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NOTES

THE LIMITATIONS ON VOIR DIRE EXAMINATION OF JURORS IN CRIMINAL PROSECUTIONS

INTRODUCTION

One of the major phases of the criminal trial, one which may be determinative of its ultimate result, is the voir dire examination of the jury panel. Voir dire, derived from a Latin phrase literally meaning "to speak the truth,"¹ is the description used to denote the examination to which prospective jurors are subjected after being impaneled for the purpose of disclosing to the parties litigant any particular beliefs, biases, or relationships of the individual veniremen which might render them objectionable as jurors.

This examination is usually conducted by counsel for each litigant in criminal prosecutions in state courts. However, in the federal courts questions are propounded to the jurors by the presiding judge, after being submitted to him in writing by each counsel. It is the purpose of this note to consider and evaluate the limitations which various jurisdictions have placed upon the subject matter which may be included in such examinations in both state and federal criminal prosecutions.

IN GENERAL

To clarify the nature of the limitations on voir dire examinations, it is first necessary to consider the purpose for which such interrogation is intended. The common belief is that a juror's examination is permitted to enable counsel to discover any facts or circumstances surrounding the juror which tend to show prejudice, bias, or some other ground for disqualification and challenge for cause. Although true, this is but half the story. The voir dire examination also serves the much broader purpose of allowing counsel to lay proper foundations in order that he may intelligently exercise his peremptory challenges.² It is this purpose of which courts frequently lose sight when imposing

1. BLACK, LAW DICTIONARY 1822 (3rd ed. 1933).

2. *Lightfoot v. Commonwealth*, 310 Ky. 151, 219 S. W. 2d 984 (1949); *Young v. State*, 41 Okla. Crim. Rep. 226, 271 Pac. 426 (1928); *Lavin v. People*, 69 Ill. 303 (1873); ALA. CODE tit. 30, § 52 (1940).

rigid limitations upon these examinations. The latter office of voir dire was recognized by a Missouri court in an early decision, *State v. Mann*,³ wherein the court stated:

... The accused is imprisoned and is brought from prison, and there for the first time, possibly, meets the forty men summoned as jurors in his case, and, if blindly to make his peremptory challenge, may strike from the panel the very men whom he would have wished to retain had he known their antecedents. If such is the law, the right of peremptory challenges may prove a snare, and, at best, is of no earthly value to the accused.⁴

This seems indicative of the most desirable trend, for the numerous challenges a criminal defendant is allowed would be of little value could he not exact sufficient information from the prospective jurors to enable an intelligent exercise of such challenges.

The general rule governing voir dire examinations is that their limitations are regulable at the discretion of the trial court.⁵ Appellate courts will therefore refuse to reverse on the ground that the trial judge, in his exercise of discretion, excluded certain questions unless a clear abuse of discretion can be shown.⁶ However, it is incumbent upon the trial courts to exercise this discretion in view of the purpose for which interrogation of the panel is allowed; never should a question be prohibited if it either tends to reveal a disqualifying characteristic of the venireman or embodies a reasonable attempt on the part of the examining attorney to obtain information necessary to enable him to exercise his peremptory challenges intelligently.

Unfortunately many trial courts today still persist in enforcing rigid regulations upon voir dire examinations, refusing to allow interrogations other than the time-honored questions pertaining to bias, prejudice, pre-formed opinions of guilt, *et cetera*. An example illustrating this proposition is found in the ruling of the Georgia trial court in the case of *Subia v. State*,⁷ in which

3. 83 Mo. 589 (1884).

4. *Id.* at 597.

5. *Connors v. United States*, 158 U. S. 408 (1895); *State v. Turley*, 87 Vt. 163, 88 Atl. 562 (1912); *State v. Hoffman*, 344 Mo. 94, 125 S. W. 2d 55 (1939).

6. *State v. Turley*, 87 Vt. 163, 88 Atl. 562 (1912); *Dyer v. State*, 241 Ala. 679, 4 So. 2d 311 (1941) (appellate court refused to reverse trial court's ruling because there was no obvious abuse of discretion, although trial court contravened the spirit of an Alabama statute providing for liberal voir dire interrogations.)

