DOES THE VOIR DIRE SERVE AS A POWERFUL DISINFECTANT OR POLLUTANT? A LOOK AT THE DISPARATE APPROACHES TO JURY SELECTION IN THE UNITED STATES AND CANADA

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I. INTRODUCTION

In both the United States and Canada, the right to a jury trial is an enshrined constitutional right; however, the jury selection procedures in each country differ vastly from the other. Jury selection is of fundamental importance to the criminal justice system because it plays a pivotal role in

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achieving a fair and just trial—a right to which the defendant is constitutionally entitled.[1] In the United States, prospective jurors are frequently required to divulge extensive background information during voir dire, and there exists a vast industry of jury consultants available for hire whose aim is to assist in selecting a sympathetic jury that will find in a client's favor.[2] Most juries in Canada are selected with the attorneys only having access to the prospective juror's name, address, and occupation, and the use of jury consultants is extremely rare.[3] Generally, upon seeing the prospective juror come forward, it is also possible for the attorneys to identify the prospective juror's gender and approximate his or her age. Where attorneys do not have prior access to the jury list, jury selection is based on "crude assessments of appearances," such as "demeanour, apparent social status[] or on preconceived notions of whether jurors of a particular race or gender" would tend to be pro-prosecution or pro-defense.[4]

The goal of this Article is to explore the disparate approaches to jury selection in the United States and Canada through the lens of two different issues that have gained national prominence in each country: (1) the Canadian jury vetting scandal and (2) the voir dire of the former Enron Chief Executive Officer, Jeffrey Skilling. Before launching into specific issues, Part II will contain a brief discussion of the jury selection framework in both Canada and the United States in order to set the stage for the more focused discussion of these two issues.

Part III will examine the jury vetting scandal that erupted in Canada in 2009 as a result of prosecutors conducting criminal background checks on prospective jurors. The conflicting caselaw beginning to emerge from

1. Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty., 464 U.S. 501, 505 (1984); *see* Skilling v. United States, 130 S. Ct. 2896, 2918 n.20 (2010).

2. David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 247 (1981).

3. Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 LAW & CONTEMP. PROBS. 141, 150, 158 (1999). The only exception to this is when the defendant is a visible minority. As will be explained below, counsel for the defendant is then usually permitted to run a challenge-for-cause process whereby each prospective juror is asked a question that seeks to determine whether he or she can set aside any biases she or he might have as a result of the race of the defendant. *See id.* at 160–61. Fellow jurors are asked to sit in judgment to determine whether the prospective juror is biased. *Id.* at 160.

4. *See, e.g.*, Michael Chesterman, *Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy*, 62 LAW & CONTEMP. PROBS. 69, 82 (1999) (discussing "'blind'" assessments in New South Wales, Australia).

appellate courts across the country will be discussed, as well as the recommendations made by the Privacy Commissioner of Ontario. Part III will also examine how the vetting scandal reveals the high level of confidence the Canadian judicial system has in random selection and how gaining background information on jurors is viewed as "polluting" the selection process and endangering the ideal of a fair and impartial jury. In Part IV, the focus will move to the controversial jury selection in *United States v. Skilling*.[5] The reasoning of the majority opinion, which concluded the voir dire effectively "disinfected" the jury of bias will be contrasted with the powerful minority opinion, which found the voir dire to be deeply flawed and was not persuaded that bias had been effectively purged from the jury.

II. JURY SELECTION PROCEDURES

A. *Canada*

In Canada, there are two distinct stages to jury selection.[6] The first is governed by provincial legislation, such as the British Columbia Jury Act or the Ontario Juries Act.[7] It is the responsibility of each province to summon citizens to local superior courthouses to report for jury duty.[8] The goal is to produce an "array" from which juries can be assembled.[9] The jurors generally report to a central jury room in the courthouse, and then panels of prospective jurors are called to specific courtrooms when the

5. *See* United States v. Skilling, 554 F.3d 529 (5th Cir. 2009).

6. *See* R. v. Yumnu, 2010 ONCA 637, ¶¶ 13–19 (Can. Ont. C.A.) (providing a recent description of the jury selection process).

7. *Id.* ¶ 14; *e.g.*, Jury Act, R.S.B.C. 1996, c. 242 (Can. B.C.); Juries Act, R.S.O. 1990, c. J.3 (Can. Ont.); Jury Act, R.S.A. 2000, c. J-3 (Can. Alta.); Jury Act, C.C.S.M., c. J30 (Can. Man.); Jury Act, S.N.B. 1980, c. J-3.1 (Can. N.B.); Jury Act, S.N.L. 1991, c. 16 (Can. Nfld.); Territories Jury Act, R.S.N.W.T. 1988, c. J-2 (Can. N.W.T.); Juries Act, R.S.N.S. 1998, c. 16 (Can. N.S.); Jury Act, R.S.P.E.I. 1988, c. J-5.1 (Can. P.E.I.); Jurors Act, R.S.Q., c. J-2 (Can. Que.); Jury Act, 1998, S.S. 1998, c. J-4.2 (Can. Sask.); Jury Act, R.S.Y. 2002, c. 129 (Can. Yukon).

8. This authority is derived from section 92(14) of the Constitution Act, 1867. *See* DAVID M. TANOVICH, DAVID M. PACIOCCO & STEVEN SKURKA, JURY SELECTION IN CRIMINAL TRIALS: SKILLS, SCIENCE, AND THE LAW 28 (1997) (discussing the Canadian jury selection process).

9. For example, in *Yumnu*, eight panels of one hundred jurors were summoned to appear between January 24 and February 3, 2005, for potential selection as the jury in this murder case, for which the estimated length was four to six months. *Yumnu*, 2010 ONCA 637, ¶ 14.

judge and lawyers are ready to empanel a jury.[10] The act of summoning citizens to appear for jury service is handled by a jury center.[11] For example, in the province of Ontario, it is the Central Provincial Jury Centre in London, Ontario, that carries out the functions of the sheriff under the Juries Act.[12] Guided by the courts' forecast of the number of jurors required for the year, the Centre mails out juror qualification questionnaires to randomly selected persons on the municipal assessment rolls for each region.[13] The aim of the questionnaire is to determine whether the recipient meets the eligibility requirements under the Juries Act.[14] The qualifications of jurors in criminal cases are determined by an "amalgam of federal and provincial legislation."[15] In Ontario, a juror must: be a Canadian citizen, be a resident of Ontario, be at least eighteen years old, not be a member of an ineligible occupation group, and be able to speak either French or English.[16] Under section 4(b) of the Ontario Juries Act, anyone who has been convicted of an indictable offense and has not been granted a pardon is ineligible for jury service.[17] There are slight variations in how eligibility is defined under each provincial jury act.[18] With respect to the permissibility of a criminal record, under section 638 of the Canadian Criminal Code, either the prosecutor or the accused may challenge a juror who has been convicted of an offense for which the sentence of imprisonment exceeded twelve months or the death sentence was imposed.[19] This provision is more expansive than the ineligibility

10. ANN CAVOUKIAN, EXCESSIVE BACKGROUND CHECKS CONDUCTED ON PROSPECTIVE JURORS: A SPECIAL INVESTIGATION REPORT 36 (2009), *available at* http://www.ipc.on.ca/english/Decisions-and-Resolutions/Decisions-and-Resolutions-Summary/?id=8303.

11. *Id.* at 34–36.

12. *Id.* at 34.

13. *Id.* at 34–35. The Centre contracts with two agents—one to assist with mailing and printing services and the other for data processing services. *Id.* at 34.

14. *Id.* at 35.

15. *Yumnu*, 2010 ONCA 637, ¶ 64.

16. Juries Act, R.S.O. 1990, c. J.3 §§ 2, 3(1), 8(2) (Can. Ont.). For example, judges, lawyers, police officers, correctional officers, medical practitioners, and firefighters are excluded. *Id.* § 3(1).

