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# Juror Bias--A Practical Screening Device and the Case for Permitting Its Use

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# Juror Bias—A Practical Screening Device and the Case for Permitting Its Use*

## I. INTRODUCTION

The principle of fairness underlies the constitutional mandate that juries be impartial,[1] and it is the key to public confidence in the jury system. Impartial juries are essential if defendants are to believe that their day in court has been a fair one. A crucial procedure for ensuring impartiality as well as the appearance of impartiality[2] is voir dire,[3] the stage of trial at

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1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

2. The "cross section of the community" requirement for jury pool selection is at least as important for the appearance of fairness as it is for actual impartiality of the ultimate jury. The notion that "justice must satisfy the appearance of justice" has been expressly cited as a factor in voir dire. Swain v. Alabama, 380 U.S. 202, 219 (1965). Maintaining the appearance of justice was also a factor behind the Court's prohibition of one-man grand juries, *see In re* Murchison, 349 U.S. 133, 136 (1955), and its reversal of summary contempt proceedings initiated by a judge who was offended by a trial attorney's conduct. *See* Offatt v. United States, 348 U.S. 11, 14 (1954). *See also* Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552 (1975). There is an inherent tension in jury selection, however, between the "cross section of the community" requirement, which implies virtually random sampling, and the need to dismiss prejudiced jurors, which obviously undermines the random selection of a final panel. This tension was clearly evident in Swain v. Alabama, 380 U.S. 202 (1965), in which the prosecutor's repeated use of peremptory challenges to strike prospective black jurors was alleged to violate due process and equal protection as well as the right to an impartial jury. Despite strong evidence that prosecutors were systematically excluding blacks, the court upheld the discretionary use of peremptory challenges. *Id.* at 227-28.

Even more fundamental than the effect of peremptory challenges on the fair-cross-section goal is the relationship between authoritarianism and the basic function of the jury system. The function of the jury in a criminal case is to serve as a buffer between the state and the individual whom the state is seeking to deprive of physical liberty. An impartial jury—one drawn randomly from a cross section of the community—will best serve as a buffer protecting criminal defendants from unfair use of the state's police power. Authoritarianism goes to the core of the jury's function: the attitudes of some jurors toward authority may be so strong that they are incapable of serving this buffer function. The jury screening device described in this Note—the Legal Attitudes Questionnaire—taps this source of bias and could be applied to make the peremptory challenge a meaningful remedy for protecting the impartiality of juries.

3. Literally translated, voir dire means "to see, to tell," or "[t]o speak the

which prospective jurors are screened for final selection.[4] The panel of prospective jurors present at voir dire is drawn according to the jurisdiction's rules or statutes.[5] Members of a voir dire panel are first questioned by the judge or trial counsel, or sometimes by both,[6] and then are either selected for the jury, struck for cause,[7] or dismissed by peremptory challenge.[8]

Voir dire has always been a somewhat unreliable method for rejecting prejudiced jurors,[9] and its effectiveness has become even more questionable now that many trial judges restrict the scope of voir dire questioning in order to save time and relieve congested dockets.[10] To select juries more intelligently under these conditions, trial lawyers have begun to turn

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truth." BLACK'S LAW DICTIONARY 1746 (4th rev. ed. 1968).

4. *See, e.g.*, FED. R. CRIM. P. 24(a); CAL. PENAL CODE § 1078 (West Supp. 1979); ILL. ANN. STAT. ch. 110A, §§ 234, 431 (Smith-Hurd 1979); MINN. R. CRIM. P. 26.02(4); N.Y. CRIM. PROC. LAW §§ 270.15, 360.20 (McKinney 1980).

5. Juror pools generally are drawn randomly from broad-based lists, such as voter registration or driver's license lists. *See, e.g.*, N.J. STAT. ANN. §§ 2A:71-1 to -3 (1979).

6. Federal trial judges can conduct voir dire themselves, but must permit the attorneys to submit questions; the judges are not, however, required to ask the questions submitted. *See* FED. R. CRIM. P. 24(a). The judge also may allow the defendant, the defendant's attorney, or the prosecutor to conduct all or part of voir dire. *Id.* State courts have traditionally allowed broader attorney participation in questioning. *See* Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 931-49 (1971). The trend in both systems, however, is toward judge-conducted voir dire. *See* Babcock, *supra* note 2, at 548-49.

7. Challenges for cause are unlimited in number, but must be based on direct juror expressions of inability to decide impartially on the evidence. *See* Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 241-48 (1968); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1500-02 (1975). For an example of a situation in which apparent racial prejudice was held insufficient to support a challenge for cause, see State v. Square, 257 La. 743, 823, 244 So. 2d 200, 229 (1971) (white juror's past association with Ku Klux Klan would not prejudice him against black defendant), *vacated on other grounds*, 408 U.S. 938 (1972).

8. The number of peremptory challenges available to either side is usually fixed by statute or rule of court, although trial judges generally have discretion to increase the number when necessary. This might occur in cases with multiple defendants, or when there has been significant pretrial publicity. *See, e.g.*, FED. R. CRIM. P. 24(b). *See also* Note, *supra* note 7, at 1502-04.

9. *See* Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505-21 (1965).

10. *See generally* Babcock, *supra* note 2; Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A.L. REV. 247 (1973); Levit, Nelson, Ball & Chernick, *supra* note 6, at 916; Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971); Note, *supra* note 7.

to other practices, such as conducting extensive investigations of jurors' backgrounds[11] and using systematic jury selection techniques, that may skew the selection process in favor of one side.[12]

This Note examines a new juror screening device—the Legal Attitudes Questionnaire—that predicts which potential jurors are most likely to harbor certain biases. Unlike polling techniques and similar juror screening devices, the Legal Attitudes Questionnaire is inherently useful to prosecutors and defense counsel alike.[13] This Note reports the findings of a field study designed to test the predictive value of the questionnaire in actual criminal trials.[14] It also discusses the factors that might enter into a court's resolution of the issue whether to permit the questionnaire or some similar device to be used at voir dire. The Note concludes that the Legal Attitudes Questionnaire has substantial predictive value for identifying jurors who hold extreme biases, that it can be employed efficiently during voir dire, and that courts should permit its use in criminal trials.

## II. THE LEGAL ATTITUDES QUESTIONNAIRE

The Legal Attitudes Questionnaire (LAQ), developed by psychologists and lawyers in 1965, is a thirty-item survey that tests for the existence of authoritarian and antiauthoritarian attitudes.[15] The LAQ assumes that there are three general types of jurors in criminal trials:[16] (a) those who are predisposed to

11. *See* notes 83-87 *infra* and accompanying text.

12. For a discussion of these new tactics, see THE JURY SYSTEM: NEW METHODS FOR REDUCING JURY PREJUDICE (D. Kairys ed. 1975); McConahay, *Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, 41 LAW & CONTEMP. PROB. 205 (1977); Van Dyke, *Selecting a Jury in Political Trials*, 27 CASE W. RES. L. REV. 609 (1977); Zeisel & Diamond, *Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1976 A.B.F. RES. J. 151. For criticism of the new tactics, see Etzioni, *Creating an Imbalance*, 10 TRIAL 28 (Nov.-Dec. 1974); Silver, *A Case Against the Use of Public Opinion Polls as an Aid in Jury Selection*, 6 RUT. J. COMPUTERS & L. 177 (1978).

13. The Legal Attitudes Questionnaire tests for both "conviction-prone" and "acquittal-prone" biases. *See* text accompanying notes 15-16 *infra*.

14. The findings of the field study are on file at the *Minnesota Law Review*.

15. The construction and experimental testing of the LAQ are reported by its principal creator in Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734. For an explanation of how the authoritarianism element was validated, see note 22 *infra*. The full text of the LAQ appears in the Appendix.

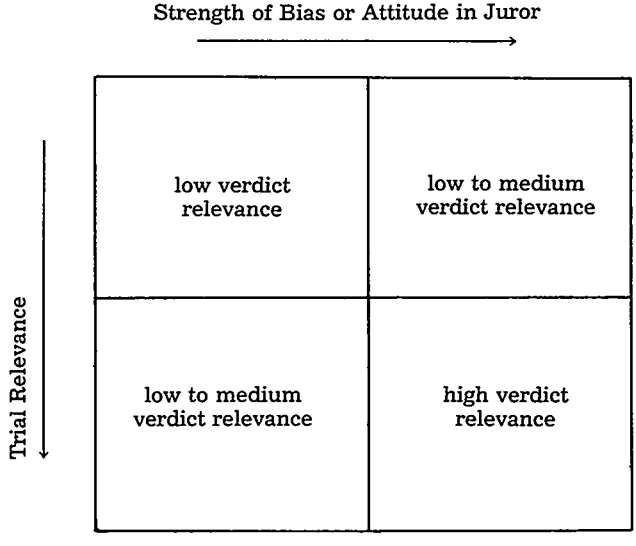
16. This brief discussion of the theoretical underpinnings of the LAQ is derived primarily from Boehm, *supra* note 15.

favor the prosecution, to believe the testimony of police or of other state witnesses, and to disbelieve the testimony of defendants; (b) those who are predisposed to believe the testimony of defendants and their witnesses, and to distrust prosecutors and the testimony of police; and (c) those who have no substantial predisposition in favor of either side. For convenience, these juror types are labeled Type A, Type B, and Type C, respectively. Type A jurors score as "authoritarian" on the LAQ and should be more conviction-prone or biased against defendants than Type B or C jurors. Type B jurors score as "antiauthoritarian" and should be more acquittal-prone or biased in favor of defendants than Type A or C jurors. Type C jurors score as "equalitarians" and should be the group most likely to be unbiased.

The LAQ's theory of bias is crucial to the questionnaire's utility in the courtroom. Courts and practitioners are concerned mainly with verdict-relevant bias—that is, bias prompting a juror to lean toward conviction or acquittal.[17] Verdict relevance is a function of how strongly a bias is held and how relevant the bias is to a specific trial.[18] There are a variety of

17. This bias need not be verdict-determinative. Verdict-relevant biases filter, rather than determine, a juror's perceptions; they prompt jurors to view the same objective evidence differently and can lead to different verdict preferences in the same case. These biases are not so strong, however, that they necessarily lead jurors to a particular verdict regardless of substantive evidence.

