

Against Zoom: Why Juries Need Courtrooms

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INTRODUCTION

Although the COVID-19 pandemic led some courts to try online or virtual jury trials, using new technologies like Zoom, juries need to return to actual courtrooms. Even after the pandemic abated, some courts considered whether specific stages of the jury process, such as voir dire, could be conducted online and then the jurors who were selected could go to actual courtrooms for the trial.¹ Courts viewed online jury selection as more convenient for prospective jurors and cheaper, quicker, and more efficient for courts. As tempting as online jury selection might appear at first glance, courts need to resist it.

Courtrooms provide a unique setting in which ordinary citizens are transformed into jurors. As I develop more fully in my book, *The Power of the Jury: Transforming Citizens into Jurors*,² every stage of the jury process, including the summons, voir dire, instructions, and deliberations, aids in this transformation. Citizens, who might be reluctant to serve initially, enter the courtroom and begin to sense that their task will be out of the ordinary.³ The formal setting of the courtroom reminds them that they must set aside their everyday obligations and concerns. It also keeps them free from outside influences and distractions and allows them to focus on becoming part of a jury. Once citizens have been summoned to the courthouse and have entered the courtroom, the other stages of the jury process,

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¹ See, e.g., Andrew Denney, *Court System to Experiment with Virtual Voir Dire for Civil Jury Trial*, N.Y.L.J., June 7, 2022, <https://www.law.com/newyorklawjournal/2022/06/07/court-system-to-experiment-virtual-voir-dire-for-civil-jury-trial/> [<https://perma.cc/637G-N48A>] (describing a pilot program in Manhattan, in which prospective jurors will receive summonses to appear for juror orientation “on Microsoft Teams--and potential selection for a one-day summary trial in a civil case. . . . The remotely selected jury will have to appear in person at 60 Centre Street for the actual trial.”).

² NANCY S. MARDER, *THE POWER OF THE JURY: TRANSFORMING CITIZENS INTO JURORS* (2022).

³ *Id.* at 27–30.

including voir dire, instructions, and deliberations, transform citizens into jurors but the courtroom is essential to this transformation.

The traditional view of jurors is that they know what to do from the moment they enter the courtroom. They are supposed to be fair and impartial, and lawyers are supposed to be able to discern these qualities from the moment prospective jurors enter the courtroom. However, these qualities are not immutable, nor are they necessarily discernible by prospective jurors much less by other courtroom participants, such as lawyers and judges.

In contrast, the transformation view of the jury recognizes that citizens do not have to arrive as ready-made jurors when they enter the courtroom, but rather, by going through the several stages of the jury process, they will be transformed into jurors. According to the transformation view, jurors are made not found.⁴

Voir dire, which is the questioning of prospective jurors, takes place in open court. The traditional view sees the questioning as a way for lawyers and the judge to decide who is impartial and can serve as a juror and who is biased and cannot serve in that case.⁵

In contrast, the transformation view of voir dire sees the questioning of prospective jurors as a way for them to learn about each other, to hear each prospective juror acknowledge in open court that he or she can be impartial, to ask themselves whether they can be impartial too, and to begin to develop the judge-jury relationship that starts with the judge-jury exchanges during voir dire.⁶ It is also significant for the transformation view that the prospective jurors sit together as a group and yet apart from everyone else in the courtroom during voir dire. It is an arrangement that they will follow throughout their time as jurors. They are also aware that they are the subject of scrutiny by those in the courtroom and will continue to be observed throughout the trial. They will be both observers and observed, and they will need to maintain an impassive expression throughout their time as jurors. Thus, citizens do not need to arrive as ready-made jurors when they enter the courtroom, but rather, by going through the several stages of the jury process, they will eventually be transformed into jurors.

Zoom, even if it is used just for voir dire, has several features that interfere with the transformation of citizens into jurors.⁷ It does not allow the prospective jurors to sit together, to see everyone else in the courtroom, and yet to be aware that everyone else can see them. In other words, it does not allow prospective jurors to see themselves, and to be seen by others, as a group. It also does not allow prospective

⁴ *Id.* at 2–4.

⁵ *Id.* at 44–45.

⁶ *Id.* at 51–68.

⁷ I will be using “Zoom” in the text of this Article; however, I consider it interchangeable with other technologies that were used during the pandemic to conduct online meetings and that continue to be used for this purpose even after the pandemic. Examples of such technologies include Microsoft Teams, Google Meet, and Webex Meetings. There are likely to be new technologies over time.

jurors to get to know each other through body language, facial expressions, and by seeing the whole person, which occurs when people meet in person. Instead, everyone is reduced to appearing as a small, one-dimensional face in a Zoom box. Zoom also does not allow prospective jurors to meet in a setting free from all other distractions and one that signals to those who are present that an out-of-the-ordinary experience is about to take place. Instead, Zoom meetings take place on computers (or other electronic devices) in people's homes, where jurors cannot necessarily give their full attention to what is taking place on the screen. Zoom meetings, which have become ubiquitous in many people's lives, make it hard for prospective jurors to discern that their role as jurors will be distinctive from their everyday work.

This Article examines why jury trials, and voir dire in particular, need to take place in the courtroom and why Zoom is a poor substitute for the courtroom. This Article focuses on just one stage of the jury trial—voir dire—because that is the stage that courts have considered moving online. In this Article, I apply the transformation view that I developed in *The Power of the Jury: Transforming Citizens into Jurors* to this one stage of the jury process. However, to do so, I also provide the backdrop that shapes prospective jurors' view of voir dire—namely receiving a summons and entering the courtroom. For many prospective jurors, this will be the first time that they enter a courtroom. The transformation view will help to explain why voir dire needs to be conducted in the courtroom and why Zoom is a poor substitute for the courtroom.

This Article proceeds in six parts. Part I considers how the summons and courthouse set the stage for voir dire and the jury trial that will follow. Part II describes the traditional view of voir dire, which is the search for ready-made, impartial jurors. In contrast, Part III describes the transformation view in which voir dire begins the process of helping citizens to be transformed into jurors and to begin to put group considerations before individual ones. Part IV explores the ways in which Zoom impedes the transformation of citizens into jurors during voir dire. Zoom interferes with the formation of the group; it does not provide prospective jurors with an out-of-the-ordinary experience during voir dire; and it impedes their effort to focus on the questioning and to remain free from outside distractions, as they would be able to do in the courtroom. Part V identifies some of the reasons that courts, taking a traditional view of voir dire, might give for conducting the questioning of prospective jurors on Zoom.

Part VI suggests how courts should proceed at this time: they should resist online voir dire. If that fails, they should proceed slowly, carefully, and incrementally with any attempt to move voir dire online; however, moving some of the preliminary steps, such as completing a juror qualification questionnaire or requesting a deferral online, does not pose the same challenges as moving voir dire online. In addition, technological developments in the future might make the experience of online voir dire resemble more closely the experience of in-person voir dire in the courtroom, but this has not happened yet. Thus, this Article concludes by highlighting what is at stake if courts move voir dire from courtrooms to Zoom.

I. SETTING THE STAGE: THE SUMMONS AND THE COURTHOUSE

Citizens do not arrive at the courthouse steps as blank slates. They are likely to have some preconceptions about jury duty from popular culture. One newspaper columnist, trying to describe the terrible reputation that middle school has, wrote that it “hovers somewhere between root canal and jury duty.”⁸ This columnist is not alone in that view. Portrayals of jurors and juries in movies,⁹ books,¹⁰ and the popular press¹¹ are usually negative. Jury duty is the experience that everyone loves to hate.

A. *The Summons*

Jury duty begins with a summons, which can evoke dread. One reason for the dread is that a jury summons is a formal, legal document that can be difficult to decipher. It is a court order, not an invitation, to appear at a specific courthouse at a set date and time. Another reason for the dread is that jury duty interrupts one’s daily life and never seems to come at a good time. Researchers have found that citizens who ignore their summons often do so because they feel that they have no control over when they serve.¹² Although the summons typically provides a phone number to call if the recipient needs to request another date, many recipients miss this information because the number is not always identified for this specific purpose.¹³

In general, important information is easy to miss because a jury summons is often poorly designed. A typical jury summons, such as the one from Cook County, Illinois, consists of a page of single-spaced text, the top half of which is all in capital letters, with little white space to make the text easier to read.¹⁴ With the top half all

⁸ Heidi Stevens, *Book Aims to Change Middle School Reputation*, CHI. TRIB., Aug. 28, 2019 (§ 5), at 1.

⁹ See, e.g., THE JUROR (Columbia Pictures 1996); TRIAL BY JURY (Morgan Creek Productions 1994).

¹⁰ See, e.g., JOHN GRISHAM, THE RUNAWAY JURY (1996).

¹¹ See, e.g., Stevens, *supra* note 8, at 1.

¹² See Susan Carol Losch, Adina W. Wasserman & Michael A. Wasserman, *Reluctant Jurors: What Summons Responses Reveal about Jury Duty Attitudes*, 83 JUDICATURE 304, 310 (2000) (“Our results indicate that commitment, choice, and control distinguish people who tried to postpone current jury duty from those who tried to excuse it.”).

¹³ See, e.g., Summons to Appear for Jury Service, Cook Cnty., Ill. (Aug. 1, 2016) [hereinafter Summons to Appear, Ill.] (on file with author).

¹⁴ See *id.* One researcher observed problems with the design of summonses over twenty-five years ago, though he thought that the design of the Massachusetts summons might be the best of the ones he examined. See ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS xiii (1998) (“We highly recommend that courts consider the Massachusetts summons reprinted in Appendix 1 as an example of a user-friendly summons.”). See

in capital letters, little stands out as important. It is difficult to distinguish between important information, such as “FAILURE TO OBEY THIS SUMMONS MAY BE PUNISHABLE BY A FINE,” with less important information, such as “BRING CHANGE FOR THE VENDING MACHINES.”¹⁵

Although the top half of the Cook County summons is entirely in capital letters, the bottom half of the page, which contains “IMPORTANT INFORMATION FOR JURORS,” is in a very small font size that is difficult to read.¹⁶ Indeed, the information at the bottom half of the page is important. For example, it tells the recipient of the summons what to do if he or she has a medical or other hardship reason that might preclude him or her from serving. This important information appears in an even smaller font-size than the other “important information” that appears at the bottom half of the page.¹⁷ Thus, a person who has a medical issue, including a visual impairment, will have an even more challenging time trying to decipher the relevant text because the font size is so small. In addition, the most important information, which is a telephone number to call if the recipient cannot serve on the date and time he or she is ordered to serve, is not identified for that purpose. There is a telephone number (312-603-5879 (JURY)) that a recipient can call if he or she is seventy years or older and needs to be excused or assigned to another courthouse.¹⁸ That same telephone number is provided for those who have dietary restrictions, a medical or other undue hardship, or require “ADDITIONAL INFORMATION” or who “HAVE ANY QUESTIONS,”¹⁹ but the text does not indicate that the recipient can call that number and receive an automatic deferral. This is critical information and yet it is not made explicit on the summons. Many citizens want to serve but cannot serve on the date and time they have been assigned. They need to know that there is a telephone number to call to defer jury service to a date and time that does not pose a conflict for them.