17. *Id.* § 4(b). "'Indictable offence[s]'" include those that are exclusively indictable and those that are hybrid and may be prosecuted either summarily or by indictment on the election of the prosecutor. *Yumnu*, 2010 ONCA 637, ¶ 68 (citing R. v. Mitchell (1997), 36 O.R. 3d 643, 646 (Can. Ont. C.A.)).

18. *See* CAVOUKIAN, *supra* note 10, at 50. For a review of the differences among the provinces, see *id.* app. 10.

19. Criminal Code, R.S.C. 1985, c. C-46 § 638 (Can.). The death penalty for

section in the Ontario Juries Act because it captures summary conviction offenses for which the sentence of imprisonment exceeded twelve months.[20]

The second stage of jury selection occurs in the courtroom and is governed by the federal legislation—the Criminal Code.[21] Basically, there are two types of challenges available to the prosecutor and defense counsel for eliminating prospective jurors: (1) peremptory challenges and (2) challenges for cause.[22] The prosecutor and defense counsel are provided with scant details about individuals in the jury pool.[23] The jury list, which is furnished a few days before trial, contains the name of the juror and street on which the juror lives.[24]

The Canadian judiciary has generally been hostile toward attempts by lawyers to gain more than the bare minimum of information about jurors. For example, in *R. v. Latimer*, it was revealed that the prosecutor and a Royal Canadian Mounted Police (RCMP) officer composed a questionnaire asking prospective jurors to divulge their views on issues

murders in Canada was abolished in 1976, but it was kept for military offenses such as treason and mutiny until 1988. *See 1976: Abolition of the Death Penalty*, CORR. SERV. CAN. (Aug. 13, 2009), http://www.csc-scc.gc.ca/text/pblct/rht-drt/08-eng.shtml; *The Death Penalty in Canada: Twenty Years of Abolition*, AMNESTY INT'L (Apr. 2000), http://www.amnesty.ca/deathpenalty/canada.php.

20. *Compare* Juries Act, R.S.O. 1990, c. J.3 § 4 (Can. Ont.) ("A person is ineligible to serve as a juror who . . . has been convicted of an offence that may be prosecuted by indictment, unless the person has subsequently been granted a pardon."), *with* Criminal Code, R.S.C. 1985, c. C-46 § 638 (Can.) ("A prosecutor or an accused is entitled to any number of challenges on the ground that . . . a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months."). However, in one way the act is narrower because it excludes convictions for indictable offenses for which the sentence of imprisonment was less than twelve months.

21. *See Yumnu*, 2010 ONCA 637, ¶ 15. Federal jurisdiction over the selection of jurors in the courtroom is derived from section 91(27) of the Constitution Act, 1867. TANOVICH, PACIOCCO & SKURKA, *supra* note 8, at 28. This Article focuses on criminal jury selection. Civil juries are extremely rare and have almost been relegated to the status of a "'medieval relic'" in Canada. W.A. Bogart, *"Guardian of Civil Rights . . . Medieval Relic": The Civil Jury in Canada*, 62 LAW & CONTEMP. PROBS. 305, 318 (1999).

22. Criminal Code, R.S.C. 1985, c. C-46 §§ 634, 638 (Can.).

23. *See* TANOVICH, PACIOCCO & SKURKA, *supra* note 8, at 184 (discussing the inapplicability of scientific jury selection in Canada because of the fact "potential jurors are not identified to counsel until shortly before the jury selection process occurs, making juror investigation impossible as a practical matter").

24. Canada Criminal Code, R.S.C. 1985, c. C-46 § 631(1) (Can.).

such as religion, abortion, and euthanasia.[25] The questionnaire was administered by RCMP officers to thirty prospective jurors, five of whom ended up serving on the jury that convicted Mr. Latimer of the murder of his severely disabled daughter.[26] At trial, the prosecutor did not disclose the contact that had occurred with the prospective jurors; the information only emerged shortly before the Supreme Court of Canada heard the appeal.[27] Chief Justice Lamer chastised the prosecutor in the strongest of terms: "The actions of Crown counsel at trial, which were fully acknowledged by Crown counsel on appeal, were nothing short of a flagrant abuse of process and interference with the administration of justice."[28] While much of the court's anger was directed at the failure of the prosecutor to abide by Canada's exacting and broad disclosure rules, it is clear the court also strongly disapproved of the attempt to shape the jury membership by eliciting information from prospective jurors regarding some of the explosive issues that were at play in the case.[29]

The principle of equality governs the role of the prosecutor and defense counsel in the selection of the twelve jurors—"[n]either is entitled to thwart the representativeness or to use the selection process to indoctrinate potential jurors to their view of the case."[30] Currently, the prosecutor and counsel for each defendant possess an equal number of peremptory challenges, which depend on the type of offense involved,[31] and recourse to the challenge for cause process when there is concern over the impartiality of prospective jurors.[32] Prior to 1992, the system was not as balanced—the prosecutor was entitled to forty-eight "stand-asides" and four peremptory challenges, while the accused was allotted either four, twelve, or twenty peremptory challenges depending on the charge.[33] The

25. R. v. Latimer, [1997] 1 S.C.R. 217, ¶ 13.

26. *Id.* ¶¶ 13–14.

27. *Id.*

28. *Id.* ¶ 43.

29. *See id.* ¶¶ 14, 43–44.

30. R. v. Yumnu, 2010 ONCA 637, ¶ 16 (Can. Ont. C.A.).

31. The Criminal Code grants twenty peremptory challenges to the prosecutor and each accused for a charge of high treason or first degree murder, twelve peremptory challenges for offenses for which the sentence of imprisonment may exceed five years, and four peremptory challenges for all other offenses. Criminal Code, R.S.C. 2010, c. C-46, § 634(2) (Can.).

32. *Yumnu*, 2010 ONCA 637, ¶ 17.

33. *See* Donald V. Macdougall, *Jury Vetting by the Prosecution*, 24 CRIM. L.Q. 98, 114 (1982) ("The number of stand-asides is normally limited to 48. . . . Recognized procedure is to call upon the accused to challenge and then the Crown to state its

stand-aside power permitted the prosecutor to request that a juror within the array step to the side during the jury selection process without having to articulate a reason for the objection.[34] The practical effect was the prospective juror would not form part of the jury because the size of jury panels in most jurisdictions was large enough that the Crown never again had to consider the inclusion of the juror asked to step aside.[35] However, in 1992, the Supreme Court of Canada found the stand-aside power violated the defendant's constitutional rights because it "provide[d] the Crown with a combination of peremptory challenges and stand bys that is more than four times in excess of the number of peremptory challenges permitted to an accused," which had the result of creating a "pervasive air of unfairness" that could not be justified as a reasonable limit in a fair and democratic society.[36]

Under section 638(1) of the Canadian Criminal Code, any juror may be challenged for cause.[37] Most of the factors enumerated in the Code relate to basic eligibility requirements, such as the juror not having his or her name on the panel list, not being a citizen, having a conviction for which the sentence of imprisonment exceeded twelve months, being unable to physically perform the duties of a juror, or being unable to speak one of the two official languages of Canada—French or English.[38] The applicability of most of these disqualifying factors can often be determined early in the process. In some Canadian provinces, prospective jurors receive an eligibility questionnaire through the mail that they must complete before they are summoned to court.[39] The questionnaire aims to determine whether potential jurors are ineligible on the basis of the grounds enumerated under the provincial Jury Act.[40] However, because prosecutors in Ontario were concerned prospective jurors may not be properly disclosing their ineligibility due to a criminal record—whether deliberately or due to an inability to distinguish between summary and indictable offenses—and because disqualification for criminal record is

position with respect to each juror called.").

34. *See id.* at 113–14.

35. John F. McEldowney, *"Stand by for the Crown": An Historical Analysis*, 1979 CRIM. L.R. 272, 275.

36. R. v. Bain, [1992] 1 S.C.R. 91, paras. 4, 7 (Can.).

37. Criminal Code, R.S.C. 1985, c. C-46 § 638(1) (Can.).

38. *See id.*

39. *See, e.g.*, CAVOUKIAN, *supra* note 10, at 35 (citations omitted) (reporting on Ontario juror qualification questionnaires mailed out to help determine juror eligibility).

