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Between a Rock and a Hard Place: Maryland Criminal Defendants, Already Subject to Severely Limited Voir Dire, Now Also Face the Prospect of Anonymous Juries

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ARTICLE

BETWEEN A ROCK AND A HARD PLACE: MARYLAND CRIMINAL DEFENDANTS, ALREADY SUBJECT TO SEVERELY LIMITED *VOIR DIRE*, NOW ALSO FACE THE PROSPECT OF ANONYMOUS JURIES

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The Maryland Standing Committee on Rules of Practice and Procedure is currently considering a request by the Maryland Circuit Court Judges' Association for the adoption of a rule allowing the empanelling of anonymous juries in both civil and criminal cases.[1] This article addresses the impact that such a rule, if adopted, would have on criminal defendants in Maryland, who already face severely limited *voir dire* in jury selection.

Part I of this article traces the origin and development of anonymous juries. An examination of the current status of *voir dire* in Maryland criminal cases follows in Part II, with particular emphasis placed on the many inconsistencies found in Maryland's appellate opinions regarding *voir dire*. Part III of the article presents arguments against the use of anonymous juries in Maryland criminal cases. Finally, Part IV highlights the steps courts have taken to protect defendants' rights during anonymous jury trials and, specifically, the importance that courts have placed on the *voir dire* process in conjunction with the use of anonymous juries. The article concludes with the suggestion that, should the use of anonymous juries be permitted in Maryland, the *voir dire* process must be expanded.

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[1] Kristi Jourdan, *Maryland, Virginia Mull Anonymous Juries*, WASH. TIMES, July 26, 2009, *available at* http://www.washingtontimes.com/news/2009/jul/26/maryland-virginia-mull-anonymous-juries/print/.

I. THE ORIGIN AND PURPOSE OF ANONYMOUS JURIES

"Necessity is the plea for every infringement of human freedom."

-William Pitt[2]

In 1979, Leroy Barnes, along with ten other defendants, was convicted of various federal narcotics violations in the United States District Court for the Southern District of New York, after a ten-week trial.[3] The defendants were involved in the distribution of "massive quantities of narcotics on the streets of Harlem and the South Bronx from which enormous profits were realized."[4] Before the trial, the judge announced that, "in the interest of protecting the privacy of the jurors and their families . . . I have elected to maintain the anonymity of the jurors."[5] The names, addresses and ethnicities of the prospective jurors were withheld from both the prosecution and the defense.[6] In doing so, this case became one of the first in the country to utilize an anonymous jury.[7]

Before proceeding to discuss the gaining popularity of anonymous juries, it is important to define precisely the term "anonymous jury." An anonymous jury is one "in which specific identifying information about the jurors—names, addresses, employer information, or other information—[is] not disclosed to or permitted to be revealed by the accused at trial."[8] Juror anonymity has varying degrees.[9] In some cases, courts provide the parties with the names and places of residence of each jury member but, in open court, identify the jurors by number rather than name.[10] Anonymous juries may also involve "limited concealment" when courts omit such information as the jurors' names and places of employment, but the courts may reveal zip codes without exact

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[2] William Pitt, Speech in the House of Commons (Nov. 18, 1783), *in* OXFORD DICTIONARY OF QUOTATIONS 596 (Elizabeth Knowles ed., Oxford University Press 2009).

[3] United States v. Barnes, 604 F.2d 121, 121, 131 (2d Cir. 1979).

[4] *Id.* at 134.

[5] *Id.* at 137.

[6] *Id.*

[7] Ted A. Donner & Richard K. Gabriel, JURY SELECTION STRATEGY AND SCIENCE DATABASE § 7:6 (3d. ed. Nov., 2009) (recognizing *Barnes* as the "earliest reported appellate court decision in which an 'anonymous jury' was identified"); *see also* Johnson v. United States, 270 F.2d 721, 724 (9th Cir. 1959) (exact address of jurors could be concealed); Wagner v. United States, 264 F.2d 524, 527 (9th Cir. 1959) (the court refused counsel's request that each jury member state his or her name and address).

[8] William D. Bremer, Annotation, *Propriety of Using Anonymous Juries in State Criminal Cases*, 60 A.L.R. 5th 39, 45 (1998).

[9] *See* United States v. Edmond, 52 F.3d 1080, 1089 (D.C. Cir. 1995) (affirming the withholding of jurors' names and addresses from the parties); United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994) (upholding concealment of jurors' names, addresses, places of employment, spouses' names, and places of employment).

[10] United States v. Honken, 378 F. Supp 2d 880, 919 (N.D. Iowa, 2004) (outlining the varying degrees of anonymity).

addresses.[11] Juries involve the highest degree of anonymity when courts order that the "names, addresses, and places of employment of prospective jurors and their spouses not be disclosed to counsel, either before or after selection of the jury panel."[12]

The use of anonymous juries is on the rise, particularly in the federal circuits[13] and in several states.[14] The common reason given for empanelling an anonymous jury is the necessity to protect jurors from intimidation or retaliation.[15] The problem for courts in empanelling anonymous juries is, of course, the level of proof required to demonstrate a real need for such protection, its potential for abuse, and the precautions taken to protect the defendant's presumption of innocence and his right to an impartial jury.

Demonstrating the Need for Anonymity

"Unquestionably, the empanelment of an anonymous jury is a drastic measure, one which should be undertaken only in limited and carefully delineated circumstances."[16] The courts that have addressed this issue require a "strong reason to believe the jury needs protection" to empanel an anonymous jury.[17] The courts point to several factors in making this determination:

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[11] *See* United States v. Edwards, 303 F.3d 606, 612 (5th Cir. 2002).

[12] *See* United States v. Shryock, 342 F.3d 948, 970 (9th Cir. 2003).

[13] *See* United States v. Ross, 33 F.3d 1507 (11th Cir. 1994); United States v. Crockett, 979 F.2d 1204 (7th Cir. 1992); United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988); United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985); United States v. Byers, 603 F. Supp. 2d 826 (D. Md. 2009); United States v. Edmond, 730 F. Supp. 1144 (D.D.C. 1990).

[14] *See* State v. Pennell, 583 A.2d 1348 (Del. Super. Ct. 1990); State v. Samonte, 928 P.2d 1 (Haw. 1996); Major v. State, 873 N.E.2d 1120 (Ind. Ct. App. 2007); State v. Brown, 118 P.3d 1273 (Kan. 2005); State v. Yates, 2004 WL 795906 (Kan. Ct. App. 2004); State v. Wren, 738 N.W.2d 378 (Minn. 2007); State v. Ferguson, 729 N.W.2d 604 (Minn. Ct. App. 2007); State v. Ivy, 188 S.W.3d 132 (Tenn. 2006); State v. Ross, 174 P.3d 628 (Utah 2007); State v. Matos, 2004 WL 384208 (Wis. App. 2004); *see also* Don J. DeBenedictis, *Ruling Incognito*, 76 A.B.A. J. 20 (Feb. 1990).

[15] United States v. Crockett, 979 F.2d 1204, 1215 n.10 (7th Cir. 1992) (identifying the empanelling of an anonymous jury as a "special precaution[] [which may] be taken in order to protect jurors from harassment, intimidation, anxiety, and a host of other disruptive influences").

[16] United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994).

