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Recommended Citation

http://repository.jmls.edu/lawreview/vol42/iss3/11

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Death. The finality implicit in this single word is enough to raise the pulse of the most hardened heart. Perhaps due to the strong emotions it evokes, the death penalty has persevered over the years in both the public eye and the court’s docket. The controversy surrounding death penalty cases has resulted in increased judicial procedural caution because of the importance of the rights at issue, namely, life. The segment of capital trials that requires, but fails to receive, the most intensive analysis is the process of juror removal.

To more fully contemplate the impact juror removal has on a capital trial, consider the following scenario: a defendant was convicted of four counts of murder and sentenced to death in a bifurcated trial.1 Prior to sentencing, the jury foreman sent a letter to the judge, indicating that there was an impaneled juror refusing to consider the death penalty.2 The judge held an in

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1. Illinois v. Nelson, 02 CF 925 (Cir. Ct., 12th Dist., Ill. 2007).
2. Id. Per the State’s Response to the Defendant’s Motion to Interview Excused Juror, three notes were sent to the judge from the jury stating that there was a juror who refused to deliberate. Id. After receiving the first note, the court instructed the jury to continue deliberating and, if there were further issues, to request that the court interview particular jurors. Id. Following receipt of both the second and third letters, the court interviewed the questionable juror and another juror to articulate the jury’s position that the juror was refusing to deliberate. Id. The juror facing dismissal answered the questions in a manner indicating the ability to serve on the jury. Id. For example, in response to the judge’s questioning, the juror stated, “I just - don’t really know how to explain it, but I don’t feel that that’s the punishment that is deserved.” Id. The juror also stated that he did not have any preconceived notion about never imposing the death penalty, and that he would be able to follow the law because his position was based upon the evidence. Id. However, the challenged juror’s statements were countered by the other
camera hearing with counsel present and asked the juror questions concerning his ability to render a verdict in accordance with the evidence. The juror's responses, while far from stating that the juror refused to return a death verdict, were apparently enough to convince the judge that dismissal of the juror was appropriate. The defense, however, was denied the opportunity to interview the juror again to ensure that he was not refusing to follow the law, as opposed to feeling the evidence did not support the death sentence.

In this scenario, is the defendant's right to a fair trial, and more specifically to an impartial jury, compromised by a judge deciding questions better answered by a psychologist? How and by what process does a judge make the undeniably crucial decisions regarding juror removal, especially in the context of death penalty cases? Sadly, the above fact scenario is not a mere hypothetical; it is a real-life case, with a real-life defendant, facing a very real death. It is the story of Brian Nelson from Will County, Illinois, who is currently appealing his conviction based in part on juror removal.

This case, as well as other recent high profile cases, illustrates the urgent and compelling need to address the process of juror removal critically in order to prevent grave injustice. Part I of this Comment will outline the rules governing juries, focusing on the voir dire process for both capital and noncapital cases. Juror removal will be discussed generally, and the deficiencies surrounding the jury process will be examined. Part II will examine how psycho-social literature relates to juries. Several analogous legal situations will then be compared to juror removal, namely the Daubert analyses and the assessments of future dangerousness, which have also given rise to criticisms of judicial arbitrariness. Part III will propose solutions to the problem of arbitrary decisions in the realm of juror removal by utilizing studies conducted in social science research and similar situations in the law.

juror's testimony. Id. Ultimately, the court took note of the challenged juror's statements as well as his demeanor and found that he was "implicitly if not explicitly . . . not being forthright." Id.

3. Id.
4. Id.
5. Id.

6. Other recent cases that deal either directly or indirectly with juror removal include former Illinois Governor George Ryan's federal trial, United States v. Warner, No. 02 CR 506-1, 4, 2006 WL 2583722 (N.D. Ill. Oct. 13, 2006), the notorious Cook County trial of one of the defendants in the Brown's Chicken massacre, Steve Warmbir, Two Mob Trial Jurors Kicked Out by Judge, CHI. SUN TIMES, Sept. 5, 2007 at 15, and even the recent federal "Family Secrets" mob trial, Illinois v. Luna, 02 CR 1543002 (Cir. Ct. of Cook County, Ill. May 10, 2007).
II. BEHIND CLOSED DOORS AND UNDER THE COVERS: GETTING TO KNOW THE AMERICAN JURY SYSTEM

In the United States, the concept of a trial by jury seems as American as apple pie. It is a deeply ingrained feature of our legal system.\(^7\) Although the makeup of the jury has evolved over time, the crucial role that the jury plays has remained the same—providing defendants with the opportunity for a fair trial by their peers.\(^8\) Perhaps because of its sacred position in the judicial system, the jury process is governed by a variety of rules, regulations, and procedures. Despite these measures, circumstances arise where a judge may need to remove a juror mid-trial or even post-deliberation. Such removal is rife with complications, the most serious of which is the potential for arbitrary judicial decisions, impacting a defendant’s rights to a disastrous degree.

A. Twelve Angry Men [and Women]—Regulation of the Jury Process\(^9\)

Thanks largely to the popularity of shows such as *Law and Order*, *The Practice*, and, to a much smaller degree, the mandatory seventh-grade constitution test, most average citizens are aware of a criminal defendant’s most powerful tool: the constitutional right to a fair trial.\(^10\) Also encompassed in this is the defendant’s right to an impartial jury.\(^11\) To accomplish the seemingly insurmountable task of providing an impartial jury, the process of voir dire is utilized. Voir dire is “a preliminary examination of a prospective juror by a judge or lawyer to decide whether the

\(^7\) See Sandra D. Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, 5 HOWARD SCROLL SOC. J. REV. 1, 9 (2002) (noting that juries are significant in trials because they are “seen as a buffer against governmental abuses, a voice of the common people as well as a body expressing an opinion deemed as valuable as that of the legally trained judge and attorneys.”).

\(^8\) See id. at 11 (commenting on the historical notion of jurors as an “old boys club” who were essentially equal to the judges and attorneys in the area of socio-economic status). In contrast, the careful jury selection process in contemporary America pays special attention to a juror’s race, class, and gender in order to approximate a “jury of peers.” Id. at 6.

\(^9\) 12 ANGRY MEN (MGM 1957). 12 ANGRY MEN is a classic movie involving a look into the jury deliberations of a capital murder trial where eleven of the twelve jurors immediately vote guilty, and one juror is left to explain his not guilty vote. Id. The dialogue between the jurors makes for a fascinating peek into the interior of a jury room and aptly demonstrates how pre-existing bias of even one juror may poison a trial. *Infra* note 52.

\(^10\) U.S. CONST. amend. VI. The sixth amendment states in part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . .” Id.