7. 46 Ga. App. 422, 167 S. E. 726 (1933).

the defendant had previously been indicted by a grand jury. During the voir dire examination defense counsel proposed to inquire of each juror whether he was related to any of the grand jurors who had returned such indictment. The trial court's refusal to allow such interrogations was upheld on appeal, the court asserting that there had been no abuse of discretion and that such questioning was beyond judicial precedent. This decision indicates a refusal by the court to take cognizance of the broader purpose of the voir dire examination, whereby the parties are permitted to acquaint themselves with the jurors' backgrounds so that the peremptory challenges might be exercised with reasonable intelligence. In this case, it seems not unreasonable for the defendant to desire to eliminate from the panel any relatives of the grand jurors. The return of the indictment indicated that the grand jurors had doubted defendant's innocence. It would only be human nature for them to discuss and relate the various aspects of this case; therefore, some of their relatives were likely to have experienced a previous taste of the case before entering the court room as veniremen. The proposed question, being reasonably related to defendant's interest in the case, was excluded by a narrow and conservative exercise of discretion which in many jurisdictions would be termed an abuse for which reversal may be granted.

The more desirable result involving a similar type of interrogation is presented by a recent Kentucky decision, *Lightfoot v. Commonwealth*,⁸ in which the ruling of the trial court was reversed because of an abuse of discretion. The question proposed on the voir dire examination was whether any of the jurors or members of their families held, or were employed in, any of the county's political offices. The trial court's refusal to allow such interrogation was reversed, the Supreme Court holding that a litigant may ask prospective jurors about *any* matter which might throw light on their background, so that he might better exercise his discretion in making peremptory challenges. Although the court deciding *Subia v. State* might well have sustained the exclusion of this inquiry on the ground of lack of precedent, the Kentucky court presents the more favorable opinion which allows the defendant an opportunity to form a logical basis for striking jurors from the panel.

8. 310 Ky. 151, 219 S. W. 2d 984 (1949).

Of course counsel may frequently attempt an examination which exceeds all propriety and which is wholly inconsistent with the system of jury selection. An example of this type of questioning was presented in *People v. Redola*,⁹ wherein defendant's counsel asked each juror whether he could start out on the case believing defendant to be innocent. Such an inquiry was properly held to be error by the court on appeal, for no litigant has a right to limit the jury to twelve jurors all possessing a present belief that the defendant is innocent. In fact, such a belief might well be the basis of a challenge for cause by the state, because the juror has a pre-formed opinion concerning defendant's culpability.¹⁰ In view of this consideration, the exclusion of this type of questioning was appropriate.¹¹

However, in spite of the fact that the limitations on the voir dire examination are generally a matter of discretion, there are three general categories of questions concerning which virtually every jurisdiction has established some definite policy. They are: (1) questions as to membership in or prejudice against various religious or political groups; (2) hypothetical questions intended to elicit opinions of jurors; and (3) questions pertaining to the law involved in the given case. It is in these three categories that the law has crystallized to some degree regarding the scope of questioning; hence it is incumbent upon practicing trial attorneys to acquaint themselves with the local policy appertaining thereto.

QUESTIONS INVOLVING MEMBERSHIP IN VARIOUS GROUPS AND PREJUDICES CONCERNING SUCH GROUPS

Today, one of the most uniform policies pertaining to voir dire examinations concerns the permissibility of examining jurors as

9. 300 Ill. 392, 133 N. E. 292 (1921).

10. This is not to be confused with interrogations of the jury in regard to the *presumption* of innocence, to which a defendant is entitled. Indeed a presumption of innocence is vastly different from a pre-conceived belief of innocence. The former will subsequently be considered herein. At any rate, the examination attempted here was improper as it embodied an effort by defendant to select jurors of a certain belief, whereas defendant's only right is to reject jurors. *State v. Cady*, 80 Me. 413, 14 Atl. 940 (1888).

11. A decision of somewhat greater doubt is that of *Kelley v. State*, 51 Okla. Crim. Rep. 249, 300 Pac. 436 (1931), where the trial court denied counsel the right to ask jurors what their verdict had been in previous criminal cases in which they sat. Is it not possible that, despite the admitted irrelevancy of the fact, defendant sought to exclude jurors who had previously convicted men on similar charges? Should then this question not be permitted?

to their membership in various groups, be they political, fraternal, religious or otherwise. In an era of multifarious "do-good" organizations, courts of the present time recognize the prejudices likely to be inculcated in the minds of members of these various movements. In general, it will be observed that our modern criminal courts permit a reasonable examination of prospective jurors as to their affiliation with such groups and also allow point-blank interrogation of each juror as to any prejudices he might harbor against any particular race, religion, or nationality.¹²

This general problem confronted the United States Supreme Court in 1895, in *Connors v. United States*.¹³ The defendant was charged with theft of certain ballot boxes from election judges in Colorado. Defense counsel proposed to inquire of each juror whether or not he was politically active in that 1890 election, and to which, if any, political party he adhered. Obviously, the entire case involved a political scandal, and defense counsel desired to reject all jurors whose political sentiments were contrary to those interests for which defendant had acted. The trial court, however, prohibited all inquiries as to political affiliations, this ruling being affirmed by the Supreme Court, which commented:

If an inquiry of a juror as to his political opinions and associations could ever be appropriate in any case arising under the statute in question, it could only be when it is made otherwise to appear that the particular juror has himself, by his conduct or declarations, given reason to believe that he will regard the case as one involving the interests of political parties.¹⁴

Apparently the court here considered only the primary purpose of a voir dire examination, completely neglecting the fact that such examination must also serve as a foundation for peremptory challenges.

