

September 1989

Gaining Access to the Jury: A Critical Guide to the Law of Jury Selection in West Virginia, Part Two

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Charles R. DiSalvo, *Gaining Access to the Jury: A Critical Guide to the Law of Jury Selection in West Virginia, Part Two*, 92 W. Va. L. Rev. (1989).

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West Virginia Law Review

Volume 92

Fall 1989

Number 1

GAINING ACCESS TO THE JURY: A CRITICAL GUIDE TO THE LAW OF JURY SELECTION IN WEST VIRGINIA, PART TWO

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I. INTRODUCTION

Part one of this Article, which appeared in Volume 91, Number 2 of this Review, surveyed the West Virginia law of challenges to jurors.

In Section II of this Part, I complete my survey of jury selection law by canvassing voir dire procedure in West Virginia. The reader who is not interested in learning procedural niceties but is interested in the compelling issues raised by jury bias and prejudice would do well to skip Section II and proceed directly to Section III.

Section III is an investigation of the interrelationship among juror characteristics, litigant characteristics, and jury decision-making. Section IV examines the effectiveness of current voir dire practices for dealing with what I call the silent biases and prejudices of jurors. It is also in Section IV that I propose a revised approach to voir dire that will bring us closer than the current system can to the ideal of an impartial jury.¹

II. THE MODE OF VOIR DIRE IN WEST VIRGINIA

A. *Who Questions?*

Two basic modes of voir dire exist in the United States. The first, dominant in the federal courts, makes questioning the private reserve of the court. While attorneys may suggest questions to the

1. United States Supreme Court jurisprudence on the question of when criminal defendants are entitled to voir dire on racial questions is outside the bounds of this article. See *Turner v. Murray*, 476 U.S. 28 (1986); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Aldridge v. United States*, 283 U.S. 308 (1931). An excellent description of the Court's evolving position in this area up to *Rosales-Lopez* can be found in Note, *Restricting Inquiry into Racial Attitudes During the Voir Dire*, 19 AM. CRIM. L. REV. 719 (1982).

court,² only the court asks questions. The other mode, under which the judge and attorneys share the questioning, is employed chiefly by state courts.³ Consistent with this trend, many West Virginia circuit courts allow attorney-dominated voir dire,⁴ while others employ a third, hybrid type of voir dire in which the court does much of the questioning but then allows the attorneys to pursue specific areas. It should be noted, however, that even in those West Virginia courts that allow lawyer questioning, such questioning is not without limits. For reasons that will appear evident later in this paper,⁵ it is important to note that few, if any, West Virginia courts allow lawyers to conduct individual, in-chambers voir dire of jurors absent special circumstances and no West Virginia courts allow individual, in-chambers voir dire as a matter of right.⁶

In very few state courts is there found a *right* to any attorney-conducted voir dire.⁷ West Virginia law, however, establishes by statute the right to *some* type of voir dire in civil cases. Section 56-6-12 of the West Virginia Code provides that a party is entitled either to voir dire the jury or to have the court voir dire the jury—the

2. FED. R. CIV. P. 47(a) allows the court to decide in civil cases whether it or the attorneys will conduct voir dire. If the court chooses to conduct voir dire alone, however, the rule obligates the court to entertain questions that the attorneys ask the court to pose. W. VA. R. CIV. P. 47(a) is identical while W. VA. R. CRM. P. 24(a) and FED. R. CIV. P. 24(a) are virtually identical.

3. Tanford, *An Introduction to Trial Law*, 51 Mo. L. REV. 623, 628 (1986).

Thirty-three states allow judge and attorney questioning, 5 states permit only attorneys to question, 10 states restrict questioning to the court, and in 2 states judges decide on a court-by-court basis. CONFERENCE OF STATE COURT ADMINISTRATORS AND NATIONAL CENTER FOR STATE COURTS, STATE COURT ORGANIZATION 1987 12 map 4, 321-28 (1988).

4. Interview with Professor Franklin D. Cleckley, Professor at the W. Va. Univ. College of Law (Aug. 8, 1989).

5. See *infra*, Section IV-A.

6. Cleckley, *supra* note 4.

7. See Tanford, *supra* note 3.

There is a movement afoot to guarantee lawyers the right to conduct voir dire. Senator Howell Heflin, D-Alabama, has introduced Senate Bills 591 and 592, entitling each side's attorney to a minimum of thirty minutes of voir dire, with discretion in the court to expand this time as necessary. Although hearings were held on this proposed legislation in July of 1987, no new law had been enacted at the time of this writing. Moore, *Lawyers Split Over Voir Dire Procedure*, LITIGATION NEWS, Feb., 1988, at 6.

In West Virginia, the Judicial Improvement Committee of the West Virginia State Bar endorsed this legislation in 1987 and recommended that the governing board also endorse it. The Committee took no position on whether similar legislation should be enacted to govern West Virginia state courts. (The author is a member of this Committee.)

choice being in the court's discretion.⁸ The West Virginia Supreme Court of Appeals has rebuffed at least one attempt to interpret this statute to mean that a party has the absolute right to conduct its own voir dire.⁹

WVRCP 47(a) and WVRCrP 24(a) provide that, should the court choose to conduct the questioning, the parties are entitled to conduct supplemental questioning or suggest additional questions¹⁰ for the court to ask. This right to supplement, however, is greatly limited by these same rules which give the court the discretion to allow or accept such questioning "as it deems proper."¹¹ The decisional law is in harmony with the rules, for it accords trial courts wide discretion in deciding whether to ask questions tendered by the parties. Thus, the West Virginia Supreme Court has declined to reverse not only in those cases in which the trial court had already adequately covered the issues raised by the submitted supplemental questions,¹²

8. W. VA. CODE § 56-6-12 reads, in relevant part, "Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein. . . ."

9. The argument that § 56-6-12 creates a right in a party to personally conduct his or her own voir dire examination was rejected in *Thornton v. CAMC*, 305 S.E.2d 316, 319 (W. Va. 1983).

The *Thornton* court further said that W. VA. R. Crv. P. 47(a) does not create such a right.

10. It is wholly within the discretion of the court to decide whether questions shall be asked by the lawyers and, if so, whether those questions can be asked orally by the attorneys or whether they should instead be submitted in writing or orally to the court so that the court might then decide whether it will ask them for the attorneys.

11. This is not to say that a court cannot abuse this discretion and be reversed on that ground. See, e.g., *State v. Peacher*, 160 W. Va. 540, 280 S.E.2d 559 (1981). In *Peacher*, the court stated: "Where a trial court's restriction of the scope of voir dire undermines the rights sought to be protected by the voir dire process it will be held to be an abuse of discretion and reversible error." *Id.* at 552-53, 280 S.E.2d at 570. The specific error in *Peacher* was the trial court's absolute refusal "to inquire into any potential relationship between members of the jury panel and law enforcement agencies or personnel." *Id.* at 553, 280 S.E.2d at 570. (Such relationships can give rise to a cause removal; see Part one of this article, 91 W. VA. L. REV. 217 (1988-89).) The *Peacher* court also found error in the trial court's refusal to "allow or conduct further inquiry into the relationships between jurors who stated they knew the defendant or his victim so as to determine whether the juror was prejudiced by his knowledge or relationship." *Id.* at 553-54, 280 S.E.2d at 570.

12. See *State v. Simmons*, 309 S.E.2d 89 (W. Va. 1983) (not error for court to refuse to ask questions proposed by defendant that were already substantially covered by the court); *State v. McFarland*, 332 S.E.2d 217 (W. Va. 1985) (not error for the trial court to refuse to ask questions about insanity defense when the court had already substantially asked the questions). *Accord*, *State v. Scotchel*, 168 W. Va. 545, 285 S.E.2d 384 (1981). See also *State v. Wood*, 352 S.E.2d 103 (W. Va. 1986) (upholding trial court's refusal to ask tendered questions which it ruled were unrelated to jurors' qualifications, when court had already conducted extensive voir dire and defendant had declined an invitation to conduct individual voir dire on qualifications).

but also in those cases in which no such questioning on those issues by the court had taken place.¹³

13. In *State v. Beacraft*, 126 W. Va. 895, 30 S.E.2d 541 (1944), for example, the trial court, after it had questioned the jurors, refused to question the jurors on reasonable doubt, the presumption of innocence, and the degree of proof. The Supreme Court of Appeals declined to find this a clear abuse of discretion.

In *State v. Wilson*, 157 W. Va. 1036, 207 S.E.2d 174 (1974), the trial court refused to grant the defendant's request that the court ask all the jurors whether they had any knowledge of the case and from what source such knowledge was obtained. The trial court had previously asked a similar question and saw but one affirmative response from a panel of twenty. The defendant's counsel took issue with this perception, saying he had perceived that several jurors had attempted to answer in the affirmative, but had not. The West Virginia Supreme Court apparently agreed with the trial court's perception and upheld the trial court on this question, saying, however, that it would have been "better practice to grant this request . . . to remove any suspicion of a biased panel." *Id.* at 1043, 207 S.E.2d at 180.

The trial court also refused to ask whether the jurors were related to witnesses the state had subpoenaed, whether the jurors thought it was more likely the defendant was guilty because the state had indicted him, and whether the jurors would give more credibility to the testimony of police officers than that of other witnesses. *Id.* With regard to the witnesses question, the relevant inquiry, according to the Supreme Court of Appeals, was whether there were circumstances existing to create a possible "interest in the cause." *Id.* at 1044, 207 S.E.2d at 180 (a disqualifying common law ground; see Part one of this article, 91 W. VA. L. REV. 217 (1988-89)). Finding none, the court then relied upon W. VA. CODE § 56-6-12, saying that the "true test" was only whether the juror was related to a party, inferring by its references to *State v. Dephenbaugh*, 106 W. Va. 289, 145 S.E. 634 (1928), that relationship to a witness is irrelevant. *Wilson* at 1044, 207 S.E.2d at 180. This is the type of arrogant decision that cuts off a party's right to information that would allow him or her to intelligently exercise his or her peremptory challenges. For example, it might be discovered through questioning of this sort that a juror is related to a key witness. Assuming that the juror is questioned and is not dismissed for cause or favor because he fails to admit that the relationship would influence the credibility with which he would vest such testimony, the disfavored party would at least then have the knowledge on which to make a decision whether to peremptorily strike the juror. *State v. Pendry*, 159 W. Va. 738, 227 S.E.2d 210 (1976), *overruled in part on other grounds*, *Jones v. Warden, West Virginia Penitentiary*, 161 W. Va. 168, 241 S.E.2d 914 (1978), makes this same point in a similar context.

The *Wilson* court rebuffed the defendant's attack on the trial court's refusal to ask whether the indictment made the defendant more probably guilty, saying that any error on that point would be cured by the court's instruction on the point. 157 W. Va. at 1044, 207 S.E.2d at 180.

Finally, the court refused to find error in the trial court's refusal to ask whether the panelists would grant police testimony added credibility, saying that the police testimony was only perfunctory and not central to the case. *Id.* at 1044, 207 S.E.2d at 180.

In *State v. McFarland*, 332 S.E.2d 217 (W. Va. 1985), the court upheld the trial court's refusal to ask a question, tendered by the defendant, about the panelists' views regarding theories of incarceration. The court reasoned that because the proffered question did not ask about the jurors' willingness to impose particular penalties, it was improper. *Id.* at 228.

In *State v. Wood*, 352 S.E.2d 103 (W. Va. 1986), the court upheld the trial court's refusal to ask certain questions that the trial court deemed not related to juror qualifications but instead to principles of law "more properly the subject of instructions at the close of evidence." *Id.* at 106.

B. Procedures for Examining and Striking Jurors in the Typical West Virginia Courtroom

At the beginning of trial, the jurors who previously have been summoned to serve are seated in the spectator section of the courtroom. Kanawha County Local Rule of Court 11 describes what occurs next in the typical West Virginia circuit court:

When the names of jurors upon a panel are called by the clerk each shall be assigned consecutive numbers, beginning with the number one. Seats bearing such consecutive numbers shall be provided in the courtroom, and, as their numbers are thus called, the respective jurors shall take seats corresponding to the numbers thus assigned to them, and shall occupy such seats pending the striking of the jury.

In a civil case, approximately ten to twelve panelists are typically called to the jury box while in a criminal case approximately twenty to twenty-four are generally called.¹⁴ The panelists are then sworn.¹⁵ The court proceeds to introduce the parties and their attorneys. The court asks a number of standard questions of the panelists involving, for example, concerns such as whether any of them have been represented by the attorneys or are related to or acquainted with the litigants or their witnesses. Those whose answers raise questions about their impartiality are usually questioned by the court or, alternatively, by the attorneys.

In a courtroom in which lawyer questioning is allowed, the attorney of the party with the burden of proof then begins questioning the panel and continues doing so until he or she makes a motion to strike, is interrupted by an objection, or completes his or her questioning. If a motion to strike is made, the opposing attorney normally has at that time the opportunity to voir dire the panelist

14. These numbers are arrived at by judges by adding to the numbers of jurors who will eventually sit the total number of peremptory strikes the parties have. Civil cases now require six jurors while criminal cases still require twelve. See W. VA. CODE § 56-6-11 (1985). In this regard it is interesting to note that although the size of the civil jury was reduced from twelve to six by W. VA. CODE § 56-6-11 in 1985, the number of peremptory strikes provided to each side has remained unchanged at four apiece. See W. VA. CODE § 56-6-12 (1966). Nonetheless, it is the practice in some state courts to grant but two peremptory challenges to each side in civil cases, thus resulting in a voir dire panel of ten (six plus two plus two). The author is unaware of any cases in which this limitation on peremptory strikes, not apparently authorized by statute, has been contested.