40. *See id.* (citing Juries Act, R.S.C. 1990, c. J.3 §§ 2–4 (Can. Ont.)).

defined more broadly in the Criminal Code, prosecutors began to conduct their own checks, which culminated in a jury vetting scandal in 2009 that is discussed later in this Article.[41]

In Canada, the only opportunity for lawyers to ask any questions of the prospective jurors before exercising their peremptory challenges and selecting the twelve jurors for trial is to persuade a judge under section 683 of the Criminal Code there is a realistic potential the jury pool contains individuals who are not impartial.[42] The presumption in Canada is prospective jurors who are presented in court are indifferent or impartial.[43] Courts in Canada have vigorously resisted permitting expansive questioning of the backgrounds, attitudes, and viewpoints of the prospective jurors as is permitted in many states in America.[44] In *R. v. Hubbert*, the Ontario Court of Appeal expressly stated the purpose of a challenge for cause was *not* to delve into a juror's personality or to garner information about a juror's political views, proclivities, beliefs, or prejudices.[45] The Ontario Court of Appeal cited, with approval, the English Court of Appeal's decision in *R. v. Kray*, in which Justice Lawton commented it would be regrettable if detailed questioning of jurors was permitted because such questioning is contrary to the spirit of the administration of justice.[46] However, in the groundbreaking 1993 case of *R. v. Parks*, the Ontario Court of Appeal concluded there was a realistic possibility a prospective juror in Toronto would be biased, either consciously or subconsciously, against a black defendant charged with murdering a white person and this bias would interfere with his or her duties as a juror.[47] After this case, it became almost routine for jury panel

41. *See* Criminal Code, R.S.C. 1985, c. C-46 § 46 (Can.) (providing definitions for terms); *id.* § 683 (providing a juror may be challenged for prior criminal convictions).

42. *See id.* § 638.

43. R. v. Williams, [1998] 1 S.C.R. 1128, ¶ 13 (Can.).

44. *See* Vidmar, *supra* note 3, at 150.

45. R. v. Hubbert, 1975 CanLII 53, ¶ 24 (Can. Ont. C.A.). The decision was upheld by the Supreme Court of Canada in a two-paragraph opinion that described the procedure outlined by the Ontario Court of Appeal as a useful guide for trial judges. R. v. Hubbert, [1977] S.C.R. 267, 267–68 (Can.).

46. *Hubbert*, 1975 CanLII 53, ¶ 24 (citing R. v. Kray, (1969) 53 Cr. App. R. 412, 416 (Eng.)).

47. R. v. Parks, 1993 CanLII 3383, para. 35 (Can. Ont. C.A.); *see also* R. v. Spence, 2005 SCC 71, ¶¶ 1, 7 (Can.) (holding the trial judge did not err in refusing to allow the defense counsel to extend the challenge question to the race of the complainant, which was East Indian, although it would also not have been an error to permit the interracial nature of the crime to be referenced).

members to be challenged on the basis of whether the race of the accused—if the accused was a visible minority—would impact their ability to judge the case fairly and without bias, prejudice, or partiality.[48] Defense counsel is usually permitted to pose one or two carefully scripted questions to the prospective juror. Two triers are selected from the jury pool, and they sit as a miniature jury, observing the prospective juror as he or she answers questions, and they then provide an opinion on whether the juror should be challenged.[49] If the juror is unchallenged and deemed acceptable, it is then left to the defense counsel and the prosecutor to determine whether to exercise a peremptory challenge, assuming they have not exhausted their reservoir of challenges. If no peremptory challenge is exercised, the individual will form part of the jury and the procedure will continue until twelve jurors are selected.[50] Professor Neil Vidmar described the Canadian jury system as both conservative and progressive.[51] Despite its strong allegiance to its British roots, the challenge-for-cause process that emanated from *Parks* is, in Professor Vidmar's view, a "recognition of twentieth century psychological understanding of human behavior."[52]

B. *United States*

The aim of this section is to succinctly review some of the most important features of jury selection in the United States. This will be accomplished by briefly summarizing the empirical data on jury selection practices in state and federal courts in the United States. It will become apparent that state and federal courts fall somewhere along a spectrum, ranging from a limited voir dire, which is judge led, to a more expansive voir dire, which is led by attorneys.

Next, this section will examine the difficulties of attempting to define the constitutional requirements for an adequate voir dire. This section

48. *See Parks*, 1993 CanLII 3383, paras. 83–84. Justice Doherty recommended "it would be the better course to permit that question in all such cases where the accused requests the inquiry." *Id.* para. 84.

49. *See* Vidmar, *supra* note 3, at 160. In *Parks*, the first question permitted concerned whether the jurors' ability to judge fairly could be affected by the fact the case involved cocaine. *Parks*, 1993 CanLII 3383, para. 16. The second question was: "Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man?" *Id.*

50. *See* Vidmar, *supra* note 3, at 145.

51. *Id.* at 172.

52. *Id.*

concludes with a brief description of challenges for cause, peremptory challenges, and the constitutional limits that have been placed on prosecutors' use of peremptory challenges.

Most United States courts, whether state or federal, "provide that the questioning of prospective jurors may be conducted by the judge, the attorneys for the parties, or both."[53] The National Center for State Courts recently completed a pioneering national study of jury system management and trial procedures in state and federal courts in the United States.[54] The judge-and-lawyer survey claims to be "the first known study to document on a national basis the extent to which judges employ various practices and procedures during voir dire, trial, and jury deliberation."[55]

Not surprisingly, the authors reported tremendous variation in jury selection procedures from state to state, including a traditional, limited voir dire with no questionnaire, general or case-specific questionnaires, individual questioning in the jury box, and group questioning.[56] Allowing more detailed questioning results in a more expansive voir dire when there is a juror questionnaire, numerous and broader questions that are both close ended and open ended, individual questioning, and participation by both attorneys and the judge.[57] In a ranking of the fifty states and the District of Columbia, South Carolina had the most judge-dominated voir dire, whereas Connecticut had the most attorney dominated.[58] In federal courts, voir dire is more often conducted by judges, whereas in state courts, the attorneys generally lead voir dire more than the judges.[59] The *State-of-*

53. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 158 (2010) (citations omitted).

54. GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007), *available at* http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendiumFinal.pdf.

55. *Id.* at 27.

56. *See id.* at 27–31.

57. For a helpful delineation of the traditional limited voir dire versus the more expansive voir dire see Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1183–86 (2003).

58. *See* MIZE, HANNAFORD-AGOR & WATERS, *supra* note 54, at 79.

59. *Id.* at 27–28; *see also* Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process*, JUDGES' J., Winter 2008, at 4, 6, *available at* http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/JJ_Winter08_full.authcheckdam.pdf.

the-States Survey broke down the types of voir dire into three categories: (1) "Predominantly or Exclusively Judge-Conducted Voir Dire," (2) "Judge and Attorney Conduct Voir Dire Equally," and (3) "Predominantly or Exclusively Attorney-Conducted Voir Dire."[60] In nearly half of the states, voir dire is led predominately by attorneys.[61] In a little over a third of the states, the judge and attorneys share the responsibilities of conducting the voir dire equally.[62] The judge exclusively conducts the voir dire in the minority of the states and the District of Colombia.[63]

The study also showed the length of voir dire for felony trials was linked to whether the process was judge led or attorney led, with South Carolina having the shortest median length—thirty minutes—for a voir dire in a felony trial and Connecticut having the longest median length—ten hours—for a voir dire in a felony trial.[64] The median time for a civil trial voir dire in South Carolina was also thirty minutes, but the median length for the voir dire in a civil trial in Connecticut was longer—sixteen hours.[65] Also, federal court practices closely resembled the practices of the state in which the court was located.[66]

Similar to Canada, challenges for cause and peremptory challenges are both available in the jury selection process. The number allocated to each party is defined by the applicable state or federal rules. For challenges for cause, the American Bar Association, in its *Principles for Juries and Jury Trials*, recommended each jurisdiction identify grounds and standards for a challenge for cause and, at a minimum, require a juror have an interest in the case, bias, a lack of a qualification to serve as juror, a familial relationship to a participant, or an inability or unwillingness to be fair and impartial.[67]

60. MIZE, HANNAFORD-AGOR & WATERS, *supra* note 54, at 28.

61. *See id.* (showing twenty-three states use "Predominantly or Exclusively Attorney-Conducted Voir Dire").