The decision in the *Connors* case, however, has long been outdated. Today, the majority view is decidedly to the contrary. As a recent illustration, the California Supreme Court decision of *People v. Buyle*¹⁵ may be considered. This case involved a bur-

12. *People v. Becker*, 22 Cal. App. 2d 143, 70 P. 2d 955 (1948); *Young v. State*, 41 Okla. Crim. Rep. 226, 271 Pac. 426 (1928); *Bethel v. State*, 162 Ark. 76, 257 S. W. 740 (1940); *State v. Tighe*, 27 Mont. 327, 71 Pac. 3 (1903).

13. 158 U. S. 408 (1895).

14. *Id.* at 413.

15. 22 Cal. App. 2d 143, 70 P. 2d 955 (1948).

glary prosecution, the entire situation being one of a series of events arising out of an industrial dispute and union strikes. Because union disputes were involved and because Communists are generally known to possess radical opinions regarding labor strife, the trial court permitted defense counsel to ask each individual juror whether he or she was a Communist. Furthermore, this ruling was affirmed on appeal, the California court aptly asserting:

In order to ascertain whether a juror is prejudiced in a given case it has always been held proper to inquire as to his membership in any political, religious, social, industrial, fraternal, law-enforcement, or other organization whose beliefs or teaching would prejudice him for or against either party to the case.¹⁶

With few exceptions, this excerpt restates the law of today, the political affiliations of jurors now being a legitimate subject of interrogation wherever politics are in some manner involved in the case.¹⁷

Another typical species of questioning which now has almost universal approval of the trial courts is an interrogation of the jurors as to prejudices which they might harbor against certain racial or religious groups. The most common situation for such examination occurs when the defendant is a Negro and his attorney desires to question the panel in regard to race prejudice. *Aldridge v. United States*¹⁸ involved just such circumstances, defendant being a Negro on trial in the District of Columbia for murder of a white man. The trial court, convicting defendant, had refused to allow his attorney to ask each juror whether he retained any prejudice against Negroes. The United States Supreme Court reversed this ruling and held that in this specific instance such questioning was both reasonable and permissive. The court then attempted to formulate a general rule to govern voir dire interrogations for the purpose of eliciting prejudices and decided that the determining factor of whether or not a ques-

16. *Id.* at 146, 70 P. 2d at 957.

17. The rule is not as settled in regard to voir dire examinations by prosecuting attorneys. The courts are generally more rigid in limiting them, in comparison with defendants' interrogations. See *Gurley v. State*, 164 Ark. 397, 262 S. W. 636 (1924), where defendant was a public officer on trial for embezzlement, and the court would not allow the prosecution to ask jurors whether they were politically sympathetic with defendant's party superior.

18. 283 U. S. 308 (1931).

tion regarding racial, religious, or political prejudice should be allowed is the remoteness of the possibility of the existence of such prejudices. Where there is any probability of the presence of racial bias in the jurors' minds, an examination to discover it shall be allowed on voir dire. Similar rules had previously been adopted in most state courts,¹⁹ the test always being one of remoteness: when the existence of prejudice is likely the interrogation of jurors pertaining thereto is permissible.

However, the permissibility of inquiring into jurors' prejudices is not to be confused with interrogations as to whether jurors will give appropriate credence to testimony of members of such races or groups. For example, a juror may be asked, "Are you prejudiced against Negroes?", but it would be outside the scope of voir dire to ask him, "Would you give equal credence to the testimony of a Negro as to that of a white man, other things being equal?" The former is a permissible question, as previously explained, but the latter is absolutely forbidden as it seeks to cause the jurors to determine a witness' credibility before he takes the stand. In effect, such a question is an attempt to elicit an opinion from a juror as to how he might react to certain situations which may arise later in the trial. Questions having such an effect are not allowable, as will be subsequently explained.²⁰ Suffice it to say that if it is desired to examine a panel to discover any hidden prejudices, the questions should be framed as direct inquiries to the jurors, but should *never* be asked in a hypothetical form, asking a juror how he might consider subsequent testimony from a person of a certain race or group.