[17] *Id.* at 1519-20 (quoting United States v. Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991)); United States v. United States v. Crockett, 979 F.2d 1204, 1215-17 (7th Cir. 1992); *Paccione*, 949 F.2d 1183, 1191-93 (2d Cir. 1991); United States v. Thomas, 757 F.2d 1359, 1362-65 (2d Cir. 1985); State v. Wren, 738 N.W.2d 378, 385-87 (Minn. 2007); State v. Ferguson, 729 N.W.2d 604, 611-12 (Minn. Ct. App. 2007); State v. Ivy, 188 S.W.3d 132, 143-44 (Tenn. 2006); State v. Britt, 553 N.W.2d 528, 531-33 (Wis. Ct. App. 1996); *see also* United States v. Scarfo, 850 F.2d 1015, 1021-26 (3d Cir. 1988); *cf.* State v. Brown, 118 P.3d 1273, 1279-81 (Kan. 2005) (requiring a "compelling reason").

> (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment.[18]

It would seem that only the third factor, "the defendant's past attempts to interfere with the judicial process," presents a compelling reason for juror anonymity because "past is often prologue."[19] Indeed, it is this author's contention that, unless there is evidence of the defendant's past attempts to interfere with the judicial process, none of the other factors necessarily compels anonymity of the jury. Otherwise, unless the courts are vigilant, prosecutors could easily manipulate these other "factors." For example, in *United States v. Vario*,[20] the United States Court of Appeals for the Second Circuit stressed that,

> [b]efore a district judge may rely on the organized crime connection of a defendant as a factor in the question of anonymous juries, he must make a determination that this connection has some direct relevance to the question of juror fears or safety in the trial at hand, beyond the innuendo that this connection conjures up.[21]

It is paramount that judges should remain cautious in making certain that the drastic measure of empanelling an anonymous jury is clearly supported by compelling reasons relevant to the case at hand. If Maryland courts were to empanel anonymous juries, however, even such vigilance on behalf of a judge would not comport with a defendant's constitutionally protected rights, as a result of Maryland's limited *voir dire*.

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[18] United States v. Shryock, 342 F.3d 948, 971 (9th Cir. 2003); United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995); United States v. Ross, 33 F.3d 1507, 1520 (11th Cir. 1994); United States v. Byers, 603 F. Supp. 2d 826, 830 (D. Md. 2009); *see also* United States v. Mansoori, 304 F.3d 635, 649 (7th Cir. 2002).

[19] WILLIAM SHAKESPEARE, THE TEMPEST act. 2, sc. 1.

[20] 943 F.2d 236 (2d Cir. 1991).

[21] *Id.* at 241; *see also* State v. Accetturo, 619 A.2d 272, 272, 274-75 (N.J. Super. 1992) (court denied the State's motion to empanel an anonymous jury where defendant was charged "with conspiracy to commit racketeering as well as various acts of racketeering, including thefts by extortion and the murder of an associate who refused to pay 'tribute' to a member of the crime family").

II. *VOIR DIRE* IN MARYLAND CRIMINAL CASES

"I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."

-Thomas Jefferson[22]

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[23] Article 21 of the Maryland Declaration of Rights likewise secures to the criminally accused of the State the right "to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."[24] The right to an impartial jury, however, is rendered meaningless if the jury selection process is so restrictive that it fails to exclude from the venire,[25] also known as the jury pool, those who may be biased against either party. *Voir dire* is intended to provide that failsafe.

Literally translated, "*voir dire*" means "to speak the truth" and, as applied to jury selection, is defined as "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury."[26] There is no statute or rule in Maryland regulating the process of *voir dire*. Moreover, given the stinginess of the appellate courts when ruling on the permissibility of particular inquiries of the venire, it is questionable to say that *voir dire* in Maryland truly serves its intended purpose. The reticence of the courts regarding the kind of questions that defendants can ask on *voir dire* is the result of the myopic view Maryland courts take of the purpose of *voir dire*. This part of the article offers a review of Maryland's appellate court opinions regarding *voir dire*, and demonstrates that, in addition to often being inconsistent, they are singularly out of touch with the rest of the nation.

Nearly every case in Maryland dealing with the propriety of asking particular questions on *voir dire* recounts the "well-settled" common law, that "[q]uestions not directed to a specific ground for disqualification but which are speculative, inquisitorial, catechizing[,] or 'fishing[,]' asked in

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[22] THOMAS JEFFERSON, THE JEFFERSONIAN CYCLOPEDIA 450 (John P. Foley ed., Funk & Wagnalls Co. 1900).

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

[24] MD. CODE, CONST., DECLARATION OF RIGHTS, art. 21 (2003).

[25] Venire is defined as "[a] panel of persons selected for jury duty and from among whom the jurors are to be chosen." BLACK'S LAW DICTIONARY 1694 (9th ed. 2009).

[26] *Id.* at 1710.

the aid of deciding on peremptory challenges,[27] may be refused in the discretion of the court, even though it would not have been error to have asked them."[28] Thus, whether or not to ask a requested question on *voir dire* is left to the sound discretion of the trial judge, and the exercise of that discretion is only limited when the requested question will reveal the existence of cause for the juror's disqualification, in which case, the question must be asked.[29] There is simply no right in Maryland for counsel to propound questions to a prospective juror if the purpose of the questions is merely to aid counsel in his decision whether to exercise a peremptory challenge.[30] Or, is there such a right?

A. The Origin: Handy v. State

Maryland cases developing the parameters of *voir dire* stretch back over one hundred years and include the oft-cited case *Handy v. State*.[31] Henry Handy stood trial for the murder of his wife.[32] After the venire was sworn, counsel for Mr. Handy, on *voir dire*, wished to personally question a juror instead of having the court ask the questions.[33] The court refused counsel this opportunity, but made clear that counsel could recite the questions to the court and the court would, in turn, ask them of the juror.[34] Counsel took exception to this process, and *voir dire* continued.[35] Another member of the venire stepped forward, and, this time, defense counsel requested the judge to ask if the gentleman was "a married man."[36] Counsel explained that he wished to have this question asked because he "desired to enlighten [himself] as to the propriety of

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[27] A peremptory challenge is "[o]ne of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex." BLACK'S LAW DICTIONARY 261-62 (9th ed. 2009).

[28] Davis v. State, 333 Md. 27, 34-35, 633 A.2d 867, 871 (1993) (quoting McGee v. State, 219 Md. 53, 58-59, 146 A.2d 194, 196 (1959)); *see, e.g.*, Curtin v. State, 393 Md. 593, 602, 903 A.2d 922, 928 (2005); State v. Thomas, 369 Md. 202, 220, 798 A.2d 566, 577 (2002); Dingle v. State, 361 Md. 1, 14, 759 A.2d 819, 826 (2000); Burch v. State, 346 Md. 253, 293, 696 A.2d 443, 463 (1997); Langley v. State, 281 Md. 337, 341, 378 A.2d 1338, 1340 (1977); Logan v. State, 164 Md. App. 1, 60, 882 A.2d 330, 363-64 (2005); McFadden v. State, 42 Md. App. 720, 729, 402 A.2d 1310, 1314 (1979).

[29] Goldstein v. State, 220 Md. 39, 45, 150 A.2d 900, 904 (1959). "[The Court of Appeals] has identified several areas of mandatory inquiry: racial, ethnic and cultural bias, religious bias, predisposition as to the use of circumstantial evidence in capital cases, and placement of undue weight on police officer credibility." Dingle v. State, 361 Md. 1, 11 n.8, 759 A.2d 819, 824 n.8 (2006).

