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## Getting Out of the *Funk*: How Wisconsin Courts Can Protect Against the Threat to Impartial Jury Trials

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# GETTING OUT OF THE *FUNK*: HOW WISCONSIN COURTS CAN PROTECT AGAINST THE THREAT TO IMPARTIAL JURY TRIALS

*This Comment critically examines the development of Wisconsin’s juror bias case law and the challenges that this body of law has created for judges and practitioners across the State of Wisconsin. Further, this Comment analyzes whether attempts by the Wisconsin Supreme Court to clear up the body of juror bias law have been successful or, as this Comment suggests, have left juror bias law grappling with the same set of issues. Wisconsin has long recognized the crucial role of the jury to its legal system and to ensuring the just administration of its laws. To preserve the integrity of the jury system, Wisconsin courts should grant broad deference to trial court judges in resolving issues of juror bias. When determining whether a juror is capable of impartiality, the trial court has the benefit of invaluable information gathered from face-to-face observations of the jurors that is not available to appellate courts or adequately noted in the trial record. This Comment suggests that appellate courts in Wisconsin, which lack access to trial court judges’ direct observations of juror bias, should consult the trial court judges, rather than relying solely on the trial record, regarding their findings on juror bias before deciding whether to uphold the trial judges’ decisions on appeal.*

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## I. INTRODUCTION

Recent discourse in the Wisconsin Supreme Court in *State v. Funk*<sup>1</sup> illustrates that current juror bias jurisprudence remains in a state of flux. The case, having three dissenting opinions,<sup>2</sup> demonstrates that current juror bias standards can produce controversial results, which pose a threat to the legitimacy of Wisconsin trials involving issues of juror bias or jurors concealing information. As noted in the past, confusing labels and inoperable standards<sup>3</sup> have hindered the State of Wisconsin's pursuit of that prized "instrument of justice,"<sup>4</sup> an impartial jury, which is guaranteed both by its constitution<sup>5</sup> and the Constitution of our nation.<sup>6</sup> To ensure that this prize is not forfeited, Wisconsin should consider both the fundamental principles that are served by voir dire, as well as how those principles can be practically administered by Wisconsin citizens and lawyers.<sup>7</sup>

While pondering the future of Wisconsin's juror bias jurisprudence, one must consider the obstacles facing jury selection—such as time constraints, maintaining judicial integrity, and the inability of some jurors to be impartial or aware of their prejudices—to ensure the ultimate success of the jury in serving its role as "the lamp that shows that freedom lives."<sup>8</sup> Acknowledging that a completely impartial jury is

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1. *State v. Funk*, 2011 WI 62, 335 Wis. 2d 369, 799 N.W.2d 421.

2. *See id.* ¶ 65 (Abrahamson, J., dissenting); *see id.* ¶ 80 (Bradley, J., dissenting); *see id.* ¶ 122 (Prosser, J., dissenting).

3. *See* Sarvenaz J. Raissi, Comment, *Analyzing Juror Bias Exhibited During Voir Dire in Wisconsin: How to Lessen the Confusion*, 84 MARQ. L. REV. 517, 521 (2000).

4. PATRICK DEVLIN, TRIAL BY JURY 164 (3d ed. 1966).

5. WIS. CONST. art. I, §§ 5, 7; *see State v. Faucher*, 227 Wis. 2d 700, 715, 596 N.W.2d 770, 777 (1999).

6. U.S. CONST. amend. VI.

7. Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC'Y REV. 513, 515 (2008) ("Jury selection procedures vary, but a significant part of voir dire is aimed at establishing whether a juror's background or attitudes raise any 'red flags' about that person's ability to keep an open mind during the trial." (internal citation omitted)); *see* Christopher A. Cospers, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1475 (2003) ("The purpose of [voir dire] is to locate and remove any members of the venire who are biased, thereby fulfilling the constitutional commitment to provide for an impartial jury."); *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 68 (1986) (discussing the importance of jury selection in allowing attorneys to meet the jury for the first time, strategically introduce facts, build rapport with the jury, and inform jurors on legal principles important to the case).

8. DEVLIN, *supra* note 4, at 164.

unattainable, the jury is designed so that each juror will “enrich and correct the others’ perceptions in ways that will lead to a common or at least integrated understanding that might not have been available to them individually.”<sup>9</sup> Voir dire serves as a tool to eliminate those perceptions that are most likely formed from “conscious or subconscious preconceptions and biases,”<sup>10</sup> and its effectiveness is dependent upon the candor of jurors, the competency of trial lawyers, and the instincts of trial judges in evaluating juror bias challenges.<sup>11</sup>

Therefore, to promote the integrity of jury trials in Wisconsin, adaptations should be made to promote juror candor and effective questioning methods by counsel, and special deference should be given to the experience and observations of trial court judges in making determinations on juror bias.<sup>12</sup> I will begin outlining these potential changes, after first describing, in Part II of this Comment, Wisconsin’s attempt to clarify its juror bias jurisprudence in *State v. Faucher*<sup>13</sup> and its surrounding era. I will then discuss the effect of a more recent case, *State v. Funk*,<sup>14</sup> in Part III. Part IV will analyze appellate decisions subsequent to *Faucher*. After discussing the existing relevant case law in Parts II through IV, I will suggest the ways that Wisconsin can improve in handling situations of juror bias.

In Part V, I will address the need for trial judges to cautiously exercise discretion, guided by the ultimate goal of impartiality and avoiding liberal juror rehabilitation methods or other cost-saving measures that threaten constitutional rights. Part VI will propose the *Transamerica* rule, which requires strong deference to the trial court judge’s determinations on whether a juror is fit to serve on the jury, ensures that defendants are properly afforded due process of law, avoids the negative impact on legitimacy that an appellate reversal can bring,

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9. See DEVLIN, *supra* note 4, at 149; JOHN KLEINIG, ETHICS AND CRIMINAL JUSTICE: AN INTRODUCTION 187 (2008) (explaining that the “deliberative ideal” is often unattainable, due to improper influences).

10. COMM. ON JURY STANDARDS, ABA JUDICIAL ADMIN. DIV., STANDARDS RELATING TO JUROR USE AND MANAGEMENT 59 (1993).

11. See *State v. Delgado*, 223 Wis. 2d 270, 279–80, 588 N.W.2d 1, 5 (1999).

12. See *infra* Parts V–VII; see also *Delgado*, 223 Wis. 2d at 279–80, 588 N.W.2d at 5 (“The effectiveness of *voir dire* depends upon the thorough and well-reasoned questions posed by counsel and the circuit court, as well as the accuracy and completeness of the answers provided by prospective jurors.”).

13. *State v. Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999).

14. *State v. Funk*, 2011 WI 62, 335 Wis. 2d 369, 799 N.W.2d 421.

and allows trial judges who have had face-to-face contact with particular jurors to make the credibility determinations rather than leaving this task to appellate judges reading from the record.<sup>15</sup> Also in Part VI, I will demonstrate that while practicing attorneys must exercise care during voir dire, Wisconsin courts should be reluctant to place extreme burdens of specificity in questioning on counsel.<sup>16</sup> The remainder of this Comment will further examine each of these topics, after first outlining the development and current state of juror bias jurisprudence.

## II. THE DEVELOPMENT OF WISCONSIN JUROR BIAS JURISPRUDENCE

Wisconsin has placed a strong emphasis on the effectiveness of its jury systems and has promoted reforms and improvements to its jury systems for a number of years.<sup>17</sup> Additionally, Wisconsin has recognized the crucial role that jurors play in our justice system and in 2008, dubbed the month of September “juror appreciation month.”<sup>18</sup> Despite its progressive tradition, Wisconsin judges have still struggled to perfect the way they deal with issues of juror bias, particularly during voir dire.<sup>19</sup>

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15. See *Transamerica Ins. Co. v. Dep’t of ILHR*, 54 Wis. 2d 272, 282–83, 195 N.W.2d 656, 662–63 (1972) (explaining that the court has repeatedly held that it is a denial of due process if an administrative agency overturns a finding of a hearing officer on a matter of credibility, without having access to the officer’s impressions of the witnesses upon which the determinations were made).

16. See *State v. Perry*, 136 Wis. 2d 92, 99–100, 401 N.W.2d 748, 751–52 (1987) (explaining that a new trial may be required where the transcript is so insufficient as to prevent any meaningful appeal); see, e.g., *Delgado*, 223 Wis. 2d at 279–80, 588 N.W.2d at 5 (explaining the purpose of voir dire is to protect against potential bias, and that this is dependent upon effective questioning by counsel and the court, as well as the accuracy of the juror’s participation in the process); *State v. Harris*, 212 Wis. 2d 241, 568 N.W.2d 784 (Ct. App. 1997) (demonstrating that the *Perry* rule is inapplicable where the record is insufficient due to a failure of counsel to make a request for voir dire or opening or closing arguments to be recorded); WIS. SUP. CT. R. 71.01 (2013); JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 124 (1987) (elaborating on the importance of interpersonal skills in interviewing jurors and effectively achieving their cooperation).

17. See JAMES D. MILLER, *JURY REFORM IN WISCONSIN: WHERE WE HAVE BEEN, WHERE WE ARE NOW, AND WHERE WE ARE GOING* 5 (2006).

18. *Wisconsin Launches Juror Appreciation Program*, WIS. CT. SYS. (Sep. 4, 2008), <http://wicourts.gov/news/view.jsp?id=88>; see OFFICE OF THE GOVERNOR, *A PROCLAMATION* (proclaiming the month of September as Juror Appreciation Month). Local courts have also taken their own efforts to promote the juror appreciation program, including special prizes and gifts to jurors. See *Juror Appreciation Program*, WIS. CT. SYS., <http://www.wicourts.gov/services/juror/appreciation.htm> (last visited Jan. 20, 2013).

19. See *State v. Faucher*, 227 Wis. 2d 700, 705–06, 596 N.W.2d 770, 773 (1999); Raissi, *supra* note 3, at 539 (“The Wisconsin Supreme Court has struggled over the past decade to

Before discussing how the voir dire process can be improved, it is necessary to have a sense of the existing body of case law.

#### A. *State v. Faucher*

Before the Wisconsin Supreme Court decided *State v. Faucher* in 1999,<sup>20</sup> juror bias jurisprudence contained a myriad of confusing labels.<sup>21</sup> In light of this confusion, the *Faucher* court noted:

From these cases we have come to recognize that our past decisions in this area of the law have to a degree lacked the clarity necessary to properly guide the bench and bar in the appropriate examination of prospective jurors for evidence of bias. We believe that the resulting confusion stems from our inconsistent, and at times imprecise, use of the terms “implied,” “actual,” and “inferred” to describe a juror’s bias. Today, we no longer refer to juror bias in these terms; their usefulness has run full course.<sup>22</sup>

Thus, the court instituted new terminology to help relieve the confusion in applying the previous standards; under the new terminology, Wisconsin recognizes three types of juror bias: statutory, subjective, and objective.<sup>23</sup> Statutory bias is simply a conclusive presumption of bias for anyone “related by ‘blood or marriage to any party or to any attorney appearing in [the] case’ and those who [have] any financial interest in the case.”<sup>24</sup> The meanings of the remaining two concepts are less straightforward and intuitive.

Courts intended subject bias to mean the bias revealed by a prospective juror’s “state of mind” on voir dire.<sup>25</sup> However, as the court noted, this type of assessment is often incapable of being shown directly, and thus turns on the juror’s demeanor, answers during voir dire, truthfulness, credibility, and other pertinent factors.<sup>26</sup> The court in

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define bias and determine when to properly overturn circuit court decisions judging juror bias.”).

20. *Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770.

21. See Raissi, *supra* note 3, at 517–25 (providing an overview of juror bias case law prior to the *Faucher* decision).

22. *Faucher*, 227 Wis. 2d at 705–06, 596 N.W.2d at 773.

23. *Id.*

24. *Id.* at 717, 596 N.W.2d at 778.

25. *Id.*

26. *Id.* at 717–18, 596 N.W.2d at 778.

*Faucher* seemingly granted broad discretion to the trial court's assessment of subjective bias, stating that it "believe[s] that the circuit court sits in a superior position to assess the demeanor and disposition of prospective jurors."<sup>27</sup> In contrast to the *Faucher* decision, the court's decision in *Funk* over a decade later placed severe limitations upon the trial courts' ultimate authority to remove a juror it believes to be biased or to order a new trial when a juror is found to have concealed a bias during voir dire.<sup>28</sup>

In contrast to subjective bias, objective bias has a broader focus. While still considering the individual juror's responses, the objective bias inquiry must also consider the "facts and circumstances surrounding the *voir dire* and the facts involved in the case."<sup>29</sup> The focus of the inquiry is whether a reasonable juror, taking into account all of the surrounding circumstances, would be capable of being impartial.<sup>30</sup> Because the objective bias determination poses a mixed question of fact and law, appellate courts must give deference to the trial courts' findings "regarding the facts and circumstances surrounding *voir dire* and [these findings] will be upheld unless they are clearly erroneous."<sup>31</sup> However, whether those facts meet the necessary legal standard is a question of law open to *de novo* review by appellate courts and facts not necessarily apparent from the record, such as observations of a juror's demeanor, may be afforded due deference.<sup>32</sup> As this Comment will demonstrate, such a standard of review highlights a significant departure of the Wisconsin Supreme Court from its tradition of affording broad

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27. *Id.* at 718, 596 N.W.2d at 778.

