

JUDICIAL RESTRICTIONS ON VOIR DIRE: HAVE WE GONE TOO FAR?

TERRY FOX[†]

ABSTRACT

The function of the jury—and the corresponding purpose of voir dire and juror challenges—in civil and criminal cases is similar: to make a reasoned decision based on admissible evidence, to apply the appropriate burden of proof, and to follow the law the court provides. Hoping to assemble a favorable jury, lawyers exercise “for cause” and “peremptory” challenges during the voir dire process.

Successful for cause challenges work to disqualify prospective jurors who cannot impartially evaluate the evidence because of bias, prejudice, or some other obstacle. Accordingly, attorneys must state a reason when exercising a for cause challenge. Peremptory challenges, however, are made without stating a reason. Former U.S. Supreme Court Justice Byron White described peremptory challenges as follows: “The function of the challenge is not only to eliminate the extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”¹ After all, every defendant is entitled to a “fair and impartial jury” under federal and state constitutions,² and “voir dire [allows] counsel ‘to determine whether any potential jurors possessed any beliefs that would bias them such as to prevent [the defendant] from receiving a fair trial.’”³

Over time, trial judges have imposed increasing restrictions on who conducts the bulk of voir dire, how it is conducted—including what questions are posed to the venire—and the time allowed for that critical component of trial.⁴ Without a doubt, state and federal courts have long had the power to oversee the voir dire process.⁵ But, have judicial restrictions gone too far? This Article examines those restrictions, within the federal

[†] A judge on the Colorado Court of Appeals, Terry Fox was appointed in 2010 and began her duties in January of 2011. As an appellate judge, she does not directly manage the voir dire process, but as a former Assistant United States Attorney and Assistant Colorado Attorney General, she participated in jury trials, including voir dire, in Colorado’s state and federal courts. The Author thanks the *Denver Law Review* student editors for soliciting this Article and shepherding it through the publication process.

1. *Swain v. Alabama*, 380 U.S. 202, 219 (1964), *overruled by* *Batson v. Kentucky*, 476 U.S. 79, 93 (1986).

2. *People v. O’Neill*, 803 P.2d 164, 169 (Colo. 1990).

3. *People v. Wilson*, 318 P.3d 538, 541 (Colo. App. 2013) (internal citation omitted).

4. *See infra* Parts III.

5. *See Connors v. United States*, 158 U.S. 408, 413 (1895) (“[Voir dire] is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases.”).

system broadly and in the state of Colorado, and asks the bench and bar to exercise care to preserve voir dire's special position within a system of justice that places so much responsibility upon the jury. Ultimately, this Article agrees that a flexible but important "essential demand of fairness" standard, which the U.S. Supreme Court articulated in *Aldridge v. United States*,⁶ determines whether judicial control of voir dire goes too far. However, that standard must accommodate a party's constitutionally based trial rights and due process rights under the Fifth and Fourteenth Amendments to the Constitution.⁷ The constitutional protections guaranteed by due process rights are endangered when a party or its counsel, particularly in criminal trials, are unable to make well-informed challenges to prospective jurors because a trial court stymied relevant and significant questioning.

TABLE OF CONTENTS

I. THE RIGHT TO TRIAL BY JURY	328
<i>A. Right to Trial by Jury in Federal Courts</i>	329
<i>B. Colorado's Jury Trial Right</i>	331
1. Criminal Cases	331
2. Civil Cases	333
II. JUROR QUALIFICATIONS	334
<i>A. Federal Jurors</i>	335
<i>B. Colorado Jurors</i>	335
III. JUDICIALLY IMPOSED LIMITS DURING THE JURY	
SELECTION PROCESS	335
<i>A. Jury Selection in Federal Court</i>	336
<i>B. Jury Selection in Colorado State Court</i>	336
<i>C. Restrictions on Counsel's Role and Questions in Voir Dire</i>	337
<i>D. Curbing Judicial Control of Voir Dire</i>	339
<i>E. Time Restrictions on Voir Dire</i>	344
<i>F. Other Judicial Control During Voir Dire</i>	345
CONCLUSION	346

I. THE RIGHT TO TRIAL BY JURY

This Article first outlines the right to a trial by jury in state and federal courts within Colorado.⁸ Part II describes who can serve as a juror in each judicial system. Part III then describes the varying judicial control of the voir dire process. The Article concludes with remarks about when judicial control should yield to certain questions posed by the parties and their lawyers.

6. 283 U.S. 308, 310 (1931).

7. See *infra* notes 74–100.

8. While the state and federal systems generally require a jury in criminal cases, the exact mechanisms—particularly the required number of jurors—varies, and in both systems the right to a jury trial in a civil case is not absolute. See *infra* Part I.

A. Right to Trial by Jury in Federal Courts

In federal courts, the Sixth and Seventh Amendments to the U.S. Constitution provide the constitutional contours of the right to a trial by jury.⁹ Additionally, Article III, Section Two of the Constitution¹⁰ serves to secure a criminal trial in the state where the crime was committed, while the Sixth Amendment is designed to guarantee that jurors be chosen from the state and district in which the crime was committed.¹¹

The Sixth Amendment guarantees defendants in federal criminal proceedings the right to a trial by jury.¹² The text says that in “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.”¹³ Significantly, the right to a jury trial expressly assures an impartial jury.¹⁴

The U.S. Supreme Court has recognized that the right to a jury trial in a criminal case encompasses only serious, and not merely petty offenses, as measured by the severity of the authorized punishment.¹⁵ And, in *Blanton v. City of North Las Vegas*,¹⁶ the U.S. Supreme Court created a presumption that an offense is petty if the maximum authorized term of incarceration is no greater than six months.¹⁷ The defendant has the burden to show that any additional statutory penalties are so severe that the otherwise petty offense should be considered serious.¹⁸ And, although the Supreme Court has ruled that the Sixth Amendment permits a six-member jury, it has held that fewer than six violates the right to a jury trial.¹⁹ The Court has also concluded that unanimity is required for six-member juries.²⁰

9. U.S. CONST. amends. VI, VII.

10. *Id.* art. III, § 2.

11. *Id.* amend. VI.

12. *Id.*

13. *Id.* This protection also extends to state court defendants, as the Fourteenth Amendment incorporates this Sixth Amendment right as a component of due process. *See Duncan v. Louisiana*, 391 U.S. 145, 162 (1968).

14. U.S. CONST. amend. VI.

15. *See Duncan*, 391 U.S. at 157–58; *see also Baldwin v. New York*, 399 U.S. 66, 73–74 (1970).

16. *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 541 (1989).

17. *Id.* at 542 n.6. In determining whether the defendant has a right to a jury trial, the court must look at each charged offense independently and must not look at the offenses in the aggregate. *See Lewis v. United States*, 518 U.S. 322, 330 (1996). If no charge is independently serious, a defendant has no right to a jury trial, regardless of the aggregate effect of the combined charged offenses. *Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974); *see also Alleyne v. United States*, 570 U.S. 99, 103 (2017) (noting that any fact that, by law, increases the penalty for a crime is an “element” that must be submitted to the jury and found beyond a reasonable doubt); *Baldwin*, 399 U.S. at 68 (reaffirming that “petty offenses” may be tried without a jury).

18. *Blanton*, 489 U.S. at 538, 543.

19. *Williams v. Florida*, 399 U.S. 78, 86 (1970); *see also Ballew v. Georgia*, 435 U.S. 223, 228 (1978) (holding that Georgia’s use of a five-member jury denied the defendant of his Sixth and Fourteenth Amendment right to a jury trial).