\(^11\) Id.
prospect is qualified and suitable to serve on a jury."\textsuperscript{12} The main purpose of voir dire is to ensure that the selected jury is impartial, meaning that it is unbiased and without prejudice.\textsuperscript{13} If a trial court seats a biased jury, it deprives the defendant of a fair trial.\textsuperscript{14} Impartiality, when referring to a juror, is not a technical term. Rather, it is a state of mind or an attitude that is determined by the court during voir dire.\textsuperscript{15} In fact, the trial court retains much of the control and discretion as to how voir dire is conducted.\textsuperscript{16} As can be expected, appeals to the Supreme Court involving claims of improper voir dire hail from both the lower federal and state courts.\textsuperscript{17} In Illinois, courts rely on Supreme Court Rule 431, which

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\item \textsuperscript{12} BLACK'S LAW DICTIONARY 764 (3rd. Pocket Ed. 1996).
\item \textsuperscript{13} People v. Metcalfe, 782 N.E.2d 263, 269 (2002) (citing People v. Williams, 645 N.E.2d 844, 850 (1994)).
\item \textsuperscript{14} Despite the trial court's obligation to provide an unbiased jury, it does not have the duty to remove jurors \textit{sua sponte} because the trial court is not restricting the scope of voir dire and is not prohibiting the defense from challenging the juror. \textit{Metcalfe}, 782 N.E.2d at 272.
\item \textsuperscript{15} People v. Smith, 793 N.E.2d 719, 727 (Ill. App. Ct. 2003). This case determined that the party challenging a juror's disqualifying state of mind bears the burden of introducing evidence that creates more than a mere suspicion that an inappropriate state of mind exists. \textit{Id.}; see also People v. Emerson, 522 N.E.2d 1109, 1120 (Ill. 1987) (stating that a trial court judge is in a superior position to determine the meaning of a prospective juror's responses during voir dire, and therefore the judge's decisions will be given deference on appeal absent a showing of abuse of discretion). Courts use such a standard of review in these cases because the judge on appeal is not able to gauge the physical signals and appearance of jurors when answering voir dire questions. Wainwright v. Witt, 469 U.S. 412, 428 (1985). This suggests that the non-verbal cues exercised during voir dire are perhaps as important as the verbal responses.
\item \textsuperscript{16} See Nicklasson v. Roper, 491 F.3d 830, 835 (8th Cir. 2007) (clarifying that the trial court makes the decisions about what voir dire questions are asked, as well as how many voir dire questions are asked). For example, a court must inquire into racial prejudice, but it does not necessarily need to ask questions about pretrial publicity. \textit{See} People v. Pineda, 812 N.E.2d 627, 632 (Ill. App. Ct. 2004) (commenting on the types of questions included in voir dire, the court stated, "[w]hile it is appropriate to ask prospective jurors whether they will follow the law, the purpose of \textit{voir dire} is not to ascertain prospective jurors' opinions with respect to evidence to be presented at trial") (citation omitted) (quoting People v. Buss, 718 N.E.2d 1, 22 (1999)).
\item \textsuperscript{17} Mu'Min v. Virginia, 500 U.S. 415, 422 (1991). With regards to appellate review, the court in \textit{Mu'Min} cited Rosales-Lopez v. \textit{United States}, 451 U.S. 182, 188 (1981), holding that:
\begin{quote}
Despite its importance, the adequacy of \textit{voir dire} is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions.
\end{quote}
\end{itemize}

This quotation stresses the problem analyzed in this Comment: how can the legal system guard against value laden and biased judicial decisions related to juror removal? The above quotation admits that judges are given wide discretion in the context of voir dire because they are physically present to see
governs certain aspects of the voir dire process.\textsuperscript{18} A different form of voir dire occurs during death penalty cases.\textsuperscript{19} This specialized voir dire is labeled death qualification.\textsuperscript{20} Death qualification, like voir dire, includes questions designed to determine prospective jurors' biases.\textsuperscript{21} Unlike voir dire in a noncapital case, however, death qualification inquires into jurors' opinions and deeply held beliefs about the death penalty.\textsuperscript{22} If a juror's beliefs would conflict with rendering a decision based on the evidence presented at trial, then the juror is excluded.\textsuperscript{23} To investigate bias, certain questions must be asked of potential jurors in a capital case to protect the defendant's right to a fair

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\item[I.18.] ILL. SUP. CT. R. 431; see also People v. Allen, 730 N.E.2d 1216, 1218-19 (Ill. App. Ct. 2000) (explaining and applying Illinois' approach to voir dire codified in ILL. SUP. CT. R. 431). In summary, the rule says that although the trial court is responsible for voir dire, attorneys for both parties may conduct additional examination for as long a period of time as the court deems reasonable. ILL. SUP. CT. R. 431(a). The court, per the rule, is also responsible for delineating to jurors their duties and for ensuring jurors understand four premises: (1) that the defendant is presumed innocent; (2) that the prosecution must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant does not have to present any evidence to defend him or herself; and 4) that the defendant cannot be penalized for choosing not to testify. ILL. SUP. CT. R. 431(b).
\item[I.19.] In Illinois, capital trials are bifurcated, and the same jury is used for both the guilt phase and the sentencing phase. 720 ILL. COMP. STAT. 5/9-1(a) (2003). In order for a defendant to be eligible for the death penalty, a unanimous jury must determine beyond a reasonable doubt that the defendant was an adult (over 18) when the instant offense occurred and that aggravating factors were present (for example, murder for hire or premeditated murder). 720 ILL. COMP. STAT 5/9-1(b), (f) (2003). Against these factors, any mitigating factors are then weighed, and the balance shows either death penalty eligibility or ineligibility. 720 ILL. COMP. STAT. 5/9-1(c) (2003).
\item[I.20.] Nicklasson, 491 F.3d at 834.
\item[I.21.] Id.
\item[I.22.] Id.
\item[I.23.] There are several standards relating to death qualification. The classic formulation is that jurors cannot be excluded simply because they voice general concerns of indecisiveness about the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). The inference is that jurors are expected to keep an open mind to all sentencing options and not form opinions prior to hearing the evidence of the case. Id. at 525 n.21. A clarification of this standard came seventeen years after Witherspoon in Wainwright v. Witt, 469 U.S. 412, 424 (1985). Wainwright articulated the standard for dismissal for cause by determining "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instincts and his oath." Id. (quoting Adams v. Texas, 448 U.S. 38, 44 (1980)). The opinion further noted that neither the Witherspoon nor the Wainwright standard requires that the judge find a juror's bias to be crystal clear. Id.
\end{enumerate}
trial and an impartial jury. For example, trial courts must look into certain beliefs that may hinder a potential juror's performance, primarily her opposition to the death penalty. Due to the vital nature of such opposition to proper death qualification, both parties are allowed to probe a juror for hidden bias. In Illinois, the trial court, not the attorneys, conduct voir dire, although attorneys may ask questions during death qualification. But because the Constitution does not explicitly or implicitly identify guidelines for voir dire, there is no mandated protocol for states to follow in capital cases.

In addition to the constitutional constraints on juries and the regulative function of voir dire in its various forms, the Federal Rules of Evidence also addresses jury operation. The pertinent rule prevents undue interference with jury deliberations. The rule prohibits jurors from disclosing anything that occurs in the course of jury deliberations. This rule, however, does not preclude jurors from testifying about the presence of external prejudicial material injected into a jury room. Such material can take the form of newspapers, magazines, or even legal materials printed from internet websites.

24. An example of a standard voir dire question taken from the Federal Judicial Center's Benchbook for U.S. District Court Judges is: "[i]f you are selected to sit on this case, will you be able to render a verdict solely on the evidence presented at the trial and in the context of the law as I will give it to you in my instructions, disregarding any other ideas, notions, or beliefs about the law that you may have encountered in reaching your verdict?" United States v. Thomas, 116 F.3d 606, 617 (2d Cir. 1997) (emphasis omitted).