28. *Compare id.* (illustrating that despite this particular court's error in failing to remove juror Kaiser, a trial court's determination will generally serve as adequate protection for a defendant's right to an impartial jury and thus will be granted deference so long as it is not clearly erroneous), with *State v. Funk*, 2011 WI 62, ¶ 48, 335 Wis. 2d 369, 799 N.W.2d 421 (demonstrating a seemingly higher burden on the court to earn deference as the trial court's assessment in finding bias was not fully articulated in the record).

In addition, in *Faucher*, the court overruled the trial court's finding of no objective bias, because the juror had expressly stated a bias towards a witness. *Faucher*, 227 Wis. 2d at 732, 596 N.W.2d at 784–85. In contrast, in *Funk*, the court overruled the trial court based on what was not present in the record, making the trial judge's assessment of greater importance. See *Funk*, 2011 WI 62, ¶ 48, 335 Wis. 2d 369, 799 N.W.2d 421.

29. *Faucher*, 227 Wis. 2d at 718, 596 N.W.2d at 779.

30. *Funk*, 2011 WI 62, ¶ 49, 335 Wis. 2d 369, 799 N.W.2d 421; *Faucher*, 227 Wis. 2d at 718–19, 596 N.W.2d at 779.

31. *Funk*, 2011 WI 62, ¶ 30, 335 Wis. 2d 369, 799 N.W.2d 421.

32. *Id.*



discretion to trial court judges on matters of juror bias.<sup>33</sup>

*B. A Brief Overview of the Case Law in the Faucher and Pre-Faucher Era*

Because discussion of the case law leading up to and culminating in the *Faucher* case already exists,<sup>34</sup> I will only briefly discuss these cases and highlight their contributions to the current juror candor jurisprudence. As illustrated in Sarvenaz Raissi's Comment, *Analyzing Juror Bias Exhibited During Voir Dire in Wisconsin: How to Lessen the Confusion*, Wisconsin juror bias jurisprudence prior to *Faucher* culminated in the cases of *State v. Louis*,<sup>35</sup> *State v. Gesch*,<sup>36</sup> *State v. Ramos*,<sup>37</sup> and *State v. Ferron*.<sup>38</sup> In addition, cases such as *State v. Wyss*<sup>39</sup> and *State v. Delgado*<sup>40</sup> are of particular importance in juror candor cases.

These cases place a great amount of discretion in the hands of trial court judges to make determinations of juror bias, particularly *Louis*, in which the court refused to adopt a per se rule against seating police officers of the jurisdiction where the crime occurred.<sup>41</sup> Instead, the court emphasized the trial court judge's role in assessing the juror's impartiality, which must be undertaken in all circumstances absent a specific statutory exclusion.<sup>42</sup> The *Gesch* decision stretched the boundaries of *Louis* by stating that certain close relationships between

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33. See, e.g., *State v. Ferron*, 219 Wis. 2d 481, 496–97, 579 N.W.2d 654, 660–61 (1998).

34. See Raissi, *supra* note 3.

35. *State v. Louis*, 156 Wis. 2d 470, 457 N.W.2d 484 (1990).

36. *State v. Gesch*, 167 Wis. 2d 660, 482 N.W.2d 99 (1992).

37. *State v. Ramos*, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), *overruled by State v. Lindell*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223.

38. *Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654.

39. *State v. Wyss*, 124 Wis. 2d 681, 370 N.W.2d 745 (1985).

40. *State v. Delgado*, 223 Wis. 2d 270, 588 N.W.2d 1 (1999).

41. *State v. Louis*, 156 Wis. 2d 470, 474, 457 N.W.2d 484, 486 (1990); see Raissi, *supra* note 3, at 519.

42. *Louis*, 156 Wis. 2d at 479–80, 457 N.W.2d at 488. The court in *Louis* further demonstrated that past decisions have allowed the trial courts discretion in refusing to strike jurors for cause so long as the trial courts engaged in inquiry into the juror's impartiality. *Id.* at 480–81, 457 N.W.2d at 489; see *Nyberg v. State*, 75 Wis. 2d 400, 404–05, 249 N.W.2d 524, 526 (1977), *overruled by Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654; *McGeever v. State*, 239 Wis. 87, 97, 300 N.W. 485, 489 (1941); see also *Ramos*, 211 Wis. 2d at 15, 564 N.W.2d at 330; *State v. Chosa*, 108 Wis. 2d 392, 395–96, 321 N.W.2d 280, 282 (1982) (explaining that the trial court judge may not exercise discretion as to a juror's bias based on some observable characteristic without first questioning the individual jurors about their inability to be impartial).

trial participants and prospective jurors result in an implied or “unconscious bias,” and thus, the trial court had erred by refusing to strike a juror who was related to a State witness despite finding the juror’s statements of impartiality credible.<sup>43</sup> *Ramos*, which has since been overruled, demonstrates the emphasis placed on achieving impartiality in voir dire in this era, because under the rule of that case, a trial court’s error in refusing to strike a juror for cause would be grounds for automatic reversal.<sup>44</sup>

In addition, *Ferron* emphasized, like much of Wisconsin’s juror bias jurisprudence, that when it comes to juror bias determinations, the trial court’s assessment is paramount.<sup>45</sup> *Ferron* instructed trial courts to strike prospective jurors these courts could “reasonably suspect”<sup>46</sup> to be biased; however, it overruled *Nyberg v. State*<sup>47</sup> by stating that appellate courts were not held to this same standard upon review.<sup>48</sup>

In *Ferron*, a juror was left on the jury after he expressed doubts about whether he could remain impartial knowing that the defendant, Ferron, would be exercising his Fifth Amendment right and not taking the witness stand.<sup>49</sup> The court did not accept Ferron’s arguments that the reasonable suspicion test should also apply at the appellate level,<sup>50</sup> instead stating that refusals to strike jurors for cause at the trial court

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43. *State v. Gesch*, 167 Wis. 2d 660, 666–67, 482 N.W.2d 99, 102 (1992); see Raissi, *supra* note 3, at 520 (providing a summary of the court’s decision).

44. *Ramos*, 211 Wis. 2d at 24–25, 564 N.W.2d at 334; see Raissi, *supra* note 3, at 521.

45. *Ferron*, 219 Wis. 2d at 496–97, 579 N.W.2d at 660 (“It is a well-settled principle of law in this state that a determination by a circuit court that a prospective juror can be impartial should be overturned only where the prospective juror’s bias is ‘manifest.’”).

46. *Id.* at 495–96, 579 N.W.2d at 660.

47. *Nyberg*, 75 Wis. 2d 400, 249 N.W.2d 524.

48. *Ferron*, 219 Wis. 2d at 496–97, 579 N.W.2d at 660 (explaining that appellate courts are not required to displace a trial court ruling on a prospective juror’s impartiality, whenever the appellate record supports a reasonable suspicion of juror bias). Thus, the *Ferron* decision is yet another example of the State’s previous policy of allowing great deference to the trial court’s discretion. See *id.*

49. *Id.* at 488, 579 N.W.2d at 657. Juror James Metzler stated, “Well, I would have a hard time believing that he was innocent if he didn’t take the stand and tell me he wasn’t [sic] innocent. That’s just my own belief.” *Id.* When asked if he would be able to consider only the evidence presented and set aside this opinion, Mr. Metzler gave responses of, “Well, I would certainly try to set it aside” and “Probably.” *Id.* at 489, 579 N.W.2d at 657. For a full transcript of the exchange between counsel and Juror Metzler, see Raissi, *supra* note 3, at 522–23.

50. *Ferron*, 219 Wis. 2d at 497, 579 N.W.2d at 661.

level is reversible error only when bias is manifest.<sup>51</sup> Bias is manifest when the record does not support a finding that the “juror is a reasonable person who is sincerely willing to put aside an opinion or prior knowledge; or . . . does not support a finding that a reasonable person in the juror’s position could set aside the opinion or prior knowledge.”<sup>52</sup> However, despite adopting a standard granting seemingly broad power of discretion to trial court judges, the end result of *Ferron* (finding error in refusing to excuse juror Metzler for cause) seemed to simultaneously withdraw some of the trial court’s discretion.<sup>53</sup> However, this apparent incongruence, as I will discuss later in the Part IV of this Comment, did not appear as drastic in the court of appeals decision in *State v. Oswald*.<sup>54</sup>

In addition to *Louis*, *Gesch*, *Ramos*, and *Ferron*, the decision of *State v. Delgado*<sup>55</sup> is of importance to the pre-*Faucher* era and is also important as a point for comparison to the decision in *Funk* because of its similar factual circumstances. In *Delgado*, the defendant was found guilty of committing six counts of first-degree sexual assault against two young girls.<sup>56</sup> During voir dire, Juror C failed to disclose that she had been a victim of sexual assault as a child, despite questions being posed to the jury as a whole, as well as to Juror C individually.<sup>57</sup> For example, each juror was asked whether he or she had been either a victim or a witness to a crime.<sup>58</sup> Later Juror C revealed in an emotional outburst during jury deliberations that she was a past victim of sexual assault.<sup>59</sup> In addition, in a post-trial hearing on the defendant’s motion for a new

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51. *Id.* at 496–97, 579 N.W.2d at 660.

52. *Id.* at 498, 579 N.W.2d at 661.

53. *Id.* at 510–11, 579 N.W.2d at 666 (Bradley, J., dissenting) (explaining how the majority has seemingly “violate[d] its own test” by overruling the trial judge’s assessment of the juror based on the statement of the juror being too unequivocal in the record).

54. *State v. Oswald*, 2000 WI App 3, 232 Wis. 2d 103, 606 N.W.2d 238.

55. *State v. Delgado*, 223 Wis. 2d 270, 588 N.W.2d 1 (1999). Like in *Funk*, in *Delgado* the court had to face the question of how to deal with a juror in a sexual assault case who did not disclose having been a victim to a sexual assault herself. *Id.* at 272–73, 588 N.W.2d at 2.

56. *Id.* at 272, 588 N.W.2d at 2.

57. *Id.* at 273–74, 588 N.W.2d at 3. When asked whether she had ever been a victim or witness of a crime, Juror C stated that she had not. *Id.* at 274, 588 N.W.2d at 3. Further, the jury as a whole was asked, “Are there any members of the jury panel who either have a close friend or close relative or you yourself who have been the victim of a sexual assault, either as a child or as an adult?” *Id.* at 274–75, 588 N.W.2d at 3 (internal quotes omitted).

58. *Id.* at 273–74, 588 N.W.2d at 3.

59. *Id.* at 273–75, 285, 588 N.W.2d at 3–4, 8.

trial, Juror C stated that she had answered the questions honestly as she believed they should be answered and was not biased against the defendant.<sup>60</sup> Surprisingly, the trial court judge found Juror C's testimony credible and upheld the conviction because she had not incorrectly responded to a material question.<sup>61</sup>

*Delgado* made two important contributions to juror bias case law. First, although the decision relied on pre-*Faucher* terminology, it stressed that just because there is no actual bias and a juror asserts his or her impartiality, the court must nonetheless consider all the circumstances of voir dire, including the fact of non-disclosure itself, to determine whether the juror is biased.<sup>62</sup> Second, the *Delgado* case stressed the importance of examining the similarity of the juror's experience to that of the victim, as well as observing jurors' behaviors during voir dire and deliberations.<sup>63</sup> These contributions position the court to protect its integrity and the right of litigants to an impartial trial by demonstrating a respect for the complex nature of bias and how it operates at both subconscious and conscious levels.<sup>64</sup>

Finally, some discussion of the decision of *State v. Wyss*<sup>65</sup> is required to understand how grounds for a new trial are determined in Wisconsin when a juror fails to accurately disclose information during voir dire.<sup>66</sup> As this Comment will later discuss, the case established the two-step analysis used to determine whether a new trial is warranted based on a juror's concealment or lack of candor.<sup>67</sup> However, what is more important for the purposes of this Comment is the reasoning advanced by the court. First, the court acknowledged the justifications behind the United States Supreme Court's holding in *McDonough Power Equipment, Inc. v. Greenwood*<sup>68</sup> that a per se rule of granting new trials

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60. *Id.* at 276, 588 N.W.2d at 4.

61. *Id.* at 277, 588 N.W.2d at 4; *see also* *State v. Wyss*, 124 Wis. 2d 681, 370 N.W.2d 745 (1985); *infra* text accompanying notes 94–95.

62. *Delgado*, 223 Wis. 2d at 285, 588 N.W.2d at 7 (explaining that despite a belief of impartiality, “the juror’s conduct might have revealed such a close connection between the juror and the case that bias may be inferred”).

