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Voi Dire--Provision of Prejudicial Questioning

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Voir Dire — Prevention of Prejudicial Questioning

Voir dire is justified by the need to select an impartial jury. It is, however, often used improperly to influence prospective jurors. The author of this Note examines the need for voir dire, the abuses that occur, and the problems inherent in curbing abuse without restricting the selection process. He concludes that limitations on the scope of questioning provide the best solution.

I. INTRODUCTION

Voir dire — the process of orally examining prospective jurors to determine whether they are qualified for jury service — is a point of pivotal importance in any jury trial. Voir dire questioning, by obtaining competent, disinterested, and unbiased jurors, is intended to implement the parties' right to a fair and impartial jury. The broad scope of examination commonly permitted by trial courts, however, has resulted in the use of voir dire for purposes other than the selection of an impartial jury.¹ It is well recognized that voir dire may afford a prudent attorney a tactical opportunity to introduce both himself and his case to the jury.² Or an alert attorney can prejudice the position of the opposing party by framing inquiries which are intended to precommit the decision of prospective jurors and which introduce extraneous matters designed to influence their partialities. Unfortunately, existing procedural devices are inadequate to protect the non-questioning party from such abuses.³ The purpose of this Note is to consider the effects of broad voir dire questioning on the non-questioning party and to recommend a solution which balances the rights of *both* parties.

II. PURPOSE OF VOIR DIRE

Since early common law the right to challenge prospective

1. Davis & Wiley, *49 Thoughts on Jury Selection*, 9 TRIAL LAW. GUIDE 110 (May 1965); Field, *Voir Dire Examination — A Neglected Art*, 33 UNIVERSITY OF MO. AT KANSAS CITY L. REV. 171, 172 (1965); Kennelly, *Jury Selection in a Civil Case*, 9 TRIAL LAW. GUIDE 15 (May 1965).

2. BODIN, *SELECTING A JURY* 1 (1948).

3. See generally Goodman, *Should California Adopt Federal Civil Procedure?*, 40 CALIF. L. REV. 184, 189 (1952); Perkins, *Some Needed Reforms in the Methods of Selecting Juries*, 13 MICH. L. REV. 391, 399 (1915); Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U.L. REV. 1, 73 (1956); Note, 12 IOWA L. REV. 433, 436 (1927); Note, 58 YALE L.J. 638, 642 (1949).

jurors has been recognized as a means to insure a fair and impartial jury.⁴ Early common law procedure required the juror to be challenged before he could be examined by counsel; voir dire was then used to produce evidence to support the challenge.⁵ In contrast, today voir dire is used to uncover grounds for a challenge,⁶ and it may or may not be conducted by counsel. Although the federal constitution⁷ and most state constitutions⁸ grant a right to a fair and impartial jury, attorney-conducted voir dire is not an essential attribute of that right.⁹ As a result, in the federal courts,¹⁰ and also in several states,¹¹ the judge may personally conduct the voir dire in his discretion. The actual challenging of prospective jurors, however, remains in the hands of the attorneys.¹²

Prospective jurors may be challenged for cause or peremptorily challenged without assigning cause.¹³ Challenges for cause seek to

4. See 3 BLACKSTONE, COMMENTARIES *358-66 (civil); 4 BLACKSTONE, COMMENTARIES *352-55 (criminal).

5. See generally Moore, *Voir Dire Examination of Jurors*, 16 GEO. L.J. 438, 441-44 (1928).

6. *E.g.*, *Duffy v. Carroll*, 137 Conn. 51, 56, 75 A.2d 33, 35 (1950); *Chernock v. State*, 203 Md. 147, 150, 99 A.2d 748, 749 (1953); *State v. Tharp*, 42 Wash. 2d 494, 499-500, 256 P.2d 482, 486 (1953). *But see Hagans v. State*, 77 Ga. App. 513, 514, 48 S.E.2d 700, 701 (1948).

7. U.S. CONST. amend. VI (impartial jury in criminal cases); U.S. CONST. amend. VII (right to jury trial in civil cases). Although not expressly provided for, the seventh amendment has been interpreted to require an impartial jury, either because of the influence of the common law, *Thiel v. Southern Pac. Ry.*, 328 U.S. 217, 220 (1946), or through the fifth amendment requirement of due process of law. Judicial Conference Committee on the Operation of the Jury System, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 465 (1960).