25. Nickalsson, 491 F.3d at 835.

26. Id.


28. Id. at 725-26.

29. FED. R. EVID. 606(b). For example:
Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

Id. However, a juror may testify on the question of: "(1) whether extraneous prejudicial information was improperly brought to the jury's attention; (2) whether any outside influence was improperly brought to bear upon any juror; or (3) whether there was a mistake in entering the verdict onto the verdict form." Id.

30. Id.

31. Id.

32. Id.

33. See Warner, 2006 WL 2583722, at *6-8 (showing examples of such materials taken into the jury room by a juror). The materials at issue in the Warner case were several pages printed from a legal website, the American
B. One of These Things Is Not Like the Other — Juror Removal in General

It is with the above-described backdrop of rules and procedures that the issue of juror removal is most appropriately examined. When juror removal occurs, it signals a breakdown in the practice of jury regulation and voir dire.

The federal and state systems vary in their treatment of jury removal. In the federal system, a statute governs juror removal. Under the statute, a judge may remove a juror for “just cause,” even after deliberation has begun, and the verdict may then be returned by the remaining eleven jurors. “Just cause” in juror removal situations requires the court to consider a myriad of factors, including incapacitation of the juror, unavailability of the juror, inability of the juror to fulfill the obligations implicit in the juror oath, the presence of a relationship between the juror and a party to the case, or a dramatic change in the juror’s life circumstances over the course of the trial.

Another circumstance that empowers a federal court to remove a juror is when the juror engages in jury nullification. Nullification refers to the intent of the juror to disregard the law and evidence offered in the case and instead rely on privately held beliefs in rendering a verdict. When such a situation presents itself, the judge has the obligation to dismiss the juror.

Judicature Society, by an impaneled juror, which the judge ultimately found to be harmless. Id.

34. FED. R. CRIM. P. 23(b)(3) states in relevant part, “[I]f the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining eleven jurors.”

35. Id.

36. For example, no longer feeling capable of rendering an impartial vote is included within the juror's oath.

37. Thomas, 116 F.3d at 613-14.

38. Id. at 614.

39. Id. In Thomas, the court, when faced with an impaneled juror who had a general opposition to the type of laws the defendant was alleged to have violated, said that the “juror's preconceived, fixed, cultural, economic, [or] social . . . reasons that are totally improper and impermissible,” which were likely to prevent the juror from convicting, regardless of the evidence, were a form of nullification. Id.

40. Id. There, the court stated:

A jury has no more 'right' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty', and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.

Id. (quoting United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983)) (per curiam) (emphasis in original).
removing such juror, a defendant's constitutional rights to a fair trial and an impartial jury are protected. 41

The issue of juror removal is more difficult at the state level when states, such as Illinois, rely on case law for resolution of such situations. 42 The consequences of this legislative ambivalence are evident in recent Illinois cases because judges have struggled in dealing with the issue of removal. 43

Regardless of the court of origin, the process of juror removal is important. Removal at any stage is of utmost concern because of the broad deference given to the lower court judge in such decisions. 44 Removal is not always based on the actual words of

41. Thomas, 116 F.3d at 616. The heightened evidence standard is “if the record evidence discloses any possibility that” a complaint about a juror’s conduct “stems from the juror’s view of the sufficiency of the government’s evidence, the court must deny the request” of the jury to investigate the juror in question. Id. at 621-22. Unfortunately, despite the strong wording of this standard, it still allows for far too much guesswork and judicial discretion in interpreting what “evidence” may exist regarding the juror’s true intent, thoughts, and bias. Bias is a tricky and amorphous concept and quite difficult to pin down. It can be postulated that judges might unconsciously push for juror removal in the case of a deadlocked jury, despite the fact that this course of action is expressly prohibited. Id. at 624-25.

42. There are states that have statutes dictating juror removal procedures. The Washington statute states that the trial court may dismiss a juror “who in the opinion of the judge, has manifested unfitness to be a juror . . . .” WASH. REV. CODE § 2.36.110 (2004). Despite the uncomfortable sensation that this and statutes similar to the Washington law allow judges into an area they know little about, namely, a juror’s psychology, the laws might reduce the type of situation demonstrated in Nelson. See supra notes 1-5.

43. In addition to Nelson, another case concerning juror removal is the case of Juan Luna. Illinois v. Luna, 02 CR 1543002 (Cir. Ct. of Cook County, Ill. May 10, 2007). His crime received nationwide coverage in 1993, because of the sheer brutality of the murders, when seven employees of Brown’s Chicken in Palatine, Illinois, lost their lives in a bloody rain of bullets. Burt Constable, Thoughtfulness Saved Life of Man Who Didn’t Think of Others, DAILY HERALD, May 18, 2005, at 10. The victims, ranging in age from sixteen to fifty, were killed execution style. Id. The most terrifying aspect of the gruesome crime was that the killers remained unknown for over a decade. Id. In a bizarre twist of fate, at the trial of one of the two defendants, there was a lone holdout for the death penalty, a modern day parallel to the old Cary Grant movie. 12 ANGRY MEN (MGM 1957). However, in this case, the holdout was not a man, and nobody on the jury seemed to be angry. The motivations and internal bias of the lone holdout can easily be questioned, making Luna’s case an interesting discussion for juror removal. See Infra note 57 (analyzing the reasoning underlying the jurors verdict in Luna).

44. See, e.g., People v. Harris, 866 N.E.2d 162, 181-84 (Ill. 2007) (removing a juror during voir dire); People v. Gallano, 821 N.E.2d 1214, 1224-25 (Ill. App. Ct. 2004) (noting that a juror may be removed after deliberations have begun); Nelson, supra notes 1-5 (discussing the removal of jurors after the completion of the guilt phase in a bifurcated death penalty case).

45. See Uttecht v. Brown, 551 U.S. 1, 19-22 (2007) (reversing the court of appeals decision holding that the district court committed error by removing a juror during an eleven day death qualification voir dire process).
the juror. At times, demeanor and nonverbal cues form the basis for removal decisions, even when the juror's statements alone would render him appropriate for service.\textsuperscript{46} Removal of jurors "for cause" during voir dire has been questioned when it appears to be based upon juror action, as opposed to juror statements.\textsuperscript{47} In Illinois, during jury deliberations, jurors can be removed for displaying a refusal to consider the evidence in the case when deciding upon a verdict.\textsuperscript{48} Similarly, other states and federal courts have spoken about juror removal during deliberations.\textsuperscript{49}

\textsuperscript{46} See id. at 9 (stating that the finding that a potential or impaneled juror is biased based upon demeanor is within the power of the trial court). Such a finding would be affirmed on appeal, even if the juror's actual statements did not allude to bias. Quoting Witt, the court stated, "[M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear,' these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." Id. at 7.

\textsuperscript{47} See Harris, 866 N.E.2d at 182 (holding that a juror who was excused during voir dire was removed permissibly despite the defendant's objection that it was inappropriate to rely on a potential juror's nonverbal cues when the juror has continuously and unambiguously promised to render a verdict consistent with the evidence and court instructions). In making the original removal decision, the circuit court noted that although the juror responded to voir dire questions in an acceptable manner, the juror's body movements apparently indicated an inability to follow the law as instructed. Id. Specifically, the juror in question shook his head back and forth while participating in voir dire. Id. It is astounding that a characteristic, which could easily be termed a "nervous tick," can be used against a juror who is otherwise qualified for service. This scenario is even more concerning when the emotionally charged and tense nature of death qualification is considered. In such situations, most people would find it abnormal not to display some nervous habits.