63. *Id.* at 285–86, 588 N.W.2d at 7–8.

64. *See id.*; *infra* notes 175–80 and accompanying text (explaining the complex nature of juror bias and the cautious approach courts should take towards juror bias).

65. *Wyss*, 124 Wis. 2d 681, 370 N.W.2d 745.

66. *Id.* at 726, 370 N.W.2d at 766.

67. *Id.*; *see also infra* text accompanying notes 92–93.

68. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984).

in all of these situations would be too costly.<sup>69</sup> Second, the court modified the two-step analysis of *McDonough* because the test failed to consider the possibility that a juror may answer honestly, yet still provide an incorrect response.<sup>70</sup> However, only later cases, such as *Ferron* and *Funk*, demonstrate how to deal with situations where a juror incorrectly answers a question during voir dire and what types of “exceptional circumstances” may allow bias to be inferred.<sup>71</sup>

### III. *STATE V. FUNK*

In *Funk*, the defendant was accused of having committed multiple sexual assaults against a minor who was ten years old at the time of the alleged acts.<sup>72</sup> Around the time voir dire began, the court stressed the inflammatory nature of the case to the jury, as well as informed them that they would be asked questions regarding whether they had been victims of a sexual assault themselves or if they knew anyone who had been a victim.<sup>73</sup> Further, the judge gave special instructions regarding these questions, stating:

With respect to [these] question[s], to be quite frank with you, if somebody asked me . . . I wouldn't answer [them], but you are under oath; maybe it's a brother or a sister, maybe it's a neighbor, or maybe it's yourself.

We could go into chambers, if you wish to; we certainly don't have to. You need to be honest. You need to answer the question, and what we will do is to avoid any embarrassment, we can go into chambers.<sup>74</sup>

Despite this warning, neither the attorneys nor the judge asked these questions of the jury directly.<sup>75</sup> However, some jurors disclosed information about personally being a victim of a sexual assault or knowing someone who was in response to other questions, and the prosecution did state, “Now, this case, as Judge Roemer noted, involves allegations of sexual assault of a child. Based upon those allegations,

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69. Wyss, 124 Wis. 2d at 724–25, 370 N.W.2d at 765–66.

70. *Id.* at 726–27, 370 N.W.2d at 766–67.

71. *Id.* at 729, 370 N.W.2d at 768 (quoting *McDonough Power Equip., Inc.*, 464 U.S. at 556–57 (Blackmun, J., concurring)).

72. *State v. Funk*, 2011 WI 62, ¶ 3, 335 Wis. 2d 369, 799 N.W.2d 421.

73. *Id.* ¶ 4.

74. *Id.*

75. *Id.*

those charges, does anyone here believe they would have a difficult time being fair and impartial both to the State and to the Defendant?”<sup>76</sup> This question led to further admissions by jurors as to sexual assaults committed against them or people they knew, which resulted in two further exclusions from the jury.<sup>77</sup> Of the two replacement jurors, one admitted to knowing someone sexually assaulted, was replaced, and then his replacement was also replaced having known a relative incarcerated for sexual assault and admitting that he would not be able to be impartial.<sup>78</sup>

Despite all of this activity during voir dire, one particular juror, “Tanya G.,” remained silent as to having been a victim of sexual assault in 1998,<sup>79</sup> while roughly the same age as the victim, having known of her two younger sisters being so abused,<sup>80</sup> and having been a victim to another sexual assault in 2005.<sup>81</sup> Furthermore, Tanya G. remained silent when questions were asked by Funk’s attorney as to whether any jurors had previously testified in a criminal or civil case,<sup>82</sup> despite having testified against the perpetrator of the 2005 assault.<sup>83</sup> After the trial, when Funk’s attorney learned that Tanya G. was a victim of sexual assault, he moved to vacate the judgment,<sup>84</sup> and a post-conviction evidentiary hearing was held.<sup>85</sup> At the hearing, Tanya G. was asked various questions regarding whether she was made uncomfortable during trial or thought about her past incidents during the course of the trial, to which she replied with a simple “No” to each question.<sup>86</sup>

However, when asked about why she failed to disclose the incidents, Tanya G. responded that a settlement agreement, subject to a penalty, prevented her from disclosing any information regarding her 1998 sexual assault.<sup>87</sup> However, she admitted that she probably should have discussed her sisters’ assaults, but withheld because they had “nothing

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76. *Id.* ¶¶ 5–6.

77. *Id.* ¶ 6.

78. *Id.* ¶¶ 7–8.

79. *Id.* ¶ 12.

80. *Id.* ¶ 13.

81. *Id.* ¶ 14.

82. *Id.* ¶ 10.

83. *Id.* ¶ 14.

84. *Id.* ¶ 12.

85. *Id.* ¶ 15.

86. *Id.* ¶ 18 n.11.

87. *Id.* ¶ 16.

else on their records indicating sexual assault, [so she] wasn't allowed to put them in jeopardy."<sup>88</sup> In regards to the 2005 sexual assault, Tanya G. indicated that she did not disclose the information because it was information that she strived to suppress, and that to recount the memory was "not the way [she] live[d] [her] life."<sup>89</sup> In light of Tanya G.'s failure to respond to voir dire questions, the trial court found her to be both subjectively and objectively biased, vacated the judgment of conviction against Funk, and ordered a new trial.<sup>90</sup>

After the order was affirmed by the court of appeals, the Wisconsin Supreme Court granted review to determine whether the trial court properly applied both the objective and subjective bias standards.<sup>91</sup> The court applied the two-step test, announced in *State v. Wyss*,<sup>92</sup> to determine whether a new trial is warranted. The *Wyss* test requires "(1) that the juror incorrectly or incompletely responded to a material question on *voir dire*; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party."<sup>93</sup> The court found that the first element was satisfied, but reinstated the verdict of conviction, because the latter element was not.<sup>94</sup> To support this conclusion, the court demonstrated how the trial court had inappropriately reached conclusions as to both objective and subjective bias.<sup>95</sup>

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88. *Id.*

89. *Id.* ¶ 17. Although doing one's best to forget a tragic occurrence is an admirable goal, it should not take precedent over litigant's rights to an impartial trial, especially where, as here, the judge took extra precaution to protect prospective juror's privacy. See U.S. CONST. amend. VI (guaranteeing the right to an impartial trial); WIS. CONST. art. I, §§ 5, 7(same); see also NANCY GERTNER & JUDITH H. MIZNER, *THE LAW OF JURIES* 110 (5th ed. 2011) (providing that if juror privacy were endangered by constitutional voir dire requirements, the constitutional right to an impartial jury would have to supersede jury privacy concerns). Furthermore, even suppressed memories have the potential to subconsciously influence a person and may surface into an active memory at any point in time. See generally Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOLOGIST 518, 518 (1993) (discussing various instances and studies of repressed memory cases in the legal system).

90. *Funk*, 2011 WI 62, ¶ 23, 335 Wis. 2d 369, 799 N.W.2d 421.

91. *Id.* ¶¶ 24, 28–29.

92. *State v. Wyss*, 124 Wis. 2d 681, 726, 370 N.W.2d 745, 766 (1985).

93. *Funk*, 2011 WI 62, ¶ 32, 335 Wis. 2d 369, 799 N.W.2d 421 (quoting *Wyss*, 124 Wis. 2d at 726, 370 N.W.2d at 766).

94. *Id.* ¶ 64.

95. *Id.* ¶¶ 44–62 (explaining why a finding of bias was inappropriate under each standard).

Regarding subjective bias, the court stressed the failure of both the trial court and the attorneys to ask Tanya G. directly about the sexual assaults during voir dire and the fact that none of Tanya G.'s assertions were explicit assertions of bias.<sup>96</sup> The court's analysis for objective bias was similar.<sup>97</sup> The court essentially concluded that Tanya G.'s past experiences and silences were not enough, in light of her statements of impartiality, to render her incapable of being impartial.<sup>98</sup> The court's emphasis on the failure of the trial court and attorneys to probe more deeply into Tanya G.'s potential bias before finding her incapable of being impartial illustrates that our current case law may possess a high tolerance for juror bias.<sup>99</sup> How this heightened tolerance is created and the threat it poses will be further explored after first reviewing the case law preceding and subsequent to the *Faucher* decision to understand the development of Wisconsin's juror bias jurisprudence.

While the goal of creating the new terminology was to set standards that reflect the reason for juror removal, as well as to describe the analysis of the judge,<sup>100</sup> the new standards nonetheless caused much disagreement amongst the Wisconsin Supreme Court. In *Funk*,<sup>101</sup> Justice Abrahamson, in her dissent, went so far as to say that the objective and subjective categories were destined to be combined.<sup>102</sup> While some discussion regarding the confusion of this new standard was already launched in 2000,<sup>103</sup> there has been little to no commentary on voir dire in Wisconsin since. A more thorough examination of the topic is necessitated by the Wisconsin Supreme Court's decision in *Funk*, along with an overall lack of guidance in juror candor cases<sup>104</sup> as to the extent of the trial judge's discretion during voir dire or the amount of responsibility placed on attorneys to draw out juror bias.<sup>105</sup>

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96. *Id.* ¶¶ 44–45.

97. *See id.* ¶ 49.

98. *See id.* ¶¶ 49–63.

99. *See id.* ¶ 63.

100. *State v. Faucher*, 227 Wis. 2d 700, 706, 596 N.W.2d 770, 773 (1999).

101. *Funk*, 2011 WI 62, 335 Wis. 2d 369, 799 N.W.2d 421.

102. *Id.* ¶¶ 70–73 (Abrahamson, J., dissenting); *see also* Raissi, *supra* note 3, at 538.

103. *See generally* Raissi, *supra* note 3, at 521 (providing discussion of the confusion caused by juror bias case law).

104. *See, e.g.*, *State v. Wyss*, 124 Wis. 2d 681, 742, 370 N.W.2d 745, 774 (1985).

105. *See* Raissi, *supra* note 3, at 529–30. Raissi illustrates an example of a discussion of juror candor, *id.*, which I argue should be revisited in light of the *Funk* decision.



IV. CASE LAW POST-*FAUCHER* AND APPELLATE APPLICATIONS OF  
THE *FAUCHER* RULE

Just as the interpretation used by the Wisconsin Supreme Court in *Funk* raises doubts about which policies are embodied by Wisconsin juror bias jurisprudence and precedent set by the *Faucher* era decisions, subsequent applications further call into question the court's decision to overturn the trial court's use of discretion in ordering a new trial.<sup>106</sup>

An interesting fact situation presented an opportunity for the court to affirm the principle that under circumstances that are "so fraught with the possibility of bias . . . [the court] must find objective bias regardless of the particular juror's assurances of impartiality."<sup>107</sup> In *State v. Tody*, Judge Eaton found himself in an awkward position: forced to consider his mother's ability to be an impartial juror in a trial over which he was presiding.<sup>108</sup> Furthermore, after neither party exercised a peremptory challenge to remove Ms. Eaton, the judge found himself in an even more difficult situation based on his belief that he did not "have any legal basis for excusing her," and he reluctantly denied a motion to strike her from the jury.<sup>109</sup> The Wisconsin Supreme Court indicated that Judge Eaton's belief was misplaced, and in overturning both the trial court and court of appeals decision, announced that:

The correct principle of law that should have guided the circuit court judge is that a circuit court judge should err on the side of dismissing a challenged juror when the challenged juror's presence may create bias or an appearance of bias. The reason for this principle of law is that a circuit court's striking a prospective juror who raises issues of bias saves judicial time and resources in the long run.<sup>110</sup>

The court justified its conclusion on the fact that previous case law has demonstrated the pervasive effects of juror bias on the overall trial process, and that such a "defect affecting the framework within which the trial proceeds," should be dealt with at the trial court level because

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106. The *Faucher*-era decisions seem to place a great amount of authority into the hands of the trial court, as well as weigh heavily the idea that the court should err on the side of caution and maintaining an appearance of impartiality. See *supra* Part II.

107. *State v. Tody*, 2009 WI 31, ¶ 5, 316 Wis. 2d 689, 764 N.W.2d 737.

108. *Id.* ¶¶ 10, 16.

109. *Id.* ¶ 17; see also *id.* ¶ 16 (demonstrating Judge Eaton's reservations about allowing his mother to serve as a juror).

110. *Id.* ¶ 32.

of the grave effects of bias on the “fairness, integrity, or public reputation of judicial proceedings.”<sup>111</sup>

The implications of this decision are twofold. First, the decision demonstrates an important policy consideration that it is better for the judge, for the sake of judicial economy and integrity, to err on the side of caution in striking jurors in situations where a juror may be biased or may create “an appearance of bias.”<sup>112</sup> Second, the case shows the strong respect for trial court discretion that was also crucial in decisions such as *State v. Louis*<sup>113</sup> and *State v. Gesch*.<sup>114</sup> The idea that trial courts should err on the side of caution and their judgments should be given special deference in these situations seemed to be a powerful theme in prior Wisconsin case law and is also embodied in case law at the federal level.<sup>115</sup>

A case more recent than *Funk*, *State v. Sellhausen*,<sup>116</sup> potentially

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111. *Id.* ¶ 44.

