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"A WOMAN'S PLACE . . .": COMBATING SEX-BASED PREJUDICES IN JURY TRIALS THROUGH VOIR DIRE

Mark Soler*

[Women] are declared to be better than men; an empty compliment, which must provoke a bitter smile from every woman of spirit, since there is no other situation in life in which it is considered the established order, and quite natural and suitable, that the better should obey the worse.1

The attempt to force a jury to become mentally blind to the [appearance] of the accused sitting before them involves both an impossibility in practice and a fiction in theory.2

I. INTRODUCTION

In the law, as in the other institutions of our society, women have long been subject to sex-based discrimination.3 A classic

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3. On discrimination against women within the substantive law, see generally KANOWITZ, WOMEN AND THE LAW (1969) [hereinafter cited as KANOWITZ].

statement of sexism in the substance of the law is Blackstone’s explanation of *covern* as the legal status of the wife during marriage:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the women is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover* she performs every thing. . . . For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself. . . .

The United States Supreme Court long embraced the attitude toward women implicit in Blackstone’s treatise. In 1884, the Court declared that “[t]he right to follow any of the common occupations of life is an inalienable right . . . formulated in the Declaration of Independence . . . a large ingredient in the civil liberty of the citizen.” The Court subsequently struck down statutes and ordinances which restricted the ability of men, citizens or non-citizens, to follow “the common occupations of life,” and, in *Truax v. Raich*, it declared that

[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure.

When it came to women, however, the Supreme Court saw things in a different light. When Myra Bradwell sought to practice law in Illinois, the Court upheld the denial of a license to her on the ground that she was unfit to practice law because she was a woman. Justice Bradley declared:

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

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*Litigating Sex Discrimination Cases, 4 FAMILY L.Q. 44 (1970); The Equal Rights Amendment, supra.*

4. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. I, Ch. 15, 442-43 (1774).

5. Butcher’s Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884).


7. 239 U.S. 33, 41 (1915).

8. Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring). Mr. Justice Bradley added:
While "protective" legislation fixing maximum hours of labor for men had been struck down, the Court upheld an Oregon statute fixing the maximum number of working hours for women, and its rationale was clear:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms with diminishing intensity, has continued to the present.

Discrimination against women is no less evident in the practice of law and in the courts. In 1967, for example, of the 300,000 lawyers in America, fewer than 3 percent were women. This same study revealed that women lawyers earned about $2,000 less per year than do men upon graduation from law school; five years later, the differential is about $4,000, and nine years later, almost $8,000. Significantly more women attorneys spend their time doing trust and estate work or handling domestic relations problems; significantly more men handle litigation or work in the corporate area. The differences in income or work area clearly have nothing to do with the relative abilities of men and women. In a study of twenty-five hundred law school graduates, no significant differences were found between men and women either in class rank in law school or in participation on

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It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

*Id.* (emphasis added).

10. Muller v. Oregon, 208 U.S. 412, 421-23 (1908). See also Goessaert v. Cleary, 335 U.S. 464 (1948), upholding state statutes prohibiting women from particular occupations, such as the Michigan statute which forbade women from working as bartenders unless they were the wife or daughter of the male owner.
12. *Id.* at 1054-57.
13. *Id.* at 1062-64.
the law review. The number of women holding federal district court or court of appeals judgeships can be counted on two hands. And, of course, no woman has ever been appointed to the United States Supreme Court.

Sexism is also part and parcel of the American jury system. The "peers" selected to sit in judgment in American trials are overwhelmingly male, and they, of course, carry with them through the trial and into the jury room the biases and prejudices of their sex. Trial counsel have traditionally attempted to combat bias on the jury through jury selection procedures, particularly through voir dire examination of prospective jurors. Yet even in this vital phase of the proceedings, sex-based prejudices and stereotypes may dominate the trial lawyer's activities. Henry Rothblatt, a well-known criminal defense attorney, advises the following:

Common sense, combined with some appreciation of how the female mind works, will go a long way toward deciding the sexual composition of your jury. Women jurors are desirable if the defendant happens to be a handsome young man. Since the jury tends to try the attorney as well, a woman juror is called for if you fit that description. Women are desirable if the principal witness against the defendant is a woman. Women are somewhat distrustful of other women.

An all-male jury is preferred where the defendant is a woman. The elderly-grandmother type is also usually to be desired over a younger woman. The occupation of a woman's husband is important, too, for generally she will feel and think in the same manner as her husband.

Even Charles Garry, who established his ability to conduct a penetrating voir dire in the trials of Black Panthers, and who is one of the acknowledged masters of the art of probing racial prejudices

14. Id. at 1072-73.
15. On the pervasiveness of sex-based prejudice and its effect on women in other areas of society, see generally SISTERHOOD IS POWERFUL, supra note 3; WOMAN IN SEXIST SOCIETY (Gornick & Moran eds. 1971). On the effects of sexist attitudes on men, see M. FASTEAU, THE MALE MACHINE (1974). See also references cited in note 3 supra. For a particularly insightful analysis of a frequently discussed topic, see Weisstein, Why We Aren't Laughing . . . Any More, Ms., Nov., 1973, at 49, 50 (emphasis in original):

Think of all the cartoons and comic strips you've read. Now think of all those that didn't include a silly club lady, a domineering mother-in-law, a wife who can't drive a car or balance a checkbook, a sex-starved spinster, a spendthrift wife, a chorus girl trying to trap a rich man, a teen-ager trying to trap a boyfriend, a fat Mexican or Indian woman trailing behind her man, a maid who dominates her employers, a nurse/stewardess/secretary/victim.

Are there any left? Are you laughing?

of prospective jurors, has been observed to depend on coquettish
innuendo to accomplish his purposes:

With middle-aged women Garry was especially effective.
A handsome, impeccably dressed man (the journalistic cliche
was "dapper"), approaching 60 but looking years younger,
only he himself seemed innocent of the seductive, even
overtly sexual, nature of his approach. Thus a standard
Garry opener for females was, "Has anything I have asked
the other jurors today triggered off something in the crevices
of your conscious or unconscious mind that you would like
to tell me about?"

This article will discuss one method of combating sexism in
one area of the law: the use of voir dire in isolating, confronting,
and "minimizing" sex-based discrimination in jury trials. The dis-
cussion will focus on criminal trials, primarily because the case law
has, for the most part, developed out of criminal rather than civil
proceedings, and will generally assume a defense counsel's point
of view. Many of the issues raised, of course, are equally appro-
priate in the civil trial context, and many of the techniques will
be equally useful to prosecuting attorneys.

The article will first consider the influences of sex-based
prejudices in jury trials. Next will follow an examination of the
constitutional standards applied by the United States Supreme
Court in sex discrimination cases. This discussion will serve as
general background for the discussion on the right to voir dire on
sex-based attitudes and prejudices. The article will then present
an extensive discussion on combating sexism through voir dire,
including the nature of voir dire and the general law governing
its conduct, the federal law on the right to an extensive voir dire,
and the significant developments in California law. Finally, the
article will present a series of sample questions which will aid trial
counsel in uncovering sex-based prejudices during voir dire. The
chief objectives of the article will be to summarize the legal foun-
dations for effective voir dire technique, to explore extensions of
existing doctrines, and to suggest practical methods by which sex-
based prejudices may be rooted out and dealt with in jury trials.

17. Blauner, Sociology in the Courtroom: The Search for White Racism
18. For the purposes of this article, it will be assumed that sex-based biases
and prejudices affect everyone in the courtroom, to a greater or lesser degree, just
as they affect everyone in society. The "degree" of influence of such biases is
the critical issue, of course, but it cannot be seriously disputed that every adult
male harbors some stereotyped ideas or attitudes toward women which affect his
perceptions of events—and evidence. See references cited in notes 3 & 15 supra.
Biases against women may also be held by women jurors: to some extent,
therefore, the trial attorney must be as concerned about the hostilities of women
jurors as about those of men. It seems reasonable to assume, however, that pro-
II. Influences of Sex-Based Prejudices in Jury Trials

When they have been sensitive to the issue of sex-based prejudice in jury trials, lawyers have generally framed the problem in terms of bias against a female party to an action. The task of the trial counsel, then, is to help the client directly by seeking to expose and overcome sex-based prejudices against her which may affect the jury's verdict. This is clearly an appropriate and important function for trial counsel to assume. There are at least three other ways, however, in which sexism infects jury trials, and diligent counsel will be cognizant of these factors as they affect the client in a more roundabout way. Each of them, it may be noted, may have a significant effect on the jury's verdict regardless of whether the actual client is female or male.

First, sex-based prejudice may affect the way in which the jury perceives female witnesses in a case. If jurors are permitted to indulge in stereotyped assessments of women witnesses—"women are emotional, excitable, and don't pay close attention to details"—without such stereotypes being exposed and confronted, the credibility of the witnesses may suffer substantially. This problem is set into sharp focus when a female witness is called by the defense to contradict the testimony of a male police officer, frequently the arresting officer. Though jurors seldom admit it on voir dire, they generally tend to place an extra degree of credibility on the testimony of a police officer. When, in addition, the police officer is a man, and is contradicted by a female defense witness, the problems for defense counsel are compounded, and the burden is greater on counsel to expose sex-based stereotypes before they can harm the client's interests, such as on voir dire.

Second, sex-based prejudice may affect the jury's perceptions of the case when the attorney representing one party is a woman. It is true that jurors' prejudices toward women lawyers may be a two-edged sword: certainly many jurors, particularly men, will feel that a woman has no business being in court, that she should be at home "where she belongs," that she can't possibly be a good attorney. Many jurors, particularly working-class people, may feel threatened in their self-image or sense of self-esteem by the sight of a highly-educated professional woman appearing in court to conduct a trial. On the other hand, sexist attitudes of male jurors

Spective women jurors will neither carry the range of stereotypes concerning women that men will, nor cling to those stereotypes as intensely as men, particularly in the face of persuasion and contrary evidence. Moreover, nascent feelings of sisterhood (for sister defendants, attorneys, witnesses and jurors) may be developed to a considerable degree under the voir dire questioning of skilled and sensitive trial counsel.
may be turned to the female attorney’s advantage through those same vaguely seductive techniques which have proved so useful to some trial attorneys.\textsuperscript{19} To be sure, there are strong arguments for and against such courtroom demeanor, but it cannot be denied that sexist attitudes may strongly affect the proceedings whenever a female attorney works on a trial. As with female witnesses, therefore, it is clearly in her client’s interests for the woman lawyer to expose and confront sex-based prejudices as early in the case as possible.

Third, sex-based attitudes may affect the jury’s verdict with respect to women jurors themselves. Since women are generally excused from jury duty more readily than men,\textsuperscript{20} the woman juror is likely to find few other members of her sex on the jury. If her perceptions of the case are somewhat different from those of the male members of the jury, she may find herself isolated and representing a distinctly minority viewpoint.\textsuperscript{21} While it is difficult to foresee this situation before the trial begins, the trial attorney may have some idea whether the issues, the witnesses, the client, or even the attorney are more likely to find sympathy with a woman juror than with a man. In such a situation, the trial attorney may want to bolster the woman juror against what may be pressures from other jurors to “cave in.”\textsuperscript{22} This may be done, for example, through voir dire questions emphasizing the rights of women and the independence of their personal judgment: “Do you believe that women have a right to be free of discrimination based on their sex? Do you think that women always vote the way their husbands vote? If you were the lone holdout on the jury after hours of deliberation, would you be influenced by the fact that the other eleven jurors disagreed with you?”\textsuperscript{23} Similar

\textsuperscript{19} Women attorneys and law students differ sharply on the advisability of using such techniques to combat sex-based prejudices and stereotypes, since they may only feed the preconceptions which a prospective juror holds.

\textsuperscript{20} Kanowitz, supra note 3, at 28-31; M. Mead & F. Kaplan, American Women 242 (1965); see Taylor v. Louisiana, 95 S. Ct. 692 (1975), discussed in text accompanying notes 53-56 infra.

\textsuperscript{21} Empirical studies of small group decision-making processes indicate that jurors in the minority on the first ballot are likely to be influenced by the size of the majority arrayed against them. See H. Kalven & H. Zeisel, The American Jury 462-63, 488-89 (1966).

\textsuperscript{22} E.g., N.Y. Times, Jan. 16, 1973, at 8, col. 3.

\textsuperscript{23} Note the difference between this question and the following: “Supposing you were the only juror on the panel that was a woman and the other eleven members were men, would there then be a jury of eleven people or a jury of twelve?” When plaintiff’s attorney asked this question in a civil trial, defense counsel jumped up and declared that plaintiff’s attorney had insulted the juror, and demanded that plaintiff’s counsel apologize. The question offended many women on the jury panel. Broeder, Voir Dire Examinations: An Empirical Study, 38 S. Cal. L. Rev. 503, 527 (1965) [hereinafter cited as Broeder].
questions may also be asked of male jurors to force them to confront sexist prejudices against female members of the jury.

III. CHALLENGING SEX DISCRIMINATION—FEDERAL CONSTITUTIONAL STANDARD

In recent years, the United States Supreme Court has reassessed its ancient and obviously antiquated notions of the "proper" status of women in society. In 1971, in Reed v. Reed, the Court was confronted with an Idaho statute which stated that "males must be preferred to females" among persons otherwise equally entitled to administer the estate of one who died intestate. The Court was urged by the female appellant to declare that discriminations based solely upon sex, like those based upon race, are inherently "suspect," and thus only justified when promoting a "compelling" governmental interest. In response, the Court abandoned the paternalistic notions of women's inferiority and "dependence" evident in Bradwell and Muller, but it nevertheless refused to declare sex a "suspect" ground of classification. Instead the Court held that the statute was arbitrary and irrational and thus violated traditional equal protection requirements.