8. *E.g.*, MINN. CONST. art. 1, § 4 (civil juries), § 6 (criminal juries). Even if it is not expressed, the right to jury trial implies a right to an impartial jury since most state constitutions provide that the right to jury trial "shall remain inviolate." See, *e.g.*, N.Y. CONST. art. 1, § 4. This indicates that the right to an impartial jury is retained from the common law.

9. *Falter v. United States*, 23 F.2d 420, 426 (2d Cir. 1928); *Carroll v. United States*, 16 F.2d 951, 955 (2d Cir. 1927); *Bradshaw v. United States*, 15 F.2d 970, 971 (9th Cir. 1926).

10. See FED. R. CIV. P. 47; FED. R. CRIM. P. 24(a).

11. See, *e.g.*, ILL. REV. STAT. ch. 110, § 101.24-1 (1965). In Illinois, however, the parties must be given a reasonable opportunity to supplement the court's examination. For discussion of the Illinois procedure see Carr, *Voir Dire Examination of Jurors: An Appraisal by an Attorney*, 1963 U. ILL. L.F. 653; Crebs, *Voir Dire Examination of Jurors: An Appraisal by a Judge*, 1963 U. ILL. L.F. 644; Comment, 15 DE PAUL L. REV. 107 (1965).

12. Some states grant the right to challenge by judicial decision, *e.g.*, *Hall v. State*, 64 Ga. App. 644, 13 S.E.2d 868 (1941), while in others it is granted through statute, *e.g.*, N.Y. CIV. PRAC. CODE § 4108.

13. *E.g.*, ILL. REV. STAT. ch. 110, § 66 (1965) (peremptory challenges); MINN. STAT. § 631.28 (1961) (challenge for cause). For a categorization and

reject a prospective juror for reasons which satisfy the court that he cannot or will not render an impartial verdict. For convenience such challenges may be classified into two categories. General cause is based on factors which disqualify a juror for any case; particular cause is based on factors which disqualify a juror for the specific case before the court.¹⁴ Grounds for general cause¹⁵ include such matters as age,¹⁶ moral character,¹⁷ significant physical or mental infirmities,¹⁸ or citizenship and residency.¹⁹ Grounds for particular cause include both those established by law, such as relationship to a party²⁰ or his attorney,²¹ and those designated as actual bias. Actual bias is not clearly definable; generally it means a state of mind such that the juror cannot try the issues impartially.²² For example, prejudice against large verdicts,²³ or opposition to capital punishment,²⁴ may constitute actual bias. The sufficiency of a showing of cause is generally determined solely by the trial judge,²⁵ although his ruling will be reviewable on appeal.²⁶

discussion of challenges at common law, see 1 THOMPSON, TRIALS 35 (Early ed. 1912); Moore, *Voir Dire Examination of Jurors*, 16 GEO. L.J. 438 (1928).

14. At common law these two categories were classified as principal challenges and challenges to the polls. 1 THOMPSON, TRIALS 55-56 (Early ed. 1912). Thompson states that since the demise of the practice of using nonjudge triers to determine the validity of challenges, this distinction is no longer followed.

15. Grounds for general cause may include those in the general qualifications for jury duty. See, e.g., N.Y. CODE CRIM. PROC. § 375(2).

16. *E.g.*, ILL. REV. STAT. ch. 78, § 2 (1965).

17. *E.g.*, *Dodys v. State*, 73 Ga. App. 483, 37 S.E.2d 173 (1946) (conviction for a crime involving moral turpitude).

18. *E.g.*, MINN. STAT. § 631.29(3) (1961).

19. *E.g.*, MO. REV. STAT. § 494.010 (1959).

20. *E.g.*, N.Y. CODE CRIM. PROC. § 377(1).

21. *E.g.*, MINN. STAT. § 631.31(1) (1961).

22. Statutory attempts to define actual bias refer to it as a state of mind which, in reference to the case at hand, evidences an inability to try the case impartially or without prejudice. *E.g.*, MINN. STAT. § 631.30 (1961).

23. In *Snyder v. General Elec. Co.*, 47 Wash. 2d 60, 287 P.2d 108 (1955), a prospective juror on voir dire stated that he would require more proof to render a verdict for over \$50,000 than for under \$50,000. This was a sufficient basis for a challenge for cause.

24. *Logan v. State*, 251 Ala. 441, 37 So. 2d 753 (1948).