112. *Id.* ¶ 32; *see, e.g.*, *State v. Ferron*, 219 Wis. 2d 481, 495–496, 579 N.W.2d 654, 660 (1998) (discussing that past case law has traditionally promoted trial courts to act in this cautious fashion).

113. *State v. Louis*, 156 Wis. 2d 470, 479, 457 N.W.2d 484, 488 (1990).

114. *State v. Gesch*, 167 Wis. 2d 660, 666, 482 N.W.2d 99, 102 (1992); *see also Tody*, 2009 WI 31, ¶ 29, 316 Wis. 2d 689, 764 N.W.2d 737.

115. *See, e.g., Ferron*, 219 Wis. 2d at 495–96, 579 N.W.2d at 660; *infra* text accompanying note 124. Granting deference to the credibility determinations of the trial judge is a policy that is seen in varying contexts in federal courts. *See, e.g., United States v. Curb*, 626 F.3d 921, 925 (7th Cir. 2010) (explaining that in the context of sentencing hearings the appellate court “do[es] not second guess the judge’s credibility determinations because he or she has had the best opportunity to observe the subject’s facial expressions, attitudes, tone of voice, eye contact, posture and body movements” (quoting *United States v. Mancillas*, 183 F.3d 682, 701 n.22 (7th Cir. 1999))); *Kadia v. Gonzalez*, 501 F.3d 817, 819 (7th Cir. 2007) (explaining the federal policy of deference to the trial judge’s determination of credibility in the context of asylum cases). The court in *Kadia*, aptly explained the difficulty of credibility assessments by stating:

Credibility assessments can embody a struggle between norms of subjective and objective decision-making. Subjective assessments are highly personal to the decision-maker, dependent on personal judgment, perceptions, and disposition, and often lacking in articulated logic. They are very difficult to review and are likely to be inconsistent from one decision-maker to another.

*Id.* (quoting Michael Kagan, *Is Truth in the Eye of the Beholder: Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J., 367, 374 (2003)).

116. *State v. Sellhausen*, 2012 WI 5, 338 Wis. 2d 286, 809 N.W.2d 14. Although implicating a per se objective bias standard for judge’s immediate family members by emphasizing the best practice is to avoid the appearance of bias, the court did not make a per se standard explicit in *Tody*, but rather held that a judge’s mother would be objectively biased. *Tody*, 2009 WI 31, ¶¶ 37–39, 316 Wis. 2d 689, 764 N.W.2d 737.

retreated from the standard set forth in *Tody*—there, Justice Ziegler’s concurrence indicated that a judge’s immediate family member is not per se objectively biased.<sup>117</sup> However, the court did not stray from the consistent theme of juror bias case law—that determinations of juror bias should be left to the broad discretion of the trial judge—and noted that it was still within the inherent authority of the judge to strike such a juror for cause if the judge believed he or she could not be impartial.<sup>118</sup> Further, the case considered a familial relationship less close (the judge’s daughter-in-law) than the one at issue in *Tody* (the judge’s mother).<sup>119</sup> While some may interpret this decision as a death knell to the notion that courts should avoid the appearance of bias, as this is the argument that the defendant in *Sellhausen* relied upon,<sup>120</sup> this argument is misplaced. A judge is supposed to be a neutral party, and thus a family member of a judge should not demonstrate any partiality to either party in the absence of other facts drawn out during voir dire. Further, the Wisconsin Supreme Court made specific note of the precautions taken by the trial court judge to avoid the appearance of impropriety and that this practice was sufficient to avoid following the typical recommended course of action and removing the family member *sua sponte*.<sup>121</sup>

Similar to *Tody*, the court in *State v. Lindell*<sup>122</sup> alluded to the principle raised in *State v. Ferron*,<sup>123</sup> instructing trial court judges to err on the side of caution and strike jurors whenever they “reasonably suspect” that juror bias exists.<sup>124</sup> In *Lindell*, the defendant was convicted of intentional homicide, arson, and burglary; he appealed his conviction on the grounds that he was required to use a peremptory challenge on a juror who should have been removed for cause.<sup>125</sup> Because of the

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117. See *Sellhausen*, 2012 WI 5, ¶ 73, 338 Wis. 2d 286, 809 N.W.2d 14 (Ziegler, J., concurring). The *Sellhausen* majority did not go so far as to hold that a family member was per se objectively biased. See *id.* ¶¶ 29–30 (majority opinion).

118. *Id.* ¶¶ 73, 75.

119. *Id.*

120. See *id.* ¶ 29.

121. *Id.*

122. *State v. Lindell*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223.

123. *State v. Ferron*, 219 Wis. 2d 481, 495–96, 579 N.W.2d 654, 660 (1998).

124. *Id.*; see also *State v. Tody*, 2009 WI 31, ¶ 46, 316 Wis. 2d 689, 764 N.W.2d 737 (explaining that the appearance of bias should be avoided); *Lindell*, 2001 WI 108, ¶ 49, 245 Wis. 2d 689, 629 N.W.2d 223 (instructing courts to err on the side of caution in striking jurors that appear biased).

125. *Lindell*, 2001 WI 108, ¶¶ 5–8, 245 Wis. 2d 689, 629 N.W.2d 223.

intensity of media coverage of the event, there was a great deal of concern by the court and the parties as to whether an impartial jury could be impaneled.<sup>126</sup> During the course of voir dire, the defense counsel asked to remove a juror who had done business with the deceased victim and had been close friends with the victim's wife for over twenty years.<sup>127</sup> The court denied the request indicating that the juror's assurances of impartiality precluded it from doing so.<sup>128</sup>

On review, the Wisconsin Supreme Court indicated that the trial judge's conclusion that he was incapable of removing the juror was incorrect; not only could he have removed the juror, but also he erred in failing to do so.<sup>129</sup> The court concluded that juror D.F. was objectively biased based on the totality of the circumstances, as a reasonable person in her position could not have remained impartial and thus should have been struck for cause.<sup>130</sup> However, the court overruled *Ramos* by upholding the conviction.<sup>131</sup> Under *Ramos*, an automatic reversal was required whenever a court failed to appropriately strike a juror for cause and consequently deprived a defendant of a peremptory strike.<sup>132</sup> The court found that the *Ramos* rule would grant too much protection to defendants and require trials even where no harm was likely caused by the defendant's use of a peremptory challenge.<sup>133</sup> Although measures promoting the efficiency of jury selection should be approached cautiously, as they sometimes come at the cost of impartiality,<sup>134</sup> the effect of the ruling in *Lindell* appears to appropriately balance the

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126. *Id.* ¶¶ 16–20. In fact, the defendant made numerous attempts to alleviate this problem by asking for individual voir dire of prospective jurors, attempting to switch venue, and sending out extensive jury questionnaires. *Id.* ¶¶ 18–19.

127. *Id.* ¶¶ 23–25.

128. *Id.* ¶ 25.

129. *Id.* ¶ 41.

130. *Id.*

131. *Id.* ¶ 131.

132. *State v. Ramos*, 211 Wis. 2d 12, 24–25, 564 N.W.2d 328, 334 (1997), *overruled by Lindell*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223; *see State v. Ferron*, 219 Wis. 2d 481, 514, 579 N.W.2d 654, 667 (1998) (applying the *Ramos* rule).

133. *See Lindell*, 2001 WI 108, ¶¶ 104, 107, 115, 245 Wis. 2d 689, 629 N.W.2d 223.

134. *See State v. Delgado*, 223 Wis. 2d 270, 280, 588 N.W.2d 1, 5 (1999) (stating that “the value of finality and the sanctity of a jury verdict must yield when juror bias undermines confidence in the fairness and impartiality of the trial”); 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, 1186–90 (1993) (demonstrating the undesirable consequences of limited voir dire proceedings in failing to discover juror biases).

ultimate goal of impartiality against practical considerations of judicial efficiency.<sup>135</sup>

Prior to both *Lindell* and *Tody*, the Wisconsin Court of Appeals provided an overview of juror bias case law shortly after the *Faucher* decision in *State v. Oswald*,<sup>136</sup> a case cited in Justice Bradley's dissent in *Funk*.<sup>137</sup> Similar to *Louis*, *Gesch*, *Faucher*, and the majority of juror bias jurisprudence at this point in time, the case showed a strong emphasis on the breadth of a trial court's discretion on the issue.<sup>138</sup> Also, the *Oswald* case illustrated three situations which warrant the finding of objective bias: (1) when a juror has a direct connection to crucial evidence to be presented at trial,<sup>139</sup> (2) when the juror "has a direct connection to a dispositive issue in the case,"<sup>140</sup> or (3) when a juror has an inflexible negative attitude towards the criminal justice system in general.<sup>141</sup> The court further elucidated that a juror's marriage to a law enforcement officer was not a significant connection and that the trial judge could have properly concluded that the juror could be impartial.<sup>142</sup>

Aside from affirming the importance of granting deference to the

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135. See *Lindell*, 2001 WI 108, ¶ 118, 245 Wis. 2d 689, 629 N.W.2d 223; see also *Ferron*, 219 Wis. 2d at 514–15, 579 N.W.2d at 667–68 (Bradley, J., dissenting) (foreshadowing the eventual overruling of the *Ramos* rule and recognizing that the right of the defendant is to an impartial jury and not to be able to "shuffle a jury pool in their favor").

136. *State v. Oswald*, 2000 WI App 3, ¶ 5, 232 Wis. 2d 103, 606 N.W.2d 238 (explaining that the trial court's assessments of subjective bias will only be overturned if clearly erroneous, while objective bias determinations will be upheld so long as a reasonable judge could have made the same conclusion). The court makes special note that the previous case law has firmly entrenched the trial court with ultimate authority to decide issues of bias, stating "*Faucher*, *Kiernan*, *Mendoza* and *Erickson* nail down the proposition that 'questions as to a prospective juror's sincere willingness to set aside bias should be largely left to the circuit court's discretion.'" *Id.* ¶ 6 (quoting *Ferron*, 219 Wis. 2d at 501, 579 N.W.2d at 662). For a summary of the case's contribution to juror bias case law, see Raissi, *supra* note 3, at 533–36.

137. *State v. Funk* 2011 WI 62, ¶ 93, 335 Wis. 2d 369, 799 N.W.2d 421.

138. See *supra* text accompanying note 136.

139. *Oswald*, 2000 WI App 3, ¶ 9, 232 Wis. 2d 103, 606 N.W.2d 238; see also *State v. Faucher*, 227 Wis. 2d 700, 707–09, 596 N.W.2d 770, 774 (1999) (demonstrating that where a juror has preconceived notions of a key witness based on a relationship between the two, the juror is objectively biased); Raissi, *supra* note 3, at 534.

140. *Oswald*, 2000 WI App 3, ¶ 11, 232 Wis. 2d 103, 606 N.W.2d 238; see Raissi, *supra* note 3, at 534.

141. *Oswald*, 2000 WI App 3, ¶ 12, 232 Wis. 2d 103, 606 N.W.2d 238; see Raissi, *supra* note 3, at 534.

142. *Oswald*, 2000 WI App 3, ¶ 21, 232 Wis. 2d 103, 606 N.W.2d 238; see Raissi, *supra* note 3, at 535–36.

trial court, the *Oswald* decision clarified that the seemingly elevated demand placed on jurors' statements of impartiality in *Ferron* was not a standard applicable to other cases, but rather that the *Ferron* holding was limited to the facts of that particular case.<sup>143</sup> In addition, the *Oswald* decision set forth an important framework for analyzing whether a particular relationship or experience disqualifies a juror.<sup>144</sup> By stressing the important distinctions between the juror in *State v. Erickson*, who had also been a victim of sexual abuse as a child,<sup>145</sup> and the juror in *Faucher*, who had expressed a direct relationship to a witness (and was thus excluded),<sup>146</sup> the court once again made clear that trial court judges must determine whether a past experience has rendered a juror biased.<sup>147</sup> This assessment is to be based not only on the juror's statements, demeanor, and tone, but also on the proximity of the events in time and their factual similarity.<sup>148</sup> *Oswald* and *Erickson* shed light on how to deal with situations in which jurors' past experiences create a suspicion of bias, a situation which the court faced in *Funk*, and also demonstrated that this analysis is best suited for the trial court.<sup>149</sup>

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143. *Oswald*, 2000 WI App 3, ¶ 7, 232 Wis. 2d 103, 606 N.W.2d 238 (explaining that an unequivocal assertion of impartiality is not required of jurors on voir dire, and the *Ferron* case was limited to its unique factual circumstance—a juror who demonstrated bias against the defendant based on his exercise of his Fifth Amendment right to not testify).

144. *Id.* ¶ 10 (explaining the decisions of *Erickson* and *Faucher* and the important distinction between the two in terms of the closeness of the relationship or the proximity of the experience that has potential for bias).

145. *State v. Erickson*, 227 Wis. 2d 758, 763, 596 N.W.2d 749, 753 (1999).