\textsuperscript{48} See Gallano, 821 N.E.2d at 1223 (cautioning that a juror should not be removed because of opinions related to the adequacy of evidence in a case). When there is any "reasonable possibility" that a juror is removed because of such opinions, the dismissal is in error. Id. at 1224. This standard protects a defendant's right to a unanimous jury verdict and ensures that jurors are not dismissed merely to create an artificial unanimous verdict. Id.

\textsuperscript{49} See, e.g., Elmore, 123 P.3d 72 (2005) (remanding the case back to the trial court because of a lack of showing that the court applied the higher federal evidentiary standard for removing a juror during deliberation). At the trial court level, the defendant alleged that an impaneled juror was rejecting the proffered evidence in the case. Id. at 74-75. The trial court initially failed to question the juror, relying instead on the allegation lodged by the other jurors. Id. When the trial court finally did interview the juror, the juror denied refusing to deliberate. Id. at 75. This denial notwithstanding, the trial court opted for removal. Id.; see also Riggs v. State, 809 N.E.2d 322, 329 (Ind. 2004) (holding that there were no grounds for removal during deliberations because no interview of the questionable juror was conducted, and no steps were taken by the trial court to minimize the effect of the removal on the remaining impaneled jurors). In a federal court context, identifying the defendant's asserted grounds for appeal, which by and large deal with juror
The fact that so many jurisdictions have addressed juror removal during deliberation reflects the importance of being cautious when balancing the need to dismiss improper jurors with a defendant's right to a fair trial and an impartial jury.50 The same consideration must be paid when jurors are removed after the first phase of a death penalty case as well.51

C. Trouble with a Capital "T"—Complications Arising from Juror Removal

The potential complications of juror removal during voir dire are obvious. First, as a result of half-hearted and inconsistent measures to eliminate jurors who cannot set aside personal beliefs, bias is often prevalent in the jury room.52 Notably, the United

bias and misconduct. See Warner, 2006 WL 2583722, at *8. In Warner, the defendants argued on appeal that many jurors made misstatements on their voir dire questionnaires regarding prior court involvement that a juror engaged in inappropriate ex-parte communications, that another juror refused to deliberate and tried to oust pro-defense jurors, and that prejudicial extraneous material was allowed into the jury room. Id. at *41-43. The alleged impact of these acts would have required a mistrial. Id. at *38. With regard to the misleading voir dire statements, although a number of jurors failed to give completely accurate accounts, the court only dismissed a few jurors, which the defendants argued was arbitrary. Id. The court ultimately found that despite the jurors' misconduct, as a whole, the jurors had acted diligently and impartially. Id. at *37; see also Warmbir, supra note 6, at 15 (commenting on the high profile “family secrets” mob trial and noting that two jurors had been removed after deliberations began because they disclosed to the court that they had already solidified their opinion on the verdict).

50. U.S. CONST. amend. VI.

51. This was the situation in Nelson when the juror was removed post-guilt phase in a bifurcated trial. See supra, notes 1-5 (discussing the procedures followed in the Nelson trial); see also 19 C.J.S. Juries § 504 (2007) (stating that in bifurcated proceedings, involving both guilt and penalty phases, a juror may be replaced even after the guilt phase has been completed without requiring the reconstituted jury to re-deliberate on the issue of guilt).

52. Perhaps the most powerful demonstration of this assertion can be seen in several exchanges between the jurors in 12 Angry Men:

I don't mind telling you this, mister: we don't owe him a thing. He got a fair trial, didn't he? What do you think that trial cost? He's lucky he got it. Know what I mean? Now, look - we're all grown-ups in here. We heard the facts, didn't we? You're not gonna tell me that we're supposed to believe this kid, knowing what he is. Listen, I've lived among them all my life - you can't believe a word they say, you know that. I mean they're born liars.

It's always difficult to keep personal prejudice out of a thing like this. And wherever you run into it, prejudice always obscures the truth. I don't really know what the truth is. I don't suppose anybody will ever really know.

Ever since you walked into this room, you've been acting like a self-appointed public avenger! You want to see this boy die because you personally want it, not because of the facts! You're a sadist!

12 ANGRY MEN (MGM 1957).
States Supreme Court has emphasized that subtle bias is not necessarily detectable when reading voir dire transcripts. The impact of any bias judges may have must be considered because of the high level of deference judges are given in juror-removal decisions. The Supreme Court appears to give lower courts permission to use a disturbing amount of discretion, which may allow judges to tap into their unconscious biases. The combination of judicial bias and the arbitrary nature of deciphering between a bull-headed reluctance in following instructions and genuine questioning of the sufficiency of evidence are deadly to the legitimacy of trials.

53. Nicklasson, 491 F.3d at 837.
54. See William A. Zolla II, Court of Appeals Upholds Governor Ryan Criminal Conviction, CBA RECORD, Sept. 2007, at 53 (critiquing the “unjust” outcome of the trial, purportedly caused by “dysfunctional jury deliberations”). The article focuses on Judge Michael Kanne’s dissent in the Court of Appeals’ decision to uphold former Governor Ryan’s conviction. Id. Judge Kanne pointed to errors in the removal of two jurors for incomplete answers after eight days of deliberation, the handling of an allegation of prejudicial extraneous material in the jury room, and the court’s response to the defendant’s allegations that a juror was removed because of doubts relating to the sufficiency of evidence and that the jury failed to follow instructions. United States v. Warner, 498 F.3d 666, 705-15 (7th Cir. 2007) (Kanne, J., dissenting). Per Judge Kanne, “[i]n the final analysis, this case was inexorably driven to a defective conclusion by the natural human desire to bring an end to the massive expenditure of time and resources occasioned by this trial—to the detriment of the defendants.” Id. at 715. This case and accompanying article add interesting dimensions to the issue of juror removal because they show an instance where one judge criticized another judge’s removal decisions.
55. In the same breath, the Supreme Court says that subtle indications of juror bias could be picked up on a subconscious level by trial court judges. Nicklasson, 491 F.3d at 837. This contradiction epitomizes the struggle courts at all levels have faced when confronted with possible juror removal. See People v. Childress, 633 N.E.2d 635, 643 (1994) (holding that a trial court judge need not adhere to a “set catechism” in conducting voir dire and may remove a juror who has failed to articulate himself or herself with “meticulous preciseness”). The Illinois Supreme Court in this opinion gave great deference to lower courts’ choices on what exactly “precise” means and therefore afforded a great deal of discretion in juror dismissal. While Childress identifies the importance of a potential juror’s words, the way those words are spoken and the general manner of the juror are often just as, if not more, important in removal decisions. Harris, 866 N.E.2d at 183-84.
56. See Thomas, 116 F.3d at 618 (2d Cir. 1997) (acknowledging the inherent difficulty in determining juror intent). In Thomas, the majority stated:

Once a jury retires ... [the] judge's duty to dismiss jurors for misconduct comes into conflict with a[other] duty that is equally, if not more, important-safeguarding the secrecy of jury deliberations.... [Where] the alleged misbehavior is a purposeful disregard of the law, [it] is a particularly difficult allegation to prove and one for which an effort to act in good faith may easily be mistaken.