18. A juror's racism, for example, would not be verdict-relevant in a case in which all the trial participants were of a race toward which the juror felt no antagonism. The relationship between bias and verdicts can be displayed graphically:



juror biases that may have some relevance in a criminal trial,[19] but the LAQ is designed to reveal one of the most fundamental: the attitude of jurors toward authority.[20] Since each criminal trial pits the state against an alleged transgressor, a predisposition to believe or trust those on either side of the authority equation will certainly have some effect on a juror's tendency to reach a given verdict. Thus, to the extent that the LAQ reliably reveals attitudes toward authority that correlate with actual biases, its value as a jury-screening device is potentially sweeping because of the strong verdict-relevance of this bias.

The LAQ is divided into ten sets, each containing three statements.[21] For each set, respondents must indicate the statements they agree with most and least, and leave one choice blank. Although the statements in each set are designed to reflect authoritarian, antiauthoritarian, and equalitarian predispositions,[22] the key factor is not the intrinsic meaning of the statements, but the relative ranking that respondents give

19. *See generally* Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99 (1966); Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U. L. REV. 1079 (1965); Friend & Vinson, *Leaning Over Backwards: Jurors' Responses to Defendants' Attractiveness*, 24 J. COM. 124 (Summer 1974); Landy & Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPER. SOC. PSYCH. 141 (1969); Nemeth & Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCH. 221 (1973).

20. This study did not examine the relevance of the LAQ to jury selection in civil cases. Since most civil trials present a conflict between private individuals rather than between an individual and the state, the LAQ's focus on authoritarianism would not seem particularly relevant. It is certainly conceivable that authoritarians and antiauthoritarians view large corporations in a way that parallels their attitudes toward the state, since large corporations and the state together comprise "the establishment." There is nothing in this study, however, that bears out such an inference. Thus, the more important aspect of the LAQ with respect to its possible application in civil cases is its methodology: forced-choice questions that indirectly probe juror attitudes. A similar approach might be employed to measure verdict-relevant attitudes in civil cases.

21. A sample set of statements is:

A. The failure of a defendant to testify in his own behalf should not be taken as an indication of guilt.
B. The majority of persons arrested are innocent of any crime.
C. Giving an obviously guilty criminal a long drawn-out trial is a waste of the taxpayer's money.

For the complete text of the LAQ, see Appendix.

22. The statements used in the LAQ were drawn from newspapers and similar publications. *See* Boehm, *supra* note 15, at 741. A sample of respondents was given the LAQ together with the F-scale and dogma-scale tests, which are independently validated psychological measures of authoritarianism. *Id.* at 739. Responses to the LAQ and the other tests showed moderate to high correlations, indicating that the LAQ statements tap attitudes related to authoritarianism in a manner similar to the other scales. *Id.*

them. There are a total of thirty statements in the LAQ—ten authoritarian, ten antiauthoritarian, and ten equalitarian. In scoring the responses,[23] the statement within each set marked "most in agreement" is given a 3, the statement not marked at all is given a 2, and the statement marked "least in agreement" is given a 1. By separately totaling the scores for the authoritarian, antiauthoritarian, and equalitarian statements, three subscores corresponding to the three attitudinal categories are created.[24] A respondent is labeled either Type A, B, or C based on which of his subscores shows the greatest standard deviation from the sample's mean subscores.[25] In short, the label A, B, or C simply indicates on which of the three subscales an individual respondent is most unlike the respondents as a whole.

As this scoring suggests, not every response that indicates an authoritarian or antiauthoritarian predisposition is a clear indication of prejudice. The LAQ assumes that prospective jurors have many attitudes, some of which could be considered authoritarian and others antiauthoritarian. The responses simply identify the extreme cases—those potential jurors who most consistently place themselves on one end of the authoritarianism spectrum.

## III. THE STUDY'S METHODOLOGY

The field study reported in this Note was designed to ascer-

23. The scoring system described here is the same as that used by the LAQ's creators.

24. The range of scores for each subscale is from 10 (*i.e.*, all authoritarian statements marked for "least agreement") to 30 (*i.e.*, all authoritarian statements marked for "most agreement").

25. "Mean" scores are a form of average scores. The mean is computed by adding all the scores and then dividing the sum by the number of items. The term "mean" is used to distinguish the figure from other statistical measures such as mode and median, which are also forms of average scores.

Standard deviation measures the degree of variability in a set of scores. It is determined by computing the mean and then determining the deviation of each score from the mean. The deviation of each score is squared, and the sum of the squared deviations is divided by the number of scores. The square root of this figure is the standard deviation. The smaller the standard deviation, the more closely the scores are grouped about the mean. *See generally* H. KENDLER, BASIC PSYCHOLOGY 54-60 (2d ed. 1968).

In this study, a mean was computed for responses on each subscale. Because the labels—Type A, B, or C—are based on standard deviation, the label assigned to a juror reflects the subscale on which he was farthest from the mean. The importance of this scoring system is that it measures relative tendencies; there are no right or wrong answers and there is no specific "cut off" point for authoritarianism or antiauthoritarianism. The LAQ simply identifies those persons on a panel of jurors who are the most authoritarian and antiauthoritarian.

tain whether the LAQ can reliably identify jurors who harbor actual biases in criminal trials.[26] The study compared groups predicted to hold biases on the basis of their LAQ responses with those who gave actual indications of bias in post-trial interviews. The purpose of the study was to produce findings of value to courts and criminal lawyers, even though that objective necessitated certain research methods that social scientists might not find totally satisfying.[27]

The sample group was drawn from actual jurors in criminal trials that occurred in a major metropolitan court.[28] Jurors

26. The LAQ has been tested under experimental conditions. A group of college psychology students was given one of two written forms of a manslaughter case; one form was designed to lean toward a "guilty" verdict and the other toward a "not guilty" verdict. If a subject voted to convict for manslaughter or second-degree murder when presented with the innocent-leaning case, he was labeled "overly tough," and if he voted to acquit or convict for manslaughter (rather than the more serious second-degree murder option) when given the guilty-prone case, he was labeled "overly lenient." Boehm, *supra* note 15, at 746. Boehm found that those making the "overly tough" error scored disproportionately as authoritarians on the LAQ, and that those making the "overly lenient" error scored disproportionately as antiauthoritarians. *Id.*

Until now, Boehm's experiment was the only published evidence of the LAQ's potential utility in jury selection. The experiment has several weaknesses. First, the sample was limited to college students, a group among the least likely to serve on actual juries. Second, paper and pencil "trials" are very unlike actual trials, which have witnesses, counselors, and defendants; at trial, these participants usually exhibit a wide range of characteristics that can play to juror biases. Finally, the Boehm study did not account for other biases that, at an actual trial, might override the authoritarian or antiauthoritarian tendencies of a juror. The study reported in this Note focuses on actual jurors and trials, and should provide information that is more credible to lawyers and judges.

27. Several methodological problems result from using real courtrooms as laboratories. In this study, for example, concern over the possibility of jury-tampering required that juror interviews not be conducted until after the trial. This technique may cause problems with recall and untruthfulness. *See* note 36 *infra* (corrective measures taken in this study). Another problem is the element of nonrandomness that arises when participation in a study is voluntary. *See* note 30 *infra*. An additional problem is the possibility that a juror's perceptions of the early stages of the trial may be colored by subsequent stages that have intervened before the interview. The most significant problem with this study, however, is that with so many different trials, defendants, lawyers, and other factors affecting the results, the tremendous variety of biases that jurors might have could mask the pattern of bias to be predicted by the LAQ. This problem is due to the impossibility of isolating a single source of bias, as is done in experimental studies. This problem, however, is also an indication of the LAQ's greatest strength. The diversity of possible biases in real courtrooms is precisely the problem that a screening device must cope with if it is to be given credence by courts and practitioners.

28. The field phase of the study took place over a 12-week period in the District Court of Hennepin County, Minnesota. Hennepin County is comprised of the city of Minneapolis, its suburbs, and a small rural fringe, and has a population of approximately one million people.

from all eighteen of the felony trials that were held during the study period were included, creating a diverse set of trial circumstances against which to measure juror biases.[29] Participation in the study was voluntary. Nevertheless, of the 216 jurors who sat at the trials, 117 participated fully by taking the LAQ and later answering detailed questions about their trial experiences.[30] Although there are some problems with this type of sample, the transferability of this study's findings to actual courtroom settings far outweighs the absence of the statistical neatness that could have been achieved had experimental juries been used.[31]

29. The following chart summarizes the 18 trials and verdicts:

| Trial | Charges | Verdict |
|---|---|---|
| 1 | First-degree criminal sexual conduct; kidnapping; sodomy | Not guilty |
| 2 | Carrying handgun without permit | Not guilty |
| 3 | Burglary; aggravated assault; kidnapping | Guilty only of simple assault |
| 7 | Robbery; theft over $2500 | Guilty on both counts |
| 8 | Two counts of terroristic threats | Count one dismissed; guilty on count two |
| 9 | Aggravated assault | Not guilty |
| 10 | Receiving stolen goods | Guilty |
| 11 | Third-degree murder | Guilty |
| 12 | Two counts of first-degree criminal sexual conduct | Guilty on both counts |
| 13 | Fraud in obtaining credit; two counts of swearing to fraudulent statements | Not guilty on count one; guilty on both other counts |
| 14 | Attempted theft | Guilty |
| 15 | First-degree murder | Guilty |
| 16 | Escape from custody; aiding offender to avoid arrest; obstructing legal arrest; aggravated assault | Guilty on counts two and three |
| 17 | Two counts of drug possession with intent to sell | Not guilty |
| 18 | Two counts of aggravated robbery | Guilty on both counts |

30. Some might question whether the voluntary nature of the participation skews the sample. An analysis of control group scores, *see* text accompanying notes 32-34 *infra*, indicated that the volunteer group of trial participants was not—at least in terms of LAQ-scored attitudes—significantly different from the nonparticipating control group. Furthermore, it is unimportant whether nonparticipants might be more or less biased than participants, since this is not a study of "objective" degrees of bias, but a study assessing whether the relative propensity to be biased can be predicted by the LAQ. That differences may exist between participants and nonparticipants has nothing to do with whether the LAQ predicts which jurors in a given group are the most biased.