62. *Id.* (showing eighteen states where judges and attorneys share the responsibilities equally).

63. *Id.* (showing nine states use "Predominantly or Exclusively Judge-Conducted Voir Dire").

64. *See id.* at 77.

65. *Id.* at 78.

66. Mize & Hannaford-Agor, *supra* note 59, at 7.

67. AM. JURY PROJECT, AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 11(C)(1)–(2), at 14 (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf.
Although there are independent state and federal rules setting out the preconditions to jury service, common requirements are that the prospective juror be at least eighteen

In *Rosales-Lopez v. United States*, the Supreme Court held a defendant is entitled to an adequate voir dire as part of his or her Sixth Amendment constitutional right to an impartial jury.[68] However, the decision is not very helpful in defining what constitutes an adequate voir dire. Justice White, in the majority decision, conceded it is very difficult to establish on appellate review that the voir dire was inadequate because the trial judge functions as a juror in assessing the bias or partiality of prospective jurors by using evidence of their demeanor and their answers to questions.[69] On the facts of the case, the Court refused to find the trial judge should have asked the jurors the following questions about possible prejudice toward Mexicans: "Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?"[70] In the Court's view, it was sufficient that the judge asked almost half of the twenty-six questions suggested by the defendant's counsel and some general questions about prejudice and feelings about aliens.[71] In a later section, this Article will examine in detail the Court's most recent pronouncement on voir dire practices in *United States v. Skilling*, and the division in the Court will illustrate how views on the adequacy of a voir dire can differ sharply.[72]

One of the controversial issues in this area concerns the efficacy of the voir dire being conducted—some allege most voir dire conducted in American courtrooms are too limited in scope to be effective,[73] while others suggest voir dire is generally time-consuming, cumbersome, and meaningless.[74] Professor Valerie Hans voiced concerns of prospective jurors being less than forthcoming during limited voir dire questioning than

years old, be a United States citizen, and not have a felony criminal record.

68. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

69. *Id.*

70. *Id.* at 185, 194.

71. *Id.* at 185–86. The Court did say the special circumstances in which questions such as this would be permitted would be cases in which the defendant is charged with a violent offense and he or she is of a different race than the victim. *Id.* at 192.

72. *See infra* Part IV.

73. *See, e.g.*, Neal Bush, *The Case for Expansive Voir Dire*, 2 LAW & PSYCHOL. REV. 9 (1976) (discussing how voir dire is limited by judges to increase efficiency, yet a more expansive voir dire results in more successful challenges for cause).

74. Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 545 (1975) ("Currently, however, the voir dire procedure is being attacked as a cumbersome, time-consuming, meaningless part of the jury trial." (citations omitted)).

during individual questioning.[75] This is due to a number of reasons, including an inability to recognize one's own biases, the desire to present oneself in a socially desirable light, feeling uncomfortable about speaking up in a group, and concern the information requested is private and confidential.[76] The reasons echo the recommendation in Principle 11 of the ABA Standards: juror questionnaires ought to be used or jurors should be questioned individually by the attorneys because studies suggest jurors are less candid when questioned as a group by the trial judge.[77] The *State-of-the-States Survey* also noted the balance between judge- and attorney-conducted voir dire is vital for several reasons and "[e]mpirical research supports the contention that juror responses to attorney questions are generally more candid . . . ."[78]

A peremptory challenge allows a party to remove a prospective juror without the necessity of articulating a reason. Historically, the only limit placed on peremptory challenges was the number each party could use.[79] However, the United States Supreme Court has placed constitutional limits on the use of peremptory challenges. In *Batson v. Kentucky*, the Court held the Equal Protection Clause prevents a prosecutor from using a peremptory challenge to exclude prospective jurors on the basis of race.[80] If a prima facie showing is made that the prosecutor improperly relied on race as a ground for exercising a peremptory challenge, the burden shifts to

75. Hans & Jehle, *supra* note 57, at 1182, 1186–90; *see also* Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 503, 510–15 (1965) (finding a number of the 225 jurors interviewed failed to reveal both relevant and prejudicial information); Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Room*, 36 CT. REV., Spring 1999, at 10 (discussing the benefit of individual questioning); Suggs & Sales, *supra* note 2, 258–61; Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 495–98, 528 (1978) (explaining an experiment that asked peremptorily excused jurors and the remaining venire members to remain as "shadow jurors" revealed "voir dire as conducted in [those] trials did not provide sufficient information for attorneys to identify prejudiced jurors").

76. Hans & Jehle, *supra* note 57, at 1192–96.

77. *Compare id.* at 1196, *with* AM. JURY PROJECT, *supra* note 67, at 13.

78. MIZE, HANNAFORD-AGOR & WATERS, *supra* note 54, at 28 (citing Susan E. Jones, *Judge Versus Attorney-Conducted Voir Dire*, 11 L. & HUM. BEHAV. 131 (1987)).

79. Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 808 n.2 (1989) (citations omitted).

80. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

the prosecutor to demonstrate there was a neutral explanation for the exercise of the challenge.[81] Much has been written in the past twenty-five years about the implications of *Batson v. Kentucky* on jury selection.[82] Many commentators have expressed real concern that it is difficult, if not impossible, to prove a peremptory challenge was racially motivated and it is too easy for prosecutors to proffer neutral grounds, such as "'posture and demeanour,'" as an escape hatch.[83]

III. JURY VETTING SCANDAL—CANADA

A. *The Jury Vetting Scandal Breaks in 2009*

In 2009, it came to light that Ontario Crown prosecutors in several regions were asking regional police forces to vet prospective juror lists by identifying which jurors had criminal records or disclosing whether any information existed suggesting a juror was unsuitable.[84] The information furnished went beyond basic eligibility requirements to serve as a juror and included comments such as "'calls a lot for minor complaints,' 'neighbour shot his cat,' and 'dad is a drinker.'"[85] These requests were in direct contravention of a memorandum issued to prosecutors in 2006 from the Assistant Deputy Attorney General in Ontario instructing them to limit checks of prospective jurors to criminal record alone and any information

81. *Id.* at 96–97.

82. *E.g.*, Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Shari Seidman Diamond, Leslie Ellis & Elisabeth Schmidt, *Realistic Responses to the Limitations of* Batson v. Kentucky, 7 CORNELL J.L. & PUB. POL'Y 77 (1997); David D. Hopper, Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811 (1988); Steven W. Fisher, Batson v. Kentucky*: Purposeful Discrimination in Jury Selection*, N.Y. L.J., Nov. 3, 1988, at 1.

83. Alschuler, *supra* note 82, at 176 (citing United States v. Forbes, 816 F.2d 1006, 1010–11 (5th Cir. 1987)); *see also* Mize & Hannaford-Agor, *supra* note 59, at 7 (describing the Supreme Court's enforcement standard as "clumsy").

84. R. v. Emms, 2010 ONCA 817, ¶ 36 (Can. Ont. C.A.). In *Emms*, the prosecutor sent the jury panel list to five police detachments and asked "if comments could be made concerning any disreputable persons we would not want as a juror." *Id.* Ontario's jury vetting has been controversial. *Compare* Shannon Kari, *Jury Vetting's Legal Upshot: A Case in Point*, NAT'L POST, Oct. 10, 2009, http://www.aspercentre.ca/Assets/Asper+Digital+Assets/Publications+and+Events/PostArticle.pdf, *with Secret Jury Vetting Prompts Privacy Probe*, CBC NEWS, June 11, 2009, http://www.cbc.ca/canada/toronto/story/2009/06/11/jury-vetting.html.