The design of the summons is not the only problem; the language that is used is formal and off-putting. It focuses on the penalties that might ensue for those who do not heed their summons rather than on the positive experience they are likely to have if they serve as jurors.²⁰ The summons also threatens the citizen with

generally EDWARD R. TUFTE, ENVISIONING INFORMATION (1990) (focusing on the importance of the visual presentation of data so that it will be understood correctly by the reader).

¹⁵ Summons to Appear, Ill., *supra* note 13, at 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Some states are trying to make their jury summons more personal and welcoming. Connecticut, for example, is considering having the summons come from the Chief Justice of the Connecticut Supreme Court rather than from an anonymous Jury Administrator and emphasizing

punishment if he or she fails to appear but does not reassure the citizen of his or her competence to perform the role. The summons also leaves many basic questions unanswered, such as how far away the parking garage is from the courthouse, whether there is childcare, and whether there are places near the courthouse to eat (or is one just limited to the courthouse vending machines).

Even if a citizen is willing to heed the summons, the summons does not always reach the intended recipient. Courts use mailing addresses drawn from lists that are not updated annually. For example, the most common list is the voter registration list, which is updated every four years.²¹ State and federal courts could use multiple lists, such as voter registration lists, along with lists of driver's licenses, tax rolls, unemployment compensation, or utilities, so that they reach as broad a swath of the citizenry as possible and so that the mailing address is more likely to be current, but they have been slow to adopt this practice.²² Meanwhile, Americans have become increasingly more mobile, and with the advent of remote work in response to the pandemic, this trend has become even more pronounced.²³ Thus, Americans are moving but the courts' jury summonses are not keeping up with their new addresses.

B. *The Courthouse*

Although courthouses are built in many different styles,²⁴ they often stand out as distinctive. Those built in a classical style suggest that they are not mere office buildings but that they are public buildings in which work of public significance will

positive rather than negative aspects of jury duty. See JURY SELECTION TASK FORCE, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON 9-14 (2020).

²¹ See Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, 2023 U. ILL. L. REV. 879, 899.

²² *Id.*

²³ See, e.g., Alex Veiga, *Many Americans Moved to Less Pricey Housing Markets in 2020*, ASSOCIATED PRESS (June 10, 2021, 5:39 PM GMT), <https://apnews.com/article/lifestyle-health-coronavirus-pandemic-business-67fdcc71ce55d9222e6c1daf32392180> (“[M]any Americans used the pandemic, and the broader acceptance of working remotely, as an opportunity to flee higher-cost metropolitan areas.”); *id.* (“The pandemic in many ways just intensified existing migration patterns and accelerated established trends, including that of people moving from the Northeast and Midwest to the Sunbelt.”) (citing Jeff Tucker, a senior economist at Zillow); Paul Davidson, *Americans Keep Moving Away from Bigger Cities*, ROCHESTER DEMOCRAT & CHRON. (N.Y.), June 15, 2024, at G16 (“Americans have continued to flee large metro areas in massive numbers as the remote work shift sparked by COVID becomes entrenched and the allure of more affordable midsize cities and smaller towns grows.”). But see Suzanne Blake, *Political Tensions Lead Some Americans to Move to Other States*, NEWSWEEK (Feb. 7, 2024, 1:42 PM EST), www.newsweek.com/americans-moving-relocating-political-reasons-1867856 [<https://perma.cc/CW7F-J3QM>] (“Despite the mass migration that saw residents leave expensive states like New York behind in favor of more temperate and cheaper climates of the South, some families are moving back, preferring to live in areas with stricter gun laws, fewer abortion restrictions or greater LGBTQ acceptance,” according to a recent Redfin report.)

²⁴ See JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

take place inside. On the outside, they might have columns or sculptures depicting justice. For example, outside the Superior Court of Justice in Toronto, there is a sculpture of eleven jurors, called “Pillars of Justice.”²⁵ The missing juror is filled in by the viewer. The sculpture, the massive building, and the surrounding gardens filled with other sculptures all signal that this is no ordinary workplace. However, not all courthouses are inspiring or welcoming. For example, one prospective juror, waiting in the courthouse on Centre Street in lower Manhattan, described the building as “grim and forbidding in a Stalinist sort of way (towering, gray, squint-windowed).”²⁶ A courthouse might or might not be built in a pleasing architectural style or setting, but it typically stands out as a building built for a particular purpose, like a house of worship.

When prospective jurors enter the courthouse, their sense of dread can be reinforced. They are made to wait in a Jury Assembly Room, and they are typically given little information about what will happen next. Some never make it beyond the Jury Assembly Room. If they do make it to a courtroom, they are already thinking about their excuses—why they cannot serve. One anthropologist described jury selection in one high-profile trial as “a culture of excuses” in which prospective jurors tried to figure out which excuses would lead the trial judge to excuse them for hardship.²⁷

At the same time as citizens feel dread when they receive their summons and when they enter the courthouse, there is another, more positive, response that they might eventually feel, and that is that they are being summoned to perform a task that is out of the ordinary. Thus, along with the dread, there is a little bit of awe. It can be the august setting of the courthouse or the symbols of the courtroom, such as the judge in a robe, the gavel, the flags, and the formal seating arrangements, that inspire this awe. It is against this backdrop—primarily of dread, but perhaps including a sense that what is about to take place in this formal building is out of the ordinary and will require out-of-the-ordinary attention and behavior—that prospective jurors begin voir dire.

II. THE TRADITIONAL VIEW OF VOIR DIRE

The traditional view of voir dire is that prospective jurors’ answers to the questions asked by the judge, the lawyers, or both will reveal who has biases relevant to the case and cannot serve and who does not and can serve. The prospective jurors

²⁵ The sculpture of eleven jurors, entitled “Pillars of Justice,” was created by Edwina Sandys and was installed in 2007 in The McMurtry Gardens of Justice, in front of the Superior Court of Justice on University Avenue in Toronto, Ontario, Canada.

²⁶ D. GRAHAM BURNETT, *A TRIAL BY JURY 20* (2001).

²⁷ MARDER, *supra* note 2, at 24 & n.47 (quoting Kelly McKowen, who was a prospective juror in the so-called “nanny case” in New York City in 2018).

are typically questioned as a group and in open court before the parties, the press, and the public.

A. Identification of Impartial Jurors

Voir dire is traditionally understood as a search for impartial jurors.²⁸ The judge must make sure that there is no obvious reason why a prospective juror cannot serve, and the judge can use for cause challenges (for which a reason must be given in open court) to remove those who cannot serve. There is no set number of for cause challenges and judges can decide when for cause challenges are appropriate to use. Typical reasons for a for cause challenge are that a prospective juror has a familial relationship with one of the parties, a financial stake in the outcome of the trial, or says that he or she cannot be impartial.²⁹

Lawyers seek sympathetic, rather than impartial, jurors, even if they will not always admit it.³⁰ They want to learn as much as possible about the prospective jurors during voir dire so that they can try to figure out which ones will be more favorable to their client and which ones they have misgivings about. Lawyers are allotted a certain number of peremptory challenges,³¹ which allow them to remove a certain number of prospective jurors without having to give a reason (except in certain limited instances).³²

²⁸ See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 50 (1988) (“The voir dire is designed by law to serve only one purpose: to enable counsel to probe jurors for information about their state of mind that might provide grounds for their removal.”); Wendy P. Heath & Bruce Grannemann, *Prospective Jurors’ Attitudes Toward Voir Dire*, *CT. REV.*, Jan. 2024, at 158, 158 (“The main goal of voir dire is to determine if a prospective juror will be impartial or biased against one of the parties in the litigation . . .”).

²⁹ *Hopt v. Utah*, 120 U.S. 430, 433 (1887) (providing instances when it is appropriate for a trial judge to grant a for-cause challenge).

³⁰ See, e.g., KASSIN & WRIGHTSMAN, *supra* note 28, at 50 (describing lawyers as seeking sympathetic, rather than impartial, jurors); JAMES P. LEVINE, *JURIES AND POLITICS* 51 (1992) (“The use of peremptory challenges is supposed to eliminate people who are biased and leave a batch of open-minded jurors. But lawyers use their prerogatives to try to accomplish just the opposite—a jury packed with sympathizers or at least devoid of antagonists.”).

³¹ For example, in civil cases in federal court, each side has three peremptory challenges. See *FED. R. CIV. P.* 47(b) (referring to 28 U.S.C. § 1870, which provides three peremptory challenges). Whereas in criminal cases in federal court, the number of peremptory challenges varies with the seriousness of the crime. There are three peremptory challenges per side in a misdemeanor case, see *FED. R. CRIM. P.* 24(b)(3), but the government has six peremptory challenges, and the defendant has ten in a felony case. See *FED. R. CRIM. P.* 24(b)(2).

³² Lawyers must give reasons for exercising a peremptory challenge if the other side establishes a prima facie case that the peremptory challenge is based on race, ethnicity, or gender. See *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (holding that a prosecutor’s use of a peremptory challenge based on race violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution);

B. Barriers to Discerning Impartial Jurors

Although the traditional view of voir dire is that the judge and lawyers will try to discern which prospective jurors are impartial and can be seated on the jury, there are several impediments to identifying bias, particularly the more subtle forms of bias, such as implicit bias. Explicit bias is a bias about which a person is aware, whereas implicit bias is a subconscious bias about which a person is unaware.³³

Even if prospective jurors are aware of their own explicit biases, they still might be reluctant to admit them during voir dire. One reason is that they want to give “socially desirable” answers in response to voir dire questions.³⁴ Social psychologists have observed that when prospective jurors are asked whether they can be impartial, they might say that they can be because it is the socially expected answer, even if they know that they cannot be.

Social psychologists have also observed that it is hard for people to recognize bias in themselves, and it is even harder for them to recognize bias in another.³⁵ This applies to prospective jurors, who might have trouble recognizing bias in themselves, particularly when they are questioned orally and have little time for reflection. Lawyers and judges might also have trouble recognizing bias in prospective jurors, particularly judges who are less familiar with the case than lawyers.³⁶ In addition, prospective jurors might feel the need to try to give a socially desirable response to the judge, who is, after all, the authority figure in the courtroom.³⁷

There are ways to address some of these structural impediments and to try to make voir dire more useful for lawyers and judges as they try to identify biased prospective jurors. For example, prospective jurors could complete a written questionnaire in advance of oral questioning. This would give prospective jurors

Powers v. Ohio, 499 U.S. 400 (1991) (extending *Batson* to any race and ethnicity); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (extending *Batson* to gender).