31. With 18 different trials, a number of circumstances existed that might have triggered biases unrelated to LAQ attitudes. Still, the LAQ must have predictive value in such a broad array of settings if it is to be an effective tool in assessing fundamental attitudinal bias. Experimental research designs using

The LAQ was administered to the members of the sample group after they had completed jury duty so that there would be no possibility of jury-tampering. In addition, a control group of seventy-one persons, who had originally been called for jury duty but did not serve, took the LAQ. On the authoritarian subscale, the mean scores of the control group and the sample group who served on juries did not differ significantly.[32] On the other subscales, however, the difference in the mean scores of the two groups was statistically significant,[33] thus indicating that the trial experience had an effect on response patterns. Further analysis showed, however, that the trial experience did not have a significant impact on the labels—Type A, B, or C—derived from the LAQ responses, and it is these labels that are the key predictors the study was designed to test. The trial experience factor was nevertheless factored into the scoring.[34]

Interviews with participating jurors[35] took place within two

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mock trials are more neat statistically because the researcher can control for certain variables. They suffer, however, from a number of weaknesses that this study is designed to correct. *See* note 27 *supra*.

32. All statistical work related to this study is on file with the *Minnesota Law Review*.

33. The concept of statistical significance entails a comparison of two variables—in this case, the subscale scores of those on juries and those in the control group—and a computation of the likelihood that the relationship between the variables is due to random chance rather than some systematic association. A "statistically significant" difference between the mean subscores on two of the scales means that there is less than a five percent probability that the differences are due to random variation (using t-test or Chi-squar statistics). *See* note 49 *infra*. Thus, the trial experience, rather than random chance, probably caused the differences in mean scores noted in the text.

34. The LAQ label for each juror was derived from the juror's standard deviation from the mean subscores. *See* note 25 *supra*. Mean scores were computed separately for the sample group, the control group, and all respondents as a whole. The standard deviations were then derived in the same manner, and LAQ labels were attached. Of the 117 respondents who sat on juries, 112 received the same LAQ label regardless of how it was computed. This means that the differences between the mean scores of the sample and control groups did not affect the label assigned in 112 of the 117 cases. The five jurors that were affected would have scored as Type C if whole-sample means were used, but scored as Type B when measured against the mean of the sample group. These five jurors were scored on the basis of the latter mean in order to "correct" for the skewing arising from their trial experience.

35. Both personal interviews and return-mail questionnaires were used. The 12 potential participants from each trial were contacted in random order, and the first quarter of the willing jurors from each case were interviewed immediately. If time and the jurors' schedules permitted, more interviews took place at a later date. Of the 117 juror participants, 53 were interviewed personally, and the balance completed the mail questionnaire. The initial questions in the personal interview were exactly the same as on the mail form so that diction or other problems could be identified. No significant problems were discovered.

weeks of trial to ensure that memories were fresh.[36] Post-trial questions were designed to provide indications of bias, so that jurors giving such indications could be compared with those whose LAQ responses predicted a strong likelihood of bias. The interviews used measures of bias seemingly imprecise to social scientists, but intuitively meaningful to practitioners. The measures employed were: juror assessments of the defendant's credibility;[37] juror beliefs concerning how often defendants are innocent;[38] the effect that the defendant's possible

36. The post-trial interview tactic has been criticized because it leaves open the possibility of untruthful or inaccurate recall. Anticipating this, the study was designed to minimize recall problems. First, all jurors were interviewed within two weeks of their trial. Second, most of the study's key bias measures were by their nature largely unaffected by recall. For example, a juror's perception of how frequently defendants are actually innocent, *see* note 38 *infra* and accompanying text, does not require any recall of his trial experience. Third, although some facts relevant to the bias measures may have been forgotten, the nature of the questions used probably reduced this possibility to a significant extent. The question concerning the effect of possible sentencing is an example. *See* note 39 *infra* and accompanying text. If a juror forgot what effect the sentence had, he would most likely select the answer "no effect" or "I didn't know what the sentence was." Intuitively, it is extremely unlikely that a juror would attempt to state a prior perception that he has now forgotten when he has neutral alternatives available. Finally, to the extent that inaccurate recall was actually a problem, it probably operated to mask response patterns otherwise predictable from LAQ scores. The problem of recall might account for the lack of a predicted pattern, but it is difficult to imagine how random forgetfulness or inaccurate recall could combine systematically to produce patterns of bias—across all juries and all measures of bias—that correspond with patterns predictable from LAQ scores.

37. In trials in which the defendant took the stand, jurors were asked:

> Try to think for a moment just about the defendant's testimony itself—as if there were no other evidence presented at the trial. Did you personally find that the defendant was . . .
>
> (a) very believable?
> (b) somewhat believable?
> (c) somewhat hard to believe?
> (d) very hard to believe?

Jurors were also asked how important this credibility factor was to their personal verdict choice.

If the defendant did not take the stand, jurors were asked:

> Did the fact that the defendant did not take the stand tend to make you . . .
>
> (a) lean toward conviction?
> (b) lean toward acquittal? or
> (c) did it not matter at all?

A similar follow-up question gauged the importance of this factor on the juror's personal verdict choice.

38. Jurors were asked:

sentence had on the juror;[39] the time during trial at which the juror first began forming a verdict preference;[40] and juror ratings of the performance of counsel.[41]

The major difficulty with using these or any other indicia of bias is finding an "objectively true" answer or attitude against which to measure juror responses. This study took a more realistic approach, using the average view of each jury as the yardstick against which to measure the existence of bias in its individual members. A defendant's credibility on the stand, for example, cannot be measured objectively; within certain limits, unbiased persons can certainly disagree about the degree of credibility displayed. Consequently, a juror's rating of a defendant's credibility was taken as an indicator of bias only if it

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How often do you think defendants that are brought to trial are actually innocent?
(a) almost never innocent
(b) seldom innocent
(c) occasionally innocent
(d) quite often innocent
(e) most are innocent

39. The question was:
Try to think about the possible sentence the defendant could have received. Did the possible sentence tend to make you . . .
(a) lean toward acquittal?
(b) lean toward conviction?
(c) no effect at all?
(d) did not know the possible sentence?

40. There were three questions in this subject area:
(1) As a trial progresses, most jurors find themselves leaning toward acquittal or conviction, sometimes changing their minds several times in the course of the trial. Try to think back to the opening arguments and recall when it was that you *first* started leaning toward acquittal or conviction. Was this . . .
(a) after opening arguments?
(b) after the prosecution rested?
(c) after the defense rested?
(d) after final arguments?
(e) not until deliberations began?
(2) Which way were you leaning at the point you indicated on the preceding question (toward conviction or toward acquittal)?
(3) If you *had to* reach a personal verdict *immediately* after opening arguments, which way would you have voted?
(a) for conviction
(b) for acquittal
(c) not sure

41. The jurors were first asked to rate separately the performance of the prosecutor and defense counsel as (1) excellent, (2) good, (3) only fair, or (4) poor. The third question asked jurors to compare the counsel for both sides:
Which of the following best describes your rating of the attorneys involved in the case?
(a) The prosecutor was much better.
(b) The prosecutor was only somewhat better.
(c) There was no difference.
(d) The defense counsel was only somewhat better.
(e) The defense counsel was much better.

differed substantially from the other jurors' ratings of the same defendant.[42] If the jurors' ratings of a defendant were widely scattered, none of the responses would be taken as indicators of bias.

A second problem with these measures is that jurors might lie rather than give answers that could make them appear biased.[43] This problem was largely solved by the predictive construct employed in this study, since the study focused on those jurors who revealed bias, not on jurors who appeared unbiased. Assuming that people lie only to hide bias, the analytical question became this: are those who reveal bias more likely to score as Type A, B, or C jurors on the LAQ? This approach sidestepped the untruthfulness problem because it did not attempt to ascertain whether apparently unbiased respondents had been truthful or not. Thus, by focusing on those who revealed bias, the study removed the untruthfulness element from its basic predictive analysis.

## IV. THE FINDINGS

Once the sample jurors were scored and labeled on the LAQ,[44] the post trial measures of bias were cross-tabulated

42. There was also no objectively correct answer on the performance of counsel. If most jurors thought one side's counsel was excellent but one or two others thought it poor—or vice versa—the existence of the small minority was treated as an indication of bias. There are a myriad of factors, however, that could override such predicted bias: a juror might not like a lawyer's accent, clothes, speech pattern, or general demeanor. This reflects the roughness of the bias measure. Still, if the LAQ construct is valid, the predicted predispositions of these jurors should include a tendency to favor one side's counsel: to be more impressed by his performance or less impressed with his opponent's performance.

43. *See* notes 78, 97 *infra.*

44. Since the LAQ was designed in 1965, some of its statements may reflect attitudes toward legal issues that are no longer current. To determine whether the assignment of LAQ labels—Type A, B, or C—had been skewed by the passage of time, extensive analysis was conducted on the LAQ's internal coherence. Each of the 30 statements was first cross-tabulated with the LAQ group labels. *See* note 45 *infra.* The results showed that each LAQ subgroup did in fact exhibit the greatest propensity to mark its corresponding subscale items for "most agreement." Other frequency analyses involved comparing the propensity of each LAQ group to mark noncorresponding subscales for "least agreement." Finally, each subscale item was examined to see if a majority of the proper LAQ group had marked the item for "most agreement." These analyses were applied to mean item scores as well as to item frequencies.

To summarize the results of this lengthy analysis, ten of the LAQ's statements were identified as weak performers. In other words, ten of the statements did not differentiate the subgroups as well as the other statements.

with the LAQ attitudes,[45] focusing throughout on measures of conviction-prone bias.[46] The first set of post-trial questions involved jurors' ratings of the defendant's credibility, or jurors' reactions to the defendant's decision not to take the stand.[47] The responses to these items are summarized in Table 1, in which all jurors[48] are categorized either as (1) having exhibited a predisposition to disbelieve defendants or to consider their

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Three of these items were on the Type A subscale, four were on Type B, and three were on Type C.

