires impose significant costs on jurors and the courts. They frequently include many questions totally irrelevant to particular—or any—cases on the trial docket.[187] Rather than being restricted to *pertinent* issues, they are structured to address *potential* issues, not only of cases on the particular trial docket for which they are used, but also extraneous issues that have arisen in past cases or that might arise in cases that will appear on the court's future dockets.

C. *Crafting Questionnaires to Meet Needs and Protect Interests*

Because public and press access to the jurors' responses to questionnaires is arguably presumed,[188] and because courts are limited in what they can do to protect juror privacy, trial courts must prudently exercise discretion in the use of jury questionnaires. Once the court permits examination of prospective jurors on a particular issue, the court must meet a rather high standard in attempting to protect jurors' privacy interests.

A number of dubious questions recur in questionnaires. The ones that are most problematic address jurors' activities, affiliations, medical histories and medicines, and opinions. We will focus briefly on each of these topics to demonstrate several points, including: First, generic questionnaires are more likely to include a number of questions quite irrelevant to the case in which they may be used. They err to the side of inclusion. This is because the questionnaires are drafted for use across a wide spectrum of cases, and are not crafted for a particular case or even a specific type of case. Thus, the questions are more likely to offend jurors who may comprehend the irrelevance of the queries. Second, these questionnaires are more likely to include broad questions drafted for blanket usage. Such questions may unnecessarily invade whatever privacy

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supra note 174. *See also* COLO. REV. STAT. ANN. § 13-71-115 (West 2007) (providing that jurors shall be given questionnaires for completion and that, unless otherwise ordered by the court, counsel shall be supplied with copies of the "appropriate completed questionnaires"); CONN. GEN. STAT. ANN. § 51-232(c) (West 2007) (instructing that confidential questionnaires including "information usually raised in voir dire examination" shall be supplied to prospective jurors and completed copies shall be provided to counsel).

[187] *See, e.g.*, FLA. R. CIV. P. 1.431(a)(2) (2004) (authorizing court to require prospective jurors to complete generic questionnaire which are then available for inspection in the clerk's office and for use during voir dire by the court and litigants). The Florida rule does provide that the questionnaire must be "in the form approved by the supreme court from time to time to time." *Id.*

[188] *See supra* note 172 and accompanying text. *But see* United States v. Brown, 250 F.3d 907, 910 (5th Cir. 2001) (upholding trial court's refusal to permit post-trial access to juror questionnaires). The court supports its conclusion at least in part on the uniqueness of the case, a promise of anonymity, and threats to the jurors. *Id.* at 916, 919 ("unique threats to the integrity of the jury," "an earlier promise of anonymity," and "well-documented threats by the media and the defendants to jurors' privacy and independence").

interests jurors possess (or should possess). Third, because questions about affiliations, medical issues, and opinions address aspects of people's private lives, they more likely will be seen as particularly invasive. Fourth, neither the questionnaires nor the court may adequately brief the jurors on their option to object to particularly offensive questions. Therefore, jurors may simply fail to honestly and fully respond to the more vexatious queries. Fifth, objectionable questions (from the jurors' viewpoint) may antagonize jurors and bias them against the parties to whom they assign responsibility for the questions. Suffice it to say at this point that this list is by no means exhaustive. The Article addresses other concerns throughout the text as they become pertinent.

The relevance of these inquiries is frequently questionable at best, and many of these questions are included as a matter of form. Questions broadly seeking such diverse information may lead to both identification of jurors (where anonymity is possible), and to intrusion into the privacy of jurors and their families. Requiring disclosures of this kind may lead to further reluctance among citizens to serve as jurors. Most people do not want to be forced to relate personal information about themselves or their loved ones. The salience of these concerns warrants further, specific consideration. As mentioned, particularly troublesome topics include jurors' activities, affiliations, medical histories and medicines, and opinions.

1. *Activities*

Questionnaires routinely ask jurors about their activities. They may be asked about their reading habits, such as magazines they read,[189] their radio-listening, televisions-viewing or internet perusal practices,[190] their hobbies,[191] and what they do with their spare time.[192] Jurors are likely to encounter questions that seek to determine preferred levels of mental activity,[193] and even how often they think about a specific topic.[194] Prospective jurors may be asked whether they have written letters to

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[189] *See, e.g.*, ALA. R. CRIM. P. Sample Form 56, Question 33 ("To what periodicals or magazines do you subscribe?.").

[190] *See, e.g.*, *id.* at Questions 29–31 (asking about TV news programs, radio programs and hours of TV viewing per week); Juror Questionnaire, United States v. Hirko, Crim. No. H-03-0093, Question 22, *available at* http://www.kir.com/documents/Juror%20Questionairre%20012605.pdf [hereinafter Hirko Questionnaire] (asking jurors how many hours they spend on the internet each week).

[191] *See, e.g.*, ALA. R. CRIM. P. Sample Form 56, Question 35 ("Please list your hobbies, spare-time activities, and outside interest[.]").

[192] *See, e.g.*, Clerk's File Sample Questionnaire, Question 32(b) (on file with author and the Connecticut Law Review).

[193] *See, e.g.*, *id.* at Question 39 (asking "[d]o you find satisfaction in thinking hard and in depth about complicated problems?").

[194] *See, e.g.*, Moussaoui Questionnaire, *supra* note 25, Question 99 (asking "[h]ow often do you think about the victims of the September 11th terrorist attacks or the families who lost members in these attacks?").

specific parties or organizations.[195] Jurors will almost assuredly be asked about their present employment, the duties involved in that employment,[196] as well as prior employment for a set period of years.[197]

The daily activities of jurors are arguably relevant—dependent, though, on the specific facts and issues of the particular case. Information about the media sources used by an individual may school an attorney about extraneous information, viewpoints or bias that the prospective juror would bring to the jury. The same may be said for a juror's present or prior occupation. However, all too often these questions are used to gain some insight into how receptive a prospective juror would be to a certain theory of a case. Such questions arguably are irrelevant to the question of whether a juror is qualified to sit on a jury. Some of these questions probably were initially developed by jury consultants for particular cases, but regularly find their way into general-form questionnaires used in many other cases where they are neither relevant nor necessary.

There is the inherent danger that inferences drawn from the answers to such queries will be based upon generalizations, even in the hands of a qualified expert. More troubling is the likely possibility that these questions will be utilized by attorneys in an unsophisticated, biased, or discriminatory manner when selecting the jury. The intrusiveness of this information and the fact that questionnaires are often presumed to be public record makes this practice overly invasive when compared to its questionable utility. The goal is a fair trial, not a scientific experiment.