The test applied by the Court, however, was somewhat different from the "traditional" equal protection standard. The Court held that the distinction between the sexes embodied in the statute did not have "a fair and substantial relation to the object of the legislation," taking its standard from a 1920 decision, Royster Guano Co. v. Virginia. Although the Court was clearly not applying "strict scrutiny" to classifications based upon sex, its requirement of a "substantial" relation between statutory classification and legislative goal did appear to constitute a somewhat higher standard than the traditional "rational relationship" test.

The next case reaching the Court which involved a classification scheme based upon sex was Frontiero v. Richardson. The issue before the Court concerned the right of a female member of the armed forces to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits on an equal footing with male members.

26. 404 U.S. at 76-77.
27. Id. at 76.
Under the applicable statutes, a serviceman was able to claim his wife as a "dependent" without regard to whether she was in fact dependent upon him for any part of her support, but a servicewoman was not able to claim her husband as a "dependent" unless he was in fact dependent upon her for over one half of his support.

The plurality opinion, representing the views of Justices Brennan, Douglas, White and Marshall, confronted the issue of sex discrimination directly:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of a "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage.

The opinion noted that during much of the 19th century, "the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children."

Although the position of women in society has improved in recent decades, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, on the job market and, perhaps most conspicuously, in the political arena.

Since sex is "an immutable characteristic determined solely by the accident of birth," a characteristic which "frequently bears no relation to ability to perform or contribute to society," the opinion stated that classifications based upon sex, like those based upon race, alienage, or national origin, are inherently "suspect" and will be subjected to "strict judicial scrutiny."

Finding that the statutory scheme served no purpose other than "administrative convenience," the opinion held that the requirement that a servicewoman prove the dependency of her husband was unconstitutional.

32. Appellant Sharron Frontiero challenged the statutory scheme under the due process clause of the fifth amendment: "'[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process."'" Schneider v. Rusk, 377 U.S. 163, 168 . . . Bolling v. Sharpe, 347 U.S. 497, 499. . . ." 411 U.S. at 680.
33. Id. at 684.
34. Id. at 685.
35. Id. at 686.
36. Id. at 686-88.
37. Id. at 690.
There was no majority opinion in *Frontiero*. Justice Stewart concurred in the judgment of the plurality, on the ground that the statutory scheme worked an "invidious" and therefore unconstitutional discrimination, citing only *Reed v. Reed* as authority.\(^{38}\) Chief Justice Burger and Justices Powell and Blackmun also concurred in the judgment, on the same authority, but stated that it would be premature to hold sex to be a "suspect classification" inasmuch as the equal rights amendment, which would resolve the issue, was concurrently involved in the ratification process in the state legislatures.\(^{39}\) Justice Rehnquist dissented.

Despite the lack of a majority ruling, *Frontiero* was clearly a victory for women's rights advocates and hopefully a harbinger of a new constitutional analysis in sex discrimination cases.\(^{40}\) In subsequent decisions, however, the Court has followed an erratic path. In *Cleveland Board of Education v. LaFleur*,\(^{41}\) the Court struck down rules in Cleveland, Ohio, and Chesterfield County, Virginia, which required public school teachers to take unpaid maternity leaves five and four months, respectively, before the expected childbirth, and which, in Cleveland, prohibited the teacher from returning to work until her child was at least three months old. The Court's analysis was very different from that in *Reed* or *Frontiero*. It found that the mandatory maternity leave provisions created an irrebuttable presumption that pregnant teachers were physically incompetent to carry on their teaching duties as early as several months before the expected childbirth, regardless of the actual physical condition of an individual teacher in the same stage of pregnancy. Similarly, the Cleveland mandatory waiting period for teachers returning to work created an irrebuttable presumption of physical incompetency until three months after the birth of the child. Noting that "'permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments,'"\(^{42}\) the Court accordingly held the rules unconstitutional. There was no discussion in the Court's opinion of the fact that male teachers with temporary physical disabilities were subject to no similar mandatory leave requirements, or of the fact that only women, after all, can become pregnant.

The Court's next opinion in a sex discrimination case was

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38. Id. at 691.
39. Id. at 691-92.
42. Id. at 644, quoting Vlandis v. Kline, 412 U.S. 441, 446 (1973).
even more curious. In *Kahn v. Shevin*, the Court considered a Florida law which provided for a $500 annual tax exemption for widows but offered no analogous benefit for widowers. The Court was well aware of the practical economic problems facing women in America:

There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs . . . . The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.

Although the statute clearly made a distinction based solely upon sex, the application of "strict judicial scrutiny," as indicated by the plurality in *Frontiero*, would have resulted in the overturning of the statute. Justice Douglas, evidently loathe to upset the tax benefit to widows, wrote the opinion of the Court, upholding the statute as meeting the *Reed v. Reed* test. Justices Brennan, Marshall, and White, who had formed the *Frontiero* plurality with Douglas, dissented on the ground that a stricter test should be applied.

In the next sex discrimination case considered by the Court, the gradual retreat from *Frontiero* became a rout. In *Geduldig v. Aiello*, with Justice Stewart writing the majority opinion, the Court held that the California disability insurance system, which excludes from the definition of covered "disability" certain disabilities resulting from pregnancy, did not violate the constitutional guarantee of equal protection of the laws. The Court did not apply either the *Reed* or *Frontiero* test. Instead, it reasoned that the challenged exclusion was justified because coverage of pregnancy disabilities would be expensive to the insurance system and therefore would disrupt the economic foundation of the program: "Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." In fact, the Court denied that the case presented a question of sex discrimination:

44. *Id.* at 353-54 (footnotes omitted).
46. *Id.* at 495.
The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.47

Subsequent opinions have similarly failed to provide any definitive framework of analysis. In Schlesinger v. Ballard,48 plaintiff Robert Ballard, a Navy lieutenant with more than nine years of active service as a commissioned officer, had failed, for the second time, to be promoted to the grade of lieutenant commander, and was therefore subject to mandatory discharge under the applicable statute.49 He brought suit on the ground that if he had been a woman, he would have been entitled to 13 years of commissioned service before being subject to mandatory discharge for lack of promotion.50 The Court, again with Justice Stewart writing for the majority, upheld the statutory scheme. It concluded that since the participation of women in combat and most sea duty is statutorily restricted, Congress may “quite rationally” have believed that women officers, with less opportunity to compile service records comparable to their male counterparts, needed a longer tenure period than male officers if they were to receive “fair and equitable career advancement programs.”51 In thoroughly embracing this “protective” legislation, the Court did not consider, ostensibly because Ballard did not challenge, the validity of the pivotal statute, which provides that “women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports.”52

Six days after Ballard was decided, the Court issued its opinion in Taylor v. Louisiana.53 Billy J. Taylor had been con-

47. Id. at 496-97 n.20.
48. 95 S. Ct. 572 (1975).
50. See id. § 6401(a) (1970).
51. 95 S. Ct. 572, 577-78 (1975).
53. 95 S. Ct. 692 (1975).
Victed of aggravated kidnapping by a Louisiana jury. Under applicable state law, a woman was not eligible for jury service unless she filed a written declaration of her desire so to serve. Though the jury selection system did not disqualify women for jury service, it was conceded that in practice the number of women called for jury service was grossly disproportionate to the number of eligible women in the community. There were no women, for example, in the venire from which Taylor’s jury was selected. The Court struck down the jury selection scheme, but not on equal protection grounds. Instead, it held that the system violated an aspect of Taylor’s sixth and fourteenth amendment right to an impartial jury in criminal prosecutions: that is, his right to a jury drawn from a “representative cross section of the community.”

In a ruling potentially as significant as the holding in the case, the Court also ruled that Taylor had standing to raise the issue of the absence of women from the venire. Relying upon Peters v. Kiff, in which the Court had held that a white defendant had standing to challenge a jury selection process which systematically excluded black people, the Court stated that Taylor had standing to raise the claim that he had been deprived of the kind of jury to which he was constitutionally entitled, even though he was not a member of the excluded class.

In Weinberger v. Wiesenfeld, the Court confronted another equal protection issue. Plaintiff Stephen Wiesenfeld challenged a provision of the Social Security Act which made benefits based on the earnings of a deceased husband and father covered by the Act payable to the widow and to the couple’s minor children, but which made benefits based on the earnings of a deceased wife and mother covered by the Act payable only to the minor children and not to the widower. The Court stated that the “gender-based distinction made by § 402(g) is indistinguishable from that invalidated in Frontiero v. Richardson . . .” and declared that an “archaic and overbroad” generalization . . . “not tolerated under the Constitution” underlies the distinction drawn by §402(g), namely, that male workers’ earnings are vital to the support of their families, while the earnings of female wage-earners do not significantly contribute to their families’ support.

56. 95 S. Ct. 1225 (1975).
58. 95 S. Ct. at 1230.
59. Id. at 1231 (footnote omitted). In a footnote the Court added:
See the observations in Frontiero, 411 U.S. at 689, n.23, that in view
The opinion is long on legislative history and short on constitutional doctrinal analysis, holding only the following:

Since the gender-based classification of § 402(g) cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero*. Like the statutes there, "[b]y providing dissimilar treatment for men and women who are . . . similarly situated, the challenged section violates the [Due Process] Clause." *Reed v. Reed*, 404 U.S. 71, 77 (1971). 60

Finally, in *Stanton v. Stanton* 61 the Court ruled on the constitutionality of the Utah statute providing that the period of minority for males extends to age 21, but for females only to age 18. Appellant Thelma Stanton had been granted support payments for her son and her daughter in a previous divorce decree, but under Utah law the payments for her daughter were discontinued when she reached the age of 18. She sued for support payments for her daughter until the daughter reached the age of 21.

The Utah Supreme Court upheld the statute on the basis of what it termed "old notions":

"that generally it is the man's primary responsibility to provide a home and its essentials" . . . ; that "it is a salutary thing for him to get a good education and/or training before he undertakes those responsibilities" . . . ; that "girls tend generally to mature physically, emotionally and mentally before boys"; and that "they generally tend to marry earlier" . . . 62

The United States Supreme Court stated, "We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect," 63 and held that the statute could not be justified even if the Utah court's contentions were true:

No longer is the female destined solely for home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is desirable, if not always a necessary antecedent, is apparent and a proper subject of judicial notice. If a specified age of

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60. *Id.* at n.11.
61. 95 S. Ct. at 1236.
62. *Id.* at 1375-76.
63. *Id.* at 1377.

of the large percentage of married women working (41.5% in 1971), the presumption of complete dependency of wives upon husbands has little relationship to present reality. In the same vein, *Taylor v. Louisiana*, 95 S. Ct. 692 (1975), observed that current statistics bely "the presumed role in the home" of contemporary women. 95 S. Ct. at 700 n.17.
minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. 64

The Court therefore, held that the provision did not withstand the equal protection attack, there being no valid distinction between male and female which could be drawn. 65

The Wiesenfeld and Stanton opinions demonstrate the unsettled nature of the Court's constitutional analysis regarding sex discrimination. Wiesenfeld, authored by Justice Brennan, frequently compares the challenged provision to those invalidated in Frontiero, which was written by the same Justice. In its ultimate citation to Reed v. Reed, however, the opinion indicates that the "strict judicial scrutiny" favored by the Frontiero plurality has not been adopted by a majority of the Court, and it is unclear whether statutory distinctions based upon sex require only a traditional "rational" basis, or, after Reed v. Reed, "rationality plus." In Stanton, authored by Justice Blackmun, the court explicitly states that it has not decided upon the appropriate constitutional standard.

Thus the exact constitutional status of sex discrimination, clearly an important issue in determining the right to an extensive voir dire on prejudice and bias, remains unresolved. What the Court has shown is that in particular circumstances it will look beyond the myths of female dependence, economic subservience, and incompetence of the Bradwell and Muller era, and make an empirical determination whether legislative presuppositions regarding the behavior and role of women have any basis in present reality. 66 In this regard the Court appears to be less concerned with whether the literal terms of a challenged statutory provision make a distinction based upon gender, and more with the practical consequences of that distinction for women, particularly in terms of economic detriment and benefit, opportunity for full participation in society, and integrity of the total statutory scheme. This is certainly not the equivalent of subjecting sex-based classifications to "strict judicial scrutiny," but it is a significant consideration in developing strategies for combating sex discrimination in jury trials.

IV. COMBATING SEX-BASED PREJUDICES THROUGH VOIR DIRE

A. Voir Dire: Definitions, Procedures, and General Principles

Before being selected for service in a particular case, prospective jurors are subjected to voir dire examination. "Voir

64. Id. at 1378 (citation omitted).
65. Id. at 1379.
66. See note 59 supra.
“dire” means “to speak the truth,” and consists of a series of questions designed to uncover bias or prejudice among the potential jurors. Voir dire procedure is generally governed by statute, and may vary somewhat in different jurisdictions. Questions may be directed at individuals, or at a group of prospective jurors, or at the entire jury panel. Individuals may be examined in isolation or with the other members of the jury panel in the courtroom. Questioning may be conducted by the judge, or by trial counsel, or both. In the federal courts, the conduct of the voir dire is governed by the provisions of section (a) of Rule 24 of the Federal Rules of Criminal Procedure:

The court may permit the defendant or his 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 his 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.

The conduct of the voir dire is thus left to the discretion of the judge. In practice, the majority of trial judges in federal courts conduct the voir dire themselves, allowing counsel to submit to them proposed questions.

During the voir dire prospective jurors may be challenged by the judge or by one of the attorneys. Two types of challenges may be exercised by trial counsel: challenges for cause and peremptory challenges. Challenges for cause may be made on the grounds of “actual” bias or of “implied” bias. Actual bias is present where the prospective juror admits to a state of mind that prevents him from being impartial. Implied bias is present where an inference of partiality can be drawn from the relationship between the prospective juror and a party or an element of the case. Peremptory challenges may be exercised by a party for any reason whatsoever. The number of challenges for cause is unlimited, while the number of peremptory challenges is governed by statute or local procedure.