[30] Stewart v. State, 399 Md. 146, 158, 923 A.2d 44, 51 (2007).

[31] 101 Md. 39, 60 A. 452 (1905).

[32] *Id.* at 40, 60 A. at 453.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

exercising the right of peremptory challenge."[37] In concluding that the trial court had properly refused to ask the requested question, the Court of Appeals of Maryland relied on English common law:

> In *Regina v. Stewart*, the headnote is as follows: "Where a party has the right of challenge, he is not entitled to ask a juryman questions for the purpose of eliciting whether it would be expedient to exercise such right." The defendants were indicted for larceny of goods from tradesmen. The prisoners' counsel, as each juryman came to the box, asked him whether he was a member of an association for the prosecution of parties committing frauds on tradesmen. Baron Alderson said: "It is quite a new course to catechise a jury in this way." Counsel said: "I have a right, my lord, to challenge; and I submit that I am entitled to ask for information that is necessary for the effective exercise of that right." To which Baron Alderson replied: "I cannot allow you to cross-examine the jury. If you like to challenge absolutely, you may do so." In *Regina v. Dowling*, "the prisoner's counsel, upon a juror being called to the box, required him to be sworn on the *voir dire*, in order that he might examine him with a view to a challenge if necessary." Erie, J., said: "You cannot do that without first stating some ground for the proceeding." To which counsel replied: "I cannot say I have any instructions with regard to this particular individual." And the judge said: "Then I must refuse your application, unless, indeed, you can quote some authority upon the subject. I think it a very unreasonable thing that a juryman should be cross-examined, without your having received any information respecting him."[38]

The appellate courts of Maryland have cited the *Handy* case numerous times—as recently as 2006[39]—in support of Maryland's strict adherence to a *voir dire* process limited to questions that will reveal grounds for disqualification.[40] Indeed, in *Davis v. State*,[41] the Court of Appeals of Maryland claimed: "Nearly ninety years ago this Court, in *Handy v. State* . . . struck . . . a policy balance and established the general principles

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[37] *Handy*, 101 Md. at 40, 60 A. at 453.

[38] *Id.* (internal citations omitted).

[39] Curtin v. State, 393 Md. 593, 602, 903 A.2d 922, 928 (2006).

[40] *See, e.g.*, Dingle v. State, 361 Md. 1, 32, 759 A.2d 819, 836 (2000); Davis v. State, 333 Md. 27, 41, 633 A.2d 867, 874 (1993); Langley v. State, 281 Md. 337, 341, 378 A.2d 1338, 1340 (1977); McGee v. State, 219 Md. 53, 58-59, 146 A.2d 194, 196 (1959); Bryant v. State, 207 Md. 565, 582, 115 A.2d 502, 509 (1955); Emery v. Asher, 196 Md. 1, 7-8, 75 A.2d 333, 336 (1950); Beck v. State, 151 Md. 615, 620, 135 A. 410, 412 (1926); Whittemore v. State, 151 Md. 309, 312-16, 134 A. 322, 322-24 (1926).

[41] 333 Md. 27, 40, 633 A.2d 867, 873-74 (1993).

governing the scope of *voir dire* in Maryland." Given the significant influence of the holding of a case more than one century old regarding the scope of *voir dire* in today's practice, close scrutiny of that case is in order.

The English cases relied on by the *Handy* court, *Regina v. Stewart*[42] and *Regina v. Dowling*,[43] were decided in 1845 and 1848, respectively. This is important because, at that time, "challenges to the . . . [individual jurors were] reduced to four heads by Sir Edward Coke: *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*."[44] "*Propter honoris respectum*" referred to a juror who was a member of Parliament and was, therefore, subject to challenge for that reason by himself or either party.[45] A challenge "*propter defectum*" was made when a juror was unqualified to serve under a particular statute.[46] A juror could also be challenged for "*propter affectum*," which was on "suspicion of bias or partiality."[47] There were two classes of challenges under "*propter affectum*:" a principal challenge or a challenge to the favour.[48] Blackstone explains the principal challenge as:

> [S]uch, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled . . . .[49]

A challenge to the favour occurred when a party, with no principal objection, "object[ed] [to] only some probable circumstances of suspicion, as acquaintance and the like."[50] The last challenge, "*propter delictum*," was permitted when a juror had "some crime or misdemeanour that affect[ed] the juror's credit, and render[ed] him infamous."[51] Regarding a challenge "to the favour," once made, its validity "[had to]

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42 Regina v. Stewart, 1 Eng. Rep. 174 (1845).
43 Regina v. Dowling, 3 Eng. Rep. 509 (1848).
44 4 WILLIAM BLACKSTONE, COMMENTARIES *361.
45 *Id.*
46 *Id.* at *362.
47 *Id.* at *363.
48 *Id.*
49 *Id.*
50 4 WILLIAM BLACKSTONE, COMMENTARIES *363.
51 *Id.*

be left to the determination of *triors*, whose office it [wa]s to decide whether the juror be favourable or unfavourable. The *triors* . . . are two indifferent persons named by the court."[52]

The most salient feature of each of these challenges is that they had to be interposed *before* any examination of the challenged juror could take place.[53] In other words, the basis for the challenge had to be known prior to any questioning of the juror. Thus, in the *Dowling* case, the defendant's counsel requested that a juror be sworn on his *voir dire* so that counsel could examine him "with a view to a challenge if necessary."[54] The judge refused to permit such a procedure, noting it was "a very unreasonable thing that a juryman should be cross-examined without your having received any information respecting him."[55]

Similarly, in *Stewart*, a case involving a charge of larceny from a tradesman, counsel sought to question each juror about possible membership in an association promoting the prosecution of those committing fraud against tradesmen.[56] The court refused to allow it, stating, "I cannot allow you to cross-examine the jury . . . . If you like to challenge absolutely, you may do so."[57] It may seem counter-intuitive to require support for a challenge to a juror without allowing questioning of the juror to gather the support. However, it is a plainly rational procedure if counsel are well informed about the jurors in advance of jury selection. At the time *Dowling* and *Stewart* were decided, especially in comparison to today, the accused and his counsel were indeed well informed about the jurors.[58] Therefore, seeking to question the juror further, without basis, truly could be considered a "fishing" expedition.

The development of the trial by jury in criminal cases has a "long tradition [of] attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement."[59] The development of what we consider a jury trial today began in the time of Henry II:

> Originally the jurors [were] called in, not in order that they may hear, but in order that they may give, evidence. They are witnesses. They are the neighbours of the parties; they are presumed to know before they come into court the facts about which they are to testify. They are chosen by the sheriff to

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52 *Id.*
53 *Id.* at *365.
54 Regina v. Dowling, 3 Eng. Rep. 509, 510 (1848).
55 *Id.*
56 Regina v. Stewart, 1 Eng. Rep. 174, 175 (1845).
57 *Id.*
58 *See infra* notes 60-63 and accompanying text.
59 Williams v. Florida, 399 U.S. 78, 87 (1970).

> represent the neighbourhood . . . and the neighbourhood . . . will know the facts.
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> In the twelfth century population was sparse, and men really knew far more of the doings of their neighbours . . . . It was expected that all legal transactions would take place in public . . . [as] every three weeks a court was held in the village, and all the affairs of every villager were discussed.[60]

Jurors in the dual role of witness and juror slowly fell out of use given the growing population and increasing complexities of life, which made performing both functions difficult.[61] What grew out of this was the use of two groups of jurors: one to investigate and charge the crime (the grand jury of today) and the other to hear and judge the facts (today's petit jury).[62] Coming full circle to the earlier discussion of the cases relied upon in *Handy*, it is clear that examining a juror on his *voir dire* before making a challenge was foreign to the judge because the defendant already knew everything about his neighbors, the jurors.[63] Thus, it is not surprising that the judge would require the defendant to first make his challenge, and if it be "for favour," an examination of the juror would take place by the *trior*.