A glaring example of an overly intrusive, superfluous inquiry is the question about what kind of books jurors enjoy.[198] Questionnaires may also ask what specific types of television shows jurors like to watch.[199] These questions obliquely are aimed at determining the personality of the juror. The fact that these types of general questions may often appear in generic jury questionnaires which are available to the public increases the need to question their utility. Is there any discernable value to the information gathered in this manner? Does the fact that an individual likes to watch shows such as *Hard Copy* over dinner a few times a week really provide quantifiable insight into that person's ability to act objectively as a

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[195] *See, e.g.*, *id.* at Question 98 ("Have you written to any elected or appointed government official; or to any newspaper or magazine . . . . ").

[196] *See, e.g.*, O.J. Simpson Trial Jury Questionnaires (10/94), Questions 19–25, *available at* http://www.vortex.com/privacy/simpson-jq [hereinafter O.J. Simpson questionnaire] (asking a series of questions about the juror's employment, work history, and job-related experiences and responsibilities).

[197] *See, e.g.*, *id.* at Question 25 (asking for prior employment for 10 years); Moussaoui Questionnaire, *supra* note 25, at Question 23 (asking for prior jobs for previous 15 years).

[198] *See, e.g.*, ALA. R. CRIM. P. Form 56, Question 34 (2007) ("Of the books you have read, which three are your favorites?"); O.J. Simpson Questionnaire, *supra* note 196, at Question 244 ("What kind of books do you prefer? (Example: Non-fiction? Historical? Romance? Espionage? Mystery?)").

[199] *See, e.g.*, O.J. Simpson Questionnaire, *supra* note 196, at Questions 252–61 (containing a number questions about television programs, movies, and books that the prospective juror had read or viewed, or views).

juror?[200] Even if the inquiries provide marginally useful information, is the somewhat dubious value of such inquiries outweighed by the privacy interests of jurors? This type of information may be collected in a less intrusive manner with similar results. Asking a juror if they have read any articles or books, or viewed any programs, that would prejudice his or her decision in the case might suffice to determine objectivity without delving into their daily television habits.

There is a similarly dubious objective in asking frequently utilized questions about whether a person has the authority to hire or fire someone at his or her job[201] or alternatively whether the person acts in a supervisory capacity in his or her job.[202] These questions are intended to determine a person's disposition in the jury room. Attorneys are seeking to identify which jurors they feel will exert the most influence during deliberations. Questions such as these possibly have very little to do with the objectivity of the juror. Sometimes these queries morph into queries about the employment and supervisory role of that individual's spouse or significant other.

Even though these questions may not ask for specific places of employment, they often provide enough information to identify at least some of the jurors even though the identities may not appear on the questionnaires. This is troubling in many cases, but it is most disconcerting in cases in which the jurors have been promised anonymity. Given the questionable utility of such questions and the likelihood that the information could lead to identification of jurors, such inquiries should be limited, possibly by restricting such queries to cases that actually deal with employment or occupational issues.

Another widely used query that should be corralled involves criminal charges brought against family members.[203] This line of questioning raises a higher level of suspicion because it delves into the activities of individuals other than the jurors themselves. Moreover, these questions frequently are not limited to convictions, but include investigations and arrests.[204] Such questions may not address issues relevant to the trial. Often times, they are broad and intrusive, and make public record of activities and inquiries that might not otherwise be available in the public domain. This is the epitome of intrusive, irrelevant, and unnecessary questions about jurors and their family members. Frequently, they are

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[200] *See, e.g.*, *id.* at Question 257 ("Do you watch any of the early evening 'tabloid news' programs? Such as 'Hard Copy,' 'Current Affair,' 'American Journal,' etc.").

[201] *See, e.g.*, *id.* at Question 22; Clerk's File Sample Questionnaire, *supra* note 192, Question 9.

[202] *See e.g.*, ALA. R. CRIM. P. Sample Form 56, Question 14; Kobe Bryant Questionnaire, *supra* note 21, at Question 24.

[203] *See, e.g.*, Hirko Questionnaire, *supra* note 190, at Question 31; Clerk's File Sample Questionnaire, *supra* note 192, at Question 24.

[204] *See, e.g.*, Moussaoui Questionnaire, *supra* note 25, at Question 50.

used because attorneys feel that they may identify jurors who would be more or less receptive and trusting of testimony from law enforcement witnesses.[205] This issue may be addressed more directly by asking jurors about their views of crime, the police, or testimony from law enforcement.[206]

Questions about the social and civic activities of jurors and their families should be limited. These questions are often intended to allow attorneys insight into what will and will not work with particular jury members. Broad inquiries of this nature should be considered more a fishing expedition for bias than an attempt to identify objectivity.

2. *Affiliations*

Common questionnaire forms contain multiple questions about jurors' affiliations. These queries can be quite encompassing. Consider this example: "What social, professional, trade, union, or other organization are you affiliated with?"[207] Generally, most jurors can answer the question without a problem (other than the fact that they may forget to mention one or more affiliations). In some cases, though, they may belong to organizations that they would rather keep confidential. Moreover, their membership in those organizations may be totally unrelated to their fitness to serve as jurors in the case at trial. For example, in a complex civil case, why would a juror need to disclose his or her membership in such organizations as MoveOn,[208] the John Birch Society,[209] the Federalist Society,[210] NARAL,[211] the National Right to Life Committee,[212] or even groups such as the Boy Scouts, or the Democratic or Republican parties? Of course, if the civil case involves abortion services, membership in either NARAL or the NRLC becomes quite pertinent and a specific query about such organizations would be warranted. Absent some showing of relevancy and need, though, sweeping questions about juror affiliations

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[205] *See id.* at Question 59 (asking whether the potential juror has had any contact with any type of law enforcement persons or agencies).

[206] *See, e.g.*, Kobe Bryant Questionnaire, *supra* note 21, at Question 34.

[207] *See* ALA. R. CRIM. P., Form 56, Question 18. Some questions are not limited to membership, and may be more provide a more inclusive list. *See, e.g.*, Kobe Bryant Questionnaire, *supra* note 21, at Question 27 ("Please list all groups or organizations in which you participate or are a member. For example, service clubs, church or church groups, unions or professional organizations, volunteer activities, educational or political groups, neighborhood groups or self-help groups.").