20. *Burch v. Louisiana*, 441 U.S. 130, 138–39 (1979); *see also* FED. R. CIV. P. 47(C) advisory committee’s note (1991) (“It is not grounds for the dismissal of a juror that the juror refuses to join with the fellow jurors in reaching a unanimous verdict.”).

The Seventh Amendment to the U.S. Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.²¹

According to earlier U.S. Supreme Court cases, the Seventh Amendment does not create a right to a jury trial in civil cases; it only preserves that right in the federal courts as it existed at common law in 1791—the date of the Seventh Amendment’s ratification by the original states.²² But, the current interpretation of the Seventh Amendment adopts a “dynamic concept” of the jury trial right.²³ Under this approach, the inquiry is directed not to the arrangement of legal and equitable issues existing in 1791 but to a legal system that England and the United States have recognized as “flexible and changing.”²⁴ And, because equity still intervenes when the remedy at law is inadequate, it is possible to adjust the scope of the Seventh Amendment as the categories of actions at law expand or contract.²⁵

According to *Beacon Theatres, Inc. v. Westover*,²⁶ when a remedy at law has been made available, there is a constitutional right to a jury trial regardless of whether the action historically would have been tried in equity.²⁷ The practical effect of the *Beacon Theatres* decision is that before trial the parties’ attorneys and the trial court must shape the issues raised by the action and determine whether the issues are purely legal, purely equitable, or common to both.²⁸ The federal jury decides the purely legal issues, and any issues common to the legal and equitable claims, while the court decides any purely equitable issues.²⁹ The trial must then be arranged so that any issues common to the legal and equitable claims are tried to the jury before the court decides the equitable aspects of the action without the jury.³⁰

21. U.S. CONST. amend. VII.

22. *Balt. & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935).

23. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959).

24. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 745 (1973).

25. See *Dairy Queen*, 369 U.S. at 478; *Beacon Theatres*, 359 U.S. at 509.

26. 359 U.S. at 506–07.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Dairy Queen*, 369 U.S. at 473.

In addition to these constitutional provisions—as clarified by Supreme Court decisions—Federal Rules of Civil Procedure 38³¹ and 39,³² and Federal Rule of Criminal Procedure 23³³ are also instructive. These rules declare the right of trial by jury as inviolate and specify how the right is invoked.³⁴

B. Colorado's Jury Trial Right

1. Criminal Cases

The right to a trial by jury in state criminal prosecutions is deeply embedded in our constitutional system and is guaranteed by the Colorado Constitution.³⁵ Article II, Sections 16³⁶ and 23,³⁷ of the Colorado Constitution outline the jury trial rights afforded in state criminal cases. Statutory provisions on the subject further amplify the jury trial right in Colorado

31. Federal Rules of Civil Procedure Rule 38 provides as follows:
- (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution – or as provided by a federal statute – is preserved to the parties inviolate.
 - (b) Demand. On any issue triable of right by a jury, a party may demand a jury trial
- Fed. R. Civ. P. 38.
32. Federal Rule of Civil Procedure 39 states:
- (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution – or as provided by a federal statute – is preserved to the parties inviolate.
 - (b) Demand. On any issue triable of right by a jury, a party may demand a jury trial
- P. 39.
33. The corresponding criminal rule states:
- (a) Jury Trial. If the defendant is entitled to a jury trial, the trial must be by jury unless:
 - (1) the defendant waives a jury trial in writing;
 - (2) the government consents; and
 - (3) the court approves.
- Fed. R. Crim. P. 23.
34. FED. R. CIV. P. 38, 39; FED. R. CRIM. P. 23.
35. See COLO. CONST. art. II §§ 16, 23.
36. Section 16 of Article II provides:
- In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.
- Id.* § 16.
37. Section 23 of Article II specifies:
- The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law. Hereafter a grand jury shall consist of twelve persons, any nine of whom concurring may find an indictment; provided, the general assembly may change, regulate or abolish the grand jury system; and provided, further, the right of any person to serve on any jury shall not be denied or abridged on account of sex, and the general assembly may provide by law for the exemption from jury service of persons or classes of persons.
- Id.* § 23.

courts, notably Sections 16-10-101³⁸ and 16-10-109³⁹ of the Colorado Revised Statutes. Colorado's Constitution, like the related federal provisions, affords criminal defendants a right to a jury trial for offenses with a potential penalty of six-months imprisonment or other serious crimes.⁴⁰ But, Colorado statutes significantly broaden this right and now provide for a jury trial in *most* criminal prosecutions.⁴¹

38. Section 16-10-101 C.R.S. provides:

The right of a person who is accused of an offense other than a noncriminal traffic infraction or offense, or other than a municipal charter, municipal ordinance, or county ordinance violation as provided in section 16-10-109(1), to have a trial by jury is inviolate and a matter of substantive due process of law as distinguished from one of "practice and procedure". The people shall also have the right to refuse to consent to a waiver of a trial or sentencing determination by jury in all cases in which the accused has the right to request a trial or sentencing determination by jury.

COLO. REV. STAT. § 16-10-101 (2019).

39. Section 16-10-109 of the Colorado Revised Statutes states as follows:

(1) For the purposes of this section, "petty offense" means any crime or offense classified as a petty offense or, if not so classified, which is punishable by imprisonment other than in a correctional facility for not more than six months, or by a fine of not more than five hundred dollars, or by both such imprisonment and fine, and includes any violation of a municipal ordinance or offense which was not considered a crime at common law; except that violation of a municipal traffic ordinance which does not constitute a criminal offense or any other municipal charter, municipal ordinance, or county ordinance offense which is neither criminal nor punishable by imprisonment under any counterpart state statute shall not constitute a petty offense . . .

(2) A defendant charged with a petty offense shall be entitled to a jury trial if, within twenty-one days after entry of a plea, the defendant makes a request to the court for a jury trial, in writing[.]

...

Id. § 16-10-109.

40. See *id.* § 16-10-101; see also *Austin v. City & Cty. of Denver*, 462 P.2d 600, 604 (Colo. 1969); see also *Lewis v. United States*, 518 U.S. 322, 326 (1996); *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989); *Baldwin v. New York*, 399 U.S. 66, 72 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *People v. Barron*, 677 P.2d 1370, 1374 (Colo. 1984) (if more than six-months imprisonment is requested, a contempt defendant is entitled to trial by jury).

41. See COLO. REV. STAT. §§ 16-10-101, 109. While the right to a jury trial can extend to petty offenses, and most municipal ordinance violations, the right is qualified. The accused must make a request in writing within twenty-one days after arraignment or entry of a plea and must pay a twenty-five-dollar jury fee to secure this right in such prosecutions. *Id.* § 16-10-109(2). An indigent defendant charged with a petty offense is entitled to waiver of this jury fee, *id.*, but must timely file an affidavit of indigency together with a motion requesting that the court waive the fee. SUPREME COURT COLO., OFF. CHIEF JUST., CHIEF JUST. DIRECTIVE 98-01, ATTACHMENT A: PROCEDURES FOR THE WAIVER OF COURT COSTS IN CIVIL CASES ON THE BASIS OF INDIGENCY (Mar. 2019). But the right to a jury does not necessarily extend to sentencing. *People v. Montour*, 157 P.3d 489, 497 (Colo. 2007) ("Since *Blakely v. Washington*, 542 U.S. 296 (2004), this Court has also recognized the Sixth Amendment right to jury trial on sentencing facts as independent of the Sixth Amendment right to a jury trial on guilt."); see also *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016) ("The Sixth Amendment provides . . . in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt."); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 494 (2000) (noting that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an element that must be submitted to a jury); *People v. Isaacks*, 133 P.3d 1190, 1192 (Colo. 2006) (holding that "a sentencing court may not use a defendant's admissions to sentence him in the aggravated range unless the defendant knowingly, voluntarily and intelligently waives his Sixth Amendment right to have a jury find the facts that support the aggravated sentence"); *Lopez v. People*, 113 P.3d 713, 723 (Colo. 2005) (en banc) (adopting *Apprendi* and recognizing that "there are at least four types of factors that are clearly valid for use in aggravated sentencing").

