Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law

JAMES H. GOLD*

INTRODUCTION

A criminal defendant will often rely on legal principles which, though well established, are not readily accepted by many members of the public. These principles include the presumption of innocence, the right to have no adverse inference drawn from a failure to testify, the availability of insanity as an exculpatory defense, and the prohibition against considering prior criminal convictions as evidence of guilt of the charged offense. After all the evidence has been presented, a defendant is entitled to have the jury instructed on these principles if they are pertinent to his case.[1] However, the jurors will not be questioned at this stage of the trial as to their willingness to conduct their deliberations in accordance with the judge's instructions. A defendant has no guarantee that the jury will follow the law in reaching its general verdict of acquittal or conviction.[2]

During the pre-trial jury selection process known as voir dire, criminal defendants often seek to question prospective jurors as to their willingness and ability to follow specific rules of law.[3] The defendant can then challenge for cause or excuse peremptorily[4] those prospective jurors whose responses

* Lecturer of Law, Indiana University; J.D. Wayne State University, 1979; B.A. Grinnell College, 1972. The author was an Assistant Appellate Defender for the North Carolina Office of the Appellate Defender from 1980 to 1983.

1. *See* Taylor v. Kentucky, 436 U.S. 478 (1978) (refusal to instruct on presumption of innocence violated due process); United States v. Winn, 577 F.2d 86, 90 (9th Cir. 1978) (refusal to instruct on insanity or mental defect not error where no evidence of either was presented).

2. *See infra* notes 86-88, 115-17 and accompanying text.

3. A typical example of such an inquiry is found in United States v. Wooton, 518 F.2d 943, 944 (3d Cir.), *cert. denied*, 423 U.S. 895 (1975):

> If you, in your own individual judgment, came to the conclusion that the government had not proven beyond all reasonable doubt that at the time the defendant committed the crimes in question he was sane and of sound mind, would you have any scruples or difficulty bringing in a verdict of not guilty?

4. A prospective juror will be excused for cause based on a showing of "a narrowly specified, provable and legally cognizable basis of partiality." Swain v. Alabama, 380 U.S. 202, 220 (1965). On the other hand, a party may excuse a prospective juror peremptorily without giving any reason for doing so. *Id.* While an unlimited number of jurors may be challenged for cause, each side is allotted by statute or court rule only a finite number of peremptory challenges. *See* J. VAN DYKE, JURY SELECTION PROCEDURES 282-84 (1977), for a list of the number of peremptories allowed in each jurisdiction. A venireman's acknowledged unwillingness to follow an applicable rule of law would present grounds for a successful challenge for cause. *See, e.g.*, State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978). However, a venireman who expressed disagreement with a legal rule, but was willing to adhere to it, probably could only be excused through the use of a peremptory challenge. *See, e.g.*, Brazelton v. State, 550 S.W.2d 7 (Tenn. Crim. App. 1974).

indicate a bias against the law. Many courts, however, will not allow questions pertaining to rules of law.[5] It is often claimed that such questions are improperly used to indoctrinate the jurors. Another reason advanced for excluding this method of voir dire is that the questions are too time consuming and are unnecessary when the same subject matter is covered in the judge's final instructions to the jury. However, there is by no means a consensus against voir dire questions concerning rules of law. Several courts have held that in order to assure a criminal defendant's right to an impartial jury reasonable questions should be permitted concerning a prospective juror's willingness to apply relevant doctrines of law.[6]

This article analyzes the decisions addressing this issue, and critically examines the reasons offered for prohibiting voir dire questions on rules of law. It concludes that these reasons do not justify blanket prohibition of this form of voir dire inquiry. Further, courts often are inconsistent in their treatment of voir dire questions on rules of law. Decisions regarding their allowance often seem to depend not on the prejudicial effects of the question, but rather on whether it is the prosecution or the defendant seeking the inquiry. Therefore, limits should be placed on the broad discretion traditionally accorded the trial judge in deciding whether to allow a proposed voir dire inquiry. This article proposes that defendants be granted a *per se* right to ask prospective jurors if they are willing to follow the judge's instructions on specific legal doctrines, and that the trial judge's discretion be limited to deciding whether more detailed, open-ended questioning beyond the minimally required inquiry is necessary to expose possible bias against a rule of law. On appellate review, the trial judge's decision regarding the scope of voir dire examination should constitute an abuse of discretion if the allowed inquiry failed to provide the defendant with a reasonable assurance that any prejudice against the law could be discovered.

HISTORICAL BACKGROUND

The practice of questioning potential jurors in order to discover bias has its origins in the United States. In 18th-century England, a juror called to sit in a criminal case could be challenged only for a specific bias, such as a family or economic relationship with one of the litigants.[7] Challenges or

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5. In refusing to allow a proposed inquiry, courts will often cite rules such as "voir dire questions concerning legal principles [are] improper," Commonwealth v. Kingsley, 480 Pa. 560, 391 A.2d 1027, 1033 (1978), or "[t]he defense [is] not entitled to ask whether the jury would be able to follow the instructions of the trial court." Head v. State, 160 Ga. App. 4, 285 S.E.2d 735, 739 (1981).

6. People v. Williams, 29 Cal. 3d 392, 174 Cal. Rptr. 317, 628 P.2d 869 (1981); Griffin v. State, 239 Ark. 431, 389 S.W.2d 900 (1965); Smith v. State, 513 S.W.2d 823, 826 (Tex. Crim. App. 1974). *See also* cases cited *infra* note 31.

7. J. VAN DYKE, *supra* note 4, at 141.

inquiries concerning a general prejudice against the defendant's class, race or religion were not permitted.[8] Further, under the English practice, a potential juror could be questioned as to possible bias only after he had been challenged on specific grounds.[9]

Following the Revolution, courts in this country greatly expanded the right of litigants to have jurors questioned and excused for prejudice.[10] This expansion has been attributed to the greater mobility and heterogeneity of the population, the vastness of the frontier, and the growing anonymity of the urban citizen, all of which made it more difficult for parties to obtain information about jurors prior to trial.[11] It has also been suggested that political trials in the colonial era, in which the fate of dissidents was often decided by juries composed of those sympathetic to the Crown, created a hostility in this country to restrictive jury selection practices.[12]

In the treason trial of Aaron Burr in 1807, Chief Justice John Marshall, sitting as trial judge, allowed defense counsel an extensive voir dire of potential jurors, holding that an individual who has formed a "strong and deep" opinion on any significant issue in the case could not be considered an impartial juror.[13] The *Burr* case was widely cited in the 19th century by state courts authorizing voir dire inquiries into possible prejudice.[14] Today, prosecutors and criminal defendants can challenge prospective jurors, for cause and peremptorily, in every jurisdiction in the country.[15] In order to facilitate the intelligent exercise of challenges, each jurisdiction also provides for some form of questioning of prospective jurors by either the attorneys, the judge, or both.[16]

As the voir dire examination developed and questioning became more expansive, critics began pointing to perceived abuses of the system, including the asking of questions relating to rules of law.[17] During the first quarter of this century, courts began holding that voir dire questions relating to

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8. *Id.*
9. Moore, *Voir Dire Examination of Jurors,* 17 GEO. L.J. 13, 35-36 (1928).
10. *Id.* at 36.
11. *Id.*
12. Gutman, *The Attorney Conducted Voir Dire of Jurors: A Constitutional Right,* 39 BROOKLYN L. REV. 290, 294-95 (1972).
13. United States v. Burr, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g).
14. Gutman, *supra* note 12, at 307 n.54.
15. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 550-51 (1975).
16. J. VAN DYKE, *supra* note 4, at 282-84.
17. In 1915, one commentator wrote that "[q]uestions intending to test the juror's bias and relating to his understanding of the weight of the evidence, the burden of proof, the presumption of innocence, and the like, are asked again and again of men unlearned in law . . . ." Perkins, *Some Needed Reforms in the Methods of Selecting Juries,* 13 MICH. L. REV. 391, 396 (1915). *See also* Falter v. United States, 23 F.2d 420, 426 (2d Cir.), *cert. denied,* 277 U.S. 590 (1928), in which Judge Learned Hand stated that "[t]he length and particularity of the examination of jurors had become a scandal, and required some effective control."

specific legal issues were improper.[18] In 1933, one writer described the state of the law as follows: "It generally is held proper to exclude questions as to the juror's knowledge of, or attitude toward, the law applicable, on the theory that such questions involve matters of law to be dealt with by the court in its instructions to the jury, which instructions the jurors are bound to follow."[19] However, some courts during this period maintained the view that defendants had a right to probe the prospective jurors' willingness to follow specific rules of law.[20] This split of authority has continued to the present day.

CURRENT STATUS OF THE LAW

The rule prohibiting questions on legal principles during voir dire is still widely, but not uniformly, followed. Appellate courts have held that defendants have no right to inquire into a potential juror's acceptance of: the state's burden of proof and the defendant's presumption of innocence,[21] the defendant's right to have no adverse inference drawn from his failure to

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18. *See, e.g.,* Richards v. United States, 175 F. 911 (8th Cir. 1909), *cert. denied,* 218 U.S. 670 (1910); Brown v. State, 40 Fla. 459, 25 So. 63 (1898); Lindsay v. State, 138 Ga. 818, 76 S.E. 369 (1912); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924); State v. Perioux, 107 La. 601, 31 So. 1016 (1902); State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921); People v. Conklin, 175 N.Y. 333, 67 N.E. 624 (1903); Jones v. State, 20 Okla. Crim. 154, 201 P. 664 (1921); Commonwealth v. Calhoun, 238 Pa. 474, 86 A. 472 (1913); State v. Turley, 87 Vt. 163, 88 A. 562 (1913); State v. Duncan, 124 Wash. 372, 214 P. 838 (1923); Ryan v. State, 115 Wis. 488, 92 N.W. 271 (1902).

One impetus for these decisions may have been the abolition of the jury's right to decide questions of law. This right, which was generally recognized in the first half of the 19th century, underwent a gradual decline in the second half, culminating in the Supreme Court's holding in Sparf v. United States, 156 U.S. 51 (1895), that it was the jury's duty to apply the law as given to it by the judge. *See generally* Note, *The Changing Role of the Jury in the Nineteenth Century,* 74 YALE L.J. 170 (1964). Courts subsequently held that voir dire questions exploring a prospective juror's knowledge or opinion of specific points of law were irrelevant because the juror was bound to take the law from the court. *See, e.g.,* State v. Willie, 130 La. 454, 58 So. 147 (1912); People v. Conklin, 175 N.Y. 333, 67 N.E. 624 (1903). Courts soon expanded this rationale to hold that questions directed to a prospective juror's willingness to follow the law were also irrelevant because of the juror's obligation to decide the case in accordance with the judge's instructions. *See, e.g.,* State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924); State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921).