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67. Black's Law Dictionary 1746 (1968). Others have defined it, perhaps more cynically, as “to see what is really being said.” La Raza Defendants and Voir Dire: A Manual to Help Combat Racist Juries I (1972) (publication of the National Lawyers Guild, San Francisco, Calif.) [hereinafter cited as La Raza Defendants].


Notably, the House of Delegates of the American Bar Association at its 1975 mid-year meeting adopted the following Resolution:

Resolved, That the American Bar Association supports the concept of voir dire by counsel as a matter of right in federal civil and criminal cases.

The significance of the voir dire was recognized in the United States at least as early as the trial of Aaron Burr. In one of the first American cases holding that a person having an opinion on a case is disqualified from sitting as a juror, Chief Justice Marshall, sitting on the circuit, discussed voir dire at some length. His statements on the nature of bias establish a foundation for requiring an extensive voir dire:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case. 71

In 1892 the Supreme Court, in Lewis v. United States, explicitly emphasized the importance of the voir dire: "The right of 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." 73

Reynolds v. United States was the first comprehensive discussion of voir dire by the Supreme Court. The Court's decision established most of the fundamental principles governing the voir dire. It presented a definition of the "impartial" juror required by the sixth amendment: "A juror to be impartial must, to use the language of Lord Coke, 'be indifferent as he stands unsworn.' " 72 The decision established the permissible scope of the voir dire: "To make out the existence of [bias], the juror who is challenged may be examined on voir dire, and asked any questions that do not tend to his infamy or disgrace." 76 It sets forth

70. One of the complaints against British rule in America was that, in criminal trials of political opponents, the policy of the Crown was "to secure jurors favorable to the Crown (Tories) and to deny defendants an effective opportunity to ferret out biased jurors." Gutman, The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right, 39 BROOKLYN L. REV. 290, 294 (1972). Previously, in Massachusetts Colony for example, the 1760 Jury Selection law had required "that the venire be chosen by a town meeting, thereby allowing the accused to thoroughly examine the character and biases of prospective jurors." Id.
72. 146 U.S. 370 (1892).
73. Id. at 376.
74. 98 U.S. 145 (1878).
75. Id. at 154.
76. Id. at 155 (emphasis added).
a minimum burden of proof for a party challenging a prospective juror: a challenge for cause "must be founded on some evidence, and be more than a mere impression."\textsuperscript{77} The decision dealt at some length with the test to be applied in determining whether a prospective juror should be dismissed for bias:

Chief Justice Marshall, in Burr's Trial (1 Burr's Trial 416) states the rule to be that, "light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." The theory of the law is that a juror who has formed an opinion cannot be impartial.\textsuperscript{78}

Further, the decision established a standard for appellate review: "The finding of the trial court upon that issue [that is, the challenge to the juror] ought not to be set aside by a reviewing court, unless the error is manifest."\textsuperscript{79} Finally, the facts of the case presented an early touchstone against which judges could measure acceptable bias in a prospective juror.

Reynolds, a Mormon, had been charged with violation of the Utah bigamy statute. His defense was that the multiple marriage was authorized under his religion. During voir dire, when the district attorney asked one of the veniremen whether he had "formed or expressed any opinion" as to the guilt or innocence of the defendant, the man replied, "I believe I have formed an opinion."\textsuperscript{80} The trial judge then took over the questioning. In response to questions, the juror repeated that he had formed an opinion, not based upon anything which had occurred in court. The juror asserted, however, that his opinion would not influence his verdict in the case. In response to questions from the defendant, the juror stated that he had not "expressed" an opinion, but that he had "formed" one. The court refused to excuse the juror for cause, stating that the defendant had not met his burden of showing that the juror could not be impartial, inasmuch as the juror only "believed" he had formed an opinion.\textsuperscript{81} Reynolds was convicted. On appeal, the Supreme Court affirmed. It attempted to distinguish Reynolds' situation from one in which the juror should have been excused for cause: "If a positive and de-

\textsuperscript{77} Id.
\textsuperscript{78} Id. at 155-56 (emphasis added).
\textsuperscript{79} Id. at 156.
\textsuperscript{80} Id. at 147.
\textsuperscript{81} Id. at 156.
cided opinion had been formed, he would have been incompetent even though it had not been expressed."82 There may be little usefulness in a distinction between an "opinion" and a "positive opinion," but the clear effect of the ruling was to give the trial judge considerable discretion in his decision whether to excuse prospective jurors for cause.

Several other general principles concerning the voir dire have become firmly established. The defendant has no constitutional right to have the voir dire conducted either by himself or by counsel, at least in federal court,83 and the refusal by the trial judge to allow personal voir dire of the prospective jurors is not an abuse of discretion.84 Moreover, it is technically improper to use the voir dire to "condition" the panel members by presenting to them aspects of a party's case, rather than to inquire into the qualifications and competency of the prospective jurors, and it is not an abuse of discretion for the court to limit counsel's questioning when such improper purpose is evident.85 Where there is a significant possibility that jurors have been exposed to potentially prejudicial material, however, such as pre-trial publicity, there is a clear obligation on the part of the trial judge to have prospective jurors examined thoroughly in order to ascertain the effects of such material.86

B. Smoking Out Bias—And Getting Burned: The Case Law

In the last forty years, the United States Supreme Court has considered the issue of bias of individual jurors several times. In United States v. Wood,87 the Court held that the eligibility of government employees for jury service in criminal cases does not contravene the fifth or sixth amendments, despite the fact that the government, as the prosecution, is a party in the proceedings. The Court said that such employment alone could not be taken as evidence of bias in favor of the prosecution: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitu-

82. Id. at 157 (emphasis added).
83. Hamer v. United States, 259 F.2d 274 (9th Cir. 1958); Paschen v. United States, 70 F.2d 491 (7th Cir. 1934).
84. Bonness v. United States, 20 F.2d 754 (9th Cir. 1927); Kurczak v. United States, 14 F.2d 109 (6th Cir. 1926).
85. See, e.g., Strickland v. Perry, 244 F.2d 24 (5th Cir. 1957).
87. 299 U.S. 123 (1936).
tion lays down no particular tests and procedure is not chained to any ancient and artificial formula."\(^88\)

The Court extended the *Wood* holding in *Dennis v. United States*,\(^89\) ruling that although federal employees were required to undergo a "loyalty" investigation to determine whether there was any evidence that they were "disloyal" to the United States, such employees would not be disqualified for jury duty in Smith Act prosecutions of members of the Communist Party. The Court affirmed the defendants' convictions and rejected the contention that the President's "Loyalty Order" would influence their decision whether to acquit or convict the Communists, relying on the jurors' assertions on voir dire that they would not be affected by the Order, and noting quixotically that "the Loyalty Order is not directed solely against Communists, and that the crime of which petitioner was convicted is not a crime peculiar to Communists."\(^90\)

In the lower court decision the Second Circuit had held that the trial judge was under no obligation to ask prospective jurors specific questions designed to probe their beliefs as to the teachings of the Communist Party, and that it was no abuse of discretion for the trial judge to refuse to excuse a juror when evidence was presented that he had made a speech indicating his extreme hostility to Communism.\(^91\)

Some Supreme Court decisions evidence more concern for defendants' objections to prospective jurors, though they do not alter the general tenor of the law. Prior to *Wood* and *Dennis*, for example, the Court had held in *Crawford v. United States*\(^92\) that a conviction for conspiracy to defraud the United States must be reversed because a juror who was an employee of the federal government was not excused for cause. The Court indicated that if there was doubt as to the impartiality of the juror, the challenge should be allowed.\(^93\)

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\(^88\). *Id.* at 145-46.

\(^89\). 339 U.S. 162 (1950).

\(^90\). *Id.* at 169.


\(^92\). 212 U.S. 183 (1909).

\(^93\). The Court said:

Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employé [sic] who re-
Even taking into account the irrationality of the anti-Communist feeling in the United States during the 1950's, to some extent reflected in the Dennis opinion, Crawford would appear to have little vitality today. One case in which the Court did hold that juror bias warranted reversal of a conviction was Remmer v. United States. There, in a prosecution for evasion of income tax, evidence presented by the defendant indicated that a person not connected to the defendant in any way told one of the jurors that the juror might make a "profitable deal" with the defendant. Without the defendant's knowledge and without telling the juror the results, the FBI subsequently made an investigation of the incident. The Court held that the juror's "freedom of action as a juror" was affected and remanded the case for a new trial.

The Supreme Court has also held, in Witherspoon v. Illinois, that disqualification for cause of veniremen having conscientious scruples against or opposed to capital punishment, without their stating that they would automatically vote against the imposition of such punishment no matter what the trial would reveal, violated the defendant's rights to a fair trial and an impartial jury secured by the sixth and fourteenth amendments. The Court stated:

It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal "organized to convict. . . ." It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.

Cases in the lower courts provide more dramatic examples of the kinds of bias which fail to shock judicial sensibilities. In Commonwealth v. DePalma the defendant, an Italian, was charged with murder. One of the prospective jurors, on voir dire, said of Italians, "As a race, they are too much for murder." The trial judge refused a defense motion to excuse the prospective juror for cause; he was seated as a member of the jury, and the defendant was convicted. The Supreme Court of Pennsylvania received a salary from the United States. . . . It need not be assumed that any cessation of that employment would actually follow a verdict against the Government. It is enough that it might possibly be the case, and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict.

212 U.S. at 195-96.
95. Id. at 381.
97. Id. at 518.
98. Id. at 521.
held that the judge's ruling was not an abuse of discretion. The Supreme Court of Nevada held that the denial by the trial judge of defendant's challenge for cause was proper and did not constitute error.

Some lower courts have set limits on the degree of prejudice they will allow, but they have evidently been willing to do so only in the most flagrant cases. For example, in People v. Ortiz a prospective juror had made the statement prior to voir dire, "They better not take me on that jury, or I will hang that Mexican —." On voir dire, however, he failed to disclose any racial prejudice or ethnic bias. The juror was seated and the defendant convicted of murder. The Supreme Court of Illinois held that the juror's statement was evidence of prejudice and the conviction must be reversed. In United States v. Chapman, a condemnation proceeding, the Tenth Circuit held that a juror who had previously testified as an expert witness for the same defendant landowner in a suit by the government to condemn land for the same project was not an "impartial" juror, and the trial court's refusal to sustain the government's challenge for cause was reversible error.

In Virgin Islands v. Bodle, a prosecution for rape, one of the prospective jurors failed to disclose on voir dire that his sister had been raped and murdered three years before, despite careful questioning during voir dire. The juror was subsequently seated and the defendant was convicted. The Third Circuit held that the defendant's constitutional right to an impartial jury had not been violated, but that it would reverse the conviction "in the exercise of its supervisory powers."

The reported opinions, of course, represent only the most dramatic examples of racial prejudice or other bias affecting

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100. Id. at 758.
101. 220 P. 552 (Nev. 1923).
102. 220 P. at 553. See also United States v. Crosson, 662 F.2d 96 (9th Cir. 1972), where the defendant was charged with burning the American flag. On voir dire one of the jurors stated, "When they burn the flag, they hurt me because they hurt my country." Id. at 103. The juror was excused for cause, but the trial judge refused to grant a mistrial on the ground that the "inflammatory statement in the presence of the other jurors" prejudicially infected the jury. The defendant was convicted. The Ninth Circuit upheld the conviction, finding no reversible error. Id. at 104.
103. 320 Ill. 205, 150 N.E. 708 (1926).
104. Id. at 150 N.E. at 712. The published opinion does not reveal what was specifically indicated by "—.
105. Id.
106. 158 F.2d 417 (10th Cir. 1946).
107. Id. at 421.
108. 427 F.2d 532 (3d Cir. 1970).
109. Id. at 534.
voir dire. Indeed, voir dire examination has generally been found, both by trial lawyers and by empirical researchers, to be extremely ineffective in exposing bias or prejudice in prospective jurors.\(^1\)

The reasons for this are evident. Many people are simply not aware of the prejudices they harbor, and those who are aware of such prejudices will seldom admit to them in open court. Furthermore, even under the best of circumstances, the types of challenges available to defense attorneys suffer other drawbacks which hamper their usefulness.

The challenge for cause may be exercised by one of the parties, but it is ultimately the judge who must decide whether to excuse the juror. As the reported cases demonstrate, trial judges cloak jurors with a strong presumption of impartiality, particularly when a juror asserts under oath that he or she can lay aside any feelings of bias and view the case with an open mind. Even when sexist attitudes are elicited on voir dire, it is likely that such attitudes will not be recognized as prejudicial by the predominantly male judiciary.

The restricted effectiveness of the peremptory challenge derives from the limited number of peremptories allowed. And given the pervasiveness of sex-based prejudice in our society, it may be just as likely that the next prospective juror will be just as biased as the one excused.\(^1\) Moreover, appellate courts usually hold that if all defense peremptory challenges have not been used, the defense will be deemed to have accepted the jury and waived errors in juror selection.\(^1\) The conscientious defense attorney thus may be hamstrung between Scylla and Charybdis, weighing each prospective juror who might be excused by peremptory challenge against the remaining members of the venire, yet fearful that objections to the jury will be ignored on appeal if all peremptories are not used.

The task of combating bias in juror selection is particularly difficult in view of the subtlety of the prejudices held by people in society. Prejudice causes a person to react in a preconceived manner toward a particular person or situation, and to close his or her mind to facts and opinions that do not fit a preconceived stereotype. Prejudice also produces feelings of hostility or supe-

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\(^{110}\) See, e.g., Broeder, supra note 23, at 505.