Frequently, for various reasons, counsel may desire to determine whether veniremen are members of certain religious or secret fraternal groups. Generally, courts today will permit such questioning under proper circumstances. In an Arkansas case, *Bethel v. State*,²¹ the defendant's attorney desired to interrogate jurors as to membership in the Ku Klux Klan, which organization had conducted a secret investigation of this case previously. Although the trial court refused to allow the examination, the

19. *State v. Munch*, 57 Mo. App. 207 (1894); *People v. Reyes*, 5 Cal. 347 (1855); *People v. Christie*, 2 Park. Crim. Rep. 579, 2 Abb. Fr. 256 (N. Y. 1855) (questions regarding prejudices against Catholics).

20. See "Hypothetical Questions to Elicit Jurors' Opinions," *infra*.

21. 162 Ark. 76, 257 S. W. 740 (1924).

Arkansas Supreme Court, in reversing, held that the question as to Ku Klux Klan membership was here permissible. An accused has the right, the court stated, to inquire as to the membership of prospective jurors in any organization whenever it is shown that such membership may influence the parties to the litigation in the exercise of peremptory challenges.²² Here, then, is a true recognition of the usefulness of a voir dire examination; the parties should be entitled to exact whatever information might reasonably influence their challenges. The text seems to be one of good faith. The party examining the jury need not introduce proof that such organization (with which the question was concerned) is actually antagonistic to defendant. As long as the court feels that the interrogation is a bona fide attempt to obtain information upon which to base peremptory challenges, the questioning as to affiliation with certain organizations should be permitted.²³

Of course, where the organization with which the examination concerns itself has no reasonable connection with the facts of the case, or the person of the defendant, the interrogation is not permissible. Thus, in a case where defendant was a woman on trial for murder, the jurors could not be asked whether they belonged to the Ku Klux Klan on the dubious reasoning that such organization was composed of men only.²⁴ In the absence of any manifestation that the organization inquired about is antagonistic to the accused or to some organization of which the accused is a member, such inquiries should not be tolerated.

In general, the same limitations would also apply to inquiries as to jurors' religious affiliations. Where there is a reasonable probability that members of a certain religious body may be prejudiced, counsel will be permitted to inquire as to the jurors' association with that religion. For example, in an early Utah bigamy case, the prosecution was permitted to discover by examination whether any members of the panel were Mormons,

22. *Id.* at 84, 257 S. W. at 743.

23. *Bethel v. State*, 162 Ark. 76, 257 S. W. 740 (1924); *Reich v. State*, 94 Tex. Crim. Rep. 449, 251 S. W. 1072 (1923); *Clark v. State*, 154 Ark. 592, 243 S. W. 868 (1922); *State v. Tighe*, 27 Mont. 327, 71 Pac. 3 (1903) (murder trial, where defendant's counsel was permitted to ask jurors if they belonged to the same lodge as deceased); *State v. Mann*, 83 Mo. 589 (1884); *Lavin v. People*, 69 Ill. 303 (1873) (trial for illicit liquor sale, where jurors were questioned for membership in temperance societies).

24. *Snyder v. State*, 160 Ark. 93, 254 S. W. 381 (1923).

since followers of that religion were known to be advocates of polygamy.²⁵

However, the wide latitude allowed in voir dire examinations of jurors for membership in religious and fraternal organizations should be exploited with caution. Such inquiries might result in prejudicial antagonism by a jury panel to counsel and his client if it appeared to the jurors that counsel insisted on prying into their religious and secret fraternal affiliations. Never should discretion be sacrificed in the conduct of the examination.

HYPOTHETICAL QUESTIONS TO ELICIT JURORS' OPINIONS

No type of interrogation in voir dire examinations is looked upon with more disfavor by the courts than the hypothetical question, posed to the jurors for the purpose of eliciting their opinions on various matters and determining how they might react should a certain situation arise in the course of the trial. A typical question in this category would be, "Mr. Doe, if each of the eleven other jurors absolutely believed the defendant guilty, and you alone possessed a reasonable doubt as to guilt, would you yield to the overwhelming odds?"²⁶ A careful analysis of the nature of such an inquiry will immediately disclose the reason for which virtually every court will refuse to allow it. The question obviously does not embody a quest for information; neither an affirmative nor a negative answer will present any basis for a challenge for cause. Of course, it may be rationalized that such a question was intended solely as a basis for exercising peremptory challenges. However valid this argument might be, courts nevertheless believe that the harm which may be wrought by permitting such interrogations would by far outweigh any service to the cause of justice resulting therefrom.

The chief objection is that such questions actually, if answered, cause the jurors to commit themselves as to how they will later decide a given issue. Thus, once allowed, there might be no logical limit of the extent to which such examination could be carried; it might even be extended to the absurd result of permitting defense counsel to ask the panel whether they shall find a verdict of not guilty if the defendant testifies under oath

25. *United States v. Miles*, 2 Utah 19 (1876).