19. Note, *Examination of Prospective Jurors on Voir Dire,* 17 MINN. L. REV. 299, 308 (1933).

20. *See, e.g.,* People v. Bennett, 79 Cal. App. 76, 249 P. 20 (1926); People v. Redola, 300 Ill. 392, 133 N.E. 292 (1921); Hibbitt v. State, 90 Tex. Crim. 527, 236 S.W. 739 (1922).

21. *See,* e.g., United States v. Price, 577 F.2d 1356 (9th Cir. 1978), *cert. denied,* 439 U.S. 1068 (1979); United States v. Ledee, 549 F.2d 990 (5th Cir.), *cert. denied,* 434 U.S. 902 (1977); United States v. Wooton, 518 F.2d 943 (3d Cir.), *cert. denied,* 423 U.S. 895 (1975); Cordero v. United States, 456 A.2d 837 (D.C. 1983); Price v. State, 295 So. 2d 338 (Fla. Dist. Ct. App. 1974); High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981), *cert. denied,* 455 U.S. 927 (1982); Smith v. State, 238 Ga. 146, 231 S.E.2d 757 (1977); State v. Bitz, 93 Idaho 239, 460 P.2d 374 (1969); People v. Lowe, 30 Ill. App. 3d 49, 331 N.E.2d 639 (1975); Commonwealth v. Rhoades, 379 Mass. 810, 401 N.E.2d 342 (1980); Manning v. State, 630 P.2d 327 (Okla. Crim. App. 1981); State v. Middleton, 266 S.C. 251, 222 S.E.2d 763, *vacated on other grounds,* 429 U.S. 807 (1976).

testify,[22] the defenses of insanity and intoxication,[23] the rule limiting consideration of a defendant's prior convictions to the question of his credibility,[24] the entrapment defense,[25] the coercion defense,[26] the doctrines of self-defense and defense of another,[27] the requirement of proof of penetration in a rape prosecution,[28] and the requirement of proof of premeditation in a first degree murder charge.[29] Other courts, without specifically describing the questions sought to be asked on voir dire, have stated generally that it is proper to prohibit questions concerning legal principles.[30] On the other hand, several appellate courts have found grounds for reversal in the refusal to allow questions on the jury's willingness to follow the same legal principles noted above.[31]

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22. *See, e.g.,* United States v. Ledee, 549 F.2d 990 (5th Cir.), *cert. denied,* 434 U.S. 902 (1977); United States v. Jordano, 521 F.2d 695 (5th Cir. 1975); United States v. Cowles, 503 F.2d 67 (2d Cir. 1974), *cert. denied,* 419 U.S. 1113 (1975); United States v. Goodwin, 470 F.2d 893 (5th Cir. 1972), *cert. denied,* 411 U.S. 969 (1973); Roberson v. State, 384 So. 2d 864 (Ala. Crim. App. 1980); Dutton v. State, 452 A.2d 127 (Del. 1982); Jacobs v. State, 358 A.2d 725 (Del. 1976); Anderson v. State, 161 Ga. App. 816, 289 S.E.2d 22 (1982); Freeman v. State, 132 Ga. App. 615, 208 S.E.2d 625 (1974); State v. Bitz, 93 Idaho 239, 460 P.2d 374 (1969); People v. Newlun, 89 Ill. App. 3d 938, 412 N.E.2d 1055 (1980); Commonwealth v. Fiore, 9 Mass. App. Ct. 618, 403 N.E.2d 953, *cert. denied,* 449 U.S. 938 (1980); People v. Lambo, 8 Mich. App. 320, 154 N.W.2d 583 (1967); Commonwealth v. Kingsley, 480 Pa. 560, 391 A.2d 1027 (1978); Commonwealth v. Richmond, 462 A.2d 1362 (Pa. Super. Ct. 1983).

23. *See, e.g.,* United States v. Flint, 534 F.2d 58 (5th Cir.), *cert. denied,* 429 U.S. 924 (1976); United States v. Wooton, 518 F.2d 943 (3d Cir.), *cert. denied,* 423 U.S. 895 (1975); Fletcher v. State, 291 Ala. 67, 277 So. 2d 882 (1973); Padgett v. State, 251 Ga. 503, 307 S.E.2d 480 (1983); Wallace v. State, 248 Ga. 255, 282 S.E.2d 325 (1981), *cert. denied,* 455 U.S. 927 (1982); Commonwealth v. Estremera, 383 Mass. 382, 419 N.E.2d 835 (1981); Commonwealth v. Killelea, 370 Mass. 638, 351 N.E.2d 509 (1976); Commonwealth v. Smith, 357 Mass. 168, 258 N.E.2d 13 (1970); State v. Dunbar, 117 N.H. 904, 379 A.2d 831 (1977); State v. Kelly, 118 N.J. Super. 38, 285 A.2d 571 (1972); Commonwealth v. Biebighauser, 450 Pa. 336, 300 A.2d 70 (1973). Commonwealth v. Geschwendt, 271 Pa. Super. 102, 412 A.2d 595 (1979), *aff'd,* 500 Pa. 120, 454 A.2d 991 (1982).

24. *See, e.g.,* United States v. Polk, 550 F.2d 1265 (10th Cir.), *cert. denied,* 434 U.S. 838 (1977); United States v. Brewer, 427 F.2d 409 (10th Cir. 1970); Gandy v. State, 49 Ala. App. 123, 269 So. 2d 141 (1972); State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), *cert. denied,* 455 U.S. 983 (1982); State v. Melendez, 121 Ariz. 1, 588 P.2d 294 (1978); Tuckson v. United States, 364 A.2d 138 (D.C. 1976); State v. Simms, 643 S.W.2d 87 (Mo. Ct. App. 1982); State v. Manley, 54 N.J. 259, 255 A.2d 193 (1969).

25. *See, e.g.,* United States v. Crawford, 444 F.2d 1404 (10th Cir.), *cert. denied,* 404 U.S. 855 (1971); Sprague v. State, 147 Ga. App. 347, 248 S.E.2d 711 (1978); State v. Talbot, 135 N.J. Super. 500, 343 A.2d 777 (1975), *aff'd,* 71 N.J. 160, 364 A.2d 9 (1976).

26. *See, e.g.,* United States v. Jones, 722 F.2d 528 (9th Cir. 1983); People v. Phillips, 99 Ill. App. 3d 362, 425 N.E.2d 1040 (1981).

27. *See, e.g.,* United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1973); Johnson v. State, 244 Ga. 295, 260 S.E.2d 23 (1979); People v. Bradley, 97 Ill. App. 3d 1100, 424 N.E.2d 33 (1981); Palmer v. State, 532 P.2d 85 (Okla. Crim. App. 1975).

28. *See, e.g.,* Davis v. United States, 315 A.2d 157 (D.C. 1974).

29. *See, e.g.,* State v. Knapp, 534 S.W.2d 465 (Mo. Ct. App. 1975).

30. United States v. Delay, 500 F.2d 1360 (8th Cir. 1974); People v. Horrocks, 190 Colo. 501, 549 P.2d 400 (1976); State v. Clark, 164 Conn. 224, 319 A.2d 398 (1973); Oliver v. State, 85 Nev. 418, 456 P.2d 431 (1969); Nease v. State, 592 S.W.2d 327 (Tenn. Crim. App. 1979).

31. Burden of proof and presumption of innocence: *see, e.g.,* Blount v. United States, 479 F.2d 650 (6th Cir. 1973); Jones v. State, 378 So. 2d 797 (Fla. Dist. Ct. App. 1980); State v. Monroe, 329 So. 2d 193 (La. 1976).

THE SUPREME COURT AND THE SCOPE OF VOIR DIRE

The United States Supreme Court has recognized the importance of an adequate voir dire in securing a criminal defendant's constitutional right to an impartial jury.[32] Recently the Court stated the following:

> *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors *who will not be able impartially to follow the court's instructions* and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts.[33]

Despite this broad language, the Court's decisions do not portend that a constitutional right to question prospective jurors on their willingness to follow applicable rules of law will be established in the near future.

Defendant's right to have no adverse inference drawn from his failure to testify: *see, e.g.*, People v. Zehr, 110 Ill. App. 3d 458, 442 N.E.2d 581 (1982); State v. Frith, 412 So. 2d 1000 (La. 1982); State v. Beatty, 617 S.W.2d 87 (Mo. Ct. App. 1981).

Insanity defense: *see, e.g.*, United States v. Allsup, 566 F.2d 68 (9th Cir. 1977); Fauna v. State, 265 Ark. 934, 582 S.W.2d 18 (1979); Washington v. State, 371 So. 2d 1108 (Fla. Dist. Ct. App. 1979); People v. Moore, 6 Ill. App. 3d 568, 286 N.E.2d 6 (1972); State v. Olson, 156 Mont. 339, 480 P.2d 822 (1971).

Rule limiting consideration of a defendant's prior convictions: *see, e.g.*, State v. Hedgepeth, 66 N.C. App. 390, 310 S.E.2d 920 (1984); State v. Ziebert, 34 Or. App. 497, 579 P.2d 275 (1978).

Self-defense: *see, e.g.*, People v. Williams, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981); Everly v. State, 271 Ind. 687, 395 N.E.2d 254 (1979); State v. Brown, 547 S.W.2d 797 (Mo. 1977).

Note that splits of authority appear within the court systems of Florida and Illinois and that voir dire questions are required on some issues, but not others, in Missouri and the Ninth Circuit.

32. This right is set forth in the sixth amendment which states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

33. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion of White, J.) (emphasis added and citations omitted). The plurality opinion containing this language was signed by only four members of the Court, but dissenting Justices Stevens, Brennan, and Marshall advocated a position even more pro-defendant, so they clearly would also endorse the quoted portion of the plurality opinion. *See also* Pointer v. United States, 151 U.S. 396, 408 (1894), in which the Court, in a unamimous opinion, refers to the right to challenge as "one of the most important of the rights secured to the accused" and states that "[a]ny system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned."

The Court, however, has never explicitly held that any voir dire examination is constitutionally mandated. For instance, in Ham v. South Carolina, 409 U.S. 524, 527 (1973), the Court stated that South Carolina law "permits" challenges for cause, and "authorizes" a voir dire examination. However, it is generally agreed that the Court would strike down on sixth amendment grounds any legislation which prevented a defendant from challenging jurors for eause. Orfield, *Trial Jurors in Federal Criminal Cases,* 29 F.R.D. 43, 75 (1961). The question of whether a defendant has a constitutional right to exercise peremptory challenges is discussed in Babcock, *supra* note 15, at 555-57.