\(^{111}\) In addition, just as in situations where racial prejudice is "acceptable" in the community, a defense attorney may jeopardize the defendant's interests substantially by challenging prospective jurors on the grounds of sexist biases, since many of the remaining veniremen will likely share such prejudices.

riority toward people who look, think, or act differently from oneself. Few people will admit to prejudices when asked directly, "Do you have any biases or attitudes which would prevent you from giving the accused a fair trial?" Upon further examination, however, occasionally people will admit that they have had "unfortunate" experiences with members of other races, that they feel uneasy in the company of certain racial minorities, that they think that a woman's place is in the home, that they would not like to have a woman as their boss, that they see nothing wrong with referring to an adult female as a "girl." General questions will not bring these attitudes to the surface: only through extended, patient, careful questioning may sexist attitudes, like racial prejudices, be isolated, confronted, and dealt with.

Questioning of prospective jurors, even if it is extensive, will generally have limited effectiveness if the entire venire is questioned as a group. Membership in the group acts as a protective blanket for prospective jurors and a screen from questioning attorneys, providing safety in numbers, diffusing any pressure to volunteer individual statements, and discouraging personal replies. Extensive voir dire of individual prospective jurors is required if deeply-held prejudices are to be exposed. Individual questioning allows the defense attorney and the defendant physically to confront the prospective juror, eyeball to eyeball, it allows

113. There may be some advantages to group voir dire:

The presence of many potential jurors and the tension of the uncertainties faced by all concerned can create excitement, contagion and sometimes candor. For example, in the Camden 28 case, one juror honestly stated that "the defendants are guilty"; the reaction among the jurors was open and pronounced, and several thereafter expressed the same opinion, although none had before. Group voir dire also allows one to view the jurors' reactions to what is happening and is more susceptible to use of the voir dire as an educational event.


114. Occasionally, the results of such direct confrontation are startling. While defending Erica Huggins, a member of the Black Panther Party, in a Connecticut trial, attorney Catherine Roraback developed the tactic of asking questions while standing directly behind Ms. Huggins, thus forcing the prospective juror to look at the defendant and to see the friendly and respectful relationship between attorney and client. After one prospective juror had repeatedly asserted that she could be fair in response to questions from the judge and three lawyers, attorney Roraback moved behind her client:

Miss Roraback asked: "Is there anything about your attitude or experiences we haven't covered in all of these questions that would make you unable to listen to the evidence in this case and reach an unbiased verdict?"

For the first time the witness looked directly at the defendant. With pure hate in her eyes, she spat out, "She's guilty!"
The judge, startled, said, "What did you say?"
"She's guilty!"
The juror was promptly excused for cause.
attorneys to ask open-ended questions, which require the juror to reveal something of his or her own personality and attitudes; and it allows the defense to make intelligent use of its peremptory challenges.

Generally, trial judges do ask at least some questions of individual jurors, though these are often confined to questions as to residence, occupation, and other relatively innocuous topics. Ideally, voir dire should be conducted for individual jurors in the judge's chambers, a method necessitated in some of the Watergate trials by the massive pretrial publicity. When individual jurors are questioned in front of the entire venire, there is a problem of superficially fulfilled expectations: the other members of the venire, when questioned subsequently, are able to adjust their responses to the answers which the reactions of the judge and the parties indicate are acceptable. In order to elicit fresh responses, questioning attorneys must come up with new questions, or at least questions newly phrased, for each prospective juror.

Finally, even if questioning is extensive and directed at individual jurors, voir dire will be of limited effectiveness if the questioning is conducted solely by the judge. The trial attorney has prepared the case, knows what the evidence will be, and is sensitive to the issues which may trigger bias or prejudice. The trial judge knows much less and often nothing whatsoever about the case. Moreover, the trial judge who decides to conduct voir dire himself must assume the additional burden of reviewing possibly hundreds of proposed voir dire questions and determining which are proper, which are relevant but should be rephrased, and which are improper. Each denial or rephrasing by the court may constitute an issue for appeal. Most importantly, it is unlikely that a judge will conduct the kind of careful, probing inquiry necessary to smoke out biased attitudes.

A judge not only must be fair, but also must preserve the appearance of fairness. Yet few judges show any inclination to engage in a searching, even potentially hostile, questioning of prospective jurors, regardless of the importance of voir dire to the particular defendant. Indeed, such conduct by the judge, the person holding pre-eminent power in the courtroom, may well be misunderstood by prospective jurors and prove extremely counterproductive to the judicial process. Trial counsel, on the other hand, has both the knowledge and the motivation to conduct an effec-


115. See THE JURY SYSTEM, supra note 113, at 28.

116. In federal court, the most common procedure is that the attorneys submit lists of questions to the trial judge who reads them to the prospective jurors.
tive voir dire, and is expected by everyone, including the prospective jurors, to provide "zealous" representation.\textsuperscript{117}

C. The Right to an Effective Voir Dire on Sex-Based Prejudices—Federal Law

1. Attorney-conducted voir dire. Under Rule 24(a) of the Federal Rules of Criminal Procedure, the trial judge may in his discretion conduct the voir dire himself or permit the attorneys to question prospective jurors,\textsuperscript{118} although in practice, trial judges conduct the voir dire themselves in a majority of the federal districts.\textsuperscript{119} Under certain circumstances, as where widespread pretrial publicity or potential racial bias is involved, some courts have indicated that the defense has the right to conduct the voir dire in order fully to explore hostile attitudes held by potential jurors.\textsuperscript{120} Nevertheless, appellate courts rarely reverse trial judges on this issue except in very unusual cases.\textsuperscript{121}

2. Scope of the voir dire questioning. The right to an extensive voir dire was recognized by the United States Supreme Court as early as 1878.\textsuperscript{122} The Court in Reynolds v. United States declared that a prospective juror may be asked "any questions that do not lead to his infamy or disgrace,"\textsuperscript{123} but, as we have seen, later courts have been less enthusiastic about protecting defendants from biased jurors. In Dennis v. United States, for example, the Supreme Court maintained: "In exercising its discretion, the trial court must be zealous to protect the rights of an accused,"\textsuperscript{124} but in refusing to reverse the Second Circuit's de-


\textsuperscript{118} See text accompanying notes 68-69 & 80-85 supra.


In United States v. McNeil, 357 F. Supp. 342 (N.D. Cal. 1973), a black anti-war activist was charged with failing to keep his local draft board informed of his current address and refusal to report for induction. The trial judge denied the defendant's motion to permit oral and direct voir dire of prospective jurors by counsel, but at trial the judge himself questioned the prospective jurors extensively on the areas pressed by the defendant, particularly racial biases and the war in Vietnam.

\textsuperscript{121} The Jury System, supra note 113, at 27.

\textsuperscript{122} Reynolds v. United States, 98 U.S. 145 (1878); see also text accompanying notes 74-82 supra.

\textsuperscript{123} 98 U.S. at 155 (emphasis added).

\textsuperscript{124} 339 U.S. 167, 168 (1950).
cision the Court itself was considerably less than zealous. On the other hand, the Court of Appeals for the Tenth Circuit has held that judges must exercise a "punctilious regard for a suspicion of prejudice," and, in the case of doubt, rule in favor of the defendant. And the Court of Appeals for the First Circuit has explicitly condemned the practice of putting a question to jurors en bloc, declaring that such a question, "with an absence of response, achieves little or nothing by way of identifying, weighing, or removing any prejudice . . . ." 

The cases discussing specific voir dire questions generally fall into one of two categories: those involving questions about various aspects of the proceedings, and those relating to parties at the trial. Thus, as to the former, questions exploring the prospective jurors' biases and attitudes towards the crimes with which the defendant is charged, for example, must be allowed.

3. Biases toward proceedings. It will be recalled that in Dennis v. United States, the Supreme Court held that federal employees were not per se disqualified from sitting as jurors in Smith Act cases, despite the fact that they were subject to a Presidential "Loyalty Order." In Morford v. United States, however, the Court held that the refusal by the trial judge to allow voir dire questions to federal employees as to the influence of the "Loyalty Order" and whether it would bias the prospective juror in favor of the prosecution was reversible error. In Lurding v. United States, the Court of Appeals for the Sixth Circuit held that in a prosecution for income tax evasion for bookmaking, it was reversible error for the trial judge to refuse to allow the defendant's attorney to ask on voir dire whether any prospective jurors were opposed to the operation of bookmaking establishments in principle or on moral grounds. The court noted that counsel "was entitled to probe for the hidden prejudices of the jurors." Finally, in Napoleone v. United States, the Third Circuit held that in a prosecution for falsely pretending to be an investigator for the Veteran's Administration, it was reversible error for the trial judge to refuse to ask on voir dire whether the prospective jurors had any particular repugnance towards liars or lying.

Voir dire questions pertaining to prospective jurors' prior ex-

125. See text accompanying notes 89-91 supra.
126. United States v. Chapman, 158 F.2d 417, 421 (10th Cir. 1946).
130. 179 F.2d 419 (6th Cir. 1950).
131. Id. at 421.
132. 349 F.2d 350 (3d Cir. 1965).
periences with incidents similar to those alleged in the current case must also be allowed. Thus, in *United States v. Poole*, the Third Circuit held that in a prosecution for bank robbery, the refusal by the trial judge to ask potential jurors, "Have you or any member of your family been a victim of a robbery or other crime?" was reversible error. In *Photostat Corp. v. Ball*, an action for personal injuries resulting from an automobile accident, members of the jury panel were asked whether they had previously been involved in an automobile accident. Owing to a misunderstanding of the question, members of the venire failed to disclose that they had, in fact, been involved in accidents previously. The Tenth Circuit held that regardless of the lack of intent to deceive on the part of the prospective jurors, the defendant's ability to exercise peremptory challenges was prejudicially restricted, thus necessitating a new trial.

Questions may also be asked as to prospective jurors' attitudes towards witnesses in the case. It is well-established that the refusal of a trial judge to allow the question whether prospective jurors would give greater weight to the testimony of a police officer *because he is a police officer* is reversible error, although the defendant is not entitled to ask whether jurors would believe the police officer's word *over* that of the defendant. Similarly, it is reversible error for the trial judge to refuse to ask whether any members of the jury panel are related to the government's witnesses in the case.

Even questions involving legal issues in the case may be necessary if the issues are ones which may provoke bias or prejudice. In *United States v. Robinson*, the trial judge refused to question the jurors regarding self-defense, stating, "I don't want to inject any legal defenses into a case before the jury has heard the evidence." The court of appeals, however, disapproved of the judge's ruling, even though the government had contended that

133. 450 F.2d 1082 (3d Cir. 1971).
134. 338 F.2d 783 (10th Cir. 1964).
135. *Id.* at 787. *See also* United States *ex rel.* DeVita v. McCorkle, 248 F.2d 1 (3d Cir. 1957), cert. denied, 355 U.S. 873 (1957), in which the court held that where a prospective juror in a robbery case neglected to disclose on voir dire that he had been a recent robbery victim, but such information came to light long after the trial and subsequent appeals, habeas corpus must be granted because of prejudice to the defendant.
137. Chavez v. United States, 258 F.2d 816, 819 (10th Cir. 1958).
138. Cook v. United States, 379 F.2d 966, 971 (5th Cir. 1967).
139. 475 F.2d 376 (D.C. Cir. 1973).
140. *Id.* at 380.
the evidence ultimately offered might not justify an instruction on self-defense:

If the issue is one on which jury attitudes should be probed on voir dire to assure a fair trial by an impartial jury, this strength of our system should not be scuttled merely because, on relatively infrequent occasions, a planned defense is unexpectedly foreclosed or abandoned. And the problem can be contained by accompanying the voir dire with a cautionary instruction explaining the purpose of the questioning and informing the jurors that the matters discussed are not in evidence and are not to be considered during their deliberations. This approach is fortified by the right of the defense counsel to present his approach to the jury before trial, in the opening argument.141

4. Biases toward parties. With respect to questions regarding the parties, the defendant must not only be allowed to ask questions regarding any relationships between prospective jurors and the parties and their attorneys, but must also be allowed to explore associational ties between prospective jurors and witnesses who will be called. Thus, in United States v. Lewin,142 the Seventh Circuit held that it was reversible error for the trial judge to refuse to ask prospective jurors if they had associations with a civic organization or a newspaper which provided most of the investigative work for the government in the case. The government's chief witnesses at trial were a paid investigator for the civic organization and a reporter working for the newspaper.143

Sometimes the questions relating to attitudes toward the parties in the case include inquiries as to religious beliefs. For example, in United States v. Daily,144 the Court of Appeals for the Seventh Circuit held that a defendant accused of failing to report for induction into the armed forces was entitled to ask if the jurors would be prejudiced against him because he was a Jehovah's Witness.

Judges must also allow voir dire questioning regarding prejudice against parties on account of their nationality. In Kuzniak v. Taylor Supply Co.,146 a diversity case involving severe injuries sustained in a traffic accident, plaintiffs Mstislaw and Elisabeth Kuzniak were Austrian nationals residing in the state of Michigan.

141. Id.
142. 467 F.2d 1132 (7th Cir. 1972).
143. Id. at 1139. See also Kiernan v. Van Schaik, 347 F.2d 775 (3d Cir. 1965), holding that in a suit for personal injuries from a fall on a sidewalk it was an abuse of discretion for the trial judge to refuse to ask prospective jurors about their prior associations with an insurance company.
144. 139 F.2d 7 (7th Cir. 1943).
145. 471 F.2d 702 (6th Cir. 1972).
The court refused to allow voir dire as to possible prejudices prospective jurors might harbor against Austrian nationals stemming from Austria's alignment with Germany in World War II.\textsuperscript{146} The court of appeals held that the ruling was prejudicial error, and that the prejudicial effects of the ruling were not ameliorated by the trial judge's general questioning of potential jurors as to whether they knew of any reason why they could not give the plaintiffs a fair trial.\textsuperscript{147}

5. Biases based on race. The cases involving questions relating to racial prejudice constitute a line of authority that is clear-cut and, for the purposes of this article, most significant.