³³ See, e.g., Jerry Kang, *What Judges Can Do About Implicit Bias*, CT. REV., May 2021, at 78, 78–79 (describing explicit and implicit biases).

³⁴ Regina A. Schuller & Caroline Erentzen, *The Challenge for Cause Procedure in Canadian Criminal Law*, 6 ONATI SOCIO-LEGAL SERIES 315, 327, 329 (2016) (describing people’s tendency to give “socially desirable” answers); Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and Terrorist Trials*, 78 CHI.-KENT L. REV. 1143, 1150 (2003) (same).

³⁵ Schuller & Erentzen, *supra* note 34, at 321.

³⁶ See, e.g., 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, 1196 (2003) (“Some studies suggest that judges are not as effective as attorneys in uncovering potential biases.”).

³⁷ *Id.* at 1197 (citing a study that suggests that “because judges have higher status than attorneys, they are more likely to inhibit prospective jurors’ self-disclosure”).

some time to think about their responses. It would also allow prospective jurors to find a style of communication that allows them to be more forthcoming with less anxiety. For example, a written questionnaire might allow a prospective juror who is an introvert to feel more comfortable answering questions on paper than in an oral exchange.³⁸ A written questionnaire would also allow a question to be asked in several different ways, and inconsistencies could be pursued during the oral questioning.³⁹ In addition, the lawyer, who is more familiar with the case than the judge, could conduct oral questioning (under the supervision of the judge) because he or she would be in a better position to anticipate possible biases that the case could raise. However, even with these structural changes, the traditional view of voir dire is that lawyers and judges can uncover biases, including subtle (or implicit) biases, even though social psychologists' studies suggest that they cannot.

Instead, voir dire needs to be recognized as serving a different purpose. Voir dire does not enable lawyers and judges to find ready-made jurors who are impartial from the start, as the traditional view holds. Rather, voir dire starts the process of transforming citizens into jurors, and by the time that they are ready to deliberate, the jury process will have transformed them into jurors who have had experiences in the courtroom that will allow them to deliberate impartially.

III. THE TRANSFORMATION VIEW OF VOIR DIRE

My argument is that voir dire is important—not for the reason the traditional view suggests, which is to weed out biased jurors—but because it helps transform citizens into responsible jurors. Voir dire facilitates this transformation so that citizens who wanted to be excused when they entered the courtroom now want to serve, or as one juror acknowledged: “I was suddenly rather keen to be on [the jury.]”⁴⁰

According to the transformation view, jurors are made, not found. Although this transformation does not begin for every prospective juror at the same moment, it does start for many prospective jurors during voir dire. There is almost a palpable moment during voir dire when prospective jurors shift from wanting to be excused to wanting to serve.

Several of the features of voir dire contribute to this transformation. These features are integral to prospective jurors' experience during voir dire and yet easy

³⁸ See generally SUSAN B. CAIN, QUIET (2020) (describing differences between introverts and extroverts and how introverts' strengths are often missed because so many environments are designed for extroverts).

³⁹ See, e.g., Vidmar, *supra* note 34, at 1157–59 (describing the use of a survey and telephone interviews that asked similar questions in different ways to reveal potential prejudice that John Walker Lindh, a Taliban fighter charged with acts of terrorism, could have faced in a jury trial in Virginia, which was directly affected by the terrorist airplane attack on the Pentagon on Sept. 11, 2001).

⁴⁰ TREVOR GROVE, THE JURYMAN'S TALE 33 (1998).

to overlook. These features do not necessarily require a courtroom, but they do need an out-of-the-ordinary physical setting, which a courtroom provides.

A. *The Jury Box*

One important feature of voir dire is that prospective jurors are seated together in a jury box and apart from everyone else in the courtroom.⁴¹ The separation between those in the jury box and those in the courtroom can be marked by an aisle, a railing, some paneling, or some combination of all the above. Thus, the jury box provides a constant physical reminder to the prospective jurors as they are being questioned, and to the jurors who are ultimately selected for the jury, that the jurors serve as a jury and must remain apart from everyone else in the courtroom for the duration of the trial.

Jurors can also observe everything taking place in the courtroom, but they quickly realize that they are being carefully watched by everyone in the courtroom as well. They understand that they must try hard, like the judge, not to show agreement or disagreement with anything that is said in the courtroom. They need to appear impassive so that they show everyone in the courtroom that they are open-minded and impartial.⁴² As one juror observed: “[Y]ou are immediately aware that you are very much part of the ‘show’ as you are watched by the principals in the case while being scrutinized by the attorneys so they can get a ‘read’ on how their case is being accepted”⁴³

B. *Group Questioning*

Another important feature is that prospective jurors are questioned orally as a group. Although this might not be the best way to elicit information from them,⁴⁴ group questioning is very important. Group voir dire gives the jurors a shared group experience. It also allows them to learn about their fellow prospective jurors, even

⁴¹ The venire is often seated initially in the public area of the courtroom and then twelve prospective jurors are chosen randomly and are seated in the jury box. As prospective jurors are excused (for hardship or for cause), they are replaced with other prospective jurors still seated in the public area. Of course, different judges follow different practices of seating a jury. *See infra* notes 56–59 and accompanying text (providing a description of two popular methods of conducting voir dire).

⁴² *See, e.g.*, JURY TRIAL INNOVATIONS 305 (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead eds., 1997); GROVE, *supra* note 40, at 34 (recognizing that the jurors remained “silent” in the courtroom and tried to give away “nothing except what could be read on [their] faces”).

⁴³ JURY TRIAL INNOVATIONS, *supra* note 42, at 305 (quoting from Letter from a Juror in a High-Profile Case) (app. 13).

⁴⁴ *See* Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, CT. REV., Spring 1999, at 10 (recommending group voir dire and then individual voir dire in the judge’s robing room so that prospective jurors cannot remain silent and can feel comfortable enough to give candid responses in a small, intimate setting).

if it is just basic background information, like what one would learn about a person at a cocktail party. It allows them to start to feel comfortable with each other. If they are in a jurisdiction that requires jurors to select a foreperson when they begin their deliberations, it gives them information about each other that might inform their decision. In addition, as they learn more about each other, they will be better prepared for deliberations, when they might view the evidence differently to begin with but will need to listen to each other to reach a unanimous verdict.

Group questioning also allows the prospective jurors to hear each other say that they can be impartial. Thus, as they hear others say that they can be impartial, they start to think that they, too, can be impartial.

Group questioning also means that all the prospective jurors have the same information about each other (such as that they have all said that they can be impartial) and that they have the same information from the judge. They are being treated as equals, which is how they will learn to treat each other.

It is also important that the judge is doing this group questioning, even though the lawyers might know more about the case, because it marks the start of the judge-jury relationship. The back-and-forth between judge and jury begins during voir dire, continues throughout the trial, and ends when the jury is dismissed, or in some courtrooms, after the judge and jury meet for a post-verdict interview.⁴⁵

During voir dire, the judge can help jurors understand their role. One of the questions the judge always asks is whether the prospective juror can be “impartial.” This question pushes prospective jurors to think beyond their personal concerns and to ask themselves whether they can serve.

At some point during voir dire, prospective jurors begin to hope that they will be selected. Psychologists note that people tend to maintain that they were present at a significant historical event, even when they were not, because they want to be part of history.⁴⁶ The opportunity to serve on a jury may work in a similar way. Those who are present in the courtroom during voir dire can almost feel the change when prospective jurors shift from wanting to be excused to wanting to serve. It is a significant moment in the courtroom and one with which judges and lawyers are familiar.

Juror accounts of their jury experience support this shift. Those who were not selected feel disappointed, even if they had not wanted to serve initially.⁴⁷ They feel

⁴⁵ MARDER, *supra* note 2, at 209–43 (describing post-verdict interviews and the ways in which they can help transform jurors back into private citizens who will serve as emissaries for the jury system).

⁴⁶ See, e.g., Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23, 26.

⁴⁷ See, e.g., Dan Hatfield, *Jury Service an Engaging Adventure*, JUDGES J., Fall 2004, at 34, 36 (“Surprisingly, that [excuse] was a bittersweet moment for me. I had gone from wanting to get out of this [jury service], to a heartfelt obligation to serve.”); Deborah J. Golder, *Reflections: A Different Duty*, 90 AM. J. NURSING 92 (1990) (describing a nurse who could have sought a deferral but decided not to because she saw jury duty as “just as important as working as an emergency nurse at a large city hospital,” yet, she was both “relieved” when she was not chosen to sit on a criminal jury but also “disappointed”); *My Day in Court. Reflections on Jury Duty*, STEPHEN J. STIRLING (May 11, 2014),

that they might have missed out on an important experience. Those who were chosen begin to put aside whatever individual inconvenience they might have felt about jury duty and instead focus on the enormous responsibility that they have assumed and that they are reminded of as they look at the parties before them.⁴⁸

C. *The Oath*

The prospective jurors who have been selected to serve on the jury stand and take an oath together. They take this oath before everyone in the courtroom. As one former juror noted: “[T]he only other occasions on which such solemn undertakings [as an oath] are pronounced in public are weddings and christenings.”⁴⁹ From the moment they take this oath, the jury has been impaneled.

The oath that the prospective jurors take is like the oath that a judge takes before assuming his or her position. A typical oath to become a juror is the following: “You and each of you, do solemnly swear that you will well and truly try the cause now pending before this Court, and a true verdict render therein according to the evidence and the instructions of the Court, so help you God?”⁵⁰ This is similar to the oath that a federal judge takes when he or she is sworn into office:

I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.⁵¹

<https://stephenjstirling.org/my-day-in-court-reflections-on-jury-duty/> [<https://perma.cc/VP5J-FWMH>] (describing the experience of a high school teacher who sought a hardship excuse and after it was granted he felt “a little disappointed”).

⁴⁸ Graham Burnett, who served as the foreperson of the jury in a murder trial in New York City, and eventually wrote a book about his experience, described his initial reluctance to serve; however, by the time of voir dire, Burnett “was completely absorbed—aware that this was a rare opportunity to participate in something important, weighty, real, something very different from [his] academic life.” BURNETT, *supra* note 26, at 29. Years later, Burnett described his jury service as “a deeply affecting experience.” D. Graham Burnett, *Foreword to the 50th Anniversary of 12 Angry Men*, 82 CHI.-KENT L. REV. 551, 551 (2007); *see also* GROVE, *supra* note 40, at 60 (recounting how the judge told Grove and several other prospective jurors to go home over the weekend and decide if they could serve on a lengthy criminal trial; upon reflection, Grove realized that he “was suddenly rather keen to be on [the jury]”).