The Supreme Court's recent decisions defining the scope of the voir dire examination have involved inquiries into possible prejudice against classes of people, rather than against rules of law. In *Ham v. South Carolina,*[34] the Court held that Ham, a black, bearded civil rights activist on trial for a drug offense, had a constitutional right under the due process clause to a voir dire inquiry into possible racial prejudice. However, the Court also held that Ham had no constitutional right to have the veniremen questioned concerning possible prejudice against men with beards, even though the Court acknowledged the possibility that one or more of the jurors harbored such a bias.[35] The only justification offered for this latter ruling was the trial judge's traditionally broad discretion in conducting voir dire and the Supreme Court's "inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices . . . ."[36]

In *Ristaino v. Ross,*[37] the Court interpreted *Ham* narrowly and held that a voir dire inquiry into racial prejudice in a robbery and assault case was not constitutionally required merely because the defendant was black and the victim white. In distinguishing *Ham,* the Court emphasized Ham's defense that he had been framed because of his civil rights activities. The Court reasoned that this defense directly injected racial issues into the trial and created a "constitutionally significant likelihood"[38] that an impartial jury would not be impaneled absent questioning about racial prejudice. The mere fact that the defendant and victim in *Ross* were of different races was held not to create such a likelihood.

The Burger Court has declined opportunities to consider whether a defendant was entitled to have veniremen questioned on their willingness to follow a specific rule of law.[39] A defendant raising this issue on constitutional grounds would face a formidable task. He would have to convince the Court that there is a greater likelihood of jury prejudice against a rule of law such as the insanity defense[40] than against a black defendant charged with assaulting a white victim or a bearded defendant on trial for a drug offense in 1970. Justice Rehnquist's majority opinion in *Ham* suggests that the Court will be less willing to find an unconstitutional restriction of a voir dire examination when the prohibited question does not concern racial bias.[41]

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34. 409 U.S. 524 (1973).
35. *Id.* at 527-28.
36. *Id.* at 528.
37. 424 U.S. 589 (1976).
38. *Id.* at 596.
39. United States v. Price, 577 F.2d 1356 (9th Cir. 1978), *cert. denied,* 439 U.S. 1068 (1979); United States v. Wooton, 518 F.2d 943 (3d Cir.), *cert. denied,* 423 U.S. 895 (1975).
40. A defendant arguing that he had a constitutional right to question prospective jurors on their willingness to follow the law on the insanity defense would likely cite polls illustrating the public's disapproval of that defense. *See infra* note 117 and accompanying text.
41. In holding that Ham had a right under the fourteenth amendment to a voir dire inquiry into racial prejudice, Justice Rehnquist's opinion emphasized that a primary purpose behind the adoption of that amendment "was to prohibit the States from invidiously discrim-

Furthermore, in *Ross* the Court stated that an inquiry into a particular prejudice feared by a defendant will generally not be necessary to satisfy the state's constitutional obligation to impanel an impartial jury.[42] Thus, the Court would appear to have little inclination to recognize a constitutional right to voir dire inquiry into prejudice against a rule of law.

The Court in *Ross* provided some encouragement for those raising voir dire issues on other than federal constitutional grounds by noting that any state is free to require questions not demanded by the Federal Constitution.[43] The *Ross* Court also declared that "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant."[44] The Court went on to state that, under its supervisory powers over federal courts, it would have required a voir dire inquiry into racial prejudice had Ross been tried in a federal court, instead of a state court.[45] Thus, *Ham* and *Ross* merely establish outer limits with respect to a defendant's voir dire rights under the Federal Constitution. They do not constitute a barrier to those pursuing voir dire issues on other than federal constitutional grounds.

THE CONCERN THAT QUESTIONS ON RULES OF LAW INDOCTRINATE JURORS

A frequent justification offered for the prohibition of voir dire questions on rules of law is that such questions are used to indoctrinate jurors and commit them to a certain point of view before they have heard the evidence and the judge's instructions. For instance, the New Jersey Supreme Court has stated:

> The impression is inescapable that the aim of counsel is no longer the *exclusion* of unfit or partial or biased jurors. It has become the *selection* of a jury as favorable to the party's point of view as indoctrination through the medium of questions on assumed facts and rules of law can accomplish.
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inating on the basis of race . . . ." 409 U.S. at 526-27. The opinion made no mention of a defendant's constitutional right to an impartial jury. The *Ham* Court made no attempt to justify the refusal to find a constitutional right to inquire into a prejudice against beards by claiming that such a prejudice was substantially less prevalent than racial prejudice. Indeed, such an argument would have been difficult to make, given the social climate in 1970, the year of Ham's trial. Instead, the Court appeared to rely on the fact that prejudice against beards was not a concern behind the adoption of the fourteenth amendment. *Id.* at 528. As Justice Marshall pointed out in his dissenting opinion, the Court had never previously suggested that the right to an impartial jury only provided protection against racial prejudice. *Id.* at 531-32 (Marshall, J., dissenting). For a detailed analysis of *Ham,* see Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry into Prejudice,* 48 U. COLO. L. REV. 525 (1977).

42. *Ross,* 424 U.S. at 595.
43. *Id.* at 597 n.9.
44. *Id.*
45. *Id.*

> . . . Under the guise of eliciting information they attempt to impart to the jurors a conception of the law highly favorable to one side of the case.[46]

But not all questions touching upon legal principles are improperly indoctrinating. Those questions which are improper can easily be controlled by the trial judge without resort to the Draconian remedy of completely eliminating voir dire questions on rules of law.

It should be a legitimate function of voir dire for a defendant to question veniremen on their willingness to follow specific rules of law because a juror who cannot decide the case according to the law is not an impartial juror.[47] Virtually every state has rejected the notion that the jury has the right (as distinguished from the power) to nullify the law by disregarding it in a specific case.[48] Even proponents of jury nullification would not allow the jury to reject a law protecting the rights of a criminal defendant.[49] Because it is a juror's duty to follow the relevant rules of law, there should be nothing improper about examining each juror's commitment to those rules. Yet, courts continue to prohibit voir dire questions merely because they seek such a commitment.

In *Anderson v. State,*[50] the defense proposed asking prospective jurors whether they would expect the defendant to testify even if the judge instructed them that the defendant had a constitutional right not to. The Georgia Court of Appeals upheld the trial court's refusal to allow this question on the grounds that it "sought to have the jurors prejudge how they might view the defendant's failure to testify."[51] However, the jury is without discretion as to how it is to consider a defendant's failure to testify. Upon request, a defendant is entitled to have the jury instructed that no adverse inference is to be drawn from his failure to testify.[52] Therefore, it is eminently reasonable to commit jurors to follow the law with respect to this issue.

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46. State v. Manley, 54 N.J. 259, 281, 285 n.1a, 255 A.2d 193, 205, 207 n.1A (1969), *quoted with approval in* People v. Saiz, 660 P.2d 2, 4 (Colo. Ct. App. 1982). *See also* State v. Melendez, 121 Ariz. 1, 3, 588 P.2d 294, 296 (1978); State v. Clark, 164 Conn. 224, 226, 319 A.2d 398, 399 (1973); Jacobs v. State, 358 A.2d 725, 728 (Del. 1976); Anderson v. State, 161 Ga. App. 816, 816, 289 S.E.2d 22, 22 (1982); People v. Phillips, 99 Ill. App. 3d 362, 369, 425 N.E.2d 1040, 1046 (1981). *See generally* Note, *The California Supreme Court Permits Voir Dire to be Conducted to Uncover a Basis for Peremptory Challenges—People v. Williams*, 4 WHITTIER L. REV. 169, 181-189 (1982), in which the author argues that questions about the veniremen's willingness to follow particular legal doctrines should not be allowed because of their tendency to indoctrinate the jury.

47. *See* Lockett v. Ohio, 438 U.S. 586, 596-97 (1978); Morgan v. People, 624 P.2d 1331, 1332 (Colo. 1981); Clarke v. Grimes, 223 Ga. 461, 462, 156 S.E.2d 91, 93 (1967); State v. Rowe, 210 Neb. 419, 427, 315 N.W.2d 250, 256 (1982).

48. The only exceptions are Maryland and Indiana. Becker, *Jury Nullification: Can a Jury be Trusted?,* 16 TRIAL, Oct. 1980 at 41, 44.

49. Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimized Disobedience,* 62 CAL. L. REV. 1289, 1299 (1974).

50. 161 Ga. App. 816, 289 S.E.2d 22 (1982).

51. *Id.* at 816, 289 S.E.2d at 22.

52. Carter v. Kentucky, 450 U.S. 288 (1981); Woodard v. State, 234 Ga. 901, 218 S.E.2d 629 (1975).

Similarly, in *State v. Melendez*,[53] the trial judge refused to ask voir dire questions concerning how the jury would consider the defendant's prior felony conviction. In upholding the refusal, the Arizona Supreme Court condemned the practice of "conditioning" the jury on voir dire by means of questions which amount to preliminary instructions. It held that the defendant's proposed questions seemed "designed to condition the jurors to damaging evidence expected to be presented at trial and to commit them to certain positions prior to receiving the evidence."[54] In Arizona, when a defendant's prior convictions are admitted into evidence, the defendant is entitled to have the jury instructed as to the limited purposes for which such evidence can be considered.[55] Again, it is a legitimate goal of voir dire to commit jurors to adhere to a rule of law which will later be embodied in the judge's charge to the jury. As a practical matter, such a commitment can only be obtained during the voir dire.[56]

It has also been argued that voir dire questions on matters of law are indoctrinating because they overemphasize certain legal principles.[57] Although such emphasis cannot be totally avoided, it is not improper. A properly phrased question merely asks jurors to commit themselves to follow a rule of law which will later be covered in the judge's instructions. In view of the evidence that juries frequently have difficulty understanding the judge's final instructions,[58] acquainting the potential jurors with the relevant rules of law during voir dire would seem to be more, not less, conducive to a fair trial. Further, the judge can limit the emphasis placed on any rule of law by directing the attorney to ask the prospective jurors once as a group about their willingness to follow a specific rule of law, instead of repeating the query to each venireman.[59] A reasonably phrased question about a

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53. 121 Ariz. 1, 588 P.2d 294 (1978).

54. *Id.* at 3, 588 P.2d at 296.

55. State v. Finley, 85 Ariz. 327, 338 P.2d 790 (1959).

56. It would be impractical to attempt to examine jurors for bias after the evidence had been presented because of the difficulty in distinguishing between a juror who was biased against the law and one who had not been persuaded by the evidence. Such a procedure would also require that an inordinate number of alternate jurors be seated.