It is understood that the essential nature of the right to a jury trial is the right to have a fair and impartial jury selected from a fair cross-section of the community that will ascertain the facts and determine guilt or innocence, including any lesser degree of the offense.⁴² Unless a jury is waived, all factual questions must be answered by the jury.⁴³ The function of the jury is to apply the law, as stated by the judge, to the facts.⁴⁴ No matter how overwhelming the evidence of guilt, a judge may not issue a guilty verdict in a jury trial—a verdict is solely in the province of the jury. And, the jury’s verdict must be unanimous.⁴⁵

2. Civil Cases

In contrast to criminal cases, there is no constitutional right to a jury trial in civil cases in Colorado.⁴⁶ The right to a jury trial in Colorado civil cases exists only to the extent that courts have interpreted Colorado Rule of Civil Procedure 38 as granting such a right.⁴⁷ Rule 38(a) identifies the cases in which a party is entitled to a trial by jury:

[I]n actions wherein a trial by jury is provided for by constitution or by statute, including actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property.⁴⁸

The basic test for determining whether a party is entitled to a jury trial under Rule 38 may be stated concisely: “The right to a trial by jury in civil actions exists only in proceedings that are legal in nature.”⁴⁹ The complaint fixes the nature of a suit, and if it joins or commingles legal and equitable claims, the court must determine whether “the basic thrust of the action is equitable or legal.”⁵⁰

Although Rule 38 appears to set out the exclusive list of civil actions in which jury trials may be demanded, Colorado courts have interpreted Rule 38 as extending the right to a jury trial to all cases that historically

42. See *Gallegos v. People*, 316 P.2d 884, 885 (Colo. 1957); see also *Duncan*, 391 U.S. at 159.

43. 50A C.J.S. Juries § 29 (last updated Oct. 15, 2019); see also *Gleason v. Guzman*, 623 P.2d 378, 382 (Colo. 1981).

44. 50A C.J.S. Juries § 29.

45. COLO. REV. STAT. § 16-10-108.

46. COLO. CONST. art. II, § 23; see also *Garhart ex rel. v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004); *Brekke v. State Farm Mut. Auto. Ins. Co.*, 81 P.3d 1101, 1104 (Colo. App. 2003). The Colorado Constitution provides only that “a jury in civil cases . . . may consist of less than twelve persons,” but prescribes no other requirements for civil jury trials. COLO. CONST. art. II, § 23.

47. See *Kaitz v. Dist. Court*, 650 P.2d 553, 555 (Colo. 1982) (en banc).

48. COLO. R. CIV. P. 38.

49. *Am. Family Mut. Ins. Co. v. DeWitt*, 216 P.3d 60, 63 (Colo. App. 2008).

50. *Zick v. Krob*, 872 P.2d 1290, 1293 (Colo. App. 1993).

sounded in law, while excluding those cases that were historically equitable.⁵¹ Thus, Rule 38's enumeration of cases where a jury trial is available cannot be understood as exhaustive.⁵²

In *Peterson v. McMahon*,⁵³ the Colorado Supreme Court discussed two methods to determine whether an action is legal or equitable.⁵⁴ The first method is a remedial test in which actions seeking an award of monetary damages are considered legal, while actions seeking to invoke the coercive power of the court (such as injunctions or specific performance) are considered equitable.⁵⁵ Under the second, historical method, a claim is treated as equitable when the plaintiff is seeking to enforce a right that was originally created in, or decided by, equity courts.⁵⁶

Colorado courts have generally preferred using the remedial method to determine whether the underlying nature of an action is legal or equitable.⁵⁷ And, if a complaint mixes legal and equitable claims, Colorado courts have adopted the "basic thrust" doctrine.⁵⁸ The doctrine declares that, if a party pleads legal and equitable claims, the court must determine whether the basic thrust of the complaint is legal or equitable; it is this basic thrust that ultimately determines the right to a jury trial.⁵⁹ Besides examining whether a case warrants a jury trial, Colorado and federal courts alike define who can serve as a juror.

II. JUROR QUALIFICATIONS

The rules dictating juror qualification in federal and Colorado courts are strikingly similar. This Part provides a brief overview of the rules.

51. See *Johnson v. First Nat. Bank*, 131 P. 284, 296 (Colo. App. 1913) ("If a law case, then the defendant was entitled to a jury trial. If the action was equitable, the defendant was not entitled, as a matter of right, to a trial by jury . . .").

52. See, e.g., *Citicorp Acceptance Co., Inc. v. Sittner*, 772 P.2d 655, 656 (Colo. App. 1989) (finding that replevin is an action to recover personal property specifically enumerated in Rule 38; alternatively, finding that replevin is an action at law); *but see Peterson v. McMahon*, 99 P.3d 594, 597–98 (Colo. 2004) (discussing two methods to determine whether an action is legal or equitable).

53. 99 P.3d at 598.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* The following claims have been characterized by Colorado courts as equitable actions for which there is no right to a jury under Rule 38(a): injunctions, declaratory relief and injunctions, garnishment actions, claims for specific performance of an agreement, foreclosure of a mortgage or lien, an accounting, employment discrimination claims, an action to declare a trust invalid, a proceeding to establish an attorney's lien, an action to abate a public nuisance, an action to pierce the corporate veil, and a claim for promissory estoppel. See COLO. CIVIL TRIAL PRACTICE § 10.2 (2d ed.) and cases cited therein.

58. See *Farm Credit of S. Colorado, ACA v. Mason*, No. 15CA0852, 2017 WL 1279716, at *1, *3 (Colo. App. Apr. 6, 2017); *Zick v. Krob*, 872 P.2d 1290, 1293 (Colo. App. 1993); *Miller v. Carnation Co.*, 516 P.2d 661, 663 (Colo. App. 1973). This doctrine holds that if a party pleads legal and equitable claims, the court must determine whether the "basic thrust" of the complaint is legal or equitable; it is this "basic thrust" that ultimately determines the right to a jury trial.

59. *Mason*, 2017 WL 1279716 at *3.

A. Federal Jurors

To be qualified for jury service a person must be: (1) a citizen of the United States; (2) at least eighteen years of age; (3) able to read, write, speak, and understand the English language; and (4) must reside in the judicial district where the offense or controversy occurred.⁶⁰ Persons who may not serve as jurors include those who have pending felony criminal charges, which may be punishable by more than one year in prison; have been convicted of a felony or misdemeanor punishable by more than one year in prison;⁶¹ have a permanent physical or mental disability that would prevent service as a juror; or hold certain occupations (full-time military, police, firefighters, or elected public official) that exempts them from service.⁶²

B. Colorado Jurors

Colorado jurors must meet criteria similar to what is required of federal jurors.⁶³ The person must be a citizen of the United States; at least eighteen years of age; able to read, write, speak, and understand the English language; and must reside in a Colorado county more than 50% of the time (regardless of where the juror is registered to vote).⁶⁴

III. JUDICIALLY IMPOSED LIMITS DURING THE JURY SELECTION PROCESS

Literally defined, voir dire means “to speak the truth”—meaning the prospective jurors disclose information about themselves and thereby allow the lawyers and the court to determine if they are suitable to impartially decide the facts.⁶⁵ But, as discussed below, the right to voir dire does not mean an *unlimited* right to voir dire.