Id. at 618.
The muddy waters of juror removal are exemplified in recent notorious Illinois trials, where judges faced difficult decisions in determining whether to remove jurors.\textsuperscript{57} It has been noted that purposeful disregard of the law is hard to prove and is easily mistaken for an effort to act in good faith.\textsuperscript{58} Such choices are rarely, if ever, clear cut and usually turn on a judge's perception of a questionable juror's nonverbal cues and demeanor. It is this

\textsuperscript{57} The story of prisoner #R63856, currently residing in Stateville Prison in rural Illinois, is different from the other cases described in this Comment because in this case there was no juror removal. Tara Malone, \textit{Juror Who Voted to Spare Luna's Life 'At Peace' with Her Decision}, \textit{Daily Herald}, May 20, 2007, at 5. However, the question as to whether there should have been still lingers. Although the jury did not notify the judge that there was a potential removable juror, they could (and arguably should) have done so. Fellow jurors noted that the holdout juror struggled to articulate her reasons for declining to vote for the death penalty. Tara Malone & Stacy St. Clair, \textit{What It was Like to Be a Brown's Juror}, \textit{Daily Herald}, May 20, 2007, at 1. It was known that the juror was the product of a strong religious background, which may have colored her vote to the point of making her unacceptably biased for jury service. Malone, \textit{supra} note 57, at 5. Judging by the way other cases have described bias leading to removal, such strong, deeply held beliefs against the death penalty should have excluded her from service. Newspaper accounts indicate that when it came to the sentencing vote, the juror did not deliberate and merely refused to assent to the death penalty. Malone & St. Clair, \textit{supra} note 57, at 1. This staunch refusal to vote for death, combined with the difficulty in articulating the reason for her refusal, and the juror's religious background should have led the remaining jurors to inform the judge, thereby allowing the court to inquire into her motivations. This may have been a case where the juror's words and actions conflicted with statement that she could render a verdict in keeping with the evidence, but in fact was unable to due to deep-seated bias, calling for removal similar to the removal in the \textit{Nelson} case. \textit{See supra} notes 1-5.

When \textit{Nelson} is examined, it could be argued that, judging by the responses of the questionable juror, there was some evidence that the juror was unimpressed with the sufficiency of the prosecution's evidence in the case. How is this different from \textit{Luna}? Although jurors in \textit{Nelson} were more vocal to the court, there seems to have been similar questionable biases against death in both cases. Per \textit{Galliano}, any evidence that a potentially removable juror is considering the sufficiency of the case presented should be honored and dismissal of the juror denied. 821 N.E.2d at 1223. The idea is that a juror does not have to be pro-death to sit on a capital trial jury. \textit{Id.} It appears that the results in \textit{Nelson} and \textit{Luna} could just as easily be reached by flipping a coin. The same can be said for the George Ryan trial. \textit{See supra} notes 43, 49.

The comparison can be made to the lone survivor of a car wreck, who looks skyward in the aftermath and asks, "why me?" Indeed, why Juan Luna? Why not Brian Nelson? Why not the tens of other cases where courts deemed biases significant enough, whether through word or action, to warrant removal? The bitter taste of arbitrary decision-making, and ultimately, judicial bias, is left long after these cases are disposed and the defendants are sentenced to their fate.

\textsuperscript{58} \textit{Thomas}, 116 F.3d at 618. This is an issue because acting in good faith means the juror is qualified for service and not removable. In contrast, a seated juror who is purposefully ignoring the law robs the defendant of the right to a fair trial.
judicial assessment of internal and largely psychological features that causes the greatest uneasiness among those who consider juror removal to be too arbitrary.

III. THE JURY IS IN: ANALYZING THE PSYCHOLOGICAL RESEARCH AND ANALOGOUS LEGAL SCENARIOS TO UNDERSTAND THE DANGER OF ARBITRARY JUROR-REMOVAL DECISIONS

In addressing concern over judicial discretion in juror removal, it is crucial to explore the psychological research relating to juries. Data regarding difficult-to-detect biases and general attitudinal trends are particularly helpful when drawing comparisons between juror bias and potential judicial bias. Determining the possibility of judicial bias is critical because it increases the likelihood that a judge's decisions as to juror removal are influenced by internal as opposed to external factors. Upon finding that judges are potentially subject to bias, comparisons to similar legal situations involving judicial discretion aid in the understanding of unchecked judicial decision-making in juror removal, an area teeming with psychological factors.

This section first summarizes the present state of the psychological literature concerning juror bias. Next, this section analyzes how these psychological findings can be applied to judges, establishing the concerns over judicial bias and decisions based on wide judicial discretion. This is especially alarming when judges are dealing with areas of study, such as psychology, which are foreign to them. Finally, this section compares analogous scenarios in the legal arena to highlight the problems inherent in allowing judicial discretion and further illustrate why the juror removal procedure should be reformed.

A. "Couching" the Issue: Juries in the Psychological Literature

In the 1980s, there was a distinct distaste in the legal field for the use of psychological and sociological studies in trials. Nevertheless, there has been a revolution of sorts in the last twenty-five years. Presently, psychology is alive and well in the

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59. The Witherspoon court scorned attitudinal studies, stating that "[t]he data adduced by the petitioner ... [is] too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." Witherspoon v. Illinois, 391 U.S. 510, 517-18 (1968). Sixteen years later, the court echoed a similar sentiment, indicating that it believed that jurors were able to set aside their personal beliefs in order to decide a case. Keeten v. Garrison, 742 F.2d 129, 133 n.7 (4th Cir. 1984). Again, in 1986, the Supreme Court said that it doubted that psychological reports were of use. Lockhart v. McCree, 476 U.S. 162, 171 (1986). In particular, the Court noted that it doubted "the value of such studies in predicting the behavior of actual jurors." Id.
criminal justice system. Psychologists now are routinely used as experts at trial. Their research is utilized in preparing cases, and they are called upon to assist in assembling juries. Much can be learned about the residual bias that exists in both juries and judges by studying psychological research. This research exemplifies why issues relating to juror removal are so important.

Although it may appear counterintuitive, bias in jurors has been shown to survive voir dire, despite being the very thing voir dire is intended to prevent. The perseverance of bias was shown in a study, finding that twenty-eight percent of participants who met the Witt standard, defined in Wainwright v. Witt, for juror suitability would nonetheless automatically impose the death penalty. In contrast, thirty-six percent of all jurors in the same study exhibited attitudes toward death so vehement that impartiality was impossible.

Jurors enter the deliberation room with personalities that can impact their verdicts as much as, if not more than, the evidence. Research shows that death qualified jurors may be more likely to demonstrate higher endorsements of statutory and non-statutory mitigating factors. The same research found that death qualified jurors were more likely to endorse legal authoritarian beliefs and

60. See James D. Griffith, Christian L. Hart, Jill Kessler & Morgan M. Goodling, Trial Consultants: Perceptions of Eligible Jurors, 59 CONSULTING PSYCHOL. J. PRAC. & RES. 148, 148 (2007) (noting that trial consultants, of which most are psychologists, are involved in a range of activities in the criminal justice system, including jury selection, community surveys for venue change, and witness and trial preparation).