146. *State v. Faucher*, 227 Wis. 2d 700, 732, 596 N.W.2d 770, 785 (1999).

147. *Oswald*, 2000 WI App 3, ¶ 10, 232 Wis. 2d 103, 606 N.W.2d 238.

148. *Id.* (stating that the remoteness in time between the *Erickson* juror's sexual assault experience and the current case "lessen[ed] the chance it would taint her judgment"); see also *State v. Delgado*, 223 Wis. 2d 270, 286, 588 N.W.2d 1, 8 (1999) (explaining that Juror C's "emotional involvement" with the case is partially a product of "the close similarity of her experience with the crimes charged").

149. See *Erickson*, 227 Wis. 2d at 763, 596 N.W.2d at 753 (depicting the trial court's assessment of Juror L. in *State v. Erickson*, which demonstrated an appropriate evaluation by the trial court judge of the particular juror's bias in light of her demeanor, responses, etc.). The court's analysis read as follows:

Well, [Juror L] is well into her 60's. The event took place when she was about 12 years of age. She talked about it without showing any emotion. She was open and seemed to be free of stress in discussing it. Her explanation that she didn't report it because she was ashamed is I think a very natural reaction. There [have] been considerable writings in the press that the average person is likely to read which report similar reactions from victims. Her contact was sudden and forced upon her and of a sexual contact nature, a brief encounter, wholly different from what would

However, as previously discussed, the majority in *Funk* chose not to honor the trial court's decision that Tanya G. was biased.<sup>150</sup> Instead the court overturned the trial court based upon a review of the record of Tanya's responses to questions regarding her impartiality during voir dire and at a post-conviction hearing.<sup>151</sup> The court's decision to ignore the guidance of the trial court is troubling for two reasons. First, the decision put too much faith in the juror's recorded statements of impartiality without the ability to consider the surrounding circumstances and demeanor of the juror.<sup>152</sup> Second, the court did not appropriately weigh the likelihood of unconscious biases, based on the similarity between Tanya's past experiences and those of the victim.<sup>153</sup>

#### V. JUROR REHABILITATION MUST BE APPROACHED WITH CAUTION TO EFFECTIVELY PROTECT THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY

Theoretically, the ultimate purpose of voir dire is to attempt to eliminate biased jurors in order to secure a fair and impartial jury.<sup>154</sup> As

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be presented here. I'm satisfied that she can act fairly and impartially.

*Id.* at 763–64 n.5, 596 N.W.2d at 753 n.5; *see also* State v. Funk, 2011 WI 62, ¶¶ 1–2, 335 Wis. 2d 369, 799 N.W.2d 421; *Delgado*, 223 Wis. 2d at 285–86, 588 N.W.2d at 8; *Oswald*, 2000 WI App 3, ¶ 10, 232 Wis. 2d 103, 606 N.W.2d 238.

150. *Funk*, 2011 WI 62, ¶ 64, 335 Wis. 2d 369, 799 N.W.2d 421; *see supra* text accompanying notes 91–95.

151. *Funk*, 2011 WI 62, ¶¶ 1–2, 335 Wis. 2d 369, 799 N.W.2d 421.

152. *See id.* ¶¶ 2, 18 n.11; *infra* notes 167, 174, 176 and accompanying text (explaining that there are numerous biases both conscious and unconscious and thus statements of impartiality should be approached with caution and considered in light of the surrounding circumstances).

153. *Funk*, 2011 WI 62, ¶¶ 2, 18 n.11, 335 Wis. 2d 369, 799 N.W.2d 421; *see infra* notes 167, 174 and accompanying text (explaining that there are numerous biases both conscious and unconscious and thus statements of impartiality should be approached with caution and considered in light of the surrounding circumstances).

154. JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* 324 (2d ed. 1990) (“The theoretical purpose of voir dire is to determine the state of the jurors’ minds so that a fair and impartial jury can be chosen”); *see* U.S. CONST. amend. VI (providing the right to impartial jury); WIS. CONST. art. I, §§ 5, 7 (same); *see State ex rel. La Crosse Tribune v. Circuit Court for La Crosse Cnty.*, 115 Wis. 2d 220, 239, 340 N.W.2d 460, 469 (1983) (stating that the purpose of voir dire is “to select jurors who will make an impartial decision upon the basis of the evidence presented to them”); *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973) (“The primary purpose of the voir dire of jurors is to make possible the impaneling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel.”); Jennifer H. Case, *Satisfying the Appearance of Justice When Juror’s Intentional Nondisclosure of Material Information Comes*

one commentator notes, “[t]he attainment of this goal is placed in the hands of the adversary process. The parties attempt to prevent from sitting on the jury potential jurors who they suspect may harbor some bias or prejudice against their respective clients.”<sup>155</sup> In addition to acting as a “filtering process” for prospective jurors, voir dire serves other important functions, such as being an information-gathering tool for a party to determine how to effectively use its peremptory challenges, as well as an opportunity to build rapport with jury members.<sup>156</sup> In regards to the filtering role of voir dire, when a particular juror’s response or demeanor raises a suspicion of bias, he or she will not necessarily be immediately disqualified from jury service.<sup>157</sup> Instead, for the sake of judicial economy, jurors are often subjected to a process called juror rehabilitation.<sup>158</sup>

It is true that obtaining qualified jurors can pose a substantial obstacle to courts—as oftentimes jurors will fail to respond to requests for service or will be disqualified by some personal factor or a recent term of service.<sup>159</sup> Yet when a conflict arises between costs and maintaining the impartiality and integrity of courts, the latter concern should prevail.

Trial judges typically conduct juror rehabilitation during voir dire

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*to Light*, 35 U. MEM. L. REV. 315, 316 (2005) (“*Voir dire* examination . . . serves to protect a litigant’s right to an impartial trier of fact”).

155. JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION* 2 (3d ed. 2011).

156. *See id.* at 2–4. Another possible function of voir dire is to educate jurors on legal principles and prepare them for the judge’s instructions. *See id.* at 3–4. However, this is not always agreed upon as a wise strategy. TED M. WARSHAFSKY & FRANK T. CRIVELLO II, *WISCONSIN PRACTICE SERIES: TRIAL HANDBOOK FOR WISCONSIN LAWYERS* § 6:09 (3d ed. 2005) (explaining that many lawyers are tempted to use voir dire to educate jurors based on the belief that jurors make up their minds early on in trial, but that this belief is misguided, as jurors tend to see through these efforts, which may negatively affect rapport with the jury).

157. *See infra* notes 160–62 and accompanying text (explaining the concept of juror rehabilitation).

158. WARSHAFSKY & CRIVELLO, *supra* note 156, § 6:15 (providing an overview of the development of juror rehabilitation as the result of bleak economic realities and how this development threatens the impartiality of the jury). For an overview of how juror rehabilitation is becoming a greater issue in Wisconsin in light of recent social phenomena, including social campaigns to instill jurors with biases towards certain types of lawsuits as well as towards lawyers in general, *see id.* at 177.

159. *See, e.g.*, THIRTEENTH JUDICIAL CIRCUIT COURT MARSHAL’S OFFICE, *ANNUAL REPORT* 9–11 (2011).



and after a juror presents facts indicative of bias.<sup>160</sup> The process involves a careful evaluation of the juror's statements, demeanor, and tone in response to being asked about whether they can set aside the potential bias.<sup>161</sup> A credible communication of impartiality is typically sufficient to allow the juror to serve on the jury.<sup>162</sup> However, in *Funk*, the overturning of the trial court order for a new trial is akin to the Wisconsin Supreme Court's rehabilitating juror Tanya G. based on the face value of her statements on the record and in spite of the trial judge's analysis of her impartiality, given that the judge had the benefit of face-to-face impressions of her demeanor.<sup>163</sup>

This approach is a cause for concern, as it appears to place Wisconsin among those states with liberal views of juror rehabilitation.<sup>164</sup> While adopting a view which essentially takes jurors' statements at face value, Wisconsin has jeopardized the right to an impartial jury by ignoring the way that bias functions, as well as the crucial purpose of voir dire in acting as the avenue for discovering and eliminating those biases (or the appearance thereof) that are so strong that the legitimacy

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160. Juror rehabilitation is one way in which courts attempt to save on the cost and time of locating additional jurors, by exploring whether a juror is capable of setting aside potential biases and remaining an impartial evaluator of the evidence. See Cospers, *supra* note 7, at 1474–75; see also GOBERT & JORDAN, *supra* note 154, at 53 (discussing whether knowledge is incompatible with impartiality and concluding that the more appropriate question is the extent to which the knowledge has impacted impartiality).

In the treason trial of Aaron Burr, Chief Justice John Marshall stated that a jury completely free of any preconceived notions regarding guilt or innocence is likely impossible, and thus the court is bound to consider whether the strength of these notions—those which “leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror.” *United States v. Burr*, 25 F. Cas. 49, 50–51 (C.C.D. Va. 1807).

161. See Cospers, *supra* note 7, at 1474–75 (explaining how the process of juror rehabilitation works generally).

162. *Id.* at 1474 (explaining that juror rehabilitation is not a term likely to be found in law dictionaries, but it has become a “judicial tool of rising significance in courthouses across the country”). The United States Supreme Court has long recognized that an affirmation of impartiality by a juror, if accepted by the trial judge, should be granted special deference and presumed correct. See, e.g., *Patton v. Yount*, 467 U.S. 1025, 1039–40 (1984) (demonstrating that the trial judge is in a superior position to evaluate whether a particular juror can be impartial and whether the juror's statements of impartiality are sincere).

163. See *State v. Funk*, 2011 WI 62, ¶¶ 63–64, 335 Wis. 2d 369, 799 N.W.2d 421; *infra* Part VII.

164. See Cospers, *supra* note 7, at 1489 (explaining that a liberal view of juror rehabilitation is one that allows extensive opportunity for a juror to be rehabilitated from more extreme showings of bias, extensive questioning by the judge to rehabilitate a juror, and little in terms of baseline measurements against which a juror's response must be measured to qualify for rehabilitation).

of the jury's verdict is easily called into question by members of the public.<sup>165</sup> To effectively serve as a means of achieving impartiality in jury trials, an effective voir dire process must take account of the nature of both the jury trial and of human biases, and of those biases, seek to eliminate those that are most prone to poison the results of the trial.<sup>166</sup> Bias can arise from several different psychological phenomena, ranging from past experiences to societal or mental pressures, which guide a juror towards a given result based on a preconceived belief or feeling

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165. GOBERT & JORDAN, *supra* note 154, at 49 (explaining that because of the secrecy of jury deliberations, and the absence of a requirement to provide a reason for their verdict, “[t]he guaranty of impartiality may be the most important safeguard of justice in an individual case”).

The goal of jury selection is impartiality, and this goal is made difficult when it is an appellate court is called on to review a determination of bias because:

an appellate court is left with only a written transcript to review, several months, often several years, after the actual jury selection. This reality limits our ability to fully assess the fairness and impartiality of an individual juror whom [it] [has] neither heard nor observed. The written transcript that [it] review[s] is usually limited only to the spoken word. Yet a juror cannot speak fairness or talk impartiality. Fairness and impartiality are communicated.

State v. Lindell, 2001 WI 108, ¶ 140, 245 Wis. 2d 689, 629 N.W.2d 223; *see* State v. Tody, 2009 WI 31, ¶ 47, 316 Wis. 2d 689, 764 N.W.2d 737 (which demonstrated that Wisconsin juror bias case law, in addition to federal case law, has emphasized that the trial judge should err on the side of caution and eliminate jurors who exhibit “even the appearance of impropriety, bias, or prejudice” (quoting *Elmore v. State*, 44 S.W.3d 278, 280 (Ark. 2004))); *see also* *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.”).

Speaking on another important part of voir dire, the United States Supreme Court stated: “[T]he peremptory satisfies the rule that ‘to perform its high function in the best way ‘justice must satisfy the appearance of justice.’” Swain v. Alabama, 380 U.S. 202, 219 (1965) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986)).

