One Jury Invisible: A Group Dynamics Approach to Voir Dire

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INTRODUCTION

This Note will explore the group dynamics literature to show how consideration of the jury as a whole may aid in voir dire and to illustrate some limitations on jury selection techniques. The American judicial system guarantees citizens the right to trial by an impartial jury of their peers. Every year, litigants, taxpayers and the courts invest a substantial sum on jury selection to ensure that the parties will receive a fair trial. It is no secret, however, that in our adversarial system, each side will attempt to choose jurors who are likely to favor their case at trial. Similarly, parties attempt to excuse jurors who are biased toward their opponents. The primary challenge faced by attorneys in jury selection is trying to predict in advance how each member of the venire will vote. Additionally, it is difficult to tell whether a favorable verdict is the result of careful jury selection, persuasive arguments and evidence at trial, or some other factor. Hindsight is not always 20-20.

Social scientists have attempted to aid frustrated litigators by applying psychological techniques to the jury selection process. However, the success of scientific jury selection remains speculative. Part of the difficulty in measuring the effectiveness of psychologically assisted jury selection is that we are precluded from examining what goes on inside the jury room. We cannot tell from the final verdict which jurors were the most instrumental in pushing the decision through the deliberations and which jurors were the most resistant.

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1. U.S. CONST. amend. VI (criminal cases); U.S. CONST. amend. VII (civil cases); see also MORRIS J. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 139-43 (1972) (listing state constitutions and statutes guaranteeing the right to trial by an impartial jury).
4. Social scientists have noted this difficulty in distinguishing between the effects of individuals on group behavior and the effects of the group as a whole on the group behavior. David A. Kenny & Lawrence La Voie, Separating Individual and Group Effects, 48 J. PERSONALITY & SOC. PSYCHOL. 339 (1985).
This uncertainty is the primary focus of the group dynamics model. The model suggests a number of factors that influence the ways in which a small group, such as a jury, interacts. These factors include the roles that each individual juror plays in the jury room, stereotypes held by each person and the proportion of jurors with given demographic traits. Every group is unique because of its specific combination of individuals and their attitudes. The role that one plays in a particular group depends on who the other group members are. Further, people rely on stereotypes to differing extent based on the availability of additional information about others. These group processes are not readily discovered during voir dire, yet their effects on the outcome of the trial are tremendous.5

The litigants, therefore, would want to learn something about the group dynamics of the ultimate jury during voir dire. The ability to predict the roles that each potential juror would play if selected would be an invaluable guide to this process. Unfortunately, it is not possible to glean this crucial information. At best, voir dire can provide an incomplete picture of how the jury will decide the case. It does not make sense, then, to permit extensive questioning during voir dire since the litigants will never be able to discover what they really want to know. A preferable practice would be to curtail the length and scope of voir dire in order to conserve judicial resources.

Section I of this Note provides background information about voir dire including a brief history, the rules governing it, and its goals and scope. Section II describes scientific jury selection, the process by which social scientists aid lawyers in impaneling jurors. Section III presents a psychological model of group dynamics. The model suggests that there is more to predicting how group members will interact than merely determining who will be the group leaders. Section IV posits that in order for attorneys to select the jurors from the venire who are most likely to return a favorable verdict, they would need to know something about the dynamics of the entire jury that is ultimately selected. However, neither the traditional methods of jury selection nor those guided by social scientists are sufficient to glean this critical information about the jury’s dynamics. This Note concludes that extensive voir dire is a waste of resources for both the court and the litigants.

I. VOIR DIRE

The term "voir dire" literally means "to speak the truth."6 The ultimate goal of voir dire is to insure that the jury is composed of individuals who are competent to weigh the evidence presented at trial, to decide the facts, and to judge witness credibility without bias, prejudice, or partiality.7 The jury must be able to decide the case on its merits, that is, solely on the basis of the evidence presented at trial.8 Ideally, through a series of questions, the court or counsel seeks the truth about each venireperson's views to eliminate jurors who will be unlikely to arrive at a just verdict because of adverse beliefs about either party.9 The attorneys may exercise challenges either for cause10 or peremptorily11 in order to eliminate jurors who they believe to be biased in some way.

In addition to the purpose of impaneling an impartial jury, voir dire may serve other functions. These include an opportunity for the attorneys and jurors to get to know each other,12 the chance to educate the venire about the issues and relevant law applicable to the case,13 a way to minimize damaging facts in advance of the trial,14 and a testing ground

10. A challenge for cause may be sustained if counsel has reason to believe that a previous experience or current attitude such as an admitted bias will prevent the juror from fulfilling his or her duty to evaluate the evidence fairly and impartially. Alvarez, supra note 7, at 963. The number of challenges for cause is unlimited for all parties. ROBERT A. WENKE, THE ART OF SELECTING A JURY 43 (1979).
11. Parties or their attorneys may dismiss potential jurors without stating a reason through the use of peremptory challenges. See infra notes 51-57 and accompanying text (explaining juror challenges).
for counsel to explore tactical strategies. In fact, many litigators who prefer attorney-conducted voir dire over questioning by the judge alone justify their preference by noting these additional functions of the jury selection process.

While these opportunities may benefit trial attorneys, they are merely secondary effects of voir dire. They are not valid justifications for sacrificing precious court time and resources. In fact, these secondary purposes of voir dire do more to create bias than they do to eradicate it. A juror who develops a rapport with the lawyers during voir dire will be no better equipped to decide the facts of the case fairly than the juror who becomes acquainted with the attorneys during opening statements or the juror who is indifferent to counsel throughout the entire trial. The well-prepared litigator should be able to persuade the jury of her case through effective trial advocacy without indoctrinating the jurors in advance. Further, if counsel-juror rapport and the development of trial tactics were of primary importance in jury selection, exclusive judge-conducted voir dire would be abandoned because the judge arguably cannot fulfill these functions. This Note assumes that the main objective of voir dire is to eliminate jurors who will not weigh the evidence fairly.

A. History of Voir Dire

Although the precise date of the origination of the twelve-person jury is uncertain, juries were in common use in England by the end of the twelfth century. Jurors were originally selected by the king or his officers from among the prominent members of the community, and they were charged with the task of resolving disputes based on their own personal knowledge. There was no need to find impartial jurors; in fact, the jurors themselves were required to conduct interviews of parties and witnesses in order to decide the facts of the case. Further, jurors were compelled to arrive at the verdict specified by the king. In the mid-1500s, for example, juries were punished for rendering unfavorable verdicts by the imposition of hefty fines, imprisonment, loss of land and

15. Hanley, supra note 12, at 865; see also KASSIN & WRIGHTSMAN, supra note 14, at 50-52 (describing legitimate and illegitimate uses of voir dire).
17. KASSIN & WRIGHTSMAN, supra note 14, at 50.
20. LANDSMAN, supra note 18, at 9.
property, and community ostracism.\(^{21}\)

As Europe emerged from the Dark Ages, the character of the jury began to shift from inquisitorial to adversarial. Potential jurors could be questioned and challenged for bias by the parties.\(^{22}\) Verdicts were rendered on the basis of in-court testimony and evidence as opposed to the fruits of the jurors’ investigations. Most importantly, jurors began to gain independence from governmental direction. In a 1670 case, a jury was fined and imprisoned for refusing to convict William Penn and William Mead for unlawful assembly and related charges.\(^{23}\) In the landmark proceeding for habeas corpus, Chief Justice Vaughan rejected the notion of governmental control over juries by the imposition of fines, imprisonment, or other punishment.\(^{24}\)

While many aspects of the American jury were adapted from English practices, voir dire is purely an American creation. In England today, jurors are selected at random from the pool of eligible jurors; questioning about potential jurors’ attitudes and beliefs is generally not permitted,\(^{25}\) and challenges are rarely exercised.\(^{26}\) Voir dire first emerged as a result of the Massachusetts Jury Selection Law of 1760 which prohibited the questioning of prospective jurors about their beliefs once they were chosen for jury duty by the sheriff.\(^{27}\) Because the jury pool was selected at town meetings, defendants began to use the local forum to question the members of the pool about possible biases. When the sheriff’s jury list was presented, the defense could use the information to exercise challenges.\(^{28}\)

By the early 1800s, the right to challenge biased jurors for cause was firmly rooted. Although the Supreme Court acknowledged the difficulty of finding jurors entirely free from the influence of pre-formed opinions, Chief Justice Marshall concluded that it was proper to prevent a clearly biased juror from being sworn.\(^{29}\) Later cases from the nineteenth century

\(^{21}\) VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 22-23 (1986).