[208] A liberal political action organization. *See* MoveOn.org, About the MoveOn Family of Organizations, http://www.moveon.org/about.html (last visited Aug. 28, 2007).

[209] A conservative political education and action group. *See* About the John Birch Society, http://jbs.org/about (last visited Aug. 28, 2007).

[210] A conservative education and action group. *See* The Federalist Society: About Us, http://www.fed-soc.org/aboutus/css.print/default.asp (last visited Aug. 28, 2007).

[211] A pro-choice political action organization. *See* NARAL Pro-Choice America: About Us, http://www.prochoiceamerica.org/about-us/ (last visited Aug. 28, 2007).

[212] A pro-life political action organization. *See* National Right to Life, Mission Statement, http://www.nrlc.org/Missionstatement.htm (last visited Aug. 28, 2007).

should be balanced against the interests of the privacy interest of jurors.

3. *Medicines*

Many questionnaires ask about medications that jurors take.[213] Such questions delve into an area that is traditionally quite heavily protected by privacy laws and privileges. It is an interesting query, frequently with an unclear purpose. It is arguable that medication needs of jurors could have certain logistic or qualification implications; however, such concerns can be accounted for with simple questions, such as whether the prospective juror has any physical or medical limitations that would hinder the individual from serving as a juror.[214] This form of question serves legitimate purposes without prying into the medical history and needs of the juror.

Medical information is highly sensitive to many people and any intrusion upon that privacy must undoubtedly be justified by the specific case. Attorneys may need to know about the medications individuals take in certain kinds of cases such as product liability or patent infringement cases dealing with pharmaceuticals. However, without some specific showing of relevance, it is difficult to justify asking a person exactly what kinds of medication they are taking when they are being screened for service on a murder trial.[215] Naturally, a criminal defense attorney may claim that the effects of a certain medication, or the lack of it, contributed to a mental state that would mitigate—or exculpate a defendant from—guilt. In such instances, it would seem sufficient to ask if any of the venire takes that specific (or some similar) medication. Courts should be very protective of the medical information of jurors. Need and relevance should be nearly self-evident before prospective jurors should be required to disclose significant information about non-relevant prescribed medicines and medical treatment.

4. *Opinions*

Although I have challenged the routine use of generic questions, some queries, even though generic, appear to be quite appropriate. For example,

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[213] *See, e.g.*, Moussaoui Questionnaire, *supra* note 25, at Question 151 ("Are you currently taking any prescription medication which may prevent you from giving your full attention to the matters in court during a trial?"); O.J. Simpson Questionnaire, *supra* note 196, at Question 8 ("Are you presently taking any form of medication? if so, please list the medications you are taking, the reasons for taking them and how often you take them: Medication? Reason for taking? How long taking?").

[214] *See, e.g.*, Moussaoui Questionnaire, *supra* note 25, at Question 151 ("Are you currently taking any prescription medication which may prevent you from giving your full attention to the matters in court during a trial?"); Hirko Questionnaire, *supra* note 190, at Question 23 ("If there is a physical or other inability for you to serve as a juror, please describe it.").

[215] *See, e.g.*, O.J. Simpson Questionnaire, *supra* note 196, at Question 8 ("Are you presently taking any form of medication? if so, please list the medications you are taking, the reasons for taking them and how often you take them: Medication? Reason for taking? How long taking?").

jurors probably should be asked if they have "any ethical, religious, political, or other beliefs" that might interfere with their service as jurors.[216] One particularly pertinent, but potentially loaded question, asks jurors about their opinion of lawyers.[217]

Not all opinion-based queries appear so appropriate. An indirect, but opinion-related, question is the seemingly ubiquitous bumper sticker query: "Are there bumper stickers on the vehicle that you drive or that your spouse drives? . . . If yes, what do they say?"[218] Such questions purportedly seek insight into preconceived biases on the part of prospective jurors. However, as discussed earlier, the accurate interpretation of these bumper stickers may require some training,[219] and, at best, they may offer only a very superficial view of the juror's actual opinions. There is the chance that the bumper sticker may lead counsel into unwarranted decisions about jurors since the motivation for placing a bumper sticker on a car ordinarily is not known. The practice of building assumptions based upon this question also overlooks the fact that if someone feels strongly enough about an issue to notify random motorists of their opinion, they will probably have no reservations about answering a question explicitly directed at garnering that opinion.

Sometimes the actual objective of the inquiries may lay latent in the queries. For example, questions about an individual's assessment of FBI investigations of certain crimes,[220] or the credibility of law enforcement officials,[221] may be used by attorneys to determine how to address particular witnesses and their testimony. Many such questions limit the choices provided as answers.[222] In that channeled form, the questions limit the ability of a venire member to answer fully and, therefore, the accuracy of the answers obtained may be called into question.

Other questions are directly designed to present a party's case to the jury pool before the trial begins. A striking example is a query used in the

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[216] *See, e.g.*, ALA. R. CRIM. P. Form 56, at Question 41 (2007) ("Do you have any ethical, religious, political, or other beliefs that may prevent you from serving as a juror?").

[217] *See, e.g.*, *id.* at Question 39 ("Based on your experience, what is your opinion of lawyers?").

[218] *See id.* at Question 36.

[219] *See supra* note 120 and accompanying text.

[220] *See, e.g.*, Moussaoui Questionnaire, *supra* note 25, at Question 61 ("What, if any, opinion do you hold about the performance of the Federal Bureau of Investigation (FBI) in each of the following investigations?"; listing Waco, Ruby Ridge, September 11th, and other well known investigations).

[221] *See, e.g.*, *id.* at Question 60 ("Would you, as a juror, give law enforcement officers when testifying as a witness in a case, more credibility, less credibility, or the same credibility as anyone else's testimony?"); O.J. Simpson Questionnaire, *supra* note 196, at Question 110 ("Based on what you know of this case thus far, what are your views concerning the LAPD?").

[222] *See, e.g.*, Moussaoui Questionnaire, *supra* note 25, at Questions 64–71. Question 64, for example, asks: "Do you believe that punishment or rehabilitation is the more important objective in sentencing those convicted of violent crimes?" *Id.* at Question 64. The responses are limited to "Punishment" and "Rehabilitation." *Id.* Deterrence, incapacitation and other sentencing objectives are not offered as possible choices.