26. This type of question was excluded from the voir dire examination in *State v. Tally*, 22 S. W. 2d 787 (Mo. 1929).

that he was innocent. Facetious as this example may be, it is of the same type as other hypothetical questions which have been proposed and excluded in voir dire examinations in nearly every jurisdiction. An excellent summary of this general, almost unanimous, rule was stated by the Missouri Supreme Court in *State v. Pinkston*:²⁷

An attorney should not, in advance, ask a juror to speculate upon what he would do, and how his verdict might be influenced by certain contingencies that may later arise in the trial.²⁸

Certainly, in view of the desire to obtain a fair, unbiased, and unintimidated jury in every criminal case, the justification for this limitation cannot be questioned.

One of the most common applications of this limitation occurs when counsel questions the jury as to how certain testimony will be received by it. As previously pointed out, in a proper case it may be permissible to question a juror as to racial or religious prejudice.²⁹ However, the question may never be framed hypothetically, *i. e.*, asking the juror whether he would give proper credence to the testimony of a Negro³⁰ or a stranger,³¹ or by asking whether he would attach greater significance to the testimony of a minister.³² In each case the object is the same: a juror cannot be required to commit himself in advance as to the weight which he will accord certain testimony which is to be presented at the trial. Were such questioning allowed, it would be a simple matter for counsel to determine at the voir dire examination what testimony would be most favorably received by that jury and to sift out witnesses not likely to meet with the panel's approval. Such a procedure would probably fail to bring about a just verdict on the merits of the case.

As elementary as the rule against hypothetical questions appears to be, it is remarkable to observe the great number of attempts by trial lawyers to make use of such interrogations, all of which are immediately restrained by the courts. Questions which may be bona fide attempts by counsel to acquaint himself

27. 336 Mo. 614, 79 S. W. 2d 1046 (1935).

28. *Id.* at 618, 79 S. W. 2d at 1048.

29. See "Questions Involving Membership in Various Groups and Prejudices Concerning Such Groups," *supra*.

30. *State v. Scott*, 198 La. 162, 3 So. 2d 545 (1941); *State v. Dyer*, 154 La. 379, 97 So. 563 (1923).

31. *Denning v. State*, 110 Tex. Crim. Rep. 153, 8 S. W. 2d 150 (1928).

32. *State v. Holedger*, 15 Wash. 443, 46 Pac. 652 (1896).

with a juror's background are carelessly phrased so as to fall within this prohibited category, and hence are excluded. For example, in *State v. Everitt*,³³ a trial involving a prosecution for cattle stealing, the defendant desired to exercise the privilege of testifying in his own defense. In such a case it would undoubtedly have been permissible for defendant's counsel to ask each juror:

Are you prejudiced against defendant? Does the fact that defendant has been indicted cause you to have any belief as to his guilt, or does it make defendant any less reliable in your eyes?

In this manner attorney could have quickly discovered which jurors, if any, were prone to disregard as untruthful the testimony which a criminal defendant gives in his own defense. Instead, however, counsel in this case inquired of a juror:

If defendant exercises the privilege of testifying in his own defense, could you give his testimony proper weight under the circumstances?³⁴

This interrogation was promptly excluded by the court, and the appellate court affirmed the decision. The question, as it was phrased by counsel, was an improper attempt to pre-commit a juror on a matter which he must subsequently decide. The same information could easily have been exacted from the panel by carefully wording the question.

A similar situation was presented in *Denning v. State*,³⁵ a prosecution for illegal sale of liquor, wherein counsel for defendant, upon discovering that several of the jurors were on friendly terms with the State's witnesses, improperly asked each such juror whether he would give the same credence to a stranger's testimony as to that of a friend. The court immediately recognized this inquiry as being within the forbidden hypothetical category, hence refused to allow the jurors to answer. In affirming this ruling, the appellate court pointed out the manner in which the same information could have been obtained by a more favorable and permissible examination, such as:

Would your acquaintance with the state's witnesses influence your verdict? Would you prejudice the credibility of the state's witnesses because of this friendship?³⁶

33. 14 Wash. 574, 47 Pac. 150 (1896).

34. *Id.* at 575, 47 Pac. at 150.

35. 110 Tex. Crim. Rep. 153, 8 S. W. 2d 150 (1928).