The leading United States Supreme Court case on the issue is \textit{Aldridge v. United States}.\textsuperscript{148} The trial judge had refused to ask prospective jurors whether they had any racial prejudices which would prevent their giving an impartial verdict in the prosecution of a black for the murder of a white man. Defense counsel had good reason to urge the question, since at a previous trial in the case a white woman juror had stated that the fact that the defendant was black and the deceased was white may have influenced her.\textsuperscript{149} The Court held that such refusal was reversible error. It cited state cases from Florida, Mississippi, North Carolina, South Carolina, New York, and Missouri holding that such questions must be allowed, and concluded: "The practice of permitting questions as to racial prejudice is not confined to any section of the country, and this fact attests the widespread sentiment that fairness demands that such inquiries be allowed."\textsuperscript{150} Moreover, it noted that the "right to examine jurors on the voir dire as to the existence of disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character,"\textsuperscript{151} citing cases from Texas, California, and Washington. Finally, in response to the government's contention that such a question would inject racial issues into a case in which none otherwise existed, the court declared:

The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve

\textsuperscript{146} Id. at 703.
\textsuperscript{147} Id.
\textsuperscript{148} 283 U.S. 308 (1931).
\textsuperscript{149} 283 U.S. at 310.
\textsuperscript{150} Id. at 313.
\textsuperscript{151} Id.
as jurors and that inquiries designed to elicit the fact of disqualifications were barred. No surer way could be devised to bring the processes of justice into disrepute.152

Several lower courts extended the Aldridge ruling, characteristically quoting extensively from the opinion. In Frasier v. United States,153 the First Circuit reversed a conviction for making false statements on a “Loyalty Certificate for Personnel in the Armed Forces,” on the ground that questions as to racial prejudice had been refused by the trial judge. The court noted that Aldridge applied even though the case did “not involve a crime of violence such as is likely to arouse racial prejudice.”154 And in King v. United States,155 the Court of Appeals for the District of Columbia Circuit agreed with the Frasier court that Aldridge was not limited to capital crimes or even crimes of violence, and held that the failure of the trial judge to allow questions as to racial prejudice was plain error, cognizable on appeal even if not brought to the attention of the trial court under Rule 52(b) of the Federal Rules of Criminal Procedure. In United States v. Gore,156 the Fourth Circuit likewise reversed a conviction for possession of stolen property, where the trial judge had refused to allow questions on racial prejudice, agreeing that Aldridge was not confined to its facts. The court pointed out that the Supreme Court had relied in Aldridge on a Florida case, Pinder v. State,157 in which both the defendant and the deceased were black, and the case apparently had no racial overtones at all.158

In United States v. Carter,159 the Sixth Circuit held that the refusal of the trial judge to interrogate prospective jurors as to racial prejudice was reversible error, despite substantial evidence of the defendant’s guilt. The Court of Appeals for the Fourth Circuit, in Smith v. United States,160 reversed the convictions of a black man and woman charged with passing forged checks because the trial judge had refused to allow prospective jurors to answer defense counsel’s questions as to whether they belonged to the Ku Klux Klan, White Citizen’s Council, or similar organizations. The appellate court held that such refusal constituted reversible error.161 Similarly in United States v. Robinson,162 where

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152. Id. at 314-15.
153. 267 F.2d 62 (1st Cir. 1959).
154. Id. at 66.
155. 362 F.2d 968 (D.C. Cir. 1966).
156. 435 F.2d 1110 (4th Cir. 1970).
157. 27 Fla. 370, 8 So. 937 (1891).
159. 440 F.2d 1132 (6th Cir. 1971).
160. 262 F.2d 50 (4th Cir. 1958).
161. Id. at 51. Cf. United States v. Bowe, 360 F.2d 1 (2d Cir. 1966), in which the court said that it was “entirely proper” in a prosecution of Black de-
the trial judge had also refused to ask jurors questions going to racial prejudice, the Court of Appeals for the Seventh Circuit reversed, holding that the judge had abused his discretion "in refusing to ask any of the proffered questions relating specifically to racial prejudice."163

If there was any doubt as to the basis for the requirement that jurors be questioned as to racial prejudices or to the force of Aldridge, it was dispelled by the Supreme Court's recent decision in Ham v. South Carolina.164 Ham, a young black man, was charged with possession of marijuana. His basic defense was that law enforcement officials were "out to get him" because of his local civil rights activities. At trial he requested that the judge inquire as to possible racial prejudices among prospective jurors. The trial judge refused, Ham was convicted, and his conviction was affirmed by a divided South Carolina Supreme Court.165

In an opinion by Justice Rehnquist, the United States Supreme Court held that the refusal of the trial judge to inquire as to racial prejudices of prospective jurors deprived Ham of the "essential demands of fairness" and denied him a fair trial in violation of the due process clause of the fourteenth amendment. The Court relied squarely on Aldridge.166

Cases following Ham have extended its holding. In United States v. Booker,167 the court of appeals held that the trial judge committed reversible error by refusing to question prospective jurors as to possible racial prejudice against the black defendant, and that the error was not rendered harmless either by the fact that the evidence of the guilt was allegedly overwhelming or by the fact that five of the jurors ultimately seated were black:

For if even one member of the jury harbors racial prejudice against the accused, his right to trial by an impartial jury is impaired . . . . Ham v. South Carolina . . . persuades us that . . . we should reverse without attempting to appraise the actual likelihood of prejudice to this appellant.168

The Court of Appeals for the Third Circuit in United States v. Robinson,169 held that similar conduct by the trial judge was re-

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162. 466 F.2d 780 (7th Cir. 1972).
163. Id. at 782.
165. Id. at 524-25.
166. Id. at 526-27.
167. 480 F.2d 1310 (7th Cir. 1973).
168. Id. at 1311.
169. 485 F.2d 1157 (3d Cir. 1973).
versible error even though the questions suggested by counsel dealt with racial prejudice toward potential witnesses rather than the defendant: "We think any such fine distinction between prejudices against witnesses based upon race and prejudice against the defendant based upon race would be pettifogging."  

6. United States v. Dellinger. One other recent federal decision merits particular attention. United States v. Dellinger, concerning the trial of the so-called Chicago Seven for riots during the 1968 Democratic Convention, establishes the strongest argument yet posited by courts for the right to an extensive voir dire. There the Seventh Circuit held that it was prejudicial error for the trial judge to refuse to allow voir dire questions in three "basic areas" of the case: protest against United States involvement in Vietnam, the "conflicts of values represented by the so-called youth culture—hippies, yippies and freaks—in contrast with the more traditional values of the vast majority of the community," and the conflict of values "symbolized in the confrontation between the city police and the demonstrators."  

Three aspects of the decision are particularly significant. First, the three "basic areas" of required voir dire represent a broad focus of inquiry, considering the specific charges of incitement to riot and conspiracy to cross state lines with intent to incite to riot. The court's rationale was that jurors' attitudes toward the Vietnam war and the yippies and hippies would very likely affect their views of the case.  

Second, the court held that refusal to allow the requested voir dire was an improper restriction on the defendants' right to peremptory challenge. Many of the cases on right to voir dire involve challenges for cause, but the court in Dellinger held that the defendants must be allowed to obtain adequate information for the proper use of peremptories: "If this right is not to be an empty one, the 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."  

Finally, the court held that denial of the right to such extensive voir dire is prejudicial per se. Quoting Swain v. Alabama, the court held that the "denial or impairment" of the right of peremptory challenge "is reversible error without a showing of prejudice."  

170. Id. at 1159.
171. 472 F.2d 346 (7th Cir. 1972).
172. Id. at 369.
173. Id.
174. Id. at 368-69.
175. Id. at 370.
176. Id. at 368.
178. 472 F.2d at 368 (emphasis added).
7. *Voir dire on sex-based prejudice.* Although *Dellinger* appears to go further than other cases in establishing the right to an extensive voir dire, it is only a logical extension of existing law, applied with a scrupulous intention to protect the rights of the accused. The standard established in *Reynolds v. United States* still prevails: the defendant must be allowed to probe for those “*strong and deep* impressions which close the mind against the testimony which may be offered in opposition to them.” Thus the critical question is whether the subject matter of the questioning goes to such “*strong and deep*” impressions.

*Alridge, Ham* and their progeny indicate that prejudice as to *race* is so powerful and affecting, so pervasive in society and so detrimental to a defendant’s right to a fair trial, that it will be considered as the type of “*strong and deep*” bias that will vitiate a judicial proceeding, even if specific prejudice is not shown. Accordingly, voir dire as to racial prejudice is a constitutional requirement of a fair trial.

Recent Supreme Court decisions indicate that prejudice as to *sex* is also powerful and affecting, pervasive and detrimental to a woman’s ability to obtain fair treatment with regard to disposition of her economic interests and societal role. The courts have apparently not considered the specific question whether such prejudice, when it infects members of the jury, also vitiates a defendant’s right to a fair trial. As a factual matter, there can be little doubt that sex-based prejudices may “*close the mind*” to the evidence offered in the case and thereby deny the defendant a fair and impartial decision. As a legal matter, the question is still unresolved. It would appear that if the courts considered the refusal to question jurors as to biases on account of sex with the same “strict judicial scrutiny” that is applied to matters involving discrimination as to race, then inquiries as to sex-based prejudices would certainly be required as an “essential demand of fairness.”

The Supreme Court, however, has not applied the same constitutional test to sex discrimination as it has to racial discrimination. On the other hand, the Court *has* shown great interest and concern for the effects of sex-based discrimination on the interests and lives of women. Indeed, the Court as a whole appears to be specifically concerned with the practical disadvantages foisted

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179. 98 U.S. 145, 155 (1878) (emphasis added).
180. See text accompanying note 66 supra.
181. See text accompanying notes 18-23 & 110 supra.
182. It appears to be a matter of virtual consensus that sex discrimination cases will be subjected to strict judicial scrutiny if the Equal Rights Amendment becomes law. See *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.).
upon women on account of their sex, and four justices would subject all issues of sex discrimination to the strictest scrutiny. In this regard, voir dire inquiry as to sex discrimination would appear to occupy a very different status than other potentially biasing circumstances, such as the defendant's having a beard.


184. In Ham v. South Carolina, 409 U.S. 524 (1973), the defendant also appealed on the ground that the trial judge refused to allow him to ask voir dire questions concerning possible prejudice due to the fact that he wore a beard. On this issue, the Supreme Court stated:

While we cannot say prejudice against people with beards might not have been harbored by one or more of the potential jurors in this case, this is the beginning and not the end of the inquiry as to whether the Fourteenth Amendment required the trial judge to interrogate the prospective jurors about such possible prejudice. Given the traditionally broad discretion accorded to the trial judge in conducting voir dire, Aldridge v. United States, supra, 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 when the trial judge refused to put this question. The inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of Aldridge and the numerous state cases upon which it relied, and from a principal purpose as well as from the language of those who adopted the Fourteenth Amendment [i.e., to prohibit the States from invidiously discriminating on the basis of race]. The trial judge's refusal to inquire as to particular bias against beards, after his inquiries as to bias in general, does not reach the level of a constitutional violation.

409 U.S. at 527-28.

The implications of this statement are as yet unclear, particularly when it is contrasted with the Seventh Circuit's opinion in Dellinger. Certainly it does not establish the broad right to voir dire which Dellinger might foster. Yet future cases raising issues with respect to voir dire may turn much more on their facts than on mechanical applications of precedent. Those arguing for a right to extensive voir dire will take note of several salient aspects of the Ham decision. First, the Court's epistle on beards is neither an extensive discussion of the issue nor a determination necessary to the holding in the case. Having reversed on the issue of inquiry as to racial prejudice, the Court had no need to deal with the beard question in order to grant relief to a defendant whose due process rights had obviously been violated. The precedential effect of its rather superficial treatment may thus reflect the peripheral position of the issue in the case.

Second, Ham's beardedness was not a "basic area" of his case, even to the extent that the Vietnam War, the youth culture, and confrontation between demonstrators and police were relevant to the prosecution of the Chicago Seven for the Democratic Convention riots in Dellinger. Thus the Court's "inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices" is really beside the point. The constitutional issue is not the "ability" to lay down an absolute rule regarding beards, or hair length, or even race or sex, since any of these may in fact give rise to prejudice among jurors; rather, it is the court's determination to protect a defendant's right to a fair trial, and thus to allow inquiry whenever it is reasonably likely that jurors may fall victim to what the Court in Reynolds called "those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them." Circumstances can certainly be imagined in which voir dire questioning regarding a defendant's beard might be constitutionally required: for example, if there were widespread publicity in a murder case that witnesses saw a bearded man fleeing from the scene of the crime. By stating that the refusal to inquire as to beards "does not reach the level of a constitutional violation" the Court
Thus, although refusal to inquire on voir dire as to sex-based prejudice would not be held to be constitutionally unfair without any showing of prejudice, voir dire on racial prejudice notwithstanding, it would appear that if the defendant made a showing of how sex-based prejudice would affect the jury's determinations, then the "essential demands of fairness" may well require such an inquiry. The defendant's burden, then, would be to make the requisite showing. Not every trial would be affected by sex-based prejudices, but, as noted earlier, sex-based biases may well affect a trial where the defendant is a woman, where the defense attorney is a woman, where female witnesses will testify in opposition to male witnesses, or where there are women on the jury. Similarly, the appellate cases on voir dire questioning indicate that voir dire on sexism may well be required, for example, where the complaining witness in a criminal charge (for example, rape) is a woman, or where a civil suit involves sex discrimination (for example, civil rights suit alleging sex discrimination in employment).

These considerations apply particularly to voir dire to elicit challenges for cause. Dellinger's emphasis on the right to exercise peremptory challenges "intelligently" provides another rationale, independent from but complementary to such arguments, for requiring voir dire on sex-based prejudices. As the Supreme Court emphasized in Swain v. Alabama, peremptory challenges are exercised arbitrarily, without stated reasons, without inquiry, and without being subject to the control of the court—and may properly be used when partiality in a prospective juror is real or only imagined. Unless the sex-based biases of prospective jurors are explored on voir dire, peremptory challenges will be exercised through guesswork rather than "intelligence."