⁴⁹ GROVE, *supra* note 40, at 33 (quoting Grove, who served as the foreperson in a jury trial involving a charge of kidnapping).

⁵⁰ CALIFORNIA SUPERIOR COURT CRIMINAL TRIAL JUDGES’ DESKBOOK 356 (Ronald M. George ed., 1988 ed.).

⁵¹ 28 U.S.C. § 453 (2018).

Both oaths help jurors and judges alike to understand that they are about to assume unusual responsibilities. Whatever their initial misgivings or reservations, they are swearing (or affirming) that they will perform these duties to the best of their abilities. They are taking this oath in the public setting of the courtroom before all who are present. One difference is that the jurors take their oath as a group and will perform their role as a group. Another difference is that jurors will perform their role for only one case, whereas the judge will perform for a set term or for a lifetime appointment. However, jurors and judges alike take an oath that signals the seriousness of the work they are about to embark upon. The oath is not an everyday experience, nor is the kind of decision making they will be asked to undertake as jurors or judges.

IV. HOW ZOOM IMPEDES THE TRANSFORMATION OF CITIZENS INTO JURORS DURING VOIR DIRE

Even after the pandemic abated, some courts continued to conduct voir dire using Zoom, as they did during the pandemic, rather than holding voir dire in the courtroom, as they had done before the pandemic and for as long as there have been jury trials in the United States. However, courts need to resist the temptation to hold voir dire on Zoom because it interferes with the transformation of citizens into jurors.

Zoom is not a replacement for a courtroom; it is missing several essential features. Foremost, Zoom does not provide a physical setting in which prospective jurors can be together, which means it does not allow prospective jurors to see each other fully, to observe others in the courtroom, and to realize that others are observing them. It also does not give prospective jurors the opportunity to get to know each other, to give them a sense that they are about to embark upon an out-of-the-ordinary experience together, to keep them free from outside influences and distractions, and to help them to focus on every stage of the jury process, beginning with voir dire. These features, which a courtroom provides, but which Zoom does not, are essential. They help transform citizens into jurors, which means that even those prospective jurors who might be reluctant to serve initially, experience behaviors in the courtroom that help them to become responsible jurors who are able to deliberate as an impartial jury.

A. Prospective Jurors Lack Physical Proximity to Each Other on Zoom

Zoom interferes with the formation of a jury because prospective jurors are not physically together during voir dire on Zoom. When prospective jurors are

questioned on Zoom—whether by the judge or the lawyers⁵²—they do not have a sense of being part of a group as they would if they were together in the courtroom.⁵³

On Zoom, each prospective juror occupies his or her own individual box. The Zoom boxes of prospective jurors might appear together, or they might not, depending on how many prospective jurors are being questioned at one time. Some prospective jurors might appear on a different page so that a prospective juror must flip back and forth between pages on his or her screen to see the whole group.

The number of Zoom boxes that appear together on a page can differ for different viewers depending upon their viewing device (a computer with a separate monitor, a laptop, an iPad, or an iPhone). Thus, all the prospective jurors are not necessarily seeing the same configuration of prospective jurors at the same time. In addition, Zoom boxes can change locations on the screen, depending upon who speaks, whereas in the courtroom, wherever a prospective juror is seated, that is where he or she remains, unless dismissed from the jury. For example, the first person seated in the jury box in some courtrooms becomes the foreperson.⁵⁴ On Zoom, it could be hard to recall who was seated first, particularly if that prospective juror does not occupy the first box on the Zoom page.

It is also hard for prospective jurors on Zoom to feel part of a group when each person is sitting alone in his or her home. The court typically instructs prospective jurors participating via Zoom to find a place at home where they will be alone and undisturbed by others in their household so that they can focus on the questioning.⁵⁵

⁵² *The Federal Rules of Civil and Criminal Procedure* provide for the judge or lawyers to conduct voir dire. See FED. R. CIV. P. 47(a) (civil trials); FED. R. CRIM. P. 24(a)(1) (criminal trials). However, federal judges in both civil and criminal jury trials often conduct voir dire but then take supplemental questions from the lawyers. The rules provide for this arrangement as well. See FED. R. CIV. P. 47(a) (“If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper”); FED. R. CRIM. P. 24(a)(2) (“If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.”). Federal judges prefer this arrangement because they believe that they are more concerned than the lawyers with conducting a voir dire that is efficient and avoids unnecessarily intrusive questions.

⁵³ Although it has been challenging to find a voir dire on Zoom to observe because they are generally live-streamed and not archived, I am assuming that voir dire on Zoom has many of the same limitations that law school courses and conferences on Zoom have. I also recognize that there may be differences among courts and individual judges in how they conduct voir dire on Zoom, just as there are differences in how some courts and individual judges conduct voir dire in the courtroom.

⁵⁴ For example, Judge Leonard B. Sand, a federal district court judge in the Southern District of New York from 1978–2016, followed this practice. I had the privilege of clerking for him in 1988–89.

⁵⁵ See, e.g., Madison Alder, *Virtual Criminal Jury Trial Getting Texas Test—iPads Included*, BLOOMBERG L. (Aug. 11, 2020, 3:50 AM), <https://news.bloomberglaw.com/us-law-week/virtual-criminal-jury-trial-getting-texas-test-ipads-included-1> (describing “the first U.S. virtual criminal jury trial,” which took place during the COVID-19 pandemic, and raised several questions, including whether jurors could remain free from outside influences and could avoid being “distracted by their phones or talking to family during the proceedings”).

Although prospective jurors on Zoom need to give the questions their full attention, they are necessarily doing so without fellow prospective jurors nearby. They see others on the screen, but they see them from the isolation of their home.

In a courtroom, however, prospective jurors are seated together. A venire (or panel) of prospective jurors is typically brought as a group from the Jury Assembly Room to the courtroom. The prospective jurors initially might sit together in the public section of the courtroom. One method of jury selection, the “struck” method,⁵⁶ entails reducing the panel to the number of jurors and alternates to be seated, plus the number of peremptory challenges available to the parties. These prospective jurors are questioned together, usually in the jury box, and there might be follow-up questions for individual prospective jurors. At the end, the parties take turns exercising their allotted peremptory challenges, outside of the presence of the prospective jurors. Those who are struck leave together and do not know which side removed them. The jury is then sworn in.

One advantage of the struck method is that it allows for group questioning.⁵⁷ It “permits all prospective jurors to participate in questioning, making the experience more educational and personally meaningful to jurors, as well as preserving their dignity by not calling attention to which jurors were struck by whom.”⁵⁸ The American Bar Association recommends the struck method of jury selection.⁵⁹

Prospective jurors, seated together in the jury box, start to feel connected to each other and separated from others in the courtroom. Their sense of belonging to a group starts during voir dire and continues throughout the trial. They sit together in the jury box, which reminds them that they are part of a group, but at the same time, the jury box is physically set apart from everyone else in the courtroom, which reminds the jurors of their unique status.

B. Prospective Jurors Cannot See Each Other Fully on Zoom

On Zoom, prospective jurors can only see each other’s faces, names, and perhaps some of the background in front of which they are sitting in their homes. Unfortunately, faces on Zoom are one dimensional. They are like looking at a headshot of a person, though the headshot can speak and move. In the courtroom, however, prospective jurors can see the entire person, from head to toe, particularly

⁵⁶ JURY TRIAL INNOVATIONS 80 (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead eds., 2d ed. 2006) [hereinafter JURY TRIAL INNOVATIONS (2d ed.)].

⁵⁷ In contrast, another method, called “strike-and-replace,” involves the questioning of small groups of prospective jurors, usually in groups of six to eight at a time. Those who are removed for cause or peremptory challenges are replaced with others on the panel until a jury is formed. *Id.* The trend, however, is toward the “struck” method. *Id.*

⁵⁸ *Id.* at 81.

⁵⁹ See AM. BAR ASS’N, PRINCIPLES FOR JURIES & JURY TRIALS 91 (2024) (Principle 11, Comment, Subdivision D).

as they move from the public section to their seat in the jury box. Once they are seated, they can still be constantly observed but only in a seated position.

Although prospective jurors on Zoom can see each other's faces, they are missing vital pieces of information that help make them memorable to each other. For example, when people meet in person, they see not only their face from a variety of perspectives, but also the shape of their head and the length and texture of their hair, as well as their body, from which can be observed their height, body type, level of fitness, how they walk, and the clothing they choose to wear. None of this information is available from the small faces that appear inside the small boxes on Zoom.⁶⁰

Prospective jurors on Zoom not only miss important information about their fellow prospective jurors but also they cannot see the other people in the courtroom. Of course, it would depend on where cameras are placed in the courtroom for the Zoom voir dire, but there is likely to be a camera focused on the judge and another on the lawyers, if they are in the courtroom. However, if the judge and lawyers are also at home, then prospective jurors will see them the same way that they see their fellow prospective jurors on Zoom. Everyone will just appear in their individual Zoom box.

In contrast, when prospective jurors are in the courtroom, they have a panoramic view of the courtroom and everyone in it. They can focus on the judge, but they can also observe the lawyers and parties, and during the trial, they need to focus on the witness in the witness box. One empirical study focused on the "offstage" behavior that jurors observed in the courtroom during the trial.⁶¹ Jurors focused on lawyers and parties not just when they performed their respective roles in the courtroom but also when they sat in the courtroom and were unaware that they were being observed. Jurors' presence in the courtroom, and their keen powers of observation, mean that they can spot behaviors that the lawyers or parties might be unaware of but that jurors are quick to notice. When voir dire is held in the courtroom, there is much for prospective jurors to observe, including members of the press and public, court staff, and parties and lawyers in their official roles, as well as when they are "offstage."

Of course, jurors in the courtroom quickly learn that while they are observing the participants in the trial, they, too, are being observed. One juror described the need that he and his fellow jurors felt to maintain an impassive demeanor so that

⁶⁰ As one law professor cautioned courts about the use of remote testimony: "If we think about all the people we've met during the Covid era and then finally meet face to face a year or two later, there are all kinds of things you notice and appreciate for the first time, even if you've had all these interactions over Zoom." Adam Liptak, *Video Testimony from Covid Era Faces Constitutional Test at Supreme Court*, N.Y. TIMES, Mar. 21, 2023, at A20 (quoting Jeffrey L. Fisher, a law professor at Stanford Law School).