15. W. VA. CODE § 56-6-12 (1966).

in aid of his or her possible resistance to the motion. (In a procedure rarely employed, the opposing party at this time may also choose to put on evidence regarding the juror's fitness.¹⁶) After the conclusion of the opponent's voir dire of a contested panelist, the court, which itself may have participated in the questioning, rules on the motion. Should the panelist be excused by the court as a result of the motion to strike, a replacement is usually empaneled at that time. The court asks the same standard questions of the replacement and then returns control of the questioning to the attorney whose client has the burden of proof.

After this attorney's questioning is complete, the court turns the questioning over to the defendant's attorney. The same process is engaged in again.

In courtrooms in which the judge does not allow lawyer questioning, the court, after asking its stock questions, may entertain questions suggested by the attorneys, may ask some additional case-specific questions himself or herself, or both.

When all questioning is completed and all motions to strike have been ruled on, a list of the panelists then remaining in the box is prepared by the clerk. Taking the list in hand, the attorney for the party with the burden of proof lines through the name of the first panelist the attorney wishes to peremptorily strike. The defendant's attorney then peremptorily strikes a juror. The process continues back and forth until each party has exhausted its peremptory strikes.

The remaining persons on the list constitute the jury that will hear the case.¹⁷ In the event that more jurors than are needed remain in the box, the necessary number of jurors is typically chosen by lot.

1. Where Does the Questioning Take Place?

Normally voir dire occurs in open court in the presence of spectators, all the sworn panelists, the parties, and the remaining un-

16. *Id.*

17. On infrequent occasions, a need to examine a juror *during* trial will arise. For example, in *State v. Dye*, 298 S.E.2d 898 (W. Va. 1982), a juror who received a threatening phone call during a criminal prosecution was subjected to the court's voir dire. (The trial court found the juror unprejudiced and the West Virginia Supreme Court refused to find otherwise.)

sworn panelists. The court has the authority, however, to exercise its discretion to conduct the voir dire of individual panelists outside of the hearing of the remaining panelists when the court "believes that the impartiality of the jury may be better determined in that manner."¹⁸

A court can authorize "in-chambers"¹⁹ voir dire, for example, when the panelist's answers might taint the remaining panelists who may be ignorant of prejudicial information known by the questioned panelist. Thus, in *State v. Pendry*,²⁰ the court suggested that panelists who had obtained information about the case from the police or others be questioned outside of the hearing of the other panelists.²¹

18. *Pendry*, 159 W. Va. at 746, 227 S.E.2d at 216.

19. Although this procedure is commonly called "in-chambers" voir dire, the author is quick to add that there is no authority in the court to exclude members of the public from the voir dire of individual panelists. It is only the remaining panelists with whom this procedure is concerned and, therefore, it is only they who are excluded from the questioning. Thus, this manner of voir dire often takes place in the jury deliberation room, the court's conference room, or some other suitable place from which the panel, but not the public, is excluded.

The United States Supreme Court in *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984), articulates the rule regarding the openness of voir dire in at least criminal proceedings: "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." 464 U.S. at 510. One could infer from the court's reasoning that the same values implicit in openness of criminal trials, principally public understanding of and confidence in the judicial process, would apply with virtually equal force to civil trials as well. Indeed, it is important in this respect to recognize that the court bottomed its decision not on the right of the defendant to a fair criminal trial under the sixth amendment, but on the first amendment rights of the press and public. *See id.* at 571, n.8, and the concurring opinions of Justices Stevens and Marshall. *See also* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578, 599 (1980) (plurality opinion of Chief Justice Burger, noting that civil trials "have been presumptively open.") (concurring opinion of Justice Stewart, noting that "[t]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials. . . , civil as well as criminal.")

The *Press-Enterprise* Court illustrated its holding, in dicta. In a rape trial (such as the underlying prosecution in *Press-Enterprise*), the trial court might have to balance the interests in public trials against the privacy interest of a panelist who "had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode." *Press-Enterprise*, 464 U.S. at 512. The Court then went on to say that if such a panelist were to request some modicum of privacy in which to be questioned, the court might remove the proceedings to its chambers, exclude the public, but allow the presence of counsel for an on-the-record voir dire. The Court also suggested that a sanitized transcript of the proceedings in chambers could later be released to the public.

20. 159 W. Va. 738, 227 S.E.2d 210 (1976).

21. *Id.* at 747-48, 227 S.E.2d at 217. A fear of tainting the remaining panelists motivated the apparent decision of the trial court to question in chambers in *State v. Bennett*, 304 S.E.2d 35 (W. Va. 1983). In *Bennett*, the trial court was concerned with the defendant's prior conviction and learning

Similarly, in *Lynch v. Alderton*,²² it was error for the trial court to ask in open court, rather than in-chambers, whether any of the panelists were insurance company employees.²³

The court fashioned a specific rule in this area in *State v. Finley*.²⁴ In the *Finley* voir dire, one juror indicated in open court that she had served on a jury hearing a previous case against the defendant, while a second juror publicly stated that he knew the defendant when he had a different name. The trial court denied the defendant's motion for a mistrial. On appeal, the supreme court found that the information may very well have prejudiced the remaining jurors, requiring more efforts to determine the ability of the remaining panelists to be fair. Because the trial court failed to take these steps, the court reversed and, in doing so, articulated this rule:

When a trial court determines that prospective jurors have been exposed to information which may be prejudicial, the trial court, upon its own motion or motion of counsel, shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice.²⁵

A second type of situation in which a court might employ in-chambers voir dire arises when the issues of the case call for the questioning of panelists on personal and sensitive areas of their own lives.²⁶

whether jurors were aware of it. This is the type of information that can taint a jury if the questioning does not take place in chambers.

Compare *State v. Angel*, 319 S.E.2d 388 (W. Va. 1984) (not error to fail to conduct in-chambers voir dire when court permits individual in-court voir dire of those who have read of defendant's prior conviction in a newspaper story).

22. 124 W. Va. 446, 20 S.E.2d 657 (1942).

23. *Id.* at 450-52, 20 S.E.2d at 659-60.

24. 355 S.E.2d 47 (W. Va. 1987).

25. *Id.* at 51.

26. "[S]ome inquiries may call for a juror to disclose information which might prove embarrassing if required to be given in open court. Also, information which may be revealed may serve to taint an entire panel if given in the presence of the entire panel. Consequently, the trial court must exercise judgment regarding the possible nature of legitimate inquiries in order to determine when there is a need to pursue them out of the hearing of other prospective jurors." *Pendry* at 747, 227 S.E.2d 210, 217.

Thus, for example, in a first-degree murder prosecution in which the author assisted defense counsel in voir dire, the court allowed the defense to conduct in chambers voir dire to determine whether the panelists had notions or experiences regarding spouse abuse that would prejudice them

2. Individual Voir Dire

The West Virginia cases use the phrase "individual voir dire" in ways that are not always clear. While in many instances the term appears to refer to the questioning of an individual panelist about his or her particular qualifications to serve, on other occasions the term seems to mean "in-chambers" voir dire. For the purposes of this article, the two terms will be used to represent distinct ideas. "In-chambers voir dire" will refer to the voir dire of a person that takes place outside the hearing of his or her fellow panelists.²⁷ "Individual voir dire" will refer to the questioning of an individual panelist, usually conducted in the presence of the other panelists, as contrasted with general questions posed to the panel as a whole.²⁸

The West Virginia Supreme Court of Appeals has made it clear that individual voir dire is required under at least two circumstances:

—*When there is the possibility of prejudice.* *State v. Pratt*²⁹ stated the rule thusly: "Jurors who on *voir dire* of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse."³⁰ Later, in *State v. Schrader*³¹ the court, reflecting on *Pratt*, said that "individual *voir dire* [is] required only when a juror has *disclosed* a possible area of prejudice."³² The court's use of the

against the defendant who claimed she had killed her abusive husband in self-defense. In the in chambers voir dire that took place, one panelist admitted abusing his own spouse, an admission that may not have been made in open court. See also *Pendry*, *supra* note 20, for the illustration provided in *Press-Enterprise* that might justify the closing of voir dire to all.

Some courts routinely examine individual panelists in-chambers when the inquiry concerns the special weight a panelist may give to the testimony of a police officer. See, e.g., *State v. Archer*, 169 W. Va. 564, 289 S.E.2d 178 (1982).

27. See, e.g., *Pendry*, 159 W. Va. at 747, 227 S.E.2d at 217.

28. See, e.g., *Schrader*, 302 S.E.2d 70 at 72 (W. Va. 1982).

29. *State v. Pratt*, 161 W. Va. 530, 244 S.E.2d 227, 541 syl. pt. 3 (1978).

30. *Id.* at 531, 244 S.E.2d at 228. See also *State v. Payne*, 280 S.E.2d 72 (W. Va. 1981); *State v. Toney*, 301 S.E.2d 815 (W. Va. 1983); *State v. Bailey*, 365 S.E.2d 46 (W. Va. 1988); *State v. Duncan*, 369 S.E.2d 464 (W. Va. 1988); *State v. Deskins*, 380 S.E.2d 676 (W. Va. 1989).

31. 302 S.E.2d 70 (W. Va. 1982).

32. *Id.* at 72 (emphasis added). Accord *State v. Mayle*, 357 S.E.2d 219, 223 (W. Va. 1987). *Schrader* was to some degree presaged by the court's language in *State v. Williams*, 160 W. Va. 19,

term “disclose” is not loose language. One is entitled to individual voir dire not as a matter of right *ab initio*, but only as a consequence of another act—namely, the juror’s act of disclosing information that might possibly disqualify him or her.³³ It appears that without such a disclosure, a trial court might legitimately confine a party to questions posed only to the panel as a group. Thus, in *Schrader*, the Supreme Court of Appeals affirmed the trial court’s refusal to allow the defendant to conduct individual voir dire because there were no signs of prejudice from any specific juror. What the court appears to be saying is that without particular evidence that grounds exist on which to suspect the qualifications of particular panelists there is no basis for a request for individual voir dire.³⁴

—*When a party has a relationship with a member of the law enforcement community.*³⁵ *State v. Pratt*³⁶ is the textbook case illustrating when individual voir dire is required. In *Pratt*, general questioning of the entire panel revealed the presence of four jurors who were kin or acquaintances of law enforcement officers.³⁷ The court reversed, finding the lower court’s refusal to allow individual questioning to be an abuse of discretion.³⁸ Later, in *State v. Beckett*³⁹ the court spoke in even stronger terms, saying that a party has a

230 S.E.2d 742 (1976) and *State v. Neider*, 295 S.E.2d 902 (W. Va. 1982):

In *Williams* we held that once it was disclosed that some of the jury panel may have read newspaper articles bearing upon the trial of the case, it was incumbent on the court to undertake specific questions to determine whether such articles have influenced the jury. . . . *Id.* at 908.

33. The limitation thus imposed on the exercise of this right should be rejected. See the discussion in Section IV of this paper.

34. See also *State v. Angel*, 319 S.E.2d 388 (W. Va. 1984). Note that *Angel*, however, is an in-chambers individual voir dire case. *Id.* at 393.

35. This set is actually a sub-set of the broader category described above.

36. *State v. Pratt*, 161 W. Va. 530, 244 S.E.2d 227 (1978).

37. *Id.* at 538, 244 S.E.2d at 232. Such a relationship was determined to be grounds for cause dismissal under *State v. West*, 157 W. Va. 209, 219, 200 S.E.2d 859, 866 (1972). For subsequent cases modifying this rule, see Part one of this article, 91 W. VA. L. REV. 217 (1988-89).

38. *Pratt*, 161 W. Va. at 538-39, 244 S.E.2d at 232. See also *State v. Lassiter*, 354 S.E.2d 595, 599 (W. Va. 1987). (“The determination concerning whether and the extent to which to permit individual voir dire rests within the sound discretion of the trial court, and is not subject to review in the absence of an abuse of discretion.”) Compare *State v. Neider*, 295 S.E.2d 902, 909 (W. Va. 1982) (finding that trial court did not err in retaining jurors whose qualifications had been challenged on individual voir dire).

39. *State v. Beckett*, 310 S.E.2d 883 (W. Va. 1983).

right to individual voir dire when a panelist indicates a consanguineal, marital, or social relationship to a law enforcement employee.⁴⁰ Finally, in *State v. Ashcraft*⁴¹ the court articulated, for the first time, a constitutional basis for the right to individual voir dire in criminal trials when the possibility of partiality appears.⁴² The court found the source of the right in the due process guarantee of the fourteenth amendment and the impartial trial guarantee of the sixth amendment of the U.S. Constitution, and the right to a jury trial in criminal prosecutions guaranteed by article III, section 14 of the West Virginia Constitution.⁴³

It is far from clear at this point whether the court would uphold a similar right to individual voir dire in civil cases, given the absence of the constitutional protections on which the criminal right rests. Surely, however, if the court is, as it often has said it is, interested in making voir dire available as a mechanism for allowing peremptory strikes to be made in an informed fashion⁴⁴, it will find the denial of individual voir dire in civil cases to be an abuse of judicial discretion, depriving a litigant of jurors free of "bias or prejudice."⁴⁵

III. SILENT BIASES AND PREJUDICES

A. Jury "Selection": Theory as Prelude to Reality

Trial theory in the United States is built upon democratic ideals. No person in a criminal or civil trial is entitled to a trial process or result that is based on anything more or less than the facts and the law. With respect to process, trial theory posits that it be pristine:

40. *Id.* at 889. See also *State v. Ashcraft*, 309 S.E.2d 600, 607 (W. Va. 1983); *State v. Worley*, 369 S.E.2d 706, 719 (W. Va. 1988); *State v. Perdue*, 372 S.E.2d 636, 638 (W. Va. 1988); *State v. Bates*, 380 S.E.2d 203, 208 (W. Va. 1989); *State v. Bennett*, slip op. 18540 (W. Va. June 15, 1989) (Westlaw, States library, W. Va. file, p. 7).