25. *Shettel v. United States*, 113 F.2d 34 (D.C. Cir. 1940); *Johnson v. People*, 110 Colo. 283, 133 P.2d 739 (1943); *State v. Rhodes*, 227 Iowa 332, 288 N.W. 98 (1939). *But see* MINN. STAT. § 631.35(2) (1961), which provides that in the trial of a challenge for actual bias, three court-appointed triers shall determine the sufficiency of the challenge. In any noncapital case the parties may consent to have such challenges tried by the court. All challenges for implied bias shall be tried by the court. See MINN. STAT. § 631.35(1) (1961).

26. Courts have stated that a ruling on a challenge for cause is a mixed

In contrast to the challenge for cause, the peremptory challenge requires neither a reason nor a ruling from the court.²⁷ Although historically unclear, the rationale of peremptory challenges is to permit a party to dismiss an unwanted prospective juror who cannot be successfully challenged for cause because of difficulties of proof.²⁸ It also has been suggested that peremptories promote party satisfaction with the jury.²⁹ Whatever its rationale, the peremptory challenge is available in all jurisdictions³⁰ with variations as to the number allowed³¹ and the time of exercise.³²

Questioning on voir dire supposedly provides information which permits the court to rule on challenges for cause, and also assists counsel to exercise peremptories effectively.³³ Jurisdictions vary on procedural matters such as whether the prospective jurors are examined collectively³⁴ or individually,³⁵ whether they are sworn before being examined,³⁶ and the order in which parties direct questions and exercise challenges.³⁷ All jurisdictions, however, recognize that the scope of voir dire is controlled by the trial

question of fact and law. *Hall v. State*, 136 Fla. 644, 666-67, 187 So. 392, 402 (1939). As to challenges for implied bias, the question is subject to broad review as if it were one of law. *Mitchell v. State*, 69 Ga. App. 771, 777, 26 S.E.2d 663, 668 (1943). But where jurors give conflicting answers to questions for actual bias, the trial court will only be reversed if it abused its discretion. *People v. Workman*, 56 P.2d 1280, 1281-82 (Cal. Dist. Ct. App. 1936).

27. *Frazier v. United States*, 335 U.S. 497, 505 (1948); *Bufford v. State*, 148 Neb. 38, 26 N.W.2d 383 (1947).

28. See 4 BLACKSTONE, COMMENTARIES *353.

29. *Ibid.*

30. *E.g.*, MINN. STAT. § 631.27 (1961); WIS. STAT. § 957.03 (1961).

31. Under early common law, a defendant in a felony case was allowed thirty-five peremptory challenges. *Moore, supra* note 13, at 447. An accused in the federal courts is allowed twenty peremptories in a capital case, ten in a felony case, and three in a misdemeanor case. FED. R. CRIM. P. 24(b).

32. In New York a peremptory must be taken before the juror is sworn. N.Y. CODE CRIM. PROC. § 371. This appears to be the majority rule, but in *State v. Rankins*, 211 La. 791, 30 So. 2d 837 (1947), the state was permitted to interpose peremptories after the jurors had been sworn.

33. *E.g.*, *Duffy v. Carroll*, 137 Conn. 51, 56, 75 A.2d 33, 35 (1950).

34. *E.g.*, *Commonwealth v. Morrison*, 180 Pa. Super. 121, 118 A.2d 258 (1955).

35. *E.g.*, *Barton v. State*, 81 Ga. App. 810, 60 S.E.2d 173 (1950).

36. *Compare Springdale Park, Inc. v. Andriotis*, 30 N.J. Super. 257, 104 A.2d 327 (1954), with *State v. Sharpe*, 138 S.C. 58, 135 S.E. 635 (1926).

37. Absent a statute, the order of challenging between the parties seems to be within the discretion of the court. *Pointer v. United States*, 151 U.S. 396, 410 (1894). The New York statute, which provides that the people will exercise their challenges before the defendant, is typical. N.Y. CODE CRIM. PROC. § 385.

court, subject to a limitation of fairness.³⁸ Any question which is incident to establishing general cause or implied bias must be allowed.³⁹ The propriety of permitting questions intended to establish actual bias or to facilitate the exercise of peremptories, however, has been left entirely to the discretion of the trial court.⁴⁰ Although questions are sometimes held improper,⁴¹ trial courts generally permit a wide scope of examination.⁴² This liberal judicial attitude is based on the constitutional right to a fair and impartial jury, together with the fact that voir dire is thought to be essential to insure this right.⁴³

III. ABUSES OF VOIR DIRE

The broad scope of examination has permitted the questioning party to precommit and influence the jury in his favor. Since jurors are to decide the case solely on the facts presented at trial,⁴⁴ precommitting or influencing the jury on voir dire denies the non-questioning party his right to an impartial jury.