60. See 28 U.S.C. § 1865 (2018); see also *How Jurors are Selected*, U.S. DIST. COURTS, <http://www.cod.uscourts.gov/JurorInformation/HowJurorsAreSelected.aspx> (last visited Dec. 11, 2019).

61. This limitation does not apply where the person has had his civil rights restored. See 28 U.S.C. § 1865. For example, a wrongful conviction that is overturned would not be a barrier to jury service.

62. *Id.*

63. The Colorado State Legislature has defined Qualifications for Juror Service as:

(1) Any person who is a United States citizen and resides in a county or lives in such county more than fifty percent of the time, whether or not registered to vote, shall be qualified to serve as a trial or grand juror in such county. Citizenship and residency status on the date that the jury service is to be performed shall control.

(2) A prospective trial or grand juror shall be disqualified, based on [specified] grounds . . .

COLO. REV. STAT. § 13-71-105 (2019); see also *Frequently Asked Questions*, COLO. JUD. BRANCH https://www.courts.state.co.us/Courts/District/FAQs.cfm?District_ID=12 (last visited Dec. 10, 2019).

64. See *Frequently Asked Questions*, *supra* note 63.

65. See David Suggs & Bruce D. Sales, *Juror Self Disclosure in Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 245 (1981) (defining literal translation of the term voir dire); *Voir Dire*, BLACK’S LAW DICTIONARY (11th ed. 2019).

The following Part discusses the voir dire process, as currently overseen by judges, before discussing judicial restrictions on voir dire and suggesting that the restrictions may need to be moderated in service of trial fairness.

A. Jury Selection in Federal Court

Federal trial judges have considerable discretion in controlling voir dire⁶⁶ and, theoretically, could conduct the entire voir dire.⁶⁷ In federal courtrooms across the United States, it is fair to say that many federal judicial officers keep a tight leash on lawyers during the voir dire process.⁶⁸ The most recent publicly available survey of federal judges' practices reveals that most federal judges conduct the bulk of voir dire and thereby allow the lawyers limited leeway to inquire of the prospective jurors.⁶⁹ The operative question therefore is not whether federal judges can control voir dire⁷⁰ but whether they should dominate voir dire.

B. Jury Selection in Colorado State Court

In Colorado, like in the federal system, the right to an impartial jury does not require that counsel be granted unlimited voir dire examination.⁷¹ In fact, the Colorado Supreme Court has held that a trial court's decision to limit voir dire cannot constitute constitutional error because "defense counsel does not have a constitutional or statutory right to unlimited voir dire."⁷² Colorado Criminal Rule of Procedure 24(a)(3) allows counsel to ask prospective jurors questions, but the trial court "may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive or otherwise improper examination."⁷³ If a defendant's counsel can determine whether "potential jurors possessed any beliefs that would bias them such as to prevent [the defendant] from receiving a fair trial, then the purpose of voir

66. See FED. R. CIV. P. 47; FED. R. CRIM. P. 24.

67. 28 U.S.C. § 1870 (2018) ("All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court."); see *Skilling v. United States*, 561 U.S. 358, 361 (2010); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 623 (1991) ("In some cases, judges may even conduct the entire voir dire by themselves."); *Lips v. City of Hollywood*, 350 F. App'x 328, 338 (11th Cir. 2009) ("During federal voir dire, district judges are granted substantial control and may conduct the entire voir dire themselves.").

68. See GORDON BERMANT, FED. JUD. CTR., JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 1–60 (1982).

69. *Id.*

70. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 583 (D. Md. 2008) (noting that the trial court's discretion during voir dire is very broad), *rev'd* 580 F.3d 206 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011); see also *Edmonson*, 500 U.S. at 623; *Simmons v. Napier*, 626 F. App'x 129, 133–34 (6th Cir. 2015) (concluding that the trial court properly allowed parties to participate by proposing questions); *Csiszer v. Wren*, 614 F.3d 866, 875 (8th Cir. 2010); *Richardson v. City of New York*, 370 F. App'x 227, 228 (2d Cir. 2010) (holding that the trial court was not required to let attorneys ask questions).

71. *People v. O'Neill*, 803 P.2d 164, 169 (Colo. 1990).

72. *People v. Rodriguez*, 914 P.2d 230, 255 (Colo. 1996).

73. COLO. R. CRIM. P. 24(a)(3); see also *People v. Flockhart*, 304 P.3d 227, 236–37 (Colo. 2018) (citing COLO. R. CRIM. P. 24(a)(3) in recognizing that "trial courts possess broad discretion to place appropriate limits on voir dire.").

dire has been fulfilled.”⁷⁴ Thus, challenges to limitations on questioning a prospective panel have largely been unsuccessful in Colorado.⁷⁵

C. Restrictions on Counsel’s Role and Questions in Voir Dire

The right to an impartial jury in federal courts in criminal cases, and the impartiality of the jury in civil cases, is inherent in the right of trial by jury provided by the Sixth and Seventh Amendments. It is also implicit in the due process requirement of the Fifth Amendment.⁷⁶ Even so, court decisions are inconsistent with respect to whether a trial judge’s failure to allow certain questions to be posed to the jury is error and whether such error warrants relief.⁷⁷ Counsel often want to inquire about such subjects as: (1) prospective jurors’ association with or attitude toward a party to the action, counsel, or a person connected with the case;⁷⁸ (2) the prospective jurors’ preconceived notions of case facts, based on media exposure or other information;⁷⁹ (3) the weight the jurors would assign to certain evidence; (4) the size of a possible verdict, or the effect of a contingency fee on the verdict; (5) views for or against law enforcement;⁸⁰ (6) prior per-

74. *O’Neill*, 803 P.2d at 169.

75. *See* *People v. Velarde*, 616 P.2d 104, 105 (Colo. 1980) (holding that the court did not abuse its discretion in failing to inquire as to jurors’ religious beliefs “where there is no showing that there [was] any issue of religious significance involved in the case and where there [was] no indication in the record that the jurors were even aware that [the defendant] was an atheist”); *Edwards v. People*, 418 P.2d 174, 177 (Colo. 1966) (“One accused of a crime is not entitled as a matter of right to a sympathetic jury, but only to one which will hear the matter fairly and impartially.”); *People v. Saiz*, 660 P.2d 2, 4 (Colo. App. 1982) (holding that the trial court did not abuse its discretion in limiting the use of hypothetical questions where it “gave counsel full opportunity to question jurors regarding any matters which might have shown bias or prejudice.”).

76. *See* *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3d Cir. 1965); *see also* *Ham v. South Carolina*, 409 U.S. 524, 526 (1972) (recognizing that the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that defendant be allowed to inquire about racial bias); *Aldridge v. United States*, 283 U.S. 308, 310 (1931) (a black defendant, who was being tried for the murder of a white policeman, requested that prospective jurors be asked whether they entertained any racial prejudice; in reversing the conviction because the trial judge refusal to so inquire, the Court stated that the “essential demands of fairness” required the trial judge ask about racial prejudice at counsel’s request).

77. *See infra* notes 78–100.

78. *See* *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122 (10th Cir. 1995) (concluding bias presumed from direct financial interest in trial’s outcome); *Hinkle v. Hampton*, 388 F.2d 141, 143–44 (10th Cir. 1968) (finding no error where trial court refused to inquire about juror’s employment in—or ownership within—the insurance industry, but allowed a more general questions about prior service as a claims investigator or insurance adjustor); *Bass v. Dehner*, 103 F.2d 28, 36 (10th Cir. 1939) (recognizing the right of counsel for a plaintiff in a personal injury action—so long as he is acting in good faith for the purpose of ascertaining the qualifications of jurors—to interrogate prospective jurors regarding their interest in or connection with indemnity insurance companies interested in the result of the action).