Since *Handy*, Maryland courts have essentially relied on reasoning tied to the state of affairs in mid-nineteenth century England to hold that, unless the judge exercises his discretion to so allow, a defendant is precluded from questioning a juror to aid in the intelligent exercise of peremptories.[64] At a time when a defendant was well versed in the affairs of his juror-neighbors, this reasoning admittedly made sense. But to apply the reasoning of *Stewart* and *Dowling* (by way of *Handy*) today, when even England's handling of juries adjusted due to the "growing population and increasing complexities of life," goes too far.

B. Inconsistent Application of Voir Dire *Precedent*

1. Questions of Law

Maryland has generally clung to the notion that the only types of questions a defendant may ask of a juror on *voir dire* are those that will

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[60] FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 56-57 (James Colby ed., AMS Press Inc. 1978) (1915).

[61] *Id.* at 57.

[62] Charles L. Wells, *The Origin of the Petty Jury*, 27 L.Q. REV. 347, 347, 357 (1911).

[63] *See also* THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 142 (3d ed., Luke Hanford & Sons 1808) ("The panel is made out and known to the parties long before the trial . . . and if they find anything which destroys the competency of a juror, they may be prepared to prove it.").

[64] *Supra* notes 27-41 and accompanying text.

reveal a basis for disqualification.[65] The courts have, however, been inconsistent in their application of this principle. For example, in *McGee v. State*,[66] the defendant was convicted of a murder arising out of a fight with the victim. McGee interposed a theory of self-defense.[67] During *voir dire*, McGee requested that the court ask several questions, all of which were denied, and one of which asked, "are you willing to resolve all reasonable doubt in favor of the accused?"[68] The Court of Appeals of Maryland held that it was not an abuse of discretion for the trial judge to "refus[e] to ask . . . for[, among other things,] the juror's opinion on the law."[69]

Conversely, in *Corens v. State*,[70] "the State's Attorney requested the court to ask each prospective juror on his *voir dire* whether he would be willing to convict on circumstantial evidence in a case where the penalty might be death, inasmuch as the State expected to prove the commission of the crime by circumstantial evidence." The trial court granted the State's request, and the Court of Appeals of Maryland, on appeal, found no error, holding that "the State has the right to challenge a juror in a capital case on the ground that he would not be willing to convict on circumstantial evidence."[71] The court reasoned that "an examination of a prospective juror on his *voir dire* is proper as long as it is conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him."[72] Both *McGee* and *Corens* involved questions about a juror's ability to follow the law, yet resulted in opposite conclusions.[73]

2. Questions Regarding a Juror's Relationships

In *Alexander v. R.D. Grier & Sons Co.*,[74] the plaintiff, a liquidator of the Keystone Indemnity Exchange, brought suit against the defendant, a Maryland corporation seeking payment for assessments. Alexander sought, and was denied, the opportunity to have the jurors asked "whether or not they, or any of their immediate families, are assessables in the

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65 *Id.*

66 219 Md. 53, 56, 146 A.2d 194, 195 (1959).

67 *Id.* at 57, 146 A.2d at 195.

68 *Id.* at 58, 146 A.2d at 196.

69 *Id.* at 59, 146 A.2d at 197.

70 185 Md. 561, 563, 45 A.2d 340, 343 (1946).

71 *Id.* at 564, 45 A.2d at 344.

72 *Id.*, 45 A.2d at 343.

73 *See also* Stewart v. State, 399 Md. 146, 160-67, 923 A.2d 44, 52-56 (2007) (finding no abuse of discretion in not giving a number of questions, one of which concerned the burden of proof); State v. Logan, 394 Md. 378, 396-400, 906 A.2d 374, 385-87 (2006) (finding no abuse of discretion when the trial judge refused to ask an improperly phrased question regarding the Not Criminally Responsible defense).

74 181 Md. 415, 416-17, 30 A.2d 757, 758 (1943).

Keystone Indemnity Exchange."[75] The Court of Appeals reversed, holding:

> The fact that a prospective juror in the instant case was an 'assessable,' or that a member of his immediate family was an 'assessable,' in the Keystone Indemnity Exchange, would in our opinion, create such bias or prejudice in his mind, that he could not reasonably be expected to decide between the parties with absolute impartiality, and no one could predict to which side his bias or prejudice would incline him.[76]

A similar issue arose in *Whittemore v. State*,[77] where the defendant, who was charged with killing a prison guard, wished to question the jurors about their occupations. Arguing before the Court of Appeals, he noted, "conceivably, [a juror] may have been a former penitentiary guard, and because of that fact unfitted to render an impartial verdict on a charge of murder of a guard by a prisoner."[78] The Court of Appeals found no abuse of discretion in the trial court's denial of the defendant's request, concluding:

> The questions excluded in this case were for no specified purpose, and apparently with no question of disqualification in mind, but were merely beginning a process of examining at large, in order to form impressions and preferences, which, while they might properly be made the ground of peremptory challenges, would not test the eligibility of the jurymen.[79]

The questions in *Whittemore* and *Alexander* go to the same issue—the status of the juror in direct relation to the issue at hand—yet, the court again reaches opposing conclusions.

The passage of time has not reduced the confusion. In fact, in some ways it has worsened. For example, *Davis v. State*[80] involved a police officer, who, after witnessing the sale of a controlled dangerous substance by the defendant, arrested him. As such, much of the defendant's case rested on the issue of the police officer's credibility.[81] As a result, defense counsel requested that jurors be asked "whether anyone on the jury has been a member or is a member of the law enforcement community or whether they have a close relative or friend who is such a

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75 *Id.* at 417, 30 A.2d at 758.
76 *Id.* at 419, 30 A.2d at 759.
77 151 Md. 309, 311-12, 134 A. 322, 322-23 (1926).
78 *Id.* at 314, 134 A. at 323-24.
79 *Id.* at 315-16, 134 A. at 324.
80 333 Md. 27, 32, 633 A.2d 867, 869-70 (1993).
81 *Id.* at 35, 633 A.2d at 871.

member[?]"[82] The majority opinion found no abuse of discretion in the refusal to ask the question.[83] In its analysis, the majority cited *Bedford v. State*,[84] despite the fact that the *Bedford* court established a very broad scope of permissible questioning in *voir dire*. Specifically, the court in *Bedford* held that "the defendant must be afforded every opportunity to 'size up' his jury and to fully examine each juror so as to assist counsel in determining which jurors should be disqualified for cause or even for no cause at all."[85] Granted, *Bedford* involved depriving the defendant of an opportunity to assist counsel in the *voir dire* by seating him at a distance from counsel, precluding their communication.[86] However, even if the broad test announced in *Bedford* is not applicable to *Davis*, surely *Alexander* should control, as there is little difference between Alexander's desire to ask jurors if any were assessables of the defendant corporation and Davis' wish to ask jurors if any were members of—or affiliated with members of—the law enforcement community on whom the state's case hinged.