Scrushy trial:[223] "Do you believe that criminal activity can occur within a company without the knowledge of its chief executive officer?"[224] The practice of asking theme-related questions is widely suggested.[225] When such a practice is coupled with practices of a similar vein, such as re-asking as many of those questions as the court will allow,[226] this amounts to little more than an attempt to subvert the process of trial and argue a party's case before the jury is seated. Such questions are poorly veiled attempts and may even insult a juror's intelligence. They are also unnecessary because they add little if anything to a well-structured voir dire.

Questions about jurors' opinions are some of the most widely used (or abused). They press for very personal information about jurors and do not necessarily aid in seating a fair and impartial jury. It is possible, and much less subversive, to ask questions directly bearing on the potential juror's opinion of the party.[227] This approach as part of a well-planned, comprehensive voir dire exposes potentially harmful bias without prying too deeply into the personal opinions of the members of venire and without unduly or inappropriately arguing to and influencing the prospective jurors before the trial commences.

5. *Religion.*

Although questionnaires frequently ask about jurors' affiliations, they often separately target religious memberships and activities. A defensible query about religion might ask: "Do you have any religious belief that would prevent you from sitting in judgment of another person? Yes No. If yes, please explain."[228] Such questions bear directly on the ability of the juror to act objectively and should be considered as a matter of qualification. Questions specifically involving religious affiliation obviously are defensible in cases that involve religiously charged issues, such as the Moussaoui case, in which the accused was charged with

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[223] *See supra* note 29 and accompanying text.

[224] Scrushy Questionnaire, *supra* note 119, at Question 68.

[225] *See* BENNETT & HIRSHHORN, *supra* note 4, § 12.10, at 166–67 (discussing the use of case-specific questions during voir dire to "reveal the case themes and explore the jurors' thoughts and feelings about what concerns you most about your case.").

[226] *See supra* note 99 and accompanying text.

[227] *See, e.g.*, Juror Questionnaire, United States v. Howard, Criminal Action No. H-03-0093 (S.D. Tex), at Question 45 ("Please describe any opinion you may have formed about the conduct of Enron, or any person or entity connected to Enron?") [hereinafter Howard Questionnaire].

[228] *E.g.*, Kobe Bryant Questionnaire, *supra* note 21, at Question 30. The Bryant questionnaire also asked more generally about religious affiliations. *See id.* at Question 27 (listing "church or church groups" as an example answer after the question: "Please list all groups or organizations in which you participate or are a member").

participating in a terrorist plot motivated by religion.[229] The Moussaoui questionnaire sought the religious affiliation of the individual as well as his or her knowledge and opinions of Islam.[230] They were pertinent to the issues of the case and dealt with what became a major point of argument on behalf of the defendant. The case required jurors to admit to and set aside any preconceived biases against Islam.[231] Such queries are relevant and necessary in cases of a religious nature.

Many other examples and forms of questions about religion exist.[232] These questions not only ask for affiliation, but also for the specific "Church, Temple or Religious Organization."[233] These types of questions are problematic for at least three reasons. First, information about religious beliefs, affiliation, and practices is very personal to many people. Second, identifying specific religious organizations may lead to juror identification in those cases that the venire is anonymous. Third, churches are places where influence may be brought to bear upon a juror outside of the courtroom. Thus, there exists a possibility of undue and inappropriate contact or influence. Allegations of activities of this sort surrounded the trial of Richard Scrushy, the former Chief Executive Office of Healthsouth.[234] The questionnaire in that case asked prospective jurors to list any religious organization to which they belonged.[235] Similar questions appear in the questionnaire for the O.J. Simpson case.[236] Both of these cases involved criminal accusations. Richard Scrushy was accused of securities fraud, an offense that has no religious implications whatsoever. The Simpson case revolved around a double murder, an action that is banned by virtually any bona fide religion. The need for and relevance of the specific religious organization that a juror belongs to is rather suspect

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[229] *See* Moussaoui Questionnaire, *supra* note 25, Questions 72–79 (containing a battery of questions under the heading "Contact, Knowledge, and Experience with Religious Groups and Organizations").

[230] *Id.* at Questions 73, 75, 76, 78.

[231] *Id.* at Questions 75–79.

[232] *See, e.g.*, Clerk's File Sample Questionnaire, *supra* note 192, at Question 17 (on file with Connecticut Law Review).

[233] *Id.*; *see also* ALA. R. CRIM. P. Sample Form 56, Question 49 (2007) ("Do you belong to a church or otherwise have any religious affiliation? . . . If yes, please specify.").

[234] *See, e.g.*, Carrie Johnson, *Jury Acquits HealthSouth Founder of All Charges*, WASH. POST, June 29, 2005, at A01, *available at* LEXIS, News Library, WPOST file (mentioning Scrushy's donation of $1 million to a church at which he spoke, and attendance of "pastors, some wearing clerical collars, to occupy benches in the courtroom in the jury's line of sight"); Ben White, *In Scrushy Trial, Jurors Chose Defense's Portrait*, WASH. POST, June 29, 2005, at D01, *available at* LEXIS, News Library, WPOST file (recounting the role of religion in Scrushy's trial, including the fact that several jurors stated in their questionnaires that they had attended a church in which Scrushy had preached, and that several of the pastors had been invited to attend the trial).

[235] *See, e.g.*, Scrushy Questionnaire, *supra* note 119, at Question 41 (asking for "all organizations, societies, or associations to which you belong," but listing a blank for religious organizations first).

[236] *See* O.J. Simpson Questionnaire, *supra* note 196, at Question 201 (asking for information related to "religious affiliation or preference," importance of religion to the juror, and the impact such religious influences might have on the juror's ability to serve on a jury).

in such cases. The fact that questionnaires dealing with similar cases do not ask for this information evidences the low utility of such inquiries.[237] The Enron questionnaire is a glaring example when compared to the Scrushy questionnaire. Both of these cases involved securities fraud allegations concerning the executives of major corporations, yet only the Scrushy questionnaire sought information about religious affiliations. The Enron questionnaire did not even mention religious affiliation.

Information regarding religious belief should be allowed only in cases where religion or religious bias will be placed prominently before the court.[238] The actual name of the religious organization that a prospective juror attends should quite possibly be limited to cases specifically involving that organization or directly raising issues related to religious beliefs or practices. The private nature of people's religious beliefs requires that queries regarding this subject should be limited in scope and used sparingly.