\(^{22}\) LANDSMAN, supra note 18, at 9.

\(^{23}\) In Penn’s Case, 6 Howell’s St. Trials 951 (1670); id. at 9-10.

\(^{24}\) In Bushell’s Case, 124 Eng. Rep. 1006 (C. P. 1671).

\(^{25}\) HANS & VIDMAR, supra note 21, at 31. The roots of the prohibition against questioning jurors was firmly established in the trial of James Cook for treason in 1696. The court stressed the importance of protecting the jurors from harassment since they were not the ones being tried. Id. at 35. For a more detailed account of the James Cook trial and the role of the seventeenth century jury generally, see THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200 - 1800, at 222-23 (1985).

\(^{26}\) Ziesel & Diamond, supra note 9, at 498-99.

\(^{27}\) HANS & VIDMAR, supra note 21, at 35.

\(^{28}\) For a more comprehensive discussion about the history of juries and voir dire, see id. at 21-44.

\(^{29}\) Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 297 (1813).
also reflect the acceptance of voir dire questioning to eliminate jurors who may not decide the case fairly. In Connors v. United States, 30 for example, the Court stated that "[A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried." 31 The Court stressed that this rule is applicable in both civil and criminal cases. 32

One limitation on voir dire is that it cannot control for bias in selecting the entire pool of potential jurors. If a group is completely excluded from being summoned to the venire, there is little that voir dire can do to guarantee representation of that group on the jury. Up until recently, the pool of eligible jurors was created in a non-uniform and highly biased manner. The key-man system employed upstanding members of the community to compile lists of eligible potential jurors. The arbitrary practice of calling upon the unemployed, retired persons, or anyone who happened to be found nearby the courthouse was also used. 33 The result was a homogeneous venire where a challenge to one juror would merely result in an alternate juror who was essentially similar to the first in both demographics and beliefs. 34 The variance in jury selection procedures among jurisdictions was so great that in 1961, each federal district court employed a different method to select its jury pools. 35 In 1968, Congress attempted to remedy the situation by enacting the Jury Selection & Service Act, 36 which requires venires to be drawn randomly from a fair cross-section of the population. The burden of assuring fair representation of the community's demographics and views was thus shifted to voir dire.

30. 158 U.S. 408 (1895).
31. Id. at 413.
32. Id.
33. KASSIN & WRIGHTSMAN, supra note 14, at 22.
35. KASSIN & WRIGHTSMAN, supra note 14, at 23.
36. 28 U.S.C. § 1861 (1968). The Act provides in part that:
It is ... the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.
No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States ... on account of race, color, religion, sex, national origin, or economic status.
Id. at §§ 1861-1862.
B. Current Voir Dire Practice

The federal rules for voir dire are essentially the same for civil and criminal cases. In federal jurisdictions, the court may conduct voir dire on its own, or it may allow the attorneys to conduct the examination in whole or in part. The majority of federal jurisdictions, as well as state courts, conduct voir dire without the oral participation of lawyers. On the state level, voir dire procedures are dictated expressly by state constitutions, state statutes, or court rules. Some jurisdictions permit counsel to either submit questions to the judge or to supplement the trial judge's inquiries. However, the judge has great discretion as to the amount of input the parties will have in questioning. If the judge alone conducts the voir dire, the parties and their counsel may be present to move to strike jurors for cause or to exercise peremptory challenges. However,

37. Fed. R. Civ. P. Rule 47(a). Rule 47(a) provides: The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Id.

38. Fed. R. Crim. P. Rule 24(a). Rule 24(a) provides: The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Id.

39. WENKE, supra note 10, at 15. This practice of excluding counsel altogether from questioning the venire has been held constitutional. United States v. Hoffa, 367 F.2d 698, 710 (7th Cir. 1966); Hamer v. United States, 259 F.2d 274, 279-80 (9th Cir. 1958), cert. denied, 359 U.S. 916 (1959).

40. WENKE, supra note 10, at 15.

41. Id.; see also Jones, supra note 7, at 132; Dean A. Stowers, Note, Juror Bias Undiscovered During Voir Dire: Legal Standards for Reviewing Claims of a Denial of the Constitutional Right to an Impartial Jury, 39 Drake L. Rev. 201, 202 (1989-90).


44. See United States v. Baldwin, 607 F.2d 1295 (9th Cir. 1979); People v. Green, 333 N.E.2d 478 (Ill. App. Ct. 1975).


attorneys may not complain that the jury is not fair or impartial absent clear prejudicial error.  

Regardless of who conducts the voir dire, the general procedure is essentially the same. The judge begins by presenting a general introduction to the venire about the purpose and importance of jury service and voir dire, and gives a brief account of the nature of the case. The jurors are administered an oath to answer all questions truthfully and to the best of their knowledge. Then the questioning begins. Voir dire may be directed toward potential jurors individually or as a group. The first questions posed are those eliciting background information, including the juror's name, place of residence, age, marital status, occupation, and level of education. Jurors are also asked whether they or any member of their immediate family have ever participated in a suit, whether as a juror, witness, party, or otherwise, or if they personally know any of the attorneys, parties, or witnesses. If the answer is yes, the juror is asked to elaborate and to indicate whether this prior experience has influenced her in a way that may impair fairness and impartiality. These questions form the basis for challenges for cause and peremptory challenges. 

The standard for challenges for cause and peremptory challenges are essentially the same on the federal and state levels. A juror is challenged for cause when something about her background precludes her from being an impartial factfinder in the case as a matter of law. Grounds for successful challenges include evidence that a potential juror: is not a U.S. citizen; is not a resident of an area under the court's jurisdiction; cannot speak or understand English; has a mental or physical disability that precludes effective jury service; is currently under indictment or has not been pardoned for a previous conviction; or has recently served on a jury. The number of challenges for cause is unlimited. Either the judge or the party moving to strike a juror for cause must state the grounds for


49. See, e.g., *Mu'Min*, 111 S. Ct. at 1902-03, 1908 (holding that the questioning of potential jurors in groups of four does not violate the Sixth Amendment right to a fair jury).

50. Cf. *Wood*, supra note 12, at 171 (discussing typical questions posed to determine whether a challenge for cause is justified); *Stowers*, supra note 41, at 202 (generally listing areas of voir dire inquiry).


the challenge.53

Peremptory challenges differ from challenges for cause in three significant respects. First, the right to exercise peremptory challenges is not constitutionally protected.54 Second, peremptory challenges are limited in number. Each party or each side is allotted a maximum number of peremptory challenges, the amount depending upon both the jurisdiction and the nature of the case.55 In some cases, both the plaintiff and the defendant are entitled to the same number of challenges, while in others, the defendant is allowed more.56 The third difference between peremptory challenges and challenges for cause is that the party exercising the peremptory challenge need not supply a reason for the juror's dismissal. As a result, counsel may strike a juror on any grounds, whether appropriate, such as a belief that the juror will be biased against her large corporate client, or inappropriate, such as because the juror is black.57

The judge has tremendous discretion in the number and types of questions to be permitted.58 The only constraints are those of fairness.59

53. Cf. GEORGE ET AL., supra note 51, at 50 (explaining that there must be a specific reason why the juror will be unable to render an impartial verdict).
55. In federal criminal cases, for example, each side is entitled to 20 peremptory challenges if the defendant is charged with a capital offense, and 3 peremptory challenges if the offense is punishable by fine, imprisonment of one year or less, or both. FED. R. CRIM. P. 24(b). If the offense charged is punishable by more than a one year prison sentence, the prosecution is entitled to 6 peremptory challenges and the defense is allowed 10. Id. In federal civil cases, each party is entitled to three peremptory challenges unless the court exercises its discretion to permit more. 28 U.S.C. § 1870. Other jurisdictions specify the number of peremptory challenges by statute. See Swain v. Alabama, 380 U.S. 202, 217, n. 20 (1965) (listing various state statutes), overruled on other grounds by Batson v. Kentucky, 476 U.S. 79 (1986).
56. GEORGE ET AL., supra note 51, at 51.
59. Aldridge v. United States, 283 U.S. 308 (1931). In Aldridge, a black man was charged with the murder of a white policeman. Noting that the possibility of prejudice was not remote and that the stakes were high, the Court held that voir dire questioning must cover the subject of possible racial bias. The Court also stated that if questions of prejudice prove the juror to be impartial, then no harm is done by asking, but if a question that would reveal prejudice remains unasked and a biased juror is obtained, injustice would be great. Id. at 314. There is, however, broad discretion in this area. In at least two cases, the Supreme Court found that the failure to pose specific questions...
In general, the questions should be designed to gain knowledge of the juror's mental attitudes about the issues in the case to aid in exercising challenges. Inquiries should be clearly directed at ascertaining either bias or possible incompetency in the particular case. Some types of potential bias, such as racial prejudice and exposure to pretrial publicity, must be covered during the voir dire examination. Latitude is often given during voir dire to ask questions leading to peremptory challenges so long as they are asked in good faith. Inquiries intended to bias the venire or create an unfair attitude toward either of the parties are impermissible. Generally, a reviewing court is more likely to find prejudice where a proper question was excluded than when an improper question was permitted.