Further adding to the confusion, the *Davis* court cited with approval *Langley v. State*,[87] for the proposition, "where a principal part of the State's evidence is testimony of a police officer diametrically opposed to that of a defendant, it is prejudicial error to fail to propound a question" asking "[i]s there anyone here who would give more credit to the testimony of a police officer over that of a civilian, merely because of his status as a police officer?"[88] The questions requested by Davis and Langley sought the exact same information. The only discernable difference is the fact that it would have required Davis to ask one additional question in order to get to the same information Langley was able to obtain with one question. Quibbling over the inexactitude of a question hardly seems appropriate when the right involved is that of an impartial jury, the right known as "the very palladium of free government."[89] Aside from the questionable result given its citation of authority, the *Davis* majority makes the remarkable statement that "we will continue to follow the principles adopted in *Handy* and *Whittemore* and *applied consistently* for the greater part of this century."[90] The only

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[82] *Id.* at 33, 633 A.2d at 870.

[83] *Id.* at 33-34, 633 A. 2d at 870.

[84] 317 Md. 659, 566 A.2d 111 (1989).

[85] *Id.* at 673, 566 A.2d at 118.

[86] *Id.* at 668-75, 566 A.2d at 116-19.

[87] 281 Md. 337, 378 A.2d 1338 (1977).

[88] *Id.* at 338, 349, 378 A.2d at 1338, 1344.

[89] THE FEDERALIST NO. 83, 407 (Alexander Hamilton) (Terence Ball ed., Cambridge Uni. Press 2003).

[90] Davis v. State, 333 Md. 27, 46, 633 A.2d 867, 876 (1993) (emphasis added).

consistency in this area of the law in Maryland is that it is inconsistently applied.

3. Questions Regarding Jurors' Ability to Remain Impartial

The Court of Appeals of Maryland took up another *voir dire* case, *Dingle v. State*,[91] in 2000. At trial, Dingle sought to have a series of questions asked regarding the status of the jurors, *e.g.*:

> 1) experience as a victim of crime; 2) experience as an accused or convicted person; 3) experience as a witness in a criminal case; 4) experience as a petit juror in a criminal case or as a member of a grand jury; 5) membership in any victims' rights group; 6) connection with the legal profession; and 7) association with law enforcement.[92]

The trial court agreed to propound the questions; however, the judge "join[ed] with each of [Dingle's] requested inquiries . . . an inquiry into whether the experience or association posited would affect the prospective juror's ability to be fair and impartial."[93] No doubt, by asking a single question incorporating the juror's ability to remain impartial, the trial judge was attempting to comport with *Davis*, which reiterated the mandate that questions "focus on the venire person's ability to render an impartial verdict based solely on the evidence presented."[94] The judge instructed the jurors to listen to the two-part questions and only stand if his or her response to the question was affirmative.[95] Thus, jurors were to engage in a "self-assessment" of their impartiality.

The Court of Appeals reversed,[96] but in doing so, managed to muddy the waters even further. The majority admitted that there is "a conflict between keeping the *voir dire* process limited and the goal of ferreting out cause for disqualification,"[97] but emphasized that "Maryland has adopted, and continues to adhere to, limited *voir dire*."[98] With this statement the court seems to make clear that the *voir dire* process in Maryland remains restricted *solely* to questions that will reveal a reason for disqualification and is not to aid in the exercise of peremptory strikes. If only it were that simple. A mere three pages later, the majority held:

> "[T]he strike for cause process encompasses the situation where the motion to strike is made on the basis of *information developed*

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91 361 Md. 1, 759 A.2d 819 (2000).
92 *Id.* at 3 n.3, 759 A.2d at 820 n.3.
93 *Id.* at 3-4, 759 A.2d at 820.
94 *Davis*, 333 Md. at 37, 633 A.2d at 872.
95 *Dingle*, 361 Md. at 5, 759 A.2d at 821.
96 *Id.* at 8-9, 759 A.2d at 823.
97 *Id.* at 14, 759 A.2d at 826.
98 *Id.* at 13, 759 A.2d at 826.

> during the *voir dire* process, not simply where the prospective juror admits an inability to be fair and impartial." . . . *The ability to challenge for cause is empty indeed if no way is provided for developing or having access to relevant information.*[99]

If, in fact, *Dingle* changed the course of *voir dire* jurisprudence in Maryland by expanding the types of questions that can be asked beyond those solely for disqualification, it was short-lived. In *Curtin v. State*,[100] an armed robbery case where the weapon of choice was a handgun, the court found no abuse of discretion in failing to ask: "Does anyone have any strong feelings concerning the use of handguns that they would be unable to render a fair and impartial verdict based on the evidence?" A majority of the Court of Appeals rationalized its holding by noting that the defendant's theory of defense was that he was not involved in the robbery or, in the alternative, that the gun used was not real.[101] Thus, Mr. Curtin was hoisted with his own petard.

4. Statutory Jury Requirements

Lastly, the Court of Appeals has also delivered confusing holdings in *Boyd v. State*[102] and *Owens v. State*.[103] These cases bear mentioning as yet another reflection of the yo-yo treatment of permissible *voir dire* questions in Maryland. In *Boyd*, the defendant requested that the jurors be asked whether anyone had a physical impairment that would hinder performance as a juror.[104] The Court of Appeals reiterated the general law that the sole purpose of *voir dire* in Maryland is to discover any cause for disqualification.[105] By statute, a physical impairment that hinders performance as a juror is a cause for disqualification completely unrelated to bias or partiality.[106] Yet, the court determined that there was no reversible error because "the identification of someone with a physical disability in no way *automatically* leads to the individual's disqualification."[107] Furthermore, the court reasoned,

> [t]he identification of potential jurors who may have a physical infirmity impairing their ability to be jurors, and the subsequent determination by the jury judge or jury commissioner that a

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[99] *Id.* at 17-18, 759 A.2d at 828 (partially quoting *Davis*, 333 Md. at 63, 633 A.2d at 885 (Bell, J. dissenting)) (emphasis added).

[100] 393 Md. 593, 597, 613, 903 A.2d 922, 925, 934 (2006).

[101] *Id.* at 611, 903 A.2 at 933.

[102] 341 Md. 431, 671 A.2d 33 (1996).

[103] 399 Md. 388, 924 A.2d 1072 (2007).

[104] *Boyd*, 341 Md. at 434, 671 A.2d at 34.

[105] *Id.* at 435, 671 A.2d at 35.

[106] MD. CODE ANN., CTS. & JUD. PROC. § 8-103(b)(4) (2006).

[107] *Boyd*, 341 Md. at 440, 671 A.2d at 37 (emphasis added).