41. *State v. Ashcraft*, 309 S.E.2d 600 (W. Va. 1983).

42. *Id.* at 609 ("[I]t is an abuse of discretion not to permit individual questioning when a juror reveals a relationship that suggests potential for bias or prejudice.").

43. *Id.* at 607. See also, *State v. Deaner*, 334 S.E.2d 627, 629 (W. Va. 1985). In *Deaner*, two panelists, in a prosecution for welfare fraud, thought welfare ought to be abolished. The Supreme Court stated that the failure to allow individual voir dire of these panelists constituted reversible error.

44. See, e.g., *West Virginia Hum. Rts. Comm'n v. Tenpin Lounge, Inc.*, 158 W. Va. 349, 355, 211 S.E.2d 349, 353 (1974).

45. W. VA. CODE § 56-6-12 (1966). See *infra* sections III and IV for a description of the conditions militating in favor of individual voir dire.

trials are to be governed by meticulously neutral procedural rules. With respect to result, the decision-makers' minds are to be blank slates, uninformed by preconceived ideas about the wisdom of the applicable substantive law, and completely neutral about the litigants, their witnesses, their lawyers, and about the results the parties seek.

The theory would have the jurors, in other words, work in perfect, laboratory conditions. Accordingly, it is not surprising that the theory holds that the race, gender, class, even the beauty of the litigants are, unless properly implicated by the substantive law,⁴⁶ to count for nothing. Any intrusion of these factors into the trial process taints and sullies the process and, perhaps, skews the result. The intrusion confounds the bedrock democratic principle that every person is entitled to the same benefits and obligations of the law.

Because the theory of trials puts irrelevant person-specific considerations outside the bounds of trial, the process of jury selection receives special attention in the theory of trials. Jury selection is the only opportunity for the system to remove panelists who would make decisions based on factors other than the law and the facts, in favor of those whose decisions will be predicated upon those two factors alone. Challenges to individual jurors are provided for no other reason. Challenges for cause and favor are designed to deal with the actuality or inference of juror partiality, while peremptory challenges play a similar role in eliminating suspected partiality.

Given its function, it is no surprise that voir dire is widely considered to have a significant causal relationship to the jury's ability to rule solely on the law and facts in the jury deliberation room. Unfortunately, there are reasons to doubt the efficacy of voir dire for achieving this goal, given the conditions under which it is now practiced.

B. Voir Dire Law: Living in the Past—The Dead Hand of the Law

When the West Virginia Supreme Court of Appeals articulated grounds for cause challenges in the 1917 case of *State v. Dushman*,⁴⁷

46. Such as in a suit based upon discrimination brought by a member of a protected class.

47. *State v. Dushman*, 79 W. Va. 747, 749, 91 S.E. 809, 810 (1917).

it relied for its authority upon a list of grounds contained in Blackstone's Commentaries. The Commentaries, written in 1765,⁴⁸ reflect eighteenth century English society, its problems and concerns. Most importantly, the Commentaries reflect an eighteenth century understanding of human behavior.

Since that time the social sciences have experienced some development. In the years since the *Dushman* decision, tremendous growth has taken place in sociology, psychology, economics, anthropology, and communication theory. In the last three decades, psychologists in particular have been hard at work studying the relationship between psychology and the legal system.

Juror behavior has been a special concern. Can the social sciences draw the picture of the perfect juror for a litigant in advance? Can jury decisions be explained using "small group" theory? Are there discernible patterns in deliberations that govern who speaks and when? What factors influence the jury's selection of its foreperson, and whom will it most likely pick?

In an area where there are few rules restricting lawyer behavior, some of the findings made in response to these questions have led to changes in the way law is practiced. For example, "scientific" jury selection (in which background research on the relevant community leads to the construction of an ideal juror profile against which the actual jurors are squared) has become the rule rather than the exception in important cases.

In the search for bias and prejudice on voir dire, however, the law of jury selection has ignored what the social scientists have been saying about jurors. For thirty years and more, psychologists and other students of human behavior have been reporting the most disturbing findings about juror biases and prejudices. In the face of these findings, the legal system has neither changed its restrictive view of favor challenges nor has it entertained alternatives to the type of juror questioning now employed. The system is frozen to a rigid, anachronistic model that was developed long before our

48. 1 W. Blackstone, Commentaries § 422.

knowledge of human behavior was as rich as it is today. This article is an attempt to get our West Virginia legal system to face up to this new knowledge.

C. *Living in the Present*

What We Are Learning About Jurors

We are learning that a human *tabula rasa* is a species that exists in trial theory but not in fact. Whether by nature or societal conditioning, humans come to the courtroom with outlooks that make them less than perfect jurors.⁴⁹

The existence of these juror characteristics, some of which are quite undesirable, has been documented by social scientists through experimental studies in which the attitudes of specific populations are tested with controlled and simulated data, through case studies in which actual jurors in a limited number of cases are interviewed, and through archival research in which the data of numerous actual trials are assessed. In four areas—gender, race, socioeconomic status, and attractiveness—this research has resulted in findings that signal trouble for our eighteenth-century view of what ought to constitute an appropriate set of cause and favor challenges.⁵⁰

Gender

The theory of trials would hold that a litigant is entitled to the same fair hearing whether the litigant is male or female. The result should not be determined or even influenced by the litigant's gender or, in a criminal case, the gender of the victim. We are learning, however, that men and women jurors relate differently to members of their gender group than to members of the opposite group. They may also have different ways of looking at the evidence. In some instances these differences might be mutually healthy and enriching.

49. See, generally, Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. AND CRIMINOLOGY 269 (1988).

50. This article does not address the bias or prejudice that may be created *during* a trial by the conduct of a juror or a third party, but see Bacigal, *Hearings on Juror Bias and Misconduct*, 10 VA. B. A. J. 20 (1984).

In other instances, however, it would appear that unfounded biases and prejudices are at work.

In particular, there appears to be a same-sex identification that occurs between jurors and parties that results in favoritism by the juror toward the same-sex party:

*Stephan⁵¹ demonstrated in an experimental study, using a murder prosecution, that “[s]ubjects were less likely to find the defendant of their own sex guilty than they were to find the defendant of the opposite sex guilty.”⁵²

*Falling along similar lines were the findings of Nagel and Weitzman⁵³ who reviewed actual data from personal injury cases. They found that male-dominated juries gave larger than average awards to male plaintiffs and lower than average awards to female plaintiffs.⁵⁴

*Deitz, Blackwell, Daley, and Bentley⁵⁵, tested prospective jurors’ and non-jurors’ empathy toward rape victims. They found that women had greater empathy for rape victims than males and that of all women tested, those who had experienced a rape or an attempted rape had more empathy than those women who had not.⁵⁶ Moreover, “subjects who indicated high levels of empathy . . . expressed greater certainty that the defendant was guilty, and attributed less responsibility for the crime to the victim and greater responsibility to the defendant than did subjects who expressed less empathy toward the victim.”⁵⁷

51. Stephan, *Sex Prejudice in Jury Simulation*, 88 J. OF PSYCHOLOGY 305 (1974).

52. *Id.*, at 308. *But cf.*, Griffit and Jackson, *Simulated Jury Decisions: The Influence of Jury-Defendant Attitude Similarity-Dissimilarity*, 1 SOC. BEHAV. AND PERSONALITY 1 (1973); Sealy and Cornish, *Jurors and their Verdicts*, 36 MOD. L. REV. 496 (1973).

53. Nagel and Weitzman, *Women as Litigants*, 23 HASTINGS L. J. 171 (1971).

54. *Id.* at 193-196. This study was conducted using archival data from 1966. With the increasingly larger percentage of women on juries the size of this disparity may have diminished or terminated altogether. In accord with Nagel and Weitzman is Stephan and Tully, *The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors*, 101 J. OF SOC. PSYCHOLOGY 149 (1977).

55. Deitz, Blackwell, Daley, and Bentley, *Measurement of Empathy Toward Rape Victims and Rapists*, 43 J. OF PERSONALITY AND SOC. PSYCHOLOGY 372 (1982) [hereinafter Deitz].

56. *Id.* at 379.

57. *Id.* at 380. The researchers’ report contains the questions asked the subjects to determine

Do men and women bring other sex-based prejudices to the jury box? There is some evidence that they do:

*Eyewitness testimony is notoriously unreliable.⁵⁸ While Brigham and Bothwell's experiment⁵⁹ found that both sexes overestimate the ability of eyewitnesses to identify culprits, it also found that men do so to a greater degree than women.⁶⁰

*In a controversial experimental study of gender differences among several hundred persons on the jury list for Yolo County, California, Constantini, Mallery, and Yapundich⁶¹ tested the respondents' propensity to prejudge the guilt of four defendants in actual criminal cases. Respondents were asked whether they believed the defendants to be guilty as charged. In each case, women had higher rates of prejudgment than men.⁶² The respondents were also asked whether they could be impartial jurors. Again, in each case women considered themselves incapable of being impartial in higher

their levels of empathy. In a courtroom where such questions were permitted, a lawyer would find them useful for determining attitudes on voir dire.

Other studies' findings are consistent with the work of Deitz, *supra* n. 55. For example, in an experimental study, Smith, Keating, Hester, and Mitchell, *Role and Justice Considerations in the Attribution of Responsibility to a Rape Victim*, 10 J. OF RES. IN PERSONALITY 346 (1976), found that males believed that rape victims are "more careless and more likely to have done something to have provoked the rape. . . . Females, on the other hand, identified more strongly with the victim and prescribed more severe punishment for the assailant than did males." *Id.* at 357. In another experimental study, Davis, Kerr, Atkin, Holt and Meek, *The Decision Processes of 6 and 12 Person Mock Juries Assigned Unanimous and Two-thirds Majority Rules*, 32 J. OF PERSONALITY AND SOC. PSYCHOLOGY 1 (1975), found that "juror sex was found to be significantly associated with subjects' perceptions of the difficulty of rape, with males generally judging rape to be more difficult than females [A] powerful determinant of defendant guilt in this [rape] case may have been the sex composition of the jury hearing the case." *Id.* at 40. In a third experimental study, Calhoun, Selby, and Warring, *Social Perception of the Victim's Causal Role in Rape: An Exploratory Examination of Four Factors*, 29 HUMAN RELATIONS 517 (1976), the researchers concluded that "male respondents viewed a raped woman as contributing to the rape to a significantly greater degree than female respondents." *Id.* at 523. Finally, Miller and Hewitt found that in an experimental study that women convicted rape defendants at a much higher rate (65% of the time) than men (45%). Miller and Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. OF SOC. PSYCHOLOGY 159, 160 (1978).

58. See E. LOFTUS, *EYEWITNESS TESTIMONY* (1979).

59. Brigham and Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Examinations*, 7 LAW AND HUM. BEHAV. 19, 26 (1983).

60. *Id.*

61. Constantini, Mallery, and Yapundich, *Gender and Juror Impartiality: Are Women More Likely to Prejudge Guilt?*, 67 JUDICATURE 120 (1983).

62. *Id.* at 125.

numbers than men.⁶³ In half of these eight comparisons, the researchers' minimum level of statistical significance⁶⁴ was achieved.⁶⁵

As an overlay to these gender-based prejudices, biases, and inclinations is the finding that men and women participate in jury deliberations in very different ways:

*Hastie, Penrod, and Pennington⁶⁶ studied the participation rates of male and female juries in mock deliberations using actual prospective jurors. They found that not only do men talk more in deliberations, but that men and women focus on different subjects. Men talk more about the facts of the case, legal issues, disputed key facts, and organizational matters than do women, while women make more verdict statements⁶⁷ than men.⁶⁸ Men are chosen to be forepersons of the jury in frequencies disproportionately high compared to their numbers in the jury population.⁶⁹ Finally, men are viewed as more persuasive than women.⁷⁰

Is there any inter-play between these participation traits and the prejudices and biases that men and women respectively hold? Logic would answer in the affirmative, but conclusive research on this precise question is yet to be done.⁷¹ If logic is proved correct, however, then knowledge of male and female participation patterns might increase the lawyer's interest in particular biases and prejudices. For example, in a rape case in which consent was a factual issue, male bias against rape victims might take on heightened importance when

63. *Id.* at 126.

64. "A measurement with great statistical significance is one that is unlikely to have occurred by chance. . . ." D. BARNES, *STATISTICS AS PROOF* 143 (1983).

65. Constantini, Mallery and Yapundich, *supra* note 61, at 126. The researchers admit their findings contradict previous research. They explain this inconsistency by stating that "previous research . . . generally considers verdicts rendered . . . rather than measures of prejudgment." *Id.* at 127. This appears to be a valid and important distinction.

66. HASTIE, PENROD, AND PENNINGTON, *INSIDE THE JURY* (1983).

67. The authors use this term to refer to "[e]xpressions advocating specific verdict positions," *Id.* at 89.

68. *Id.* at 142. The authors caution that while these differences exist, they may very well be attributable to factors other than gender, such as occupation, education, etc.

69. Marden, *Gender Dynamics and Jury Deliberations*, 96 *YALE L. REV.* 593, 595 n. 9 (1987).

70. HASTIE, PENROD, AND PENNINGTON, *supra* note 66, at 145.

71. Some research, with conflicting results, has been performed in this area. See Marden, *supra* note 69, at 596 n. 17.

viewed against the over-participation by males in deliberations over disputed key facts.