79. *United States v. Hall*, 536 F.2d 313, 325–27 (10th Cir. 1976) (concluding that pretrial publicity was not so extensive that trial court felt compelled to allow additional probing of the jury by defense counsel).

80. *United States v. Lawes*, 292 F.3d 123, 130–31 (2d Cir. 2002) (determining that questions regarding occupation of prospective jurors and members of their households sufficient to reveal most compelling circumstances in which law enforcement bias would arise); *Chavez v. United States*, 258 F.2d 816, 819 (10th Cir. 1958) (finding that the trial court committed no error in refusing to ask prospective jurors whether they would credit law enforcement officer’s testimony over the defendant’s

sonal experience (or that of close family or friends) with the criminal justice system; (7) the ability, in a criminal case, to hold the prosecution to its burden of proof; and (8) potential biases or prejudices, including preconceptions based on race or ethnicity.⁸¹ Arguably, these proposed areas of inquiry could be useful as counsel evaluates whether certain members of the venire should be excused—for cause or peremptorily—due to personal biases that would manifest as unfair prejudice to a party. Where the scope of voir dire is so limited that it “does not create any reasonable assurances that prejudice would be discovered if present,”⁸² reversal may be required.⁸³

In addition to protecting the trial rights of the parties, there are pragmatic reasons to allow lawyer-conducted voir dire:⁸⁴

- Lawyers typically have far more exposure to the case facts than judges; they are, therefore, better situated to craft targeted questions relevant to their case.

testimony); *see also* *Cox v. Treadway*, 75 F.3d 230, 239 (6th Cir. 1996) (rejecting argument that juror was automatically disqualified because she had family members in law enforcement); *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir. 1981) (concluding the trial judge abused his discretion in refusing to hold an evidentiary hearing upon discovery that the jury foreperson’s son was completing a training program as a parole officer).

81. *See Nichols v. Marshall*, 486 F.2d 791, 793–94 (10th Cir. 1973) (concluding that the defendant’s right to voir dire was not prejudiced by the trial judge’s denial of the defendant’s question, which would have alerted the jury that the plaintiff’s widow had remarried); *see also United States v. Lewin*, 467 F.2d 1132, 1137–39 (7th Cir. 1972) (concluding that the trial court reversibly erred by arbitrarily refusing to put significant questions proposed by counsel and designed to ascertain possible prejudices of veniremen); *Kuzniak v. Taylor Supply Co.*, 471 F.2d 702, 703 (6th Cir. 1972) (holding that the trial judge’s refusal on voir dire to allow the plaintiffs to question potential jurors concerning their possible prejudice against Austrian nationals—where the plaintiffs were Austrian nationals residing in Michigan—was reversible error); Donald Paul Duffala, *Propriety and Prejudicial Effect of Federal Court’s Refusal on Voir Dire in Civil Action to Ask or Permit Questions Submitted By Counsel*, 72 A.L.R. FED. 638 (1985); H.C. Lind, *Right of Counsel in Criminal Cases Personally to Conduct the Voir Dire Examination of Prospective Jurors*, 73 A.L.R.2d 1187 (1960).

82. *United States v. Gillis*, 942 F.2d 707, 709–10 (10th Cir. 1991).

83. Some courts require an actual showing of prejudice, but a few presume prejudice. *Zia Shadows, L.L.C. v. City of Las Cruces*, 829 F.3d 1232, 1244–47 (10th Cir. 2016) (addressing circumstances under which bias should be presumed when a city employee is a prospective employer and the city is the defendant, and rejecting a per se rule of presumed bias); *Smedra v Stanek*, 187 F.2d 892, 895 (10th Cir. 1951) (concluding that even if erroneous, the trial judge’s refusal to allow questioning was not a ground for reversal unless it was inconsistent with substantial justice, the court thus implied that the plaintiff was required to demonstrate prejudice); *see also Progner v. Eagle*, 377 F.2d 461, 462–63 (4th Cir. 1967) (directing that if, on remand, the trial judge found nothing that would have altered the composition of the jury as it stood at trial, then the judgment for the defendant was to be reinstated, but if the remand disclosed that the identical jury would not have been impaneled, a new trial was to be ordered); *Louisville & Nashville R.R. Co. v. Williams*, 370 F.2d 839, 841–42 (5th Cir. 1966) (suggesting that where a trial court has erred in refusing to permit counsel to examine jurors as to their connections with a liability insurance company, the trial court should, following the verdict, question the jurors as to their interest in the insurance company and, if no juror is shown to have had a disqualifying interest, then no prejudice will be deemed to have resulted).

84. G. THOMAS MUNSTERMAN ET AL., *JURY TRIAL INNOVATIONS* 55–57 (2d ed. 2006); *see also* WILL ROUNTREEA, *JURY SELECTION IN CRIMINAL CASES: LEADING LAWYERS ON BALANCING THE ART AND SCIENCE OF THE VOIR DIRE PROCESS* 3 (2013) (recognizing that the way that a question is asked may determine the answer).

- Lawyers have a less exalted status than the judge and, thus, may be less intimidating to the prospective jurors, resulting in greater candor.
- As advocates, lawyers are highly motivated to search for and detect biases that will assist them in exercising for cause and peremptory challenges.
- The parties, through their lawyers, feel they have more meaningful participation in the trial and are likely to leave more satisfied with the judicial process.

On the other hand, proponents of judicial control might counter that there are legitimate reasons for the trial judge to remain firmly in control of voir dire:⁸⁵

- The judge, unlike the lawyers, is less likely to use voir dire for advocacy.
- The judge is better equipped to keep voir dire focused so that the prospective jurors' time is not unnecessarily wasted.
- The judge is best positioned to make sure the lawyers do not inquire into irrelevant matters or otherwise invade juror privacy.

But a judge can achieve these ends through a supervisory role. The pragmatic and strategic reasons to allow a lawyer-controlled voir dire cannot be meaningfully achieved unless lawyers are given an active role in the process.

D. Curbing Judicial Control of Voir Dire

Judges' heavy-handed limits on counsel's ability to inquire of the jury—directly or by questions the court accepts—could negatively influence the very fairness of a judicial proceeding.⁸⁶ While the trial court enjoys discretion in how voir dire is conducted, and by whom, that discretion is not unlimited.

In *Aldridge*, the U.S. Supreme Court held that the “essential demands of fairness” mandate that, in the trial of a black defendant charged with the murder of a white police officer, a defense request for voir dire questioning

85. MUNSTERMAN ET AL., *supra* note 84, at 57.

86. See, e.g., *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981) (observing that the trial judge must conduct a voir dire examination in the manner that permits the informed exercise by counsel of peremptory challenges and challenges for cause and concluding that the trial judge abuses his discretion in refusing to probe the jury adequately for bias or prejudice about material matters on request of counsel; consideration must therefore be given to whether the questions submitted by counsel are important to the informed exercise of counsel's right to challenge prospective jurors).

about racial prejudice had to be granted.⁸⁷ Although the Court did not identify the source of that “fairness,” presumably it derived from the Sixth Amendment’s right to a trial by an impartial jury. Years later, in *Ham v. South Carolina*,⁸⁸ the Supreme Court clarified that *Aldridge*’s “essential demands of fairness” mandate derives from the Due Process Clause of the Fourteenth Amendment and serves to prevent invidious race-based discrimination.⁸⁹ In *Ham*, an inquiry of the prospective jury concerning race was constitutionally required in a black civil rights activist’s trial for drug possession.