38. *Aldridge v. United States*, 283 U.S. 308, 310 (1931). Voir dire cannot be governed by fixed rules due to the uniqueness of a particular case and the parties involved, the individuality of counsel, and the necessity of the jury representing a cross section of society. *Smith v. Nickels*, 390 S.W.2d 578, 582 (Mo. Ct. App. 1965). See also *State v. Hawkins*, 240 S.W.2d 688, 693-94 (Mo. Sup. Ct. 1951).

39. The grounds for general cause and implied bias are usually set forth by statute. To disallow questions which will directly reveal such grounds is error. See, e.g., *Cady v. State*, 198 Ga. 99, 31 S.E.2d 38 (1944).

40. See *Greenman v. City of Fort Worth*, 308 S.W.2d 553, 554 (Tex. Civ. App. 1957).

41. Questions which disclose a juror's present impression, or what his reaction will be under certain facts, should be disallowed because of the danger that the juror may be precommitted. *Commonwealth v. McGrew*, 375 Pa. 518, 100 A.2d 467 (1953). It is improper to commit jurors before they have heard any evidence, instructions of the court, or arguments of counsel. *State v. Katz Drug Co.*, 352 S.W.2d 678 (Mo. 1961). Hypotheticals substantially outlining the proof to be introduced are improper as tending to exact a pledge from the juror. *Chambers v. Bradley County*, 384 S.W.2d 43 (Tenn. Ct. App. 1964). It is improper to emphasize facts such as insurance with the view of conveying to the jury the idea that the insurer will be the one to pay the judgment. *Bunch v. Crader*, 369 S.W.2d 768 (Mo. Ct. App. 1963).

42. E.g., *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45, 49-50 (4th Cir. 1963); *Logan v. State*, 251 Ala. 441, 443, 37 So. 2d 753, 755 (1948); *State v. Wallace*, 83 Ariz. 220, 222, 319 P.2d 529, 530 (1957); *State v. Higgs*, 143 Conn. 138, 142, 120 A.2d 152, 154 (1956); *People v. Moretti*, 6 Ill. 2d 494, 532, 129 N.E.2d 709, 729 (1955); *State v. Sullivan*, 43 N.J. 209, 239, 203 A.2d 177, 193 (1964).

43. See *Fedorinchik v. Stewart*, 289 Mich. 436, 438-39, 286 N.W. 673, 674 (1939).

44. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 346-47 (6th ed. 1938).

Probably the most prevalent method which attempts to precommit the judgment of the jurors is the use of a hypothetical question which asks the prospective juror to assume facts and to state his conclusion based on the assumed facts.⁴⁵ For example, a juror may be asked whether he could return the death penalty if the killing was done in an attempt to commit robbery.⁴⁶ Such a question is improper because the jury should decide the issues on the evidence produced at trial, and not be psychologically precommitted by answers given on voir dire.

Hypothetical questions intended to test the reactions of prospective jurors to certain witnesses are also objectionable.⁴⁷ For example, the questioning attorney may ask what weight the examinee would give the testimony of a "Chinaman." Such information is sought to enable counsel to plan his trial strategy better.⁴⁸ However, this question seeks the examinee's evaluation of testimony before he has heard or observed the witness. If a witness of Chinese descent does testify, the juror will tend to react to such a witness' testimony as his answer on voir dire indicated.

Another type of improper question, and more subtle in effect, is one that introduces extraneous matter which may influence prospective jurors. Such questions are objectionable whether the matter introduced is admissible or inadmissible at trial. For instance, evidence of liability insurance generally is inadmissible at trial;⁴⁹ however, jurors may be asked on voir dire if they are associated with an insurance company.⁵⁰ As a result, counsel on voir dire may create the implication that defendant has insurance cov-

45. Examples of hypothetical questions on voir dire can be found in Annot., 99 A.L.R.2d 7 (1965). In civil cases the hypothetical is often used to uncover prejudice against large verdicts, although it is generally permissible to examine with respect to size of verdict if such questions are phrased in general terms. *Jones v. Parrott*, 111 Ga. App. 750, 143 S.E.2d 393 (1965). It is difficult to imagine a hypothetical question which would be effective in discovering such a prejudice that would not tend to precommit the juror to a particular verdict.