⁶¹ Mary R. Rose, Shari Seidman Diamond & Kimberly M. Baker, *Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials*, 34 LAW & HUM. BEHAV. 310, 322 (2010) (finding that jurors pay attention to trial actors' behavior even when they are not performing in their formal roles in the courtroom, but that these observations do not play much of a role during jury deliberations).

those who were watching them would not be able to discern whether the jurors agreed or disagreed with what was being said in court.⁶² Another juror, who ended up writing a book about his jury experience, noted that he and his fellow jurors knew that the public and press in the courtroom were focused on the jurors but the jurors tried not to reveal anything.⁶³ They were “stony-faced as sphinxes”⁶⁴ but understood that everyone in the courtroom tried to “read” their faces anyway.⁶⁵ Those in the courtroom saw the jurors as a jury and understood the power they possessed by virtue of that role. Everyone in the courtroom wanted to know what the jurors were thinking because they understood “it was [the] twelve who had ultimate power in this court.”⁶⁶

C. Prospective Jurors Cannot Get to Know Each Other Very Well on Zoom

Prospective jurors on Zoom will find it much harder to get to know each other than if they were meeting in the courtroom. As anyone who has attended a Zoom conference or even a Zoom class knows it is hard to meet people on Zoom whom you do not already know. Zoom makes it difficult for two people to engage in small talk. Everything that is said on Zoom is shared with the entire group. To avoid such widescale sharing, participants on Zoom usually just put themselves on mute while they wait for others to enter the Zoom room and for the formal program to begin. As a result, everyone is silent; no sharing takes place.

Holding voir dire on Zoom means that prospective jurors will not have the informal exchanges with each other that they would have if they were in person in the courtroom. There can be downtime even during voir dire, and this downtime allows prospective jurors who are physically sitting next to each other to exchange a few words. Such informal exchanges help jurors to learn about and feel comfortable with each other. They need to develop a rapport with each other so that when they begin the difficult task of deliberating, they will have a foundation from which to work.⁶⁷

⁶² See JURY TRIAL INNOVATIONS, *supra* note 42, at 305 (app. 13).

⁶³ GROVE, *supra* note 40, at 35.

⁶⁴ *Id.*

⁶⁵ *Id.* at 34.

⁶⁶ *Id.*

⁶⁷ In the film *12 Angry Men*, the jurors had a very difficult deliberation because they took an early vote and eleven jurors voted to convict and one juror, Juror #8 (played by Henry Fonda), voted to acquit. See *12 ANGRY MEN* (Orion-Nova Films 1957). To reach a unanimous verdict to acquit took much time and careful review of the evidence by all the jurors, but it also took informal exchanges between one or two jurors—by the window, in the adjoining washroom, and sharing asides with the person they were sitting next to—before they reached a unanimous verdict to acquit. Of course, few juries can manage to vote eleven to one to convict and end up with a unanimous verdict to acquit, except in the movies. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 110 (1986) (“[*12 Angry*

For example, in one high-profile trial in New York, one prospective juror observed that about eighty percent of his fellow prospective jurors sought hardship excuses as soon as the judge announced that the trial involved a murder charge, would take more than a week, and the jury would be sequestered.⁶⁸ The prospective juror whispered to the woman sitting next to him that he was surprised to see that so many prospective jurors were not curious about what would happen in the case.⁶⁹ The woman said the only reason she was still in her seat was that she was thinking about which hardship excuse was likely to be most effective with the judge.⁷⁰ That kind of informal exchange could not have taken place on Zoom, especially because the judge would have heard it and would not have granted the woman any hardship excuse at all. While the woman was still trying to decide which excuse to give, the man decided to stay in his seat and not offer an excuse. He had pondered the following question: “My sense was that I was busy, but how could I be too busy for this?”⁷¹

When voir dire is held in the courtroom, prospective jurors can chat briefly with those sitting beside them. When prospective jurors are taken from the Jury Assembly Room to the courtroom, they can also talk with the prospective jurors walking alongside them. Zoom, however, is not conducive to such informal conversations, even though they can help prospective jurors to become acquainted and to work together if they end up on the jury. Indeed, in both a mock Zoom jury trial and an actual virtual civil jury trial during the pandemic,⁷² some participants suggested that it would be helpful for jurors on Zoom to get to know each other better before they had to deliberate.

D. Prospective Jurors Do Not Experience Voir Dire as Out of the Ordinary on Zoom

Meetings on Zoom are such a commonplace occurrence that voir dire on Zoom is unlikely to produce out-of-the-ordinary experiences for most prospective jurors unlike the courtroom which remains an out-of-the-ordinary experience for most prospective jurors. When prospective jurors go on Zoom for voir dire questioning,

Men’s plot, in which one juror persuades the other eleven to change their vote,] makes for a gripping movie, but outcomes like this one almost never occur in real life.”).

⁶⁸ BURNETT, *supra* note 26, at 23–24.

⁶⁹ *Id.* at 24.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Valerie P. Hans, *Virtual Juries*, 71 DEPAUL L. REV. 301, 311 (2022) (citing a mock Zoom jury trial, conducted by the Civil Jury Project at NYU School of Law in June 2020, in which some mock jurors suggested that it would have been useful for them to get to know each other before deliberations); *id.* at 312–13 (describing an actual virtual civil jury trial, in *Dallo v. Holland Am. Line N.V.*, in which the judge noted that the jurors had not had “an opportunity to meet or talk to other jurors prior to deliberations”).

they are likely to view it like any other Zoom experience. It is unlikely to stand out in the way that a visit to a courtroom does. Yet, prospective jurors need to understand that voir dire questioning is an out-of-the-ordinary experience and needs to be treated that way.

For every Zoom meeting, an individual's face appears in a box and their name appears at the bottom. The judge is likely to remind them to find a room in their home where they will not be disturbed and that has a door that can be closed. Although a judge will ask questions of the prospective jurors, and possibly the lawyers will ask questions too, this Zoom meeting is not readily distinguishable from other Zoom meetings, such as meetings for business, school, or even family get-togethers. At most, the judge might have as his or her background a view of the courtroom or law books in the judge's chambers, but those are hard to see given the size of an individual box, even if one shifts the view from the smaller "gallery" images to the larger "speaker" image on Zoom.

In contrast, being in a courtroom, particularly for the first time, is an out-of-the-ordinary experience. Although prospective jurors would have seen courtrooms on television and in the movies, entering a courtroom can still inspire awe. The courtroom is likely to be large (especially for a jury trial), with high ceilings, and wood paneling. The interior of a courtroom has a set place for every trial participant or observer to sit. There is the raised bench where the judge sits, replete with the symbols of the judge's authority, from his or her gavel, to the flags, and the court insignia. There is a box for the witness, another box for the jury, tables for counsel and the parties, a place for the court reporter, the bailiff, the law clerks, and a federal marshal (in federal court), as well as areas for the public and the press to sit. There is also an established decorum. Everyone is told to rise when the judge enters the courtroom, and to be seated only after the judge is seated. Everything about the courtroom is meant to inspire awe. Some writers have noted that the traditional courtroom provides participants with "co-presence with others," which Zoom does not provide.⁷³ Even the prospective juror who was initially dubious about serving as a juror was struck by "the sacral architecture" of the courtroom: "the altarlike bench, the choirlike jury box, the lectern-like witness stand, the rood screen of the balustrade separating the congregation in their pews from the powerful seats beyond."⁷⁴ The comparison of a courtroom to a house of worship is apt. They both signal that what is about to take place inside is an out-of-the-ordinary group experience that requires a level of individual focus and engagement that goes beyond what is required in daily life.

⁷³ Neal Feigenson, *Adjudication on Zoom and Beyond: Human Interaction in Virtual Courts*, 62 WASHBURN L.J. 461, 465 (2023). Feigenson explained co-presence as "the natural lived experience of being together in a shared space." *Id.* Other writers, such as Meredith Rossner and David Tait, have suggested that online courts may eventually be able to add "jury rituals to increase [jurors'] sense of presence." Meredith Rossner & David Tait, *Virtual Technology and the Changing Rituals of Courtroom Justice*, 98 CHI.-KENT L. REV. 251, 277 (2023).

⁷⁴ BURNETT, *supra* note 26, at 22.

E. *Prospective Jurors Find It Difficult to Maintain Their Focus on Zoom*

Even though the judge will have instructed prospective jurors to find a place in their homes where they can be free from distraction and interruption during the voir dire questioning on Zoom, it will still be difficult for prospective jurors to maintain their focus on Zoom.

Not all prospective jurors will have a quiet place in their home where they can close a door and be assured that family members will not disturb them. In addition, because they are at home, and not in a dedicated space for courtroom questioning, they might still feel the pull of work and family responsibilities. There have been myriad studies describing how human brains are not designed for multi-tasking but that has not stopped human beings from trying.⁷⁵ In a courtroom, everyone must focus on the voir dire questioning. If they do not pay attention and do not respond to a question directed to them, everyone will notice. Plus, there is the pressure to pay attention to avoid public embarrassment. However, this is not necessarily the case when one is at home and questioned on Zoom. There is the temptation to look at work-related matters, emails, or texts, rather than focusing entirely on the voir dire questions, particularly if the questions are directed to other prospective jurors. This means that prospective jurors will not use voir dire to learn about each other but will instead use it as an opportunity to do other tasks unrelated to voir dire.

Even if one is not multi-tasking and is trying to pay attention to the voir dire questioning on Zoom, it is harder to stay focused on Zoom than it is in person. It takes more effort. One reason might be because movements that would be overlooked in person become very distracting on Zoom. Therefore, one must sit very still because the slightest movement can draw unwanted attention. However, sitting still for a long period of time is hard. Another reason it is a challenge to stay focused on Zoom might be because there is a lack of eye contact between speaker and listener. It feels most comfortable to look at the person who is speaking, but in doing so, one's own eyes are not focused on the camera, and they would have to be for one's image to be seen as looking straight ahead (which is still not looking at the speaker).

Another distraction, unique to Zoom, is that people not only see other participants during the voir dire on Zoom, but also they see themselves. Zoom was an amazing tool, particularly during the pandemic, because it allowed us to see and

⁷⁵ See, e.g., Peter Wilson, Opinion, *Think You're a Good Multi-Tasker?*, CANBERRA TIMES (Austl.), Jan. 3, 2024, at 39 ("The issue with multi-tasking at a brain level, is that two tasks performed at the same time often compete for common neural pathways – like two intersecting streams of traffic on a road."); Bruce DeMara, *So You Think You Can Multi-Task? You May Be Headed for Trouble*, TORONTO STAR (Ont., Can.), Jan. 24, 2013, at A1 (reporting on a study from the University of Utah, which found that "people who think they are the best at multi-tasking are usually the worst."); Jo Moir, *'Experts' Don't Have Upper Hand Multi-Tasking*, DOMINION POST (Wellington, N.Z.), Jan. 24, 2013, at 1 (citing Victoria University psychologist Marc Wilson, who researched the merits of multi-tasking and found studies that indicate that multi-tasking is 40% less efficient than doing one thing at a time).

talk to others online, but it also required that we see ourselves. Having to see oneself while being questioned might lead some prospective jurors to feel self-conscious—even more self-conscious than they would feel in the courtroom.