In *Ristaino v. Ross*,⁹⁰ the Supreme Court later limited application of the “essential demands of fairness” race-based voir dire inquiry, stating that *Ham* does not require a racial inquiry every time persons of different races or different ethnicities are before the court.⁹¹ Rather, the Supreme Court said that *Ham* “reflected an assessment of whether under all the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as ‘indifferent as they stand unsworn.’”⁹²

The Tenth Circuit applies the essential demands of fairness inquiry, but not always to expand counsel’s role in voir dire. In *United States v. De Pugh*,⁹³ the Tenth Circuit rejected the defendant’s contention that the trial court erred in not asking all of the voir dire questions submitted by the defendant. The court concluded that the trial court was not required to propound questions that are argumentative, cumulative, or tangential.⁹⁴ The court also concluded the trial court’s probing questions had thoroughly

87. *Aldridge v. United States*, 283 U.S. 308, 310–11 (1931); see also *Photostat Corp. v. Ball*, 338 F.2d 783, 786 (10th Cir. 1964) (recognizing that the “denial or substantial impairment of the statutory right to peremptory challenge is prejudicial to the constitutional right to a fair and impartial jury”); compare *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3d Cir. 1965) (recognizing the trial court’s broad discretion as to the questions to be asked on voir dire but cautioning that the exercise of that discretion is “subject to the essential demands of fairness”), with *Hinkle v. Hampton*, 388 F.2d 141, 144 (10th Cir. 1968) (refusing to follow *Kiernan* and observing that case had the effect of eliminating the discretion of the trial judge in the area of voir dire questioning); see also *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F. Supp. 1240, 1246 (D. Ohio 1980) (noting that while the judge, in “civil and criminal proceedings, is afforded considerable latitude with respect to the nature, scope and extent of voir dire examination,” the exercise of such discretion is “subject to the essential demands of fairness.”).

88. 409 U.S. 524 (1972).

89. *Hinkle v. Hampton*, 409 U.S. 524, 526–27 (1973).

90. 424 U.S. 589, 595–96 (1976).

91. *Id.*

92. *Id.*; see also *Rosales-Lopez v. United States*, 451 U.S. 182, 192–94 (1981) (concluding there was no “reasonable possibility” of prejudice, the court declined to find that the trial court’s refusal to allow jurors to be questioned about possible attitudes towards Mexican-Americans was reversible error).

93. 452 F.2d 915, 921–22 (10th Cir. 1971).

94. *Id.* at 921.

examined the prospective jurors to determine their fitness and qualifications to sit in the case.⁹⁵ Thus, the Tenth Circuit found no abuse of discretion and no denial of the essential demands of fairness.⁹⁶

Although no “hard-and-fast formula dictates the necessary depth or breadth of voir dire,”⁹⁷ the essential demands of fairness can vary depending on the issues in a case, the questions proposed for the jury venire, and the court-imposed restrictions. Surely the essential demands of fairness must be the counter-balance to the trial court’s discretion, especially where life and liberty are at stake. But when does the trial court’s discretion conflict with the essential demands of fairness? Such conflict may exist where counsel for either party, particularly in criminal trials, is prevented from making well-informed challenges to prospective jurors because a trial court stymied relevant and significant questioning.⁹⁸ Rarely—if ever—will prospective jurors admit that they hold a particular bias;⁹⁹ thus, lawyers have to artfully tease out information from prospective jurors about

95. *Id.*

96. *Id.* at 921–22.

97. *Skilling v. United States*, 561 U.S. 385, 386 (2010).

98. *Compare Brundage v. United States*, 365 F.2d 616, 618 (10th Cir. 1966) (noting that, in the Tenth Circuit, “voir dire is customarily conducted by the trial judge and it is his responsibility to probe the minds of the prospective jurors concerning their precognitions, predilections, experiences and any other matters which may peculiarly bear upon their qualifications and competency to serve fairly and impartially in the particular case. In our case the distinguished trial judge did not fail to perform his full duty in that respect.”), *with State v. Higgs*, 120 A.2d 152, 155–56 (Conn. 1956) (reversing the conviction of a black man for the rape of a white woman on the ground that the trial court erred in refusing to allow counsel to examine prospective jurors with respect to racial prejudice), and *State v. Brazile*, 86 So. 2d 208, 211 (La. 1956) (annulling a murder conviction on the ground that the trial court erred in refusing to allow the defendant’s counsel to submit a certain document to a prospective juror to determine whether he could read or write and noting that the defendant has the right to have jurors examined as to their qualifications to be able to challenge for cause, and also, within reasonable limits, to elicit such facts as will enable him to make an intelligent exercise of his right of peremptory challenge); *see also Lips v. City of Hollywood*, 350 F. App’x 328, 338 (11th Cir. 2009) (noting that voir dire is sufficient if process provides a reasonable assurance that jurors’ prejudices could be discovered); *Alcala v. Emhart Industries, Inc.*, 495 F.3d 360, 363 (7th Cir. 2007) (“Voir dire is sufficient if the court has asked enough questions to ‘enable the parties to exercise challenges intelligently.’”) (citation omitted); *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 884–85 (8th Cir. 2006) (determining that voir dire is sufficient if there was an adequate inquiry into potential bias or prejudice of prospective jurors); *Butler v. City of Camden*, 352 F.3d 811, 815 (3d Cir. 2003) (concluding that an examination that is too general, and fails to adequately probe into the possibility of hidden prejudices, is an abuse of discretion); *United States v. Lawes*, 292 F.3d 123, 128 (2d Cir. 2002) (stating that in deciding whether to ask particular questions, the trial judge must balance the need for counsel to get a feel for any bias against need to avoid using voir dire as a mini-trial); *Scott v. Lawrence*, 36 F.3d 871, 874 (9th Cir. 1994) (“Voir dire must be probing enough to reveal jurors’ prejudices regarding issues that may arise at trial, so that counsel may exercise their challenges in an informed manner.”); *Art Press, Ltd. v. W. Printing Machinery Co.*, 791 F.2d 616, 618–19 (7th Cir. 1986) (“[T]he voir dire conducted in this case was so limited as to preclude the parties from adequately discovering whether the jurors were biased or prejudiced and did not permit sufficient inquiry to allow the parties to intelligently exercise their peremptory challenges.”).

99. *Moran v. Clarke*, 443 F.3d 646, 650–51 (8th Cir. 2006) (“The courts presume that a prospective juror is impartial, and a party seeking to strike a venire member for cause must show that the prospective juror is unable to lay aside his or her impressions or opinions and render a verdict based on the evidence presented in court. Essentially, to fail this standard, the juror must profess his inability to be impartial and resist any attempt to rehabilitate his position.”) (citation omitted); *Thompson v. Alzheimer & Gray*, 248 F.3d 621, 626 (7th Cir. 2001) (“Had she said she could not be fair, the judge would of course have had to strike her for cause.” (emphasis omitted)); *United States v. Gonzalez*, 214

views that would render them unsuitable for the case being tried.¹⁰⁰ And, rarely have courts concluded that the trial court's limits on voir dire in civil cases warrant reversal.¹⁰¹

Reversal based on the court's limitations on voir dire is not common in criminal cases, but it is possible if the questions posed do not give counsel (or a party) a meaningful opportunity to exercise juror challenges.¹⁰² A very general or generic question posed by a judge may not be sufficient to probe a prospective juror's unsuitability for a particular case. For example, in *Rainey v. Conerly*,¹⁰³ the court held that the failure to ask whether the prospective jurors would give enhanced weight to law enforcement officers' testimony—in a case where most of the evidence came from law enforcement officers—was reversible error.¹⁰⁴ Before *Rosales-Lopez v.*

F.3d 1109, 1111–12 (9th Cir. 2000) (recognizing that while “[b]ias can be revealed by a juror’s express admission of that fact, ...more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence,” and noting it would be error not to strike a juror whose personal experiences suggested an inability to be impartial and who, when asked three times whether she could be fair, said only that she would “try”).” (alteration in original) (quoting *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977)); *but see* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding that it is impermissible to strike a prospective juror because of gender); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630 (1991) (holding that parties in a civil trial may not strike a prospective juror because of that person’s race); *United States v. Helmstetter*, 479 F.3d 750, 754 (10th Cir. 2007) (noting that the circuits considering the issue have rejected challenges where peremptories were used to discriminate against individuals because of their age); *Weber v. Strippit, Inc.*, 186 F.3d 907, 911 (8th Cir. 1999) (upholding use of peremptory challenges based on age in age discrimination case).