46. See *State v. Bunk*, 4 N.J. 461, 73 A.2d 249 (1950).

47. A question of this type contains the assumption that a particular witness will testify and the juror is asked what weight he will give to such testimony. The reason for allowing such a question is that it may divulge a bias against a certain type of witness. For example, it was held to be improper for the trial court to refuse to ask jurors if they would be prejudiced against the testimony of witnesses of official status. *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964).

48. Carr, *supra* note 11.

49. See, e.g., *Schultz v. Swift & Co.*, 210 Minn. 533, 299 N.W. 7 (1941); *Brand v. Mangust Holding Corp.*, 53 N.Y.S.2d 882 (Sup. Ct. 1945).

50. See, e.g., *Farwell v. Stambaugh*, 203 Minn. 392, 281 N.W. 526 (1938); *Wood v. New York State Elec. & Gas Corp.*, 257 App. Div. 172, 12 N.Y.S.2d 947 (1939).

erage. Since evidence inadmissible at trial is not to be considered by the jury,⁵¹ such a use of voir dire can be prejudicial to the defendant.⁵² The policy underlying the rules of evidence dictates that inadmissible evidence should not be suggested to jurors through voir dire questioning.

Questions concerning material which is admissible at trial may also raise inferences which create bias.⁵³ The reference to the material on voir dire rather than at trial is objectionable because it has not yet been offered as evidence. For example, a prospective juror is asked whether he would convict of rape if the state proves the defendant raped and communicated venereal disease to a little girl.⁵⁴ Such a question, by implying that the girl has such a disease, could lead the jury to infer there is strong evidence of rape. Obviously such medical testimony may be introduced at trial, but there it must meet the requirements of the rules of evi-

Some courts require that before counsel may examine as to insurance on voir dire he must have some previous knowledge that one or more prospective jurors are interested in insurance companies. *E.g.*, *Ewing Von Allmen Dairy Co. v. Godwin*, 304 Ky. 161, 200 S.W.2d 103 (1947). Others require counsel to give the court, out of hearing of the jury, a reason for asking the question. *Carter v. Rock Island Bus Lines, Inc.*, 345 Mo. 1170, 139 S.W.2d 458 (1940).

51. *E.g.*, *Brown v. Walter*, 62 F.2d 798 (2d Cir. 1933).

52. It has been suggested that the only proper way to handle the problem of insurance is to inquire of the entire panel, at the beginning of the term before the jurors know what cases will be called, whether they have interests in any insurance company. This information could then be made available to counsel, and incompetent jurors could be dismissed without the necessity of letting the panel know that insurance is involved. Nilles, *The Right to Interrogate Jurors With Reference to Insurance in Negligence Cases*, 3 DAKOTA L. REV. 406, 413 (1931); Note, 10 U. CINC. L. REV. 315, 318 (1936); 52 HARV. L. REV. 166 (1938); 87 U. PA. L. REV. 234 (1938). It is said that this solution satisfies the interests of both parties, since the plaintiff learns whether a juror is connected with an insurance company, and yet the panel is not aware that insurance is a factor in the case. 10 U. CINC. L. REV. 315, 318 (1936).

Conceivably, a similar practice could be extended to other matters arising on voir dire which prejudice the nonquestioning party.

53. Because of the broad subject matter which may be inquired into on voir dire, this type of question is prevalent. The problem created is that an element in the case is suggested to the juror without the necessity of having to prove it. For instance, if counsel wants to suggest that self-defense may be an element and wants to implant this in the juror's mind, he will ask a question containing the word "self-defense." Suppose counsel asks a juror if the fact that an officer of the law were involved would affect his belief in self-defense. Here the question apparently is an attempt to discover or reveal a bias against law officers, but it latently implies that self-defense is an element in the case.

54. See *Fields v. State*, 203 Ark. 1046, 159 S.W.2d 745 (1942).

dence, and the witness testifying to the matter will be subject to cross examination. Moreover, if the matter is raised on voir dire, the jurors may have it in mind throughout the trial and thus be prevented from objectively weighing the evidence.

With regard to questions which tend to precommit decision or to introduce extraneous influential matter, it is not significant if the question is not answered. The evil arises from the mere utterance of the question. A juror may make a predetermination or draw inferences even though he does not answer or gives a negative answer.

The seriousness of the abuses of voir dire is magnified when the ineffectiveness of the nonquestioning party's remedial devices is recognized. A party who feels his opponent has precommitted or wrongly influenced a prospective juror at voir dire has three choices: he can object to the improper question;⁵⁵ he can appeal if his objection is overruled;⁵⁶ or he can exercise a peremptory challenge.