85. *See* CAVOUKIAN, *supra* note 10, at 7.

gleaned that suggested an individual would not be impartial was to be disclosed to the defense attorney.[86]

Jury vetting arose, in part, because of prosecutors' concern that the system failed to identify jurors who were ineligible for jury service due to past convictions.[87] The system relied on the prospective jurors to reveal in a juror qualification questionnaire whether they had been convicted of an indictable offense, yet this is a distinction that would be difficult for a nonlawyer to make in Canada.[88] Summary offenses are tried by a judge only and are generally much less serious than indictable offenses, in which the accused may choose between a judge only or a judge and jury trial.[89] Confusion can easily arise in distinguishing the two because there are a plethora of offenses that are hybrid, meaning they can be either summary or indictable and the prosecutor must make an election as to the procedure to be followed.[90] The vetting crisis revealed many Ontario prosecutors were asking police to do a check on the eligibility of prospective jurors, but a few were also receptive to any other police information on prospective jurors that might be relevant to the case.[91] Police databases contain information that goes beyond criminal records—data such as whether a person has ever called to file a complaint and whether they have ever been charged with an offense, even if that charge is ultimately withdrawn or stayed.[92]

B. *Appellate Provincial Courts' Differing Reactions*

In a series of decisions released in 2010, the Court of Appeal for Ontario had the opportunity to consider what impact prosecutorial vetting has on a defendant's right to a fair and impartial jury.[93] In the first of the trilogy, *R. v. Yumnu*, Justice Watt, writing for a unanimous court,

86. *See id.* at 8, 17, 177–78.

87. *See id.* at 141.

88. *See id.* at 193.

89. DON STUART, CANADIAN CRIMINAL LAW: A TREATISE 53–54 (5th ed. 2007). However, there are several offenses—such as murder or treason—for which trial without jury requires the consent of the Attorney General. CRIM. CODE, R.S.C. 1985, C-46 § 473 (Can.).

90. *Id.*

91. *See* CAVOUKIAN, *supra* note 10, at 77–79, 84.

92. *See* ANN CAVOUKIAN, WHAT IS INVOLVED IF YOU ARE ASKED TO PROVIDE A POLICE BACKGROUND CHECK? 1–2 (2007), *available at* http://www.ppao.gov.on.ca/pdfs/sys-pol-ipc.pdf.

93. *See* R. v. Davey, 2010 ONCA 818 (Can. Ont. C.A.); R. v. Emms, 2010 ONCA 817 (Can. Ont. C.A.); R. v. Yumnu, 2010 ONCA 637 (Can. Ont. C.A.).

concluded the police were entitled to investigate whether or not any of the prospective jurors had a prior conviction that would affect their ability to serve as jurors.[94] In this case, the police officer conducting the checks confined himself to criminal records information, and he did not see it as part of his role "to help determine who should be on the jury."[95] The undisclosed information, gleaned from the prosecution's checks on prospective jurors, did not affect the reliability of the verdict or fairness of the trial.[96] The *Yumnu* Court heavily weighed the fact the prosecutor had revealed to the defense attorneys that a prospective juror might have a record for an indictable offense.[97] The court found the defense attorneys ought to have known from this statement that criminal record checks had been conducted on the prospective jurors.[98] Also, the disclosed notes of a police officer revealed the officer had vetted the list at the prosecutor's request, and there were no requests for disclosure or complaints made by the defense attorneys.[99] In fact, the court observed there was "[n]ot a peep from a quintet of experienced defence counsel."[100] The failure to disclose the results of the criminal record checks was found to have no impact on the reliability of the appellants' convictions and did not affect the overall fairness of the trial to an extent it compromised the appellants' right "to make [a] full answer and defence."[101] The record also revealed there was no reasonable possibility the jury would have been constituted differently if the defense attorneys had access to the results, as they did not exhaust their peremptory challenges and the prosecutor was always the first to challenge a prospective juror when the inquiries had revealed a criminal record.[102]

94. *Yumnu*, 2010 ONCA 637, ¶ 89. Justice Watt stated prior convictions may affect both juror eligibility and juror qualifications, and thus it follows logically that parties ought to be able to enquire into the prior convictions of prospective jurors. *Id.* In practical terms, it is only the prosecutor who has access to criminal record checks. *Id.* ¶ 90.

95. *Id.* ¶¶ 32, 34–36, 95.

96. *Id.* ¶ 107.

97. *See id.* ¶ 100.

98. *Id.*

99. *Id.* ¶¶ 102–03.

100. *Id.* ¶ 103.

101. *Id.* ¶¶ 110, 113. The appellant, Yumnu, will seek leave to appeal this decision to the Supreme Court of Canada. Cristin Schmitz, *Jury Vetting Storm Heads for Top Court*, LAW. WKLY., Oct. 15, 2010, http://www.lawyersweekly.ca/index.php?section=article&articleid=1269. The process of seeking leave to appeal to the Supreme Court of Canada is analogous to seeking certiorari in the United States Supreme Court and is extremely difficult to obtain.

102. *See Yumnu*, 2010 ONCA 637, ¶ 122.

In *R. v. Emms*, the Ontario Court of Appeal found that although the investigation of the jurors' criminal histories violated the jurors' privacy rights, it did not impact the trial's fairness, as there was no correlation between the jurors' personal history and the reliability of the verdict.[103]

In *R. v. Davey*, the court found that not all information about jurors in the purview of the prosecutor had to be disclosed to the defense.[104] "Community intelligence," which includes the personal opinions of a prosecutor based on "exposure to daily appearances in the courts and interactions with the police, witnesses, victims and the communities at large in their jurisdiction," is not subject to stringent disclosure requirements.[105] This type of knowledge, however, is likely to occur only in small geographic regions; it is unlikely to exist in the larger urban centers.

In *Yumnu*, the Court of Appeal for Ontario found the defendant was not prejudiced by the lack of access to the prosecutor's background information and, therefore, had not "wasted" peremptory challenges on jurors.[106] While the court agreed defense counsel would probably not have used peremptory challenges on certain jurors because he would have known from the background information that the prosecutor was likely to exercise a peremptory challenge, the reality was the defense counsel never exhausted his peremptory challenges.[107] Thus, the improper vetting by the prosecutor did not affect the jury's composition.[108] Furthermore, the defense was never in the situation of wanting to remove a prospective juror but not having a peremptory challenge left to use.[109]

In Nova Scotia, the appellate court reacted quite differently to an episode of jury vetting by the Crown prosecution. In *R. v. Hobbs*, the

103. R. v. Emms, 2010 ONCA 817, ¶¶ 55, 58–59 (Can. Ont. C.A.). For example, it was disclosed to the prosecution that one juror had been connected with drugs but not convicted. *Id.* ¶ 40.

104. R. v. Davey, 2010 CanLII 818, ¶ 42 (Can. Ont. C.A.).

105. *Id.* (citing *Yumnu*, 2010 ONCA 637, ¶ 76); *see also id.* ¶¶ 30–31 (explaining the personal opinions of police officers about jurors are not part of the information the prosecution is required to disclose).

106. *Yumnu*, 2010 ONCA 637, ¶¶ 113, 122–27.

107. *Id.* ¶ 122.

108. *Id.*

109. *Id.* ¶¶ 50, 122; *see also Davey*, 2010 CanLII ¶¶ 31–32 (explaining opinions offered by police officers and court officers were of limited use, especially when the prosecutor did not exercise a peremptory challenge against a juror whose name was marked by the police with the word "No," and that juror still ended up forming part of the jury).