There is a split of authority as to whether hypothetical questions may be asked during voir dire. Some jurisdictions state that it is improper to inquire what jurors' opinions would be if certain facts were proved, how an individual juror would apply the law to a hypothetical fact pattern, or to what extent the judge's instructions could and would be followed. This line of inquiry is occasionally used by attorneys to try aspects of their case in advance and to make decisions about what types of evidence they should present at trial. For this reason, such hypothetical questions are often barred. Other jurisdictions do permit this line of questioning as a matter of course or in specific instances. Courts are also divided as to whether jurors may be asked about how they would likely react in a group. In some jurisdictions, questioning about how a
juror would be influenced if there was disagreement during deliberations is not allowed. In others, such inquiry is proper.

Some questions are disallowed because of their form. Questions phrased in an ambiguous, obscure, confusing, or inconsistent manner, or so as to imply an incorrect statement of the law are impermissible. Further, judges generally prohibit questions that instruct the jury about the law except with regard to burden of proof or presumption of innocence. In criminal cases in particular, questions should be restricted to issues and defenses that will be raised during trial. However, courts are generally lenient with regard to the form of the inquiry and focus more on the substance of the questions.

C. Jurors' Duties

Jurors have the duty to answer all questions truthfully and to the best of their knowledge during voir dire. Under the Uniform Rules of Criminal Procedure, the prospective jurors are instructed that they may not communicate information or opinions about the trial with anyone else, that they are not to be exposed to any media coverage concerning the case, and that they have a duty to report any violations of the rules by themselves or by others to the court promptly. If a juror fails to respond to a question that would disqualify herself by an affirmative response, the court interprets the silence as a negative response.

This situation tends to arise when a question is posed to the entire venire as

68. Temperly v. Sarrington's Admin., 293 S.W.2d 863, 868 (Ky. 1956); State v. Boyer, 112 S.W.2d 575, 579 (Mo. 1938); State v. Morgan, 73 P.2d 745, 747 (Wash. 1937).
69. King v. State, 390 So. 2d 315 (Fla. 1980), cert. denied, 450 U.S. 989 (1981) (finding question improper when addressed to a panel as a whole as opposed to asking each juror individually); State v. Facaine, 99 So. 2d 333 (La. 1957) (noting that the confusing use of hypothetical questions is improper); Harrison v. State, 191 S.W. 548 (Tex. 1916) (phrasing questions in an inconsistent manner held improper). But see Ham v. South Carolina, 409 U.S. 524, 527 (1973) (noting the broad discretion as to form permitted by the Fourteenth Amendment).
70. WENKE, supra note 10, at 18.
71. Cf. Rosales-Lopez v. United States, 451 U.S. 182, 192 (1981) (finding the refusal to ask question on ethnic bias not reversible error when it would not clearly affect the partiality of the jury); Ham, 409 U.S. at 526-28 (holding that the trial court erred by failing to inquire about racial bias, but failure to explore bias against beards did not reach the level of constitutional violation). See generally 47 AM. JUR. 2D JURY § 202 (discussing the scope of voir dire in criminal trials).
72. McCarter & Potter, supra note 65, at 344.
73. Stowers, supra note 41, at 202-03.
74. UNIF. R. CRIM. P. 512(a) (1987).
75. Brady v. Black & White Cab Co., 357 S.W.2d 720, 723 (Mo. App. Ct. 1962) (where the court asked if any juror had been a plaintiff before, and assumed that jurors who did not respond affirmatively had never been plaintiffs); Johnson v. State, 5 N.E.2d 343, 343 (Ohio Ct. App. 1935); 47 AM. JUR. 2D JURY § 208 (1969).
opposed to inquiries directed toward an individual juror. An illustration would be a question about whether anyone has ever been a party in a lawsuit before. Intentional failure to answer such questions may result in a new trial.76

One problem with the current jury selection process is that sometimes jurors fail to fulfill their responsibilities by making false statements or concealing information during voir dire.77 To be sure, a juror may intentionally lie, but inaccuracies may also reflect the fact that some jurors are intimidated by the questioning process and have difficulty producing the correct response.78 Some biases may not be discovered until after the trial is completed.79 Bias may be either actual80 or implied.81 Jurors may be indicted for criminal contempt for failing to disclose information that would lead to a successful challenge for cause.82 If a juror withholds information that would show bias and lead to a peremptory challenge, a new trial may be granted.83 It is therefore important for litigators to use all of the tools available to discover partiality and to choose the jury wisely.

II. SCIENTIFIC JURY SELECTION

One commentator has suggested an analogy between jury selection and the game of “truth or consequences;” attorneys conducting voir dire must find out the truth about each juror’s beliefs or else they will suffer the consequences of an unfavorable verdict.84 Under this adversarial view, the goal of voir dire is to impanel a jury with a favorable attitude toward the client’s case, although the statutory purpose of voir dire is to

77. Stowers, supra note 41, at 203.
78. Wood, supra note 12, at 171.
79. Valerie P. Hans & Neil Vidmar, Jury Selection, in THE PSYCHOLOGY OF THE COURTROOM 39, 59 (Norbert L. Kerr & Robert M. Bray eds. 1982) (noting that normative data about jurors is often obtained from simulations or retrospective accounts of jurors). Hans & Vidmar suggest that proper trial preparation and questioning can help litigators to better uncover jurors’ attitudes and prejudices during voir dire. Id.
80. Actual bias is the existence of a juror’s state of mind which leads to an inference that he or she will not act impartially with regard to the case. Hopt v. Utah, 120 U.S. 430, 432 (1887) (citing Utah’s criminal procedure statutes); see also Alvarez, supra note 7, at 961-62.
81. Implied bias may be statutory and is based on the recognition that certain relationships between the juror and participants in the trial are likely to result in either conscious or unconscious prejudices. Alvarez, supra note 7, at 962.
82. Clark v. United States, 289 U.S. 1, 10 (1933).
83. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984) (holding that the movant must show that a juror failed to answer honestly a material question on voir dire and that a correct response would have provided a valid basis for a challenge for cause); see also Stowers, supra note 41, at 205-08 (discussing the Supreme Court’s analysis in Clark and McDonough Power).
84. Luvera, supra note 60, at 11.
select fair and impartial jurors.\textsuperscript{85} Traditionally, lawyers have relied on their own intuition and beliefs, along with a modicum of common sense, to guess which venirepersons will be the most sympathetic to their clients.\textsuperscript{86} The success of this “gut feeling” approach is difficult to measure. Attorneys cannot determine how the verdict would have come out had they selected different members of the venire.\textsuperscript{87} Further, studies have shown that damaging jurors often slip through the cracks due to failure to ask certain types of questions.\textsuperscript{88} In other instances, important factors about a juror’s background simply may not be elicited on relevance grounds. Further, there may be a psychological time limit constraining counsel from asking one question too many for fear of irritating potential jurors.\textsuperscript{89}

Due to these problems and related concerns, the past century has seen a publication explosion in the area of practice guides which purport to aid litigators in jury selection.\textsuperscript{90} These guides provide information about the best “types” of jurors to select or exclude based on demographics and stereotypes.\textsuperscript{91} Unfortunately, the authors’ suggestions often conflict, leaving the litigator with lots of “advice,” but few answers.\textsuperscript{92} Perhaps this is why at least one commentator has noticed the paucity of instruction in voir dire in trial advocacy courses.\textsuperscript{93} For this reason, many attorneys turn to social scientists for more empirical guidance. What has emerged is a theory called scientific jury selection (“SJS”).

\textsuperscript{85} See supra notes 6-17 and accompanying text (on the purpose of voir dire).