Nor can it be claimed that questions on sex-based prejudices will inject an element into the proceedings which did not previously exist. Faced with such a contention the Supreme Court in Aldridge commented:

We think it would be far more injurious to permit it to be

merely begs the question without referring to constitutional standards of fairness against which judicial conduct may be judged.

Finally, and perhaps most importantly, the Court in Ham did not characterize Ham's proposed questions in terms of his right to peremptory challenges. Thus the strength of the Seventh Circuit's holding in Dellinger, and its implications for voir dire in other areas, are undiminished.

See also the separate opinions in Ham of Justices Douglas and Marshall, concurring in part and dissenting in part, both of whom believed that the denial of inquiry as to attitudes regarding Ham's beard was of constitutional stature. 409 U.S. at 524, 529-30.

185. See text accompanying notes 18-23 supra.
187. Id. at 218-21.
thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualifications were barred. No surer way could be devised to bring the processes of justice into disrepute.\(^{188}\)

Finally, *Taylor v. Louisiana*\(^ {189}\) provides a legal justification for an imperative which confronts us daily: sex-based biases should be exposed and challenged by *men*, perhaps even more so than by women, since it is, after all, primarily other men who harbor the biases. *Taylor* gives standing to male parties to challenge discrimination against women which affects the fairness of judicial proceedings. Thus, when relevant in view of the gender of the respective witnesses, voir dire questions as to sexist attitudes can, and should, be asked on behalf of male defendants, by male attorneys. Such efforts may be particularly effective with male jurors, and may even carry beneficial side effects to the men wearing the black robes who control the proceedings.

**D. The Right to an Effective Voir Dire on Sex-based Prejudices—Developments in California Law**

1. *Attorney-conducted voir dire.* Although the right of counsel to examine a prospective juror before challenge was established in California law 120 years ago,\(^ {190}\) the California Supreme Court, in *People v. Crowe*,\(^ {191}\) cut back significantly on the scope of that right. At Crowe's trial, the judge refused to allow counsel to question prospective jurors directly, but instead conducted the examination himself with the assistance of written questions submitted by counsel. After Crowe was convicted, he appealed on the ground that the judge had violated section 1078 of the Penal Code, which provided:

> It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He *shall* permit reasonable examination of prospective jurors by counsel for the people and for the defendant.\(^ {192}\)

The Court reviewed both the legislative history of this Penal Code provision and the cases interpreting it, and emphasized that it conferred a right to “reasonable” examination of prospective jurors:

> A reasonable examination can embrace a procedure by which counsel submits questions to the judge who, in turn,
renders them to the prospective juror. Nothing in the legislative history of section 1078 or in the cases interpreting it compels the conclusion that direct questioning by counsel is essential to comply with the mandate of section 1078 . . . .
We find no statutory prohibition of a procedure, such as that followed in this case, which channels *voir dire* examination through the trial judge.108

The court found support for its conclusion in the existing federal procedure and recent changes in the law in other states. The true basis for its decision, however, was clear:

We approve this method [examination by the trial judge] of curtailing the inordinate time consumed in the process of the selection of jurors. Thus appellate cases have referred to "the waste of valuable court time involved" . . . and to the "tedious, irksome and time-wasting prolongation of individual questioning of individual jurors by one side and then another" . . . 104

Noting extensive abuses by counsel on *voir dire* examination,105 the court declared:

We conclude that direct examination by counsel has perverted the purpose of *voir dire*, and transformed the examination of jurors into a contest between counsel for the selection of a jury partial to his cause and for the attainment of rapport with the jurors so selected, a contest which may overshadow the actual trial on the merits.106

Justice Mosk vigorously dissented from the court's opinion, arguing that when section 1078 was originally enacted, the legislature had rejected a proposal to allow the trial judge discretion whether to allow counsel to examine directly prospective jurors. Instead the lawmakers had declared that direct examination "shall"

193. 8 Cal. 3d at 824-25, 506 P.2d at 199, 106 Cal. Rptr. at 375.
194. *Id.* at 825, 506 P.2d at 199, 106 Cal. Rptr. at 375.
195. *Id.*
196. *Id.* at 828, 506 P.2d at 202, 106 Cal. Rptr. at 378. In Hawk v. Superior Court, 42 Cal. App. 3d 108, 117-18, 116 Cal. Rptr. at 719 (1974), petitioner Hawk was representing Juan Corona in a murder trial which had received widespread publicity. The attorney persisted in attempts to use the voir dire to gain sympathy for his client, despite repeated admonishments by the trial judge. For example, he asked:

Now he [the prosecutor] made some reference to a psychologist being here, and this man sitting here, his name is Harvey Ross from Los Angeles. He is a psychologist. Do you have any objection to someone coming up from Los Angeles for a couple of days free of charge to Mr. Corona to help Mr. Corona select a jury because he believes Mr. Corona is innocent?

*Id.* at 117-18, 116 Cal. Rptr. at 719. Hawk was held in contempt and the citation was upheld on appeal. Hawk was also cited for contempt for stating that the exercise of a peremptory challenge by the district attorney against a prospective juror who was black was "an act of absolute white racism." This contempt citation was also upheld. *Id.* at 120-21, 116 Cal. Rptr. at 720-21.
be permitted. Justice Mosk stressed that the majority's conclusion was opposed by the District Attorneys and County Counsels Association of California, the California Public Defenders Association, and the State Bar. He quoted the court's own decisions supporting the right of counsel to question prospective jurors directly, declaring that "neither respondent nor the majority can point to a single reported criminal case in California sanctioning total gagging of counsel." Mosk, a former California Attorney General, took the occasion to discuss in detail the considerations making direct voir dire of prospective jurors vitally important, emphasizing that interrogation by counsel is essential to intelligent use of peremptory challenges in that only the attorney has sufficient grasp of the facts to expose biases.

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197. 8 Cal. 3d at 834, 506 P.2d at 206, 106 Cal. Rptr. at 382.
198. Id. at 836, 506 P.2d at 209, 106 Cal. Rptr. at 385. Justice Mosk wrote:

It is contended by the respondent on this hearing that the error of the court, if any such error was made, in refusing to permit appellant to examine the jurors regarding the result of the former trial and as to their state of mind upon learning of such result, if any of them had learned of said result, was cured by these general and special questions asked of the jurors. We are not certain that this is the case. The asking of a general question of a juror does not always direct his attention to all the elements which go to make up the subject matter of such question. For example, a juror in answer to a general question might state with perfect sincerity that he knew of no reason why he could not give the defendant a fair and impartial trial, but upon further and more minute examination it might be shown that his conception of a fair and impartial trial for one who had been previously tried by a jury, ten of whom believed him guilty, differed in many material respects from that which the law accords to all persons accused of crime. Furthermore, he might presume the defendant innocent until proven guilty, but his state of mind might be such that it would require less evidence to convince him of defendant's guilt in a case where the latter had been previously tried with the result as above indicated, than if no previous trial has been had. He might be in perfect accord with the law which declares that a defendant shall not suffer conviction until proven guilty beyond all reasonable doubt, but having heard that the former jury stood ten to two for conviction, he might not feel called upon to scrutinize and weigh the evidence with that extreme care and caution which the law enjoins of every juror in passing upon the life and liberty of one against whom a criminal accusation has been made.

199. Id. at 838, 506 P.2d at 209, 106 Cal. Rptr. at 385 (emphasis added), quoting People v. Carmichael, 198 Cal. 534, 545, 246 P. 62, 66-67 (1926).
200. 8 Cal. 3d at 839, 506 P.2d at 208, 106 Cal. Rptr. at 384. Justice Mosk added:

In addition to its policy and precedential shortcomings, the majority opinion will inevitably produce burdensome judicial fallout. When it is counsel who interrogates prospective jurors he has no legal basis for claiming dissatisfaction with the ultimate product of the selection process in which he participated. But if the court alone interrogates veniremen, taking some questions suggested by counsel and as here, impermissibly rejecting others, an issue for appellate review emerges. In such circumstances we must recreate the scene, ascertain if the rejected queries should have been permitted, and if so, undertake to determine whether the exclusion was prejudicial. This is unlike the usual case in which we weigh the prejudicial effect of evidence; here the issue is the prejudicial inclinations of jurors. For a reviewing court, in this context, to attempt an analysis of the juror's undisclosed predilection in order to reach a conclusion on potential prejudice would require an omniscience which I
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mentioned a point urged by the Public Defenders Association that denial of attorney-conducted voir dire is an infringement upon the right to counsel, since effective use of voir dire is one mark of a skilled practitioner. While not specifically embracing this theory, Mosk commented:

"Dependence upon the trial judge alone, even when questions are submitted to him, to effectively probe into the sensitive areas of racial, cultural, and economic bias, displays majestic indifference to the realities of contemporary urban life. No well-intentioned but necessarily general inquiry by the court—such as, "Will you be prejudiced against the defendant because of his race or color?"—is likely to produce anything but a negative response. Skillful counsel, by contrast, might well be able to reveal in a venireman a deep-rooted aversion to unorthodox dress, speech patterns, or life style of ghetto residents of a particular race or color."202

For all the hot debate it engendered, the Crowe decision has not resulted in the exclusion of counsel from the questioning process. In September, 1974, with the specific intention of overcoming the effect of Crowe, the legislature added to section 1078 the following words: "such examination to be conducted orally and directly by counsel."203 To the same end, the Judicial Council amended similar language to the rules governing the examination of prospective jurors in the municipal and superior courts.204 The effect of these measures is that trial judges permit oral and direct voir dire of prospective jurors by counsel, but keep a cautious eye for the "tedious, irksome, and time-wasting" questions criticized by the Crowe majority.

2. Scope of voir dire questioning. Definitions of actual and implied bias are contained within the California Penal Code. While biases implied by law arise in a number of specific statutorily defined circumstances, actual bias is a state of

for one disclaimer. The Court's housekeeping seal of approval on denial of counsel's right to interrogate prospective jurors presses new bases for appeal with which reviewing courts will be grappling in innumerable future cases. A substantial portion of the time saved at trial may thus be expended on appeal.

Id. at 839-40, 506 P.2d at 210, 106 Cal. Rptr. at 386 (footnotes omitted).

201. Id. at 835, 506 P.2d at 207, 106 Cal. Rptr. at 383.

202. Id.


204. CAL. SUPER. CT. R. 228; CAL. MUN. CT. R. 516.

205. See generally The Jury System, supra note 113; California Jury Selection Law, supra note 203; Voir Dire Examination of Jurors in Criminal Cases, 43 CAL. ST. B.J. 70 (1968).


207. Id. § 1074 provides:
mind which prevents the prospective juror from acting "with entire impartiality and without prejudice to the substantial rights of either party." The general test for actual bias was articulated by the California Supreme Court in People v. Reyes.

Wherever the right of trial by jury exists, the law in all cases contemplates that each and every juror who sits in a cause, should have a mind entirely free from all bias or prejudice, of any kind whatsoever. In order to arrive at the condition of the person's mind, who is offered as a juror, a party is permitted to ask of the person himself, questions, the answers to which may tend to show whether he is prejudiced or not in the cause, which he is about to undertake to decide. If not satisfied with his answers, he can charge the person offered as a juror with actual bias, and if the charge be denied, its truth or falsity must be determined by triers. The triers are to determine the fact from the testimony, and any testimony which would lead to the conclusion that a bias existed in the juror's mind, is competent testimony. If the prejudice with which the juror is charged is to be determined one way or the other, by distinctions or inferences drawn by the Court from the questions put to the juror, there would be no necessity for triers, where actual bias is charged. Prejudice is a state of mind, which, in the eye of the law, has no degrees. If the juror is prejudiced in any manner, he is not a fit or proper person to sit in the box.

The high court further discussed actual bias in People v. Riggins:

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity of affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.
2. Standing in the relation of guardian and ward, attorney and client, master and servant or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted, or in his employment on wages.
3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution.
4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.
5. Having served on a trial jury which has tried another person for the offense charged.
6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it.
7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.
8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

208. Id. § 1073.
209. 5 Cal. 347 (1855).
210. Id.
Such bias may consist of an opinion as to the guilt or innocence of the accused, based upon some knowledge or information of the facts embraced in the charge or of the evidence to be produced, or it may exist without such knowledge or information, and may consist of a preconceived opinion concerning the defendant or the prosecuting witness which would prevent a fair consideration by the juror of the evidence given or facts proven in the case.

With regard to specific areas of questioning, the court held in *Reyes* that it was error to prohibit questioning as to affiliation with political and other groups, in an effort to uncover prejudice against particular racial or ethnic groups, Catholics or foreigners. Along the same line, in *People v. Car Soy* the court held that it was reversible error, where the defendant was Chinese, for the trial judge to refuse to allow voir dire questions as to whether a prospective juror would take the word of a Chinese person as soon as that of a "white man," and whether, if the defendant took the stand, the prospective juror would give his testimony the same credibility he would give that of a white person, under the same circumstances. Both decisions were cited with approval by the Supreme Court in *Aldridge v. United States*.  

*Reyes* held that questions regarding political affiliations were proper. Inquiry may also be directed to membership in any religious, social, industrial, fraternal, law-enforcement or other organization whose belief or teaching might prejudice the prospective juror. The occupation and employment of the prospective juror

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211. 159 Cal. 113, 112 P. 862 (1910). See also People v. Bennet, 79 Cal. App. 76, 249 P. 20 (1926):

Hence, to a party whose rights are to be committed to the arbitrament of a jury, it is always of singular importance that he should be convinced that those individuals who are to compose the jury will be governed . . . by the evidence . . . [and] the law . . . . [T]he field of inquiry in the ascertainment of whether a prospective juror is or is not freed from actual or implied bias is and should be broad. In other words, such inquiry should not be so restricted as to prevent a thorough probe of the juror's mind to the end that it may thus be satisfactorily determined whether such juror, if selected to try the accused, would accord to him, as well as to the People, a perfectly fair trial upon the evidence and the principles of law appropriate to the case.