57. State v. Churchill, 664 P.2d 757, 761 (Hawaii Ct. App. 1983).

58. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153 (1982); O'Mara & Eckartsberg, *Proposed Standard Jury Instructions—Evaluation of Usage and Understanding*, 48 PA. B.A.Q. 542 (1977); Moffat, *As Jurors See a Lawsuit,* 24 OR. L. REV. 199 (1945). One experiment conducted on a group of veniremen showed that only 50% understood that the defendant did not have to present any evidence of his innocence even though they had just viewed a videotape of a pattern jury instruction for a criminal case covering that point. Strawn & Buchanan, *Jury Confusion: A Threat to Justice,* 59 JUDICATURE 478 (1976). The authors hypothesized that jury comprehension would be enhanced by giving as many of the instructions as possible at the beginning of the case so that jurors would know what to look for. *Id.* at 483. An expansive opening jury charge was also recommended in Note, *Jury Instructions v. Jury Charges,* 82 W. VA. L. REV. 555, 563-64 (1980).

59. In order to encourage venireman self-disclosure, each prospective juror should be required to individually respond to any voir dire question addressed to the group. *See infra* notes 113-14.

potential juror's willingness to apply a particular doctrine of law should not be excluded merely because it stresses certain laws or facts.[60] Such emphasis is an "unavoidable consequence of the voir dire" if the examination is to serve its function of exposing jury bias against the law.[61]

One court has stated that voir dire questions on legal rules are improperly indoctrinating when they "forewarn the jury of unfavorable facts concerning defendant," such as a prior criminal record.[62] This contention is also without merit. Evidence should be damaging because of its substance and not because of the timing of its introduction. For instance, courts have rejected the argument that it is impermissible for a party to attempt to reduce the prejudicial effect of anticipated impeachment by asking his own witness on direct examination about his criminal record.[63] Similarly, an otherwise legitimate voir dire question should not be disallowed merely because it alerts the jurors to damaging evidence.

Those voir dire questions concerning matters of law which do constitute improper efforts to indoctrinate or mislead prospective jurors can easily be controlled by the trial judge. One way an attorney can abuse the voir dire process is to pose questions which slant or misstate the law.[64] However, such questions can be eliminated simply by requiring the attorney to submit his questions to the judge prior to the examination of the jurors.[65] The judge can then direct the attorney to rewrite or discard those questions which are not accurate statements of the law. The judge's task during voir dire would be similar to that performed at the conclusion of the trial when he decides whether to give requested jury instructions. With the advent of pattern jury

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60. United States v. Blount, 479 F.2d 650 (6th Cir. 1973); People v. Williams, 29 Cal. 3d 392, 407-08, 174 Cal. Rptr. 317, 324-25, 628 P.2d 869, 877-78 (1981).

61. United States v. Blount, 479 F.2d 650, 652 (6th Cir. 1973).

62. State v. Schad, 129 Ariz. 557, 567-68, 633 P.2d 366, 377 (1981), *cert. denied,* 455 U.S. 983 (1982).

63. State v. Fleming, 117 Ariz. 122, 571 P.2d 268 (1977); People v. DeHoyos, 64 Ill. 2d 128, 355 N.E.2d 19 (1976); Commonwealth v. Cadwell, 374 Mass. 308, 372 N.E.2d 246 (1978); State v. Hedgepeth, 66 N.C. App. 390, 310 S.E.2d 920 (1984); State v. Gilbert, 282 Or. 309, 577 P.2d 939 (1978).

64. The Historical and Practice Notes to Illinois Supreme Court Rule 234, which prohibits voir dire questions concerning matters of law or instructions, contain the following language:

> The examination of jurors concerning questions of law supposed to be encountered in the case is without question one of the most pernicious practices indulged in by many attorneys. The usual procedure is to inquire as to whether or not jurors will follow certain instructions if given. That the supposed instructions as orally expounded by the advocate are slanted, argumentative and often so clearly erroneous as to cause certain reversal if given by the court, surprisingly appears to be a matter of little concern.

ILL. ANN. STAT. ch. 110A §234, (Smith-Hurd 1968), *quoted with approval in* State v. Manley, 54 N.J. 259, 278, 255 A.2d 193, 204 (1969).

65. The mechanism for such a procedure is already in effect in the many jurisdictions in which it is the judge who questions the prospective jurors on voir dire, with the attorneys merely submitting proposed questions. Those jurisdictions in which the judge conducts voir dire are listed in J. VAN DYKE, *supra* note 4, at 282-84.

instructions,[66] it should be relatively easy for both judges and attorneys to formulate voir dire questions embodying correct statements of the law.

Voir dire inquiries are also improper when they seek to disclose the prospective jurors' reaction to specific evidence to be presented at trial, rather than to an applicable rule of law. A defendant is not entitled to "obtain a pre-judgment by the prospective juror as to what his verdict would be on facts hypothesized by the question."[67] While the jury is required to follow the law as given by the trial judge, it is the jury's function to apply that law to the facts which it finds from the evidence presented.[68]

As with questions which misstate the law, voir dire inquiries which improperly require the veniremen to prejudge specific evidence can be controlled by the trial judge. For instance, in *State v. Rancourt,*[69] a self-defense case, the defense attorney during voir dire sought to describe in detail the defendant's version of the events leading up to the shooting and then ask

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66. Standardized pattern jury instructions are available in over 40 states, the District of Columbia, and the federal courts, and it is expected that the remaining states will fall in line in the next few years. A. ELWORK, B. SALES & J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE 8 (1982). Although the first pattern instructions were published in California in 1938, most states have adopted pattern instructions within the last twenty-five years. Nieland, *Assessing the Impact of Pattern Jury Instructions,* 62 JUDICATURE 185 (1978). Prior to the adoption of pattern instructions, each party would submit his own requests for instructions and the judge would decide which ones to give. A. ELWORK, B. SALES & J. ALFINI, *supra,* at 7. The requested instructions were often confusing and argumentative. One book contained fifty different charges on burden of proof which could be requested. Hannah, *Jury Instructions: An Appraisal by a Trial Judge,* 1963 U. ILL. L.F. 627, 635-36. Before pattern instructions were adopted, it was difficult to prevent attorneys from abusing the voir dire process by committing jurors to argumentative statements of the law. Judges can now require voir dire questions on rules of law to conform to the language of the pattern instructions.

67. State v. Abney, 347 So. 2d 498, 501 (La. 1977). *See also* People v. Williams, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981); State v. Crockett, 419 S.W.2d 22 (Mo. 1967); Commonwealth v. Johnson, 452 Pa. 130, 305 A.2d 5 (1973). The reasoning behind the rule (which is followed equally by jurisdictions which do and do not allow questions as to a venireman's willingness to follow specific legal principles) is that attorneys should not try their cases during the voir dire examination. *See generally* Everly v. State, 271 Ind. 687, 395 N.E.2d 254 (1979). For example, a defendant should be able to ask veniremen whether they would follow the law entitling him to an acquittal if the evidence showed that he acted in self-defense, but not whether they believe that specific evidence would show that the defendant did, in fact, act in self-defense.

68. Unitcd States v. Simpson, 460 F.2d 515 (9th Cir. 1972). Because it is for the jury to decide which witnesses to believe, a voir dire examination directed towards the prospective juror's assessment of witness crcdibility is of debatable propriety. A number of courts, including some which consider voir dire questions concerning legal principles to be improper, have held that a defendant has a right to ask prospective jurors whether they would give more weight to the testimony of a law enforcement officer merely because of his official status. *See* Annot., 28 A.L.R. FED. 26, 103-07 (1976); Annot., 99 A.L.R.2D 7, 71-72 (1965). Whether such an inquiry constitutes a legitimate search for attitudes which would be grounds for disqualification for cause, Commonwealth v. Futch, 469 Pa. 422, 366 A.2d 246 (1976), or is merely an invasion of the province of the jury to determine credibility, Bennett v. State, 153 Ga. App. 21, 264 S.E.2d 516 (1980), is beyond the scope of this article. The questions examined here are those probing the prospective jurors' willingness to apply rules of law which they are legally bound to follow.

69. 435 A.2d 1095 (Me. 1981).

whether, under the described circumstances, the jurors could find the defendant not guilty under the theory of self-defense. Such an inquiry was deemed improper because it tended to commit the jury to a certain view of the evidence before it was presented at trial.[70] However, the defect in the inquiry could easily have been remedied. If the defense attorney had recited the law of self-defense, without reference to the specific evidence of the case, and then asked whether the jurors were willing to adhere to those principles if so instructed by the judge, the defendant would have been able to impanel jurors committed to following the law without having committed them to a particular view of the evidence.[71] Again, the widespread availability of pattern jury instructions makes it relatively easy to formulate queries which do not require the juror to prejudge the specific evidence to be presented at trial.

Thus, the prohibition of voir dire questions relating to legal issues is not justified by the argument that such questions improperly indoctrinate the jury. That argument fails to recognize that not all questions as to matters of law are improper, and it fails to recognize the capacity of the trial judge to restrain improper efforts to indoctrinate or commit the jury.

THE CONCERN THAT LEGAL ISSUES EXPLORED ON VOIR DIRE WILL TURN OUT TO BE IRRELEVANT AT TRIAL

Courts have occasionally upheld the refusal to allow voir dire questions relating to a legal issue on the ground that the judge could not know until the conclusion of the trial whether the issue would turn out to be relevant at trial. For instance, the Tenth Circuit has upheld a lower court refusal to allow the defendant to question prospective jurors regarding bias against the defense of entrapment because "the trial judge could not know until the case was concluded whether the evidence justified instructions on that issue."[72] The underlying concern is that the jury might speculate on matters not in evidence.[73]

Although a defendant may not be able to guarantee that a certain issue will be developed at trial, the prejudice or confusion that would arise from

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70. *Id.* at 1099.

71. A proper inquiry might be phrased as follows: "If the judge should instruct you that it would be your duty to return a verdict of not guilty on grounds of self-defense *if* you should find (1) that the defendant was without fault in bringing on the confrontation and (2) that he used deadly force because he reasonably believed that the use of such force was necessary to protect himself from death or great bodily harm, would you for any reason be unwilling to follow that instruction?"

A slightly more general iuquiry might ask: "Do any of you feel that you would be unable to follow the judge's instructions on self-defense because of your personal views on the subject?"

72. United States v. Crawford, 444 F.2d 1404, 1405 (10th Cir.), *cert. denied,* 404 U.S. 855 (1971). *See also, e.g.,* United States v. Clarke, 468 F.2d 890 (5th Cir. 1972); State v. Martinez, 122 Ariz. 596, 596 P.2d 734 (1979); State v. Manley, 54 N.J. 259, 255 A.2d 193 (1969); Oliver v. State, 85 Nev. 418, 456 P.2d 431, 434 (1969).