Nova Scotia Court of Appeal ordered a new trial in a marijuana production and trafficking case because information supplied by the police to the prosecution on 100 of the 323 potential jurors was never disclosed to the defense.[110] Pivotal in the case were two concessions made by the prosecution: first, the information collected by the police should have been disclosed to defense counsel, and second, had the information been furnished, the defense would have probably exercised its peremptory challenges differently.[111] Thus, the concession by the prosecution—it had withheld information inappropriately, and this information would have impacted how counsel for the defendant participated in the jury selection process—seemed to all but ensure a successful appeal. The court, however, dismissed the argument the prosecution's conduct amounted to an abuse of process, and it determined even if the conduct was abusive, a stay was still not appropriate.[112] While the prosecutor's conduct had created the appearance of unfairness by relying on information denied to the defense, the court adopted the view the prosecutor was well-intentioned and the aim in using the police information was to select an impartial jury.[113]

C. *The Investigation by the Ontario Information and Privacy Commissioner*

Concerns over jury vetting prompted an investigation by the Information and Privacy Commissioner of Ontario. The investigation was tasked with determining the extent of the juror vetting and whether prosecutors and police agencies had violated privacy rights of prospective jurors under the Freedom of Information Protection of Privacy Act (FIPPA)[114] and the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)[115] when conducting background checks. In a report entitled *Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report*, the Commissioner found that although there had been internal discussions within the Ontario Ministry of the Attorney General since 1993 concerning the propriety of background checks on prospective jurors,[116] a formal "Practice Memorandum" was not issued to

110. R. v. Hobbs, 2010 ONCA 62, ¶¶ 1–2, 18–19, 24, 29 (Can. N.S. C.A.).

111. *Id.* ¶¶ 29, 32.

112. *Id.* ¶ 41.

113. *Id.*

114. Freedom of Information and Protection to Privacy Act, R.S.O. 1990, c. F.31 (Can.).

115. Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 (Can.).

116. CAVOUKIAN, *supra* note 10, at 7. These discussions precipitated from a 1993 decision by Justice David Humphrey of the Ontario Superior Court in which he

prosecutors banning the practice of juror background checks until March 2006.[117] The Commissioner, however, found this memorandum was largely ineffective because it failed to provide direction in any detail about the type of checks that would be permissible.[118] As a result, there were wide-ranging opinions held by the province's prosecutors on background checks—whether they were permitted and what form they could take.[119] Not surprisingly, this led to differing practices; 67% of the thirty-seven offices in the province conducted no background checks, whereas 33% received personal information about jurors that was not limited to criminal record convictions and went beyond eligibility requirements.[120]

The Commissioner concluded the practice of obtaining personal information beyond eligibility requirements violated section 38(2) of FIPPA.[121] The Commissioner ordered prosecutors in Ontario to immediately cease collecting personal information that was beyond the criminal record entries needed to confirm eligibility under the Juries Act and the Criminal Code and recommended the Provincial Jury Centre—a centralized agency already in possession of jurors' names—be the only agency entitled to access criminal records databases such as CPIC to screen jurors on the basis of criminal record.[122] The Ontario legislature acted swiftly to enact this recommendation and section 38 of the Good Government Act of 2009, which made several changes to the Juries Act. The amendments created a system whereby the sheriff may request a criminal record check be conducted by a police force in order to assess a person's eligibility to serve as a juror.[123]

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questioned the practice of juror background checks. *Id.*

117. *Id.* at 8.

118. *See id.*

119. *See id.* at 8–9.

120. *Id.* at 8.

121. *Id.* at 120 (citing Freedom of Information and Protection to Privacy Act, R.S.O. 1990, c. F.31 (Can.)). For example, section 638(1)(c) of the Criminal Code gives the "prosecutor or an accused" an unlimited number of challenges to a prospective juror who "has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months." Criminal Code, R.S.C. 1985, C-46 § 638(1)(c) (Can.).

122. CAVOUKIAN, *supra* note 10, at 10.

123. Good Government Act, S.O. 2009, c. 33, sched. 2, § 38 (Can. Ont.). The category of those ineligible to serve as a result of a criminal record was also clarified by the Act. *Id.* A person is now ineligible under section 4(b) of the Ontario Juries Act if they have been found guilty of "an offence that *may* be prosecuted by indictment," rather than the previous version, which excluded only if the person *has been* convicted of "an indictable offence." *Id.* (emphasis added). Thus, those individuals who have

Unfortunately, in neither the Privacy Commissioner's report nor the provincial appellate court decisions from Ontario or Nova Scotia is there any careful weighing of the privacy rights of prospective jurors with the right of an accused person to a fair and impartial jury. Instead the Commissioner stated that "since no party [had] challenged the constitutionality of any provision of *FIPPA* or *MFIPPA*," no need existed to conduct a detailed analysis about whether the privacy provisions violated an accused's right under section 11(d) of the Charter of Rights and Freedoms to "a fair . . . hearing by an independent and impartial tribunal."[124] She further concluded there was no need to even use the Charter values of a fair and impartial jury trial as an interpretive principle for the Privacy Act provisions because the supreme court only allowed these values in cases in which "genuine ambiguity" existed.[125] However, Justice Rosenberg wrote in *R. v. Davey* that "violations of privacy legislation do not in and of themselves undermine the fairness of the jury selection process."[126] In fact, the court found the appellant had not established any privacy violations and had not articulated how any alleged violation had undermined the fairness of his trial.[127] This issue may receive more in-depth treatment if any of the trilogy of cases is successful in gaining leave to appeal to the Supreme Court of Canada. However, because the focus of the cases is on reproving the conduct of the prosecution in obtaining background information irrelevant to eligibility, the court may not wish to broaden the issue. If the issue were framed in terms of defense counsel demanding equal access to the background information rather than being critical of any party having the information, the courts might be more inclined to consider whether the right of a prospective juror to privacy must yield to the right of a defendant to participate in meaningful jury selection beyond the "hunch-based" system brought about by the limited information on jurors.

There is no question that under Canada's strict disclosure laws any of the information gleaned by the Crown prosecutor should be disclosed to

been convicted of an offense in which the Crown proceeded summarily are clearly ineligible if the offense was hybrid and the prosecutor had to make an election on how to proceed. An example of a hybrid offense is fraud involving an amount under $5,000. Criminal Code, R.S.C. 1985, C-46 § 380(1).

124. CAVOUKIAN, *supra* note 10, at 105, 107.

125. *Id.* at 107–08.

126. R. v. Davey, 2010 ONCA 818, ¶ 29 (Can. Ont. C.A.).

127. *Id.*

defense counsel,[128] but does the failure to do so mean that neither the prosecutor nor defense counsel should be entitled to this information in the future? This does not mean to suggest the accused's right to a fair and impartial jury would trump the privacy rights of prospective jurors, but to present it as an irreducible conclusion that neither party should be entitled to any information beyond what appears on the list seems to ignore the reality of the Internet age in which information about many people is easily available through Google, LinkedIn, and Facebook searches.

The consequences of the jury vetting scandal in Ontario and Nova Scotia include both legislative change to the Ontario Juries Act and the formulation of juror vetting policies by the Public Prosecution Service of Canada (PPSC) and the Nova Scotia Public Prosecution Service.[129] On June 11, 2009, the PPSC released its policy stating federal prosecutors may only ask the Royal Canadian Mounted Police to conduct criminal record checks of potential jurors.[130] The purpose of the checks is limited to establishing jurors have a conviction that would render them ineligible to perform jury service under the auspices of either the Criminal Code or the provincial Juror's Act where the trial is to be held.[131] Additional information may not be sought and "[a]ll information obtained will be disclosed to defence" counsel.[132] In the meantime, it is patently clear neither the defense nor the prosecution is entitled to peruse the contents of police databases for extraneous information on prospective jurors. What is less clear is whether either party has a right to use publicly available sources to research prospective jurors and to use this information when exercising peremptory challenges.

128. The Supreme Court of Canada has made it clear the prosecution must disclose all relevant information in its possession. R. v. Stinchcombe, [1991] 3 S.C.R. 326, paras. 24–26 (Can.).