D. *Extra Precaution for the Information Age*

Using voir dire questionnaires likely will lead to additional issues. For example, some questions may gather data quite useful for identity thieves. Thieves now steal personal data such as an individual's name, address, Social Security number, or other identifying information, and use that information to fraudulently make purchases or obtain services by using the victim's identity. The victims of identity theft may spend considerable time and money restoring credit records. They also may have difficulty financing purchases, finding employment, or remaining clear of unwarranted law enforcement scrutiny.[239]

Despite the current risks of widespread data collection, courts persist in accumulating and possibly memorializing treasure troves for identity thieves, probably with less than adequate procedures for the protection of such data. For example, in Washoe County, Nevada, a qualification questionnaire asks the prospective jurors for their names, birth dates, addresses, phone numbers, and employment information.[240] These data are all that would be necessary for identity theft, although identity thieves probably would also covet credit card numbers and expiration dates.

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[237] *See, e.g.*, Howard Questionnaire, *supra* note 203, at Question 4 (asking only for "Religious preference").

[238] *See, e.g.*, Yarborough v. United States, 230 F.2d 56, 63 (4th Cir. 1956) (noting that appellant's contention that trial judge erred in not questioning jurors about their religious affiliations in a case in which there was no issue of "religious significance" was "so lacking in merit as to warrant only the briefest mention" and referring to religious affiliation as "a private matter").

[239] *See generally* FTC, Fighting Back Against Identity Theft, About Identity Theft, http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html (last visited Aug. 28, 2007) (discussing identity theft in general).

[240] *See* Second Dist. Court State of Nev., Washoe County Courthouse, Jury Questionnaire, *available at* http://www.washoecourts.com/index.cfm?page=jury (last visited Aug. 28, 2007).

Identity theft is a genuine concern. During early 2005, ChoicePoint, a leading consumer data reporting agency,[241] informed over 30,000 individuals in California that unauthorized parties accessed the company's data files.[242] In addition to names and addresses, these files contained Social Security numbers, credit information, and a wide range of personal data on consumers.[243]

That is but one event among many involving one database. If one needs to search public records at a courthouse, ChoicePoint is available.[244] Whether those courthouse records include jury questionnaire data depends upon whether the questionnaires are accessible public records. Courts should not become part of the problem by building data sources for identity thieves.

If courts fail to protect jury privacy by developing questionnaires that appropriately balance the court's need for information and the jurors' need for protection of their privacy, litigants may pay a price for their questionnaires. For example, in some criminal cases, courts may authorize the use of expansive questionnaires to gather information but also use an anonymous venire to protect jury identity.[245] In such cases, the price imposed may exceed the benefits obtained. The parties may learn much about a juror, but they will not learn facts that would identify the juror, such as the juror's name, address, employment, and many other identifying details. Thus, the price for some marginally useful data may be the loss of significantly more helpful information.

E. *Limiting Distribution of Questionnaires to the Appropriate Venire*

Courts should refrain from mailing questionnaires to entire venires. Instead, they should limit the distribution to those prospective jurors who

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[241] ChoicePoint is "the nation's leading provider of identification and essential verification services." http://www.choicepoint.com/ (last visited Aug. 28, 2007). It maintains dossiers "on virtually every U.S. citizen . . . ." Bob Sullivan, *Database Giant Gives Access to Fake Firms*, Feb. 14, 2005, MSNBC.COM http://msnbc.msn.com/id/6969799/. ChoicePoint's website permits authorized users to "Search Billions of Records" and touts "billions of current and historical records on individuals and businesses." ChoicePoint.com, Search Billions of Records from Your Desktop Computer, http://atxp.choicepoint.com/ (last visited Aug. 28, 2007).

[242] Sullivan, *supra* note 241; *see also* Letter from J. Michael De Janes, Chief Privacy Officer ChoicePoint, to Consumers Whose Information Was Compromised (Feb. 9, 2005), *available at* http://www.csoonline.com/read/050105/choicepoint_letter.html.

[243] *See* Sullivan, *supra* note 242.

[244] *See* ChoicePoint, About AutoTrackXP, http://atxp.choicepoint.com/about.htm (last visited Aug. 28, 2007) (offering to perform on-demand court record searches).

[245] *See, e.g.*, United States v. Barnes, 604 F.2d 121, 137 (2d Cir. 1979) (upholding the use of an anonymous jury). In *Barnes*, the trial court based its ruling on juror privacy; the appellate court relied on juror safety. *Id.* Courts are much more likely to accept jury anonymity if juror safety, rather than juror privacy, is the basis for protecting jurors' identities. *See, e.g.*, United States v. Sanchez, 74 F.3d 562, 564 (5th Cir. 1996) (limiting juror anonymity to cases involving "serious threat to juror safety" if appropriately balanced with the defendant's presumption on innocence and need for an effective *voir dire*).

will form the venire from which the jury in the case for which the questionnaire was drafted will be chosen. Initially, this approach seems superior to the bulk mailing of generic questionnaires. The questionnaire can be honed to fit the case for which it is distributed, and the attorneys possibly will have more time to peruse the answers of prospective jurors before undertaking voir dire and jury selection. Nevertheless, even the mailing of questionnaires for a specific case has negative aspects. For example, even if questionnaires are distributed with a particular case in mind, it is possible—perhaps probable—that the data gathered will be available to other attorneys and parties, and used in other cases as well.[246]

Of course, courts that mail questionnaires to entire jury venires also expend valuable, frequently limited, resources. Additional costs arise from the obvious need to prepare, handle, and mail larger expansive questionnaires.[247] What is more, these generic questionnaires intrude unnecessarily into jurors' privacy. For example, the court will naturally excuse some of the jurors who are asked to respond to a questionnaire from jury service before they become subject to scrutiny as a potential trial juror. Additionally, some of the jurors will be assigned to cases in which the attorneys would not have utilized jury questionnaires but for the fact that they are available.[248] In either of these cases, jurors who otherwise would not have been asked to respond so thoroughly to inquiries about private matters will be subjected to such queries in the generic questionnaires.