73. United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1973).

an ultimately irrelevant issue being explored on voir dire will generally be minimal. It is unlikely that a jury's verdict would be influenced by a voir dire question on a defense such as entrapment when that defense is not presented at trial, especially if, as suggested by the Federal Court of Appeals for the District of Columbia,[74] a cautionary instruction is given explaining the purposes of the voir dire examination and that the matters discussed therein are not in evidence. The fact that a defense attorney is routinely allowed to present his theory of the case to the jury in his opening statement further suggests that the concern about the occasional irrelevant voir dire question is unwarranted.[75] "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."[76] The court should require no more than a good faith belief on the part of the attorney that an issue to be explored on voir dire will be relevant at trial.[77]

Voir dire inquiries proposed by defendants have even been denied on the grounds that the restrictions were for the defendants' own good. When a defendant has been unable to state with certainty that he will eventually testify, courts have refused to allow the defendant to question prospective jurors concerning their willingness to follow instructions regarding the limited purpose for which a defendant's prior convictions may be considered.[78] The prohibition was deemed necessary to "protect" the defendant by preventing jury speculation that he had a criminal record.[79] (A defendant's prior convictions are generally inadmissible except when he chooses to take the stand.)[80] However, defense counsel is presumably aware of the risk of jury speculation and would not seek to ask questions concerning the defendant's prior convictions if it was not reasonably likely that the defendant was going to testify. Strategic and tactical decisions which must be made both before and during trial rest with the accused and his attorney, not with the trial judge.[81]

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74. *Id.* at 380.

75. *Id.*

76. United States v. Robinson, 475 F.2d 376, 380 (D.C. Cir. 1973), *quoted with approval in* United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977).

77. It is unethical for an attorney to allude in court to any matter that he does not reasonably believe is relevant or that will not be supported by admissible evidence. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (c)(1)-(2) (1981). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1983).

78. *See, e.g.*, State v. Martinez, 122 Ariz. 596, 596 P.2d 734 (1979); State v. Manley, 54 N.J. 259, 255 A.2d 193 (1969).

79. State v. Manley, 54 N.J. 259, 255 A.2d 193, 199 (1969).

80. United States v. Fosher, 568 F.2d 207, 211 (1st Cir. 1978). *See* FED. R. EVID. 404(b), 609(a).

81. Estelle v. Williams, 425 U.S. 501, 512 (1976); *cf.* United States v. City of Philadelphia, 482 F. Supp. 1248, 1252-53 n.1 (E.D. Pa. 1979), *aff'd*, 644 F.2d 187 (3d Cir. 1980) (court notes counsel's responsibility, but grants remedy because error was court-induced). *But see*

Defense counsel is certainly in a better position than the judge to predict whether or not the defendant will testify. Therefore, a defendant's voir dire examination should not be curtailed because the trial judge wishes to protect the defendant from possible prejudice.

THE ARGUMENT THAT VOIR DIRE ON RULES OF LAW IS UNNECESSARY BECAUSE OF THE ASSUMPTION THAT JURORS WILL FOLLOW THE LAW

The justification most frequently given for upholding a refusal to allow a question concerning a specific rule of law is that the question was unnecessary either because the rule was covered in the judge's final jury instructions[82] or because the jurors previously indicated that they would abide by the judge's instructions.[83] Underlying this justification is the assumption that jurors will follow the law in deciding the case.[84] A typical example of this position is found in a 1978 decision of the Ninth Circuit rejecting the

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Lakeside v. Oregon, 435 U.S. 333, 341-42 (1978), in which the Court held that the trial judge did not unconstitutionally interfere with defense counsel's trial strategy by instructing the jury, at the end of the trial and over the defendant's objections, that no adverse inference could be drawn from the defendant's failnre to testify. The tactical decision of whether to ask a voir dire question is perhaps distinguishable from the one involved in *Lakeside* because, at the time of the voir dire examination, the defendant's attorney is better able than the trial judge to predict whether the defendant will ultimately take the stand (thus bringing his prior convictions into issue). When the judge decided to give the instruction at issue in *Lakeside,* he was in as good a position as defense counsel to decide whether the instruction was necessary to protect the defendant's right.

82. *See, e.g.,* United States v. Price, 577 F.2d 1356, 1366 (9th Cir. 1978), *cert. denied,* 439 U.S. 1068 (1979); United States v. Polk, 550 F.2d 1265, 1267 (10th Cir.), *cert. denied,* 434 U.S. 838 (1977); United States v. Flint, 534 F.2d 58 (5th Cir.), *cert. denied,* 429 U.S. 924 (1976); United States v. Crawford, 444 F.2d 1404 (10th Cir.), *cert. denied,* 404 U.S. 855 (1971); Roberson v. State, 384 So. 2d 864 (Ala. Crim. App. 1980); Collins v. State, 365 So. 2d 113 (Ala. Crim. App. 1978); Padgett v. State, 251 Ga. 503, 307 S.E.2d 480 (1983); Wallace v. State, 248 Ga. 255, 282 S.E.2d 325 (1981); People v. Phillips, 99 Ill. App. 3d 362, 425 N.E.2d 1040, 1046 (1981); People v. Bradley, 97 Ill. App. 3d 1100, 424 N.E.2d 33 (1981); Manning v. State, 630 P.2d 327 (Okla. Crim. App. 1981); Commonwealth v. Hoffman, 236 Pa. Super. 442, 398 A.2d 658 (1979); State v. Middleton, 266 S.C. 251, 222 S.E.2d 763, *vacated on other grounds,* 429 U.S. 807 (1976).

83. *See, e.g.,* United States v. Ledee, 549 F.2d 990 (5th Cir.), *cert. denied,* 434 U.S. 902 (1977); United States v. Wooton, 518 F.2d 943 (3d Cir.), *cert. denied,* 423 U.S. 895 (1975); United States v. Goodwin, 470 F.2d 893 (5th Cir. 1972), *cert. denied,* 411 U.S. 969 (1973); Padgett v. State, 251 Ga. 503, 307 S.E.2d 480 (1983); People v. Lowe, 30 Ill. App. 3d 49, 331 N.E.2d 639, 642 (1975); State v. Simms, 643 S.W.2d 87 (Mo. Ct. App. 1982); State v. Knapp, 534 S.W.2d 465 (Mo. Ct. App. 1976); Oliver v. State, 85 Nev. 418, 456 P.2d 431 (1969); Commonwealth v. Johnson, 452 Pa. 130, 305 A.2d 5 (1973); Commonwealth v. Richmond, 462 A.2d 1362 (Pa. Super. Ct. 1983).

84. *See, e.g.,* United States v. Wooton, 518 F.2d 943 (3d Cir.), *cert. denied,* 423 U.S. 895 (1975); Cordero v. United States, 456 A.2d 837 (D.C. 1983); State v. Bitz, 93 Idaho 239, 460 P.2d 374 (1969); People v. Phillips, 99 Ill. App. 3d 362, 425 N.E.2d 1040 (1981); State v. Middleton, 266 S.C. 251, 222 S.E.2d 763, *vacated on other grounds,* 429 U.S. 807 (1976).

defendant's argument that the scope of his voir dire was improperly restricted:

> Charles Mitchell requested the court on voir dire to instruct the jury on the presumption of innocence and burden of proof and to ask them whether they thought of such laws as being unfair. The trial court refused, and this refusal is assigned as error. The trial court did ask the jurors if they would follow his instructions as to the law. The jurors nodded in affirmation. At the close of the evidence, the jury was fully instructed as to the burden of proof, the presumption of innocence, and the defendants' right to remain silent. The jurors were sworn to follow the law. The scope of the voir dire is directed to the sound discretion of the trial court, and it is assumed that a jury will, in accordance with the oath they take, follow the judge's instructions.[85]

The assumption that jurors will follow the law appears to be based primarily on wishful thinking. While jurors do not have the right to disregard the judge's instructions, they clearly have the power[86] and are often willing to use it.[87] Commentators and courts have acknowledged that jurors are often either unwilling or unable to follow specific rules of law relied on by a criminal defendant.[88] In fact, reversible error has been found in the refusal to excuse such jurors for cause.[89] Therefore, the fact that a legal principle

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85. United States v. Price, 577 F.2d 1356, 1366 (9th Cir. 1978), *cert. denied,* 439 U.S. 1068 (1979).

86. Becker, *supra* note 48, at 41.

87. *See* United States v. Dougherty, 473 F.2d 1113, 1130-35 (D.C. Cir. 1972).

88. In H. KALVEN & H. ZIESEL, THE AMERICAN JURY 395-410 (1966), the authors cite examples in which juries apparently disregarded the law to the defendant's detriment with respect to the defenses of entrapment, insanity, intoxication, and self-defense, and the requirement of proof of penetration in rape case.

In State v. Manley, 54 N.J. 259, 269-70, 255 A.2d 193, 199 (1969), the court had this to say with respect to the rule that a defendant's prior convictions could only be considered in evaluating his credibility as a witness:

> We recognize the almost unavoidable psychological impact on the layman-juror of evidence of a defendant's conviction of similar crimes. It may be a lot to ask of him that he put aside an almost common impulse to regard earlier proven proclivity toward commission of similar crimes as some indication of guilt of the offense presently charged against him.

In People v. Williams, 29 Cal. 3d 392, 411, 628 P.2d 869, 879, 174 Cal. Rptr. 317, 327 (1981), the court stated the following with respect to the doctrine of self-defense:

> [T]here is a real possibility the average juror might disagree with the controversial rule that a person may use force in self-defense even though an avenue of retreat is open . . . . A juror who firmly believed that all passive means of self-defense should be utilized before employing deadly force would find it difficult to judge defendant's conduct objectively under our law.

The Supreme Court has recognized that a judge's instructions can only minimize, not prevent, jury speculation about why a criminal defendant fails to testify. Carter v. Kentucky, 450 U.S. 288, 303 (1981). And in United States v. Cockerham, 476 F.2d 542, 544 n.2 (D.C. Cir. 1973), the court noted its agreement with the suggestion that some jurors may resist the insanity defense.