There can be little doubt that some of the items have suffered from the passage of time. The statement that the "Supreme Court is Communistic," for example, was probably a referent for reaction to Warren Court decisions on subjects such as school prayer and the rights of defendants. By the late 1970s, decisions on abortion, the death penalty, and other controversial issues probably clouded the authoritarian biases this statement was designed to tap. Two of the weak items tapped racial attitudes. The fact that neither produced response patterns consistent with the rest of the LAQ suggests quite strongly that racial attitudes cut across the authoritarianism lines established by the LAQ. Most of the other weak items were part of the triad that included one of the above items, suggesting that the former were not intrinsically weak but were probably skewed by the other weak choice in the triad.

As a final check, all ten weak items were excluded and the respondents were rescored on the remaining items. Of the 117 jurors in the sample, only 17 scored differently under the best-item version of the LAQ. Moreover, the "all-item" subscores correlated extremely well with the "best-item" subscores. Type A subscale scores on the all-item and best-item versions showed a .95 correlation; Type B subscores showed a .89 correlation; and Type C subscores showed a .90 correlation. All correlations were significant at the .0001 level. Clearly, the best-item version taps the same attitude dimensions as the original LAQ. The balance of this Note reports analysis reflecting the best-item version of the LAQ. Most of the bias analysis was also conducted with the all-item version of the LAQ labels and the restructuring did not affect the basic thrust of any of the findings.

45. A cross-tabulation is simply a display of the relationship between the frequency distributions of two variables. In this study, LAQ groupings were cross-tabulated with interview responses. The resulting relationship was then analyzed to determine what proportion of the Type A, B, and C groups revealed a given bias, and which proportion was greatest. Related analysis assessed whether the relationships observed—for example, that one group was the most likely to reveal a certain bias—were due to random chance or to a systematic association between the variables (*i.e.*, due to what the LAQ predicted). This analysis involved the concept of statistical significance, which is explained in note 33 *supra* and note 49 *infra*.

46. The data were not reanalyzed to infer acquittal-proneness: having found that the most "authoritarian" jurors were most likely to convict, it seemed probable that the most "antiauthoritarian" jurors would be the least prone to convict.

47. The precise questions asked are found in note 37 *supra*.

48. Table 1 displays juror responses from all trials in which the defendant did not take the stand and from the six trials in which the defendant testified. Credibility ratings showed that some jurors significantly underrated the defendant's testimony. Necessarily excluded were the trials in which the defendant testified, but juror ratings were too scattered for any individual response to be an indicator of bias.

not testifying as evidence of guilt, or as (2) not having exhibited a predisposition to disbelieve defendants or to consider their not testifying as evidence of guilt.[49] Table 1 shows that Type A (authoritarian) jurors were approximately three times as likely to exhibit this bias against defendants than either of the other groups.[50] Moreover, although Type A jurors made up only 40.5% of the sample group of participating jurors, they constituted 66.3% of those revealing an antidefendant bias.[51]

TABLE 1. Direct assessments of the defendant by LAQ groups.

| (raw #)<br>row %<br>column % | Type A jurors | Type B jurors | Type C jurors | ROW TOTALS |
|---|---|---|---|---|
| Jurors not biased against defendant testifying or failing to testify. | (18)<br>32.1%<br>60.0% | (14)<br>25.0%<br>87.5% | (24)<br>42.9%<br>85.7% | (56)<br>75.7% |
| Jurors exhibiting bias against defendant testifying or failing to testify. | (12)<br>66.3%<br>40.0% | (2)<br>11.6%<br>12.5% | (4)<br>22.4%<br>14.3% | (18)<br>24.3% |
| COLUMN TOTALS | (30)<br>40.5% | (16)<br>21.6% | (28)<br>37.8% | (74)<br>100% |

CHI-SQUARE TEST: SIGNIFICANT AT .05

The second measure of bias involved the presumption of innocence.[52] The inference employed here was that jurors who believe that defendants are seldom or almost never innocent probably are biased against the particular defendant appearing

49. For all the cross-tabulations reported or implied in this study, the Chi-square test of statistical significance was used. That test involves computing row and column marginal totals that would be expected if there were no association between the variables in the table and then estimating the likelihood that the difference between the expected marginal totals and the actual marginal totals is due to chance variation. A given pattern between the two factors is "statistically significant" at the .05 level if there is less than a five percent chance that the relationship shown—for example, that Type A jurors are more likely to disbelieve defendants—is due to random variation rather than a systematic association.

50. 40.0% of the Type A jurors revealed this bias, as opposed to 12.5% and 14.3% of the Type B and C groups, respectively.

51. Even when juror responses to the defendant's failure to testify were separated from the responses given when the defendant did testify, the pattern remained significant at .05. Type A jurors were three times as likely as Type C jurors to admit that they favored conviction in reaction to the defendant's failure to testify, and none of the Type B jurors so responded.

52. *See* note 38 *supra*.

before them.[53] The juror responses appear in Table 2.

TABLE 2. Frequency with which defendants are believed innocent by LAQ groups.

| Jurors saying that defendants are: (raw #) row % column % | Type A jurors | Type B jurors | Type C jurors | ROW TOTALS |
|---|---|---|---|---|
| ALMOST NEVER or SELDOM INNOCENT | (14)<br>48.3%<br>29.2% | (7)<br>24.1%<br>22.6% | (8)<br>27.6%<br>22.2% | (29)<br>25.2% |
| OCCASIONALLY INNOCENT | (31)<br>42.5%<br>64.6% | (16)<br>21.9%<br>51.6% | (26)<br>35.6%<br>72.2% | (73)<br>63.5% |
| QUITE OFTEN or MOST ARE INNOCENT | (3)<br>23.1%<br>6.3% | (8)<br>61.5%<br>25.8% | (2)<br>15.4%<br>5.6% | (13)<br>11.3% |
| COLUMN TOTALS | (48)<br>41.7% | (31)<br>27.0% | (36)<br>31.3% | (115)<br>100% |

CHI-SQUARE TEST: SIGNIFICANT AT .05
Two jurors did not answer.

Type A jurors were the most likely to believe that defendants are seldom or almost never innocent, but this difference was not as great as may have been expected.[54] Part of the problem with this question lay in the coding of its responses[55]—to some people the "occasionally innocent" response meant "only occasionally," while to others it conveyed greater frequency. In many interviews, jurors stressed the "only" aspect of the response but still believed that the "occasionally innocent" response accurately reflected their views. Although this language problem could not be corrected after the fact, it may explain why the predicted pattern was not stronger. Interestingly, Type B (antiauthoritarian) jurors were nearly five times as likely as other groups to think either that most defendants are

53. Surely one can believe generally that few defendants are innocent, yet still apply the presumption of innocence in a given case. One juror in the sample group admitted that he thought most defendants were guilty, but said that because he was aware of his attitude, he resolved every doubt in favor of the defendant. Nonetheless, a presumption of guilt would probably most often work to the disadvantage of defendants.

54. 29.2% of the Type A jurors held this view, as did approximately 22% of the other two groups. Although not striking, this difference is statistically significant at the .05 level.

55. For a list of the alternative responses to this question, see note 38 *supra*.

innocent or that defendants are "quite often" innocent.[56] Although Type B jurors represented only 27.0% of those responding to the question, they comprised 61.5% of those who more frequently perceived the defendant as innocent.[57]

The third measure of bias used in the study concerned the effect of the defendant's possible sentence on jurors.[58] Jurors rarely know what the sentence might be for a given crime, and they are instructed simply to base their verdicts on the facts. It is therefore not surprising that most jurors (approximately seventy-seven percent) responded that they either did not know or did not consider the possible sentence. The responses of the other twenty-seven jurors appear in Table 3.

TABLE 3. Sentencing effect by LAQ groups.

| The defendant's possible sentence caused the juror to: (raw #) row % column % | Type A jurors | Type B jurors | Type C jurors | ROW TOTALS |
|---|---|---|---|---|
| FAVOR ACQUITTAL | (1)<br>20.0%<br>10.0% | (3)<br>60.0%<br>42.9% | (1)<br>20.0%<br>10.0% | (5)<br>18.5% |
| FAVOR CONVICTION | (7)<br>87.5%<br>70.0% | (1)<br>12.5%<br>14.3% | (0) | (8)<br>29.6% |
| HAD NO EFFECT | (2)<br>14.3%<br>20.0% | (3)<br>21.4%<br>42.9% | (9)<br>64.3%<br>90.0% | (14)<br>51.9% |
| COLUMN TOTALS | (10)<br>37.0% | (7)<br>25.9% | (10)<br>37.0% | (27)<br>100% |

CHI-SQUARE TEST: SIGNIFICANT AT .05 [59]

Theoretically, Type A jurors should lean more often toward conviction, and Table 3 shows that in fact they were approxi-

56. 25.8% of the Type B jurors held this view, as compared with only approximately 6% of the other two groups.

57. The pattern in Table 2 is even more interesting when viewed in light of the study's follow-up questions. Jurors were asked whether their thoughts on this question came to mind during the trial and how important these thoughts were to their choice of verdict. Of the 14 Type A jurors who thought defendants were seldom or never innocent, exactly half stated that this perception came to them during the trial, and the same half considered it somewhat or very important to their verdict. Of the seven Type B and eight Type C jurors who had the same perception, only two of each stated that it came to them during the trial.

58. *See* note 39 *supra*.

59. The number of jurors included in this table—27—is small because most jurors indicated that they did not know or consider the possible sentence. Still, if the whole sample of jurors is assessed by dichotomizing the responses to this item into those "leaning toward conviction" and "all other responses," the proportion of LAQ groups revealing the bias does not change, and the pattern is significant at the .05 level.

mately five times more likely than other jurors to do so.[60] Type B jurors, on the other hand, should perceive sentences as heavy and be influenced toward acquittal more often. As Table 3 shows, Type B jurors were approximately four times more likely than other jurors to lean toward acquittal because of the possible sentence.[61] Finally, as would be expected from the LAQ construct, Type C jurors were overwhelmingly the group more likely to be unaffected by possible sentences.[62]

The two other measures of bias—the stage of trial at which jurors first began forming a verdict preference and the jurors' ratings of the attorneys' performance—both produced patterns consistent with those predicted by the LAQ.[63] The patterns on each single question, however, were not statistically significant. Nevertheless, because these measures are intuitively meaningful, they are included in the index in Table 4.