100. For example, in cases where the race of one of the parties is an issue, probing about racial biases—and how to avoid having those biases infect the decision—would seem appropriate. *See, e.g.*, *United States v. Bishop*, 959 F.2d 820, 825–26 (9th Cir. 1992) (concluding that the reason offered—that the juror lived in a high crime area plagued by uneasy police relations—was really a proxy for race), *overruled on other grounds by* *United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2011); *Rector v. State*, 444 S.E.2d 862, 864–65 (Ga. Ct. App. 1994) (noting that the gold tooth had “nothing to do with [her] ability to perform as a juror” as the court rejected the prosecutor’s excuse that he struck a black, gold-toothed prospective juror because the gold tooth suggested to him that the juror was thumbing her nose at society); *McCormick v. State*, 803 N.E.2d 1108, 1111 (Ind. 2004) (concluding that the reason provided—that the juror would find it difficult “passing judgment on a member of one[']s own in the community”—was not facially race neutral).

101. *See, e.g.*, *Art Press, Ltd. v. W. Printing Machinery Co.*, 791 F.2d 616, 619 (7th Cir. 1986) (concluding voir dire “did not permit sufficient inquiry to allow the parties to intelligently exercise their peremptory challenges”); *Feitzer v. Ford Motor Co.*, 622 F.2d 281, 286 (7th Cir. 1980) (concluding that Ford’s right to an impartial jury was impaired by the district court’s failure to sufficiently probe the jury about prospective juror’s or his family’s involvement in rear-end collisions, collisions resulting in burn injuries, and ownership of a Mercury Comet).

102. *See, e.g.*, *United States v. Robinson*, 485 F.2d 1157, 1160 (3rd Cir. 1978) (concluding that the defendant had a right to inquire about race, and the court’s failure to allow inquiry into racial prejudice was reversible error); *United States v. Carter*, 440 F.2d 1132, 1134–35 (6th Cir. 1971) (concluding racial questioning needed to be allowed in a nonviolent crime prosecution of a black defendant). In capital cases, a capital defendant accused of an interracial crime is entitled to have the court inform the prospective jurors of the victim’s race and inquire on the subject of racial bias. *Turner v. Murray*, 476 U.S. 28, 36–40 (1986) (plurality opinion).

103. *Rainey v. Conerly*, 973 F.2d 321, 325 (4th Cir. 1992), *overruled by* *United States v. Lancaster*, 96 F.3d 734 (4th Cir. 1996).

104. *See* *United States v. West*, 458 F.3d 1, 6 (D.C. Cir. 2006) (recognizing that counsel must be given a full and fair opportunity to expose bias or prejudice of venire members); *Fietzer v. Ford Motor Co.*, 622 F.2d 281, 285 (7th Cir. 1980) (recognizing that the court should not “block the reasonable exploration of germane factors that might expose a basis for challenge” (citing *FED. R. CRIM. P. 24(a)*)); *Lowther v. United States*, 455 F.2d 657, 666 (10th Cir. 1972) (recognizing voir dire must be

United States,¹⁰⁵ many federal circuit courts would not have treated failure to inquire about racial prejudice as harmless error.¹⁰⁶

Colorado courts—or federal courts—need not turn over complete control of voir dire to counsel. There are states where, by constitution or statute, lawyers have extensive rights in the voir dire process.¹⁰⁷ For example, in Connecticut, lawyers, not the judge, conduct voir dire in civil and in criminal cases.¹⁰⁸ After the judge issues a statement to the jury explaining the voir dire process, that judge is free to leave the bench.¹⁰⁹ Usually, the judge has no role while the attorneys question the jurors, except when a problem or question is posed requiring the judge to clarify. Not only do the attorneys question each juror they also decide juror biases.¹¹⁰ Interpreting an earlier version of the statute, the Connecticut Supreme Court decided in *State v. Higgs*¹¹¹ that a defendant, as a matter of right, is entitled to examine each prospective juror.¹¹² And the trial judge's restrictions—refusing to allow counsel to examine prospective jurors with respect to racial prejudice—were found to constitute reversible error where a black man was accused of raping a white woman.¹¹³ Since *Higgs* was decided, the Connecticut Supreme Court has reaffirmed its holding.¹¹⁴ In fact, in 1972, this right was constitutionalized by including it in an

adequate to test the qualifications and competency of the jurors); *but see* *United States v. Brunty*, 701 F.2d 1375, 1379 (11th Cir. 1983) (recognizing that a party is “not entitled to a sympathetic jury; merely an impartial one.”).

105. 451 U.S. 182, 187–88 (1981).

106. *See, e.g.*, *United States v. Williams*, 612 F.2d 735, 736–37 (3d Cir. 1979); *Robinson*, 485 F.2d at 1158–60 (holding that racial inquiry was constitutionally mandated in the trial of a black defendant accused of failing to provide current address and to report for induction to Selective Service); *United States v. Bowles*, 574 F.2d 970, 973 (8th Cir. 1978) (reversing based on trial court's refusal to allow inquiry into potential racial bias); *United States v. Booker*, 480 F.2d 1310, 1310 (7th Cir. 1973) (concluding that the trial judge committed error in his conduct of the voir dire by refusing to interrogate prospective jurors about possible racial prejudice against the black defendant, and the error was not rendered harmless even where the evidence of guilt was allegedly overwhelming and five of the jurors who served were black); *Carter*, 440 F.2d at 1133–35 (racial inquiry required in trial of black defendant accused of bank robbery); *Frasier v. United States*, 268 F.2d 62, 66 (1st Cir. 1959) (requiring racial questioning in nonviolent crime circumstances).

107. CONN. GEN. STAT. § 51-240 (2019) (voir dire procedure in civil cases); *id.* § 54-82(f) (voir dire for criminal cases).

108. *See id.* § 51-240; *id.* § 54-82(f) (voir dire for criminal cases). Section 51-240 provides, in pertinent part:

(a) In any civil action tried before a jury, either party shall the right to examine, personally or by his counsel, each juror outside the presence of other perspective jurors as to his qualifications to sit as a juror in the action. (b) If the judge before whom the examination is held is of the opinion from the examination that any juror would be unable to render a fair and impartial verdict the juror shall be excused by the judge from any further service upon the panel, or in the action, as the judge determines. (c) The right of examination shall not be abridged by requiring questions to be put to any juror in writing and submitted in advance of the commencement of the action.

Id. § 51-240 (a judge need not remain on bench while attorneys are questioning jurors); *see also id.* § 52-84(f) (same as civil statute).

109. *Id.* §§ 51-240, 54-82(f).

110. *Id.*

111. 120 A.2d 152 (Conn. 1956).

112. *Id.* at 154.