61. Psychologists study testing, diagnosis, assessment, and treatment of mental disorders. John M. Fabian, Psy.D., Death Penalty Mitigation and the Role of the Forensic Psychologist, 27 LAW & PSYCHOL. REV. 73, 84 (2003). In the course of their evaluations, psychologists look to the spheres of cognition, social functioning, and emotional functioning to describe and interpret behavior. Id. The experts typically utilized in the justice system are forensic psychologists, who specialize in evaluating offenders and completing assessments for the court. Id.


63. See Metcalfe, 782 N.E.2d at 273 (identifying that the purpose of voir dire is to ensure an impartial jury selection).

64. The Witt standard for juror dismissal requires assessing "whether juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instincts and his oath." Wainwright, 469 U.S. at 424.


66. Id.


68. Id.
Arbitrary Decisions in the Area of Juror Removal exhibit an external locus of control. The results of this study suggest that it may be a juror's personality that contributes to decision-making in deliberations, rather than the actual evidence or law presented. The conclusion that can be drawn from this data is that individuals who survive death qualification may be of a certain personality type.

Per available data, attitudes influence sentencing in three ways: (1) attitudes may have a direct effect on sentencing; (2) attitudes may be mediated by aggravating or mitigating factors; or (3) attitudes may interact with aggravating or mitigating factors. Attitude interference having a direct effect on sentencing is the least desirable in a courtroom because the evidence presented at trial is not the deciding factor. A study, however, identified that this type of attitude interaction was indeed present in participants, suggesting that jurors are not blank slates and may choose not to consider the law, despite stern instructions to the contrary.

Other juror characteristics also have been shown to significantly affect verdicts. For example, men tend to be more inclined to vote for the death penalty. Additionally, those with conservative social and political beliefs tend to be more punitive than those with more liberal philosophies. In general, jurors who pass the Witt standard are more likely to be male, Caucasian, financially secure, conservative, and either Catholic or Protestant. Gender and deeply held personal beliefs, like politics or religion, are ingrained in individuals and are unlikely to change. Because of their lifelong persistence, these characteristics may arguably have subtle effects on decision-making that are

69. The idea of "locus of control" is that individuals either believe that events in their lives are governed by things that they can control (an internal locus of control) or by things that are largely outside of their personal control (an external locus of control). Id. at 61.
70. Id. at 66.
71. Id.
73. Id.
74. Id. at 444-45.
75. Stuart J. McKelvie, Attitude Toward Capital Punishment is Related to Capital and Non-Capital Sentencing, 8 N. AM. J. OF PSYCHOL. 567, 568 (2006). This study examined the relationship between attitudes toward capital punishment and sentencing severity. Id. Two hundred and twenty-eight Canadian undergraduates were given one of two vignettes and asked to make sentencing recommendations. Id. at 571-74. They were also asked to fill out a questionnaire on capital punishment beliefs and a Likert-type scale related to severity of execution methods. Id.
76. Id. at 569.
77. Butler, supra note 67, at 58.
undetectable by the jurors themselves.

Extra-legal features of defendants may also have an effect on jurors’ decision-making abilities. The appearance of a defendant during trial has been shown to affect jurors’ decisions to a statistically significant degree. However, like jurors’ attitudes and personalities, extra-legal factors are not supposed to play a role in jury verdicts. Ultimately, such factors clearly find their way into the deliberation room.

The discussion above provides psychological data supporting the proposition that jurors do not come to the criminal justice system without bias. Therefore, it is logical to infer that judges are also subject to the same influences. Judges, like jurors, are human and are not immune to psychological bias. Research indicates that jurors may not realize the depth or extent of their own bias, and the same likelihood holds true for judges. In fact, because of the complexities of an individual’s psychological makeup, even if a person were aware of their bias, it would be difficult to shut it off temporarily for purposes of trial. Therefore, it can be assumed that judges’ biases are present at trial. The premise that emerges from juror studies and the


79. See McKelvie, *supra* note 75, at 568 (stating that the personal characteristics of both judge and jury are important in cases).

80. In terms of jurors’ ability to recognize their own bias, the court in *Wainwright* cautioned that “many veniremen simply cannot be asked enough questions to reach the point where their bias has been made ‘unmistakably clear’; these veniremen may not know how they will react . . . or may be unable to articulate, or may wish to hide their true feelings.” *Wainwright*, 469 U.S. at 424-25.

81. Antonio, *supra* note 78, at 233 (asserting that providing more detailed instructions informing jurors of their potential biases would likely not change the effect of such biases on jury verdicts because many people are not aware that they are engaging in stereotypical behaviors and biases are often very subtle).

82. Judicial bias is hinted at in studies that show an interesting phenomenon in jury trials. These studies indicate that judges often decide for themselves what the verdict should be and unintentionally transmit their dispositional preference nonverbally to the jury. Antonio, *supra* note 78, at 216. The jury then unconsciously considers the judge’s impression in their own verdict. *Id.* In a situation like this, both the judge and the jury are utilizing psychological tools (nonverbal behavior) and biases (the judge’s own feelings on a case injected into the jury’s deliberations). Other studies have found that sentencing disparities in federal courts prior to the adoption of federal sentencing guidelines were explained more by individual differences among judges than any other single factor. GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* § 9.06 at 267 (2d ed. 1997). This is a powerful result as it provides evidence that personal characteristics influence judicial
information available on judges is that both jurors and judges do not come to the courtroom as blank slates.

The proposition that judges walk into cases with their own bias calls into question situations like juror removal, where a judge is given wide discretion over decisions that may be outside the judge's area of expertise. Judges who lack a formal background in psychology may inadvertently fall back on their own biases about human behavior and nonverbal cues to render erroneous rulings.

B. Comparing Apples to Apples: Other Dilemmas of Judicial Decision Making

The problem addressed in this Comment is further clarified by examining other circumstances where the judiciary has been accused of having too much discretion, resulting in arbitrary decisions. Two of the most prominent examples of "unwise" judicial discretion are admissions of scientific testimony based on Daubert standards and admission of assessments of future dangerousness.

The United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals made judges responsible for determining the validity of expert scientific testimony, including experts in psychology. This is a heavy burden on judges who

decision making. The same source puts forth the hypothesis that "cases in which individual philosophies play the most important role are probably those in which conflicting information . . . is present." Id. Juror removal is arguably a situation where conflicting information is present. It is when the written record of the juror's responses to questions about potential bias is contrary to the judge's interpretation of the juror's nonverbal behavior that the judge's personal biases and beliefs about such behavior play the largest role.

83. The burden of proof set for juror removal decisions is very low. In fact, it "does not require that a juror's bias be proved with 'unmistakable clarity.'" Wainwright, 469 U.S. at 424. The decisions made by trial court judges regarding juror removal are given a great deal of deference on appeal because such judgment as to whether a juror is biased "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Id. at 428.

84. Wainwright articulated this when it allowed a judge to remove jurors although the printed record failed to show juror bias. Id. at 425-26. But the judge had the impression that the juror was unable to "faithfully and impartially" follow the law. Id. The word "impression" infers that judges can rely upon their "gut" feelings, which may be influenced by personal biases.

85. These exercises of judicial discretion are "unwise" in the sense that the majority of judges do not have sufficient training or knowledge of psychology to make decisions about areas that are heavily laced with psychological issues.