\textsuperscript{86} In fact, most litigators indicate that they “just know” which jurors will be favorable, and which will be hostile. Their selections are guided by a gut feeling that is developed by years of trial experience. Demetrio, supra note 2. These attitudes about the “good” and “bad” juror may also be fostered by the plethora of folklore surrounding the practice of voir dire. Hans & Vidmar, supra note 79, at 63-65; Solomon M. Fulero & Steven D. Penrod, The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?, 17 OHIO N.U. L. REV. 229 (1990).

\textsuperscript{87} Some researchers have attempted to discover how challenged jurors would have voted had they been selected for the panel. See, e.g., Ziesel & Diamond, supra note 9. But while experiments and interviews may provide insight into how an individual juror may vote, the effect of the other eleven jurors’ views on that particular juror’s vote remains unknown. This criticism of current jury selection practices is developed further in Section IV of this Note.

\textsuperscript{88} Broeder, supra note 34, at 507-10.

\textsuperscript{89} Id. at 505, 515.

\textsuperscript{90} Fulero & Penrod, supra note 86, at 230.

\textsuperscript{91} For a thorough and amusing compilation of suggestions advanced in jury selection handbooks, see id.


A. The SJS Process

The goal of SJS is to use the fruits of long-standing social science research to better educate attorneys about which members of the venire are their best and worst choices. The technique was developed in the early 1970's in connection with a highly publicized political trial known as the Harrisburg Seven Trial. The case involved Philip Berrigan, an anti-war activist priest who was tried with others for conspiracy to kidnap Secretary of State Henry Kissinger. Faced with concerns that their clients would not receive a trial by a fair and impartial jury, the defense counsel hired social scientists Jay Schulman and others to aid in jury selection. The result was a 10 to 2 hung jury in favor of acquittal. The SJS technique subsequently has been applied to a variety of areas of law, including medical malpractice and personal injury cases, although its use has been most prevalent in political trials.

SJS involves a three step process: (1) development of juror profiles; (2) determination of which factors will be influential in the given case; and (3) application of the findings during voir dire. Juror profiles are essentially a listing of demographic aspects and attitudes of members of the community from which the actual jury will be drawn. To develop profiles of a representative sample of community members, social scientists seek respondents from the regions from which the pool of jurors is drawn. Phone surveys, mock trials, or some combination of the two are employed. Questions are asked regarding background information such as age, occupation, preferred leisure activities, and attitudes about
issues that will emerge in the trial.\textsuperscript{101} The resulting juror profiles usually contain the same sort of information that attorneys would discover during voir dire to exercise a challenge for cause.\textsuperscript{102}

For the second step, the researchers compile the demographic and attitudinal information and analyze which types of profiles correlate with a favorable verdict in the case. The social scientists thereby attempt to develop a mathematical model that corresponds to the prototype of an ideal juror.\textsuperscript{103} SJS also tries to predict the degree of influence that each juror will have in the group, and which jurors are most likely to be selected as foreperson.\textsuperscript{104} One advantage of using a SJS method that accounts for both demographics and attitudes simultaneously is that it helps the advocate to detect juror misconduct, including lying during voir dire.\textsuperscript{105} While jurors may often lie about their views of, say, capital punishment, it is unlikely that they will lie about their occupation or educational background. If a juror’s response during voir dire differs significantly from what the profiles suggest, attorneys may use this additional information in deciding whether to exercise a peremptory challenge. When possible, the social scientist’s hypothesis is tested through a mock trial. The resulting information is then used to guide voir dire, the third step.\textsuperscript{106}

Because SJS is still in its infancy, many attorneys who use SJS regard it as a supplement to their intuition, and not as a substitute.\textsuperscript{107} A lawyer whose gut tells her to accept a juror will be even more certain of her choice if the SJS method approves of her selection as well. Agreement between counsel and the social scientist can similarly indicate which jurors are worth the use of a peremptory challenge. In cases

\begin{itemize}
  \item \textsuperscript{101} For example, in a medical malpractice case, respondents might be asked how frequently they see doctors, how many different doctors they have visited in the last year, whether they have regular checkups, about their attitudes toward physicians, nurses and other health care professionals and about their views on medical fees.
  \item \textsuperscript{102} See supra notes 50-53 and accompanying text (describing the information relevant to these challenges).
  \item \textsuperscript{103} John B. McConahay et al., \textit{The Uses of Social Science in Trials With Political and Racial Overtones: The Trial of Joan Little}, 41 LAW & CONTEMP. PROBS. 205, 214 (1977).
  \item \textsuperscript{104} Saks, supra note 9, at 9.
  \item \textsuperscript{105} Id. at 7. For a more complete discussion of how jurors often do not cooperate during voir dire and the implications of such misconduct, see Hardwick, supra note 8, at 35; Stowers, supra note 41, at 201.
  \item \textsuperscript{106} There has also been research using computers to both create the mathematical models and to run simulations of how jurors will reach a verdict depending on who is selected. See e.g., John L. Wanamaker, Comment, \textit{Computers and Scientific Jury Selection}, 55 J. URB. L. 345 (1978).
  \item \textsuperscript{107} Cf. McConahay et al., supra note 103, at 214 (noting that attorneys may use the SJS recommendation even when it appears contrary to their instincts about a particular juror); Saks, supra note 9, at 9 (suggesting that the best choices are jurors who are selected by both the attorneys’ intuitions and SJS).
\end{itemize}
where intuition and the scientific method suggest conflicting courses of action, the advocate then must use her discretion to decide whether to accept or challenge the juror. In these instances, the SJS prediction is simply an additional piece of information which the lawyer can use to help her make her decision.

B. Criticisms of SJS

There are several criticisms of the use of SJS, the most obvious being the lack of empirical evidence supporting its effectiveness. Experiments testing the predictive value of SJS models have failed miserably.\textsuperscript{108} As a result, some critics have dubbed SJS merely “intelligent guesswork.”\textsuperscript{109} For example, there is no conclusive evidence to show that if a case using SJS is won, that the favorable verdict was not either the result of chance\textsuperscript{110} or because the side using SJS would have won anyway.\textsuperscript{111} As a practical matter, SJS is a product of thorough trial preparation, which is likely to be helpful in and of itself. Additionally, it is not possible to test SJS using both the prediction model and the traditional method in the same trial. Researchers do not have the opportunity to re-try a case under identical circumstances to see what would have happened if different jurors were selected. In psychological terms, there is no control group. Thus the effectiveness of SJS can only be measured by the verdicts of the ultimate jurors, and not by directly comparing SJS verdicts to verdicts by juries selected in the traditional manner. However, supporters of SJS contend that even in light of an unfavorable verdict, the statistical probability that any given juror selected by the model is a good choice will be high in the long run.\textsuperscript{112} Following the SJS recommendations repeatedly over time will yield favorable verdicts to a higher degree than may be explained by chance. Further, there is no evidence supporting the contention that SJS ever actually harms the party that uses it.\textsuperscript{113}

Studies comparing statistical prediction to human intuition show

\textsuperscript{108} In one instance, a researcher developed a model with four predictive factors that explained a substantial proportion of the variance of the verdict. However, when the experiment was replicated with a new sample of venirepersons, the model was shown to have no predictive value at all. Diamond, supra note 96, at 182.

\textsuperscript{109} RICHARDSON R. LYNN, JURY TRIAL LAW AND PRACTICE § 4.5 (1986).

\textsuperscript{110} The social scientist’s “burden of proof” is usually one of statistical significance at the .05 level. In other words, for a predictive model to be valid in a psychological sense, the experimenter must show that the probability of the same result occurring by mere random chance is less than one in twenty, or 5% (.05). For a more comprehensive explanation of the statistical significance of test results, see DAVID HILDEBRAND, STATISTICAL THINKING FOR BEHAVIORAL SCIENTISTS (1986), or any general statistics text.

\textsuperscript{111} Saks, supra note 9, at 13-14.

\textsuperscript{112} Id. at 8.

\textsuperscript{113} Id. at 13.
that the former yields more reliable results. But it is also important to understand what it means to say, for example, that a black juror is more likely to favor a black defendant than a white juror. Such a statement does not reveal whether black jurors favor black defendants 75% of the time as opposed to 25% of the time for white jurors, or whether racially similar jurors vote favorably 51% of the time as opposed to 49% for racially dissimilar jurors. One would also want information as to whether the observation was made in 1965 or 1990, and whether the statistic was meant to apply specifically to larceny cases or racial discrimination cases. Additionally, the level of statistical significance for the reliability of a predictor like race may be quite low. Stated differently, if race is helpful six times in one-hundred for predicting a juror's vote merely by chance, race could still be considered a statistically significant predictor under the psychological standard of significance. Empirical evaluations have suggested that the predictive value of most SJS models is still quite low.