Because the jurors complete the questionnaires outside the presence of court officials, other issues arise. The jurors do not have ready access to

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[246] For example, in July 2005, a trial was held in which Ronnie Cottrell and Ivy Williams, two former assistant football coaches, sued the NCAA, two NCAA officials, and a sports recruiting analyst arising out of allegations of improper recruiting at the University of Alabama which had resulted in serious NCAA sanctions against the Alabama football program. *See, e.g.*, *Cottrell/Williams Trial Set to Begin Today*, THE DECATUR DAILY, July 12, 2005, *available at* http://www.decaturdaily.com/decaturdaily/sports/050712/trial.shtml (reporting on the commencement of the trial). A questionnaire was distributed by mail to the entire venire for that particular session of court. Interview with Fran Brazeal, *supra* note 82. During the jury term, the completed questionnaires were not only provided to the attorneys and judge in the case for which the questionnaires had been prepared, circulated, and completed, but also were provided to an attorney in another case tried during the same jury term in another courtroom before a different judge. *Id.* According to Mrs. Brazeal, an attorney in an unrelated civil case obtained copies of all of the questionnaires (although some of the jurors probably were serving in the Cottrell case or on juries in other courtrooms). Apparently, the attorney(s) on the other side of that case did not obtain copies of the questionnaires because they did not request copies from the clerk's office. It is unknown whether they knew such questionnaires existed or were available upon request. *Id.*

[247] Naturally, in civil cases and criminal cases in which the defendants are financially able, the court may impose the costs of jury questionnaires on the parties. In indigent criminal cases, though, the costs will be borne by the government. Furthermore, it is likely that even if the parties pay the direct costs of questionnaire preparation and mailing, the court will also incur costs.

[248] *Cf.* Interview with Fran Brazeal, *supra* note 82 (reporting the distribution of questionnaires prepared specifically for the Cottrell case to an attorney in another case set for trial during the same jury week). Although the Cottrell questionnaire was not a generic questionnaire, its use in another case raises the same concerns addressed in the text.

court officials if they need instructions or clarifications of questionnaire instructions or propounded questions. Because the jurors probably will complete the questionnaires in their homes at a time of their choosing, they may not focus their full attention on the task. Questions may be answered during television commercial breaks or while the juror also attempts to supervise children, converse with a spouse, or entertain a pet.

Even if the court limits the distribution of questionnaires to those prospective jurors who actually appear at the convening of the court session, this process—to a great extent—bears the same shortcomings mentioned with regard to mailed questionnaires. The cost of preparing and processing a larger number of questionnaires than otherwise might be needed is apparent; the court would not need questionnaires for those trials in which either the parties did not seek to use questionnaires or were able to resolve the case before undertaking jury selection. Additionally, the venire will be unavailable for jury selection while it completes the questionnaires. Some trials may have proceeded without questionnaires, but because questionnaires are available from the empanelling process, those trials may be paused to wait for responses to, and analysis of, the questionnaires. This alternative is more costly than necessary, although it does save the additional postage necessary for the first alternative. On the other hand, when questionnaires are completed in court, distractions such as television programs, children, spouses, and pets are not present. Furthermore, jurors may take the questions more seriously if they are completing the questionnaires in court,[249] and they are more apt to answer the questions themselves without input from others. Additionally, court officials are more readily available to supervise the process or to answer questions.

As suggested earlier, the court should limit distribution of questionnaires to the actual trial venire for the case for which the questionnaire was prepared. Clearly, this approach removes some of the undesirable characteristics of the other two methods of distributing questionnaires. No mailing costs are involved; production and handling costs are reduced; fewer jurors are exposed to invasive questions; and there are fewer distractions and kibitzers. Even so, this approach entails costs. For example, the court must delay the voir dire to provide jurors time to complete the questionnaires. The attorneys must have time to peruse the questionnaires. Additionally, if questionnaires are used in one case, the

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[249] *See, e.g.*, BENNETT & HIRSCHHORN, *supra* note 4, § 8.22, at 115 (reporting a juror's differing responses to a question on the questionnaire and the same question on *voir dire*). They report that in the questionnaire, jurors were asked the question "What's the first thing that comes into your mind when you hear the words *criminal defense lawyer*?" One juror responded "They feed off the blood of people's miseries." At *voir dire*, the same juror responded "You're here to preserve the Constitution." *Id*. Whatever one might think of the advisability of leaving that person on a panel, it is obvious that the juror responded to the same question differently in court than out of court.

practice may encourage other litigants to request questionnaires in other cases on the trial docket. Once a court adopts a questionnaire paradigm, it may become rather difficult to contain the practice.

Nevertheless, if expansive questionnaires are used, this would be the preferred time frame for their use. Rather than submitting voir dire questionnaires to prospective jurors who may not become part of the trial venire, the court could restrict the distribution of questionnaires to the actual trial venire, from which the jury will be selected. The trial judge also can supervise the content and use of the questionnaires.[250] Furthermore, because the questionnaires can be configured for the particular parties and issues in the trial, they are more easily restricted to pertinent inquiries. The questionnaires also can be drafted to fit the expected voir dire and, thus, help limit the resources directed toward voir dire.[251] This efficiency is arguably one of the principle reasons for using questionnaires,[252] and it can best be accomplished through true voir dire questionnaires narrowly tailored to elicit information pertinent to the case at hand.

IV. GOVERNING THE USE OF JURY QUESTIONNAIRES

In Part III, I contended that even if juror questionnaires are used, they should be narrowly tailored to meet the needs of the court and to protect the privacy of the prospective jurors. This Part advances several suggestions to govern the use of questionnaires and the information gathered if questionnaires are used.

I have argued that juror questionnaires should not be routinely used by courts, but that if they are used, they should be used only when a demonstrable need exists and when that need is weighed against the harm that potentially results. As we have seen, this harm arises not only from intruding into the private lives of jurors but also from memorializing the

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[250] *Cf.* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 512 (1984) ("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 . . . ."). Even when questionnaires are drafted for a particular case, they may be overly broad or contain errors. *See, e.g.*, Cottrell Questionnaire, *supra* note 82, at Questions 32, 37. The questions are identical: "Do you or any member of your family belong to a group or organization that promotes the limitation of lawsuits or the monetary compensation awarded in lawsuits? . . . If yes, explain:" *Id.*

[251] *See, e.g.*, 4 ELAINE A. GRAFTON CARLSON, MCDONALD & CARLSON TEX. CIV. PRAC. § 21.17[a] (2006) (opining that more detailed but more specific questionnaires are efficient and will shorten the *voir dire* process) *But see* BENNETT & HIRSCHHORN, *supra* note 4, § 8.22, at 115 ("You should re-ask as many of the questions [on the questionnaire] as the court will tolerate.").