87. Sarah H. Ramsey & Robert F. Kelly, Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era, 59 U. MIAMI L. REV. 1, 4 (2004). Prior to the Daubert case in 1993, clinical testimony was evaluated by the Frye rule in federal court. MELTON, supra note 82, § 1.04(c)
generally are unschooled in psychology or other scientific fields. Although Daubert was a civil case, it has impacted the admission of technical and scientific evidence in criminal cases as well.

The court's role under the Daubert analysis is to ensure the reliability and relevance of expert testimony, with judges having plenty of leeway in determining how to assess reliability. Critics found that this discretion makes the Daubert standard incredibly flexible, allowing the court too much discretion often in an unfamiliar area of expertise. The Frye test, used in federal courts before Daubert and still used in many state courts, did not give as much discretion to the courts. Instead, the Frye test employed the expertise of scientists in the field at issue to determine whether a particular practice was generally accepted. The opposite is true under Daubert, where judges are expected to make decisions about the quality of scientific evidence that they likely do not understand.

The wide latitude given to judges under Daubert is similar to juror removal. In both scenarios, judges are granted wide discretion to make decisions that have a significant impact on the outcome of cases. Additionally, in both situations it is the judge's lack of specialized knowledge in the area of study at issue that makes their decision questionable. Asking a judge who knows little about psychology to determine the admissibility of an expert's testimony under Daubert or juror removal issues is similar to asking a blind individual to judge a fashion show.

The same criticisms that befall Daubert determinations also apply to assessments of "future dangerousness" at capital trials. A clinical assessment of future dangerousness is an aggravating

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at 20. The Frye standard came from a 1923 court decision involving the admission of polygraph test results. Id. Stated simply, the admission of scientific evidence was conditioned upon its being "sufficiently established to have gained general acceptance in the particular field to which it belongs." Id.

88. See id. § 1.04(c) at 21 (indicating that new ideas, not yet generally accepted in a field, are not barred under the Daubert standard). This creates a dilemma for judges because there appears to be little guidance under Daubert, unlike the previous standard which barred expert testimony in a field that had not gained general acceptance in a particular scientific community. Id.


90. Id. at 501.
91. Id. at 502.
92. Id. at 493.
factor considered in death penalty cases in roughly eight states and is used to determine the likelihood that a defendant will commit another crime in the future.94 These assessments are known in the psychological community for being unreliable and inaccurate.95 Despite doubt surrounding future dangerousness predictions articulated by the American Psychological Association, courts still have admitted these assessments.96 Courts have acknowledged the speculation involved in predicting future dangerousness, but they have ruled that there is no constitutional barrier to allowing the evidence.97

Despite such assessments being technically admissible, serious concerns exist over whether future dangerousness should be admitted because such assessments have been shown to be unreliable.98 Another reason to question the admission of future dangerousness evaluations is that trained experts often have difficulty interpreting and predicting whether a defendant will be violent in the future.99 Evidence that mental health experts have trouble with these assessments casts doubt on the courts ability to say with certainty whether they should be admitted. It can be postulated that courts admit such evidence because it sounds definitive, not because it is definitive.100 A decision like this

94. MELTON, supra note 82, § 9.07(b) at 271.
95. See Fabian, supra note 61, at 74 (noting that it is difficult for professionals to determine future dangerousness, evidenced by the fact that the American Psychological Association distrusts such evaluations).
96. See Regnier, supra note 89, at 470 (acknowledging that the American Psychological Association believes that assessments of future dangerousness have significant deficiencies); see also MELTON, supra note 82, § 9.09 at 271 (asserting that the field of psychology has yet to demonstrate that predictions of future dangerousness are likely to be “highly accurate”).
97. See Diaz, 2007 U.S. Dist. LEXIS 18442, at *73 (acknowledging that future dangerousness projections require predictions of behavior based upon less than solid patterns of past behavior, although such evidence is not prohibited by the Constitution).
99. There are four factors in particular that make future dangerousness evaluations difficult for psychology experts. MELTON, supra note 82, § 9.09(a) at 277-79. First, there is a great deal of variability in the legal definition of the term “dangerous.” Id. Second, the complexity of the literature on the subject can be daunting to experts. Id. Third, the expert is susceptible to unconscious and conscious errors and biases in judgment when assessing dangerousness. Id. Fourth, the clinician may fall prey to the potential consequences of an erroneous prediction. Id. Since there is a lack of bad consequences when a client is predicted to be dangerous and is not, an expert may have an incentive to err in the direction of finding a client to be dangerous in close cases. Id.
100. See United States v. Scheffer, 523 U.S. 303, 334 (1998) (Stevens, J.,
suggests that judges draw on their own beliefs, which is, in the case of future dangerousness assessments, likely detrimental to defendants.

The information available on Daubert hearings for admission of expert testimony and the admission of future dangerousness predications at trial indicates that these areas pose a great risk for judicial bias because of the wide discretion afforded to the judiciary. When combined with psychological studies on jury and judicial bias, this research portrays a disturbing trend. Collectively, this section suggests that judicial bias is present in other areas of the law, in addition to juror removal. The presence of such bias elsewhere in the criminal justice system strengthens the proposition of this Comment. Specifically, judicial bias is dangerous in juror removal because of the wide discretion given to the judicial branch and the general lack of formal knowledge regarding the field of psychology. Decisions fueled by biases are harmful not only to defendants, but also to the operation of the criminal justice system at large.

IV. MAKING LEMONADE FROM JUDICIAL LEMONS: PROPOSED BUFFERS TO BIAS IN JUROR-REMOVAL DECISIONS

The same data that supports the conclusion that judicial bias is present may also be the Rosetta Stone, helping to decipher the solution. Thus far, this Comment has laid the groundwork for explaining the necessity of enforcing tighter reins or "buffers" to deter bias when judges make juror-removal decisions. Such buffers are necessary to protect a defendant's rights and the integrity of judicial rulings. It is further essential to change the current practice of allowing judges, who are often strangers to psychological research and techniques, to render decisions that rely on the social science disciplines in order to be accurate. After reviewing the available psycho-social literature and examining the cautionary tales presented by Daubert hearings and assessments of future dangerousness, there are several possible methods for reducing the arbitrariness with which juror-removal decisions are made.101

dissenting) (stating that "[t]here is no legal requirement that expert testimony must satisfy a particular degree of reliability to be admissible. Expert testimony about a defendant's 'future dangerousness' to determine his eligibility for the death penalty, even if wrong 'most of the time,' is routinely admitted.").

101. There are likely those who feel no change is necessary and that judges already do a sufficient job making juror removal decisions. See Leonard Save & Gershon Ben-Shakhar, Admissibility of Polygraph Tests: The Application of Scientific Standards Post-Daubert, 5 PSYCHOL. PUN. POLY & L. 203, 219-20 (indicating that despite judges' struggle to comprehend scientific concepts and differentiate between good and bad science, courts usually make decisions in
Because the research on juries suggests that bias is present in trials despite efforts to control it, the target should be increasing judges' knowledge of psychology. This would make previously arbitrary decisions more educated and less likely to be based upon judicial bias. This educational tactic has been used in other legal situations. For example, in an effort to ensure more consistent evidentiary rulings under Daubert, a number of justices from Massachusetts attended a seminar designed to educate them on the intricacies of DNA. The obvious criticism of this particular method is that a few hours of rudimentary training in a highly specialized area, especially one as complex as science or psychology, do not grant justices with knowledge equivalent to that of an expert. A legitimate concern is that such basic training would create a false sense that judges have been magically transformed into experts, with the know-how to make sophisticated determinations involving a subject about which they realistically know little.