166. *See* Cospers, *supra* note 7, at 1483 (“[A] threat exists that group deliberations may magnify small biases at an individual level. Thus, while the correlation between individual bias and jury outcomes is unclear, the seating of one biased juror may have a drastic effect on the outcome of the litigation.”); James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 269–71 (1988) (explaining that both the secrecy of jury verdicts, and the extreme difficulty of appealing them, makes the impartial jury a greater necessity, as one impartial juror might be particularly influential during jury deliberations); Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in the Age of Mass Media?*, 40 AM. U. L. REV. 631, 632 (1991); *see also* *United States v. Vargas*, 606 F.2d 341, 346 (1st Cir. 1979) (explaining that when a juror betrays the trust of the court by concealing information, the only means of redress is to determine whether there is enough bias or prejudice that maintaining the legitimacy of trials requires a new trial).

that stems from one of these phenomena.<sup>167</sup> Because it is impossible for each bias to be properly accounted for, keen trial lawyers attempt to keep jurors who they believe will be sympathetic to their side.<sup>168</sup>

However, the trial court judge is nonetheless obligated to eliminate those jurors whose biases, whether openly admitted or inferred from the circumstances, are so severe as to prevent them from considering and deciding upon the evidence presented at trial.<sup>169</sup> Determining whether a particular juror's bias necessitates a removal for cause, or in the case of a later-discovered bias, a new trial, is a complicated question that is best resolved by the trial court judge who can make use of his observations of juror's nonverbal expressions and carefully weigh the circumstances of the case in light of an understanding of how bias operates.<sup>170</sup> When

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167. Cospers, *supra* note 7, at 1481 (describing how bias can arise from the tendency of jurors to confirm pre-existing beliefs, which arise out of certain stereotypes and patterns of behavior that are unique to the individual and tune out evidence that goes against these beliefs). Furthermore, biases, such as "belief perseverance" (where greater weight is given to information consistent with an earlier belief), are according more weight to information presented earlier on or the strong tendency to remain fixed on a belief despite contrary evidence as well as processing information guided by subconscious motivations. *Id.* at 1482–83; see Cass R. Sunstein, *Deliberative Trouble?: Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000) (explaining that group deliberation tends to polarize group members to stronger positions in alignment with their pre-existing beliefs).

168. Gobert, *supra* note 166, at 271 (explaining that the "difficulty and challenge involved in identifying the components of impartiality is compounded by the fact that trial lawyers do not seek impartial jurors"); see WALTER F. ABBOTT & JOHN BATT, A HANDBOOK OF JURY RESEARCH 1–10 (1999) (stating that the object of juror evaluation is to rid the jury pool of those jurors most favorable to the other side).

169. See *State v. Faucher*, 227 Wis. 2d 700, 716, 596 N.W.2d 770, 778 (1999) (illustrating that currently in Wisconsin, "subjective bias is most closely akin to what we had called actual bias, and . . . objective bias in some ways contemplates both our use of the terms implied and inferred bias"). The court in *Funk* cites this same proposition. *State v. Funk*, 2011 WI 62, ¶ 36 n.16, 335 Wis. 2d 369, 799 N.W.2d 421; see also *Reynolds v. United States*, 98 U.S. 145, 155 (1878) (explaining that the biases to be concerned with are those "deep impressions" which will cause a juror to ignore contrary evidence); GERTNER & MIZNER, *supra* note 89, at 62–63 (explaining that not all bias can be eliminated during voir dire and thus biases are evaluated as "a question of degree and not kind").

170. See *Funk*, 2011 WI 62, ¶ 70, 335 Wis. 2d 369, 799 N.W.2d 421 (Abrahamson, J., dissenting). Chief Justice Abrahamson noted in her dissent:

A juror's good-faith belief that she is not or was not biased, however, is not necessarily an accurate belief. Even if we could be assured of truthfulness, some people are incapable of making correct assessments of self, especially on an issue such as bias. A juror may emphatically believe that she is not biased, yet unknowingly lack the ability to be impartial.

*Id.*

relying solely on juror statements of impartiality—particularly taking the words alone from a court transcript at face value—the courts do not adequately recognize the importance of “[t]he right to a fair and impartial adjudication [which] extends not only to criminal defendants but also to the government and, through it, to society.”<sup>171</sup> Justice Cardozo explained the potential hazard of allowing a juror who has concealed information on the jury in *Clark v. United States*:<sup>172</sup>

The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning.<sup>173</sup>

Further, the fact that jurors’ statements of impartiality are often motivated by pressure from the judge, a sense of civic obligation, or pressure from other peers on the jury, regardless of the juror’s true feelings, means that liberally accepting them is a dereliction of the duty arising out of the right to an impartial jury that our judiciary and society should not tolerate.<sup>174</sup> As studies have shown, past experiences of jurors, particularly those that can be closely assimilated to the trial or relationships to key witnesses, pose a significant threat to the likelihood of the jurors’ impartiality, and thus their statements must be taken as only a single factor in evaluating their impartiality.<sup>175</sup>

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171. *Chi. Council of Lawyers v. Bauer*, 371 F. Supp. 689, 691 (N.D. Ill. 1974), *rev’d and remanded*, 522 F.2d 242 (7th Cir. 1975); see FREDERICK, *supra* note 155, at 11 n.6 (explaining that a study demonstrated that rehabilitation during *voir dire* caused a reduction in the number of jurors (both biased and unbiased) who believed the defendant guilty, as well as a drop in confidence among those who held to the belief); GOBERT & JORDAN, *supra* note 154, at 48. See generally Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 LAW & HUM. BEHAV. 212 (2010) (elaborating on the subject of juror rehabilitation).

172. *Clark v. United States*, 289 U.S. 1 (1933).

173. *Id.* at 11.

174. Joshua S. Press, *Untruthful Jurors in the Federal Courts: Have We Become Comfortably Numb?*, 21 ST. THOMAS L. REV. 253, 259 (2009).

175. See GOBERT & JORDAN, *supra* note 154, at 213 (providing that jurors who have

Therefore, while Wisconsin courts attempt to evaluate jurors for either objective or subjective biases, they should approach both tests with the totality of the circumstances in mind, as this best reflects the numerous sources of bias or concealment on the part of jurors.<sup>176</sup> Moreover, when a particular juror has been a victim of a crime, Wisconsin courts should carefully analyze the similarity and nature of the crimes, as well as any cues that can be gathered from the juror's tone, demeanor, and statements regarding his or her impartiality.<sup>177</sup> Also, if applicable, the court should inquire into the reason for a juror's failure to disclose that he or she had been a victim of a crime.<sup>178</sup> Only upon consideration of all of these factors can the court truly be said to be fulfilling its duty to protect every litigant's right to an impartial jury.<sup>179</sup> Focusing only upon the juror's state of mind, as Wisconsin's subjective bias standard does, fails to properly detect bias and places upon the trial lawyer a dangerous burden of sacrificing a conservative questioning strategy designed to build rapport with the jury, an issue that will be addressed in the next section.<sup>180</sup>

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been a victim of similar past crimes are more likely to identify with the victim); Scott E. Culhane et al., *Crime Victims Serving as Jurors: Is There Bias Present?*, 28 LAW & HUM. BEHAV. 649, 655 (2004). Important examples include the tendency of jurors who have been victims of a crime similar to that at issue in the trial (or know of a close friend or relative who was) to convict at higher rates than those who have not been a victim of crime, or have been a victim of a dissimilar crime (even if violent). *Id.* The study found that the closer that the crime at issue came to matching the juror's previous victim experience, the higher the conviction rate amongst those jurors. *Id.* It should be noted, however, that although the difference in conviction rates was significant, it was not enough to lead the authors to conclude that a per se rule of exclusion should apply, but rather that jurors who have been past victims should be approached with particular caution. *Id.* at 657.

176. See Press, *supra* note 174, at 256–58 (explaining that reasons for jurors failing to answer a question appropriately during voir dire are numerous and both conscious and subconscious); *supra* text accompanying notes 25–26, 29.

177. See, e.g., State v. Funk, 2011 WI 62, ¶¶ 22–23, 335 Wis. 2d 369, 799 N.W.2d 421; State v. Oswald, 2000 WI App 3, ¶ 10, 232 Wis. 2d 103, 606 N.W.2d 238.

178. In *Funk*, the trial court's analysis of whether Tanya G. was objectively biased included a comparison of the crimes which she had been victim to or witnessed, to those at issue in the case. *Funk*, 2011 WI 62, ¶ 22, 335 Wis. 2d 369, 799 N.W.2d 421.

179. See Case, *supra* note 154, at 326 (explaining that generally, courts should be permitted some discretion to make determinations in deciding to grant new trials when nondisclosure occurs).

180. See Robert G. Loewy, Note, *When Jurors Lie: Differing Standards for New Trials*, 22 AM. J. CRIM. L. 733, 761–62 (1995) (explaining that a strictly juror misconduct or actual bias standard is not an appropriate standard for deciding to grant a new trial). As Loewy notes, the strict actual bias standard is inappropriate because:

VI. THE APPEARANCE OF BIAS CANNOT PROPERLY BE  
DETERMINED FROM VIEWING THE TRIAL RECORD:  
INSTITUTING THE *TRANSAMERICA* RULE

Aside from cautioning against liberal juror rehabilitation, this Comment does not seek to advocate higher standards for juror placement, but rather to address the existing distribution of decision-making authority in seating jurors and making determinations on juror bias. The trial court, which oversees the voir dire and trial and is charged with the duty of ensuring an impartial trial, should be afforded greater deference to the decisions it makes to effectuate that goal. One of the most troubling aspects of the *Funk* decision is that the decision to reinstate the verdict was based solely on an ex post facto review of the trial court record and the responses of Tanya G. during voir dire and in the post-conviction hearing.<sup>181</sup> The trial judge was not consulted regarding the impressions upon which he based his assessment of Tanya G, nor was he consulted regarding any observations he may have made during the course of the trial and jury selection process, which ultimately led him to the conclusion that she was in fact biased.<sup>182</sup>

While characteristics such as demeanor, tone of voice, and facial expressions are not traditionally considered “evidence,” their impact in

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First, as Justice Brennan noted in *McDonough*, jurors are particularly reluctant to admit their own biases. This is because most people are either embarrassed about their biases or are unaware that they have biases, a problem that becomes even more acute after the trial is over, both because the state may have a stronger criminal contempt prosecution against the juror because the juror may be reluctant to give any information that would upset a verdict that, in large part, reflects a personal investment of time and energy.

*Id.* at 762. Likewise, Loewy explains why the actual bias standard is inappropriate “because it fails to account for the unique procedural posture of a post-trial hearing when a juror lies during voir dire.” *Id.* Additionally, Loewy argues that the important distinction is that jurors who reveal biases during voir dire may be rehabilitated, whereas if the juror’s bias is not revealed until later, no such option exists. *Id.*; *infra* notes 204–06 and accompanying text.

181. See *Funk*, 2011 WI 62, ¶¶ 63–64, 335 Wis. 2d 369, 799 N.W.2d 421; see *supra* text accompanying note 163.

182. See *Funk*, 2011 WI 62, ¶ 64, 335 Wis. 2d 369, 799 N.W.2d 421. Such an approach departs from previous case law that imparted both broad discretion to trial court judges, and disregarded the superior position that trial judges are in to gather information about a juror’s ability to be impartial based upon observable behaviors. See, e.g., *State v. Ferron*, 219 Wis. 2d 481, 497, 579 N.W.2d 654, 660–61 (1998); *Reynolds v. United States*, 98 U.S. 145, 156–57 (1878) (“[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record.”).

the jury's determination of whether or not a particular witness is credible cannot be denied.<sup>183</sup> Due to the obvious dangers and complications that would be presented if the jury were allowed to make findings on another juror's bias during jury selection, the judge is called upon to make crucial assessments as to the credibility of jurors whose honesty may be in question after they fail to answer or incorrectly answer a question posed during the jury selection process.<sup>184</sup> Thus, the judge must consider the same factors that would affect a jury's determination, such as those perceptions gathered from the prospective juror's behavior during the trial and jury selection.<sup>185</sup>

When an appellate court reviews a trial judge's determination on juror bias, it does so without the information that can be gleaned from circumstances such as the juror's demeanor.<sup>186</sup> One possible solution is to institute a rule requiring appellate courts who are reviewing an issue of juror bias (e.g., a challenge for cause ruling or a lack of juror candor situation<sup>187</sup>) to consult with the trial judge regarding these impressions if the trial record does not contain clear indications of the judge's reasoning behind either removing or refusing to remove a juror for cause. Such a rule would function much like the rule in Wisconsin workers' compensation cases from *Transamerica Insurance Co. v. Department of Industry, Labor, & Human Relations*,<sup>188</sup> which prohibits

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183. DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH 5 (2d ed. 2008); see 4A WIS. PL. & PR. FORMS § 33:140 (5th ed. 2009):

You should not reject the testimony of any witness from mere caprice or without reason, but give the testimony of each witness the weight which you think it is entitled to receive. If you believe that any of the witnesses have not stated the truth, because of their appearance on the stand, the improbability of their statements, or for any other reason, you may reject that testimony. However, you should not reject it without due care.

4A WIS. PL. & PR. FORMS § 33:140.

184. See *State v. Faucher*, 227 Wis. 2d 700, 715, 596 N.W.2d 770, 777 (1999) (noting that “[t]he requirement that a juror be indifferent is codified in [Wisconsin Statute] § 805.08(1) . . . [which] requires the [trial] court to examine on oath each person who is called as a juror to discover if he or she ‘has expressed or formed any opinion or is aware of any bias or prejudice in the case.’” (quoting WIS. STAT. § 805.08(1) (1995–1996))).

185. See *supra* note 183 and accompanying text.

186. See *infra* text accompanying note 213.

187. *Faucher* is an example of appellate review of a challenge for cause ruling. See *Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770. for an example of appellate review of a new trial ruling based on a juror candor issue (where a juror failed to disclose information), see *Funk*, 2011 WI 62, 335 Wis. 2d 369, 799 N.W.2d 421, .