> potential juror is in fact "incapable" of rendering "satisfactory" jury service, shall occur before the potential juror appears for jury service through the information contained in the juror qualification form.[108]

So, even though a juror can be disqualified under Maryland's statute if he or she is physically impaired to such a degree as to affect his or her ability to be a juror, the court made clear that this sort of determination is taken care of by virtue of juror questionnaires sent to all potential jurors along with a second check made by the jury commissioner.[109]

Ten years after *Boyd*, Adeyemi Alade, a non-citizen, improperly served on the jury that convicted Marcus Owens of second degree murder.[110] Mr. Alade's foreign citizenship was not revealed until after the trial, at which time Mr. Alade called the jury commissioner after learning of the citizenship requirement to sit as a juror.[111] On appeal, Owens argued that he had a statutory right to have a jury of only U.S. citizens and, given the clear holding in *Boyd*, which mandated that defendants have no right to a *voir dire* question concerning the statutory requirements to serve on a jury, any request by Owens for a *voir dire* question regarding citizenship would have been futile.[112] Owens also stressed that, under *Boyd*, he was entitled to rely on the jury selection process that occurs before potential jurors enter the court.[113] The court rejected these arguments and held:

> Simply because it is *not mandatory* for a judge to pose a particular question does not make it a *prohibited* question. Had Owens sought, and the trial judge refused, a citizenship question in the present case, the propriety of the denial would have been preserved for appellate review as an abuse of discretion. But because Owens did not suggest the question, he may not complain reasonably that a non-citizen was empanelled on his jury.[114]

Mercifully, the court in *Owens* partially overruled *Boyd* in stating that a citizenship question could have been asked and preserved for appellate review;[115] however, it did Owens no favor as the court found that Owens

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[108] *Id.* at 442-43, 671 A.2d at 39.

[109] *Id.*

[110] Owens v. State, 399 Md. 388, 397, 400, 924 A.2d 1072, 1077-78 (2007).

[111] *Id.* at 400, 924 A.2d at 1078; *see* MD. CODE ANN., CTS. & JUD. PROC. § 8-102(a) (2006).

[112] *Owens*, 399 Md. at 420, 924 A.2d at 1090-91.

[113] *Id.* at 421, 924 A.2d at 1091.

[114] *Id.* at 422, 924 A.2d at 1092 (emphasis in original).

[115] *Id.*

had waived any right to complain.[116] Ah, "[f]or 'tis the sport to have the engineer [h]oist with his own petard."[117]

5. Maryland is Out of Touch with the Rest of the Country

It is fair to say that, while these cases have resulted in a head-spinning hodgepodge of rulings, the court continues to insist that it is being guided by one bedrock principle: "In Maryland, the sole purpose of *voir dire* is to ensure a fair and impartial jury by determining the existence of cause for disqualification, and not as in many other states, to include the intelligent exercise of peremptory challenges."[118] By adhering to this principle, Maryland is in the minority, as most states permit both the prosecutor and the defense counsel to ask questions of the venire that will aid counsel in making peremptory challenges.[119] In fact, of those states that have

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[116] *Id.*

[117] WILLIAM SHAKESPEARE, HAMLET act 3, sc. 4.

[118] Stewart v. State, 399 Md. 146, 158-59, 923 A.2d 44, 51 (2007) (citing State v. Logan, 394 Md. 378, 396, 906 A.2d 374, 384 (2006)); State v. Thomas, 369 Md. 202, 207, 798 A.2d 566, 569 (2002); Evans v. State, 333 Md. 660, 676, 637 A.2d 117, 125 (1994).

[119] The following states permit an expanded *voir dire*: Alabama, *Ex Parte* Dobyn, 805 So.2d 763 (Ala. 2001); Alaska, Bachner v. Pearson, 479 P.2d 319 (Alaska 1970); Arizona, State v. Melendez, 588 P.2d 294 (Ariz. 1978); Arkansas, Hutcheson v. State, 213 S.W.3d 25 (Ark. Ct. App. 2005); Colorado, Oglesby v. Conger, 507 P.2d 883 (Colo. App. 1972); Connecticut, State v. Ebron, 975 A.2d 17 (Conn. 2009); Delaware, Ortiz v. State, 869 A.2d 285 (Del. 2005); Florida, Solorzano v. State, 2009 WL 3787196 (Fla. Dist. Ct. App. 2009); Georgia, Allen v. State, 659 S.E.2d 900 (Ga. Ct. App. 2008); Hawaii, State v. Altergatt, 559 P.2d 728 (Haw. 1977); Idaho, State v. Larsen, 923 P.2d 1001 (Idaho Ct. App. 1996); Illinois, People v. Dixon, 887 N.E.2d 577 (Ill. App. Ct. 2008); Indiana, Perryman v. State, 830 N.E.2d 1005 (Ind. Ct. App. 2005); Iowa, State v. Tubbs, 690 N.W.2d 911 (Iowa 2005); Kentucky, Fields v. Commonwealth, 274 S.W.3d 375 (Ky. 2008); Louisiana, State v. Constance, 2009 WL 3853163 (La. Ct. App. 2009); Massachusetts, Commonwealth v. Fudge, 481 N.E.2d 199 (Mass. App. Ct. 1985); Michigan, People v. Vesnaugh, 340 N.W.2d 651 (Mich. Ct. App. 83); Minnesota, State v. Ritter, 719 N.W.2d 216 (Minn. Ct. App. 2006); Mississippi, Jordan v. State, 995 So.2d 94 (Miss. 2008); Missouri, Care & Treatment of Wolfe v. State, 291 S.W.3d 829 (Mo. 2009); Montana, Whitlow v. State, 183 P.3d 861 (Mont. 2008); Nebraska, State v. Shipps, 656 N.W.2d 622 (Neb. 2003); Nevada, Whitlock v. Salmon, 752 P.2d 210 (Nev. 1988); New Hampshire, State v. Goding, 474 A.2d 580 (N.H. 1984); New Jersey, State v. Tinnes, 877 A.2d 313 (N.J. Super. Ct. App. Div. 2005); New Mexico, Sutherlin v. Fenenga, 810 P.2d 353 (N.M. Ct. App. 1991); New York, People v. Corbett, 418 N.Y.S.2d 699 (N.Y. App. Div. 1979); North Carolina, State v. Cummings, 648 S.E.2d 788 (N.C. 2007); Ohio, Eickenberry v. McFall, 36 N.E.2d 27 (Ohio Ct. App. 1941); Oklahoma, Sanchez v. State, 2009 WL 4797497 (Okla. Crim. App. 2009); Oregon, State v. Williams, 860 P.2d 860 (Or. Ct. App. 1993); South Carolina, State v. Wise, 596 S.E.2d 475 (S.C. 2004); South Dakota, State v. Fool Bull, 766 N.W.2d 159 (S.D. 2009); Tennessee, Wallis v. State, 546 S.W.2d 244 (Tenn. Crim. App. 1976); Texas, Unista v. Bed, Bath Beyond Inc., 245 S.W.3d 591 (Tex. Ct. App. 2007); Utah, Alcazar v. Univ. of Utah Hosp. & Clinics, 188 P.3d 490 (Utah Ct. App. 2008); Vermont, Fowlie v. McDonald, 82 A. 677 (Vt. 1912); Washington, State v. Wilson, 555 P.2d 1375 (Wash. Ct.App. 1976); West Virginia, State ex rel Nationwide Mutual v. Karl, 664 S.E.2d 667 (W. Va. 2008); Wyoming, Wardell v. McMillan, 844 P.2d 1052 (Wyo. 1992). Virginia provides that it is within the trial judge's discretion to allow questioning in aid of exercising peremptory challenges. Davis v. Sykes, 121 S.E.2d 513 (Va. 1961).

addressed the issue, only California,[120] Pennsylvania,[121] and Maryland[122] limit *voir dire* to questioning solely for the purpose of determining causes for disqualification. Additionally, every federal circuit permits expanded *voir dire*.[123] In attempting to decipher all of this, the bottom line is that, at best, Maryland's appellate courts continue to restrict *voir dire* in criminal cases and, at worst, litigants will be perpetually uncertain of what is and is not permitted on *voir dire*.

III. THE CASE AGAINST ANONYMOUS JURIES

"Knowledge is power."