It is possible that some of the jurors who revealed just one of the above biases were not actually prejudiced against defendants, although, for certain measures of bias, the prejudice is intuitively obvious.[64] This helps to explain why Type B and C jurors may exhibit some of the indicators of "conviction-prone" bias. The inexactitude of these measures of bias can be mitigated, however, by focusing on the jurors who revealed multiple biases. This can be accomplished by means of an index that combines responses to all the individual measures of

60. 70.0% of the Type A jurors who stated that they had considered the sentence indicated that it made them favor conviction, while 14.3% of the Type B jurors and none of the Type C jurors gave similar indications.

61. 42.9% of the Type B jurors favored acquittal because of the sentence, as opposed to only 10.0% of either of the other groups.

62. 90.0% of the Type C jurors who considered the sentence said it had no effect at all, as did only 20.0% and 42.9% of the Type A and B jurors, respectively.

63. One question asked jurors was whether, after opening arguments, they would have voted for conviction or acquittal, or whether they were unsure. Type A jurors were approximately twice as likely as the others to reveal a willingness to convict at this stage. A second question asked jurors to specify the point at which they first began leaning toward a verdict. A conviction-prone response was inferred when a juror's first verdict preference was for conviction *and* that preference came at a stage much earlier than the point at which most members of the jury indicated that they first began leaning toward a verdict. Type A jurors were twice as likely as other jurors to exhibit this bias response. Finally, jurors rated the performance of prosecutors and defense counsel on independent scales (poor to excellent) and on a direct comparison scale. *See* note 41 *supra*. A response was deemed conviction-prone when a juror substantially overrated prosecutors or underrated defense counsel relative to the norm rating of all jurors at the trial. Type A jurors were more than twice as likely as either of the other groups to overrate the prosecutor; to rate defense counsel as "only fair" or "poor"; and to underrate defense counsel.

64. For example, a presumption of guilt, *see* text accompanying notes 52-57 *supra*, would probably most often work to the disadvantage of defendants.

bias. Such an index was constructed by summing the number of times each juror gave a conviction-prone response in terms of (1) disbelieving the defendant's testimony or treating his failure to testify as evidence of guilt; (2) perceiving defendants as seldom or almost never innocent; (3) leaning toward conviction because of the possible sentence; (4) deciding for conviction immediately after opening arguments or leaning toward conviction earlier than most jurors on the same trial; or (5) overrating the prosecutor's performance or underrating the defense counsel's performance. Jurors were grouped by the number of conviction-prone responses they gave, and this distribution was cross-tabulated with the LAQ groupings. The results are displayed in Table 4.

TABLE 4. Index of juror biases by LAQ groups.

| (raw #)<br>row %<br>column % | Type A jurors | Type B jurors | Type C jurors | ROW TOTALS |
|---|---|---|---|---|
| 0 bias responses | (9)<br>23.1%<br>18.8% | (13)<br>33.3%<br>40.6% | (17)<br>43.6%<br>45.9% | (39)<br>33.3% |
| 1 bias | (13)<br>32.5%<br>27.1% | (12)<br>30.0%<br>37.5% | (15)<br>37.5%<br>40.5% | (40)<br>34.2% |
| 2 biases | (13)<br>65.0%<br>27.1% | (5)<br>25.0%<br>15.6% | (2)<br>10.0%<br>5.4% | (20)<br>17.1% |
| 3 biases | (9)<br>90.0%<br>18.8% | (0) | (1)<br>10.0%<br>2.7% | (10)<br>8.5% |
| 4 or more biases | (4)<br>50.0%<br>8.3% | (2)<br>25.0%<br>6.3% | (2)<br>25.0%<br>5.4% | (8)<br>6.8% |
| COLUMN TOTALS | (48)<br>41.0% | (32)<br>27.4% | (37)<br>31.6% | (117)<br>100% |

CHI-SQUARE TEST: SIGNIFICANT AT .05.[65]

Table 4 shows that 54.2% of Type A jurors revealed two or more conviction-prone biases, while only 21.9% of Type B and 13.5% of Type C jurors fell in this category. More impressive is the fact that 27.1% of Type A jurors held three or more biases against the defendant, while only 6.3% of Type B and 8.1% of Type C jurors gave that many conviction-prone responses. Moreover, while 40.6% of the Type B and 45.9% of the Type C

jurors revealed no conviction biases at all, only 18.8% of the Type A jurors were in this category.

An examination of the mean number[65] of bias responses given by each LAQ group produced interesting results. The mean number of conviction-prone responses given by Type B jurors was .94, and the mean number given by Type C jurors was .82. In other words, Type B and C jurors gave an average of less than one conviction-prone response. The mean number of biases exhibited by Type A jurors, however, was 1.72—approximately twice the mean of either of the other groups. Although the difference observed between the means for Type B and C jurors was not statistically significant, the difference between the mean of Type A jurors and that of either of the other groups was statistically significant.[66]

To summarize, the goal of this study was to assess the usefulness of the LAQ as a device for screening potential jurors in criminal trials. The relationship between LAQ-predicted biases and actual observed biases was analyzed by comparing LAQ groupings with juror responses to a set of post-trial questions designed to elicit indications of bias. Although there are other biases that may supersede those predicted from LAQ scores,[67] the significant finding is that the predicted patterns withstood this analysis. The individual bias measures used in this study were imprecise enough to allow some genuinely unbiased jurors to appear biased on at least one of the measures. Despite this, jurors classified as Type A (authoritarian) by their LAQ responses were without exception those most likely to exhibit one or more of the conviction-prone biases. Moreover, the Type A jurors were more than twice as likely as either of the other groups to reveal more than one bias, twice as likely to reveal more than two biases, and four times as likely to exhibit more than three biases. Eighty-three percent of jurors giving more than four conviction-prone responses were Type A jurors, and no Type B jurors revealed this level of bias.

65. The significance level is reported at .05 for the sake of consistency with the other tables. In fact, the relationship between type of juror and number of bias responses in Table 4 is significant at the .01 level, meaning that there is only a one percent chance that the observed relationship between LAQ scores and levels of bias is due to random variation.

66. *See* note 25 *supra*.

67. The t-test of statistical significance was used here. The test indicated a 71% probability that the Type B and C means differed only because of random chance. The difference was therefore not statistically significant. On the other hand, the chance was less than 1% that the difference between the Type A mean and the means of the other two groups resulted from random chance. These differences were thus statistically significant.

That the expected pattern emerged for each of the measures of bias suggests a strong internal consistency in the authoritarianism concept; it is a deep and serious source of prejudice with widespread, yet subtle, implications. The fact that the expected pattern held across all of the trials, despite the wide differences in objective circumstances and the existence of possible intervening biases,[68] seems to confirm that the attitudes tapped by the LAQ are indeed fundamental and highly relevant in nearly any type of criminal trial.

## V. USING THE LAQ

The findings of this study, taken as a whole, show that the LAQ is a reliable predictor of prospective jurors' relative biases for and against defendants in criminal trials.[69] Thus, the LAQ and more refined screening devices that might be developed in the future provide a valuable new approach to the voir dire of prospective jurors. The need for such an approach, the benefits and risks it presents, and the practical and policy implications of its use are the focus of the following analysis.

Responses to the LAQ would not provide a basis to challenge jurors for cause, for such challenges normally require a direct statement of opinion or bias by a juror[70] that shows he could not "stand indifferent"[71] at trial.[72] The LAQ labels, however, would provide an excellent basis for the intelligent use of peremptory challenges. Either side can exercise peremptory

68. Racism is one such bias. *See* also note 69 *infra*.

69. The 18 different defendants represented diverse races, socioeconomic statuses, demeanors, speech patterns, accents, clothing styles, and hair lengths. All of these are possible sources of juror prejudice that would tend to result in random bias responses. A similar randomizing effect may result from the different types of offenses involved, the character of victims, and other differences in trial circumstances.

70. A number of methodological problems arose because actual trials were used as a laboratory. *See* note 27 *supra*. However, the predicted bias patterns occurred despite such inherent difficulties.

71. Caselaw and statutes adhere to the notion that a juror's admission of bias must normally take the form of a personal statement expressing his inability to reach a verdict solely on the evidence. *See, e.g.*, Irvin v. Dowd, 366 U.S. 717, 724 (1961); ILL. ANN. STAT. ch. 78, § 14 (Smith-Hurd Supp. 1979). An implied bias will not support a challenge for cause except on certain narrow grounds defined by statute, such as when a prospective juror is an interested party or is personally familiar with the parties or their counsel. For a discussion of these grounds and their possible expansion, see Note, *supra* note 7, at 1498-1501 & nn.28-36.

72. Lord Coke described an impartial juror as "indifferent as he stands unsworne." 1 E. COKE, FIRST PART OF THE INSTITUTE OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON § 234, at 155.a (1st American ed. 1853).

challenges without stating any ground whatsoever.[73] The importance of peremptories goes beyond the statutory framework that structures their use. The Supreme Court has noted that "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury,"[74] and that "[t]he right of [peremptory] challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury."[75] Given the importance of peremptories, voir dire questions aimed only at the exercise of peremptories have generally been allowed.[76]

Despite the importance of the peremptory challenge, conventional voir dire questioning frequently provides an inadequate basis for the intelligent exercise of peremptories. Prospective jurors often fail to disclose and sometimes even deliberately conceal opinions that seriously bias their ability to render an impartial decision.[77] This deception is understanda-

73. The LAQ does not direct jurors to consider the truth or falsity of any statement, nor does it involve other direct statements of juror opinion. The LAQ simply asks jurors to indicate the statements with which they most and least agree. The LAQ result is simply a prediction of how likely a juror is to be biased, and is not an implied admission of bias. *See* note 71 *supra*. Only indirectly does the LAQ facilitate voir dire aimed at challenges for cause: when attorney-conducted voir dire is permitted, counsel for both sides can first use LAQ responses to identify those prospective jurors who are the most extreme, and then concentrate aggressive questioning toward such jurors, in hopes of eliciting admissions that would constitute cause. The fact that the LAQ would not be a basis to challenge for cause suggests that courts will not be inclined to initiate use of the LAQ or similar devices. Trial counsel will thus have to request its inclusion with voir dire. Even after such a request, the trial judge may refuse to include the LAQ with voir dire. *See* notes 101-124 *infra* and accompanying text.

74. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 220 (1965) ("The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."); N.Y. CRIM. PROC. LAW § 360.30 (McKinney 1979).

75. Swain v. Alabama, 380 U.S. 202, 219 (1965).

76. Lewis v. United States, 146 U.S. 370, 376 (1892). *Cf.* Stilson v. United States, 250 U.S. 583, 586-87 (1919) (suggesting that the peremptory is simply a statutory privilege). For an analysis of why Swain v. Alabama, 380 U.S. 202 (1965), could be read as virtually overruling *Stilson*, see Babcock, *supra* note 2, at 555-56.

77. Not all states have approved of voir dire aimed solely at the exercise of peremptories. *See, e.g.*, People v. Rigney, 55 Cal. 2d 236, 244, 359 P.2d 23, 27-28, 10 Cal. Rptr. 625, 629-30 (1961). *But see* People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (1964) (implying that the intelligent exercise of peremptories requires voir dire directed to that end). In Swain v. Alabama, 380 U.S. 202 (1965), however, the Supreme Court put to rest the argument that exercising peremptories is not a valid purpose of voir dire: "The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories . . . ." *Id.* at 218-19. *See* United States v. Dellinger, 472 F.2d

ble since prospective jurors often feel that jury duty is imbued with civic approval and that dismissal for prejudice is a stigma to be avoided.[78] Indeed, it is possible that a juror may lie simply to gain the opportunity to exercise his prejudice.[79] Some commentators feel that the problem of deception by prospective jurors is growing because of the effort to streamline voir dire by having only judges question the juror panel.[80] When voir dire consists of nothing more than a judge questioning all members of a panel at the same time, the group dynamics of the setting alone make it difficult for even a sincere prospective juror to admit harboring the types of prejudice the peremptory challenge was designed to eliminate.[81] For all of these reasons, trial lawyers are often left to intuition, surmise, and guesswork in exercising their peremptories.

The lack of meaningful information that can be obtained through direct voir dire questioning has prompted the use of at least two other types of selection tactics that many consider undesirable: background investigations[82] and public opinion polls.[83] Background investigations may include interviews with

340, 367-68 (7th Cir. 1972) ("The government argues that the court is obligated to inquire only into matters that would disqualify a juror for cause . . . . We disagree. . . . [T]he defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges."), *cert. denied*, 410 U.S. 970 (1973). *See also* Bailey v. United States, 53 F.2d 982, 984 (5th Cir. 1931).

78. Professor Broeder has documented widespread deception by prospective jurors. Broeder, *supra* note 9. One type of deception is withholding relevant information unless it is specifically requested. The practice is illustrated by a narcotics-sale case in which a juror did not mention that she was married to a member of a local crime commission that was in the midst of an anti-dope campaign, and by a car-theft case in which a juror did not reveal that he was once arrested for car theft. Another type of deception is more blatant: several jurors, when asked about any connections with the parties or their counsel, did not mention, respectively, that one worked for a company also represented by the present defense lawyers and had in fact dealt with one of the lawyers on several occasions; that one was a close friend of the plaintiff's family; and that one had previously been generously compensated by the defendant railroad for an unrelated accident. *Id.* at 507-11.

79. *See, e.g., id.* at 511.

80. *See id.* at 510-14. *See also* Babcock, *supra* note 2, at 547-48.

81. *See* Babcock, *supra* note 2, at 548-49; Broeder, *supra* note 9, at 503-05. For a discussion of the relative merits of attorney-conducted versus judge-conducted voir dire, see Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290 (1972); Note, *Judge-Conducted Voir Dire as a Time-Saving Trial Technique*, 2 RUT.-CAM. L.J. 161 (1970). For empirical evidence indicating that the time saved may be minimal, see Levit, Nelson, Ball & Chernick, *supra* note 6, at 936-55; Zeisel, *supra* note 10, at 711.

82. This inference is intuitively clear to most trial lawyers. For empirical evidence, see Broeder, *supra* note 9, at 510-14.

83. For a discussion of investigation techniques, see Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 838 (1968).

a prospective juror's friends, neighbors, and co-workers,[84] as well as examinations of more personal data.[85] The practice raises obvious right to privacy concerns.[86] Because it directly taps relevant juror attitudes, the LAQ offers lawyers more reliable information than the secondhand recollections and inferences gathered in typical background investigations, and thus can obviate much of the need for such investigations. Moreover, the availability of such screening devices might make the legal restriction of background investigations more defensible.

The use of public opinion polls to systematize jury selection is a more recent response to the problems of voir dire questioning.[87] This new tactic has arguably been responsible for acquittals in a number of celebrated cases.[88] Polling tactics, however, have also led to charges of jury-rigging and calls for restricting the use of such tactics because of the unfair advantage they may give one side.[89] Although the LAQ is potentially vulnerable to the same charges, it would be a simple matter to structure its use to avoid the problems of public opinion polls. Polling questions are usually drafted with the needs of only

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For a criticism of these tactics, see Comment, *Computers and Scientific Jury Selection: A Calculated Risk*, 55 U. DET. J. URB. L. 345, 356-64 (1978).

84. *See* authorities cited in note 12 *supra*. *See generally* note 88 *infra*. *See also* Van Dyke, *supra* note 12, at 616-21.

85. *See* Okun, *supra* note 83.

86. Prosecutors have sometimes utilized the records of government agencies. *See* United States v. Costello, 255 F.2d 876 (2d Cir.) (prosecutor examined prospective jurors' prior tax returns before selecting jury for tax prosecution), *cert. denied*, 357 U.S. 937 (1958); Van Dyke, *supra* note 12, at 619 n.34 (prosecutor used FBI to conduct background investigations of jurors).

87. *See* Comment, *supra* note 83, at 356-64.

88. Typically, a poll is conducted of a sample drawn from the same lists used for jury selection (*e.g.*, voter registration lists, driver's license lists) to ascertain attitudes toward particular legal or social issues relevant to the trial (*e.g.*, attitudes toward the Vietnam War, race relations, or the American Indian Movement). The respondents' attitudes are correlated with the sample's demographic characteristics (age, race, sex, occupation) to create a profile of desirable and undesirable jurors. During voir dire, a prospective juror's demographic traits are compared to the profile, and jurors whose traits correlate highly with "undesirable" attitudes are peremptorily struck. *See* THE JURY SYSTEM: NEW METHODS FOR REDUCING JURY PREJUDICE (D. Kairys ed. 1975). Although the nominal aim of these tactics is the selection of more impartial juries, the tactics on their face function only to strike prospective jurors who may be unfavorable to a single side.

89. The cases include the Mitchell-Stans Watergate trial, several trials of Vietnam War protesters, and the Joan Little trial. *Compare* Etzioni, *supra* note 12 (acquittals in the celebrated cases resulted in large part from the selection tactics) *with* Saks, *Social Scientists Can't Rig Juries*, PSYCH. TODAY, Jan. 1976, at 48 (rebutting same proposition).

one side in mind.[90] Furthermore, even if the polling information generated for a given case is helpful to both sides, the poll itself is often quite expensive, and this makes it less fair to force one side to turn over its results to the other. The LAQ, on the other hand, taps an attitude dimension—authoritarianism and antiauthoritarianism—that is inherently meaningful to both sides in a criminal trial. Moreover, the LAQ is very inexpensive and would pose no fairness problem if a court ordered its results shared. Thus, the LAQ can be administered in a manner that is wholly fair to both sides. Finally, the availability of direct attitude information from a questionnaire like the LAQ may lessen interest in polling tactics because the attitude information elicited from polls is more inferential, based solely on the demographic traits of prospective jurors.[91]

Use of the LAQ during voir dire should produce the information needed for more effective use of peremptories, but the LAQ is not a substitute for conventional voir dire. Prejudice unrelated to authority could, in any particular case, override the authoritarian bias predictable from LAQ responses. An antiauthoritarian juror (Type B) who is also a racist, for example, may not behave as predicted if the defendant is black.[92] Direct questioning regarding specific prejudices may offer the only hope of identifying these sources of juror bias. The LAQ would nevertheless be an important supplement to conventional voir dire questioning.

The LAQ takes fifteen to twenty minutes to complete and can be administered to a panel of prospective jurors at one sitting. There is no need for the judge to be present; the LAQ can be administered by other court staff when the panel is first assembled. Juror responses can be scored by the staff of either or both the defense counsel and prosecutor while conventional

90. *See* Silver, *A Case Against the Use of Public Opinion Polls as an Aid in Jury Selection*, 6 RUT. J. COMPUTERS & L. 177 (1978).

91. Any specific attitude measured in a poll is helpful to both sides. For example, information revealing that *New York Times* readers in a given community are more likely to be biased against Native Americans than readers of local papers in that community could be equally valuable to both prosecutors and defense counsel in a trial involving American Indian Movement leaders. Since one side may design the poll to measure only certain attitudes and demographic traits, however, the side not involved at the design stage may lack an opportunity to include questions about the attitudes it considers important. Thus, even though the results of any particular poll may be equally meaningful to both the prosecution and the defense, the process of polling is designed to help one side and is not sensitive to the informational needs of both sides.