Another argument challenging the reliability of SJS is that it is based on the assumption that the pool of potential jurors is similar to the members of the community who may be reached through questionnaires, phone surveys, and mock trials. However, many people who are ideally eligible for jury duty are precluded from serving, and are therefore not part of the active jury pool. Excluded categories include both the highly educated persons barred from serving by the nature of their professions (such as physicians and clergypersons) and the poor and uneducated who are not registered voters and are thereby omitted from lists of potential jurors. Others may be selected for jury service but will either refuse or be unable to participate in the SJS studies. For the mathematical SJS models to be valid, they must exclude the same individuals who would not be summoned for jury duty and include as many prospective jurors as possible.

Some critics of SJS further argue that social scientists' involvement with the selection of juries is an illegitimate tampering with the adversary system. They express fear that the juries will be manipulated in such a way that the constitutional guarantee of an impartial jury of one's peers will become meaningless. A similar skepticism has been reflected in

114. Id. at 8-9 nn. 20-21.
115. See supra note 110 and accompanying text (explaining statistical significance).
116. Saks, supra note 9, at 15-16.
117. McConahay et al., supra note 103, at 215.
119. Id. at 4.
cases discussing the use of scientific evidence at trials. But had these concerns been permitted to exclude technological breakthroughs from guiding the factfinder in evaluating evidence, commonly accepted techniques such as fingerprinting would not exist today. The methods used in SJS do not alter the character of voir dire or the pools of community members eligible to serve on juries. SJS is merely a suggestion for how lawyers can operate effectively within constitutional constraints. The notion that jury selection may be used to obtain jurors who will render a favorable verdict is older than the United States.

Aside from questions of the validity and predictive value of SJS, the scientific method has the disadvantage of a high price tag. Jury selection experts may charge as much as $200,000 for a single trial. The mathematical models alone cost tens of thousands of dollars. If SJS is truly the panacea for the uncertainty inherent in jury trials, it may be exploited by wealthier parties until a more cost-effective alternative is established. Innovative law firms are currently searching for less expensive ways to obtain the same sort of information that SJS provides.

Finally, social science research has indicated that there are more effective ways for counsel to secure a favorable verdict than by using SJS, including wise selection of venue, convincing presentation of the evidence at trial, and challenges to the composition of the grand jury in criminal trials. One informal survey indicated that eighty-five percent of all criminal trials are decided on the basis of the evidence, while only fifteen percent are decided by juror biases. Another researcher found that the only juror attitude that was a reasonably consistent predictor of


121. HANS & VIDMAR, supra note 21, at 21-23 (describing English cases in the sixteenth and seventeenth centuries).

122. LYNN, supra note 109, at § 4.5; Fulero & Penrod, supra note 86, at 229 (noting that fees for SJS run upward of $100,000).

123. McConahay et al., supra note 103, at 214 (costing about $35,000 in 1977 when the article was written).


125. One Chicago firm employs a taxicab driver to provide background information about neighborhoods where the potential jurors live. The firm then uses this data to guide voir dire questioning.

126. Diamond, supra note 96, at 182; Miller, supra note 5, at 470.

127. Diamond, supra note 96, at 182-83.

128. McConahay et al, supra note 103, at 206.

129. Id. at 226.
how that individual would vote was whether or not the juror liked the prosecutor. In a case where a black man was accused of raping a white woman, defense counsel used a change in venue to reduce the degree of racial bias among potential jurors. A survey research firm found that racist community sentiment, in conjunction with pretrial publicity, had caused a significantly higher percentage of eligible jurors to have prejudged the defendant’s guilt in the original venue than in a more remote locale. The remand to a distant county presumably provided a more impartial jury. Similar methods were employed to obtain a new venue in the highly publicized Joan Little trial. These applications of psychology and sociology have encountered much less resistance from the legal community than has SJS. The group dynamics model is yet another framework that litigators may employ to guide their voir dire inquiries.

III. THE GROUP DYNAMICS APPROACH

One justification for the use of juries in deciding the facts of a case is the belief that twelve minds are better than one. From this, it follows that there must be something empirically different about the way that a group versus an individual makes decisions. Virtually everyone has been impressed by the fact that individuals act very differently in different types of situations. For example, a person who is very talkative when in a small group of close friends may become reticent among strangers. A person’s behavior in a group, therefore, depends on both the context and his relationships to the other group members. To be sure, group dynamics have been systematically studied since the turn of the century.

130. Saks, supra note 9, at 16-17 (describing a survey conducted by Robert Buckhout).
132. Miller, supra note 5, at 470-71.
133. Id.
135. Although the Supreme Court has upheld the constitutionality of six-member juries, Williams v. Florida, 399 U.S. 78 (1970) (state court cases); Colgrove v. Battin, 413 U.S. 149 (1973) (federal court cases), this Note will focus on the traditional twelve-member jury.
136. Leroy Wells, Jr., The Group-as-a-Whole Perspective and its Theoretical Roots, in 2 GROUP RELATIONS READER 109, 114 (A.D. Colman & Marvin Geller, eds. 1985) (Wells advances a multilevel theory of group processes. He posits that group dynamics may be studied from five distinct dimensions: the traits and needs of each individual in the group (intrapersonal level); the types and frequency of interactions among individuals within the group (interpersonal level); the dynamics of the entire group as a social system (group-as-a-whole level); the relations of subgroups within a group (intergroup level); and the relationships between a group and its greater social environment (interorganizational level). One may gain insights into a group’s nature by analyzing the group from each of these perspectives. Most importantly, Wells suggests that the study of the group-as-a-whole level is the key to discovering the group’s true gestalt. Id. at 114).
What the group dynamics model suggests is that it would be helpful for the persons conducting voir dire to know in advance not only the stereotypes and biases held by each venireperson, but what role each individual will play if she is ultimately on the jury. Put differently, the parties would want to know how the selected jurors will work together. While an effective voir dire may shed some light onto the jurors' attitudes and beliefs, its scope is limited to the issues in the case. Additionally, it is virtually impossible to predict an individual's group role in advance. The group dynamics model illustrates how these shortcomings undermine the utility of extensive voir dire. This section will present the theories and mechanisms underlying the group dynamics model. Section IV will apply the group dynamics framework to the voir dire process.

A. Norms, Assumptions and Work Groups

Psychologist Wilfred Bion suggested that small groups evolve through a predictable series of stages. Group participants begin as strangers, so they initially seek to make a good impression on their fellow group members. They share an understanding that they must cooperate to realize group goals. In order to feel accepted by the rest of the group, individuals often defer to others instead of relying on their own judgments. For example, a talkative individual may make a conscious effort to give others the opportunity to speak. It is at this crucial point in group development where norms and expectations are formed. Norms and expectations, in turn, shape the way in which group members will interact in the future. This situational factor is likely to play as large a role as genetics, personality, and attitude in predicting how a given person will behave in the group.

Group norms originally derive from what are termed the basic as-

138. Wilfred R. Bion, Selections from Experiences in Groups, in 1 Group Relations Reader 11, 12-13 (A.D. Colman & W.H. Bexton eds., 1975). Bion's stages are not comprised of a rigid set of steps that a group must take in order to progress from a dozen unrelated individuals to a sophisticated, well-functioning group. Rather, Bion explains that newly-formed groups tend to experience similar emotional problems which progress along a loosely defined continuum. The progression may be observed by the passage of landmark events.

139. A classic illustration of how individuals will abandon their own senses in order to conform with the group was provided by Solomon Asch. In Asch's experiment, subjects were shown a standard line segment and were asked to pick a segment of the same length from a small set of lines. When alone, subjects were extremely accurate in judging the length of the segments. But when confederates who deliberately gave wrong answers were present, one-third of the subjects gave incorrect responses. Solomon E. Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, in Groups, Leadership and Men 393, 394-96 (H. Guetzkow ed., 1951). These results, which have been replicated in numerous studies, suggest that in situations where the correct answer is more ambiguous, people may be even more likely to be persuaded by other group members.