129. R. v. Hobbs, 2010 NSCA 62, ¶ 46 (Can. N.S.). The Ontario Ministry of the Attorney General released a direction and reminder to all prosecutors on May 26, 2009, that criminal record checks should only be requested for indictable offenses and that disclosure ought to be provided to the defense. *See* Memorandum from John Ayre on Juror Background Checks to All Dirs., Crowns, & Ass't Crown Attorneys (May 26, 2009), *in* CAVOUKIAN, *supra* note 10, at 179.

130. *Hobbs*, 2010 NSCA 62, ¶ 45.

131. *Id.* For example, section 638(1)(c) of the Criminal Code of Canada provides a juror who has a conviction for which the sentence was more than twelve months imprisonment and has not received a pardon is not qualified. Criminal Code, R.S.C. 1985, C-46 § 638(1)(c).

132. *Hobbs*, 2010 NSCA 62, ¶ 45.

IV. *SKILLING V. UNITED STATES*—AN ATTACK ON THE SUFFICIENCY OF THE VOIR DIRE

The United States Supreme Court addressed the subject of fair trial jurisprudence in *Skilling v. United States.*[133] In a decision written by Justice Ginsburg, the majority was not persuaded the empaneled jurors had shown bias during the voir dire.[134] The Court acknowledged the fairness of the trial in which the Chief Executive Officer of Enron had faced charges of honest-service wire fraud, securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading.[135] However, it nonetheless vacated Skilling's honest-services fraud conviction on different grounds and remanded the matter to the Fifth Circuit.[136] Skilling had argued the pretrial publicity and community prejudice prevented him from receiving a fair trial and actual bias infected the jury that tried him.[137] He attacked the sufficiency of the five-hour voir dire, arguing it failed to meet basic constitutional requirements and alleged several jurors were openly biased.[138]

While the Fifth Circuit presumed juror prejudice against Enron and Skilling existed amongst the population in Houston as a result of the magnitude and negative tone of media coverage, it found voir dire can act as a "strong disinfectant of community prejudice" and the voir dire in Skilling's case was "exemplary."[139] The Supreme Court agreed and cited two factors as effective steps taken to rid the jury of bias: first, the extensive screening achieved by the fourteen-page questionnaire drafted in large part by Skilling's lawyers, which "helped to identify prospective jurors excusable for cause,"[140] and second, the trial judge's voir dire

133. Skilling v. United States, 130 S. Ct. 2896 (2010).

134. *Id.* at 2925.

135. *Id.* at 2911, 2925.

136. *Id.* at 2934–35. The court found Congress, in prohibiting fraudulent deprivations of "the intangible right of honest service" in 18 U.S.C. § 1346, intended only to encompass schemes involving bribes and kickbacks. *Id.* Because it had not been alleged that Skilling's misconduct included either bribes or kickbacks, the conviction was vacated. *Id.*

137. United States v. Skilling, 554 F.3d 529, 557 (5th Cir. 2009).

138. *Id.*

139. *Id.* at 561.

140. *Skilling*, 130 S. Ct. at 2919. Hardship exemptions were granted to about ninety persons. *Id.* at 2909. Another 119 were excused for cause, hardship, or physical disability, and both parties agreed to exclude every prospective juror who indicated on the questionnaire a preexisting opinion would impair his or her ability to impartially consider the evidence. *Id.* In Justice Sotomayor's view, two-thirds of the jurors—188

questioning of the remaining prospective jurors ensured those selected either had no connections or only attenuated links to Enron.[141]

Skilling's multiple requests for a change of venue were all denied.[142] He also requested the attorneys be permitted to conduct the voir dire of the jurors.[143] The trial judge refused because in his experience jurors were more forthcoming to the judge than to the lawyers.[144] He did, however, permit counsel to ask follow-up questions.[145] During the voir dire, jurors were asked about exposure to Enron in the media and directed to any of the answers in their questionnaire that signaled potential bias, and then follow-up questions by the attorneys were permitted.[146] This process resulted in the qualifying of thirty-eight prospective jurors from which the twelve jurors and four alternates could be empanelled after each side used their peremptory challenges.[147] An unsuccessful challenge for cause was made against Juror 11 by Skilling's counsel.[148] His counsel also objected to the seating of six of twelve jurors and maintained he would have used a peremptory challenge to exclude them had he not used up the fourteen joint peremptory challenges on venire members the trial judge refused to excuse for cause.[149] No assertion was made that these six jurors were biased.[150] The trial judge refused to grant any more additional peremptory challenges than the extra two given.[151] Justice Ginsburg distinguished this case from its previous fair trial jurisprudence in which it presumed juror prejudice.[152] Instead, the Court asserted the cases of *Rideau v. Louisiana*,

of the 283 who completed questionnaires and were not excused for hardship—reflected a predisposition to convict in their answers. *Id.* at 2944 (Sotomayor, J., concurring in part and dissenting in part).

141. *Id.* at 2920 (majority opinion).

142. *Id.* at 2908–10.

143. *Id.*

144. *Id.* It is interesting the judge's personal experience conflicts with some of the empirical literature that suggests lawyers are better able to uncover bias. *See, e.g.*, Hans & Jehle, *supra* note 57, at 1196–97.

145. *Skilling*, 130 S. Ct. at 2910.

146. *Id.*

147. *Id.* at 2911.

148. *Id.* at 2924. Juror 11 had stated "'greed on Enron's part' triggered the company's bankruptcy and that corporate executives, driven by avarice, 'walk a line that stretches sometimes the legality of something.'" *Id.* However, he also asserted he did not know if "Skilling had crossed that line" and "could be fair." *Id.*

149. *Id.* at 2911.

150. *Id.*

151. *Id.* at 2911 n.7.

152. *Id.* at 2915–16 (citations omitted).

Estes v. Texas, and *Sheppard v. Maxwell* establish it is only in an extreme case the Court will make a presumption.[153] The Court discussed some of the key factors that distinguished *Skilling* from these cases: (1) Houston's 4.5 million eligible jury population size provided a large, diverse pool of prospective jurors, (2) there was no confession in the news coverage of Skilling that would be impossible for jurors to intellectually set aside during the trial, and (3) there was a significant time delay between Enron's bankruptcy and Skilling's trial.[154]

We can see in the majority opinion authored by Justice Ginsberg that the Court deferred significantly to the trial judge who conducted the voir dire.[155] The Court stated "[n]o hard-and-fast formula dictates the necessary depth or breadth of voir dire" and jury selection is particularly within the domain of the trial judge.[156] This deference and hesitancy to overrule the trial judge who had the unique opportunity to view the prospective jurors' demeanor and body language recognized the record simply cannot capture the numerous factors that could influence a trial judge's assessment of partiality.[157] Although the voir dire lasted only five hours, the Court pointed out the juror questionnaire effectively screened a large number of the venire members and highlighted problematic areas both the judge and counsel could zero in on during their focused questioning of the prospective jurors.[158] Additionally, the questioning was conducted individually at the urging of Skilling's counsel.[159] Skilling was unable to meet the stringent test of "manifest error" required to overturn a trial judge's finding of impartiality.[160] The Court concluded that, notwithstanding the flaws listed by Skilling, the jury selection process was able to secure a jury that was "largely untouched by Enron's collapse."[161]

In Justice Sotomayor's view, which was joined by Justices Breyer and Stevens, the breadth of probing conducted during the voir dire must be relational or respond to the depth of the prejudice in the community.[162] Many of the most egregious remarks cited in Justice Sotomayor's opinion

153. *Id.* (citations omitted).
154. *Id.*
155. *Id.* at 2917.
156. *Id.*
157. *Id.* at 2918.
158. *Id.* at 2919.
159. *Id.*
160. *Id.* at 2923 (citing Mu'Min v. Virginia, 500 U.S. 415, 428 (1991)).
161. *Id.* at 2919–20.
162. *Id.* at 2942 (Sotomayor, J., concurring in part and dissenting in part).