-Sir Francis Bacon[124]

There are several constitutional and statutory arguments that one can make against the use of anonymous juries in Maryland. First, statutes in Maryland governing jury selection *require* that access to juror information, including name and address, be provided to the parties in the case.[125] In Maryland criminal cases, a party may challenge the entire jury array from which the sworn jury is to be chosen,[126] or may challenge an individual juror for cause.[127] Specifically, with respect to a challenge to the array, the Courts and Judicial Proceedings Article of the Maryland Code provides that "[o]n a showing that a party needs access to a record to prepare for a hearing on a motion pending [to the array] . . . a trial judge may allow the party to inspect and copy a record as needed to prepare."[128] Additionally, with respect to a challenge to an individual

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[120] CAL. CIV. PRO. CODE § 223 (2009) ("Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.").

[121] Dep't of Gen. Servs. GS v. United States Mineral Prods. Co., 927 A.2d 717 (Pa. 2007).

[122] *Supra* notes 27-41 and accompanying text.

[123] Mu'Min v. Virginia, 500 U.S. 415, 432 (1991) ("*Voir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."); United States v. Noone, 913 F.2d 20, 32, 34 n.19 (1st Cir. 1990); United States v. Salameh, 152 F3d 88, 121 (2d Cir. 1998); Gov't of the V.I. v. Felix, 569 F.2d 1274,1277 n.5 (3d Cir. 1978); United States v. Lancaster, 96 F.3d 734, 738 (4th Cir. 1996); Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991); United States v. Blanton, 719 F.2d 815, 822 (6th Cir. 1983); Alcala v. Emhart Indus., 495 F.3d 360, 363 (7th Cir. 2007); United States v. Poludniak, 657 F.2d 948, 957 (8th Cir. 1981); United States v. Annigoni, 96 F.3d 1132, 1139 (9th Cir. 1996); Photostat Corp. v. Ball, 338 F.2d 783, 786 (10th Cir. 1964); Cummings v. Dugger, 862 F.2d 1504, 1507 (11th Cir. 1989); United States v. Washington, 705 F.2d 489, 496 (D.C. Cir. 1983); *see also* FED. R. CRIM. P. 24(a) (2009).

[124] JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 168 (Nathan Haskell Dole ed., 10th ed., Blue Ribbon Books Inc. 1919).

[125] *See, e.g.*, Md. Rule 4-312(c)(1).

[126] Md. Rule 4-312(a)(3).

[127] Md. Rule 4-312(d)(2).

[128] MD. CODE ANN., CTS. & JUD. PROC. § 8-409(c) (2006).

juror during jury selection, Maryland Rule 4-312,[129] which governs jury selection in criminal cases, provides:

> Before the examination of qualified jurors, *each party shall be provided with a list that includes each juror's name, address, age, sex, education, occupation, spouse's occupation, and any other information required by Rule.* Unless the trial judge orders otherwise, the address shall be limited to the city or town and zip code and shall not include the street address or box number.[130]

Further, the rule allows "[a] party [to] provide the jury list to any person employed by the party to assist in jury selection."[131] The trial judge may prohibit a party from disseminating the list "to any other person."[132] Moreover, subsection (d) expressly states that "[o]n request of any party, the judge *shall* direct the clerk to *call the roll of the array* and to request each qualified juror *to stand and be identified* when called."[133] And lastly, subsection (f)(1) provides that "[t]he individuals to be impaneled as sworn jurors, including any alternates, *shall be called* from the qualified jurors remaining on the jury list in the order previously designated by the judge and shall be sworn."[134] These rules and statutes leave little doubt about the defendant's right to be provided with juror information prior to jury selection. The rules are not recommendations. They are precise rubrics that leave no discretion. The use of the word "shall" throughout these rules reflects their mandatory nature. Finally, the fact that Rule 4-312(c)(1) specifically requires the deletion of the juror's specific address, instead allowing access to the city, town, and zip code, strongly suggests that the Court of Appeals has considered and determined that a juror's address is the *only* information that can be kept from a defendant in a criminal trial.

People v. Watts,[135] a case out of New York, is instructive. In *Watts*, the State sought to empanel an anonymous jury over the defendant's objection that doing so would violate the Criminal Procedure Law of New York.[136] The defendant referred to a law, which provided that "the

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[129] Maryland Rules have the force of law. MD. CODE ANN., CONST. art. 4, § 18(a) (2003).

[130] Md. Rule 4-312(c)(1) (emphasis added).

[131] Md. Rule 4-312(c)(2)(A).

[132] Md. Rule 4-312(c)(2)(B).

[133] Md. Rule 4-312(d) (emphasis added).

[134] Md. Rule 4-312(f)(1) (emphasis added). Throughout the rules governing jury selection, reference is made to the requirement of "calling" each qualified juror. *See* Md. Rules 4-312, 4-313. In addition, the rule governing access to records provides that, unless ordered otherwise by a judge and upon request, "[a] custodian shall . . . disclose the names and zip codes of the sworn jurors contained on a jury list after the jury has been impaneled and sworn." Md. Rule 16-1004.

[135] 661 N.Y.S.2d 768 (N.Y. Sup. 1997).

[136] *Id.* at 770.

court shall direct that the names of not less than twelve members of the panel be drawn and *called*."[137] The State contended that the statute did not create a substantive right but was merely a rule of procedure for jury selection.[138] In response to this argument, the court pointed out that a separate section of the rule allowed the court "for good cause shown" to issue a protective order "regulating disclosure of the . . . residential address of any prospective or sworn juror."[139] Reading the two sections in conjunction, the court held that the section regarding the juror's address must have been added to give the judge discretion to limit public disclosure of the address; however, the failure of the legislature to add the same discretion in the section concerning juror names indicates a conscious decision to remove any discretion on the court's part that would allow withholding juror names.[140] Like Watts, defendants in Maryland have statutes and rules clearly reflecting a preference for disclosure.

Maryland also adheres to the "common law principle of openness regarding public access to court proceedings and court records."[141] Speaking for the Court of Appeals in *The Baltimore Sun, Co. v. Mayor & City Council of Baltimore*, a case involving the closing of a courtroom to the public and the sealing of court documents, Judge Eldridge stated:

> The common law principle of openness is not limited to the trial itself but applies generally to court proceedings and documents. . . . This "legacy of open justice" traveled to America and became an intrinsic element of early colonial governments. . . . In Maryland, "the rules of the common law of England were . . . adopted as the principles which were to direct the proceedings of the provincial government, whether legislative or judicial . . . ." . . . The common law rule that court proceedings, records, and documents are open to the public is fully applicable in Maryland except to the extent that the principle has been modified by legislative enactments or decisions by this Court. Consequently, the trial judge . . . could properly have closed the courtroom and issued the sealing order only if authorized by statutes, rules promulgated by this Court, or decisions of this Court modifying the common law principle under specified circumstances.[142]

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[137] *Id.* (emphasis added).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] Baltimore Sun Co. v. Mayor and City Council of Baltimore, 359 Md. 653, 660, 755 A.2d 1130, 1134 (2000) (citing Baltimore Sun Co. v. Colbert, 323 Md. 290, 302-06, 593 A.2d 224, 230-32 (1991)).

[142] *Id.* at 661-62, 755 A.2d at 1134-35.