The most immediate course of action open to the nonquestioning party is to object to the question as improper.⁵⁷ If an objection is sustained, the objecting party will be protected only if the court removes the juror on its own initiative⁵⁸ or grants a challenge for cause. Once an improper question has been asked, the harm has been done, so merely striking it is not sufficient. A dismissal of the particular examinee to whom the question was addressed, however, does not provide an adequate remedy if the entire panel heard the question.⁵⁹ But for the impracticality, perhaps all prospective jurors who heard the improper question should be dismissed.⁶⁰

55. See, e.g., *Kloss v. United States*, 77 F.2d 462 (8th Cir. 1935) (right to object ends when fair and impartial jury is chosen); *Cross v. State*, 89 Fla. 212, 103 So. 636 (1925).

56. See note 26 *supra*.

57. The objection must be made seasonably or it is waived. *Ball v. State*, 252 Ala. 686, 42 So. 2d 626 (1949); *Bufford v. State*, 148 Neb. 38, 26 N.W.2d 388 (1947).

58. The court has wide discretion to determine whether a juror should be removed without challenge. *State v. Parker*, 112 Conn. 39, 151 Atl. 325 (1930).

59. It is within the discretion of the court whether a juror is to be examined in the presence of the whole panel. *Wientjes v. Commonwealth*, 263 S.W.2d 721 (Ky. Ct. App. 1954); *LeFors v. State*, 130 Tex. Crim. 426, 94 S.W.2d 738 (1936).

60. This is completely impractical since it would have to be done each time an improper question was asked. Courts are unwilling to allow each juror to be examined out of the hearing and presence of others. As one court stated,

Courts often refuse to sustain objections to prejudicial questions on voir dire, despite the frequently expressed rule that questions which precommit or influence jurors are improper. This reluctance to disallow such questions is largely based on the rationale that allowing a wide scope of examination will safeguard the constitutional right to an impartial jury. Accordingly, since it is difficult to determine whether a question will precommit or otherwise wrongly influence a juror,⁶¹ the courts generally exercise their discretion in favor of a liberal construction of the constitutional right.

Appeal is not an adequate vehicle to deal with the problems created by unfairness at voir dire because of the traditional narrow scope of review on appeal. Appellate courts, in the absence of a clear abuse, will not disturb the exercise of discretion by the trial court.⁶² A clear showing of abuse is required because the propriety of questions generally is not clearly revealed by the record.⁶³ Moreover, to prevail on appeal, prejudice must be established. In order to prove prejudice, the objecting party is usually required to show that the examinee served on the jury and the appellant had exhausted his peremptories at the time the objectionable question was asked.⁶⁴ These prerequisites do not adequately reflect the possible prejudice which the party may have suffered.⁶⁵

The remedy of a peremptory challenge of prospective jurors

it would be a "backward step" in the administration of justice to hold that voir dire must be so conducted, notwithstanding the adverse effect on the remainder of the panel. *Levermann v. Cartall*, 393 S.W.2d 931 (Tex. Civ. App. 1965).

61. *City Transp. Co. v. Sisson*, 365 S.W.2d 216 (Tex. Civ. App. 1963), illustrates the fine lines courts draw in determining whether a question is improper. The court held a question asking the juror whether he would consider evidence of appellee's use of narcotics for any purpose to be improper. But a question asking if the juror would form any bias toward appellee if, during trial, evidence of use of narcotics should be introduced was held proper. If one of these questions tends to precommit or influence the juror, the other would certainly seem to have the same tendency.

62. See, e.g., *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *Jones v. Parrott*, 111 Ga. App. 750, 143 S.E.2d 393 (1965).

63. *Smith v. Nickels*, 390 S.W.2d 578, 583 (Mo. Ct. App. 1965).