188. *Transamerica Ins. Co. v. Dep't of Indus., Labor & Human Relations*, 54 Wis. 2d

the Labor and Industry Review Commission from overturning a hearing officer's finding of credibility without having access to each hearing officer's impressions of the witness.<sup>189</sup>

While the *Transamerica* rule operates in a different context—requiring evaluation of administrative law judge's determinations of witness credibility—the trial court judge's role in determining juror bias also relies heavily upon assessments of demeanor, tone, facial expressions, and essentially boils down to a credibility determination by the judge in evaluating the juror's responses to questions regarding his or her ability to be impartial.<sup>190</sup> Thus, instituting the *Transamerica* rule protects the parties' due process rights by ensuring due deference to those best positioned to make assessments of witnesses' credibility; the rule would require appellate courts to consult the impressions of trial court judges regarding potentially biased jurors and would serve the goal of impartiality and protect litigants' due process rights.<sup>191</sup>

272, 195 N.W.2d 656 (1972).

189. *Id.* at 282–83, 195 N.W.2d at 662.

190. *Id.*; see *State v. Wyss*, 124 Wis. 2d 681, 730, 370 N.W.2d 745, 768 (1985) (“Bias may be inferred from surrounding facts and circumstances. The trial court must be satisfied that it is more probable than not that the juror was biased against the litigant.” (citing *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir. 1981))); see also *Rose & Diamond*, *supra* note 7, at 517 (“Based on their interpretation of the juror's answers and demeanor, judges may choose to regard the juror's statement of fairness as credible (and, hence, choose not to excuse the juror for cause), or they may decide to ‘overrule’ the person's own self-assessment and dismiss the juror for cause.”). Compare *Transamerica*, 54 Wis. 2d at 285, 195 N.W.2d at 663–64 (explaining that findings of fact in workmen's compensation cases are not to be based merely on conjecture), with *Reynolds v. United States*, 98 U.S. 145, 157 (1878) (explaining that the record is often insufficient for findings of fact), *Funk*, 2011 WI 62, ¶ 115, 335 Wis. 2d 369, 799 N.W.2d 421 (Bradley, J., dissenting) (explaining that “[w]hen deciding whether a juror is biased, a circuit court judge essentially must make a credibility determination”), and *Funk*, 2011 WI 62, ¶ 67, 335 Wis. 2d 369, 799 N.W.2d 421 (Abrahamson, J., dissenting) (stating that “a circuit court cannot blindly rely on a juror's self-assessment”).

191. The court in *Transamerica* stated:

[W]here an examiner hears conflicting testimony and makes findings based upon the credibility of witnesses, and the commission thereafter reverses its examiner and makes contrary findings, the record should affirmatively show that the commission had the benefit of the examiner's personal impressions of the material witnesses . . . .

The demands of due process cannot be satisfied with anything less.

*Transamerica*, 54 Wis. 2d at 282–83 n.14, 195 N.W.2d at 662 n.14 (quoting *Braun v. Indus. Comm.*, 36 Wis. 2d 48, 57, 153 N.W.2d 81, 86 (1967)); see also *State v. Ferron*, 219 Wis. 2d 481, 497, 579 N.W.2d 654, 660–61 (1998) (explaining that the trial court has the benefit of observing juror's demeanor during voir dire, whereas the appellate court must make its assessment “from the cold, typewritten words of an appellate record”); *Reynolds*, 98 U.S. at 156–57.



Instituting the *Transamerica* rule in the juror bias context will promote the ultimate goal of voir dire, an impartial jury, which coincides with the constitutional right of the accused in a criminal trial.<sup>192</sup> Additionally, such a rule would foster both judicial economy and legitimacy by preventing embarrassing disagreements between trial and appellate courts, as well as possibly deterring costly appeals on decisions of a new trial.<sup>193</sup> Likewise, the *Transamerica* rule would require greater cooperation between lower and appellate courts, allowing for a more integrated judicial system, as well as lessening the harsh effect of seemingly hyper-technical requirements to either preserve a right to challenge a refusal to remove a biased juror or grant a new trial when a juror has concealed information.<sup>194</sup>

In *Funk*, the majority placed significant emphasis on three facts: (1) that there were no findings in the record upon which the trial court judge made his finding that Tanya G. was subjectively biased, (2) that Tanya G. was never asked specifically if she was a victim of sexual assault during voir dire, and (3) that Tanya G. was not asked her reason for why she did not disclose her past victimization.<sup>195</sup> However, this emphasis is misplaced.<sup>196</sup> As Justice Marshall stated in his dissent in *Smith v. Phillips*,<sup>197</sup> “[t]he right to a trial by an impartial jury is too important, and the threat to that right too great, to justify rigid insistence on an actual proof of bias. Such a requirement blinks reality.”<sup>198</sup>

Trial counsel certainly must do their part to ensure that their client’s right to an impartial jury is protected (including making sure that the entire voir dire proceeding appears in the record and practicing effective questioning methods), yet where counsel has employed a reasonable strategy and a juror has nonetheless concealed information, the court

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192. U.S. CONST. amend. VI; WIS. CONST. art. I, §§ 5, 7; see Case, *supra* note 154, at 316 (explaining that the purpose of voir dire is protecting each litigant’s right to an impartial jury); Cosper, *supra* note 7, at 1475; FREDERICK, *supra* note 155, at 2.

193. See, e.g., *Funk*, 2011 WI 62, ¶ 117, 335 Wis. 2d 369, 799 N.W.2d 421 (noting the inefficiency in having to have a new trial).

194. See *supra* text accompanying notes 186–91.

195. See *Funk*, 2011 WI 62, ¶¶ 48, 60, 335 Wis. 2d 369, 799 N.W.2d 421.

196. As the majority states rather contradictorily “[s]ubjective bias also may be revealed through a juror’s demeanor, with a determination of bias resting on whether the circuit court finds the juror credible.” *Id.* ¶ 46.

197. *Smith v. Phillips*, 455 U.S. 209 (1982).

198. *Id.* at 231–32 (Marshall, J., dissenting); see also Case, *supra* note 154, at 316.

should provide some leniency.<sup>199</sup> Dictating an overly strict standard, such as that implicated by *Funk*, poses a potential threat to counsel's trial strategies during voir dire, which may hinder another oft-cited important aspect of voir dire—building rapport with the jury.<sup>200</sup>

While the effectiveness of both the voir dire and the jury system itself is often questioned by legal scholars,<sup>201</sup> the longstanding tradition of both in our country, as well as the constitutional enshrinement of the jury trial, make it unlikely that either is departing any time soon.<sup>202</sup> Thus, attorneys must face the realities of voir dire head on.

From what I have observed during several voir dire proceedings as a judicial intern and law clerk and from the input of attorneys I have spoken to, the voir dire process can be a challenge for jurors and attorneys alike.<sup>203</sup> For jurors, the biggest challenge is accurately answering potentially embarrassing or personal questions. For attorneys, the greatest challenges are maintaining focus of the jurors and keeping a keen ear to jurors' responses. To combat the tendency of jurors to lose focus, attorneys should begin with easy and open-ended questions to make the jurors feel at ease and to lay the foundation for the next line of questioning.<sup>204</sup> Thus, a wise trial counsel may strategically decide not to immediately jump to pointed questions about

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199. See Loewy, *supra* note 180, at 747 (explaining that few states are willing to place heightened questioning standards on lawyers, because they can cause drawn out voir dire proceedings and strain attorney—juror rapport).

200. See, e.g., FREDERICK, *supra* note 155, at 3 (explaining that the second goal of voir dire is building a favorable rapport with the jurors, which is done by showing respect and interest in the jurors and making them feel at ease to promote an open forum).

201. Compare Marc Mezibov, *The Mapplethorpe Obscenity Trial*, LITIGATION, Summer 1992, at 12 (explaining the extensive efforts in jury selection undertaken by counsel), with William C. Smith, *Challenges of Jury Selection*, 88 A.B.A. J. 34 (2002), and comparative law articles regarding the jury system (explaining that jury selection is often misused by counsel as an opportunity to explain the law, rather than to build rapport and eliminate biases), e.g., Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 443, 469–99 (1997) (explaining the advantages and disadvantages of a jury system).

202. U.S. CONST. amend. VI (addressing a right to a jury trial in a criminal context); WIS. CONST. art. I §§ 5, 7 (guaranteeing a right to jury trial in both criminal and civil contexts). See generally JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 1 (2006) (providing an overview of the development of the American jury system).

203. See generally Alan M. Tuerkheimer, *Persuading Jurors During Voir Dire*, WIS. LAW., Nov. 2006, at 14.

204. *Id.* at 16.

unpleasant experiences, such as whether a person “or someone they knew, had ever been a victim of sexual assault.”<sup>205</sup> Instead, counsel may attempt to build rapport with jury members by asking broader questions to determine if these more offensive or private questions have to be asked and also to limit the targets of these questions to preserve as much rapport and juror privacy as possible.<sup>206</sup> While arguably counsel has alternative methods to ensure juror privacy, such as the use of jury questionnaires, the effectiveness of these procedures at actually maintaining privacy has been questioned and may impose additional costs on attorneys and their clients.<sup>207</sup>

Regardless of whether these methods are available, Wisconsin courts should be hesitant to restrict attorneys from forming effective questioning strategies. Judges should also be less sympathetic to jurors who fail to disclose information, as the same non-disclosure may occur regardless of the method of questioning. However, this approach towards allowing counsel to mold their own voir dire strategy appears to be greatly hindered by the court in *Funk*. This is because the *Funk* decision repeatedly placed blame on counsel for his questions being

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205. *State v. Funk*, 2011 WI 62, ¶ 4, 335 Wis. 2d 369, 799 N.W.2d 421 (explaining that counsel did not ask whether anyone had been a victim of sexual assault).

206. *See* FREDERICK, *supra* note 155, at 6 (explaining that Wisconsin follows a combined method of jury selection, in which “[p]otential jurors are questioned in a group where both individual and group questioning occurs”); GERTNER & MIZNER, *supra* note 89, at 108 (finding that while there is no constitutional right of juror privacy, “the privacy of prospective jurors [is] an appropriate factor to be considered in passing on a given voir dire question”). In addition, jurors are capable of detecting when attorneys have ulterior motives. *See* Tuerkheimer, *supra* note 203, at 16.

207. Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1, 16–29 (2007) (explaining that despite possible benefits of a more open ended questioning of jurors, jury questionnaires may cause more damage through unnecessarily broad questioning, reduced ability to interact and observe jurors, and the potential to place private identification information into public record). It is not my intention to address the use of juror questionnaires extensively in this Comment, and I will only briefly acknowledge that currently their use is rising in popularity, although whether they are truly beneficial is still open for debate. *See id.* While the use of jury questionnaires has become an increasingly hot topic among scholars, some sources have indicated that despite all of the hype, questionnaires are actually riddled with more costs than benefits. *Id.* at 17. Further, Colquitt argues that the cost of jury questionnaires, which is significant, goes beyond merely dollars and cents. *Id.* at 17–18 (stating that “[i]t is not enough to weigh the utility of a questionnaire solely with regard to its cost in dollars and time, although that cost alone is significant”). Nonetheless, others insist that questionnaires are excellent time savers and more accurate at finding bias as people are more willing to be truthful when forced to write down answers. *See, e.g.*, FREDERICK, *supra* note 155, at 167–68 (describing the apparent benefits of juror questionnaires).

“inartfully posed” despite the probability that had Tanya G. appropriately answered the question, further questions would have revealed her past during voir dire.<sup>208</sup> Placing such a burden to explore every avenue on trial counsel when counsel has good reason to believe that doing so is both a waste of time and potentially bad for their rapport with the jury, runs against one highly-prevalent general criticism of voir dire, that it is unnecessarily long and intrusive.<sup>209</sup>

Instead, appellate judges should provide the same type of special deference on findings of juror credibility that is currently afforded to hearing officers in workers’ compensation cases using the *Transamerica* rule.<sup>210</sup> Instead of simply noting the absence of clear impressions on the record, like Justice Roggensack’s opinion did in *Funk*, appellate judges reviewing a trial court’s decision to grant a new trial based on juror concealment should consult with the trial judge to gather his or her impressions of the juror in question.<sup>211</sup> After consulting with the trial judge, an appellate judge would still possess the power to overturn the trial court’s decision if the trial judge’s impressions were found to be baseless or clearly contrary to the record. However, requiring appellate judges to consult trial judges on these matters would ensure that the right to an impartial jury is carefully considered and the superior position of the trial judge to gather invaluable non-verbal cues from jurors is respected.<sup>212</sup>

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208. *Funk*, 2011 WI 62, ¶ 63, 335 Wis. 2d 369, 799 N.W.2d 421 (agreeing with the court of appeals that Tanya G.’s non-answers were not sufficient for a finding of objective bias); *see supra* note 180 and accompanying text (illustrating that there are numerous reasons for non-disclosure).