were from prospective jurors who did not actually make it onto the jury.[163] Skilling's lawyer had challenged these prospective jurors, but the challenge had been dismissed by the trial judge.[164] They did not form part of the jury because Skilling's lawyer elected to use peremptory challenges to exclude them.[165] While the continued existence of the peremptory challenge is a topic of substantial controversy, it was vital in this case to remove from the venire jurors whose answers suggested bias but whom the judge refused to challenge for cause. Justice Sotomayor called into question the "undiscovered" bias of many of the jury members.[166] She pointed to the failures of the trial judge to agree to the challenge of patently biased jurors as infecting the process and to adequately probe the jurors.[167] She was concerned with the trial judge's willingness to accept at face value an assertion of lack of bias or a stated willingness to judge the case fairly and without bias.[168] As an example of the concern that society should have about the process, Justice Sotomayor cited the decision of the district court judge to ask the group of jurors en masse rather than individually if they would be unable to judge the case fairly and without bias.[169] She pointed out that, of the large group who maintained they could shoulder this task, a significant number later showed bias during the individual questioning.[170] Justice Sotomayor concluded there were likely others who "harboured similar biases that a more probing inquiry would likely have exposed."[171] Reflected in Justice Sotomayor's opinion is the image of a tainted jury pool that needed to be cleansed with a thorough, lengthy, and intensive jury

163. *Id.* at 2944–45. Juror 29 wrote Skilling "was 'not an honest man'" on her questionnaire. *Id.* at 2945 n.6. She had also lost about $50,000–60,000 from her 401(k) due to Enron's bankruptcy, but she claimed to be able to presume innocence. *Id.* at 2959 n.19. Juror 63 expressed the view Skilling "probably knew [he was] breaking the law" but claimed to be able to absolutely presume innocence. *Id.* at 2960. The for-cause challenges made to these jurors were denied, although peremptory challenges prevented them from actually serving on the jury. *Id.* at 2959–60.

164. *See id.* at 2944–45, 2945 nn.4 & 6.

165. *Id.* at 2923 n.31 (majority opinion).

166. *See id.* at 2962 (Sotomayor, J., concurring in part and dissenting in part) ("It thus strikes me as highly likely that at least some of the seated jurors, despite stating that they could be fair, harbored similar biases that a more probing inquiry would likely have exposed.").

167. *Id.* at 2958–59.

168. *Id.* at 2959 ("Worse still, the District Court on a number of occasions accepted declarations of impartiality that were equivocal on their face.").

169. *Id.* at 2962.

170. *Id.*

171. *Id.*

selection process.[172] The only question is how intensive this cleaning process must be. This conflicts with the Canadian view of the juror as essentially untarnished and unbiased. The majority's opinion reflected a compromise position—even a speedy voir dire can effectively ferret out prejudice when screening questionnaires are used and questioning by the judge and attorneys is focused and exacting.[173]

Clearly the abbreviated length of the voir dire process irked Justice Sotomayor, although she put in a caveat that she did not mean to suggest brevity and efficiency during the jury selection process should be punished.[174] However, it is clear the short time devoted to jury selection was a significant contributing factor to the deficiencies she found in the process. The jury selection in *Skilling* started with four-hundred prospective jurors and lasted only five hours, excluding the time spent completing the questionnaire, whereas the voir dire process in *Patton v. Yount*—forming part of the Court's jurisprudence on jury selection—took ten days and involved 292 prospective jurors.[175]

In short, while there was little evidence to suggest actual bias in those jurors who served on Skilling's jury, the manner in which the jury selection process unfolded—its abbreviated nature, the failure of the judge to remove for cause many clearly biased jurors, and the refusal of the judge to permit expanded review of answers about exposure to media coverage—meant, in the minority's view, the defendant did not have a fair opportunity to identify biased jurors.[176] Justice Sotomayor characterized the judge's questioning of the jury pool as anemic and found that the limitations placed on the follow-up questions the lawyers could ask were unduly strict.[177]

Although Justice Sotomayor did not go as far as suggesting the change of venue application should have been granted, she did suggest there is a sliding scale for the expectations placed on the voir dire process.[178] In some cases where the prejudice is high, even the most

172. *See id.* at 2962–63.

173. *See id.* at 2917–25 (majority opinion).

174. *Id.* at 2956 n.13 (Sotomayor, J., concurring in part and dissenting in part).

175. *Id.* at 2951 (citing Patton v. Yount, 467 U.S. 1025, 1029 (1984)).

176. *See id.* at 2962 & n.25.

177. *Id.* at 2958 n.17, 2961 (suggesting the majority's criticism that Skilling's lawyers failed to obtain additional information through follow-up questioning is an unfair criticism given the limits placed on questioning by the trial judge).

178. *See id.* at 2953 (stating while procedures used by the district court may be sufficient in "typical high-profile case[s]," the same procedures were not sufficient in

scrupulous voir dire will not be able to produce an impartial jury.[179] While clearly this was not one of those cases—she never suggested it would have been impossible for the judge to conduct an adequate and fair voir dire—she certainly found the process undertaken was far from exemplary. However, it is fair to ask if Justice Sotomayor is putting an impossibly high standard on district court judges. Is Justice Sotomayor getting dangerously close to trying to control the jurisdiction of a trial judge to conduct jury selection and abandon the historical deference due decisions on bias and challenges to jurors?

While both the majority and minority have radically different views on the adequacy of the *Skilling* voir dire, the case illustrated the tension that exists in conducting jury selection expeditiously while attempting to be thorough and exacting enough to detect bias amongst prospective jurors. In the majority's view, this balance was achieved and there was not a manifest error that would have entitled the Court to impugn the process and vacate the convictions. Trial judges who continue to shoulder the burden of these conflicting goals during jury selection will at least gain comfort from the *Skilling* decision, knowing the appellate courts are loathe to intervene and second-guess the judgment calls made during the voir dire process.

V. CONCLUSION

The comparative approach taken by this Article demonstrates how the voir dire process—a protected component of the constitutional right to a jury trial—can operate quite differently in two countries, yet still strive to achieve the same end of a fair and impartial jury for those accused of crimes. It is artificial, of course, to suppose the voir dire process unfolds in a uniform way in each country. There are important regional differences, as well as federal and state variations, reflected in the comprehensive *State-of-the-States Survey*.[180] However, as seen in the description of each country's voir dire process, an essential difference exists between the two countries. Canada is generally hostile toward any trend to "pollute" the jury by using antecedent information about jurors' views and life experiences during jury selection, whereas in the United States, as recently professed by the Court in *Skilling*, there is confidence this type of

this case due to the extraordinary circumstances).

179. *See id.* at 2952.

180. *See generally* MIZE, HANNAFORD-AGOR & WATERS, *supra* note 54. There is no comparable study of how jury selection procedures vary from province to province in Canada.

information can be used in the voir dire process to "disinfect" the jury pool of those who are partial and biased.

This Article has shown how the recent jury vetting scandal has highlighted Canada's strong commitment to the principle of random jury selection and its recognition of the right of jurors' privacy. While the decisions of the two provincial appellate courts that recently considered the improper vetting have differed on the seriousness of the breach, both have been critical of the practice of using police databases to glean background information, which goes beyond the question of whether a prospective juror has a criminal record that makes them ineligible. Whether or not this issue will be litigated on the national stage depends on the success of *Yumnu*'s recent application to the Supreme Court of Canada.

The United States Supreme Court's grappling with the jury selection procedure in *Skilling* showed the tension that exists in trying to balance the right of a defendant to an adequate voir dire and the interests of courts in conducting an expeditious voir dire. It also raised the interesting question of whether the repeated failure of the trial judge to allow the challenge of jurors in the face of disturbing information about their views of Skilling's guilt or their close connection to the scandal, which necessitated the use of peremptory challenges, should call into question the jury selection process as a whole. While the majority was not persuaded that the brevity of the voir dire procedure or the judge's willingness to accept jurors as impartial in the face of evidence of their bias imperiled the defendant's rights, Justice Sotomayor's powerful indictment of the voir dire conducted certainly reflected a very different view of the jury selection and raised interesting questions about whether the failure to challenge jurors whose answers suggested bias should cause us to lose confidence in the absence of bias among other persons in the venire.