There is no statute or decision by the Court of Appeals of Maryland that modifies this common law principle, fully applicable in this state,[143] in regard to anonymous juries.[144] To be sure, there are certain scenarios that allow for the closure of courtroom proceedings; however, none address concealing identifying information of jurors from the parties.[145] And, quite to the contrary, there are Maryland Rules, cited above, that *enforce* the common law principle of openness, particularly with respect to juror information.[146]

A defendant's right to a public trial as guaranteed by the Sixth Amendment to the United States Constitution and article 21 of the Maryland Declaration of Rights is "vital to a fair administration of justice."[147] As was stated in *Estes v. Texas*,[148] "the publictrial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings."[149] The United States Supreme Court has recognized that "[n]o right ranks higher than the right of the accused to a fair trial. But the primacy of the

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[143] Maryland Declaration of Rights, Article 5 entitles "the Inhabitants of Maryland . . . to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State." MD. CODE ANN., CONST., DECLARATION OF RIGHTS, art. 5 (2009).

[144] The Court of Appeals for the Fourth Circuit had occasion to address the denial of access for the Baltimore Sun to the jury list in a case involving the trial of one of the defendants involved in the savings and loan debacle. *In re* Baltimore Sun Co., 841 F.2d 74 (4th Cir. 1988). The court held that "the risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity. If the district court thinks that the attendant dangers of a highly publicized trial are too great, it may always sequester the jury; and change of venue is always possible as a method of obviating pressure or prejudice." *Id.* at 76. However, in a footnote the court acknowledged that it was not addressing a case "in which there existed realistic threats of violence or jury corruption." *Id.* at 76 n.5

[145] In order to preclude individuals from a courtroom, "[t]he trial court must find specifically that no reasonable alternative short of closure of the courtroom will protect the defendant's right to a fair trial." Baltimore Sun Co. v. Colbert, 323 Md. 290, 303, 593 A.2d 224, 230 (1991) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980); Buzbee v. Journal Newspapers, Inc., 297 Md. 68, 82, 465 A.2d 426, 434 (1983)). To determine if prejudice is substantially probable from an open hearing, the court is to look "into the extent of publicity that the case has received and is likely to receive after the hearing . . . the nature of the information that will be made public during the hearing, community reaction to information about the defendant, the crime with which the accused is charged, and whether closure of the courtroom will prevent the asserted prejudice." *Id.*

[146] *See* Md. Rule 4-312(c)(1).

[147] Robinson v. State, 410 Md. 91, 120, 976 A.2d 1072, 1089 (2009) (Greene, J., dissenting).

[148] 381 U.S. 532 (1965).

[149] *Id.* at 588 (citing *In re* Oliver, 333 U.S. 257, 266-73 (1948)) (Harlan, J., concurring).

accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness."[150] The importance of the right to a public trial cannot be overstated; nor can the right to open *voir dire* proceedings:

> Proceedings held in secret would deny . . . and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct *by jurors fairly and openly selected.* . . . Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.[151]

If it is the State that seeks to have the jury remain anonymous, "it must be shown that the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[152]

IV. OTHER JURISDICTIONS' APPROACH TO ANONYMOUS JURY TRIALS

"Corn can't expect justice from a court composed of chickens."

-African proverb

A. Precautions to Protect the Defendant's Rights

When an anonymous jury is empanelled due to concerns for juror safety, this may undermine a defendant's presumption of innocence and infringe his or her Sixth Amendment right to an impartial jury. Recognizing these serious concerns, courts have utilized several measures to protect the defendant's rights, including instructions to juries suggesting that the need for anonymity is unrelated to a potential danger to the juries. For example, in *United States v. Scarfo*,[153] the trial judge instructed the jury before the trial began "that they would hear testimony about organized crime, and that he wanted them to consider the case without any apprehension that they or their families would be endangered" and that "anonymity was intended to protect the interests of both the prosecution and the defense . . . to make sure that both sides get a fair trial."[154] Similarly, in *United States v. Edmond*,[155] the court instructed the jury that "[i]t is a common practice . . . to keep the names

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[150] Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508 (1984).

[151] *Id.* at 509 (emphasis added).

[152] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982). It is interesting that most courts apply a different test, *i.e.*, they require that there be a "strong reason" for anonymity as opposed to a "compelling governmental interest." *See supra* note 17.

[153] 850 F.2d 1015 (3d Cir. 1988).

[154] *Id.* at 1017.

[155] 730 F. Supp. 1144 (D.D.C. 1990).

and identities of the jurors in confidence. This is in no way unusual. It is a procedure being followed in this case to protect your privacy even from the Court."[156] These cases illustrate that an instruction, should one be given, must be careful not to make jurors more fearful, thereby further reducing the defendant's presumption of innocence.

B. Expanding Voir Dire

Another critical precaution taken in many cases employing anonymous juries, and one that is the focus of this article, is the extensive use of *voir dire* when selecting the jury. Even though the judge in *United States v. Barnes*—the first anonymous jury case—kept the jurors' names and addresses confidential, he permitted extensive questioning on the jurors' counties of residence, occupations, possible racial prejudices, and memberships in clubs or groups.[157] In *United States v. Scarfo*, the court allowed written questionnaires concerning a broad range of personal biographical information as well as "thorough" *voir dire* by the judge and counsel.[158] Indeed, as is clear in all of the cases permitting anonymous jurors:

> The most important aspect of this *voir dire*/peremptory challenges issue is that, when a court takes appropriate measures, attorneys for both sides receive *more* material information about members of an anonymous jury than they do in ordinary trials in which jurors identify themselves by name and address. The Court uses the term "material" advisedly, because "[a] trial judge is required to permit at least some questioning with respect to any material issue that may actually or potentially arise during the trial."[159]

The *Edmond* court concluded that the extensive *voir dire* in conjunction with the expansive juror questionnaire "enhance[d] rather than diminish[ed] the defendants' rights to exercise their peremptory challenges . . . to be tried by a fair and impartial jury."[160]

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[156] *Id.* at 1150 n.13. This author posits that this type of instruction can be viewed as slightly dishonest.

[157] United States v. Barnes, 604 F.2d 121, 135-36 (2d Cir. 1979).

[158] *Scarfo*, 850 F.2d at 1022.

[159] *Edmond*, 730 F. Supp. at 1149 (quoting United States v. Tutino, 883 F.2d 1125, 1133 (2d Cir. 1989)).

[160] *Id.* at 1149; *see also* United States v. Ross, 33 F.3d 1507, 1520 (11th Cir. 1994) ("Where jury anonymity is warranted, the defendant's fundamental right to an unbiased jury is sufficiently guaranteed by the court's conduct of a *voir dire* that can uncover any bias toward issues in the case or to the defendant himself."); United States v. Byers, 603 F. Supp. 2d 826, 834 (D. Md. 2009) ("A defendant's right to an impartial jury is secured through the administration of a thorough *voir dire* process. Perhaps the most critical consideration in this endeavor is the need to uncover any biases against the issues or any of the defendants involved. For this reason, measures have been taken to ensure that an especially extensive *voir dire* process is conducted . . . .").

V. CONCLUSION

In Maryland, should a rule be passed allowing for the empanelling of anonymous juries, the extent of and reason for *voir dire* must be expanded. Because the effectiveness of peremptory challenges bears a direct relation to the breadth of information that is revealed on *voir dire*, Maryland should abandon its insistence on *voir dire* questions limited solely to those that would reveal a basis for disqualification and allow questions to be asked that would aid in the exercise of peremptory challenges. Otherwise, the right to a fair trial by an impartial jury will remain illusory.