89. *See, e.g.,* State v. Byrd, 646 S.W.2d 419 (Mo. Ct. App. 1983) (veniremen's responses tended to show a disregard of defendant's right not to testify); State v. Leonard, 296 N.C.

is covered in the judge's instructions is not adequate to insure that the jury will follow the law on that issue. As a California state appellate court observed:

> A court may charge a jury accurately respecting the law pertinent to the case, yet it does not follow therefrom that the jury will accept the court's statement of the law as correct and follow it in passing upon the issues to be decided. 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, in determining what their verdict shall be, not alone by the evidence adduced before them, but also by the law which the court may conceive is pertinent to the case and essential to an enlightened consideration of the proofs.[90]

Nor is it adequate to insure a juror's impartiality to ask on voir dire whether he can be fair and whether he will follow the judge's instructions. Such general queries, which almost invariably invoke an affirmative response,[91] fail to direct the venireman's attention to the specific issues which are likely to be the subject of controversy. For instance, in *State v. Simms,*[92] the defendant sought to ask potential jurors if they would be able to follow the judge's instruction limiting their consideration of the defendant's prior convictions solely to the issue of his credibility as a witness. The Missouri Court of Appeals upheld the lower court's refusal to allow this question on the grounds that it was repetitious because the panel had previously been asked if they could follow the judge's instructions. However, at the time this preliminary question was asked, the veniremen were unaware that evidence of prior convictions would be introduced. Most, no doubt, were also ignorant of the rule prohibiting them from considering those convictions as substantive evidence of the defendant's guilt. Had the voir dire examination focused on this specific rule of law, the defendant would have been able to

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58, 248 S.E.2d 853 (1978) (three veniremen indicated they would not be willing to return a verdict of not guilty by reason of insanity); State v. Holden, 136 Vt. 158, 385 A.2d 1092 (1978); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980); Morgan v. People, 624 P.2d 1331 (Colo. 1981) (a juror repeatedly indicated he would have difficulty applying the principle that the burden of proof rests solely upon the prosecution).

The decision of the Colorado Supreme Court in *Morgan* is ironic in that it is apparently within the judge's discretion in Colorado to prohibit voir dire questions relating to the burden of proof. People v. Strock, 42 Colo. App. 404, 600 P.2d 91 (1979), *rev'd on other grounds,* 623 P.2d 42 (Colo. 1981). Thus, a defendant in Colorado has a right to have a prospective juror excused who is unwilling to follow the law on burden of proof, but it is within the judge's discretion to prohibit the asking of the voir dire questions necessary to discover such a bias.

90. People v. Bennett, 79 Cal. App. 76, 89-90, 249 P. 20, 25 (1926), *quoted with approval in* Everly v. State, 395 N.E.2d 254, 256 (Ind. 1979).

91. Criminal defense attorney Charles Garry wrote that the typical judge's idea of voir dire is to simply ask the prospective juror whether he can be fair, "even though Adolf Hitler himself would have answered that question in the affirmative." Garry, *Attacking Racism in Court before Trial,* in MINIMIZING RACISM IN JURY TRIALS xxii (A. Ginger ed. 1969).

92. 643 S.W.2d 87 (Mo. Ct. App. 1982).

assess whether the veniremen were susceptible to "the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.' "[93] The veniremen could have stated much more accurately whether they were willing and able to follow the judge's instructions.

A few courts have recognized the inadequacy of a general inquiry into a venireman's willingness to follow the law. This viewpoint is cogently articulated by the California Supreme Court:

> [I]n addition to the problem of subtle or unconscious bias that makes a general proclamation of fairmindedness untrustworthy, here the ordinary venireman has a very limited fund of knowledge from which to evaluate the broadly phrased question. His answer may be true to the extent that he is willing generally to act as the judge instructs him. *But it is untenable to conclude that the venireman's general declaration of willingness to obey the judge is tantamount to an oath that he would not hesitate to apply any conceivable instruction, no matter how repugnant to him.* Hence the answer is merely a predictable promise that cannot be expected to reveal some substantial overtly held bias against particular doctrines.[94]

A criminal defendant should not have to rely on a venireman's declaration of his general willingness to follow the judge's instruction when an inquiry focusing on the specific legal doctrines likely to be relevant at trial would be much more effective in attaining the goal of an impartial jury.

THE CONCERN WITH EXPEDIENCY

The criticism most frequently leveled at the overall voir dire procedure is that it is too time consuming.[95] This concern has occasionally been expressed by courts which refuse to allow voir dire questions on rules of law.[96] While it is open to debate whether changes need to be effected in the general voir dire procedures in order to promote judicial economy,[97] the interest in

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93. Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (opinion authored by then Circuit Court Judge Warren Burger), *cert. denied,* 390 U.S. 1029 (1968).

94. People v. Williams, 29 Cal. 3d 392, 410, 628 P.2d 869, 878-79, 174 Cal. Rptr. 317, 326-27 (1981) (emphasis added and footnote omitted). *See also* United States v. Bear Runner, 502 F.2d 908, 912-13 (8th Cir. 1974); Fauna v. State, 265 Ark. 934, 582 S.W.2d 18 (1979); People v. Thomas, 89 Ill. App. 3d 592, 411 N.E.2d 1076, 1083 (1980).

95. State v. Pendry, 227 S.E.2d 210, 217 (W. Va. 1976); Gaba, *supra* note 41, at 532.

96. United States v. Wooton, 518 F.2d 943 (3d Cir.), *cert. denied,* 423 U.S. 895 (1975); People v. Saiz, 660 P.2d 2 (Colo. Ct. App. 1982); People v. Phillips, 99 Ill. App. 3d 362, 425 N.E.2d 1040, 1045 (1981); State v. Manley, 54 N.J. 259, 255 A.2d 193 (1969).

97. The extent to which lengthy voir dire examinations contribute to congested court systems may be somewhat exaggerated. Craig, Erickson, Friesen & Maxwell, *Voir Dire: Criticism and Comment,* 47 DEN. L.J. 465, 482 (1970); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges,* 27 STAN. L. REV. 1493, 1514 (1975) [hereinafter cited as Note, *Voir Dire: Establishing Minimum Standards].* Most critics of the time required for voir dire point to a few notorious trials in which the voir dire lasted days or weeks. *E.g.,* Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study,* 44

expediency cannot justify a blanket prohibition of questions directed to a venireman's willingness to follow a specific rule of law. As noted by the Seventh Circuit, "Expedition is clearly subsidiary to the duty to impanel an impartial jury."[98] The jury selection process should not be streamlined at the expense of questions reasonably designed to discover bias.[99] Because a juror who is unwilling to follow a pertinent rule of law is not impartial, questions which most directly explore this type of bias[100] should not be sacrificed in the interest of expediency.

It should be further noted that a question pertaining to a prospective juror's acceptance of a specific legal principle can usually be asked and answered in a relatively short amount of time.[101] When the legal principle at issue is particularly complex or controversial, counsel may seek to ask additional questions to probe more deeply into each prospective juror's attitude towards the rule of law. It is here that the judge can exercise his discretion by deciding whether the additional expenditure of time is necessary for the intelligent exercise of challenges.[102] But the minimal inquiry as to the veniremen's willingness to follow the judge's instructions on a specific rule of law has such little impact on the length of voir dire that it should never be eliminated in the name of judicial economy.

S. CAL. L. REV. 916, 923 n.28 (1971); Note, *Judge Conducted Voir Dire as a Time-Saving Trial Technique,* 2 RUT.-CAM. L.J. 161, 164 n.24 (1970). However, studies of the *average* time spent on voir dire in various jurisdictions generally show an expenditure of only one, two, or three hours. *See* Van Dyke, *Voir Dire: How Should It Be Conducted to Ensure That Our Juries Are Representative and Impartial?,* 3 HASTINGS CONST. L.Q. 65, 83-88 (1976).

98. United States v. Dellinger, 472 F.2d 340, 370 n.42 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973).

99. Various standards have been set forth attempting to strike a balance between the right to an impartial jury and the desire for a time efficient selection process. It has been stated that "all questions which would reasonably tend to bear on the possible prejudice of a juror should be asked, but . . . those questions should be asked as clearly, and with as little loss of time, as possible." Report of the Judicial Conference Committee on the Operation of the Jury System, 26 F.R.D. 409, 467 (1960). The Eighth Circuit allows the judge to consider the need for expediency in deciding how to conduct voir dire, while requiring that the procedure used create "a reasonable assurance that prejudice could be discovered if present." United States v. Cassel, 668 F.2d 969, 970-71 (8th Cir.), *cert. denied,* 457 U.S. 1132 (1982) (citation omitted). In People v. Williams, 29 Cal. 3d 392, 174 Cal. Rptr. 317, 628 P.2d 869 (1981), the court held that, although inordinately extensive and unfocused questioning should not be allowed, a defendant has a right to ask questions reasonably designed to assist in the intelligent exercise of peremptory or for cause challenges. Under any of these standards, a question as to a venireman's willingness to apply a specific doctrine of law should be allowed.

100. Questions as to a venireman's willingness to follow a specific rule of law can be effective at exposing bias. *See infra* notes 115-21 and accompanying text.

101. See United States v. Cassel, 668 F.2d 969 (8th Cir.), *cert. denied,* 457 U.S. 1132 (1982). Most attorneys are aware that a needlessly time-consuming voir dire examination can antagonize the jury. Draheim, *Efficient Jury Utilization Techniques . . . Or Proposition 12,* 28 DRAKE L. REV. 21, 35 (1979).

102. See, *e.g.,* Brundage v. United States, 365 F.2d 616 (10th Cir. 1966).

THE EFFECTIVENESS OF VOIR DIRE QUESTIONS ON RULES OF LAW

The discussion up to this point has assumed that attorneys can discover biases against rules of law through voir dire questioning. This assumption will now be explored. Some commentators are skeptical about the effectiveness of voir dire in unearthing prejudice generally,[103] and questions on rules of law have been disallowed, in part, on this basis.[104] Certainly, the less likely it is that such questions will expose the biases of prospective jurors, the less justification there is for allowing the questions.[105] However, as noted throughout this article, the detrimental effects arising from questions relating to rules of law are generally minimal, both in terms of prejudice to the parties and concerns of judicial economy. Therefore, a reasonable probability of unearthing prejudice should be sufficient to justify the use of such questions.

There have been relatively few attempts to scientifically evaluate the overall effectiveness of voir dire in screening out biased jurors, and those studies which have been conducted have failed to produce a consensus. In one experiment, the first ballot votes of the actual jurors in criminal cases were compared with the votes of peremptorily excused veniremen who remained to deliberate as a "shadow jury."[106] It was concluded that "there are cases in which the jury verdict is seriously affected, if not determined, by the voir dire."[107]

However, in an oft cited study by Professor Dale Broeder based on juror interviews at the end of twenty-three trials in a federal district court, the author concluded that, "[a]s an institution for sifting out'unfavorable' jurors, *voir dire* cannot be effective."[108] This opinion was based on Broeder's observations that the attorneys were unable to anticipate many factors in the veniremen's backgrounds that would affect their evaluation of the case, and that the jurors he interviewed had often been deceptive in responding to the voir dire examination.[109]

Professor Broeder's contention that voir dire examination is inherently ineffective fails to take into account the manner in which the specific examinations he studied were conducted. Those examinations were character-

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103. Broeder, *Voir Dire Examinations: An Empirical Study,* 38 S. CAL. L. REV. 503 (1965); Gaba, *supra* note 41, at 532-33.