36. *Id.* at 154, 8 S. W. 2d at 150. Observe that this question is *not*

In virtually every case, therefore, the rule against hypothetical questions to elicit jurors' opinions should not prove much of a hindrance to attorneys. A careful framing of the questions in each case will enable counsel to obtain all the desired information from the panel without transgressing the universal prohibition against hypothetical questions.³⁷

Another common occasion upon which hypothetical questions are frequently attempted is the first degree murder prosecution in which jurors are questioned concerning their willingness to impose capital punishment. Undoubtedly it is permissible, the practice being quite common, to inquire of a juror whether or not he opposes capital punishment and hence would not be able conscientiously to recommend such penalty. However, observe the manner in which the State's attorney chose to examine the panel on this issue in the case of *State v. Pinkston*.³⁸

If you were accepted as a juror in this case, and found defendant was guilty without a reasonable doubt, if you believe from the evidence that the death penalty was proper, would you vote for it?³⁹

The trial court unhesitatingly rejected the inquiry, and on appeal, the Missouri Supreme Court refused to reverse the ruling, adhering strictly to the principle that:

An attorney should not, in advance, ask a juror to speculate

hypothetical in form. The juror is asked if he would pre-judge the credibility of this friendly witness, which question refers to the *present* state of mind of the juror. However, by asking the juror whether he will give the same credibility to testimony of strangers as to that of friends, counsel is requiring the juror to decide the question of credibility which is to arise in the *future*, during the course of the trial.

Thus, the question suggested by the court would be: "Mr. Juror, do you *now* believe that the witness with whom you are friendly will be truthful?" To answer the question, the juror needs only to examine the present state of his own mind. He need not speculate as to how he might later decide the relative credibility of friendly and strange witnesses.

37. See also *Mattney v. State*, 231 Ala. 70, 163 So. 656 (1935), where defendant was prosecuted for unlawful possession of liquor. Counsel for defendant brazenly asked the jurors whether they would feel bound by the testimony of the State's only expert witness, one Hibbitt. The court prohibited the interrogation, citing it as a flagrant example of attempting to commit a juror to a certain conclusion before the testimony had been heard; *accord*: *Jenkins v. State*, 31 Fla. 196, 12 So. 677 (1893).

The rule is actually not entirely unanimous, although it may be so considered for all practical purposes. For example, *People v. Car Soy*, 57 Cal. 102 (1880) has never been overruled, although it held that jurors may be asked whether they would "take the word" of a Chinaman to be as reliable as that of a white man.

38. 336 Mo. 614, 79 S. W. 2d 1046 (1935).

39. *Id.* at 618, 79 S. W. 2d at 1048.

upon what he would do, and how his verdict might be influenced by certain contingencies that may later arise in the trial.⁴⁰

On some occasions it may be exceedingly difficult to recognize hypothetical questions and distinguish them from legitimate inquiries. For example, the two cases of *State v. Henry*⁴¹ may appropriately be considered. These cases involved a first degree murder prosecution in which a conviction upon the first trial was reversed by the appellate court, and a new trial granted, at which another conviction was obtained. Upon the voir dire examination at the initial trial defendant's counsel interrogated the jury thus:

If defendant is proven guilty, *could* you also vote for a verdict of guilty without capital punishment, but imprisonment for life?

This question was permitted by the judge with acquiescence by the upper court on appeal. But at the second trial, the state's attorney attempted a similar examination, asking each juror:

If you find defendant not entitled to a qualified verdict or mercy, *would* you vote for the death penalty?

This inquiry was excluded by the trial court, and the ruling affirmed on appeal. The Louisiana Supreme Court pointed out that hypothetical questions are not competent when their evident purpose is to cause jurors to commit themselves to certain ideas or views concerning the decisions they are ultimately to make. However, the court clearly distinguishes the questioning allowed at the first trial, since that inquiry was made merely to discover whether a juror *could* conceive of any other punishment besides the death penalty. There was no attempt to commit the jurors in advance. Evidently the court based the entire distinction on the substitution of the word "would" for "could," the former being a word which tends definitely to cause the juror to speculate as to his future verdict. Use of the word "could," on the other hand, inquires of the juror merely whether he is conscientiously capable of arriving at a certain verdict. Perhaps this may be regarded as an undue exercise of semantics by the court, but it nevertheless illustrates how rigidly a court may enforce the rule against hypothetical questions even though the information sought is for a legitimate purpose.⁴²

40. *Ibid.*

41. 196 La. 217, 198 So. 910 (1940), and 197 La. 199, 3 So. 2d 104 (1941).

42. The underlying reason for the court's apparent inconsistency in

The limitation involved herein is thus one of virtually universal application. To the careful and precise practitioner, it will prove of little detriment; its prohibitions are easily circumvented by well-planned and carefully framed questions.