140. Saks, supra note 9, at 19.
sumptions - what the members expect or literally assume about the group when they enter it.141 Basic assumptions include notions such as: that it is impolite to talk when others are speaking; that everyone should have the opportunity to express his or her own views; or that there will be one individual who will serve as the group leader. While many basic assumptions are shared by all group participants, each individual has expectations that differ from those of other group members. For example, one person may assume that quiet group members are shy and in need of prompting in order to elicit their views, but a fellow group member may think that others are quiet merely because they have nothing to contribute to the discussion. Individuals are then placed in a dilemma. They wish to participate in the group task, which requires compliance with group norms, but they also desire to maintain their individuality.142 A degree of discomfort then arises. This phenomenon is universal, to some extent, in all groups. When there is a clash between the basic assumptions of two or more group members, the norms of the group are defined and challenged.143

Coexisting with the basic assumptions is the work task - the primary job that the group has convened to undertake.144 Work tasks are goals such as selecting a new employee from a list of potential candidates, developing a new budget, or preparing a report. At times, the basic assumptions impede progress on the work task. Perhaps an individual believes that his suggestions are being dismissed prematurely or that the views of another are unjustifiably favored. Such a conflict is usually not discovered until the group begins to work toward its goal. One or more group members feel that their individuality is being compromised for the sake of the group, and wish to express their discomfort. However, the norms established by the group prevent the members from airing their feelings. There may be a group norm of talking in turn, or a norm which prevents members from addressing their emotions or other personal matters not directly related to the group task. Additionally, there is often an

141. Bion, supra note 138, at 14-20. Assumptions in this context are more like expectations that individuals rely on as opposed to hypotheses which must be tested. Assumptions are beliefs that group members hold to be true.


143. Norms in groups are analogous to attitudes such as prejudices on the individual level. Kenny & La Voie, supra note 4, at 341. The dilemma is illustrated by noting that a challenge to a basic assumption is more significant than the mere questioning of a prediction. When we formulate hypotheses, we consider the possibility that our guess may be wrong. Our basic assumptions, in contrast, are rarely questioned and are presumed to be true. Therefore, we find challenges to basic assumptions to be troublesome and unpleasant.

144. Turquet, supra note 142, at 354.
implicit group norm that members must remain in the group until the work task is completed; movement in and out of the group is restricted. Thus the member's complaints about undue partiality are thereby ignored. Frustration ensues, leading the slighted members to be uncooperative and disinterested in realizing group goals.

Bion and others have observed a systematic pattern in which groups confront conflicts in basic assumptions.\(^{145}\) These conflicts arise in the context of the work task. First the group addresses dependence or leadership issues. These include not only who will be in charge, but how the group will be structured.\(^{146}\) A disagreement then ensues as to whether an authority figure is necessary or desirable, how many persons should be in charge, how much power each individual should have, and for what duration.\(^{147}\) The group must also resolve whether the work task will be subdivided, when and under what conditions the group will convene in the future, and when the group is to be disbanded.

Upon the resolution of leadership issues, the group turns to interpersonal issues.\(^{148}\) These include individuals' prejudices regarding the other group members which may be based on age, race, gender, socio-economic status, nationality, occupation, or educational background. The members must acknowledge that each individual does not interact with all other group members in the same way. The disparate treatment is not explained by the group structure,\(^{149}\) so each member must examine the personal biases that influence his or her interactions and interfere with the work task. To illustrate, in a class composed of thirty white individuals and three black individuals, the students may be influenced by the

\(^{145}\) Bion, supra note 138, at 11.

\(^{146}\) In some groups, and particularly in informal settings, it is not clear that a leader is necessary to accomplish the group's objectives. However, there are usually group members who think that someone should take charge of the situation. These individuals may even nominate a leader. Cf. Warren G. Bennis & Herbert A. Shepard, A Theory of Group Development, 9 Hum. Dev. 127, 134-35 (1956); Margaret J. Rioch, "All We Like Sheep—" [Isaiah 53:6]: Followers and Leaders, in 1 GROUP RELATIONS READER, supra note 138, at 159. All basic assumptions include the existence of a leader. Bion, supra note 138, at 19.

\(^{147}\) The disagreement need not be a fight or even a lengthy discussion; a few words or tacit acceptance of an authority figure are sufficient to indicate that the issue has arisen and been resolved in some way. It is also common for a group to accept the status quo with regard to leadership initially, and to criticize the leader at a later time for group shortcomings. Margaret J. Rioch, The Work of Wilfred Bion on Groups, in 1 GROUP RELATIONS READER, supra note 138, at 21, 21-25.

\(^{148}\) Bennis & Shepard, supra note 146, at 139-42. It is important to reiterate that the shift in focus is not a conscious group decision. Once the group becomes comfortable with its organizational structure, members are then free to test their standing and status within the group-defined constraints.

\(^{149}\) In some groups, there is an external structural reason why some group members carry more weight than others. A seasoned architect, for example, would have a more respected opinion on the issue of designing an earthquake-proof building than would a high school senior. However, there would be no external structural reason to prefer the architect's opinion on what to eat for lunch.
race of the professor. This does not necessarily mean that the class will favor a white instructor over a black one because of the racial composition of the class. White students actually may be overly enthusiastic about their black professors in order to try to "prove" to their classmates that they are not racially biased. The roles that the black and white students play will affect the overall bias of the group. Three black leaders will have a different impact than three black followers or some combination thereof. The number of possibilities is virtually infinite. These interdependence issues are explained in psychological terms by stereotypes, tokenism, and intragroup roles.

B. Stereotypes & Tokenism

Two of the major factors that influence an individual's effectiveness in communicating with and influencing other group members are stereotyping and tokenism. Stereotypes are generalizations about social groups without regard to individual variations within the group. Stereotypes are not necessarily bad; they may provide some basis for understanding a group when little or no first-hand information about its members is available. The belief that all Americans speak fluent English is an example of a benign stereotype that could be used by a foreign tourist in deciding what language to speak on a visit to the United States. However, this same lack of information leads to over-generalizations that present a distorted view of individual members of a given group. When a stereotype takes on a hostile and negative emotional tone, suggesting the superiority of one group at the expense of others, it is called a prejudice.

To illustrate these concepts, consider the events during the first week of school from the perspective of the new incoming students. Ste-
reotypes affect the school and intraclass dynamics in terms of the way that the upperclassmen, faculty, and staff are perceived, and the way in which the freshmen relate to each other both during and between classes. Seniors may be considered aloof, secretaries may be labelled as bureaucratic, and professors may be revered, feared, or respected. An individual's prejudices will clearly affect who the student will find most affable in the school. Each person's prejudices and stereotypes, in turn, will impact on the class' communication structure. People tend to communicate most with those who they perceive to be most similar to themselves, or people who share common traits with other current friends. Initial friendships are developed in part by reliance upon stereotypes, and distrust of fellow classmates is a result of prejudices. Stereotypes and prejudices thereby mold a group's pattern of interaction.

The second major factor that influences group dynamics is tokenism. In a token situation, what is important is the proportion of members with any given trait. When a group has a large majority of members with a common characteristic (such as race or gender) and only a few members without that commonality, the latter individuals will be tokens with respect to that trait. For example, a lone man in a group of women is a token male. The effect of the small proportion of men is that the man will be treated differently and will have a different amount of influence than he would in a group that was more balanced between the sexes. Because of his token status, he may be either discounted as having an unimportant minority view, or stereotyped as possessing the views of all men. As the proportion of men to women increases, the token effect of each man decreases. The same token effect occurs when all but one member of a group are of the same race, age, or socio-economic status.

Tokenism may be applied to explain group dynamics when different proportions of group members share a common viewpoint. Peter Berger provides a clear illustration of ideological tokenism at work. In one instance, a group of cannibals discuss the ethics of cannibalism with a single non-cannibal. By the end of the conversation, the non-cannibal

158. Kanter, supra note 157, at 207.
159. Id. at 210-12.
162. PETER L. BERGER, INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE (1963).
will likely be convinced that it is acceptable to eat others.\textsuperscript{163} Berger contrasts this scenario with the case where there are two equally sized groups of cannibals. One group thinks that people over the age of sixty are too flabby to eat while the other group believes that anyone older than fifty is unpalatable. The end result in this hypothetical would be a compromise agreement to eat only those aged fifty-five or younger.\textsuperscript{164} One may therefore conclude that the most effective types of groups in terms of accomplishing the work task are demographically and ideologically heterogeneous with minimal token effects.\textsuperscript{165}

C. Intragroup Roles

Stereotyping and token effects influence each person’s group role. In the group dynamics sense, a role is a pattern of behavior that characterizes an individual’s place in a group.\textsuperscript{166} In order to complete its work task, the group must recognize and utilize the skills brought in by each of its members.\textsuperscript{167} Each group member tries to ascertain his or her own role in the group, as well as the roles played by others.\textsuperscript{168} The longer the group develops and the more complicated its tasks, the greater the variety of roles that must be filled by the members.\textsuperscript{169}

The first role that must either be filled or intentionally excluded is that of the leader. The group members assume that there will be a leader who will provide guidance and protection to the group as a whole.\textsuperscript{170} Some situations are ambiguous in terms of whether a leader is needed at all, such as in an informal gathering of friends. In more concrete settings, such as a business meeting, a leader may already be appointed.