Socioeconomic Status

According to trial theory, no person is above the law. The rhetoric supporting this principle is especially strong in the criminal area. The results of extensive psychological studies indicate, however, that some persons may be treated more or less favorably by jurors because of their status in society, because of the jurors' status, or both.⁷² So powerful is socioeconomic bias that Professor Freda Adler describes it as—

. . . the bias which appears to be the most important single extra-legal factor associated with juror deliberations. . . . In our stratification system individuals are perceived by each other as occupying a position in a power-prestige hierarchy. Furthermore, this stratification generally coincides in our modern industrial society with the division of labor. Even in a society with a fluid class system, values are not homogeneous; the position a person occupies influences his values and has a profound influence on his understanding of, and judgment toward, people of other ranks.⁷³

*Adler's remarks are found in her report⁷⁴ of her study of the occupations of actual defendants and jurors in 100 Pennsylvania state court criminal cases. She found that "discrepancy in occupational status between juror and defendant is related to trial outcome. High discrepancy between defendant and jurors is more likely to lead to conviction than a trial situation in which low discrepancy occurs. This relationship holds under various configurations of occupational level among jurors and defendants."⁷⁵

*Although factors other than socioeconomic prejudices of jurors may certainly be at work, it is nonetheless not surprising in light of Adler's findings that Nagel,⁷⁶ in a study of thousands of actual

72. "The bulk of the trial data demonstrates socioeconomic discrimination in the criminal jury trial." Stephan, *Selective Characteristics of Jurors and Litigants*, in *THE JURY SYSTEM IN AMERICA* 106, 107 (R. Simon ed. 1975).

73. Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. OF L. AND SOC. CHANGE 1, 4 (1973).

74. *Id.*

75. *Id.* at 10.

76. S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* (1969).

federal and state court jury decisions, found that 85 to 90% of indigent criminal defendants were found guilty “in contrast to consistently lower percentages for the non-indigent. . . .”⁷⁷ Jurors are not, as a class, indigent.

*Vivid illustrations of the role played by socioeconomic status in actual juror decision-making are given in Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*.⁷⁸ For example, in one civil case studied by Broeder, upper class jurors favored the corporate defendant, while the working class jurors favored the plaintiff, a laborer. Of the eight jurors favoring the worker, six were themselves workers. Broeder comments that “occupational bias was the central characteristic of the . . . deliberations and of the thinking of the . . . jurors with regard to the case.”⁷⁹

*Reed⁸⁰ questioned 158 persons who sat on 36 actual civil and criminal trials. He found that in a criminal trial “the higher the status of the individual juror the more likely he was to vote guilty; the lower the status of the individual juror the more likely he was to vote not guilty.”⁸¹ Reed also reported that “[p]etit jurors also differentially treated persons accused of a crime. Persons with high occupational status were much more frequently held not guilty than their low socioeconomic counterparts.”⁸²

77. *Id.* at 90. Nagel did not specifically locate the source of this disparity in juror prejudice. Stephan, in commenting on the study on which Nagel drew his data, Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* (1965), and on other studies, reviews the disadvantages under which indigent criminal defendants labor. Stephan, *supra* note 72, at 102, 107.

78. 40 N.Y.U. L. REV. 1079 (1965). Broeder was a researcher in the famous University of Chicago Jury Project. See Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 23 INS. COUN. J. 368 (1957).

79. *Id.* at 1090. This example is also cited by Adler, *supra* note 73.

80. Reed, *Jury Deliberations, Voting, and Verdict Trends*, 45 SOUTHWESTERN SOC. SCI. Q. 361 (1965).

81. *Id.* at 366.

82. *Id.* But cf. Bray, Struckman-Osborne, McFarlane, and Scott, *The Effects of Defendant Status on the Decisions of Student and Community Juries*, 41 SOC. PSYCHOLOGY 256 (1978).

A more recent study similar to Reed's was conducted in 1988 by C. Walter for the Roscoe Pound Foundation and reported in J. GUNTHER, *THE JURY IN AMERICA* (1988). Persons who had served as actual jurors in three state and federal courts in Pennsylvania between January 28, 1985 and January 31, 1986 were surveyed post-trial with close to a 100% response rate. *Id.* at 289-90. Walter found in civil cases that “[j]uries which decided in favor of the defendant contained more jurors who had

*In a jury simulation study a similar pattern was found. Frederick⁸³ reported that mock jurors convicted defendants of low socioeconomic status more frequently than they convicted high status defendants.⁸⁴ Consistent with these findings were those reported by Foley, Chamblin, and Fortenberry.⁸⁵ These researchers determined that subjects who viewed the defendants' socioeconomic status as high rated such defendants as less guilty. Moreover, there was also found to be a relationship between the socioeconomic status of the jurors and their evaluations of the defendants' guilt.⁸⁶

*Reed's archival finding that the higher the status of the juror, the more likely the juror is to vote to convict finds support in the experimental study conducted by Simon.⁸⁷ Simon condensed the transcripts of actual trials, had them recorded, and played them to persons from actual jury pools.⁸⁸ She found that in prosecutions for housebreaking and incest, when a verdict-status relationship was found, "it always supported the expectations that . . . lower status jurors are more likely to favor the defendant."⁸⁹

completed some or all of college. Juries which decided in favor of the plaintiff were comprised of more jurors with less formal education." *Id.* at 353. Walter reports that these differences are to a "nearly statistically significant degree. . . ." *Id.* Walter concludes that "[t]here appears to be a relationship between education and verdict." *Id.* at 343. (While Walter also reported that jurors with professional or graduate education split evenly between plaintiff and defendant juries, she does not explain the discrepancy; one might suspect that the number of such persons appearing on juries was relatively insignificant.)

83. Frederick, *The Effects of Decision Alternatives, Participant's Respectability, and Sex of Subject on Decisions Reached by Simulated Juries: A Comparison Between Two Populations*, paper presented at the Southeastern Psychological Association Convention, Atlanta, Ga., 1978, *cited in* J. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 242, n. 4 (1987).

84. *Id.* at 242. Despite his own study, Frederick states that the effect of socioeconomic status is not clear. *Id.* Dane and Wrightsman, however, counter that while "the effects of socioeconomics may be complex" that "does not mean that socioeconomic status should be written off as having no influence. . . ." Dane and Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors Verdicts* in *THE PSYCHOLOGY OF THE COURTROOM* 83, 95 (N. Kerr and R. Bray, eds.) (1982).

85. L. Foley, M. Chamblin, and J. Fortenberry, *The Effects of Race, Socioeconomic Status, and Personality Variables on Jury Decisions* (paper presented to American Psychological Association, Sept., 1979), *cited in* Dane and Wrightsman, *THE PSYCHOLOGY OF THE COURTROOM*, *supra* note 84, at 93.

86. *Id.*

87. R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967).

88. *Id.* at 36.

89. *Id.* at 112.

Race

One pattern that emerges at this point is this: jurors tend to identify with those who resemble them in some significant way.⁹⁰ Thus, women tend to identify with women; men tend to identify with men; members of a certain socioeconomic class tend to identify with other members of that class. The archival, case study, and experimental evidence indicates that the pattern holds for race, too.

Recent psychological experiments have resulted in findings that indicate white jurors are "more likely to find a minority-race defendant guilty than they [are] to find an identically situated white defendant guilty":⁹¹

*Miller and Hewitt⁹² tested the proposition that "a jury would be more likely to convict a defendant accused of rape when the victim and the jurors" were of the same race⁹³ by garnering the reactions of black and white subjects to a videotape of part of an actual trial and to written summaries of the balance of the case. The results were startling in their magnitude: black jurors voted for conviction 80% of the time when the victim was black whereas they voted for conviction only 48% of the time when the victim was white. Similarly, white jurors convicted defendants who had raped white victims at a 65% rate, while defendants who had raped black victims were convicted at only a 32% rate.⁹⁴

90. "[A]ttraction toward other people is influenced by the degree of attitudinal similarity. . . , similarity of belief systems. . . , perceived racial identity. . . , ideological similarity. . . and the attractiveness of the victim and the defendant. . . ." Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. OF EXPERIMENTAL SOC. PSYCHOLOGY 133, 134 (citations omitted) (1979). *But cf.* Byrne and Wong, *Racial Prejudice, Interpersonal Attraction, and Assumed Dissimilarity of Attitudes*, 65 J. OF ABNORMAL PSYCHOLOGY 246 (1962) (finding more tolerance of persons who are racially dissimilar with dissimilar attitudes than of racially similar persons with dissimilar attitudes).

91. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1626 (1985). Many of the race studies reported here are described in greater detail in Professor Johnson's excellent article. Professor Johnson also reports on a few studies, not described here, which "fail to find a direct cause and effect relationship between the race of the defendant and guilt attribution." *Id.* at 1631.

92. Miller and Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. OF SOC. PSYCHOLOGY 159 (1978).

93. *Id.* at 159. The race of the defendant was black. *Id.* at 160.

94. *Id.* at 160.

*McGlynn, Megas, and Benson conducted an experimental study⁹⁵ to determine whether “blacks would be judged more severely than whites” by white mock jurors in a case in which insanity was the defense.⁹⁶ These researchers found that black males were adjudged to be guilty more frequently than white male defendants and black females more frequently than white female defendants.⁹⁷ They conclude that “race . . . may influence decisions in cases in which a plea of insanity is entered” and that “the results provide some support for the hypothes[i]s of prejudicial treatment of . . . blacks.”⁹⁸

*Feild⁹⁹ suggests that the theory advanced by Brownmiller¹⁰⁰—that the discriminatory treatment of black rape defendants results from white jurors wanting to safeguard white women from black men¹⁰¹—is correct. In Feild’s experimental study, black defendants were treated more harshly when the victim was white than when they were black.¹⁰²

*Ugwuegbu¹⁰³ conducted an experimental study of the attitudes of whites and blacks toward a simulated case of aggravated and forcible rape. All his subjects met the legal requirements for jury duty in the state of Ohio. Ugwuegbu found that black and white jurors alike evaluated racially dissimilar defendants more harshly than racially similar defendants. He also found that when the victim of the rape was racially similar to the juror, the juror had a greater affect for the victim than otherwise and more feelings of punitiveness toward the defendant.¹⁰⁴ Ugwuegbu also found that when the victim

95. McGlynn, Megas, and Benson, *Sex and Race as Factors Affecting Attribution of Insanity in a Murder Trial*, 93 J. OF PSYCHOLOGY 93 (1976).

96. *Id.*

97. *Id.* at 96. See Table I and accompanying text at 96.

The researchers also found that, on sentencing, blacks were not treated more harshly than whites. They suggest that this result might be caused by juror feelings that blacks are not as responsible as whites. McGlynn, Megas, and Benson, *supra* note 95, at 99.

98. *Id.* at 97.

99. Feild, *Rape Trials and Jurors’ Decisions*, 3 LAW AND HUM. BEHAV. 261 (1979).

100. Brownmiller, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

101. Feild, *supra* note 99, at 278-279.

102. *Id.*

103. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. OF EXPERIMENTAL SOC. PSYCHOLOGY 133 (1979).

104. In an important finding, Ugwuegbu also learned that “[w]hen the evidence is ambiguous,

is racially similar, interracial rape is punished more severely than intraracial rape.¹⁰⁵

*In a fairly sophisticated experimental study designed to determine levels of pretrial guilt probabilities, Klein and Creech¹⁰⁶ found that white mock jurors in burglary, rape, and murder prosecutions believed that defendants charged with victimizing black women were *a priori* less guilty than defendants charged with victimizing white women.¹⁰⁷ They also found that when presented with neutral evidence, tailored by the researchers to favor neither the prosecution nor the defense, white jurors interpreted the evidence more favorably to the prosecution when the victim was white than when the victim was black.¹⁰⁸ Klein and Creech conclude from these findings that white jurors are biased in favor of white victims¹⁰⁹ and that "the white victim receives preferential consideration in all stages of the decision process."¹¹⁰

*In an experimental study under realistic conditions, Bernard¹¹¹ conducted mock jury trials and deliberations. Bernard found a "highly significant difference" in the treatment afforded white and black defendants.¹¹² Black defendants were convicted at a greater rate under otherwise identical fact situations.¹¹³

Case studies of jury deliberations and archival research confirm these experimental results:

the difference in punitiveness between racially similar and racially dissimilar defendants will be especially strong." *Id.* at 135. Ugwuegbu's finding is consistent with the "liberation theory" described by Kalven and Zeisel. H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* (1966). See text accompanying footnote 168 (Kalven and Zeisel liberation theory).

105. Ugwuegbu, *supra* note 103, at 139.

106. Klein and Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 *BASIC AND APPLIED SOC. PSYCHOLOGY* 21 (1982).

107. *Id.* at 24. "For each crime, the race of the male defendant and the female victim were also varied. . . ." *Id.* at 23. "[T]ests of interactions between crime type and race of the victims and race of the defendants were not conducted." *Id.* at 24.

108. *Id.* at 27.

109. *Id.* at 25, 27.

110. *Id.* at 30.

111. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 *LAN & PSYCHOLOGY REV.* 103 (1979).

112. *Id.* at 109.

113. *Id.*

*Professor Dale Broeder studied all the jury trials conducted in an unnamed Northern state's United States District Court for a year-and-a-half in the mid-fifties.¹¹⁴ One section of his study focused on criminal cases in which blacks were defendants.¹¹⁵ His extensive post-trial interviews with the jurors who sat in judgment of these blacks revealed overt, openly-acknowledged racism to a shocking extent. Some jurors had argued that a defendant ought to be convicted solely because he was black.¹¹⁶ One juror stated: "Niggers have to be taught to behave. I felt that if he hadn't done that, he'd done something else probably even worse and that he should be put out of the way for a good long while."¹¹⁷

Broeder further reported that his interviews were filled with phrases such as "dirty jig" and "damn nigger."¹¹⁸ Many jurors articulated fear of inter-racial marriage.¹¹⁹

*Racial prejudice was reported in Kalven and Zeisel's now famous, ground-breaking report on juries, *The American Jury*.¹²⁰ Rather than interviewing jurors, as Broeder had done, they interviewed judges in order to isolate the causes of judge-jury differences in jury trial results.¹²¹ Professor Sheri Johnson summarizes the findings:

. . . the race of the defendant affected jury deliberations in three ways. First, in only twenty-two cases did the jury vote to convict when the judge would have acquitted; in four of these cases, the judge saw substantial evidentiary problems and explained the jury's verdict as prompted by the jurors' antagonism toward the defendant's involvement in interracial sex. Second, the juries tended toward undue leniency in black defendant/black victim assault cases. Third, although judges thought that jurors often acquitted guilty defendants out of sympathy for the particular defendant . . . , black defendants were much less likely than white defendants to be the recipients of such leniency because they were viewed as extremely unsympathetic.¹²²

114. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19.