104. State v. Churchill, 664 P.2d 757, 761 (Hawaii Ct. App. 1983); State v. Kelly, 118 N.J. Super. 38, 285 A.2d 571, 579 (1972).

105. Ham v. South Carolina, 409 U.S. 524, 533 (1973) (Marshall, J., dissenting); Gaba, *supra* note 41, at 536.

106. See Zeisel & Diamond, *The Effects of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 STAN. L. REV. 419 (1978).

107. *Id.* at 518-19.

108. Broeder, *supra* note 103, at 505.

109. *Id.* at 505-06.

ized as "perfunctory, stilted affairs"[110] presided over by a judge hostile to prolonged questioning in which legal rules precluded many questions relevant to bias.[111] Furthermore, the voir dire was conducted by attorneys who, overall, had a "feeling that one group of twelve was as likely to be as good or as bad as another."[112] Neither pertinent, probing questions, nor honest, revealing answers are apt to arise from such circumstances.[113] Broeder's study only suggests that a restricted and perfunctory voir dire will be ineffective at exposing jury bias; it is not enlightening on the effects of a more extensive, spirited inquiry.[114]

Although no studies have been found specifically investigating how often prospective jurors admit a bias against a rule of law in response to voir dire questions requiring an individual response, other evidence exists suggesting that such an inquiry can be effective at exposing jury bias. It should first be noted that many members of the public disagree with a number of fundamental legal principles relied on by defendants. For example, the Supreme Court recently cited a national survey showing that 37% of the public believes it is a defendant's responsibility to prove his innocence.[115] Other studies also have cast doubt on the public's acceptance of a defendant's

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110. *Id.* at 503.
111. *Id.* at 505.
112. *Id.* at 503-07.
113. There is a close relationship between the manner in which the voir dire examination is conducted and the extent of venireman self-disclosure. *See* Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis,* 56 IND. L.J. 245 (1981); Note, *Voir Dire: Establishing Minimum Standards, supra* note 97, at 1502-08; Note, *Exploring Racial Prejudice on Voir* Dire: *Constitutional Requirements and Policy Considerations,* 54 B.U.L. REV. 394, 398-401 (1974) [hereinafter cited as Note, *Exploring Racial Prejudice].* A prospective juror might not acknowledge a bias because he fails to recognize it within himself, because he might want to be chosen to serve on the jury, or because he is too embarrassed to publicly admit a prejudice. Note, *Voir Dire: Establishing Minimum Standards, supra* note 97, at 1506 n.55. A voir dire examination directed to the group with volunteered responses will elicit less information than questions directed to the individual and requiring an individual response. *Id.* at 1523. Questions will be more effective when they are detailed and open-ended, requiring more than a yes or no response. Mitcham, *Psychotherapy Techniques in Voir Dire Selection,* 16 TRIAL, Sept. 1980, at 52, 54; Note, *Exploring Racial Prejudice, supra,* at 398-401 (1974). For instance, consider which question would be more enlightening about juror attitudes: "Would you give the defendant a fair trial?" or "How do you feel about the insanity defense?" Obviously, the voir dire methods which will be most informative will also generally be more time consuming.
114. It is not at all clear from Broeder's study how often, if ever, jurors were personally questioned about their willingness to follow specific doctrines of law. Broeder did report that a number of jurors disregarded the rule that no adverse inference could be drawn from a defendant's failure to testify, even though this point was discussed during voir dire. Broeder, *supra* note 103, at 523. However, the only description of questioning on this subject was the following: "Would anyone here draw a negative inference should my client fail to take the stand?" *Id.* at 522. Such an inquiry, requiring only group silence to indicate a lack of bias, would obviously not be as effective at revealing bias as would an inquiry requiring each prospective juror to personally indicate whether he would have any reservations about following the rule that no inference of guilt may be drawn from a failure to testify.
115. Carter v. Kentucky, 450 U.S. 288, 303 n.21 (1981), in which the Court referred to a study conducted for the National Center for State Courts.

presumption of innocence and his right not to testify.[116] Hostility toward the insanity defense is also prevalent. A survey of over 1,000 prospective jurors conducted in Colorado more than ten years prior to John Hinckley's controversial insanity defense trial showed that 71% of those returning questionnaires agreed that "the plea of insanity is a loophole allowing too many guilty men to go free."[117] As noted previously, jurors often find it difficult to accept the principles of self-defense, entrapment, and the rule limiting the jury's consideration of a defendant's prior convictions.[118] Thus, jury bias against the law poses a real threat to a criminal defendant's right to have his case decided in accordance with applicable legal principles.

It should be clear that many attorneys believe voir dire questions relating to legal issues can effectively expose bias because appellate courts are often called upon to decide the propriety of such questions. In fact, a number of judges and attorneys have recommended the use of such questions to discover prejudice against the law.[119] Further, an examination of recent appellate opinions reveals many instances in which prospective jurors, in response to voir dire questioning, have indicated a reluctance to accept legal principles relied on by a criminal defendant.[120] The frequency of these references

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116. Over half of those participating in a nationwide random survey felt that a criminal defendant should be required to take the stand and prove his innocence. Bush & Stuart, *The Future of Voir Dire in Minnesota: Fair Juries or False Expediency?*, 38 BENCH & B. MINN., Dec. 1981, at 39, 43. *See also supra* note 58.

117. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 6-8 (1970). More recently, in a survey conducted by ABC News in June of 1982 in the wake of the Hinckley trial, 79% of those questioned disapproved of laws which allow a criminal defendant to be found not guilty because of insanity. *Americans Evaluate the Court System*, PUB. OPINION, Aug.-Sept. 1982, at 24, 27.

118. See *supra* note 88.

119. Werchick, *Method, Not Madness: Selecting Today's Jury*, 18 TRIAL, Dec. 1982, at 64, 67-68; Clarie, J., Remarks at the Annual Judicial Conference of the Second Judicial Circuit of the United States (Sept. 10, 1982), 97 F.R.D. 556, 588-59; Cleary, *Jury Selection in a Federal Criminal Case (with form)*, 26 PRAC. LAW., June 1, 1980, at 37; Fahringer, *"In the Valley of the Blind"—Jury Selection in a Criminal Case*, 52 N.Y. ST. B.J. 197 (1980); Hannah, *Voir Dire: Its Value—How to Use It*, 55 JUDICATURE, Oct. 1971, at 110.

120. Burden of proof and presumption of innocence: *see, e.g.*, Morgan v. People, 624 P.2d 1331 (Colo. 1981); People v. Stone, 61 Ill. App. 3d 654, 378 N.E.2d 263 (1978); People v. Lowe, 30 Ill. App. 3d 49, 331 N.E.2d 639 (1975); State v. Shea, 421 So. 2d 200 (La. 1982); State v. Nolan, 341 So. 2d 885 (La. 1977); State v. Thompson, 331 So. 2d 848 (La. 1976); State v. Youngblood, 648 S.W.2d 182 (Mo. Ct. App. 1983); Homan v. State, 662 S.W.2d 372 (Tex. Crim. App. 1984); State v. Holden, 136 Vt. 158, 385 A.2d 1092 (1978); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980); Breeden v. Commonwealth, 217 Va. 297, 227 S.E.2d 734 (1976); State v. Bennett, 304 S.E.2d 35 (W. Va. 1983).

Defendant's right to have no adverse inference drawn from his failure to testify: *see, e.g.*, State v. Turrentine, 122 Ariz. 39, 592 P.2d 1305 (1979); State v. Glaze, 439 So. 2d 605 (La. Ct. App. 1983); State v. Pennington, 642 S.W.2d 646 (Mo. 1982); State v. Byrd, 646 S.W.2d 419 (Mo. Ct. App. 1983); State v. Williams, 624 S.W.2d 127 (Mo. Ct. App. 1981); State v. Merritt, 589 S.W.2d 359 (Mo. App. 1979); State v. Ransburg, 540 S.W.2d 172 (Mo. Ct. App. 1976).

Insanity and intoxication defenses: *see, e.g.*, Nobis v. State, 401 So. 2d 191 (Ala. Crim. App. 1981); Godfrey v. Francis, 251 Ga. 652, 308 S.E.2d 806 (1983); Riggs v. State, 264 Ind.

suggests that a significant number of jurors, if asked, are willing to acknowledge their disagreement with the law.[121] This willingness might be explained in part by the fact that it is more socially acceptable to publicly acknowledge a disagreement with the law than a prejudice against a class of people.

Thus, it appears that the voir dire examination can reveal jury bias against rules of law. There is no compelling evidence that questions on matters of law are so ineffective at exposing bias so as to warrant the conclusion that they are not worth the time it takes to ask them. The fact that a defendant may not be able to completely eliminate juror bias against the law does not justify prohibiting reasonable efforts by him to do so. As stated by the Supreme Court, "[n]o surer way could be devised to bring the processes of justice into disrepute" than "to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred."[122]

INCONSISTENT RULINGS ON THE SCOPE OF VOIR DIRE

Appellate courts which have roundly condemned defense efforts to explore veniremen attitudes towards applicable rules of law on voir dire have often reacted more favorably to similar inquiries by the prosecution. These inconsistent decisions are often upheld on the basis of the trial judge's broad discretion in conducting the voir dire.[123] For instance, in 1981 the Missouri Court of Appeals found that the trial judge properly overruled the defendant's objection to the prosecutor's voir dire question as to whether any prospective juror would refuse to convict the defendant if the State failed to produce an eyewitness.[124] The court held that the inquiry was a legitimate attempt to discover prejudice against the rule allowing circumstantial evidence

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263, 342 N.E.2d 838 (1976); State v. McIntyre, 365 So. 2d 1348 (La. 1978); State v. Foster, 437 So. 2d 309 (La. Ct. App. 1983); Commonwealth v. Prendergast, 385 Mass. 625, 433 N.E.2d 438 (1982); State v. Rowe, 210 Neb. 419, 315 N.W.2d 250 (1982); State v. Leonard, 296 N.C. 58, 248 S.E.2d 853 (1978); State v. Johnson, 119 R.I. 749, 383 A.2d 1012 (1978).

Self-defense: *see, e.g.*, People v. Williams, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981); Todd v. State, 143 Ga. App. 619, 239 S.E.2d 188 (1977), *cert. denied*, 436 U.S. 921 (1978); State v. Sylvester, 400 So. 2d 640 (La. 1981); State v. Eaker, 380 So. 2d 19 (La.), *cert. denied*, 449 U.S. 847 (1980).