One problem inherent in the selection of leaders is that there is not always a custom or set rule for what type of person should fill the position.\textsuperscript{171} Any of a number of methods may be employed to arrive at a

\begin{itemize}
  \item \textsuperscript{163} Id. at 71-72.
  \item \textsuperscript{164} Id. at 72.
  \item \textsuperscript{165} Shaw, supra note 137, at 249.
  \item \textsuperscript{166} Luft, supra note 156, at 33. Common roles include leaders, negotiators, and emotional caretakers.
  \item \textsuperscript{167} Turquet, supra note 142, at 355.
  \item \textsuperscript{168} Leader and follower are not the only roles available. In fact, the number of labels that may be created to describe individuals' roles in groups is infinite and depends heavily on what type of task the group is performing. Luft, supra note 156, at 34. This note will focus on the roles most applicable to the functions of a jury.
  \item \textsuperscript{170} Bion, supra note 138, at 14.
  \item \textsuperscript{171} Indeed, there is no one set of characteristics that defines a "leadership personality." The required traits of a leader are highly dependent upon both the nature of the group task and the personalities of the group members.
\end{itemize}
leader, including distinctions based on age, gender, race, or educational background. Whoever is chosen is immediately afforded high status and a high degree of authority within the group. The important thing to note is that often the criteria used to select the leaders are arbitrary and unrelated to the group task. As the group evolves, members begin to question the authority vested in the leader and often regret or resent the designation. Unfortunately, such discontent with the authority figure(s) is universal to all groups. In a structured group where the hierarchy of leadership is clear and based on some recognizable external criterion, the discontent may be voiced by group members, but little action is taken to change or challenge the structure. However, in more ambiguous situations, groups may turn to drastic measures to remove the leader and/or challenge her authority. This creates intragroup conflict, which easily interferes with the group's work task. As a result, a new leadership structure may emerge that relegates the displaced leader to a minor, ineffective role.

A very important player in addition to the leader is the catalyst, the person who is able to find an alternative gray area in between the black and white of leader and follower positions. As the name suggests, catalysts encourage changes in the group structure and organization. The group begins to realize that there are different leaders for the different tasks that need to be performed. While one person may be the ritualistic leader (i.e. the person who keeps the attendance rolls), another person may be the discussion leader who decides who will speak in what turn, and yet another may be the work leader who organizes which topics should be addressed first. There are fight leaders, the people who can be counted on to create an argument or conflict when the discussion gets too hot, and flight leaders who will lead the group to abandon a touchy topic. When the group as a whole becomes particularly unhappy, it may nominate a scapegoat in the hopes that that individual will represent group shortcomings, thereby enabling the other group members to focus

172. Shaw, supra note 137, at 271; Turquet, supra note 142, at 357-58.
173. The reason for the inevitable disenthrallment with the leader is that one of each group's assumptions is that the authority figure is omnipotent and will provide for every contingency. Since this is an impossible task, the leader will eventually fail and be challenged by other group members. Turquet, supra note 142, at 357-58.
174. This may occur even in a more formalized setting. For example, if a group of employees thoroughly discredits its supervisor, the latter's authority is merely titular; the group functions as if it was self-governing.
175. In psychological terms, the catalysts are persons who are not conflicted with regard to either dependency or personal aspects of the group. Bennis & Shepard, supra note 146, at 131.
176. Id.
on the work task. Eventually, the group will recognize and acknowledge the importance of each member's contributions and will plunge itself back into the work task with new energy.

In order to fully understand how a group tackles its work task, it is important to identify the group's basic assumptions and the role that each member plays in hindering or realizing group objectives. For example, a group that is deadlocked between two clear courses of action may lack a strong catalyst who can help the factions to compromise and settle on some middle ground. A group composed entirely of leaders is ineffective when the members spend at least as much time challenging the authority figures as they allocate to the work task. Similarly, the absence of strong leaders permits the group to wallow in the basic assumptions because there is insufficient inertia to direct the group toward its goal.

If one could peek into the future to see which norms, stereotypes, and role players most impede progress on a particular group's work task or shape it in a particular fashion, these factors may be manipulated in advance. Unfortunately, if one prejudice is removed, another stereotype will take its place. Unless one can intervene in the group's development while it is in progress, the best that one can hope to do is to try to influence the roles and basic assumptions before the group convenes. This is what the attorneys attempt to do at trial. The "indoctrination" begins with the selection of the jury pool and is not complete until the jury retires with the judge's instructions. Voir dire is therefore only a small portion of the process.

IV. HOW THE GROUP DYNAMICS MODEL AFFECTS JURIES

The problem presented by the group dynamics model may be broken down into two basic dilemmas. First, there is a difficulty in predicting the way in which the jurors will react to one another. This may be stated as an inquiry into the group's basic assumptions. The voir dire examination simply cannot provide enough of the information necessary

177. Babad et al., supra note 152, at 102-04; Wells, supra note 136, at 120.
178. Turquet, supra note 142, at 356-57.
179. One important caveat to keep in mind when applying the group dynamics model to juries is that all juries do not exist or deliberate for a uniform duration. Some trials may last for months or years, while others last for a matter of days or hours. Clearly, a jury that hears and deliberates a case in forty-eight hours does not have time to develop as a cohesive group in the same way as does a jury serving for a month-long trial. This effect may be minimized in a sequestered jury due to the intensity of the experience. Thus a sequestered jury that meets for two days may be a more cohesive and developed group than a non-sequestered jury that meets for two weeks. The group dynamics of sequestered juries, however, are beyond the scope of this Note. For purposes of this Note, I will assume that the trial and jury deliberations extend for at least a week. This time limit is arbitrary, but it should be sufficient for the jury to develop through the stages discussed in this Note.
to assess jurors' attitudes outside of the scope of the issues at trial. The second dilemma is the difficulty in predicting the power structure of the jury - what roles each individual will play. This includes determining who will be leaders, who will be strong dissenters, and who will sit idly by, contributing little to the deliberations. The effect of this inability to predict either the basic assumptions or the group power structure is that the lawyers have little control over the work group - the aspect of deliberations focusing on arriving at a verdict. The inevitability of this result suggests that an extensive voir dire will not provide significantly more insight into jury dynamics than a shorter, more tailored inquiry. Belaboring the jury selection process, therefore, has a high economic cost with few social benefits.

To illustrate how these types of prediction problems may come into play, consider a hypothetical traffic accident. The defendant, a black twenty-four year-old male, is accused of rear-ending a car driven by a forty year-old white man. The plaintiff claims that he suffered broken bones and chronic back pain as a result of the collision. Practice manuals instruct counsel for the plaintiff to challenge elderly jurors, Germans, English, and Scandinavians, certain law enforcement personnel, and white collar professionals. Because voir dire inquiry may legitimately explore racial bias, those who are admittedly prejudiced against black defendants are also eliminated. Jurors A and B are selected. Both Juror A and Juror B are young black working-class males, but Juror A is also a homosexual. Juror B is homophobic. Sexual orientation is not a permissible area of inquiry during voir dire for this case. The remaining jurors, Jurors C - L, are all Caucasian and have varying occupations, socio-economic levels, and educational backgrounds.

Although Jurors A and B appear to have similar views from a demographic perspective, particularly from the standpoint of racial bias, it is highly unlikely that they will work in concert in the jury room. Personal prejudices that do not bear directly on the issues of the case will influence both their alliances to the parties and their desires to affiliate with the other jurors.