Finally, there is the distraction provided by technological glitches on Zoom. Although Zoom is user-friendly, there are so many things that can still go wrong. For example, one can be on a Zoom call, and suddenly the connection is cut off and one might not be able to return to the call at all. The reason might be a glitch in the internet connection or some other reason that is hard to discover at the time. The only recourse is to reboot and hope that the connection will be restored. If a prospective juror is bounced from the voir dire on Zoom, this will lead to frustration for the prospective juror as well as for the other participants, though those trial judges who are comfortable with technology might not find it as jarring.⁷⁶

Even without the connection being fully disrupted, there can be other technical problems. A slow internet connection can lead to a disjuncture between one's video and audio, which means the image and sound are not in sync. This can be distracting because we take it for granted that what we see and hear will coincide. When movie theaters encounter this problem, they must stop the film and try to fix it. A problem with the internet connection can also lead to an image that freezes and words that are lost. These are all disruptions that can lead prospective jurors, lawyers, and judges to become frustrated with voir dire on Zoom. Courts might or might not be able to offer technical assistance. Sometimes prospective jurors will be left on their own to work out the technical problems, and they might be unable to do so. They might want to cooperate with the court and appear on Zoom for voir dire questioning, but the technological problems undermine their efforts. It is hard to concentrate on the substance of what is being said during voir dire on Zoom if the technology is not working properly and is creating gaps.

In contrast, prospective jurors do not have to worry about technological glitches in the courtroom. If there are such glitches, responsibility falls to the judge, court staff, or lawyers to fix them, and not to the individual prospective juror. In addition, the technology is more limited in the courtroom. The kinds of technical problems that could arise in a courtroom, such as a power outage, are usually problems that affect the entire courthouse, and not a single courtroom, and if only a single courtroom is affected, then the proceeding could move to a different courtroom.

The main difference is that prospective jurors do not have to resolve these problems on their own. Such problems would be the responsibility of the court. When technology goes wrong on Zoom, it is up to the individual prospective juror to fix it. However, when technology goes wrong in the courtroom, it is up to the

⁷⁶ For example, the federal district court judge in the virtual civil jury trial in *Dallo v. Holland Am. Line, N.V.*, explained that “[w]e lost a couple of jurors for a couple of minutes a couple of different times, but, by and large, I thought it was as well tried a case as we’d have in court.” Hans, *supra* note 72, at 312–13 (quoting Julie Steinberg & Madison Alder, *Injured Cruise Passenger Wins \$1.35 Million in Virtual Trial (2)*, BLOOMBERG L. (Oct. 8, 2020, 11:04 AM CDT), <https://news.bloomberglaw.com/litigation/injured-cruise-passenger-awarded-1-35-million-in-virtual-trial>) [<https://perma.cc/K75H-66LB>]).

court to fix it. Individuals have enough to worry about when being questioned about whether they can serve on a jury; they should not have to worry about whether they can fix their computer, their internet connection, or the syncing of their video and audio on Zoom.

V. COURTS' REASONS FOR MOVING VOIR DIRE TO ZOOM

Although voir dire on Zoom poses potential problems, some courts are willing to experiment with it because it also has potential benefits. One potential benefit is that it will reduce waiting time for prospective jurors. Another potential benefit is that the pool of prospective jurors may be larger and more diverse for voir dire on Zoom than for voir dire in the courtroom because prospective jurors do not need to travel to participate on Zoom. In addition, voir dire on Zoom could eventually save courts money, after initial outlays for technology and staff. Finally, an early study's initial finding, though it is still ongoing, did not find any significant differences between in-person and virtual voir dire and deliberations for mock jurors,⁷⁷ but other related experimental efforts did find that participants did not always take the exchanges with the court as seriously online as they would in person.⁷⁸

A. Reduce Waiting Time for Prospective Jurors

One reason that some states are considering or are already permitting voir dire on Zoom (or a similar remote technology) is because they believe that it will reduce the disruption that jury service creates in people's lives.⁷⁹ If prospective jurors do not have to go to a courthouse until after they have been selected to serve on a jury, then they will save the time that they would have had to spend traveling to a courthouse and waiting to be called for a trial. In 1998, the National Center for State

⁷⁷ See *id.* at 318–19, 320, 324.

⁷⁸ See, e.g., Meredith Rossner & Martha McCurdy, *Video Hearings Process Evaluation (Phase 2) – Final Report*, HM CTS. TRIB. SERV. 41, 44 (2020), https://assets.publishing.service.gov.uk/media/5f23057ed3bf7f1b18aaace2/HMCTS391_Video_hearings_process_evaluation_phase_2_v2.pdf [<https://perma.cc/5UG5-YMU2>]; see also Tara Kunkel & Kristina Bryant, *Do Remote Hearings Help—or Hurt—Access to Justice?*, JUDICATURE (Spring 2022), <https://judicature.duke.edu/articles/do-remote-hearings-help-or-hurt-access-to-justice/> [<https://perma.cc/YB6V-3C2Y>] (examining treatment courts and remote versus in-person hearings and finding that court staff and judges were more pessimistic about the quality of information when court hearings were held virtually rather than in person and court staff expressed greater concern about judges' ability to form connections virtually compared to in person).

⁷⁹ See, e.g., Conf. of State Ct. Adm'rs, *Citizens on Call: Responding to the Needs of 21st Century Jurors* 14 (2023) (“Remote voir dire allows jurors to comply with jury service with minimal disruption to their daily lives.”) (quoting Remote Jury Trials Work Group, *Best Practices in Response to Frequently Asked Questions*, Wash. Cts. (June 2021)), https://cosca.ncsc.org/data/assets/pdf_file/0024/97251/COSCA-Citizens-on-Call.pdf [<https://perma.cc/5G2T-WDK6>].

Courts (NCSC) published a manual that indicated that prospective jurors were “unprepared for, and amazed at, how much time they spend waiting.”⁸⁰ About ten years later, the NCSC published another manual that indicated that the waiting time was still an issue: “The single biggest complaint that people have about jury service is the seemingly interminable waiting”⁸¹ According to a 2024 report by the Conference of State Court Administrators (COSCA): “The single biggest improvement courts could make to reduce juror dissatisfaction would be to simply not keep jurors waiting!”⁸²

Although there are preliminary steps that courts could take online to reduce waiting time for prospective jurors without switching to voir dire online,⁸³ several states are moving in the direction of, or now permit, online voir dire. For example, a workgroup of the California Supreme Court recommended developing “virtual jury selection platforms that incorporate modules for conducting voir dire.”⁸⁴ Meanwhile, the supreme courts of Alaska, California, and Florida have issued an administrative order or court rule permitting “remote technology for jury selection,”⁸⁵ while King and Snohomish Counties in Washington State currently use video to conduct remote voir dire.⁸⁶

B. Produce More Diverse Jury Venires

Another benefit that courts believe online voir dire will produce is more diverse jury venires. Courts recognize that there are many people who find it difficult to go to a courthouse and if they could limit their time at the courthouse to the time when the jury trial began then they might be able to serve. Among those who might be affected are those with childcare responsibilities, healthcare issues, transportation challenges, and disabilities. As one law professor learned when she supervised a virtual court observation project in Texas during the pandemic: “What I didn’t think

⁸⁰ Nat’l Ctr. for State Cts., *Through the Eyes of the Juror: A Manual for Addressing Juror Stress* 7 (1998), <https://ncsc.contentdm.oclc.org/digital/collection/juries/id/310> [<https://perma.cc/W8SA-VDEY>].

⁸¹ Conf. of State Ct. Adm’rs, *supra* note 79, at 10 (quoting Nat’l Ctr. for State Cts., *Jury Managers’ Toolbox* (2009)).

⁸² *Id.*

⁸³ Among the preliminary steps that courts could take to reduce the need for prospective jurors to go to court for jury selection are those that permit them to complete juror questionnaires online, seek deferrals or excuses online, receive texts or emails about when they might need to appear in court, and complete trial specific juror questionnaires online. *Id.* at 6-8, 14; *see infra* text accompanying notes 84 to 86.

⁸⁴ Conf. of State Ct. Adm’rs, *supra* note 79, at 14–15.

⁸⁵ *Id.* at 14.

⁸⁶ *Id.* at 15.

through is there are a number of people. . . who have a hard time getting to the courthouse. . . . It turns out that it's easier for certain people to testify or participate in a hearing on Zoom"⁸⁷ As one mock juror in a virtual mock jury study explained: "As a disabled person being able to attend to my needs while also being able to attend this event was a huge advantage. I truly hope we as a society start making more use of the advances technology give[s] us where accessibility is concerned."⁸⁸

Some judges observed greater diversity of the jury venire and increased response rates with virtual jury trials during the pandemic. According to one paper by the American Society of Trial Consultants, "judges have reported greater venire diversity with virtual jury selection compared to in-person jury selection."⁸⁹ Other judges also observed greater diversity of the jury venire with virtual civil jury trials and increased response rates to jury summonses for virtual juries, at least in some jurisdictions.⁹⁰ Of course, these observations were based on what judges saw during the pandemic and were largely impressionistic. There is a need for post-pandemic data and whether there was less representation of other groups, based on age or lack of access to technology, which would cut against the greater diversity that some judges observed in the venire.⁹¹

C. Reduce Costs for Courts

With voir dire on Zoom, courts might save money in the long run, though initially they would have to expend money to purchase the tools and training needed for online voir dire. For example, judges and court staff would need training on how to use Zoom, and its specialized features such as breakout rooms. Lawyers would also need training. In addition, courts would have to update their websites and summonses so that they communicate the new online procedures with prospective jurors. Courts would also need to hire personnel who could assist prospective jurors who run into technical problems during the voir dire on Zoom. For example, during the Remote Civil Jury Trial Pilot Project in the Fourth Judicial District of Florida, a

⁸⁷ D. Todd Smith & Beth Thornburg, *Lessons Learned from Online Court Proceedings*, TEX. APP. L. PODCAST, at 15:31 (Nov. 26, 2020), <https://www.butlersnow.com/2020/11/lessons-learned-from-online-court-proceedings-beth-thornburg/> [<https://perma.cc/UA9Z-UBSD>].

⁸⁸ Hans, *supra* note 72, at 317.