212. 5 Cal. 347 (1855).
213. 57 Cal. 102 (1880).
214. 283 U.S. 308 (1931). In *Aldridge*, the United States Supreme Court noted that the right to examine jurors on the voir dire as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character.

*Id.* at 313.

is also a proper subject for voir dire.\textsuperscript{218}

Prospective jurors may also be questioned as to their feelings regarding the type of crime involved.\textsuperscript{217} Moreover, if the defendant might testify, it is proper to inquire as to possible bias regarding prior convictions.\textsuperscript{218}

Finally, it should be noted that voir dire questions directed to laying a foundation for peremptory challenges have generally been held improper,\textsuperscript{219} although there is substantial authority to the contrary.\textsuperscript{220} And it is clear that an appeal from a trial judge's decision as to a particular juror or voir dire question will not lie unless all peremptory challenges have been exhausted.\textsuperscript{221}

3. \textit{Voir dire on sex-based biases.} In \textit{Sail'er Inn, Inc. v. Kirby}\textsuperscript{222} the California Supreme Court established sex discrimination as a matter of particular judicial concern under California law. The case involved challenges to section 25656 of the California Business and Professions Code, which prohibited women from tending bar except when they were licensees, wives of licensees, or singly or with their husbands sole shareholders of a corporation holding the license. In addition to holding that the provision violated other provisions of state and federal law,\textsuperscript{223} the court held that section 25656 violated the equal protection clause of the Cali-

\textsuperscript{217} People v. Tamasovich, 56 Cal. App. 520, 206 P.119 (1922).
\textsuperscript{218} People v. Ranney, 213 Cal. 70, 1 P.2d 43 (1931). \textit{See also} Rousseau v. West Coast House Movers, 256 Cal. App. 2d 878, 880, 64 Cal. Rptr. 655, 657 (1968) where it was held that questions were acceptable which covered prior knowledge of or contact with the parties or their attorneys; knowledge of the facts of the case; the reality of pain and suffering; experience in adjustment of claims; racial, ethnic, and religious prejudice; prior injuries; current litigation; ability to apply the law as given by the court; occupations of the jurors and their spouses; prior jury service; and other subjects relating to the prospective jurors' ability to try the case fairly and impartially.
\textsuperscript{219} People v. Crowe, 8 Cal. 3d 815, 824, 506 P.2d 193, 199, 106 Cal. Rptr. 369, 375 (1973); People v. Rigney, 55 Cal. 2d 236, 244, 359 P.2d 23, 27, 10 Cal. Rptr. 625, 629 (1961); People v. Ferlin, 203 Cal. 587, 265 P. 230 (1928); People v. Edwards, 163 Cal. 752, 127 P. 58 (1912).
\textsuperscript{221} People v. Wilkes, 44 Cal. 2d 679, 284 P.2d 481 (1955).
\textsuperscript{222} 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).
\textsuperscript{223} The court also held that section 25656 violated \textit{CAL. CONST.} art. XX, \S 18, which provides that "[a] person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation, or profession," 5 Cal. 3d at 8-10, 485 P.2d at 533-34, 95 Cal. Rptr. at 333-34, and that section 25656 violated section 2000e-2 of the federal Civil Rights Act of 1964 (42 U.S.C. \S 2000e-2(a) (1970)). \textit{Id.} at 10-15, 485 P.2d at 534-37, 95 Cal. Rptr. at 334-37.
fornia Constitution. Probably more significant than the holding is the standard of review on this issue applied by the court. The court subjected the statutory provision to "strict scrutiny," applicable to cases involving "suspect classifications" and "fundamental interests," for two reasons: "first, because the statute limits the fundamental right of one class of persons to pursue a lawful profession, and second, because classifications based upon sex should be treated as suspect." The reasons for the court's decision that sex-based discriminations should be "suspect" were clear and, indeed, were essentially identical to those later cited by the United States Supreme Court plurality in Frontiero:

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. . . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when

224. The court also held that section 25656 violated the equal protection clause of the United States Constitution.
226. 5 Cal. 3d at 17, 485 P.2d at 539, 95 Cal. Rptr. at 339.
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those classifications are made with respect to a fundamental interest such as employment. 227

The court found no interest, “compelling” or otherwise, to justify the statute. 228

_Sail’er Inn_ establishes a clear and critical constitutional distinction between federal law and California law regarding sex-based discrimination. 229 The significance of that distinction with

227. _Id._ at 18-20, 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41 (footnotes omitted).

228. Indeed, the court was wholly unimpressed with the arguments advanced on behalf of the statute:

Two Court of Appeal cases which uphold section 25656 against equal protection challenge (Hargens v. Alcoholic Bev. etc. App. Bd. (1968) 263 Cal. App. 2d 601 [69 Cal. Rptr. 868]; People v. Jemnez (1942) 49 Cal. App. 2d Supp. 739 [12 P.2d 543]) suggest two interests served by the statute; first that women who do not have an interest by way of ownership or marriage in the liquor license will not be sufficiently restrained from committing “improprieties,” and, second, that women bartenders would be an “unwholesome influence” on young people and the general public.

The first rationale rests upon the peculiar and wholly unacceptable generalization that women in bars, unrestrained by husbands or the risk of losing a liquor license, will commit improper acts. This rationale fails as a compelling state interest because it is wholly arbitrary and without support in logic or experience.

The second rationale—that women bartenders would be an “unwholesome influence” on the public—is even weaker than the first. The claim of unwholesomeness is contradicted by statutes which permit women to work as cocktail waitresses, serve beer and wine from behind a bar (Bus. & Prof. Code, § 25655), or tend bar if they or their husbands hold a liquor license. The objection appears to be based upon notions of what is a “ladylike” or proper pursuit for a woman in our society rather than any ascertainable evil effects of permitting women to labor behind those “permanently affixed fixtures” known as bars. Such notions cannot justify discrimination against women in employment.

_Id._ at 20-21, 485 P.2d at 541-42, 95 Cal. Rptr. at 341-42.

229. _See also_ Brenden v. Independent Sch. Dist., 342 F. Supp. 1224 (D. Minn. 1972); Hardy v. Stumpf, 37 Cal. App. 3d 958, 112 Cal. Rptr. 739 (1974). _But see_ Long v. State Personnel Bd., 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1974), upholding a “male-only” certification requirement which prohibited a female Methodist minister from securing a position as chaplain at a state youth training center, on the ground that a “female chaplain’s own sense of modesty might find itself substantially offended if the male inmates were so uninhibited as to disregard her presence [when she entered their living quarters, the informality of male dormitories being a ‘matter of common knowledge’]” and that the requirement “protects” women by not making them subject to sexual or other physical attack. _Id._ at 1010-11, 116 Cal. Rptr. at 568-69.

The “Keep Them Barefoot and Pregnant” Award for adolescent sexual attitudes among California’s judiciary, however, probably should go to Locker v. Kirby, 31 Cal. App. 3d 520, 107 Cal. Rptr. 446 (1973), in which the court held that a prohibition on employing or using topless waitresses in premises where liquor is sold did not violate equal protection concepts by failing to prohibit display of the naked male chest.

As was the case with the Supreme Court in _Boreta_, “We decline to probe the metaphysics of toplessness ‘as such.’” (2 Cal. 3d at p.107) We note, however, the indisputable fact that the naked female breast has for centuries been a symbol of sexuality but that no such generalization can be made about the male chest. Given the fact and the obvious physical differences between mature male and female breasts, and also given the state’s interest in regulating the sale of alcoholic beverages and the
respect to voir dire as to sex-based prejudices is indicated by the United States Supreme Court decision in *Ham*. The Court in *Ham* noted: "The inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of *Aldridge* and the numerous state cases upon which it relied. . . ."[230] The "numerous state cases" relied upon in *Aldridge*, however, were not limited to those involving prejudice against black people: they included cases where the right to voir dire had been held to apply where there was a danger of prejudice against members of other racial minorities and members of particular religious groups. As one commentator has noted,

> [s]ince nonracial prejudice may have an equally detrimental effect on a juror's ability to be impartial the reasoning of the *Aldridge* and *Ham* decisions would seem to apply with equal force where nonracial prejudice is involved.[231]

The significance of *Sail'er Inn* in this context is that the California Supreme Court declared therein that as a matter of state constitutional law, sex discrimination is to be treated by the same standards as race discrimination. Thus the constitutional standard applied in California state courts on issues of sex discrimination is much stricter than the standard applied in federal courts. While the full implications of this distinction are unclear, at the very least it would appear that a female defendant in a California state court would stand in a position directly analogous to that of defendant *Ham*: her federal constitutional right to the "essential demands of fairness" at her trial, secured by the due process clause of the fourteenth amendment, would guarantee her the right to examine prospective jurors on voir dire as to possible sex-based prejudices. Similarly, denial of the opportunity to voir dire as to sex-based biases would violate the constitutional guarantee of due process of law. It is less clear whether this analysis would apply with equal force where the defense attorney or witnesses at the trial are women, as opposed to the defendant, but lower court cases

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following *Ham* have followed the spirit of the opinion and indicate that it would.232 The purpose of voir dire, after all, is to expose those biases which would deny the defendant a fair trial, and it is the particular distinction of the California Supreme Court’s opinion in *Sailer Inn* that it recognizes the pervasive effects of sex-based discrimination and provides the legal foundation for combating centuries of “protective” oppression.

**CONCLUSION**

It is fundamental to the administration of justice that litigants have their rights adjudicated by jurors whose minds are free of any influence predisposing them to a particular result. The state of mind amounting to prejudice has no place in the jury box, and it is essential to the American judicial system that prejudices and predisposing attitudes be explored prior to enpanelment, thus insuring as far as practicable an impartial jury.

If sexist attitudes have the potentiality to compromise the rights of a litigant—male or female—those biases must be brought forth on voir dire, and those potential jurors holding such conceptions should be treated as would be a juror with unfounded or predisposing attitudes based on a litigant’s race. Because we seek a system characterized by fairness to all parties, if sex stereotypes are permitted to remain buried in the minds of the jury until they are manifested in final deliberation, a party to the action may have his or her rights unjustly influenced. The solution therefore is to permit wide latitude in counsel’s voir dire on any matter of possible significance to the client.

It is the position of this article that sexist attitudes frequently operate to the detriment of female defendants, female attorneys and any other party whose case involves female participants, such as a male defendant whose principal witness is female or whose attorney is female. Hopefully, enactment of the Equal Rights Amendment or the judicial recognition of sex as a suspect classification would do much to eliminate at least the most blatant forms of sex discrimination in the courtroom.

No less than racial prejudice, sex-based prejudice may be a factor which, if undetected in a juror, may compromise the rights of a person whose most fundamental interests are at stake. Such attitudes have no place in modern jurisprudence, and it is the right and duty of counsel to explore sexist attitudes and insist that juries be free of all those persons whose preconceived notions about men and women prevent the unbiased fact finding which is the charge of the jury.

232. See United States v. Booker, 480 F.2d 1310 (7th Cir. 1973), and United States v. Robinson, 485 F.2d 1157 (3d Cir. 1973).
A. Voir Dire Technique

Trial counsel experienced in combating racism in jury trials through voir dire have developed a number of tactical principles which are relevant and helpful to attorneys concerned with sexism on the jury.288

First, it is important to ask open-ended questions. Judges may be reluctant to allow counsel to ask prospective jurors questions like “What do you think of the movement for women’s liberation?” Such questions, however, are critical to the success of an anti-sexist voir dire. Questions which permit a “yes” or “no” answer reveal very little about the prospective juror. Counsel should ask as many open-ended questions as possible and stress the necessity of such questions when confronted by the trial judge.

Second, a question permitting a “yes” or “no” response may provide an opportunity for an open-ended question. Thus the question, “Have you ever discussed the women’s liberation movement with a friend?” may be answered “yes” or “no.” The next question, however, should be: “What was the discussion about?”

Third, since voir dire seeks to make jurors aware of their sexist attitudes, and the effects of those attitudes, it may be useful to ask questions which elicit some kind of emotional reaction. Questions such as, “Would you prefer that your boss be a man or a woman?” or “Why do you think a woman has never been named to the United States Supreme Court?” may confuse or embarrass a juror, but they may also start the juror thinking about feelings which he never knew he had.

Fourth, questions which elicit a stereotyped reaction, as well as those calling forth an emotional response, may be useful. The question, “Do you like the advertisements featuring women models which appear in the New York Times Sunday Magazine?” will ordinarily receive a “yes” answer. The next question should be, “Do you know that many women find it degrading that women should be displayed in advertisements for the sole purpose of selling cigarettes, liquor, luggage, vacations, even men’s clothes?” In response to the first question, the juror may place himself in a position of reacting in a stereotyped manner. The second question forces the juror to recognize that many women are insulted by that same stereotype.

Fifth, it may be useful to ask a question which evokes a lie as an answer. Few men honestly believe that a woman could do their job as well as they do it. A question to that effect, however, will almost always elicit an affirmative declaration. Such a question may awaken the juror to conflicts of values and his own biases against women.

233. The following discussion is based upon La Raza Defendants, supra note 67, at 2-3.
Sixth, particularly in federal courts, trial counsel may foster empathy with prospective women jurors by demanding that the judge ask questions in a sex-blind manner. For example, most judges will, as a preliminary matter, ask a male juror his occupation. If the prospective juror is a woman, the judge might ask her occupation, and will certainly ask the woman her husband's occupation. The judge may then be challenged by defense counsel with the demand that he similarly ask male prospective jurors the occupations of their wives.