64. E.g., *Clem v. State*, 166 Tex. Crim. 429, 314 S.W.2d 579 (1958); see 58 YALE L.J. 638, 643 (1949).

65. If the whole panel has heard the question, they are all susceptible to the harmful effects of a question. Thus, the fact the examinee did not serve on the jury will be of little importance. Also, peremptories will be of little value since the nonquestioning party cannot strike the entire panel.

whom the nonquestioning party feels have been wrongly influenced or precommitted is always available. The effectiveness of this remedy, however, is diminished by the fact that the entire panel may have been influenced by the objectionable question while the number of peremptories is limited.⁶⁶

IV. REASSESSMENT OF VOIR DIRE

The function of the jury is to resolve factual disputes which are in issue.⁶⁷ Ideally, to serve this function, jurors should be completely impartial; however, absolute impartiality is unattainable. No matter how extensive or penetrating the voir dire examination, all the biases and predilections of the jurors will not be revealed. Moreover, to contend that voir dire examinations, being nonpsychological in nature, could ever reveal all the factors influencing a juror would be to disregard completely the force and effect of the subconscious mind.⁶⁸ Even if all factors influencing the jurors could be revealed by proper questions, there is no certainty that jurors would reveal that their deliberations might be affected by questions on voir dire.⁶⁹ Indeed, it is doubtful that a juror would be aware that his mind had been precommitted or prejudiced by a subtle albeit improper question.

The factfinding function of the jury is not an entirely rational process since many fact issues can be reasonably resolved in more than one way. At some point in reaching its decision, the jury necessarily exercises value judgments⁷⁰ which are made with reference to the jurors' experiences in society.⁷¹ These value judgments,

66. This limitation is magnified when the challenging party must finally accept or reject a prospective juror without a chance to compare him with others. *St. Clair v. United States*, 154 U.S. 134 (1894). See also 24 U. CHI. L. REV. 751, 757-59 (1956). For a thorough examination of the peremptory as a protective device, see *id.* at 752-57.

67. Broeder, *The Functions of the Jury—Facts or Fictions?*, 21 U. CHI. L. REV. 386, 387 (1953).

68.

Fundamentally, of course, whether a juror is fair and impartial lies peculiarly in the mind and heart of the individual juror. Whatever lurking prejudice he might have in a particular instance may well be exposed only through psychological analysis. Suffice it to say that such a personalized approach is not within the province of the courts and the practical administration of justice.

Smith v. Nickels, 390 S.W.2d 578, 581 (Mo. Ct. App. 1965).

69. 60 COLUM. L. REV. 349, 375 (1960).

70. Broeder, *supra* note 67, at 389.

71. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 349 (6th ed. 1938).

however, should not vary in cases involving similar issues and similarly situated parties. That is, value judgments should not be a function of the particular case or particular parties involved. Any jurors whose qualifications indicate that they are not able to decide the issues involved in such a manner are not impartial.⁷²

The broad scope of examination allowed in voir dire to help disclose impartiality affords considerable advantages to the questioning party. Extensive questioning is more likely to ferret out jury biases unfavorable to his case.⁷³ While there are other advantages to be gained by an attorney on voir dire, the discovery of bias is the only result of broad examination which is incident to the questioning party's constitutional right to an impartial jury. Any other advantages achieved by the questioning are not due as a matter of right.

The conflict between the parties' rights with regard to voir dire is evident. A broad scope of examination effectuates the right of the questioning party to an impartial jury, but allows jurors to be precommitted or wrongly influenced. Consequently, it is apparent that the rights of both parties must be balanced in delineating the limits of voir dire. Roughly speaking, the right to examine jurors must be curtailed at the point where it denies the nonquestioning party his right to a fair and impartial jury.

In order to protect the nonquestioning party, several jurisdictions allow the court to conduct the entire voir dire.⁷⁴ It is thought that abuses will be curtailed because the examining judge will be impartial when compared to the attorneys.⁷⁵ The use of a court-conducted voir dire will eliminate conscious attempts to precommit or influence jurors. Moreover, an immediate advantage of such a procedure is that questions thought to be objectionable by the trial judge will never be asked. Thus both parties will be protected from the effect that objectionable questions have on the entire panel. If the broad scope of examination remains, however,

72. 60 COLUM. L. REV. 349, 350 (1960).

73. *E.g.*, a question which reveals a juror's connection with an insurance company will aid a plaintiff's counsel. If one who has such an interest is left on the jury, this will be an unfavorable element because it may be inferred that this juror's tendency will be to disallow or diminish the recovery.

74. See, *e.g.*, FED. R. CIV. P. 47; FED. R. CRIM. P. 24(a).

75. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U.L. REV. 1, 73 (1956); 12 IOWA L. REV. 433 (1926); 13 MICH. L. REV. 391 (1914); 17 MINN. L. REV. 299 (1933). For a discussion of the possible constitutional objections to removing voir dire from the hands of counsel, see 15 DE PAUL L. REV. 107, 112 (1965).

questions which precommit and influence may still arise. In an attempt to reveal juror bias, a trial judge might ask such questions. A more adequate solution than court-conducted voir dire would be to limit the questions which may be asked on voir dire.