115. *Id.* at 21-22.

116. *Id.* at 23.

117. *Id.*

118. *Id.* at 24.

119. *Id.*

120. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

121. *Id.*

122. Johnson, *Black Innocence and White Juries*, 83 MICH. L. REV. 1611, 1620 (1985) (footnotes omitted).

Archival research findings confirm the experimental studies and the case studies:

*Gerard and Terry¹²³ determined that in Missouri state courts black defendants were convicted far more often than whites.¹²⁴ In another study covering all persons indicted for first degree murder over a six-year period in a number of Florida counties, Foley found that blacks were convicted in significantly higher proportions than whites.¹²⁵

*Chin and Peterson,¹²⁶ after studying twenty years' worth of civil jury verdicts in Cook County, Illinois, concluded that "[l]itigants' race seemed to have a pervasive influence on the outcomes. . . ."¹²⁷ Black plaintiffs won, as a percentage, less often than white plaintiffs. When black plaintiffs did win, their awards were only seventy-four percent of the average award to white plaintiffs for the same injury. As defendants, blacks also fared poorly, losing more often than white defendants. When blacks and whites sued each other the differences in result were marked, with white plaintiffs doing much better against black defendants than black plaintiffs against white defendants: "White plaintiffs, for example, won sixty-two percent of slip and fall trials against blacks defendants, but black plaintiffs won only fifty percent of such suits against white defendants."¹²⁸

Attractiveness

Should jurors base their judgment of a party, even in part, upon the party's physical attractiveness? Trial theory holds, of course, that attractiveness is an extra-legal factor and that a jury decision

123. Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 70 WASH. U.L.Q. 415 (1970).

124. *Id.* at 430-31.

125. L. Foley, *The Effect of Race on the Imposition of the Death Penalty* (Sept. 1979) (unpublished paper presented at a meeting of the American Psychological Association in New York), cited in Johnson, *supra* note 122, at 1621.

126. Chin and Peterson, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* (1985).

127. *Id.* at viii.

128. *Id.*

must be based solely on the law and the evidence.¹²⁹ Yet what does the evidence demonstrate about the choices jurors make?

*Sannito and Arnolds¹³⁰ questioned hundreds of persons across the country who had served on actual jury trials. They found a significant relationship in criminal cases between the attractiveness of the defendant and the jurors' verdicts.¹³¹ "When jurors were esthetically impressed, they were more prone to acquit; the more their eyes were offended, the greater was their tendency to convict."¹³²

*Kulka and Kessler¹³³ allowed mock jurors to experience a mock trial via a coordinated audio tape and slide presentation in which the subject matter was an automobile accident. They varied the attractiveness of the plaintiff and defendant and found that mock jurors "exposed to an attractive plaintiff and an unattractive defendant . . . would be more likely to find in favor of the plaintiff than those exposed to an unattractive plaintiff and an attractive defendant"¹³⁴ Moreover, attractive plaintiffs were awarded higher damages than unattractive plaintiffs.¹³⁵ The researchers concluded that their research identified "a tendency in society to value physically attractive persons more highly than those who are physically unattractive."¹³⁶

*Efran,¹³⁷ in another less sophisticated study, found that jurors felt less certain of the guilt of physically attractive defendants of either gender and meted out milder punishment to them than to unattractive defendants.¹³⁸ One aspect of Efran's study has special

129. "If justice were indeed blind, the physical attractiveness of a plaintiff or a defendant should be irrelevant to any decisions made by a jury." Kulka & Kessler, *Is Justice Really Blind?—The Influence of Litigant Physical Attractiveness on Juridical Judgment*, 8 J. OF APPLIED SOC. PSYCHOLOGY 366, 377 (1978).

130. Sannito & Arnolds, *Jury Study Results: The Factors at Work*, 5 TRIAL DIPLOMACY J. 6 (Spring 1982).

131. *Id.* at 9.

132. *Id.*

133. Kulka & Kessler, *supra* note 129.

134. *Id.* at 373.

135. *Id.*

136. *Id.*

137. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RES. PERSONALITY 45 (1974).

138. *Id.* at 49. Efran found this effect to be strong in the men he tested, but not in the women.

implications for voir dire: prior to their being tested, the subjects had overwhelmingly rejected attractiveness as an appropriate factor in the decision-making process.¹³⁹

*Stephan and Tully¹⁴⁰ conducted an experimental study in which they found mock jurors in a personal injury case favored attractive plaintiffs with their verdicts significantly more frequently than unattractive plaintiffs. The jurors also awarded significantly more damages to the attractive plaintiffs than to unattractive ones.¹⁴¹

*This disturbing evidence that humans favor those who are attractive over those who are not appears to exist outside the jury box and in the roots of our culture. Dion¹⁴² found that adults viewed a child's misbehavior as less serious when the child was attractive. In particular, a transgression committed by an unattractive child will result in an onlooking adult assigning higher levels of dishonesty and unpleasantness to the child than if the child were attractive. In a comment laden with import for the present discussion about juror behavior, Dion notes that "[i]f the unattractive child is seen as more likely to lie than an attractive child, establishment of his [or her] innocence may not be as easy."¹⁴³

Criticisms of Using Psychological Data

Lawyers and others have a tendency to believe that psychological findings have an immediate and unmediated application in the courtroom. Were life so simple. In fact, the psychological data reported here should not be uncritically embraced. But neither should it be taken lightly. A brief review of the problem of generalizing from psychological theory to legal practice is in order.¹⁴⁴

139. Only 7% of the mock jurors believed that attractiveness should affect judicial decisions. Efran, *supra* note 137, at 49.

140. Stephan & Tully, *The Influence of Physical Attractiveness of a Plaintiff on the Decisions of Simulated Jurors*, 101 J. Soc. PSYCHOLOGY 149 (1977).

141. *Id.* at 150.

142. Dion, *Physical Attractiveness and Evaluation of Children's Transgressions*, 24 J. PERSONALITY & Soc. PSYCHOLOGY 207 (1972).

143. *Id.* at 212.

144. In the psychological literature this problem is known as the problem of "external validity." The external validity of a study "refers to the degree to which the findings or results of research in one setting, such as a laboratory experiment, can be generalized to another setting, such as an actual courtroom." HASTIE, PENROD, & PENNINGTON, *INSIDE THE JURY* 38 (1983).

Critics have pointed to a number of features of experimental studies to support their claims that the results of such studies should be approached cautiously:

—In many of the studies the subjects did not deliberate. Instead, they were often simply questioned as individuals, without any interaction among themselves. Interaction is important, the argument goes, because jurors' biases balance each other out and because minds change as a result of discussion.

—Without the formalities of the courtroom—its solemnity, the oath, etc.—subjects are apt to take a psychologist's study less seriously than an actual jury deliberation.¹⁴⁵

—The subjects of the studies often do not resemble actual jurors and therefore do not reflect typical characteristics of the juror population.¹⁴⁶ Many of the studies, for example, are conducted using college students exclusively.

—The experimental studies involve unrealistic simulations of jury trials. The "trial" experienced by the mock jurors is sometimes substantially unlike the trial experienced by actual jurors. For example, subjects sometimes receive nothing but brief written summaries of "trials" on which to base their individual reactions.¹⁴⁷ Moreover, the written summaries may unnaturally emphasize the extra-legal elements to be tested¹⁴⁸ and de-emphasize proper evidence.¹⁴⁹ By contrast, actual jurors receive information at trial in an integrated, holistic and perhaps more balanced way.

The problem of external validity is a real one. The criticisms leveled against experimental studies are not without foundation.¹⁵⁰

145. *Id.* at 41.

146. See Bray and Kerr, *Methodological Consideration in the Study of Psychology in the Courtroom*, in *PSYCHOLOGY OF THE COURTROOM* 287, 308 (1982).

147. An example of this criticism can be found at Bernard, *Interaction Between the Race of the Defendant and That of the Jurors in Determining Verdicts*, 5 *LAW & PSYCHOLOGY REV.* 103, 104-05 (1979). See also Bray & Kerr, *supra* note 146, at 306-07.

148. HASTIE, PENROD, & PENNINGTON, *supra* note 144, at 41.

149. "[A]n attempt is often made to keep the evidence weak or ambiguous in experiments to assure maximum sensitivity to the manipulation's effect." Tanford & Tanford, *Better Trials Through Science: A Defense of Lawyer-Psychologist Collaboration*, 66 *N.C.L. REV.* 741, 755 (1988).

150. For more detailed expositions of this argument, see Bermant, McGuire, McKinley and Salo, *The Logic of Simulation in Jury Research*, 1 *CRIM. JUST. & BEHAV.* 224 (1974); Davis, Bray, and Holt, *Empirical Study of Decision Processes in Juries*, *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY*

Upon careful analysis, however, the argument against taking experimental results seriously must fail.

Implicit in the criticisms of experimental studies is the notion that the best way to draw deductions about juror behavior is to study the workings of actual juries. There are, however, two problems with this approach. The first is that it is improper to eavesdrop on jury deliberations. In 1954, University of Chicago researchers, using hidden microphones, taped the deliberations of juries in five cases in a federal district court in Kansas, unbeknownst to their subjects, but with the assent of the presiding judge. Not only were the researchers roundly criticized,¹⁵¹ but their methodology was promptly proscribed by Congress.¹⁵²

The second problem with the study of actual juries is the difficulty, if not impossibility, of obtaining internal validity in such studies. Internal validity "refers to the degree to which changes in the measured dependent variables can be attributed to the manipulated variables."¹⁵³ In an experimental study, the researcher can study the effect of a factor, such as racial bias, by holding all other factors constant and manipulating the isolated racial factor only. While this procedure might put added and perhaps unrealistic emphasis on the factor being tested, it does allow for a clear observation of the effect of race on decision-making. It is impossible to construct such conditions in field research. Not only is every actual trial different from every other trial, thus making it impossible to compare effects under otherwise identical conditions, but it is im-

326 (1977); Weiten and Diamond, *A Critical Review of the Jury Simulation Paradigm*, 3 *LAW & HUM. BEHAV.* 71 (1979); and Vidmar, *The Other Issues in Jury Simulation Research*, 3 *LAW & HUMAN BEHAV.* 95 (1979). See also, Colasanto and Sanders, *Methodological Issues in Simulated Jury Research* (unpublished revision of a paper delivered in 1978 to a meeting of the Law and Society Association). The Colasanto-Sanders paper, as well as some of the other authorities mentioned here, are described in some detail in Wasserman and Robinson, *Extra-Legal Influences, Group Processes, and Jury Decision-Making: A Psychological Perspective*, 12 *N.C. CENT. L.J.* 96 (1980). See Strodtbeck, *Social Process, the Law, and Jury Functioning*, (Evan ed. 1972); *LAW AND SOCIOLOGY* 144, 151 n. 8 (1962).

For a response to many of these criticisms, see Bray & Kerr, *supra* note 146.

151. See Strodtbeck, *supra* note 150.

152. 18 U.S.C. § 1508 (1982). The author is unaware of any similar West Virginia statute. Eavesdropping in West Virginia, however, like eavesdropping in other jurisdictions, would certainly not be tolerated and would surely be punished through the court's contempt powers.

153. Hastie, Penrod, & Pennington, *supra* note 144 at 38.

possible to control, limit, and clearly observe the input of information the jurors are receiving. As a result of the illegality of eavesdropping and the difficult, if not impossible, conditions under which systematic field research would have to be conducted, the use of actual jury trials is limited to case studies and statistical analyses. All other knowledge must come from experimental studies.

This lack of choice, however, does not mean that researchers have been insensitive to the criticisms advanced against the conditions under which their experiments have been conducted. Researchers have employed non-student subjects and constructed more realistic test conditions and materials.¹⁵⁴ While it is true that some of the data described above come from experiments employing students, the attacks made upon the use of students as subjects have been largely discredited.¹⁵⁵

Moreover, some of the doubts created by the methodology employed in experimental studies have been greatly lessened, if not removed entirely, by the confirmation those studies received in case studies or in the statistical analyses performed on the results of actual trials. This pattern is particularly strong in the areas of race, socioeconomics, and gender.¹⁵⁶

With respect to the charge that deliberations are not built into experimental simulations, one must admit this to often be the case. The significance of this departure from reality is questionable, however. Deliberations are alleged to be important because jurors have

154. Tanford & Tanford, *supra* note 149.

155. Researchers who have compared the use of students as against non-student adults have found "little or no difference in comparisons of verdicts by student and adult jury-eligible respondents in the same cases." MacCoun, *Experimental Research on Jury Decision-Making*, 244 *Sci.* 1046 (1989).

Ugwuegbu offers an interesting defense to the criticisms of the use of college students as subjects. "[T]here is no strong a priori reason to believe that real jurors would be able to set aside these biases, especially if the jurors are less sophisticated than university students." Ugwuegbu, *supra* note 103, at 144-45.