EXAMINATION OF JURORS WITH RESPECT TO THE LAW INVOLVED IN THE CASE

Probably the most controversial question in regard to limitations upon voir dire examinations is the permissibility of interrogating jurors as to their cognizance and approval of the law involved in the case to be heard by them. Typical of the questions in this category is the familiar inquiry usually attempted by defendant's counsels:

You understand, don't you, that in order to bring in a verdict of "guilty" against defendant you must be convinced beyond a reasonable doubt of his guilt; a mere preponderance of evidence in the prosecution's favor is insufficient.

In the United States today, there is confusion generally as to the propriety of such interrogations. In fact, the highest courts of several states have approved *both* viewpoints, holding that neither allowing nor excluding such inquiries is such an abuse of discretion as to warrant reversal.⁴³ Jurisdictions which exclude such questions generally do so to prevent an invasion of the exclusive province of the court of instructing the jury as to the law,⁴⁴ while other courts advance the reasoning that to permit such interrogations would lead to interminable, time-consuming voir dire explanations.⁴⁵ However, jurisdictions allowing such inquiries will usually impose some limitation, as shall subsequently be considered.

The first analysis here to be made will be of the justification for the *prohibition* of questions concerning the law; the contrary viewpoint will later be discussed. Referring again to the twofold ultimate purpose of voir dire examinations, *i. e.*, to discover bases for causal challenges and to gain knowledge to enable an intelligent exercise of peremptory challenges, it would appear that

these two cases may be that the question allowed in the first trial was submitted by defendant's counsel, while at the second trial it was the prosecution's examination which was limited. Courts are apt to be more lenient when a defendant is examining than when the inquiry is by the State.

43. *State v. Turley*, 87 Vt. 163, 88 Atl. 562 (1912).

44. *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624 (1903).

45. *State v. Douthitt*, 26 N. M. 532, 194 Pac. 879 (1921).

inquiries involving the law are improper components of voir dire. Such questions serve neither purpose: they do not give rise to challenge for cause,⁴⁶ nor do they provide counsel with information of a juror's background which might provide a foundation for a peremptory challenge. The sole motivation for such interrogations is generally counsel's desire to impress upon the jury that portion of the law which is favorable to his client.⁴⁷

Many courts prohibit voir dire interrogations involving the law as a practical matter; the chief fear seems to be that examinations of jury panels would become too time-consuming once the door was opened to such questions. This doctrine was effectively enunciated in *State v. Bauer*,⁴⁸ where defendant, charged with rape, sought to explain by appropriate questioning the basic law involving burden of proof and presumption of innocence. The highest court of Minnesota sustained the exclusion of such questions, emphatically declaring:

... if the defendant has a legal right to examine, as a matter of law, prospective jurors, first instructing them as to the law and then exacting a promise to apply such law favorable to the defendant, then there is no limit to which he may not go. He may explain and exact a promise in reference to the law of circumstantial evidence, confessions, corroborating testimony, accomplices, credibility of witnesses, and numerous other matters which he thinks are favorable to his case.⁴⁹

However, in view of the great discretion exercisable by a trial court in limiting voir dire examinations, the reasoning advanced in the *Bauer* case seems rather shallow. No great perplexity would arise if the court allowed counsel to extend his examination to the very general propositions of law, but then imposed limitations whenever counsel sought to formulate those indecorous questions pertaining to finer points of law which would tend unduly to prolong the examination. Thus, the alleged interminability of such examinations seems a poor justification for prohibiting voir dire inquiries involving general principles of law.

46. A juror is not incompetent because of his ignorance of the law. *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624 (1903); *State v. Dreher*, 166 La. 924, 118 So. 85 (1928).

47. Nor can this type of examination be justified as a means of discovering whether jurors will follow certain laws involved, for all jurors are under a rigid oath to follow the law as instructed by the court.

48. 189 Minn. 280, 249 N. W. 40 (1933).

49. *Id.* at 282, 249 N. W. at 41. Virtually identical reasoning was employed in *State v. Douthitt*, 26 N. M. 532, 194 Pac. 879 (1921).