92. *See* note 88 *supra*.

questioning takes place.[93] The scores will then be available to both sides and can be taken into account when peremptory challenges are exercised.[94] This process might even save time by obviating the need for individual questions that bear on attitudes measured by the LAQ.[95]

The value of the LAQ during voir dire, however, is not merely its efficiency; it provides information that conventional voir dire questioning cannot provide. As a reliable predictor of bias, the LAQ can help overcome the problem of juror deception during voir dire, regardless of whether the deception stems from a determination to avoid dismissal, a failure to recognize one's own biases, the inhibiting effect of group questioning by a judge, or malice towards one of the trial opponents. This is because indirect questioning like the LAQ is generally superior to direct questioning for unmasking true attitudes. Rather than asking jurors whether they favor one side over the other—the "correct" answer to which may be given without revealing one's true feelings—the LAQ asks respondents to indicate relative agreement or disagreement with a series of statements, although they might never admit such choices directly. This forced-choice ranking is a method of indirect questioning that identifies deep-seated attitudes, which in turn are reliable predictors of actual bias against criminal defendants.[96]

Some may contend that jurors who hide biases during direct voir dire will do so in response to the LAQ as well. The

93. For examples of other possible superseding biases, see note 69 *supra*.

94. In a noncelebrated, noncapital case, the entire panel may consist of only 25 to 30 prospective jurors. The set of LAQ responses could easily be scored, averaged, and labeled in about half an hour. One study of voir dire practices shows that even the voir dire conducted entirely by judges lasts longer than this. *See* Levit, Nelson, Ball & Chernick, *supra* note 6, at 946-48, 958-59.

95. Two basic approaches are usually followed in organizing voir dire challenges. *See generally* Judicial Conference Comm. on the Operation of the Jury System, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 468 (1960). Under the "struck juror" method, prospective jurors are first called and examined, in turn, with dismissals for cause permitted where appropriate. Once the number called and not struck reaches the sum of 12 plus the statutory number of peremptory challenges for both sides, counsel begin exercising peremptories until only 12 remain (or more if alternates are to be selected). The alternative method requires counsel to exercise their peremptories or to accept the juror as each one is called. This leaves counsel in the position of gambling on whether the next persons called will be "better" or "worse." If LAQ-type responses from all prospective jurors were available at the outset of voir dire, counsel could more intelligently exercise peremptories under either system.

96. For example, in cases in which a police officer will be testifying, attorneys often question prospective jurors to discover if they tend to give extra credence to police testimony. This and related lines of questioning are designed to reach attitudes tapped by the LAQ.

results of this study, however, undercut this contention. The jurors in this study would be as inclined as any to project themselves as impartial and to pattern their responses to the LAQ accordingly. In fact, the sample jurors would probably have been more prone to attempt to skew their responses, since they were aware that their "performance" as jurors was the subject of the study. Still, as the findings show, the jurors whose LAQ responses predicted bias were those most often displaying actual bias.[97]

On balance, the LAQ offers a major improvement over direct questioning by counsel and over group questioning by the judge alone. Such improvement is important not only for the adversaries, but also for enhancing the impartiality of juries. Assuming that conventional voir dire questioning will result in the removal for cause of those who admit partiality, and that juror comments that intuitively reveal prejudice will be the basis of initial peremptory challenges, LAQ responses can be used by both sides to exercise their remaining peremptory challenges against those who score on the Type A or Type B extremes of the LAQ spectrum. There can be no guarantee that the resulting jury would be unbiased, but the process would provide both the prosecutor[98] and defense counsel with reliable information so that they can intelligently exercise their peremptory challenges. This maximizes the likelihood that the jury will be the most impartial one available from a given venire.[99]

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97. The superiority of indirect questioning seems most clear when the source of juror deception is taken into account. A well-intentioned juror might not consciously perceive his underlying bias, or, if he does, might reasonably decide not to make such an embarrassing admission. This kind of admission is particularly difficult when it must be delivered before a group of people, none of whom have made similar admissions. Understandable timidity and the failure to recognize one's own biases are the most frequent sources of juror deception; both are remedied by the indirect, forced-choice design of the LAQ.

98. Another fear might be that prospective jurors who do not want to serve would skew their responses to the LAQ in order to appear undesirable. Most persons who want to evade jury duty, however, can do so on the basis of hardship or other statutory grounds for exemption. *See, e.g.*, MINN. STAT. § 593.45(2) (Supp. 1980). For that matter, one seeking to appear undesirable can easily accomplish this by giving the "wrong" answers to conventional direct questioning on voir dire. LAQ-type devices neither create, worsen, nor solve this potential problem.

99. At English common law, the peremptory challenge originated as a right of the defendant. *See* Moore, *Voir Dire Examination of Jurors: I. The English Practice*, 16 GEO. L.J. 438 (1928). In the United States, the peremptory has always been available to prosecutors as well: "[I]mpartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution." Hayes v. Missouri, 120 U.S. 68, 70 (1887).

Although pursuit of information for peremptories is both proper and essential for assuring impartiality, it is usually within the trial court's discretion whether the LAQ, a similar device, or any specific voir dire question can be used.[100] Perhaps the single greatest concern that courts have in exercising their discretion on this point is the time and cost of lengthy voir dire to the public and the jurors.[101] Proper administration of the LAQ or similar screening devices need not be time-consuming, however, and might even save time by removing a wide subject area from the individual questioning phase.[102]

A second concern of courts is that lawyers not use voir dire to "condition" jurors.[103] Although any line of questioning conditions jurors to some extent, the questions that cause the most judicial concern are those that have little bearing on prejudice and serve only to "try the issues" during voir dire rather than at trial. The LAQ poses no real problem in this respect. Because jurors are not asked to acknowledge the truth or falsity of any LAQ statement,[104] they are not encouraged to form an opinion on the legal issues that underlie the LAQ. Second, LAQ statements are standardized rather than tailored to the circumstances or issues of any particular trial. Moreover, the relevance of LAQ responses to actual prejudice is intuitively clear and is also established by this study.[105] Finally, an implicit element of the "conditioning" concern is the usual one-

100. "Experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge." Hayes v. Missouri, 120 U.S. 68, 70 (1887). *Cf.* Swain v. Alabama, 380 U.S. 202, 219 (1965) ("The function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to *assure the parties* that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.") (emphasis added).

101. This discretionary power may be established by statute, *see, e.g.*, N.J. REV. STAT. § 2A:78-4 (1976); by rule, *see, e.g.*, FED. R. CRIM. P. 24(a); or by case law, *see, e.g.*, Aldridge v. United States, 283 U.S. 308, 310 (1931).

102. *See, e.g.*, People v. Crowe, 8 Cal. 3d 815, 828 n.22, 506 P.2d 193, 202 n.22, 106 Cal. Rptr. 369, 378 n.22 (1973) (duty to restrict voir dire to expedite trial) (citing People v. Semone, 140 Cal. App. 318, 326, 35 P.2d 379, 383 (1934)). *See generally* Levit, Nelson, Ball & Chernick, *supra* note 6.

103. *See* text accompanying note 96 *supra*.

104. "Conditioning" may take the form of "preinstructing" prospective jurors on the facts of the case or on law applicable to those facts. The statements in the LAQ are standardized and could not be used to such ends. Another conditioning device is to commit a juror in advance on an important issue. Usually this involves questioning a juror about his willingness to award money damages if fact *X* is found. Obviously, the LAQ could not be used to achieve this effect. Finally, attorneys sometimes use voir dire to establish a "good guy" rapport with jurors. The LAQ certainly has no impact on jurors in this regard. *See generally* Levit, Nelson, Ball & Chernick, *supra* note 6, at 942-46.

105. For the text of the LAQ instructions, see Appendix.

sidedness of voir dire questioning.[106] To the extent that the LAQ, like any question, may condition jurors, it does so in ways that benefit both sides.

The discretion of trial judges to restrict voir dire related to peremptories is quite sweeping because appellate courts have been reluctant to reverse jury verdicts when the only provable issue was *possible* bias arising from the refusal to allow particular questions.[107] Although declining to reverse verdicts in many cases,[108] appellate courts have announced guidelines for the scope of voir dire that are similar to the relevancy standard applied for judging the admissibility of evidence. For example, the Court of Appeals for the District of Columbia has held that the scope of voir dire relating to peremptory challenges should reach "matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law, yet significantly skew deliberations in fact."[109] The LAQ is designed to help ascertain the existence of biases that might "significantly skew" deliberations. In *United States v. Dellinger*,[110] the Seventh Circuit held that "[a]t a minimum . . . inquiry must be made into matters where the likelihood of prejudice is so

106. In establishing the relevance of possible prejudice to voir dire questions, courts have acknowledged the use of social science methods like those employed here. *See, e.g.*, United States v. Robinson, 475 F.2d 376, 381 & n.10 (D.C. Cir. 1973).

107. In United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1973), the defense counsel was denied an opportunity at voir dire to question jurors on their attitudes toward the defense of self-defense, on the ground that it would "inject" legal issues before evidence was submitted. The court feared that this defense might not actually be used at trial and that the defendant would unfairly benefit from raising it at voir dire. The circuit court rejected the trial court's argument, suggesting that the problem could be resolved by a cautionary instruction to the effect that voir dire questions are not evidence. *Id.* at 380.

108. *See, e.g.*, United States v. Robinson, 475 F.2d 376, 380 (D.C. Cir. 1973); Krueter v. United States, 376 F.2d 654, 657 (10th Cir. 1967), *cert. denied*, 390 U.S. 1015 (1968); Gorin v. United States, 313 F.2d 641, 647 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963).

109. For criticism of the lack of clear standards defining when trial courts may be reversed, see Note, *supra* note 7, at 1509-15.

110. United States v. Robinson, 475 F.2d 376, 381 (D.C. Cir. 1973). Among the "commonly known" matters that "the trial court *must* take into account and [that] govern . . . voir dire accordingly" are prejudice against wagering, the use of intoxicants, witnesses who are admitted liars, and religious minorities. *Id.* at 381 n.9 (emphasis added). The *Robinson* court further allowed that sources of prejudice that might "significantly skew deliberations" could still be inquired into, but that "it is incumbent upon the proponent to lay a foundation for his question by showing that it is reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp." *Id.* at 381. Clearly, the evidence established in this study linking LAQ attitudes with actual authoritarian biases is much more than "speculative."

great that not to inquire would risk failure in assembling an impartial jury."[111] Among matters to which the *Dellinger* court made reference were the "conflict of values . . . symbolized in the confrontation between the city police and the demonstrators. A juror's *basic sympathies with the actors* in these events could easily impair his ability to consider alternative views of the case as presented in court."[112] This standard for the minimum scope of voir dire questioning that trial judges must allow[113] seems on its face to encompass LAQ-type inquiries. The Fifth Circuit has suggested a standard that would allow questions "*reasonably practicable* to enable the accused to have the benefit of the right of peremptory challenge or to prevent unfairness in the trial."[114] The practicability of the LAQ has been discussed previously.[115]

In addition to establishing minimum guidelines for lines of inquiry that judges must permit at voir dire, appellate courts have occasionally required that certain types of questions be allowed. The District of Columbia Circuit found reversible error when a trial court refused to allow voir dire questions bearing on whether prospective jurors tended to give extra credence to police testimony simply because it was police testimony.[116] The Tenth Circuit is in accord.[117] It is precisely this type of prejudice that the LAQ taps.