156. See, e.g., *supra* note 53-54, 69, 73, 76, 78, 80-81, 83, 85. These studies indicate that men give women unfairly low personal injury awards, that the greater the socioeconomic distance between jurors and defendants the greater the likelihood of conviction, and that whites give blacks unfairly low personal injury awards and give them verdicts less often than they give white plaintiffs verdicts.

Insofar as it is possible for a body of studies to be self-confirming, it should be also noted that the weight of the experimental studies favor the conclusions reached in this article. As in all the social sciences, there is not unanimity.

the opportunity to *counter* each other's biases and prejudices. The critics argue that experimental studies, by omitting deliberations, are fatally flawed because the actual system cleanses the jurors of bias. This is a ridiculous position.¹⁵⁷ If that were the case across the board, then how do the critics explain the studies of actual trial data that report men disfavoring female personal injury plaintiffs, and whites disfavoring black personal injury plaintiffs? How do the critics explain the tendency, observed in actual trials, of upper-class persons to convict lower-class persons? The critics, moreover, are wrong in their assumptions on yet another basis. Their criticism rests on the notion that a jury represents a fair cross-section of the community such that there is a balancing of biases and counter-biases. It has been long recognized, however, that the jury, as a fair cross-section of the community, exists in constitutional theory only. Take West Virginia juries, for example. To begin with, civil juries have been cut down to six persons in number. The smaller the jury, the less likely it is to represent minority interests.¹⁵⁸ It is inevitable, therefore, that such small juries would have within them a less well-balanced mix of biases and counter-biases. Even more important than this is the fact that less than perfect West Virginia juries are pre-ordained. One of the principal sources from which we draw our jurors is the voter registration list. Such lists are widely recognized as being unrepresentative of the community.¹⁵⁹

A third response to the criticism regarding lack of deliberations is that actual jurors are questioned *prior* to deliberations. It is precisely their pre-deliberation state with which we are concerned. The very purpose of voir dire is to root out bias and prejudice *before*

157. There is no "assurance that deliberation will consistently reduce bias. . . ." Wasserman & Robinson, *supra* note 150, at 135. Indeed, some "studies with very close cases show sustained or even enhanced bias after deliberation." MacCoun, *supra* note 155 at 1048.

158. "[R]udimentary sampling theory indicates that a smaller jury will be less representative of minority interests in the community." MacCoun, *supra* note 155 at 1048.

159. See, DiSalvo, *The Key-Man System for Composing Jury Lists in West Virginia—The Story of Abuse, The Case for Reform*, 87 W. VA. L. REV. 219 app. A at 257-59 (1984-5). W. VA. CODE § 52-1-5 (1988) requires the use of at least two source lists for the compilation of the master list from which jurors are summoned: (1) lists of persons who pay state income tax; (2) persons who hold drivers' licenses; and (3) lists of registered voters.

Almost all counties avoid the use of taxpayer lists. Most merge driver and voter lists in ways that give undue emphasis to voter lists, the less representative of the two lists.

they get to the deliberation room. Experimental studies, therefore are useful for telling us what is going on in the minds of actual members of a jury panel.

A final comment with respect to this criticism concerns the behavior of actual jurors. Since the early research done by Kalven and Zeisel,¹⁶⁰ it has been acknowledged that “with very few exceptions the first ballot decides the outcome of the verdict. . . .”¹⁶¹ If this is so, then the initial feelings of the juror—including the juror’s biases and prejudices—may count more heavily than the deliberations that follow.¹⁶² Experimental studies that sample the juror’s proclivities before deliberation possess importance from this standpoint.¹⁶³

For all these reasons, the criticism that experimental studies should include deliberations is hardly a conclusive argument against the use of experimental data.

Finally, no claim is made here that there is a one-to-one relationship between experimental results and actual courtroom behavior. Such a claim would be naive and foolish. Trial lawyers know there is a multitude of reasons for a jury’s decision—the strength of the evidence, the quality of the trial lawyers, the strategies they employ, the individual experiences of the jurors, their choice of foreperson, the instructions of the court, the politics of the time—the list is virtually endless. Because there are many factors that make up a jury’s decision, however, is no reason to deny what the psychological studies are telling us—that human beings have *particular biases*. *These biases and prejudices constitute one of the factors that*

160. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

161. *Id.* at 488. For a review of the work done since the time of Kalven and Zeisel, offering different models for explaining this phenomenon, cf. MacCoun, *supra* note 155 at 1047-48.

162. There is no intention on the part of the author to state here that deliberations are an exercise in futility. The question of the relationship between deliberations and outcome is a complex one and is outside the scope of this article. For in-depth discussion of the subject see S. PENROD, R. HASTIE & N. PENNINGTON *supra* note 144; Wasserman and Robinson, *supra* note 157.

163. This is not to deny that juries often deliberate before taking a first vote.

While there are some reports that deliberations reduce the impact of extra-legal factors, it is apparent deliberations do not remove them completely. Feild, *Rape Trials and Jurors' Decisions*, 3 L. & HUM. BEHAV. 261, 281 (1979).

play into a jury's decision, especially in cases in which the evidence is ambiguous.¹⁶⁴ Bray and Kerr put the point this way:

. . . we are not persuaded that simulation studies must accurately estimate the strength of an effect or that the effects must account for large amounts of variability in the behavior of actual courtroom actors in order to be useful. If our interest is exclusively predictive, weak effects may not be terribly useful. But if our interest extends to the ability of courtroom participants to carry out their responsibilities, even small or infrequently applied biases may be important, particularly when they are based on extralegal factors or might be remedied through minor procedural safeguards. Nor is it essential that an experimental treatment in a simulation study accurately mirror the range in variation or prominence of the independent variable in "typical" trials. In this regard, one might draw an analogy between strong manipulations in simulations and feeding massive doses of a substance to laboratory rats to determine possible carcinogenic effects of that substance. Even if saccharine is not a major cause of human bladder cancer, demonstrating that massive saccharine doses reliably lead to bladder cancers in rats can alert us to possible risks and can guide future research. Demonstrations that artificially powerful treatments reliably affect courtroom behavior can serve similarly valuable functions.¹⁶⁵

There is no one-to-one relationship between a demographic characteristic and the behavior of a particular juror in a particular case. Whether a juror's biases and prejudices affect the jury's decision "depends in complicated ways on the details of a specific case."¹⁶⁶ Wasserman and Robinson offer no fewer than five possible ways in which "extra-legal factors" can enter into the decision-making process. In ascending order of subtlety, they are:

164. See *supra* note 104 and accompanying text.

165. Kerr and Bray, *supra* note 146, at 317.

MacCoun puts it somewhat differently: "When the objective is to precisely estimate the magnitude of the relations among variables in actual jury trials, the archival method is more appropriate. The role of mock jury experimentation is to explain the processes underlying those relations." MacCoun, *supra* note 155 at 1046.

166. S. KASSIN & L. WRIGHTSAM, *THE AMERICAN JURY ON TRIAL*, 29 (1988). The authors give an example:

In one study, for example, Rita Simon had people listen to a recorded simulation of a criminal trial involving either a breaking-and-entering or an incest charge. In both cases the defendant pleaded not guilty by reason of insanity. She found that compared to their male counterparts, female jurors were more lenient toward the housebreaking defendant but harsher toward the accused in the incest case. That kind of interaction is more the rule than the exception in the relationship between juror demographics and verdicts.

See also Davis, Bray & Holt, *The Empirical Study of Decision Processes in Juries*, in *LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY* 327-33 (1977).

— . . . the factor may be explicitly considered and treated as having probative value just as any other item of evidence

—The extra legal factor may affect the standard of proof

—The extra-legal factor may “slide into” a legitimate consideration that provides the basis or pretext for its consideration

—By causing the decision-maker to favor one side, the extra-legal factor may motivate [the juror] to emphasize the evidence favoring that side

—The extra-legal factor may so dispose the fact-finder toward one side of the case that makes the evidence for that side appear much stronger”¹⁶⁷

In an earlier era of research, Kalven and Zeisel took a simpler but similar approach in constructing their “liberation hypothesis”:

[There is] a central proposition about jury decision-making, what we shall call the liberation hypothesis. . . . [In one category of cases], there is an evidentiary difficulty to which the jury may be responding and there is also a sentiment or value to which it may be responding. Would the jury have responded to one stimulus without the impact of the other? . . . The sentiment gives direction to the evidentiary doubt; the evidentiary doubt provides a favorable condition for a response to the sentiment. The closeness of the evidence makes it possible for the jury to respond to sentiment *by liberating* it from the discipline of the evidence. . . .

The point here is fundamental to the understanding of jury psychology and jury process. We know . . . that the jury does not often consciously and explicitly yield to sentiment in the process of resolving doubts as to evidence. The jury, therefore, is able to conduct its revolt from the law within the etiquette of resolving issues of fact.¹⁶⁸

The interactions that produce jury verdicts are complex. Complexity, however, should not blind us to the presence of factors we

167. Wasserman and Robinson, *supra* note 157, at 106-109.

168. H. KALVEN AND H. ZEISEL, *supra* note 160, at 165 (1966) (emphasis original). Reed casts the theory in a slightly different form:

The legal ideal posits both a rational man and an individual actor. Research and observations of aspects of the trial point to the converse. Extraneous matters vie with the evidence for the jury's deliberating time. Experimental and actual jury research indicate that only a portion of the time spent in the jury room is given to discussion of the facts or evidence in the case. Most of the time is spent talking about trial functionaries or matters wholly foreign to the trial. Voting, on the other hand, is supposed to be determined by the facts or the evidence in the case. Civilly the measure is “preponderance”; criminally, “beyond a reasonable doubt”. Both measures, however, create “gaps” between the evidence and the verdict, which makes it feasible for the juror to vote his values rather than those of the legal or politico-legal system.

Reed, *Jury Deliberations, Voting and Verdict Trends*, 45 S.W. Soc. Sci. Q. 361, 370 (1965).

would rather not have present in the process. Where we find racism, class prejudice, sexism and the like, fidelity to the theory of trials obligates us to root them out.

IV. A PROPOSAL FOR REFORM

A. Is the Present System Up to the Task of Dealing with the Biases and Prejudices of Our Time?

An example of quiet prejudice

Milas Martin, a 31-year old¹⁶⁹ factory hand at the former Volkswagen plant in South Charleston, West Virginia, died on a Charleston Area Medical Center x-ray table while undergoing an intravenous pyelogram.¹⁷⁰ Mr. Martin, a sufferer from diabetes mellitus, had an acute anaphylactoid reaction¹⁷¹ to the dye injected during the pyelogram.

Mr. Martin's widow sued. Her expert witness testified that the economic loss alone to the family was between \$768,000 and \$865,000. The widow also asked for non-economic damages for the loss of her husband and the loss of their children's father.

The jury returned a damage award of less than a third of the damages, \$250,000.

Why was the Martin verdict so low? Was it because Mr. Martin was black and the jury entirely white?¹⁷² Why did another jury in the same term, drawn from the same venire, return a verdict close to million dollars for another wrongful death plaintiff? Was it because that plaintiff was white?¹⁷³

169. Most of the facts concerning Milas Martin and his injury are taken from *Martin v. Charleston Area Medical Center*, 382 S.E.2d 502 (W. Va. 1989). Martin's age was reported in an interview with Barry Hill, Mr. Martin's attorney (July 27, 1989).

170. A roentgenogram of the ureter and renal pelvis. *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* 1424 (1981).

171. An anaphylactic shock is a severe allergic reaction resulting from the injection of substance to which a person has been sensitized. *Id.* at 80.

172. Author interview with attorney Barry Hill (July 27, 1989).

173. *Id.*

The irrelevancy of cause challenges

On voir dire, all the *Martin* jurors swore to be fair to the parties.¹⁷⁴ The jurors were probably all sincere people who took the juror's oath seriously.¹⁷⁵ Did racism, however, subtly infect the jury's decision?

None of the jurors was disqualified on the basis of cause, as that term is described in Part I of this article,¹⁷⁶ nor was any disqualified for favor on the grounds that the juror could not be fair to blacks.¹⁷⁷ The West Virginia Supreme Court, when the case reached it, reversed the jury's verdict as inadequate and sent the case back to be re-tried. In doing so, the court bluntly stated that its decision was "informed to some extent by the fact that the plaintiff is a black woman suing for the death of a black husband and father on behalf of herself and four black children."¹⁷⁸ Then, citing Chin and Peterson,¹⁷⁹ the court went on to say that in "cases of this type involving white plaintiffs," the awards "are substantially higher. . . . In short, it is well documented that some jury awards are affected by the race of the plaintiff."¹⁸⁰ The *Martin* case is anecdotal evidence that, sadly enough, the racism that exists in other parts of our country is also at work in West Virginia juries. It is also anecdotal evidence that our voir dire practices must be improved. The old categories of cause challenges, handed down to us from the time of

174. Strangely enough, there appears to be no explicit requirement in the W. VA. CODE that jurors be sworn. As pointed out to the author by Richard Rosswurm of the West Virginia Supreme Court Administrator's Office, a number of provisions do, however, imply such a requirement. See, e.g., W. VA. CODE § 56-6-12, 56-6-12(a), and 56-6-16 (1966). Telephone interview with Richard Rosswurm, West Virginia Supreme Court Administrator's Office (August 10, 1989).

The oath given in Monongalia County Circuit Court is illustrative of the oaths given throughout the state. The juror must swear or affirm that he or she will "well and truly try the matters in issue and a true verdict render according to the law and evidence." L. STARCHER & F. DEPOND, A HANDBOOK OF INFORMATION FOR TRIAL JURORS, 7-8.

175. Indeed, the plaintiff's lawyers did not voir dire on the race question because they wanted to credit the jurors with fairness and because they did not believe that racist jurors would admit to racism in public. Interview with Barry Hill, *supra* note 169.