113. *Id.*

114. *See State v. Hill*, 495 A.2d 699, 702 (Conn. 1985).

amendment to Connecticut's Constitution, which now provides that "[t]he right to question each juror individually shall be inviolate."¹¹⁵

Colorado need not go the way of Connecticut. There are inherent benefits of allowing judges control over their courtrooms and overseeing trial management, and existing Colorado case law would not support the generous lawyer questioning Connecticut allows.¹¹⁶ Obviously, the trial court is well within its discretion to limit voir dire if counsel's proposed inquiry duplicates questions the court has already asked or has little relevance to the case at issue.

Of course, counsel must ensure their own trial strategy does not undercut a later claim of unfairly limited voir dire. For instance, if counsel is offered the opportunity to submit written questions for the court to ask, it will be difficult to later complain on appeal that questions could have or should have been asked.¹¹⁷ Likewise, if peremptory challenges remain unused, it will be difficult on appeal to establish prejudice to the party requesting additional inquiry of a prospective juror.¹¹⁸

Adhering to these restrictions, courts can ensure that limitations on voir dire meet the essential demands of fairness by allowing counsel an adequate opportunity to delve into biases so as to prevent unfair prejudice. Unfortunately, this standard is not an exact one that can be monitored through precise content or time restrictions.

E. Time Restrictions on Voir Dire

There are few decisions discussing judicially imposed time restrictions on voir dire.¹¹⁹ But, the Federal Judicial Center (FJC) has compiled data on time restrictions imposed by federal judges.¹²⁰ The results of

115. CONN. CONST. art. I, § 19.

116. *People v. Rodriguez*, 914 P.2d 230, 255 (Colo. 1996) ("Defense counsel does not have a constitutional right to voir dire, so long as the court's 'examination allowed counsel to determine whether any potential jurors possessed any beliefs that would bias them such as to prevent [the defendant] from receiving a fair trial.' Likewise, defense counsel does not have a constitutional or statutory right to unlimited voir dire." (citing *People v. O'Neill*, 803 P.2d 164, 169 (Colo. 1990))).

117. *See Brundage v. United States*, 365 F.2d 616, 617-18 (10th Cir. 1966) (observing that, absent a showing of inadequacy of court's voir dire to test qualifications and competency of jurors, court's discretion under Federal Rule of Criminal Procedure 24 will not be disturbed); *but see United States v. Grismore*, 546 F.2d 844, 848 (10th Cir. 1976) (stating that, under Federal Rule of Criminal Procedure 24(a), the contention on appeal that voir dire examination of jurors should have been conducted by defense counsel rather than trial judge was "frivolous and wholly without merit").

118. *See Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122-23 (10th Cir. 1995); *see also Linden v. CNH Am., LLC*, 673 F.3d 829, 839-40 (8th Cir. 2012) (failure to strike for cause was harmless where juror was struck with peremptory challenge); *see also Hummel v. Hurlbert*, 245 F. App'x 571, 572 (9th Cir. 2007) (concluding that failure to strike for cause was harmless where juror was struck with peremptory challenge).

119. *See, e.g., Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 884 (8th Cir. 2006) (discussing case where trial judge vetted proposed questions and then gave each side twenty minutes for supplemental questioning).

120. JOHN SHEPHARD & MOLLY JOHNSON, FED. JUD. CTR., SURVEY CONCERNING VOIR DIRE (Oct. 1994).

the FJC report reveal, according to the judges who responded to the surveys, the following:

- On average, federal judges allowed one hour and twelve minutes of voir dire in civil cases and one hour and thirty-nine minutes in criminal cases (this includes court-conducted voir dire and voir dire by counsel).
- In criminal cases, 34% of the judges allowed two hours or more for questioning the venire; 55% of the judges allowed one to two hours; 10% of the judges allowed thirty to sixty minutes; and 2% of the judges limited questioning to less than thirty minutes.
- In civil cases, 15% of the judges allowed two hours or more for questioning the venire; 56% of the judges allowed one to two hours; 25% of the judges allowed thirty to sixty minutes; and 4% of the judges limited questioning to less than thirty minutes.¹²¹

Without some context, it is difficult to evaluate whether the amount of time allotted was appropriate for a given case. Obviously, the complexity of the case and the number of parties involved, among other factors, can dictate whether thirty minutes or five hours of voir dire are appropriate.

F. Other Judicial Control During Voir Dire

When a trial involves multiple parties, there may be issues around the number of peremptory challenges allowed per side or per party.¹²² The U.S. Supreme Court has firmly declared that the trial judge decides how those are allocated,¹²³ and Colorado state courts follow a similar practice.¹²⁴ Recently, however, a Colorado case with multiple parties challenged the fact that the trial judge had himself exercised the remaining

121. *Id.* at 2.

122. 28 U.S.C. § 1870 (2018); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 623 (1991) (“In cases involving multiple parties, the trial judge decides how peremptory challenges shall be allocated among them.”); *Standard Indus., Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 225 (10th Cir. 1973) (upholding trial court’s decision to apportion three challenges to each of the two plaintiffs and two challenges to each of the five defendants); *see also Dickens v. Taylor*, 655 F. App’x 941, 945–46 (3d Cir. 2016) (concluding that the trial court had discretion to allocate peremptory challenges to multiple defendants); *United States v. Turner*, 389 F.3d 111, 118 (4th Cir. 2004) (requiring two defendants to share ten peremptory strikes with pool of twenty-eight jurors); *Tidemann v. Nadler Golf Car Sales, Inc.*, 224 F.3d 719, 725 (7th Cir. 2000) (concluding that trial court had discretion to grant three peremptory challenges each to both defendants); *In re Air Crash Disaster*, 86 F.3d 498, 518–19 (6th Cir. 1996) (upholding trial court’s decision to require two defendants to share peremptory challenges); *Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir. 1984) (holding that trial court abused its discretion in giving extra peremptory challenges to co-defendants with same interests, but the error was harmless because plaintiff was not prejudiced); *Fedorchick v. Massey-Ferguson, Inc.*, 577 F.2d 856, 858 (3d Cir. 1978) (upholding trial court’s decision to allow extra peremptory challenges in multiparty case).

123. *Edmonson*, 500 U.S. at 623.

124. *See* COLO. REV. STAT. § 16-10-104 (2019); COLO. R. CRIM. P. 24(d); *see also People v. Priest*, 672 P.2d 539 (Colo. App. 1983).

peremptory challenges.¹²⁵ While a division of the Colorado Court of Appeals agreed it was error for the judge to do so, it ultimately concluded that the error was not reversible because the parties entitled to those peremptory challenges chose not to exercise all of them.¹²⁶

CONCLUSION

I submit that courts—federal and Colorado—and the lawyers who practice in those courts should be ever mindful of the importance of lawyer involvement in voir dire and their role in providing a fair jury and, thus, a fair trial. Judges, in an effort to adhere to the essential demands of fairness, should not reject out-of-hand requests for lawyer questioning or questions proposed by the parties. Lawyers should be equally careful by crafting thoughtful and relevant questions. If lawyers do not overreach in trying to secure an unbiased jury, there will be fewer opportunities for the trial judge to reject the proposed inquiry. Our system of justice is well served if we heed the Supreme Court's exhortation that: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."¹²⁷

Given the corresponding import of jury selection in helping to facilitate a fair trial with impartial decision-makers, the same care is warranted for voir dire. Judges and lawyers alike share in the responsibility to preserve robust voir dire.

125. *People in the Interest of R.J.*, 2019 COA 109, ¶ 25. Of course, parties are always free to waive one, some, or all of their peremptory challenges. *See* *Thompson v. Newell*, Nos. 05-6214, 05-6296, 2007 WL 2972598, at *2 (E.D. Pa. 2007), *aff'd*, 291 F. App'x 477 (3d Cir. 2008).

126. *Interest of R.J.*, 2019 COA 109, ¶¶ 28–29.

127. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).