The basic assumptions problem may be stated as the error of select-

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180. See Wenke, supra note 10, at 75 (suggesting that retired persons tend to return conservative damage awards).
182. Wenke, supra note 10, at 74-75; Hanley, supra note 12, at 868.
184. Because a prejudice toward homosexuals will not show that a juror will be impartial to either of the parties in the case, the judge would likely find that questions about sexual orientation are beyond the scope of permissible voir dire inquiry.
ing twelve individual jurors as opposed to one jury. The attorneys focus on the question of whether a venire member is likely “favorable” or “unfavorable” with regard to the parties and issues in the case. But by using such a framework for jury selection, the lawyers neglect to consider whether each juror will be “favorable” or “unfavorable” with respect to working with the other eleven members of the panel.

The group dynamics model explains how this method of jury selection is problematic. In the hypothetical situation presented above, the attorneys will likely anticipate that Juror A and Juror B will react similarly to the evidence presented. Yet Juror B may play Devil’s Advocate to Juror A’s position simply because Juror A is gay, irrespective of Juror B’s assessment of the evidence in the case. On the other hand, Jurors A and B, as token blacks, may be driven to cooperate in light of stereotypes held by the remaining ten white jurors. The attitudes and sexual orientations of Jurors C - L will affect the ways in which they react to Juror A’s homosexuality and Juror B’s emphatic hostility toward it. These alliances are not predictable through voir dire since it is highly unlikely that attorneys will discover the entire venire’s opinions of gays and lesbians in a traffic accident case. However, these coalitions will impact upon the way that the jury analyzes the evidence and interprets and applies the judge’s charge. By pigeon-holing the individual jurors instead of focusing on the group as a whole, counsel unwittingly creates a jury of factions.

The second problem suggested by the group processes model, the prediction of individuals’ roles in the group, is more complex. Suppose that a questionable (from a partiality point of view) juror is in the box, and defense counsel must decide whether to accept or excuse him. In an ideal world, the attorney would want to know what role this person, Juror X, will play. If Juror X is a follower, it may be worth the risk of accepting him in the hopes that the other jurors will be more favorable, and that they will persuade Juror X of the defendant’s innocence. But if Juror X is a leader and counsel is uncertain whether he will be sympathetic to the defendant or not, the risk of accepting him is greater. He

185. This will occur to some extent no matter how carefully the attorneys try to eliminate racial bias. Remember also that the plaintiff’s attorney likely will not challenge a racially prejudiced juror since that individual will be perceived as being beneficial to his case. Further, for reasons discussed infra, a potential juror may be actually biased, but may not reveal this fact during voir dire.

186. This is not as easy a task as it appears on first blush. Context is crucial. A factory foreman may be a leader at work, but not necessarily in a jury composed of white collar professionals. Also, some people have such strong personalities that fellow jurors may consider them abrasive and therefore discount their opinions.
may prove to be a strong advocate for the defense, but he may also staunchly support the plaintiff.

Defense counsel may try to discover Juror X’s leadership tendencies by asking him about the roles that he plays in other groups to which he belongs. For example, a person who is president of his worker’s union and an officer of the local PTA may be more likely to be a strong voice in the jury room than someone who belongs to many organizations on a superficial level. This type of information, however, may be misleading. Jurors are unlikely to reveal every leadership role and group affiliation that they have held in their lifetime. Responses tend to reflect what is currently important in the juror’s life. A middle-aged woman, therefore, would probably not mention that she was president of her high school sophomore class, and a recent trade school graduate is not likely to have great involvement with the upper echelons of his newly-joined trade association. Additionally, jurors may withhold information about their affiliations for personal reasons, such as membership in a support group.

The paradox is compounded if the other eleven jurors are considered. If Juror X is truly an all-around leader and the remainder of the jurors are followers, the chance is good that Juror X will initially take charge of the deliberations. But what if the other eleven panelists are leaders as well? Juror X is then less certain to be the foreperson. Clearly, there will be a struggle amongst the jurors for the leadership role. What if all of the jurors, including Juror X, are followers? How is the litigator to know who will emerge with authority? This is yet another problem created by selecting twelve jurors as opposed to one jury.

The prediction of jurors’ roles is not merely an inquiry for legal pundits in ivory towers. In 1987, the American Bar Association Section of Litigation presented a mock trial in Chicago where jury deliberations were videotaped. One juror was described by the defense attorney as “‘a squishy kind of guy’ who was likely to be led by more aggressive jurors.” During jury selection, he appeared passive. The defense attorney indicated, outside the presence of the jury, that he would have challenged that juror in a real trial. Watching the videotape, the participating attorneys were surprised to find that not only was the questionable juror not passive, but he dominated the deliberations, coercing others to vote for the defense.

But perhaps the defense attorney was not entirely incorrect about

188. Id.
189. Id.
the juror after all. Although the juror was a strong advocate for the defense, his abrasive style alienated some of his fellow panelists. The jury selection is therefore a gamble where tradeoffs must be made between the presumed and the unknown.

The problem is further magnified if Juror X is the first person to be selected, as opposed to the last person to be impaneled. If Juror X is the last person, attorneys may exercise an intelligent guess as to how Juror X will fit in with the rest of the group. But if Juror X is among the first to be impaneled, no one really knows what the other choices are. Does one risk using a peremptory challenge in the hopes that the remaining venirepersons will be less negative (or more positive)? What if Juror X turns out to be a token? One may obviously look at the whole venire and notice if there are only a few Asian-Americans or a handful of women. The same cannot be said about guessing which potential jurors decry capital punishment. A diverse group of potential jurors does not guarantee a diverse jury.

The group dynamics model is not a solution to the voir dire dilemma. The group processes approach is merely an alternative lens through which jury selection may be viewed. What the model does provide is an explanation for why juries sometimes return verdicts that appear to be against the weight of the evidence. There is truly no way to know in advance how jurors will interact to digest the data provided at trial. Further, learning about how a particular jury conducted its deliberations will not necessarily predict the dynamics of a different jury hearing the same case. The implication of the group dynamics model is that voir dire should be kept to its primary purpose of weeding out potential jurors who are clearly biased and cannot even attempt to be impartial. Anything beyond this will cost more in terms of court resources than it will benefit the judicial system in terms of fair juries.

**Conclusion**

Litigators attempt to “deselect” unfavorable members of the venire through challenges for cause and peremptory challenges. Each side will presumably be satisfied that the twelve ultimate jurors are, at least, not “unfavorable.” From the group processes perspective, this view of voir dire is problematic because the attorneys think about selecting twelve individuals to serve as jurors instead of in terms of picking one

190. Some attorneys will try to pick favorable jurors instead of focusing on who they think will hurt them. The group processes model applies equally well to such a method, but the deselection model will be used for illustration due to greater clarity.
jury from a large panel. Stated differently, the problem is that although a juror may appear to be impartial as an individual, she is not necessarily impartial in the context of her eleven fellow jurors.  

Consider a juror who creates the impression during voir dire of being moderately sympathetic to the plaintiff, but who is not deselected by defense counsel. This juror will not necessarily vote for the plaintiff at the end of the deliberations. She may be prevented from fully expressing her point of view by more dominant jurors, or she may be heard and understood, but persuaded to change her mind during the course of discussion. It is also possible that the plaintiff’s attorney misjudged the juror, and that she was actually predisposed to favor the defendant. While an experienced attorney may be able to make an educated guess about an individual’s attitudes, beliefs, and leadership abilities, prediction on the group level is nearly impossible. Yet the character of the jury as a whole is what will make a difference in the verdict in a close case.  

Voir dire serves the important purpose of allowing litigants to exclude jurors who will not be able to give each party fair consideration in rendering a verdict. By exercising challenges, parties may also remove jurors who could be fair, but who appear biased in some way toward their adversaries. However, jury selection has become, among other things, a chance for lawyers to try to “stack” the jury with individuals who will return a verdict in their favor. The problem in doing so is that in order to effectively predetermine which potential jurors will be the best choices, lawyers need to know something about the dynamics of the ultimate jury. Unfortunately, the best that we can hope for is a semi-educated guess and a strong, well-presented case.  

Voir dire is not a waste of time, but current practices do waste time. Instead of spending days trying to discover if Juror A is more prejudiced against blacks than Juror B and whether or not Juror C is really politically correct, attorneys should move through voir dire quickly and efficiently to remove anyone obviously biased, and then get on with the trial. By conserving precious judicial resources, the shorter trial will best administer justice in the long run.  

191. Kenny & La Voie, supra note 4, at 341 (suggesting that constructs will have different meanings and effects on the individual and the group levels).