A far more potent reason, however, for excluding such questioning is that it constitutes an invasion of the court's exclusive province of instructing juries as to the law. The basic operative principle of the jury system is that questions of fact are to be decided by the jury, the court retaining the power to determine the applicable doctrines of law and to instruct the jury as to how the latter should be applied to the former in order to obtain a just and proper verdict. To allow counsel to advise and examine the jury on the various legal propositions involved would constitute a usurpation of this exclusive province of the court. So, in *State v. Ford*,⁵⁰ where defendant, in a prosecution for armed robbery, attempted to interrogate the jury panel as to the distinction between robbery and assault, the Missouri Supreme Court affirmed the trial court's ruling excluding such examination, stating that:

Counsel may not implant in the jury's minds the idea that they should independently draw legal distinctions. They must be guided by the court's instructions on such questions.⁵¹

This reasoning seems irreproachable. The jury is sworn to adhere to the law as expressed and defined by the court, hence counsel's consideration of the law on the voir dire examination is patently inappropriate.⁵²

Nevertheless, a substantial proportion of American courts still permit the voir dire examination to touch upon general principles of law involved in the case. A leading case supporting this proposition is *People v. Bennett*,⁵³ in which the court held that inquiries as to whether jurors will follow certain legal propositions are pertinent to assure a just trial. Defendant there was charged with murder, and his counsel attempted to ascertain upon voir dire examination whether the jurors understood and would follow the rules of law in regard to burden of proof, presumption of innocence, and self-defense. Although the trial court excluded such questions as invading the province of the court, the appellate tribunal reversed this ruling as an abuse of discretion, stating:

50. 346 Mo. 882, 143 S. W. 2d 289 (1940).

51. *Id.* at 884, 143 S. W. 2d at 290.

52. *State v. Ford*, 346 Mo. 882, 143 S. W. 2d 289 (1940); *Ryan v. State*, 115 Wis. 488, 92 N. W. 271 (1902).

53. 79 Cal. App. 76, 249 Pac. 20 (1926).

That the matter of instructing a jury upon the law by the court, and the question whether the jury will follow the law as it is thus submitted to them are, when considered with respect to the exercise of the right of a party to probe a juror's mind to ascertain and determine whether he can and will try the case fairly and impartially, two entirely different and distinct considerations, is a self-evident proposition.⁵⁴

The court thus considered an interrogation as to whether a juror would follow a certain law completely distinguishable from an instruction as to what that law is. However, the court apparently overlooked the fact that, in order to inquire into the juror's willingness to follow the law, it is first necessary for counsel to state the law completely, just as the court might state it in an ensuing instruction. Is not this then a usurpation of the power of the court, since counsel is performing the identical task which shall subsequently befall the court? Furthermore, does it not seem futile to ask each juror whether he will follow such laws if so instructed by the court, since the entire jury is committed by oath to adhere to instructions given from the bench? It is suggested that the true reason for allowing such interrogations is not to ascertain whether jurors will follow the law, but to enable counsel vividly to implant in the juror's minds those basic and fundamental principles that underlie a criminal trial, of which the jurors should never lose sight.

The *Bennett* case, however, is not authority for the general sanction of voir dire examinations on questions of law. The court, in fact, strictly observed that exploratory interrogations on various principles of law should not be allowed. But, it was pointed out, the basic principles of law, such as burden of proof, whether or not a given juror understands and will follow such propositions, constitute matters of pertinent inquiry in ascertaining whether said juror is legally qualified to hear the case. In this respect the *Bennett* case is illustrative of the usual practice in jurisdictions which allow interrogations pertaining to the law. While such courts will permit an examination concerning the general, basic legal propositions involved in the case, they will invariably refuse to permit counsel to conduct an exhaustive inquiry on every principle of law applicable to such case.⁵⁵

54. *Id.* at 89, 249 Pac. at 25.

55. For question of law usually permitted in framing voir dire interrogations, see *People v. Kestian*, 335 Ill. 596, 167 N. E. 786 (1929).

Thus, while there is direct conflict on the permissibility of certain interrogations concerning the law, virtually all jurisdictions agree that no voir dire examination should embrace *all* the detailed legal questions likely to be involved. Reasonable inquiries on the basic principles of law involved in the case seem hardly objectionable so long as the court does not feel that counsel is invading its sole and exclusive province of instructing as to the law.

SUMMARY

The problem of limiting voir dire examinations, it may be concluded, is a matter largely within the discretion of the trial court. A liberal exercise of that discretion is virtually mandatory if the criminal defendant is to benefit from the privilege of exercising his peremptory challenges, for without adequate means of obtaining information, there can be no intelligent basis for striking jurors from the panel.

In general, courts have formulated definite policies in regard to examinations on such questions as group or religious affiliations or prejudices, hypothetical questions to elicit jurors' opinions, and inquiries concerning the law of the case. Only as to the second category, hypothetical questions, have the courts developed what may be called a general prohibition, but that injunction may easily be circumvented by the careful wording of each question. Examinations seeking to uncover prejudices against certain groups are now seldom limited, but the conflict as to the permissibility of inquiries pertaining to law has as yet not been resolved. In all events, it is urged that voir dire examinations be given a maximum latitude in criminal prosecutions. Then, and then only, will the fullest possible benefit of a trial by jury be given to the defendant.

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