Since the grounds for a challenge for cause, excepting actual bias, are fairly definite in nature, examination to establish such grounds is amenable to direct questions; the questioning attorney has little opportunity to prejudice the opposing party. This is not true, however, in regard to questioning incident to establishing actual bias or to facilitating the exercise of peremptories. By limiting voir dire in these two areas, the abuses of voir dire could be substantially eliminated.

To establish actual bias, it is suggested that the voir dire examination be limited to a general question. The judge, working in conjunction with counsel and accepting such suggestions from them as he deems useful, will preface this general question with a statement of the facts of the case. Of course, this statement of facts will necessarily be general in nature and will not contain any reference to facts in dispute. After the basic facts of the case are outlined by the judge, each juror will be asked generally if he knows of any reason why he cannot decide the case in an impartial manner.⁷⁶ There are distinct advantages to this type of procedure. Any reference to influential matter will be made in a general manner without undue emphasis. Also, absolutely no opportunity exists for asking questions that will precommit the jurors.

The limitation to a general question will not be seriously detrimental to the questioning party. Since voir dire will disclose only those conscious biases the examinee is willing to reveal, the suggested general question seems to be as likely to uncover bias as would extensive questioning. Even if the use of a general question somewhat restricts the scope of voir dire, it is justified by the necessity to protect the nonquestioning party.

To effectively curb abuses of voir dire, it is also necessary to limit questioning for the purpose of exercising peremptories. Indeed, if any questioning solely for the purpose of exercising peremptories is permitted, there is no feasible way to limit the scope of examination. Since any question counsel may ask could possibly facilitate the exercise of peremptories, an attempt to limit

76. This type of question was advocated by the Illinois Supreme Court for use on voir dire. See 1959 ILLINOIS JUDICIAL CONFERENCE REPORT 56-60. Under English practice, such a general type of question is used. 13 MICH. L. REV. 391 (1914).

questions on the basis of the purpose for which they are asked is futile. Because no definite standard can be applied, the questioning party may precommit and influence the jurors, much the same as in examining for actual bias.

Although the existence of peremptory challenges can be justified, there is no good reason to allow interrogation on *voir dire* in order to exercise them more effectively. If the rationale for peremptories is to compensate for the difficulty in proving cause, the examination should be limited to these questions allowed for a challenge for cause. Also, if the rationale is to promote party satisfaction with the jury, the need for questioning is doubtful. A party would be dissatisfied if he was unable to prove cause, or had an intuitive feeling about a particular juror.⁷⁷ In either case, merely allowing the peremptory challenge removes the party's dissatisfaction. It may be argued, however, that party satisfaction only results if peremptories can be exercised after counsel has had an opportunity to investigate prospective jurors. Since it is impossible to make such an investigation before trial,⁷⁸ interrogation on *voir dire* is necessary. Accordingly, if party satisfaction is an important policy of peremptories, perhaps examination incident to peremptories has some merit. Even so, it is overshadowed by the necessity to eliminate abuses which threaten the nonquestioning party's right to a fair and impartial jury. A denial of the opportunity to examine in order to exercise peremptories leaves his right to a fair and impartial jury intact. If no ground for a challenge for cause exists, a juror is assumed to be impartial.⁷⁹

V. CONCLUSION

In order to obtain an impartial jury, courts have concentrated on insuring a liberal scope of examination on *voir dire*. This has resulted in an impairment of the nonquestioning party's constitutional right. Under existing procedures, the nonquestioning party can do little to remedy his predicament. Furthermore, attempts to establish standards for determining proper questions have

77. See 4 BLACKSTONE, COMMENTARIES *353.

78. In Blackstone's time counsel may very well have been acquainted with a majority of the panel. In today's urban society, however, a party wishing to make an investigation of prospective jurors will be forced to do so outside of court. This is a totally impractical and legally questionable alternative. See 17 MINN. L. REV. 299, 301 (1933).

79. To be subject to a challenge for cause, a juror must be biased, either impliedly or actually. See note 20 *supra*.

failed. Accordingly, it is necessary to place restrictions on the questioning party. Balancing the interests of both parties dictates the use of only a general question to reveal actual bias and to facilitate the exercise of peremptories. The value of the present broad scope of examination is doubtful; yet the harm that can result from its use is irreparable.