⁸⁹ Conf. of State Ct. Adm'rs, *supra* note 79, at 15 (quoting Am. Soc'y Trial Consultants, ASTC Position Paper on the Elimination of Peremptory Challenges: And Then There Were None 9 (2022)).

⁹⁰ See Hans, *supra* note 72, at 316-17.

⁹¹ See Valerie P. Hans, Shari Seidman Diamond, Sanja Kutnjak Ivković & Nancy S. Marder, *Judgment by Peers: Lay Participation in Legal Decision-Making*, 20 ANN. REV. L. & SOC. SCI. 141, 155 (2024) ("[T]he digital divide, in which some people in the community have less access to and less familiarity with digital resources, might undermine representativeness rather than improve it.").

group of “remote bailiffs” were needed to address problems that jurors encountered online.⁹²

Although courts would have to expend funds initially, they would save money eventually because prospective jurors would only have to come to the courthouse on the days they were needed as jurors, and they would know the start date of the trial. Thus, fewer prospective jurors would be in the courthouse and fewer court personnel would be needed to look after them. In those jurisdictions that reimburse prospective jurors or jurors for parking near the courthouse, that expense would also be reduced.

More significantly, judges and lawyers would have to spend less time commuting to the courthouse and would be able to spend more time presiding over or participating in jury trials respectively. This might result in fewer judges being needed, which would be one way for courts to save money. This might also result in lawyers being able to represent clients for less money, which would result in savings for clients (but not for courts unless the lawyers were court-appointed lawyers).

VI. HOW COURTS SHOULD RESPOND TO VOIR DIRE ON ZOOM

Courts need to resist voir dire on Zoom. Online voir dire, at least as it currently exists and is exemplified by Zoom, is an inadequate substitute for in-person voir dire in the courtroom. Prospective jurors still need to be in the courtroom, where they can sit in the jury box with fellow prospective jurors, learn about each other through group voir dire and in-person conversations, and stand and take an oath together in the presence of the parties, as well as everyone else in the courtroom (the judge, lawyers, and members of the public and press). Through such out-of-the-ordinary experiences in the unusual setting of a courtroom, they learn behaviors that transform them from citizens into jurors.

If courts cannot resist voir dire on Zoom because remote proceedings are here to stay, then courts need to proceed slowly and incrementally.⁹³ They could embrace preliminary steps online, while still eschewing voir dire online. They could also keep abreast of developments in technology because new technology is likely to change the online experience over time. Finally, if courts continue to experiment with voir dire on Zoom, then they need to acknowledge the full costs of substituting screens for courtrooms. Savings of time and money are paltry benefits compared to the harms to jurors and juries if voir dire leaves the courtroom and moves online.

⁹² See Hans, *supra* note 72, at 323.

⁹³ As Justice Sandra Day O’Connor once explained, the reason there are tortoises at the base of the lamps in the courtyards of the U.S. Supreme Court is because Cass Gilbert, the architect of the Supreme Court building, wanted to include a reminder that “justice moves slowly.” DVD: Supreme Court and Selecting Judges, Aspen Ideas Festival (C-SPAN 2009) (on file with author).

A. Resist Voir Dire on Zoom

Courts need to resist moving voir dire from courtrooms to Zoom. There are certain experiences that require unique settings and the questioning of prospective jurors during voir dire is one of them. Online voir dire is an inadequate substitute. Prospective jurors need to be in the courtroom for voir dire. The transformation view of voir dire calls attention to the experiences of prospective jurors during voir dire, whereas courts' traditional view of voir dire, in which prospective jurors just need to answer questions to see if they can be impartial, means that courts do not have a full picture of what is lost when voir dire is conducted on Zoom rather than in person in the courtroom.

It might be easier to recognize in familiar contexts, such as classrooms and workplaces, that intangible elements can be lost when the in-person setting is replaced with a screen. For example, children experienced setbacks in their learning when they had to leave the classroom and attempt to have classes on Zoom during the pandemic.⁹⁴ Even though they have since returned to the classroom, their reading and math scores remain well below past years' scores.⁹⁵ Being in the classroom, and being with teachers and fellow students, led to learning, whereas just seeing teachers and students on Zoom did not (at least not at the levels that in-person instruction produced).

Similarly, being in a workplace with fellow employees leads to collaboration, informal exchanges, and shared information that is motivating employers to urge employees to return to the office.⁹⁶ These employers are not asking employees for five days a week in the office, as had been the norm before the pandemic, but are aiming for two or three days per week.⁹⁷ Some companies are concerned that with

⁹⁴ See, e.g., Julie Watson & Carolyn Thompson, *Distance Learning a Long, Hard Slog*, CHI. TRIB., Apr. 23, 2020 (§ 1), at 11 (“Teachers across the country report their attempts at distance learning are failing to reach large numbers of students. . . . Those who do log on have countless distractions: They are babysitting siblings, sharing laptops, lying in bed during lessons.”).

⁹⁵ See, e.g., Sarah Mervosh, *California Will Spend \$2 Billion on Students Hurt by Online Classes*, N.Y. TIMES, Feb. 2, 2024, at A18 (“New national research released this week underscored the long-term impact of the pandemic and remote learning: U.S. students have made up just a third of their pandemic losses in math, and inequality has widened, with students in poor communities at a greater disadvantage than they were five years ago.”); Sarah Mervosh & Francesca Paris, *Pandemic Effect: Absence From Schools Is Soaring*, N.Y. TIMES, Mar. 30, 2024, at A1 (“In the four years since the pandemic closed schools, U.S. education has struggled to recover on a number of fronts, from learning loss, to enrollment, to student behavior.”).

⁹⁶ See, e.g., Hanna Ingber, *Work From Home or at the Office: What’s Your Choice?*, N.Y. TIMES, Oct. 30, 2022, at B5 (“The value of being in an office can be hard to convey, but readers [of the *New York Times*] spoke of more efficient in-person meetings, more effective brainstorming and an easier time getting to know colleagues.”).

⁹⁷ See, e.g., Emma Goldberg, *Even Zoom Is Returning to the Office*, N.Y. TIMES, Aug. 8, 2023, at B4 (“‘We believe that a structured hybrid approach—meaning employees that live near an office need to be on site two days a week to interact with their teams—is most effective for Zoom,’ a company spokesperson [for Zoom] said.”); Ian Austen, *Canada’s Public Sector Unions Threaten Disruption*

remote work, employees miss out on collaborating with each other and building on each other's ideas.⁹⁸ In addition, young employees have difficulty meeting mentors and learning the subtleties of the workplace when they only work from home.⁹⁹ Three economists, who studied the effects of remote work on engineers at a large technology company, found that there was the “power of proximity,” so that those “working in the same building, holding meetings in person and interacting with colleagues in the cafeteria” provided twenty-one percent more feedback than those working in different buildings who did not meet with each other in person.¹⁰⁰ With the pandemic, when everyone worked from home, the feedback gap at this company disappeared.¹⁰¹ The economists concluded that “it had been physical proximity—not some other difference between the groups—that had led to greater feedback for in-person teams.”¹⁰² So far, some employees have been reluctant to return to the office because they value a flexible schedule as well as the productivity that comes from workdays free from commuting and the distractions of a workplace.¹⁰³ In addition, working parents prefer the flexibility that remote work provides.¹⁰⁴

over Return to Office, N.Y. TIMES (May 11, 2024, 06:00 EST), <https://www.nytimes.com/2024/05/11/world/canada/canada-public-sector-unions-remote-work.html> (reporting that unions in Canada are “challenging a plan calling for three days a week at workplaces” for government employees; the government currently requires government employees “to show up at the workplace at least twice a week,” except for those who cannot do their work remotely).

⁹⁸ See, e.g., Ingber, *supra* note 96, at B5 (“The feeling of being in a room with three or four people and a whiteboard, it’s amazing,” [Mr. Hirzel, who works for a tech start-up in Boston,] said. “You can see people’s body language, you can hash it out.”); Laura Gross, Letter to the Editor, *Have American Workers ‘Gone Soft’?*, N.Y. TIMES, Apr. 8, 2023, at SR11 (“When we are in person, our team is more creative and collaborative. Being in person has allowed me to learn about my colleagues, their working style and how best to manage each of them. We can also give feedback better when we are in person.”).

⁹⁹ See, e.g., Emma Goldberg & Ben Casselman, *What Young Workers Miss Without the ‘Power of Proximity’*, N.Y. TIMES, Apr. 24, 2023, at B1 (describing three economists’ study of engineers at a large technology company; they found that remote work “reduced the amount of feedback that junior engineers received (in the form of comments on code), . . . [and t]he effects . . . were especially pronounced for female engineers”); Ingber, *supra* note 96, at B5 (describing Nick Kreilein, who worked for a commercial insurance broker, and was disappointed that so few returned to the office; consequently, he took a job with a competitor with “an in-office culture” because he wanted “to take the next step, not just sit behind a screen for the rest of [his] career”).

¹⁰⁰ Goldberg & Casselman, *supra* note 99, at B1.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See, e.g., Goldberg, *supra* note 97, at B4 (describing a tense meeting at Zoom in which employees “expressed frustration about the time and money they’d waste while commuting, according to an employee who was at the meeting”).

¹⁰⁴ Goldberg & Casselman, *supra* note 99, at B1 (“In a survey from FlexJobs, the remote job search site, 60 percent of women and 52 percent of men said they would consider looking for a new

Although employees' preferences could play a role in striking the right balance between working at home and in the office because most of them have had some experience working in both environments (office and remote), prospective jurors are often new to the experience of serving as jurors. They do not typically have any experience with being in a courtroom; nor do they typically have any experience with rendering a verdict, which has far greater consequences than most ordinary decisions that people make every day.

Some prospective jurors might prefer the convenience of voir dire questioning that does not require them to leave their homes but when it comes to making decisions that affect the parties' lives, shortcuts should not be taken. In some states, judges instruct jurors that they should deliberate for as long as they need; there is no prescribed amount of time in which to reach a verdict. For example, in Connecticut civil jury trials, the judge instructs jurors before they begin their deliberations as follows: "No one will hurry you. If you are not able to reach a verdict today, you will resume your deliberations tomorrow. You may have as much time as you need to reach a verdict."¹⁰⁵ Similarly, in deciding who can serve on the jury, the questioning should take as long as it requires and should be done in the setting in which it will be most effective. The courtroom is the appropriate setting because it helps to transform citizens, who might initially be reluctant to serve, into responsible jurors.