[252] *See, e.g.*, Stevens v. State, 770 N.E.2d 739, 751 (Ind. 2002) ("Jury questionnaires are a useful tool employed by courts to facilitate and expedite sound jury selection."); State *ex rel.* Beacon Journal Publ'g Co. v. Bond, 781 N.E.2d 180, 188 (Ohio 2002) (reasoning that "the purpose behind juror questionnaires is merely to expedite" *voir dire*, and therefore "questionnaires are part of the voir dire process."); ABA CIVIL TRIAL PRAC. STDS., pt. One(a)(i) (1998) (encouraging the use of questionnaires "in appropriate cases" to "expedite and enhance voir dire . . . .").

private information gathered by the questionnaires. No one normally represents the interests of the jurors (and, likely, the interest of the public and the media) when the court and the parties address the issue of jury questionnaires in pretrial proceedings. Therefore, rules should be promulgated after appropriate debate and consideration to guide the court and the parties with regard to the use of questionnaires. Otherwise, the courts will continue to utilize questionnaires in a discretionary and ad hoc manner and possibly without adequate consideration of policy issues and the interests of unrepresented parties.

Whether or not required by law, the courts are obliged to protect juror privacy. Of course, in protecting jurors' privacy interests, trial judges must comply with applicable law and rules. As readily observable, many competing interests exist with regard to the use of juror questionnaires. There are four facets to an appropriate balancing of the rights and interests in this area. First, the court's action is limited by its authority. Second, the court must address and uphold the rights of the parties (whether criminal defendant, civil litigant, or the government). 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. What the court cannot do is forget to recognize the rights of jurors not to disclose highly personal information without a showing by the parties of relevancy and need. Judges also should be sensitive to the fact that jurors, judges, and attorneys are likely to view quite differently what should be protected as private, personal, or embarrassing. For example, some courts have determined that litigants have no right to ask jurors about their religious beliefs absent a showing of relevancy,[253] yet many jurors may be quite willing to discuss their beliefs. In fact, some may feel it is their duty to acknowledge, even proselytize, their faith. Conversely, courts have determined that jurors must answer questions about their medical history,[254] yet many jurors may consider such information to be highly personal.

This Part now proffers a number of suggestions which should be formally adopted as rules by the appropriate entities—judicial or legislative—in furtherance of the worthy goals that parties receive fair

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[253] *See, e.g.*, Yarborough v. United States, 230 F.2d 56, 63 (4th Cir. 1956) (noting that appellant's contention that trial judge erred in not questioning jurors about their religious affiliations was "so lacking in merit as to warrant only the briefest mention"); State v. Poncelet, 610 P.2d 698, 706 (Mont. 1980) (finding trial court acted appropriately in limiting inquiry to belief in God rather than engaging in detailed inquiries during *voir dire*).

[254] *See, e.g.*, State *ex rel.* Beacon Journal Publ'g Co., 781 N.E.2d 180, 185 (Ohio 2002) (reciting nature of questionnaire questions including inquiries about "medical history"); O.J. Simpson Questionnaire, *supra* note 196, at Questions 7, 8 ("Do you have medical or physical condition that might make it difficult for you to service as a juror? . . . Please describe." "Are you presently taking any form of medication? If so, please list the medications you are taking, the reasons for taking them and how often you take them.").

trials which are open to public scrutiny, and that the privacy of prospective jurors is protected insofar as possible. My suggestions are:

1. A court should not routinely use written jury questionnaires that seek information beyond that needed to ensure that prospective jurors are qualified to serve as jurors in that court.

2. When a party requests that a court permit the use of a written jury questionnaire in a case pending before that court, the party should be required to proffer a proposed questionnaire, make a showing of the particular need for the use of written questionnaires, and demonstrate the need for the information sought in the questionnaires.

3. The opposing party or parties should be afforded ample opportunity to be heard on the questions of whether to use a questionnaire, the process, and the content of any questionnaire.

4. When a party makes a showing to support a request for the use of written jury questionnaires, the court should weigh the party's need for the written questionnaires and the information sought in the questionnaires against the cost to the prospective jurors, the opposing party or parties, the court, and the public.

5. Certain types of identifying information, such as addresses, Social Security numbers, drivers' licenses, and telephone numbers, should not be sought through supplemental questionnaires.[255]

6. If questionnaires are used, the court should instruct the jurors on the need for complete and truthful answers as well as the right of jurors to object to any questions of a particularly personal nature. In the event of an objection, the court should hear the juror's objection in private and determine how to approach the issue. Options available to the court should include—but not be limited to—instructing the juror to answer the question, permitting the juror to answer in a confidential manner, sealing the juror's response, or striking the question from the questionnaire. In selecting a course of action, the court should balance the litigant's need for the information against the juror's interest in keeping the information confidential, as well as the right of the public to open proceedings.

7. Although questionnaires are public records,[256] access should be limited to the extent permitted by law. Questionnaires should not be accessible or available for perusal by anyone for purposes other than jury qualification or selection and public scrutiny of court processes. Idle curiosity, I submit, is not a sufficiently legitimate basis for public access.

8. When a court uses written juror questionnaires, the court should

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[255] Interestingly, in 1992 the New Jersey Law Revision Commission suggested that the use of Social Security numbers would aid jury list merging and urged that federal law be amended to allow such use. *See* N.J. L. REVISION COMM'N, *supra* note 153, at 5.

[256] *But see* ALA. R. CRIM. P. Sample Form 56 (2007) (stating in the instructions paragraph that the questionnaire "is not public information").

ensure that jurors' personal information gathered by the court is protected to the fullest extent permitted by law. To ensure minimal dissemination of private information, the questionnaires should be either returned to the jurors or collected and destroyed by the court. Whether this can be accomplished will be affected greatly by the law of the jurisdiction[257] and the status of the case.

Because the questionnaires may be needed during post-trial proceedings, in the absence of an agreement by the parties to permit return of the questionnaires to the jurors, the court will be unable to return the questionnaires to the jurors other than by mailing them to the jurors quite some time after the conclusion of the trial. In lieu of returning the questionnaires to the jurors at the conclusion of the trial, the parties should be required to return all completed questionnaires to the court by the end of the expiration of time for appeal or, alternatively, at the conclusion of any appeal and the court should either return the questionnaires to the jurors or destroy all copies of the questionnaires.[258] If the original questionnaires must be retained for use by the court for other post-trial proceedings, any portions of the questionnaires that contain jurors' personal information should be sealed. They should be made available to counsel and parties upon a showing of need and should be used only for the purpose of the post-trial proceedings.

In sum, when legally permissible, questionnaires should be returned to jurors or destroyed as soon as they are no longer needed by the parties and the court. To flesh out that suggestion, I use an analogy.