Despite such cases and the general standards set forth by some courts, at least one other circuit[118] and the Supreme Court have indicated their unwillingness to set minimum standards for the scope of voir dire.[119] Thus, it is doubtful whether a trial judge must allow use of the LAQ at the risk of subsequent reversal.[120] Lawyers who seek to employ the LAQ or

111. 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

112. 472 F.2d at 368.

113. *Id.* at 369 (emphasis added).

114. The court added: "We have pointed out the inadequacy of a general question in testing a juror's possible prejudice in a specific area where it may well exist." *Id.*

115. Bailey v. United States, 53 F.2d 982, 984 (5th Cir. 1931) (emphasis added).

116. *See* text accompanying notes 70-98 *supra*.

117. Brown v. United States, 338 F.2d 543, 544-45 (D.C. Cir. 1964). *See also* Sellers v. United States, 271 F.2d 475, 476 (D.C. Cir. 1959). The opinion in *Brown* was authored by Judge (now Chief Justice) Burger. This is most interesting, given the trend of recent Supreme Court decisions concerning voir dire. *See* note 120 *infra*.

118. *See* Chavez v. United States, 258 F.2d 816, 819 (10th Cir. 1958).

119. *See* Gorin v. United States, 313 F.2d 641, 646-47 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963).

120. In Ham v. South Carolina, 409 U.S. 524 (1973), the trial court did not al-

similar screening devices should therefore focus their efforts on persuading the trial court that the LAQ is a proper and relevant method of inquiry,[121] that it comes within the minimum standards for voir dire questioning that appellate courts have recommended, that it is fair if the results are shared with opposing counsel, and that it can be administered very efficiently.

In the event that a trial judge should refuse to allow use of the LAQ as a whole, an attorney may still find it helpful to employ as many individual sets of forced-choice questions[122] as the court will allow. Although this approach clearly lacks the reliability or statistical probability of a complete screening device,[123] it at least elicits responses that are intuitively meaningful to the practitioner.

## VI. CONCLUSION

The field study showed that the LAQ was a reliable predictor of actual bias: Type A (authoritiarian) jurors were two to

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low voir dire questions relating to racial prejudice or prejudice against beards. The Supreme Court reversed on the issue, citing lack of inquiry regarding racial bias, but made it clear that minimal inquiry about race would have been a sufficient basis to affirm. The Court would not have reversed solely on the facial-hair-prejudice matter: "Given the traditionally broad discretion accorded to the trial judge in conducting voir dire, . . . and our inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices, we do not believe the petitioner's constitutional rights were violated." *Id.* at 528.

If there was any doubt after *Ham* about the Court's willingness to put voir dire standards on a constitutional footing, they were resolved in the negative in Ristaino v. Ross, 424 U.S. 589 (1976). In *Ristaino*, the Court held that "[t]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him." *Id.* at 594. *Ristaino* involved a black on trial for armed robbery, and the Court found this situation quite different from that in *Ham*, a case involving a black civil rights activist on trial for possession of marijuana. *Id.* at 595. The trial court did not have to inquire about racial prejudice in *Ristaino* because racial issues were not "inextricably bound up with the conduct of the trial." *Id.* at 597. *Ristaino* was a state prosecution, and the Court indicated that it probably would have required the racial inquiries in federal courts under the Court's supervisory power. *Id.* at 597 n.9.

121. *See* notes 108-109 *supra* and accompanying text.

122. Perhaps the most compelling reason trial courts should exercise their discretion to allow devices like the LAQ is the fundamental policy underlying trial by jury in criminal cases: the need to impose a buffer between the state and the individual when the state seeks to deprive the individual of his physical liberty. By identifying jurors who hold beliefs at the extremes of the authoritarianism spectrum, the LAQ enhances the jury's buffer function. *See* note 2 *supra*.

123. In other words, the attorney should take a pair of authoritarian and antiauthoritarian statements and ask the juror which one he agrees with most and least.

five times more likely than jurors of either other group to display each of the conviction-prone biases studied and were overwhelmingly more likely to reveal multiple biases as well. Moreover, the consistency of the bias pattern across all trials and across all measures of bias indicated that these attitudes toward authority are fundamental and operate to a significant degree in virtually every type of criminal trial. The biases that flow from these attitudes may be subtle, but they are powerful and verdict-relevant.

Although LAQ responses probably would not be a basis for challenging jurors for cause, the questionnaire could be a valuable part of voir dire aimed at the intelligent exercise of peremptories. Use of the LAQ would provide more accurate and reliable information about the attitudes and prejudices of prospective jurors. It can help resolve the problem of juror deception and can obviate much of the need for recently developed selection tactics such as background investigations and polls. The efficiency of administering the LAQ can help reduce the time pressures that are transforming voir dire into a judge-conducted procedure. Moreover, by improving the accuracy of peremptory challenges for both sides, the LAQ or some similar device could make criminal juries as a whole more impartial.

Allowing use of the LAQ or similar devices is a matter within the discretion of the trial courts. Nevertheless, the refusal to allow some form of inquiry into authority-related biases has been held reversible error in a number of cases. Furthermore, the major concerns of courts in exercising their discretion to restrict voir dire are not presented by the LAQ. Use of the LAQ could reduce the total time spent on voir dire, and it would neither "condition" jurors nor "try the issues" before trial has begun. Most importantly, the LAQ is not designed with the needs of only one side in mind. Rather, it taps significant prejudices relevant to both sides. Trial courts should allow use of the LAQ because it clearly comes within the scope of voir dire guidelines set out by appellate courts, because it promotes the policy objectives behind voir dire, and because it can be administered efficiently.

## APPENDIX

*The Legal Attitudes Questionnaire appears on the next few pages exactly as it was administered, except that the subscale for each item is marked where the respondents would place their marks.* "A" *indicates the authoritarian response,* "AA" *indicates the antiauthoritarian response, and* "E" *indicates the equalitarian response.*

## LEGAL ATTITUDES QUESTIONNAIRE

There are ten groups of statements on the following pages, each expressing a commonly held opinion about law enforcement, legal procedures and other things connected with the judicial system. There are three statements in each group.

Please put a plus mark (+) on the line next to the statement in a group that you agree with most, and a minus (−) mark next to the statement you agree with the least. The statements are not true or false in any sense and you should not try to judge any of them as true or false. They are opinions and you merely mark the one you agree with the most and the one you agree with the least.

An example of a set of statements might be:

\+ A. The failure of a defendant to testify in his own behalf should not be taken as an indication of guilt.

_____ B. The majority of persons arrested are innocent of any crime.

\− C. Giving an obviously guilty criminal a long drawn-out trial is a waste of the taxpayer's money.

In this example, the person answering has agreed most with statement A and least with statement C.

Please try to work carefully, choosing the item you agree with most and the one you agree with least in each set of statements. There is no time limit on this questionnaire, but do not spend too much time on any set of statements. Some sets are more difficult than others, but please do not omit any set of statements.

Set I

"AA" A. Unfair treatment of underprivileged groups and classes is the chief cause of crime.

"A" B. Too many obviously guilty persons escape punishment because of legal technicalities.

"E" C. The Supreme Court is, by and large, an effective guardian of the Constitution.

Set II

"A" A. Evidence illegally obtained should be admissible in court if such evidence is the only way of obtaining a conviction.

"AA" B. Most prosecuting attorneys have a strong sadistic streak.

"E" C. Search warrants should clearly specify the persons or things to be seized.

Set III

"AA" A. No one should be convicted of a crime on the basis of circumstantial evidence, no matter how strong such evidence is.

"E" B. There is no need in a criminal case for the accused to prove his innocence beyond a reasonable doubt.

"A" C. Any person who resists arrest commits a crime.

Set IV

"E" A. When determining a person's guilt or innocence, the existence of a prior arrest record should not be considered.

"AA" B. Wiretapping by anyone and for any reason should be completely illegal.

"A" C. A lot of recent Supreme Court decisions sound suspiciously Communistic.

Set V

"AA" A. Treachery and deceit are common tools of prosecutors.

"A" B. Defendants in a criminal case should be required to take the witness stand.

"E" C. All too often, minority group members do not get fair trials.

Set VI

"AA" A. Because of the oppression and persecution minority group members suffer, they deserve leniency and special treatment in the courts.

"E" B. Citizens need to be protected against excessive police power as well as against criminals.

"A" C. Persons who testify in court against underworld characters should be allowed to do so anonymously to protect themselves from retaliation.

Set VII

"E" A. It is better for society that several guilty men be freed than one innocent one wrongfully imprisoned.

"A" B. Accused persons should be required to take lie-detector tests.

"AA" C. When there is a "hung" jury in a criminal case, the defendant should always be freed and the indictment dismissed.

Set VIII

"AA" A. A society with true freedom and equality for all would have very little crime.

"E" B. It is moral and ethical for a lawyer to represent a defendant in a criminal case even when he believes his client is guilty.

"A" C. Police should be allowed to arrest and question suspicious looking persons to determine whether they have been up to something illegal.

Set IX

"A" A. The law coddles criminals to the detriment of society.

"AA" B. A lot of judges have connections with the underworld.

"E" C. The freedom of society is endangered as much by over-zealous law enforcement as by the acts of individual criminals.

Set X

"AA" A. There is just about no such thing as an honest cop.

"E" B. In the long run, liberty is more important than order.

"A" C. Upstanding citizens have nothing to fear from the police.