Seventh, while it is important to make jurors see that they have sexist feelings, it is of prime importance to trial counsel to recognize that such feelings influence the way in which jurors perceive the evidence in the case and consequently may affect the rights of the client. The connection can be made during the closing argument, in a statement such as this:

These preconceptions, or prejudices, are usually subconscious. After all, no one really thinks of himself as discriminating against women on the basis of their sex. But these stereotypes and feelings influence jurors as the trial unfolds. They affect how you view the testimony, whom you believe, what facts you think are realistic, and a number of other intangibles. Therefore the voir dire questions were intended to make each juror look inside himself. That's all the defendant is asking, for each of you to look at these hidden prejudices and to try to view the evidence without any stereotypes. Because that's what a fair trial is all about.234

This closing statement serves two other important functions: it serves as an apology to the jury for possibly having offended any of them on the voir dire, and it limits the degree to which the prosecutor can claim that the defense sought to make a run-of-the-mill case into a women's liberation cause célèbre. The effects of the voir dire in establishing feelings of solidarity and sisterhood between women jurors and the female defendant, attorney, or defense witness, have already been noted.235

An anti-sexism voir dire may make a lot of people in the courtroom uncomfortable and even hostile. If the judge becomes hostile, he may restrict the scope of the voir dire. Trial counsel should prepare for this eventuality and should bring to court a pretrial brief supporting the right to an extensive voir dire, particularly on matters so fundamentally prejudicial as sex-based biases. Clerks, marshals, and reporters may get uptight, although their feelings will not have a substantial effect on the proceedings. Most important, prospective jurors may feel threatened by the questions. There is no easy solution to this dilemma, but counsel must be extremely watchful of the line between education and exploration of attitudes, on the one hand, and antagonism and harassment on the other. One suggestion is that the most disturbing questions, such

234. Id. at 2.
235. See note 18 supra.
as, "Do your wife's opinions carry as much weight in your household as your own?" might be saved for jurors whom counsel has already decided to excuse. At worst, the defense will have to excuse the juror with a peremptory, but it is possible that the juror will demonstrate his prejudice to a degree that will allow him to be excused for cause. In addition, the emotion-eliciting question may raise the consciousnesses of the other jurors.

In addition, some general suggestions may be helpful. Spacing the questions during the entire voir dire is important—asking each juror every question will quickly put everyone to sleep and ruin the effectiveness of the examination. The best questions should be asked of the first few jurors, since all the prospective jurors will still be listening then. All the veniremen should be asked what they think of the women's liberation movement—it is a topic which most people have an opinion on and which is subject to wide ranges of emotions and attitudes, and the answer may reveal a lot about the prospective juror's feelings. If the defendant is a woman, counsel should ask some questions while standing behind her, forcing the juror to look at her when he answers. If a prospective juror appears to be helpful for the defense, counsel should not ask too many questions, for fear of exposing attitudes which the prosecutor will move to excuse. Finally, if under local procedure the voir dire is not recorded, counsel should demand that a record be kept. This record may be important for purposes of appeal, and may be instructive to counsel in preparing later voir dires.

B. Sample Voir Dire Questions

The questions below are arranged very generally into categories, but neither the number of categories nor the groups of questions are by any means exhaustive. They are designed only to provide suggestion for areas which may be fruitfully covered in an anti-sexism voir dire.

The questions cover a number of areas: which ones are appropriate in any particular instance will depend upon the circumstances of the individual case. Even the most basic question as to sex-based biases may engender a hostile reaction from opposing counsel or the judge. In addition to general questions on sex-based prejudices,

236. When San Francisco attorney Susan B. Jordan sought to raise the issue of sex-based biases during a voir dire examination, the following exchange occurred:

Miss Jordan: You understand, don't you, that the questions we are going to ask are designed only to protect the rights of the defendant Mr. Hughes, and to guarantee a fair trial to both sides, and not meant to intimidate or anger you. You understand that, all of you, don't you?

(All four members of the panel nodded affirmatively.)

Is there anything in so far as this case or the lawyers in it that bothers you in any way at all?

Is there anything about the fact that I'm a woman and my assistant here is a woman and that we are here trying this case, and we aren't home washing the dishes or taking care of the baby, does that
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questions should be selected which are appropriate to specific aspects of the case and the proceedings: the particular charges against the defendant; whether a woman is alleged to be a principal or an accessory to a crime, or a complaining witness; what roles women will likely be shown to have played in the incident at issue, as the evidence comes in; whether the personalities or group associations of those women might be significant in the case or in the selection of the jury; whether a female defendant or witness is actively involved in the women's movement, and whether that fact might be significant in the case or in the selection of the jury; whether a female defendant or witness is a lesbian, and whether that might be significant; whether the female defendant will have a large number of women supporters in the courtroom; whether the defendant or counsel is a woman, or both. It will be evident that some of the questions below might not be appropriate in a criminal trial but would be appropriate in a civil proceeding, for example, a Title VII case on sex discrimination in employment, or a personal injury case where the issue is the amount of damages to be recovered by a woman plaintiff for lost wages or loss of earning capacity. Some questions will be appropriate only where sex-based prejudices or women's rights become central issues, as in a trial involving an outspoken and widely-known feminist.237

The phrasing of a question may be critical. There is a great difference between "Do you know who Lily Tomlin is?" and "Are you aware that Lily Tomlin refuses to play roles in comedy sketches which demean women?" Finally, it is often necessary to follow up an exploratory question with further inquiries designed to pin down the attitudes elicited. Some examples of this technique will follow.238

bother you in any way?

Mr. Parrish [the district attorney]: Objection. It bothers me.
The Court: What the lawyers say is not testimony, and whether it bothers you or me or Mr. Parrish is incidental. Another question.
Miss Jordan: Would the fact that myself and my assistant are women prejudice you against this defendant?
(All four members of the panel nodded affirmatively.)
If you found yourself thinking that, would you do everything in your power to set that feeling aside and give Mr. Hughes a fair trial?
(All four members of the panel answered yes.)

237. See, e.g., Blitman & Green, Inez Garcia on Trial, Ms., May, 1975, at 49.

An argument may be made for not asking voir dire questions designed to bring out sex-based prejudices, at least in certain circumstances. Where a woman is a co-defendant in a criminal prosecution, for example, sexist attitudes may make it difficult for jurors to see the woman as a principal in the crime, as opposed to an accomplice, thus making her the beneficiary of a kind of "benign neglect." Indeed, it may be that the sex of the attorney is considerably more important than that of the defendant, since lawyers are the focal actors in the courtroom, rather than the parties. Conversation between the author and Anne Flower Cumings, May 9, 1975, San Francisco, Calif.

238. Note, Voir Dire: Strategy and Tactics in the Defense of Social and Political Activists, 5 AKRON L. REV. 265, 285 (1972), provides several examples of questions which may alienate prospective jurors without eliciting sincere attitudes:

Q. Was the Kent R.O.T.C. building worth more than one student?
1. Introducing the Issues

Q. Is there anything about this case which will prevent you from giving the defendant a fair trial?
Q. Do you think that it is unusual that the defendant is a woman? Why do you think that it is unusual?
Q. Were you surprised when you walked into court and saw that the attorney representing the defendant is a woman?
Q. Do you think that women are as observant about details as men?
Q. Were you surprised when you saw the many women sitting in the visitors' section of the courtroom?

2. General Stereotypes

Q. Have you ever heard women called "the weaker sex"? Do you think that is true? In what way? Are you aware that studies have shown that women live longer than men and have more resistance to disease and to stress?
Q. Have you ever gotten behind a "woman driver" and wondered how she could be so bad? Did you know that, statistically, women have fewer accidents than men?
Q. Do you feel that the long days you put in at work are a lot harder than the housework your wife does? Did you know that the average housewife works about a 100-hour work-week?

3. Local and National Figures

Q. Have you ever heard of Bella Abzug? Do you think she is an effective member of the House of Representatives? Why? (Why not?)
Q. Do you know who Shirley Chisholm is? Are you aware that she was the first woman to make a serious attempt at running for President of the United States?
Q. Have you ever heard of Shirley Hufstedler, who is a judge on the United States Court of Appeals for the Ninth Circuit?
Q. Do you know who Ella Grasso is? Do you think she is doing a good job as governor of Connecticut? Why? (Why not?) How about the Library? The Administration Building? Let me ask you this—is one student worth more than the Empire State Building?

Q. Why are poor people poor? Why are rich people rich?
Q. Are you an honest person?
Q. Then you can honestly tell me that you would not mind a Black family living next door to you, right?

Several of the questions in the following section make use of material in Verbal Karate, in Sisterhood is Powerful, supra note 2, at 557. See also A. Ginger, Jury Selection in Criminal Trials 365-441, 521-662 (1975).
Q. Have you ever heard of Constance Baker Motley, who is a judge of the United States District Court for the Southern District of New York?
Q. Can you imagine anyone referring to one of these women as a "girl"?
Q. Do you know the magazine of which Gloria Steinem is the editor?
Q. Do you know who Lily Tomlin is? Are you aware that she has refused to perform in comedy sketches which show women in demeaning roles?
Q. Do you know who the founder of the National Organization of Women is?

4. Working Women

Q. Have you ever wondered why some women complain about having to stay at home during the day to take care of the house, when you have to work? Have you ever thought, If they don't like staying home, why don't they go out and get a job?
Q. Have you ever heard about civil rights suits against giant corporations, like the recent suit against the telephone company, charging discrimination against women in employment? Have you ever wondered what all the fuss was about?
Q. Did you know that 40% of all working-age women work? Did you know that women are 35% of the work force?
Q. Did you know that 28 million women in America work at more menial jobs, at lower pay, and suffer higher unemployment than men?
Q. Did you know that in 1900 the typical woman worker was 26 and single; now she is 41 and married?
Q. Have you ever thought about the fact that so many women work in offices as secretaries or clerks? Did you know that in about 70% of those office and clerical jobs, men get paid more than women—for exactly the same work?
Q. Have you heard about high rates of female absenteeism from jobs? Did you know that the Public Health Service has found that men lose more days from work each year than do women—even including days off for pregnancy and childbirth?
Q. Did you know that in 1920 a higher proportion of women received Ph.D's than do today?
Q. Did you know that of the Americans who earn more than $10,000 a year, less than 5% are women?
Q. Did you know that about one-fifth of employed women with Bachelor's degrees have jobs in such categories as clerks, factory workers, and cooks?

5. The Law and Women Lawyers
Q. Are you surprised to see a woman practicing before you today? Did you know that only about 3% of the lawyers practicing in the United States today are women?

Q. Do you think that a woman can handle difficult questions as well as a man? Do you think that a woman can be as assertive as a man?

Q. Do you feel that women should not be aggressive? Do "pushy" women make you uncomfortable?

Q. Did you know that employment discrimination also affects women lawyers—they earn $2,000 less than men when they graduate from law school, about $4,000 less five years later, and about $8,000 less nine years after graduation?

Q. But did you know that there are no significant differences between men and women either in class rank in law school or in honors such as law review?

Q. Have you ever heard of the Equal Rights Amendment? What have you heard? Would you vote for it if you were a state legislator?

6. The Women's Movement

Q. Have you ever discussed the women's liberation movement with a friend? What was the discussion about?

Q. Have you ever heard women involved in the women's movement refer to other women as "sisters"? What do you think they meant by this?

Q. Have you ever read the book, *Sisterhood is Powerful*?

Q. Do you know who Kate Millett is?

Q. Have you ever heard of Simone de Beauvoir?

Q. Have you ever read *Ms.* magazine? Do you know why it is called "Ms."

Q. Do you think women in the women's movement hate men?

Q. Do you think women in the women's movement have legitimate grievances?

7. Media Images of Women

Q. Have you ever seen the Geritol commercial where the man looks at his wife and says, "I think I'll keep her"? Do you think this image of a wife as a mere possession is demeaning to women?

Q. Have you ever seen the advertisement on television for Winchester "Little Cigars," in which the handsome young man with the mustache in the leather hat offers a Winchester to a beautiful young woman... then heads her off somewhere into the jungle or behind a circus tent? Why do you think a commercial for cigars is presented like that?

Q. Have you ever seen any of the James Bond movies? Have you noticed any major roles for women in those movies?
Q. Have you ever seen the advertisement in the newspaper showing a very pretty young stewardess, who says, "I'm Jennifer. Fly me to Miami"? Why does she say, "Fly me"?

Q. Do you ever read *Playboy* magazine? Are you aware of any magazines which feature centerfolds with pictures of men in the nude? Did you ever see the centerfold in *Cosmopolitan* with Burt Reynolds in the nude? Did you think he looked pretty silly sitting there with no clothes on?

Q. Have you ever seen the Ultra-Brite commercial, in which a young woman gives a young man a kiss, in fact several kisses, for using that particular brand of toothpaste?

Q. Have you ever seen the advertisement for breath mints which asks, "If he kissed you once, will he kiss you again? Be certain with Certs"?

9. Abortion

Q. Did you know that more than 1½ million abortions a year are performed in the United States?

Q. Do you think that this is wrong?

Q. Did you know that in the past, 80% of all women in New York City who died from abortions were black or Latin?

10. Gay Women

Q. Would you be surprised if you learned that the defendant is a lesbian?

Q. Do you think that homosexuals are sick?

Q. Do you know any gay women?

Q. Did you know that Gertrude Stein, Willa Cather, and Virginia Woolf were all lesbians?

Q. Have you ever felt very close to another man (woman)?

Q. Do you think that women should not love women?

Q. Do you think that homosexuals are not to be trusted?

11. The Personal Is Political

Q. At home, does your wife's opinion count as much as yours?

Q. If your wife were pregnant, would you want a son or a daughter?

Q. Do you think a woman could do your job as well as you?

Q. Do you think it's all right for married men to play around? Married women?

Q. At home, do you (does your husband) ever cook the meals?

Q. Who does the shopping for food in your house?

Q. Who keeps the checkbook in your house?
Q. If your child has a problem, does the child come to you or your wife?
Q. Do you ever worry that your son is a sissy?
Q. Would you want your daughter to play on a girls' Little League baseball team?