176. DiSalvo, *Gaining Access to the Jury: A Critical Guide to the Law Selection in West Virginia, Part I: A Survey of the Law of Challenges*, 91 W. VA. L. REV. 217, 224-26 (1988-89).

177. Interview with Barry Hill, *supra* note 169.

178. *Martin*, 382 S.E.2d at 506.

179. Chin and Peterson, *supra* note 126.

180. *Martin*, 382 S.E.2d at 506.

Blackstone, are wholly inadequate for dealing with racism, sexism, class prejudice, and the like. Recall the common law grounds for cause challenges:

- kinship
- service as an arbitrator for either party
- interest in the cause
- an action pending between a juror and a party
- the juror has taken money for his verdict
- the juror was formerly a juror in the same case
- the juror is the party's master, servant, counselor, steward or attorney or of the same society or corporation
- the juror is a member of the law enforcement community.¹⁸¹

None of these grounds have any direct or useful connection with the types of bias and prejudice with which we are concerned here.

The practical constraints on the intelligent exercise of favor challenges

In theory, jurors plagued with racism, classism, sexism, or like prejudices and biases will be removed on the basis of favor.¹⁸² Indeed, the controlling statute requires that no juror be "sensible of any bias and prejudice."¹⁸³ Unfortunately, a number of factors conspire to make it the exception rather than the rule that jurors carrying modern social biases and prejudices will be removed.

First, many judges refuse to allow lawyers any latitude in questioning jurors about social issues, such as racism, sexism, and class

181. *State v. Dushman*, 79 W. Va. 747, 91 S.E. 809 (1917), discussed in DiSalvo, *supra* note 176, at 228-48. These are in addition to the statutory grounds for cause challenges, which themselves are equally irrelevant. See DiSalvo, *supra* note 176, at 226-28.

182. The grounds for favor challenges are reviewed at DiSalvo, *supra* note 176, at 250-61.

183. W. VA. CODE § 56-6-12 (1966).

prejudice.¹⁸⁴ This is particularly true in those cases in which there are no special circumstances making such an inquiry conspicuously necessary.¹⁸⁵ In the typical case judges usually confine lawyers to the narrow bounds of cause challenges and a narrowly understood range of favor grounds. Indeed, without a substantial change in his or her thinking, it would be a radical departure for any trial judge to allow lawyers to test social attitudes.¹⁸⁶ Many would recoil at the thought of a lawyer in a routine personal injury case, for example, using open-ended questions to probe a male juror's attitudes toward women. Without being aware of the prejudice men have been proven to have against women litigants in such situations, the court would be justified in believing such questioning is a waste of judicial resources.

A second problem arises from the tradition of judge-dominated questioning that adheres in some of our courts. The problem is that even if judges were disposed to question jurors about their social attitudes, jurors are not likely to tell the court the truth. The judge sits as the courtroom's pre-eminent authority figure. The judge represents the best ideals of our society, among them equality before the law. When a judge questions a juror about the juror's ability to be fair, the juror, consciously or not, reacts to a need to give the socially acceptable answer to the black-robed judge.¹⁸⁷ So, for example, when a judge asks a white juror whether the juror can be

184. Psychologists who have studied actual trial data report that judges in cases with black defendants "were more likely to accept [voir dire] questions [submitted by defense attorneys] that bore directly on the law and legal issues, and they tended to reject questions that dealt with more general experiences prospective jurors had with blacks. Furthermore, the law-related questions were most often posed in a close-ended way, for example, "Do you realize that the presumption of innocence applies to a black defendant as well as to a white defendant?" whereas the more general questions were more likely to be open-ended, for example, "How would you describe your experience with black people at your job?" Thus, judges tended to reject open-ended questions, and those that dealt with matters outside the courtroom." Hans, *The Conduct of Voir Dire: A Psychological Analysis*, 11 JUST. SYS. J. 40, 54 (1986).

185. This is not to imply that due process should not require such questioning under certain circumstances. Again, this Article does not address the jurisprudence of the United States Supreme Court on when such questioning may sometimes be required. See *supra* note 1.

186. "The average judge's idea of voir dire is just to ask, 'Can you be fair?' Once the prospective juror has answered 'Yes,' everything else is considered irrelevant and the judge passes on to the next juror. . . ." Garry, *Attacking Racism in Court Before Trial*, MINIMIZING RACISM IN JURY TRIALS xxii (1969).

187. Vinson, *Juror Bias: Are Present Legal Remedies Enough?*, 9 TRIAL DIPL. J. 19, 24 (1986).

fair to a black criminal defendant, even the most prejudiced juror will likely say "yes."¹⁸⁸

A recent experimental study conducted by Jones,¹⁸⁹ employing realistic test conditions, demonstrates this point. Jones' data confirms the hypothesis that "jurors who [are] interviewed by a judge . . . remain in states of relative heightened public self-awareness" that "cause their self-reports of attitudes and beliefs to differ considerably from their privately held attitudes and beliefs."¹⁹⁰ Jones found that jurors were "considerably more candid in disclosing their attitudes and beliefs about . . . important topics during an attorney-conducted voir dire. . . . [D]uring a judge-conducted voir dire jurors attempted to report not what they truly thought or felt about an issue, but instead what they thought the judge wanted to hear."¹⁹¹ Jones' conclusion was that "there may be implicit pressures in the courtroom toward conformity to a 'perceived standard' that differs *depending on who conducts the voir dire.*"¹⁹²

Third, when lawyers are allowed to question at all, they must question the jurors, absent some special circumstance,¹⁹³ in a public setting, before their fellow jurors. This is ineffective for one of the same reasons judge-questioning is ineffective—the juror senses he or she is on trial before his or her peers and attempts to give the socially acceptable answer.¹⁹⁴ The formal, ritualistic atmosphere of

188. "Evidence suggests that jurors with clearly defined biases continue to protest that they can be fair." *Id.* at 20. Of course, a trial court should not be satisfied with the mere denial of prejudice when there is the suggestion "of the probability of bias." *Lambert v. Sisters of St. Joseph of Peace*, 560 P.2d 262, 266 (Or. 1977), quoted with approval in *West Virginia Department of Highways v. Fisher*, 289 S.E.2d 213, 219 (W. Va. 1982). *See also*, *State v. Williams*, 160 W. Va. 19, 26, 230 S.E.2d 742, 747 (1976), "The trial court is charged with ascertaining in the first instance whether there is bias or prejudice on the part of the juror and, although the opinion of the juror is entitled to consideration, it should not be taken as conclusive." One would suspect the *Williams* rule to be honored principally in the breach.

189. Jones, *Judge-Versus Attorney-Conducted Voir Dire*, 11 LAW & HUM. BEHAV. 131 (1987).

190. *Id.* at 134.

191. *Id.* at 143.

192. *Id.* (Emphasis added). In accord with Jones' findings are those reported by Vidmar & Melnitzer, *Juror Prejudice: An Empirical Study of a Challenge for Cause*, 22 OSGOOD HALL L.J. 488 (1984).

193. *See supra* notes 27-44 and accompanying text.

194. [I]t is important to understand the forces of conformity acting on each of the prospective jurors. They are thrust into an unfamiliar environment with a group of strangers

the courtroom probably contributes to this reluctance to be forthcoming with one's true feelings.¹⁹⁵

The ineffectiveness of public questioning was amply demonstrated in *State v Dean*.¹⁹⁶ (*Dean* and *Martin* are the only West Virginia cases of which the author is aware in which jury verdicts were overturned on the basis of juror racism.) In *Dean*, all twenty jurors were asked, as a group, "whether or not [they] were biased in favor of or prejudiced against the members of the Negro race?" Juror Clifford Burns sat in stony silence in response to that question. After the black defendant was convicted, Burns was heard to voice his true prejudicial feelings about blacks in a rather different setting—a bar. It is socially acceptable to announce one's racist views in bars, but not in front of a judge or other jurors. Despite the widespread incidence of racism, sexism, and class prejudice, it simply is not socially acceptable to publicly claim such outlooks on life.

The fact is that jurors are more truthful when questioned individually and privately.¹⁹⁷ A 1982 study of actual trials in Kentucky state courts by Nietzel and Dillehay¹⁹⁸ demonstrated that "individual, sequestered voir dire . . . permit[s] a fuller disclosure of juror bias."¹⁹⁹

and may well be threatened by it. Such a situation will tend to elicit conformity on the part of each juror (citation omitted); especially in a threatening situation, it is unlikely that a juror will reveal his or her true feelings when a group question is asked of an entire venire. Similarly, it is not likely that a juror will discredit himself or herself when asked a direct question in front of other people. Also, whenever jurors observe the voir dire of others, they become educated as to the "appropriate" responses. Thus, conducting the voir dire as a group process will tend to exert social pressures on the prospective jurors to give socially desirable responses.

Elwork, Sales, & Suggs, *The Trial: A Research Review*, THE TRIAL PROCESS (1981).

Vidmar and Melnitzer concur and provide an additional reason jurors are not forthcoming with the truth in public settings: "[a]n admission of prejudice may be perceived as an admission of weakness of character, especially when the other panelists. . . give the appearance of not holding biases against the accused." Vidmar & Melnitzer, *supra* note 192, at 510.

195. See Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 264 (1981).

196. 130 W. Va. 257, 58 S.E.2d 860 (1960).

197. An attorney for the plaintiff in *Martin* states that had he the right to conduct individual, in-chambers voir dire he may very well have decided to squarely confront the race issue. Interview with Hill, *supra* note 169.

198. Nietzel & Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 LAW & HUM. BEHAV. 1 (1982).

199. *Id.* at 10.

These researchers found a marked difference resulting from in-chambers voir dire: "When attorneys pose questions carefully tailored to specific jurors the resulting dialogues are richly revealing relative to the yield in open court, even when the judge permits questions put to individuals."²⁰⁰

Fourth, it is often the case that when lawyers are successful in coaxing individual jurors to admit bias or prejudice, judges then intervene by cross-examining the juror in an effort to lead the juror into saying that he or she can actually judge the case on the law and evidence alone. This is nothing short of exploiting the judge's status in the courtroom in order to put words in the juror's mouth that will appear in the appellate record to meet the technical standards.²⁰¹ Although the case did not involve social bias or prejudice, the trial court's questioning in *State v. Bennett*²⁰² is illustrative of the type of leading on voir dire in which judges often engage. The juror in *Bennett* indicated that the community was "pretty much against" the defendant and that the defendant was more likely to have committed the crime of which he was accused than not.²⁰³ The trial court intervened, as recounted by the Supreme Court:

Even though you think he's probably more guilty than he is innocent, you've got to put that out of your mind. Can you do that?" [The juror's] response was "Yeah." Again, at the conclusion of this questioning, the judge asked [the juror], "I know you don't want to serve on this jury, and I understand that, but someone's got to serve. If you have to serve will you be fair?", to which [the juror] answered, "I'll do my best." [The judge] then asked "Can you be fair?", and [the juror] said "Yeah."²⁰⁴

200. *Id.* Professor Lawrence Wrightsman, in his work, *PSYCHOLOGY & THE LEGAL SYS. CONCURS: After all, just how effective in unearthing bias is a directive, posed to 12 or 28 prospective jurors sitting together in a jury box, to "raise your hand if you feel that you are prejudiced against black people and that that would stand in your way of being fair in this case?" In a group setting, few people will acknowledge socially unacceptable feelings. Rather, one offers whatever is the socially correct way to respond. A more open-ended sort of questioning in the judge's chambers will be more revealing. It also keeps jurors from witnessing their predecessors' responses and rehearsing their own.*

Wrightsmann, *PSYCHOLOGY & THE LEGAL SYS.* 244 (1987) (emphasis added).

See also, Vinson, *The Biased Juror* 14 *THE BRIEF* 22, 27

201. See DiSalvo, *supra* note 176, at 249.

202. No. 18540 (W. Va. June 15, 1989).

203. *Id.* at 2.

204. *Id.* at 3. For another example in which the prospective's opinions about his ability to be fair were bounced around the courtroom like a ping-pong ball by counsel and the trial court alike, see *State v. Perdue*, 372 S.E.2d 636 (1988).

Intervention of this sort, all too common in trial courts, makes it difficult for lawyers to effectively challenge bias and prejudice.²⁰⁵

For all these reasons, favor challenges are ineffective against modern bias and prejudice without certain changes in the manner in which voir dire is conducted. It is to those changes I now turn.

B. *Getting Serious About Empaneling Fair Juries*

The previous discussion makes it apparent that serious changes in voir dire practice are necessary to ferret out modern biases and prejudices. First, because jurors are more truthful about their biases and prejudices with lawyers than with judges, lawyers must be allowed to conduct voir dire. Second, because jurors are less truthful in public than in private, questioning in chambers must be the rule rather than the exception.²⁰⁶ Third, because modern biases and prejudices cannot be discovered by simply asking jurors close-ended questions (e.g., "Can you decide the case on the law and evidence alone?"), judges must re-tool their understanding of favor challenges and allow the broader, open-ended questioning necessary to elicit

205. The courts also signal the correct answers to jurors, even when there has been no expression of unease by the juror, by using close-ended questions.

Zymewski v. Sluss, No. 78-453 (Kanawha County Cir. Ct. 1978), was a civil action for damages growing out of a rape. The questioning of a prospective juror by the court in that case is illustrative of how a judge's language leads jurors, whether they are prejudiced or not, to the correct answer:

THE COURT: All right now, if in this case the evidence were to show that the plaintiff is a white woman, and if the evidence in the case were to show she was raped by a black man, would that circumstance standing alone make it difficult or impossible for you to decide this case in accordance with all the evidence and in accordance with the law of the case given you by the Court? First I will ask you if you understand the question.

JUROR: You are asking me if I would be quicker to condemn a colored man than a white man?? Is that what your question is?

