Vetting Voir Dire

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John Campbell et al., *An Empirical Examination of Civil Voir Dire: Implications for Meeting Constitutional Guarantees and Suggested Best Practices* (Apr. 27, 2020), available at SSRN.

An Empirical Examination of Civil Voir Dire: Implications for Meeting Constitutional Guarantees and Suggested Best Practices is a provocative new paper by an all-star cast of empirical legal scholars, including John Campbell, Jessica Salerno, Hannah Phalen, Samantha Bean, Valerie Hans, Less Ross, and Daphna Spivack. In the paper, the authors start with a set of key questions: "[I]f a fair jury is the real goal, how do we ensure we have one? Which jurors should be seated, and which excluded? And how do we achieve the goal of finding the biases that pervert the jury system?" (P. 2-3).

In tackling these key questions, the authors recognize that juries sit in the center of our civil justice system; the decisions they make cast shadows that affect myriad claims. And voir dire (the process whereby questions are asked of the venire panel to identify the prospective jurors who will be excluded by peremptory challenges or for cause) is the filter that determines which individuals serve on juries and which do not. Yet, despite the process's importance and centrality, we know remarkably little about how voir dire is conducted in the United States and how good it is at achieving its stated aims. The authors' much-needed investigation starts to answer both questions—and, as I explain below, might also have implications far beyond the paper's four corners.

To gain leverage on the voir dire efficacy question, the authors gave 2,567 Mechanical Turk participants three scenarios that presented three separate vignettes involving (variously) a bad faith insurance law claim, a wrongful birth claim, and a medical malpractice claim. The "prospective jurors," meanwhile, were "screened" either not at all, via bare-bones questioning, or via an extended inquiry that probed, among other things, the individuals' support for litigation, discomfort with noneconomic damages, attitudes toward lawsuits, suspicion regarding fraudulent claims, and political ideology.

Ultimately, the authors conclude that a rigorous voir dire examination matters—and it matters more than you might think.

Interestingly, the authors found that the information surfaced by truncated voir dire questioning—in use in hundreds of American courthouses—did not usefully predict jurors' judgments. By contrast, the authors found that responses to extended voir dire *significantly* predicted how jurors would rule. Indeed, responses to extended voir dire questioning offered insight beyond the obvious. For example, the authors discovered that jurors who were opposed to noneconomic damages were more than twice as likely to also offer a verdict favoring the defendant, even though views regarding the appropriateness of such damages, logically, should not impact judgments regarding liability.

When it came to uncovering those prospective jurors who would have trouble following a judge's directions—i.e., those prospective jurors who really ought to be excluded for cause—findings were similar.

In all, the authors uncovered a "surprisingly high number of jurors"—42 percent of the sample— "whose responses revealed that they might have trouble following the law." (P. 80.) Yet, these non-law-followers

"would not have been identified and struck from the jury based only on the minimal voir dire questions that required jurors to self-identify biases." (P. 80.) It took more sustained interrogation in order for their unsuitability to come to light. Also disquieting: When the non-law-followers *were* allowed into the jury pool, they were less likely to rule for the plaintiff and also awarded significantly depressed damages. Indeed, the non-law-followers awarded $852,932 less than respondents generally, on average.

Given all this, the authors conclude that, to be done reasonably well, "voir dire requires time." (P. 84.) If voir dire is rushed, or if it's conducted in a perfunctory fashion, its value is, unfortunately, *de minimis*, and jurors will be empaneled who, by rights, ought to be excluded for cause.

The paper is critically important in its own right: With concrete tips for how voir dire should be conducted, alongside sober evidence about the peril of side-stepping or short-circuiting these guidelines, this piece is essential reading for every trial judge interested in the impartial operation of the civil (or criminal) justice system.

Yet, I find the paper valuable for another reason, too: Embedded deep within it, perhaps, is a clue to solving a crucial puzzle—relevant for tort scholars and practitioners, in particular.