B. Allow Steps Prior to Voir Dire to Be Done Online

Courts need to resist replacing the courtroom with the Zoom screen for voir dire, but that does not mean they must avoid all online shortcuts. There are several preliminary steps that could be done online without interfering with the voir dire questioning that will eventually take place in the courtroom. To save prospective jurors' time, courts could permit prospective jurors to complete their juror qualification questionnaire or trial specific juror questionnaire online, as well as any requests for a deferral, excuse, or alternative jury date. Courts could also provide prospective jurors with updates about their upcoming jury service by text or email. All these steps could be performed online without interfering with the voir dire questioning of qualified prospective jurors that would still take place in the courtroom.

Allowing prospective jurors to complete their juror qualification questionnaire online would be convenient for prospective jurors and save time for courts. Some courts already do this. In 2007, a survey by the National Center for States Courts

job if they could no longer work remotely; 62 percent of women and 56 percent of men said better work-life balance was a benefit of remote work.”).

¹⁰⁵ CONN. CIV. JURY INSTRUCTION 2.9-3 (2008) (Process for Jury's Deliberations).

(NCSC) found that eleven percent of courts were doing this.¹⁰⁶ In 2023, a State-of-the-States Survey by NCSC showed that thirty-two percent of courts were doing this,¹⁰⁷ but a 2024 report by the Conference of State Court Administrators (COSCA) questioned why the percentage was not higher than thirty-two percent given that having prospective jurors complete their juror qualification questionnaire online would be convenient for prospective jurors and save time for court staff.¹⁰⁸ In addition, courts could use their website to provide prospective jurors with other information that they would find helpful. For example, before prospective jurors head to the courthouse it would be useful for them to know how to reach the courthouse by public transportation, where to park if they drive, and to have links to juror orientation videos, so that they could watch them at home (if they choose to do so) in preparation for their jury service.¹⁰⁹

Permitting prospective jurors to go online to complete trial specific juror questionnaires or request deferrals, excuses for hardship, or new court dates would expedite these preliminary steps for prospective jurors and court staff alike. Although some courts still require prospective jurors to take these steps by telephone, U.S. mail, or in person, other courts recognize that allowing prospective jurors to take care of these tasks online eases the burden on prospective jurors and court staff. For those prospective jurors who prefer to make these requests the old-fashioned way, they could still do that. According to the California Supreme Court Ad Hoc Workgroup: “Providing summonsed jurors with the option to complete their initial questionnaires or hardship forms online, after they are empaneled but before having to physically come to the courthouse, can result in significant efficiencies in court resources, while promoting greater access to the public.”¹¹⁰

Some courts have turned to texts and emails to provide prospective jurors with updates on the status of their jury service. These forms of instant communication have enabled courts to stay in touch with prospective jurors, to remind them to report for jury duty, and to alert them to last-minute schedule changes, weather-related announcements, or road delays. Prospective jurors appreciate the up-to-date information, and it does not take courts much time or money to provide. One prospective juror who was “on call” for jury duty for three months in New Mexico,

¹⁰⁶ See Paula Hannaford-Agor, *Jury News: Getting the Biggest Bang for Your Buck from Online Qualification Technologies*, 23 CT. MANAGER 25, 25 (2008).

¹⁰⁷ Conf. of State Ct. Adm’rs, *supra* note 79, at 7 (citing Nat’l Ctr. for State Cts., 2023 State-of-the-States Survey of Jury Improvement Efforts).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 6-7 (quoting Cal. Sup. Ct. Ad Hoc Workgroup on Post-Pandemic Initiatives Interim Report: Improving the Juror Experience (Mar. 2022)).

appreciated the “handy text message” she received at night reminding her to report to court for potential jury duty the next morning.¹¹¹

All these preliminary steps can be done online before prospective jurors show up at the courthouse and are assigned to a courtroom for voir dire questioning. Permitting these preliminary steps to be done online does not impinge on the courtroom voir dire experience in any way; instead, it allows prospective jurors to take care of the initial matters quickly and conveniently. For those prospective jurors who do not have access to computers or smartphones or who do not feel comfortable conducting official business online, they would still have the option to communicate with the court by phone or mail, as they have done in the past.

C. Keep Abreast of New Technology

Even though courts are slow to adopt new technologies--sometimes out of caution, other times because of attachment to past practices, or simply due to a lack of funds--they need to stay abreast of new technologies because Zoom and similar technologies will not always be as limited as they are today.

Even though my view is that juries need to remain in courtrooms, developments in online courtrooms might, in the future, manage to replicate many of the attributes of today’s brick-and-mortar courtrooms. Although we have not reached that point yet, there are current pilot programs, such as the UK Pilot Program,¹¹² that are experimenting with how to recreate online the experience of entering a traditional, brick-and-mortar courtroom. For example, the UK Pilot Program has tried to recreate online the sense of entering a courtroom by clicking through a series of pages, to indicate that one is embarking on a “journey” and entering a separate space.¹¹³ Some courts try pilot programs as a way of testing new practices¹¹⁴ or new technologies.¹¹⁵ Courts can also follow experiments taking place in “courtrooms of the future,” such as the one at William & Mary Law School in Virginia.¹¹⁶

The pandemic required courts to experiment with new ways of conducting jury trials both online and in person or to stop holding jury trials altogether and allow backlogs to grow. Although many courts stopped their experimentation in the

¹¹¹ Jessica Onsurez, *Summoned for Jury Duty? I Know How You Feel*, CARLSBAD CURRENT-ARGUS (N.M.), Jan. 3, 2024, <https://www.aol.com/summoned-jury-duty-know-feel-115408556.html> [<https://perma.cc/7VWR-VCJA>].

¹¹² See Rossner & Tait, *supra* note 73, at 277.

¹¹³ *Id.* at 263.

¹¹⁴ See, e.g., Nancy S. Marder, *Answering Jurors’ Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 747–49 (2010) (describing state courts’ use of pilot programs to test new jury practices).

¹¹⁵ See, e.g., Feigenson, *supra* note 73, at 461 & n.2.

¹¹⁶ See *McGlothlin Courtroom*, CTR. FOR LEGAL & CT. TECH., <https://www.legaltechcenter.net/about/mcglathlin-courtroom/> [<https://perma.cc/3L95-33ZG>].

courtroom once the pandemic abated,¹¹⁷ courts did experiment when they were compelled to do so. It should not require a pandemic for courts to continue to experiment with new technologies in the courtroom and on the screen, at least as pilot programs.

CONCLUSION

Voir dire, along with the summons, instructions, and deliberations, helps transform citizens into jurors. These stages of the jury process help jurors to move from individual to group considerations. They also provide jurors with experiences in the courtroom that enable them to adopt behaviors that are integral to their role as jurors. These jury stages, which take place in person and in the courtroom, transform citizens into jurors so that they do not have to arrive as ready-made jurors. What this means is that a broader and more diverse swath of the community can serve as jurors because the experiences they have in the courtroom at every stage of the jury process will help transform them into jurors who will be able to deliberate impartially.

Voir dire begins this transformation, but it requires the courtroom for it to be effective. In the courtroom, prospective jurors sit together in the jury box, yet they are kept apart from everyone else. They realize that they are being observed by everyone in the courtroom and must take care to maintain a neutral demeanor, but they can also observe all the trial participants and need to do so carefully and attentively. They are questioned as a group so that every prospective juror hears the others' responses. They begin to learn about each other, which will make it easier for them to select a foreperson (if they are in a jurisdiction that gives them that responsibility), and to deliberate after the trial. When they hear other prospective jurors say they can be impartial they start to think that maybe they too can be impartial and serve as jurors.

After some prospective jurors are excused for hardship or removed with for cause challenges or peremptory challenges, those who remain will be sworn in as jurors. They will stand together and take an oath. The experience of taking an oath,

¹¹⁷ Trial courts that tried to conduct jury trials in person during the pandemic experimented by minimizing the number of people who had to be present in court, having them wear masks and remain six feet apart from each other, adding to the number of rooms that were used, and installing plexiglass barriers. These efforts were abandoned once the pandemic abated. Similarly, the U.S. Supreme Court experimented with telephonic oral argument, *see* Press Release, U.S. Sup. Ct. (Apr. 28, 2020) https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20 [<https://perma.cc/VCD7-L5V3>] (“The Court will hear oral arguments by telephone conference on May 4, 5, 6, 11, 12 and 13[, 2020] in a limited number of previously postponed cases.”) but abandoned it and returned to traditional oral argument in the courtroom once it was safe to do so. *See* Adam Liptak, *Supreme Court Will Return to Its Courtroom Next Month*, N.Y. TIMES (Sept. 8, 2021), <http://www.nytimes.com/2021/09/08/us/supreme-court-arguments.html> [<https://perma.cc/5BRU-2S53>].

which is a rare occurrence in most people's lives,¹¹⁸ will be one of many out-of-the-ordinary experiences that will signal to jurors that they are engaged in an out-of-the-ordinary task. Ultimately, they will deliberate together in a jury room, where they will have to explain their views to each other by giving reasons; they will have to vote; and in many courts, they will have to reach a unanimous verdict.¹¹⁹ After they reach a unanimous verdict, they will return to the courtroom where their verdict will be announced. In some cases, the jurors will be polled individually in open court, and only after each juror has said that he or she agrees with the verdict will it be accepted by the court.¹²⁰

Voir dire on Zoom is a poor substitute for voir dire in the courtroom. It does not give prospective jurors much information about each other; it does not allow them to talk to each other informally; and it does not allow them to begin to feel that they are part of a special group—a jury. As they try to answer the judge's questions on Zoom, they are isolated in their own homes, where they might find it difficult to maintain their focus, to keep from being distracted by work or family, and to pay attention to the substance of the questions even if they encounter technological glitches that they are expected to resolve on their own.

Although courts might want to make voir dire more convenient by conducting it on Zoom, they need to resist this temptation. Too much is at stake for courts to take shortcuts with voir dire, or any of the other stages of the jury process. Courts need to proceed slowly and carefully before making any changes to the stages of the jury process. Replacing voir dire in the courtroom with voir dire on Zoom is a change that courts should resist because it would be detrimental to the jury whose task is to render a verdict, and to the parties and public who have to accept that verdict.

¹¹⁸ See GROVE, *supra* note 40, at 33 (“The only other occasions on which such solemn undertakings [as an oath] are pronounced in public are weddings and christenings.”) (quoting Trevor Grove, who served as foreperson of a jury).

¹¹⁹ In all federal criminal and civil jury trials, *see* FED. R. CRIM. P. 31(a); FED. R. CIV. P. 48(b), and in serious state criminal trials, *see* Ramos v. Louisiana, 590 U.S. 83, 90 (2020), juries must reach a unanimous verdict. If they are unable to do so, the judge will declare the jury to be a hung jury and declare a mistrial.

¹²⁰ *See* FED. R. CRIM. P. 31(d) (Jury Poll).