Another potential option, along the same lines as judicial education, involves creating a symbiotic relationship between the judicial branch and psycho-social researchers. If the judicial branch were to communicate its research needs to social science experts, then the disciplines of law and social science could work together to tailor studies specific to the judges' experience and line with the generally held views of the scientific community). This statement, coupled with the belief that no reform is necessary to reduce bias in judicial decisions, is contrary to the manifest weight of the literature presented in this Comment. Criticisms over the discretion given to judges by the Daubert test can easily relate to juror removal:

Our responsibility . . . is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not 'good science,' and occasionally to reject such expert testimony because it was not 'derived by the scientific method.' Daubert v. Merrel Dow Pharm. Inc., 43 F.3d 1311, 1316 (9th Cir. 1995). The critique that judges without sufficient knowledge delve into sophisticated scientific problems is very similar to the problem of judges deciding psychology-laden juror removal decisions without a social science background. This problem is clear enough to warrant an investigation into how juror removal can be improved to reduce the amount that judges must rely on their own biases when making rulings on this issue.

102. See Ramsey, supra note 87, at 4 (noting that when attorneys and judges use social science research, they must have the capacity to assess and use it correctly). The article further asserts that judges need to be knowledgeable consumers of social science literature in order to accurately assess experts and briefs related to psychology. Id. at 81.
104. Id.
105. Id. at 651.
106. Id.
After research is completed, the results could then be published and distributed for widespread use. Submitting research results to government agencies may also help generate additional funding for further research. Instead of having researchers develop original studies, private research organizations could be commissioned to conduct meta-analyses on existing related studies. The organizations could be instructed to focus on particular questions that would aid judges in objectively utilizing social science data. This research would help establish standards for judges to use when dealing with psychological issues like nonverbal behavior and bias. Standards like these would effectively limit the amount of arbitrariness and judicial bias that could creep into juror-removal decisions. Unfortunately, the relationship between the areas of law and social science, while much improved, has not evolved to the point where they can cooperate to the extent necessary to make this collaborative research possible. In the future, however, this avenue may become the standard in terms of reducing judicial bias in deferential juror-removal decisions.

Yet, a different option is available to improve current juror instructions. This solution aims at reducing the number of situations where juror removal needs to be utilized. The revised jury instructions would be designed to help jurors become aware of their own biases. Such instructions would tell jurors at the

107. See Ramsey, supra note 87, at 80 (suggesting that additional funding for research can be attained by submitting articles based on preliminary research to the government, and if enough interest is generated within the particular government agency, then the agency would be willing to sponsor more studies).

108. See id. (indicating that an alternative to asking scientists to design new study concepts is to have scientists analyze available research to answer the questions at hand).

109. Id.

110. Id.

111. Id.

112. Id. at 33.

113. The alliance between the disciplines of law and social science may improve significantly due to a recent collaboration between law schools and researchers to develop a new tool to measure deceit (the FMRI). Tina Hesman Saey, Secrets of Brain Could Reshape the Courtroom, ST. LOUIS POST-DISPATCH, Oct. 9, 2007, at A1. This study may potentially open the door for more extensive cooperation between courts and researchers, which would make this option more feasible as a tool to reduce the arbitrariness of judicial juror removal decisions. For those interested in working toward buffers for arbitrary juror removal decisions, the best kick-start would perhaps be to contact the researchers in charge of the FMRI study and discuss how they conceived of and designed the project. This would provide a blueprint for collaboration between law and science and assist in taking the first steps toward addressing juror removal issues.

114. See Antonio, supra note 78, at 233 (suggesting that revising jury
outset that there are a number of psychological factors that might arise over the course of the trial.\textsuperscript{115} The theory behind this approach is that alerting jurors to the potential for their personal biases to influence their decisions will lead to greater recognition and the ability to control such biases when, and if, they appear.\textsuperscript{116} The criticism to this approach is that even when individuals are told to expect biases, they may have a difficult time seeing it within themselves and thus will not attempt to control their effects.\textsuperscript{117}

The final and most feasible option for reducing arbitrary judicial decisions is to mandate expert assistance for judges when conducting juror removal hearings. This concept is far from novel. In \textit{Daubert} situations, judges are allowed to appoint experts to help them better understand the scientific evidence at issue.\textsuperscript{118} This concept could similarly be used for juror removal: an expert in psychology would be appointed by the court to assist in determining whether a juror is unacceptably biased by weighing the relevant psychological factors and theories. Utilization of experts in this manner would likely be feasible, given the wide range of services with which psychological experts currently provide the court.\textsuperscript{119} Implementation might be expensive and time-consuming, but it would be the most helpful to judges in

\textbf{instructions could make jurors more vigilant about the effect their own biases may have on their verdicts).}

\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Federal Rule of Evidence 706(a) provides:

\begin{quote}
The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have an opportunity to participate.
\end{quote}

\textbf{FED. R. EVID. 706(a).}

\textsuperscript{119} See Griffith, \textit{supra} note 60, at 148 (describing the wide range of roles filled by psychologists within the criminal justice system). Notably, psychology experts serve in a variety of advisory positions to the court during voir dire, trial preparation, and witness preparation. \textit{Id.} The difference between the roles identified in the Griffith article and the role proposed for experts in juror-removal decisions is that in the current proposal, experts would be mandated for the court, rather than electively hired by an individual party to gain an advantage. \textit{Id.}; see also Fabian, \textit{supra} note 61, at 84 (noting that forensic psychologists are the most frequent type of psychology expert utilized in the courtroom, and that they perform a variety of evaluative functions for the court); MELTON, \textit{supra} note 82, § 18.01 at 519 (explaining the numerous roles available to forensic psychologists within the courtroom context). Although none of these sources suggest that experts be used to assist in juror removal hearings, such a use would be a natural fit for psychology experts given their advisory role in voir dire and trial preparation.
juror-removal decisions. A superior solution would be to have a combined approach, wherein experts are mandated to assist the court, but there is also an ongoing study set up to research the issue of juror removal. From the solutions described above, it seems clear that there is at least one way to approach the issue of juror removal.

V. CONCLUSION

The process of juror removal is far from perfect. Judges, likely saddled with preexisting biases, are given far too much discretion. As seen in the material presented in this Comment, there are analogous situations in the legal world, including *Daubert* hearings and assessments of future dangerousness. Both of these scenarios have been heavily criticized for the gate-keeping role in which they cast upon judges. Such a role is grossly inappropriate in nature for judges who do not have the formal education or skill in psychological techniques necessary to assess the psychological behaviors of jurors. Given the outrage expressed regarding *Daubert* and future dangerousness predictions, it stands to reason that juror removal should be of greater importance because defendants' constitutional rights are at issue. Fortunately, from the available literature and caselaw, there appears to be several potential solutions, including court-appointed experts for juror removal hearings, revised pattern jury instructions, ongoing collaborative research, and judicial education. These options are not only feasible but judicially responsible in light of the specialized knowledge juror-removal decisions require. Hopefully, this Comment will serve as the first shout in a rising roar for reform, and in the not-so-distant future judges will no longer be allowed to arrive at juror-removal decisions by peering into a magic eight ball.