It is well known that there are dramatically fewer tort trials in the United States than there used to be.[1] We also know that, when there *are* tort trials, damage awards are down sharply. According to the Bureau of Justice Statistics, the median jury award in state court tort cases was $71,000 in 1992 but only $33,000 in 2005—a drop (in inflation-adjusted dollars) of 53.5 percent.[2]

But why? What explains that steep decline? There are, to be sure, any number of possible culprits—from reforms to substantive law, to changes in judicial composition, to the advent of AI-driven tech.[3] One possible explanatory variable that I return to, however, is that *juries* might be viewing cases differently than they did in the days of yore—and that, therefore, to unlock the mystery of declining damages, a close look at jury composition and conduct is called for.[4]

And *that* brings us full circle to John Campbell and co-authors' work. Campbell and co-authors find that, without a detailed voir dire, non-law-followers will be included on juries—and when these non-law-followers do make it on to juries, they are apt to significantly skew judgments and drive down damages.

And, what has happened to voir dire in recent decades? Fueled by a shift toward "managerial judging" and a sense that court time is a scarce resource that must be restricted and rationed, judges have "streamlin[ed] voir dire procedures."[5] Perhaps as a consequence, voir dire in many courts (particularly in the federal system) has, it appears, become ever more cursory. As one recent article explains: "Numerous courts across the country, citing time constraints, have either reduced the time allocated for voir dire or switched from attorney- to judge-conducted voir dire." Owing to these restraints, "most federal courts, and many state courts, only provide litigants with very basic identifying information."[6] This cursory examination, Campbell and co-authors show, yields almost nothing of use.

Now, did the restriction of voir dire partially *cause* the observed drop in tort damages? Are the two trends causally linked? Not necessarily. Correlation is not causation; far more research is required.[7] But, given Campbell et al.'s findings—that (1) many prospective jurors actually have disqualifying biases, (2) cursory voir dire fails to identify these individuals, and (3) when these individuals *are* seated on juries, they tend to side with defendants and depress damages—certainly, we ought to find out.

1. Nora Freeman Engstrom, *The Diminished Trial*, 86 **Fordham L. Rev.** 2131, 2131–32 (2018).
2. Bureau of Just. Stat., 223851, Civil Bench and Jury Trials in State Courts, 2005 (2009). These

numbers come from trials conducted in the nation's seventy-five most populous counties. During this period, damages in contract cases rose (from $77,000 in 1992 to $92,000 in 2005), suggesting that the change reflects something about tort, in particular. Interestingly, as damages have fallen, tort filings have dropped as well—meaning, likely, that the cases that *are* filed have survived more stringent screening and are therefore (one might assume) of relatively higher quality. *See* Nora Freeman Engstrom, *Supplying a Key Piece of the Tort Decline Puzzle*, **Jotwell**, Mar. 30, 2020, https://torts.jotwell.com/supplying-a-key-piece-of-the-tort-decline-puzzle/ (collecting statistics).

3. For a discussion of these and other changes that might explain observable trends, see David Freeman Engstrom & Nora Freeman Engstrom, *Legal Tech and the Litigation Playing Field*, at 1–3 (working draft, 2021).
4. Some trial lawyers, at least, seem to share the view that juries have changed, observing: "[J]uries have gotten mean, real mean." Stephen Daniels & Joanne Martin, *Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest – It's Even More True Now*, 51 **N.Y.L. Sch. L. Rev.** 285, 297 (2007) (quoting a Texas trial lawyer, interviewed in the late 1990s).
5. Judicial Conference of the United States, Committee on Court Administration and Case Management, Civil Litigation Management Manual 110 (2d ed. 2010); *see also* Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 **U. Richmond L. Rev.** 1261, 1278, 1300, 1304–05 (2010) (noting that various proponents of managerial judging have pushed for limits on voir dire).
6. Andrew Guthrie Ferguson, *The Big Data Jury*, 91 **Notre Dame L. Rev.** 935, 953–54 (2016) (quotation marks omitted).
7. For other potential culprits, see *supra* note 3.

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