209. Loewy, *supra* note 180, at 747 (explaining that while many states impose a materiality standard, few states are willing to impose a heightened specificity standard, because such a requirement can produce extra lengthy voir dire proceedings). Asking specific questions after there is a reason to believe that these questions are unnecessary “could also put unnecessary strain on the lawyer/juror relationship.” *Id.*

210. *See Transamerica Ins. Co. v. Dep’t of ILHR*, 54 Wis. 2d 272, 282, 195 N.W.2d 656, 662 (1972).

211. *Funk*, 2011 WI 62, ¶ 48, 335 Wis. 2d 369, 799 N.W.2d 421 (illustrating the absence of the trial judge’s findings on the record). Justice Roggensack’s opinion states:

A finding of subjective bias must be based on factual findings that show the specific juror’s state of mind. No such findings were made here . . . . The court also did not make any findings about her demeanor that indicated subjective bias . . . . Accordingly, the circuit court’s finding that Tanya G. was subjectively biased against Funk is not supported by facts of record and is clearly erroneous.

*Id.*; *see also Transamerica*, 54 Wis. 2d at 282–83, 195 N.W.2d at 662.

212. *See Transamerica*, 54 Wis. 2d at 282–83, 195 N.W.2d at 662; *see also Funk*, 2011 WI

The *Transamerica* rule is grounded in common sense and scientific understandings of human nature in the juror bias context.<sup>213</sup> Non-verbal gestures and expressions are an integral part of human communication, and, thus, for our legal system to successfully accomplish its purpose as an impartial means of resolving disputes and allegations, a keen awareness of this aspect of human nature is mandatory.<sup>214</sup> Because the trial court judge is the only judicial authority who has the opportunity to visually and aurally observe the juror's tone and demeanor, he or she is in the best position to determine whether a juror is sincere in his or her assertions of impartiality as a "function of the circuit court's experiences and knowledge of human nature."<sup>215</sup> While the results of scientific studies concerning people's ability to detect deception in others indicate that generally people can only achieve a "chance" or fifty percent rate of accuracy in detecting deception, other studies indicate that certain people whose professions require a special interest in determinations of truthfulness are consistently more accurate.<sup>216</sup>

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62, ¶ 48 n.14, 335 Wis. 2d 369, 799 N.W.2d 421. The decision in *Funk* appears to abandon any notion of deference to the trial court, as well as recognize that there is more to be gathered from juror's expressions than the words that comprise them. *Id.* ¶ 48 (describing that the trial court made no findings of fact regarding Tanya G.'s bias and thus neglecting the simple powers of observation, which only the trial court is capable of exercising). Both federal and Wisconsin state courts have shown strong support of trial court discretion in prior case law. *See supra* note 115 and accompanying text.

213. Non-verbal behaviors are inextricably linked to communication. *See* Paul Ekman & Wallace V. Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCHIATRY J. FOR THE STUDY INTERNAL PROCESSES 88, 88 (1969) [hereinafter Ekman, *Nonverbal Leakage*] (exploring the relationship between verbal and non-verbal communication and highlighting that non-verbal communications are not simply redundant of simultaneous verbal communications and that different body parts will convey different messages). *See generally* Paul Ekman et al., *Facial Expressions of Emotion: An Old Controversy and New Findings*, 335 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 63, 64 (1992) (explaining the physiological changes that the body undergoes when a certain facial expression is used, regardless of whether the person truly intends to convey that emotion).

214. This Comment is not intended to extensively address theories of non-verbal communications, but some understanding of the concepts is necessary to demonstrate the importance of these communications as a source of information to trial judges in achieving the most impartial jury possible. *See generally* Ekman, *Nonverbal Leakage*, *supra* note 213.

215. *Funk*, 2011 WI 62, ¶ 71, 335 Wis. 2d 369, 799 N.W.2d 421 (Abrahamson, J., dissenting) (explaining the basis on which trial court judges are to make determinations of subjective bias). Studies have indicated that sixty to sixty-five percent of all communication takes place through nonverbal behaviors. FREDERICK, *supra* note 155, at 43.

216. *See* Robin S. Edelstein et al., *Detecting Lies in Children and Adults*, 30 LAW & HUM. BEHAV. 1, 8 (2006) (demonstrating that "average observer[s] [were] at chance when discriminating between true and false statements," but that others portrayed higher levels of

Trial court judges handle countless jury trials in a given year and sit upon a greater wealth of information (including non-verbal communications of jurors) on which to assess a juror's sincerity, unlike appellate judges performing cold reviews of the court record.<sup>217</sup> Should this interest and experience prove insufficient in improving judges' accuracy, the possibility of specialized training similar to that undertaken by law enforcement personnel remains open. Even absent such training, the judgment of the trial court judge should be respected as it is grounded on some human intuition more closely connected to that individual trial experience than the appellate court can claim.<sup>218</sup>

Another suggested approach to this problem is to simply presume in cases where jurors have not disclosed information during voir dire that the juror is biased, requiring the judge to grant a new trial to maintain the "appearance of justice."<sup>219</sup> While it is difficult to dispute the efficiency by which this method would preserve the appearance of

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accuracy and additional study of these individuals may provide important information about "specific behavioral or verbal cues," which may be useful in training judges). Furthermore, the presence of non-verbal leakage clues is a thoroughly studied phenomena, and while there has been disagreement as to the accuracy of various clues, there is little doubt that much of what a person intends, or does not intend, to communicate is exhibited by non-verbal behavior. See generally Ekman, *Nonverbal Leakage*, *supra* note 213.

217. Paul Ekman, Maureen O'Sullivan & Mark G. Frank, *A Few Can Catch a Liar*, 10 PSYCHOL. SCI., 263, 264–65 (1999) [hereinafter Ekman, *Few Can Catch a Liar*] (demonstrating that federal judges achieved an average of over 60% accuracy at detecting lies or truthfulness in a study conducted by Paul Ekman, Maureen O'Sullivan, and Mark G. Frank).

218. See *id.* at 265 (providing the results of the study of Paul Ekman and others, indicating that "it is possible for some people to make highly accurate judgments about lying and truthfulness without any special aids such as slowed motion, repeated viewing, and the scoring of subtle changes by either trained coders or computer-based measurements"; illustrating that groups with special interest or expertise in detecting deception performed better than those who did not possess a special interest or expertise; describing that the task which judges would be most likely to have to concern themselves with in examining jurors—whether there are any signs of lying—was found to be the most accurately performed by judges); see also Rose & Diamond, *supra* note 7, at 533 (demonstrating that the more confidently a juror attests to his or her impartiality, the less likely that he or she is to be excused); *id.* ("Further, confidence predicted some of the judges' own impressions of the jurors' abilities to be fair"); *id.* at 535 (explaining that "judges may simply see value in using confident self-reports as a cue for an ability and willingness to be fair, whereas attorneys do not.").

219. Case, *supra* note 154, at 337 (explaining that because perceptions of bias degrade the integrity of the court in the eyes of the public, courts should eliminate even the appearance of bias); see also *supra* text accompanying notes 111, 113 (demonstrating that the notion of guarding against the appearance of bias is not unfamiliar to Wisconsin case law).

justice, this approach creates the threat that counsel who become aware of a juror's non-disclosure during voir dire may fail to notify the court, so that the counsel may preserve the right to a new trial if a favorable result is not reached.<sup>220</sup> While most appellate courts will not allow this to occur, the possibility that a lawyer may attempt to conceal his knowledge of the juror's failed disclosure, as well as the needless delay that will result if a new trial must be awarded, weigh against the use of the "Missouri Rule," which grants new trials whenever it is found that a juror concealed information.<sup>221</sup> Therefore, instituting a *Transamerica* type rule in juror bias situations is a better practice that is more fully supported by the underlying policy considerations of voir dire,<sup>222</sup> as well as by logical and scientific understandings of human interactions than the current approach.<sup>223</sup>

VII. CONCLUSION: THE COURT'S DECISION IN *STATE V. FUNK* THREATENS THE RIGHT TO AN IMPARTIAL JURY AND DISREGARDS A LONG LINE OF PRECEDENT SUPPORTING TRIAL COURT DISCRETION IN DETERMINING JUROR BIAS

From the case law for juror bias in Wisconsin, as well as at the federal level, it is clear that a strong policy towards granting trial court discretion on determinations of juror bias was present but not sufficiently respected by the court's decision in *Funk*.<sup>224</sup> Furthermore, the seemingly hyper-technical requirements that the decision places on counsel to ask every possible question disrupts trial strategy and could potentially impose additional costs to litigation.<sup>225</sup> The majority decision in *Funk* places the right to an impartial jury trial in peril, with the only foreseeable benefit being the potential to save on the cost of new

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220. See Loewy, *supra* note 180, at 747.

221. Case, *supra* note 154, at 338; Loewy, *supra* note 180, at 749; see also Vivion v. Brittain, 510 P.2d 21, 24-25 (Wyo. 1973) (denying a motion for new trial based on theory that juror failed to disclose involvement in prior litigation where counsel had actual knowledge of this fact having taken part in that very litigation).

222. See *supra* text accompanying notes 166-80.

223. See *supra* text accompanying notes 213-14.

224. See, e.g., *supra* note 45; *State v. Messelt*, 185 Wis. 2d 254, 270, 518 N.W.2d 232, 239 (1994); *Amirault v. Fair*, 968 F.2d 1404, 1405 (1st Cir. 1992) (explaining that a juror's statements of impartiality are not conclusive proof of impartiality and that determinations of juror credibility are uniquely suited to a trial judge's discretion); see also *Wainwright v. Witt*, 469 U.S. 412, 428 (1985) (explaining that determinations of juror credibility are traditionally a matter for the trial judge to decide); *Patton v. Yount*, 467 U.S. 1025, 1038 (1984).

225. See *supra* notes 205-07 and accompanying text.

trials.<sup>226</sup> However, saving on this expense comes at the cost of potentially stripping criminal defendants of their constitutional rights, as well as the integrity of Wisconsin's judicial system.<sup>227</sup>

Moreover, simply presuming, like in the Missouri approach, that jurors who do not disclose material information are biased would also erode the integrity of Wisconsin courts.<sup>228</sup> While this approach certainly preserves the appearance of justice<sup>229</sup> by eliminating jurors who create suspicion for bias, it does not adequately consider the serious costs of new trials to all parties involved. Instead, to best protect litigant's rights of due process, Wisconsin courts should provide special deference to the trial court because the trial court maintains a superior position to interpret the credibility of a juror either during voir dire or, in the case of juror candor cases, in post-trial hearings.<sup>230</sup> Providing this discretion to the trial court will guard against results that mar the appearance of justice, such as the court's decision in *Funk*, as well as promote judicial integrity by reducing the amount of overturned lower court decisions.<sup>231</sup> By requiring appellate courts to consult with trial court judges regarding their impressions of jurors before upsetting the trial court's ruling,

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226. *State v. Funk*, 2011 WI 62, ¶ 82, 335 Wis. 2d 369, 799 N.W.2d 421 (Bradley, J., dissenting) (noting that the majority's approach seemed to take a step back from the existing case law). In particular, Justice Bradley stated:

Here, the circuit court assessed the voir dire as a whole. It compared the factual similarities between Tanya G.'s assaults and the facts of this case, evaluated her nonresponsiveness, weighed her subsequent conflicting statements, and concluded, "I must follow the law." Ultimately it determined that a reasonable person in Tanya G.'s position could not be impartial. Rather than giving deference to those on the front lines making these tough decisions, the majority turns back the clock. It applies a long-discarded test which skews its analysis and leaves confusion in its wake.

*Id.*

227. *See Case, supra* note 154, at 337 ("Without attention to the perception of the fairness of the legal system, we risk disintegration and, ultimately, defiance." (quoting Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 299 (1995))).

228. *See Loewy, supra* note 180, at 749–51.

229. *See Case, supra* note 154, at 337; *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (describing the cost of trials to the parties, the jurors, and the society).

230. *See supra* notes 190, 206.

231. *Compare* the majority opinion in *Funk*, 2011 WI 62, 335 Wis. 2d 369, 799 N.W.2d 421, *with* the dissent by Justice Abrahamson, *id.* ¶¶ 65–79 (Abrahamson, J., dissenting), *and with* Justice Bradley's dissent, *id.* ¶¶ 80–120 (Bradley, J., dissenting).



Wisconsin courts would demonstrate respect for the complexities of bias that align with understandings of human nature and judicial integrity.<sup>232</sup> Most importantly, the *Transamerica* rule would clearly demonstrate to the public the court's efforts at ensuring justice and would prevent ugly perceptions that are created when appellate courts make judgment calls based off of "the cold, typewritten words of an appellate record."<sup>233</sup>

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232. *See supra* Part VI.

233. *State v. Ferron*, 219 Wis. 2d 481, 497, 579 N.W.2d 654, 660–61 (1998); *see also State v. Faucher*, 227 Wis. 2d 700, 721, 596 N.W.2d 770, 780 (1999) (providing that the trial judge's determination as to juror's objective bias is only overturned if as a matter of law a reasonable judge could not have reached such a conclusion).

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