THE COURT: That may be part of it, but would the matter standing alone, just because the evidence would show it was a black man, if it were, and the woman was a white woman, would that fact alone cause you any difficulty or prejudice or feelings in the case, in hearing the case?

JUROR: I don't think so, because a wrong is a wrong, whether it is done by black, white, red or yellow. That is the way I look at it. It doesn't make any difference if a person is red or black or white, if the evidence shows they did wrong, I don't think I would go any quicker against a colored man than I would a white man for the same wrong.

Transcript of individual voir dire. *Id.* at 6-7.

206. Voir dire, of course, cannot be completely closed. While other prospective jurors may be excluded from the questioning, the public cannot. See *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). See also *supra* note 17.

information to support favor challenges on the basis of racism, sexism, classism, and the like.²⁰⁷

The West Virginia Legislature should enact voir dire legislation to remedy this situation.²⁰⁸ As an alternative to legislation, the West Virginia Supreme Court should amend our rules of civil and criminal procedure, effecting these proposed changes. In either case, the Supreme Court of Appeals should urge the circuit courts to exercise their discretion by allowing attorneys to pursue lines of open-ended voir dire questions designed to test for the presence of racism, sexism, classism, and the like. Such questioning should be allowed in *all* cases, for biases and prejudices exist not only in the obvious cases, such as in *Martin*, but also in garden variety cases, such as automobile injury actions.²⁰⁹

The proposal advanced here to secure by statute the right to attorney-conducted, individual, in-chambers voir dire will undoubtedly resurrect criticisms of attorney-conducted voir dire that have been raised before.²¹⁰ Rather than fully re-create here the debate over

207. What Professors Bastress and Harbaugh have said about client interviewing is equally applicable to interviewing of jurors:

The primary means of obtaining information during the . . . interview is the posing of a series of questions to the client. Questions, however, can be of various types, each type having a different goal. Your inquiries can be broad or narrow, leading or nonleading. In this stage of the interview, you should prefer broad questions to narrow ones, nonleading ones to leading ones. Since your goal in the initial client interview (and many follow-up interviews) is to obtain information from the client's perspective, . . . you should avoid tainting the product with narrow, leading questions. . . . Leading questions obviously exert the most stringent interviewer control. They therefore are most useful when you seek to maintain the maximum amount of control over what is said.

R. Bastress and J. Harbaugh, *Interpersonal Skills for Lawyers: Interviewing, Counseling and Negotiation* 205, 349 (unpublished manuscript). See also R. GORDEN, *INTERVIEWING* 350-353 (1975).

208. A bill sponsored by Senator Howell Heflin of Alabama calls for establishing a right to attorney-conducted voir dire in the federal courts. S. 591 and S. 592. See Heflin, *Let Lawyers Ask the Questions*, A.B.A. J. 14, 20 (November 1984). See also Moore, *Lawyers Split Over Voir Dire Procedure*, 13 LITIGATION NEWS 5, No. 3 (February 1988).

209. See CHIN AND PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* (1985).

For alternatives to the proposal advanced here, see Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Standards*, 27 STAN. L. REV. 1493 (1975) (urging courts to presume prejudice under certain circumstances where it is not now presumed and suggesting procedural guidelines) and Note, *Juror Bias—a Practical Screening Device and the Case for Permitting its Use*, 64 MINN. L. REV. 987 (1980) (suggesting use of attitudinal questionnaires).

210. For reviews of these arguments, see Van Dyke, *Voir Dire: How Should It Be Conducted*

these criticisms that occurred in the '70s and early '80s, allow me to summarize the criticisms and the responses that discredited them.²¹¹

The criticisms fell into two broad categories. The first was that voir dire was being exploited by lawyers for reasons unattached to the purposes for which voir dire was designed. A 1973 decision of the Supreme Court of California accurately reflects this criticism:

Such examination is not for the purpose of determining the exercise of peremptory challenges. . . . Neither is it the function of the examination of prospective jurors to educate the jury panel to particular facts of the case, to compel the jurors to vote a certain way, to prejudice the jury for or against a certain party, to argue the case, or to instruct the jury in matters of law.²¹²

The court claimed lawyers were employing voir dire "as a ploy to gain tactical advantage," with a view toward securing a jury that would be "more fair to one side than the other."²¹³ The only true purpose of voir dire, according to the Court, is "to weed out unsuitable jurors."²¹⁴

The second criticism was of the "inordinate time consumed in the process of selection of jurors."²¹⁵ Lawyers were accused of asking "tedious and time-wasting questions, which are seemingly interminable and repetitious. . . ."²¹⁶ Then-Chief Justice Warren Burger

to Ensure That Our Juries are Representative and Impartial?, 3 HASTINGS L.Q. 65 (1976), and Note, *The Need for Attorney-Conducted Voir Dire in New Jersey Capital Cases*, 36 RUTGERS L. REV. 915, 925-27 (1984).

211. See, e.g., Babcock, *Voir Dire: Preserving Its Wonderful Power*, 27 STAN. L. REV. 545 (1975). See also, Padawer, Singer, & Singer, *Voir Dire By Two Lawyers: An Essential Safeguard*, 57 JUDICATURE 9 (1974).

212. *People v. Crowe*, 100 Cal. Rptr. 369, 375, 506 P.2d 193, 199, (1973) (quoting *Rousseau v. West Coast House Movers*, 256 Cal. App. 2d 878, 882, 64 Cal. Rptr. 655, 658 (1967)).

By contrast, the West Virginia Supreme Court has never wavered in its belief that one of the principal purposes of voir dire is to provide information for the intelligent exercise of peremptory challenges. See *State v. Pendry*, 159 W. Va. 738, 746, 227 S.E.2d 210, 217 (1976), *overruled on other grounds*, *Jones v. Warden, West Virginia Penitentiary*, 161 W. Va. 168, 241 S.E.2d 914 (1978).

213. *Crowe*, 106 Cal. Rptr. at 376, 506 P.2d at 200.

214. *Id.* at 371, 506 P.2d at 195. Apparently this weeding out was to be done with a greater, perhaps exclusive, emphasis on cause and favor challenges since it is more difficult to exercise peremptory challenges intelligently without lawyer voir dire than with it.

215. *Id.* at 375, 506 P.2d at 199.

216. *Id.* at 376, 506 P.2d at 200.

used hyperbole to complain that voir dire had “become in itself a major piece of litigation consuming days or weeks.”²¹⁷

The accusations that lawyers have attempted to manipulate voir dire opportunities to educate jurors about the case, to establish rapport with the jurors, and to persuade the jurors to the lawyer’s point of view may, in the main, have been justified, if somewhat exaggerated. Fears about the abuse of voir dire for advocacy purposes are greatly lessened, if not completely extinguished, however, by the regulatory power of the trial court. Like other areas in which lawyer zealotry is exhibited, there is a ready cure in the intervention power of the court. When a lawyer steps over the legitimate boundaries of opening statement, witness examination or closing argument, there is always a lawyer on the other side all too eager to invoke the court’s assistance in halting the offensive conduct. The same is true of voir dire. Opposing counsel is there to blow the whistle. In many instances the presence of such opposing counsel is superfluous as many judges do not need an invitation to intervene, but instead take primary and direct responsibility for policing the conduct of lawyers in their courtrooms.

Moreover, those who oppose lawyer-conducted voir dire on the grounds that lawyers will abuse it do not evince much understanding of West Virginia practice. With the great majority of litigation in West Virginia involving practitioners who appear over and over before the same judges, West Virginia lawyers have every incentive to comply with the desires of trial courts in this area.

One final comment with regard to advocacy on voir dire is in order. Is it not perfectly proper, and, indeed, commendable, that a lawyer on voir dire should ask questions that, in effect, advocate that jurors *not* discriminate on the basis of race, class, gender, or attractiveness? Opposition to advocacy on *this* point shows a lack of sensitivity to the ultimate goal of fairness.

With respect to the criticism that attorney-conducted voir dire is inefficient, I must first point out that it has *not* been conclusively

217. Remarks of Chief Justice Burger to the National Conference on the Judiciary, Williamsburg, Va., as quoted by Van Dyke, *supra* note 210, at 83. As Professor Van Dyke points out, Justice Burger’s remarks constituted an over-reaction to a few major political trials of the time. *Id.*

demonstrated that lawyer-conducted voir dire is in fact more time-consuming than judge-conducted voir dire.²¹⁸ The fear that many of us have that lawyer-conducted voir dire is more time-consuming, however, is not irrational. We have read about the few cases to which Justice Burger alluded. Judges who are concerned about the costs of delay and crowded condition of their calendars have a particular right to be concerned.²¹⁹

Is there a way to achieve the virtues of lawyer-conducted, individual, in-chambers voir dire and still achieve some efficiencies? One method that immediately springs to mind is to construct the right so that it does not obtain in every case, but only in those cases in which it is relevant. With respect to race, this might be easy to do by simply reserving the right to those situations in which there is a minority litigant or defendant. The biases and prejudices that are associated with socioeconomics and gender, however, are present, in varying degrees, in almost all cases. Accordingly, an attempt to restrict the right to relevant cases would be equivalent to defining a set that includes virtually the entire universe of cases.

A second alternative would be to confine the right to cases in which the biases and prejudices are particularly acute. This solution, however, poses insurmountable definitional problems. Courts cannot even agree on the acuteness of prejudice in the relatively easy situation of a minority defendant-white jury.²²⁰ One can imagine the disagreement that might attend a judgment on attractiveness/unattractiveness. The most appealing alternative, though certainly not a perfect one, is one that provides each litigant with the right to individual, in-chambers, lawyer-conducted voir dire for a limited period of time. In this respect, the proposal of Senator Howell Heflin of Alabama to provide thirty minutes per litigant for lawyer-

218. After examining the findings of 18 different voir dire time studies, Professor Jon Van Dyke concluded that "the evidence does not indicate conclusively that any of the systems is necessarily less time-consuming." *Id.* at 88.

219. "[W]e have never held that *in camera* individual voir dire is required (citation omitted). An inflexible rule of mandatory *in camera* individual voir dire would quickly grind this State's criminal justice machinery to a halt." *State v. Lassiter*, 354 S.E.2d 595, 600 (W. Va. 1987). *Accord*, *State v. Mayle*, 357 S.E.2d 219 (W. Va. 1987).

220. *See, e.g.*, *Rosales-Lopez v. United States*, 451 U.S. 182 (1981).

conducted voir dire in the federal courts is intriguing.²²¹ While thirty minutes may not be fully adequate to perform questioning under optimal conditions, it would allow for either brief questioning of all jurors or the questioning of selected jurors who might be most likely to harbor biases and prejudices. To provide for cases in which the bias and prejudice issues may be acute, the trial court ought to be given the discretion to lengthen the time allowed upon a showing of particularized need.

In exercising their discretion under this proposed statute, our trial courts will surely keep in mind that efficiency is not the exclusive goal of the court system.²²² If the West Virginia Supreme Court's opinion in *Pendry* is indicative, it is not the tradition in this state to crown speed at the cost of fairness:

The criticism most frequently voiced by those who would restrict *voir dire* examination is that it is time-consuming. It is true that the time of the court and all parties is important. However, the efficient utilization of time does not require any sacrifice of procedures which are calculated to assure that . . . a jury [is] free from any taint. . . .²²³

221. See *supra* note 7. Senator Heflin's proposal only calls for lawyer-conducted voir dire. It does not establish a right to individual, in-chambers voir dire.

The text of S. 591 is as follows:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That Rule 24(a) of the Federal Rules of Criminal Procedure is amended to read as follows:

(a) EXAMINATION.—Upon the request of the defendant or the Government, the court shall permit the defendant or his attorney and the attorney for the Government each a minimum of 30 minutes to conduct an oral examination of the prospective jury. Additional time for examination by the attorneys may be provided at the court's discretion, and the court may, in addition to such examination, conduct its own examination. The court shall have authority to impose reasonable limitations with respect to the questions allowed during such voir dire examination. In a case in which there are multiple defendants, each side shall have an additional 10 minutes for each additional defendant, except that the total time required to be allowed shall not exceed one hour per side.

S. 591 101st CONG., 1st SESS., 135 CONG. 2706 (1989)

S. 592, which amends FRCP 47(a), is virtually identical.

222. If, upon adoption, the proposal made here is found to cause the removal of more jurors than were removed under the previous practice, we may find the costs of the jury system increasing modestly as larger panels are initially called.

223. *State v. Pendry*, 159 W. Va. 738, 747, 227 S.E.2d 210, 217 (1976). See also, *State v. Van Metre*, 342 S.E.2d 450, 452 (W. Va. 1986) ("When the demands for fair procedure conflict with the desirable public policy of economy of effort and money, fair procedure prevails").

The right to lawyer-conducted voir dire in chambers should be recognized as just such a procedural right.²²⁴ The hypothesized disadvantages of lawyer-conducted, individual, in-chambers voir dire are ultimately trivial and petty when cast against the importance of the cherished democratic theories that support the institution of trial by jury. As the body best able to give life to these theories, the legal community is obligated to provide each litigant with a jury that conforms to the ideals of a *tabula rasa* and systemic neutrality as closely as possible.

The legal community will cast aside the troubling news reported here about juror bias and prejudice, and the failure of our current system to deal with it, at great risk to these ideals. Failure to address the operation of bias and prejudice in our jury system will not only mean that injustices will be visited upon individual litigants, but it will also spawn a lack of faith in the system among the citizenry at large.

We can have fairer and more upright juries. We can eliminate cases like *Martin* from our system. We can do so, however, only by boldly breaking from a past that has failed us and embracing a future that promises justice to all of our citizens, regardless of whether they are male or female, wealthy or impoverished, beautiful or plain, black or white.

224. Compare, Note, *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1584 (1988).