Perhaps jury questionnaires should be treated somewhat like bailments. Prospective jurors supply information to the court, attorneys, and litigants. This information belongs to the jurors, not the court, attorneys, or litigants. It is supplied for a particular purpose, namely to enable the court and the attorneys to empanel a jury. Once the jury is selected, neither the court nor the attorneys have a general need for, or right to, the information supplied

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[257] *See, e.g.*, Bellas v. Superior Court of Alameda County, 102 Cal. Rptr.2d 380, 387 (Cal. Ct. App. 2000) (annulling a citation of contempt against a public defender who refused to return completed jury questionnaires after the conclusion of a trial, and finding "there was no content-based privacy rationale sufficient for the trial court . . . to order the removal of the questionnaires from the Public Defender's files for the purpose of sealing them"). Florida judges are empowered to distribute questionnaires to the venire, which, once completed, are returned to the court. Copies of the forms are accessible in the court clerk's office, "and copies shall be available in court during the voir dire examination for use by parties and the court." FLA. R. CIV. P. 1.431(a)(2) (2007). The rule requires that the copies be available, but does not specifically require a distribution of copies to the attorneys for their files.

[258] *See* AMERICAN JURY PROJECT, *supra* note 37, at princ. 7(A)(8) (2005) (suggesting that original records related to jury summoning and selection may be destroyed after the time or appeal has passed or any appeal is complete except in criminal cases in which the records should be maintained using "exact replicas," presumably through media such as microfilm, CD-Roms or Adobe Acrobat files).

by the jurors.[259] Thus, in many respects, the transaction resembles a bailment. Without becoming mired in the minutiae of bailments and whether or not the transaction at hand truly constitutes a bailment, a brief review of pertinent points should demonstrate at least a useful analogy.

A bailment is the rightful possession of personal property by a person who does not own the property.[260] Bailments exist in various forms, but the one most pertinent to our topic is the *commodatum*.[261] In a *commodatum*, the bailor (owner) provides *gratis* to the bailee (holder) something that the bailee will use for the bailee's benefit.[262] In the case of jury questionnaires, one might argue that the jurors are providing something (information) without charge to the court, the attorneys, and the litigants for their use. The jurors receive nothing in return, and the court, attorneys, and litigants receive the information, which they use only for the purpose of selecting and empanelling a jury.[263] Thus, the jurors are like bailors and the court and parties receive the information much like bailees.

Of course, in bailments, the item supplied is to be returned to the bailor upon the bailor's request or at the end of the bailment. Unfortunately, jury questionnaires are unlikely to be returned to the jurors. The court probably will keep copies of all questionnaires at least for some period of time in case issues develop about juror responses during the trial or post-trial proceedings. Moreover, some courts may forego any effort to collect jury questionnaires from the attorneys and other courts may not be empowered to order attorneys to return the questionnaires. But if the questionnaires—or at least all copies of the questionnaires other than the original copy—are destroyed by the court at the end of their use, the destruction serves the same purpose. By destroying the questionnaires, the property (viz., personal information) is restored to the bailor by the fact that it no longer is routinely available to the bailees.

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[259] Of course, a record of the information must be made for use, if necessary, with regard to post-trial motions or appeals.

[260] *See, e.g.*, 19 RICHARD A. LORD, WILLISTON'S A TREATISE ON THE LAW OF CONTRACTS § 53.1 (4th ed. 2001).

[261] *Id.*

[262] *See, e.g.*, RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 11.1 (3d ed. 1975) (describing the *commodatum* or "lending gratis"). Of course, collecting jury information by questionnaire is not wholly like a commodatum because the jurors as bailors do not voluntarily provide the information for the benefit of the court and parties. They are compelled to provide the information by court order.

[263] Rightful use of the information is limited to jury selection. The jurors are not asked to provide the information to the parties for any other purpose, and in a *commodatum* the gratuitous bailee is obligated to use the bailed property solely for the contemplated use. *See, e.g.*, LORD, *supra* note 261, § 53.10, at 46.

V. CONCLUSION

This Article discusses the loosely regulated use of jury questionnaires, which generally is a practice relegated to judicial discretion. It unveils a number of issues and suggests several remedies for existing shortcomings in the use of supplemental questionnaires. Because the various jurisdictions approach the use of questionnaires differently, problems and potential solutions may vary from state to state, but damage is being done.

Trial by jury is an essential component of our judicial process.[264] One court system tells its prospective jurors that jury service is "one of our greatest responsibilities."[265] Yet our citizens are not responding to the call as freely and enthusiastically as they once did. As recently as January 20, 2007, Fox-TV News was reporting that

> [C]ourtrooms across the country are facing a crisis. . . . [It is] prompting a nation-wide crackdown. . . . [P]otential jurors . . . seem to be skipping out of their civic duty in huge numbers. . . . The yield in some more urban courts will be only twenty to thirty percent . . . . Political scientists say that some cities like Miami have a no-show rate as high as ninety percent.[266]

Task forces have been created to identify and rectify the problem of unanswered jury summonses.[267] To be sure, invasive voir dire and questionnaires obviously are not the sole cause of citizen reluctance to serve as jurors, but they are a component to be addressed, and, to date, the task forces have not focused enough attention on this facet of the dilemma of citizen reluctance and unwillingness to serve.

It is time for reflection and—where necessary—repair. We need to ensure that we have appropriate rules in place. In order to properly address the issues, committees or task forces should be formed and instructed to study the advisability and use of jury questionnaires. As part of the process they should be instructed to balance the needs of litigants for fair trials against the needs of the public to have ready and reasonable access to the courts and their records. Those needs should be balanced in turn against the privacy interests of the jurors.

Questionnaires are useful devices, but they also negatively impact the

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[264] *See* AMERICAN JURY PROJECT, *supra* note 37, at Preamble ("The American jury is a living institution that has played a crucial part in our democracy for more than two hundred years.").

[265] *See Your Guide to Jury Duty*, *supra* note 157.

[266] *Jury Summons* (WBRC-TV News television broadcast, Jan. 20, 2007) (on file with Connecticut Law Review).

[267] *See, e.g.*, CALIFORNIA BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT, FINAL REPORT 51 (1996), *available at* http://www.courtinfo.ca.gov/reference/documents/BlueRibbonFullReport.pdf (recommending improvement such as better enforcement of jury summonses).

judicial process. Used appropriately and sparingly, they can provide the courts and litigants with essential information about prospective jurors. Appropriate and sparing use also can help protect the jurors while perhaps making jury service a more palatable experience for our citizens.