121. Obviously, the fact that one or more jurors indicated their disagreement with a legal principle during voir dire will many times go unmentioned in an appellate court opinion.

122. Aldridge v. United States, 283 U.S. 308, 315 (1931).

123. The broad discretion of the trial judge in conducting voir dire is recognized in virtually every jurisdiction. Ryan & Neeson, *Voir Dire: A Trial Technique in Transition*, 4 AM. J. TRIAL ADVOC. 523, 526 (1981). Appellate opinions will often express disapproval of voir dire questions relating to rules of law and then hold that the trial judge did not abuse his discretion in prohibiting such questions. *See, e.g.*, United States v. Wooton, 518 F.2d 943 (3d Cir.), *cert. denied*, 423 U.S. 895 (1975); State v. Melendez, 121 Ariz. 1, 588 P.2d 294 (1978); Jacobs v. State, 358 A.2d 725 (Del. 1976); Padgett v. State, 251 Ga. 503, 307 S.E.2d 480 (1983).

124. State v. Reed, 629 S.W.2d 424 (Mo. Ct. App. 1981).

to support a conviction.[125] The same court, the very next year, found no abuse of discretion in the trial judge's refusal to allow the defendant to question prospective jurors about their willingness to follow the rule limiting their consideration of the defendant's prior convictions to the issue of his credibility as a witness.[126] Missouri courts have also found no abuse of discretion in permitting the prosecution to ask if prospective jurors had any quarrel with the law of felony-murder and the rule holding a defendant criminally responsible for the acts of an accomplice.[127] Yet the Missouri Court of Appeals ruled in another first degree murder case that the defendant had no right to inquire whether the veniremen were willing to follow the judge's instruction requiring the prosecution to prove that the defendant acted with premeditation and deliberation.[128]

Similarly, in separate cases involving the insanity defense and the defense of acting to protect another, the Oklahoma Court of Criminal Appeals held that the defendants' proposed voir dire questions were improper because they regarded legal issues which would be covered in the judge's instructions.[129] Yet, in the time interval between those two decisions, the same court held in a rape case that it was a legitimate inquiry for the prosecutor to ask the veniremen if they thought it would ever be proper for a stepfather to "educate" his daughter by having intercourse with her, even though the judge's jury charge undoubtedly discussed whether intercourse with one's stepdaughter would ever be permitted under the law.[130] It is not difficult to find other examples of seemingly contradictory holdings in which the only factual distinction appears to be whether it was the prosecution or the defendant seeking the voir dire inquiry.[131]

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125. *Id.* at 427.

126. State v. Simms, 643 S.W.2d 87 (Mo. Ct. App. 1982).

127. State v. Thompson, 610 S.W.2d 629 (Mo. 1981).

128. State v. Knapp, 534 S.W.2d 465 (Mo. Ct. App. 1975).

129. Nauni v. State, 670 P.2d 126 (Okla. Crim. App. 1983); Palmer v. State, 532 P.2d 85 (Okla. Crim. App. 1975).

130. Hancock v. State, 664 P.2d 1039 (Okla. Crim. App. 1983).

131. Third Circuit: *Compare* United States v. Wooton, 518 F.2d 943 (3d Cir.), *cert. denied,* 423 U.S. 895 (1975) (defendant not permitted to question veniremen on willingness to follow law on insanity defeuse and burden of proof) *with* United States v. Todaro, 448 F.2d 64 (3d Cir. 1971), *cert. denied,* 404 U.S. 1040 (1972) (court asked veniremen if they would follow instruction that defendant can be guilty of attempted extortion even if no money changed hands).

Alabama: *Compare* Watwood v. State, 389 So. 2d 549 (Ala. Crim. App. 1980) (prosecution permitted to ask veniremen if they would be unwilling to convict if its case depended on the testimony of only one eyewitness) *and* Jackson v. State, 56 Ala. App. 94, 319 So. 2d 290 (1975) (prosecution allowed to inquire about juror willingness to convict if case relied on circumstantial evidence) *with* Fletcher v. State, 291 Ala. 67, 277 So. 2d 882 (1973) *and* Ward v. State, 44 Ala. App. 229, 206 So. 2d 897, 917-20 (1966) (both courts denied defendant the opportunity to explore juror attitudes toward the insanity defense).

Arizona: *Compare* State v. Baumann, 125 Ariz. 404, 610 P.2d 38 (1980) (allowed inquiries by the trial court into the prospective jurors' ability to judge testimony of state witness testifying pursuant to a plea bargain) *and* State v. Bullock, 26 Ariz. App. 149, 546 P.2d 1158 (1976)

The most notable example of the prosecution being allowed to ask voir dire questions relating to legal issues is the common practice in capital cases of "death-qualifying" the jury. This process involves asking veniremen if they have beliefs which would prevent them from ever imposing a death sentence.[132] There seems little basis for allowing such an inquiry while refusing to allow defendants to explore juror attitudes toward other legal issues. The death qualification questioning can be quite time consuming, it addresses legal issues which are eventually covered in the judge's instructions, and it has the same potential for indoctrination as any other voir dire inquiry into legal matters. In *Commonwealth v. Fisher,*[133] the defendant argued that, because the state had the right to death-qualify a jury, he should be entitled to question prospective jurors on their willingness to apply the law of self-defense. The Pennsylvania Supreme Court's only justification for rejecting this analogy was that public opposition to the law of self-defense was not as widespread as opposition to capital punishment.[134] However, just because opposition is not widespread does not mean it is nonexistent. Even one

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(allowed inquiries by the trial court regarding the prospective jurors' agreement with the proposition that the presumption of innocence gives way in the face of evidence to the contrary) *with* State v. Melendez, 121 Ariz. 1, 588 P.2d 294 (1978) (upheld trial court's refusal to pose voir dire questions relating to accomplice testimony and defendant's prior felony convictions).

Georgia: *Compare* Smith v. State, 238 Ga. 146, 231 S.E.2d 757 (1977) *and* Head v. State, 160 Ga. App. 4, 285 S.E.2d 735 (1981) (both cases held that the defense was not entitled to ask whether the jury would follow the trial court's instructions) *with* Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971), *cert. denied,* 405 U.S. 1050 (1972) (prosecution's voir dire questions relating to adherence to law held proper) *and* Clark v. Grimes, 223 Ga. 461, 156 S.E.2d 91 (1967) (prosecution's voir dire questions concerning prospective jurors' conscientious objections to capital punishment held proper).

Illinois: *Compare* People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353, *cert. denied,* 104 S. Ct. 507 (1983), *reh'g denied,* 104 S. Ct 1017 (1984) (prosecution permitted to ask veniremen if they would follow state laws on circumstantial evidence and allowing the defendant to be found guilty of murder even though an accomplice pulled the trigger) *and* People v. Freeman, 60 Ill. App. 3d 794, 377 N.E.2d 107 (1978), *aff'd,* 79 Ill. 2d 147, 402 N.E.2d 157 (1979) (allowed prosecution's voir dire inquiries relating to whether prospective jurors would be prejudiced against following Illinois law permitting a conviction to be based on circumstantial evidence) *with* People v. Freeman, 60 Ill. App. 3d 794, 377 N.E.2d 33 (1981) (defense denied inquiry into jurors' willingness to follow law with respect to self-defense) *and* People v. Newlun, 89 Ill. App. 3d 938, 412 N.E.2d 1055 (1980) (defense not allowed to inquire of prospective jurors whether defendant's refusal to testify would prejudice the presumption of innocence).

132. See *generally* Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair Cross-Section Requirement in Capital Cases,* 15 CREIGHTON L. REV. 595 (1982).

133. 447 Pa. 405, 290 A.2d 262 (1972).

134. *Id.* at 408-09, 290 A.2d at 264-65. Pennsylvania appellate courts have also upheld trial court refusals to allow defendants to question prospective jurors about their willingness to follow the law with respect to the insanity defense. Commonwealth v. Biebighauser, 450 Pa. 336, 300 A.2d 70 (1973); Commonwealth v. Geschwendt, 271 Pa. Super. 102, 412 A.2d 595 (1979), *aff'd,* 500 Pa. 120, 454 A.2d 991 (1982). This doctrine may well be more controversial than the death penalty. In a national opinion poll conducted in 1981, only 25% of those questioned stated that they were opposed to the death penalty for persons convicted of murder. THE GALLUP REPORT, April 1981, at 18. Compare this figure with the results of polls examining attitudes towards the insanity defense discussed *supra* note 117 and accompanying text.

undetected juror unwilling to abide by a rule of law can affect a jury's verdict.

Current case law creates the unmistakable impression that the prosecution's interest in securing a jury willing to follow the legal principles necessary to its case is more highly valued than the defendant's corresponding interest in seating jurors willing to adhere to the legal principles upon which he relies. This state of affairs is incompatible with the principle that an individual is not to be deprived of his liberty except by due process of law, and cannot be justified by a blind deference to the trial judge's discretion. Appellate courts must be willing to review lower court rulings in a consistent and principled fashion, even if it means occasionally ordering a new trial when a defendant's voir dire inquiry has been improperly restricted.

A Proposed Standard

No one questions the trial judge's power to forbid voir dire inquires which are misleading, argumentative, or unreasonably lengthy. At the same time, inquiries into the prospective jurors' willingness to follow specific rules of law relied on by a criminal defendant are a legitimate and essential part of the voir dire examination.[135] Once it is recognized that there is no justification for a blanket prohibition of such questions, the difficult task remains of formulating a standard which strikes a proper balance between the defendant's right to probe for bias against the law and the need for judicial control over the examination.

One approach is to create a *per se* right to a minimum voir dire inquiry. The defendant would be entitled, upon request, to have the following question asked with respect to any relevant legal rule:

> If the judge instructed you that . . . [set forth the rule], is there any reason why you would be unwilling or unable to follow that instruction?

This minimal inquiry could be directed to the veniremen as a group, but individual responses should be required in order to encourage disclosure. Under this approach, it would still be within the judge's discretion to decide the exact wording of questions, including how the rule of law is defined.[136] If the defendant feels that the legal principle at issue is particularly complex or controversial, he may wish to probe more deeply for jury bias by having more detailed, open-ended questions directed to each individual veniremen.

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135. Whether it is proper for the *prosecution* to make voir dire inquiries with respect to rules of law *on which it will rely* depends on how one views the controversy over jury nullification. Proponents of jury nullification would allow jurors to acquit, but not convict, a criminal defendant by disregarding relevant rules of law. *See* Christie, *supra* note 49, at 1299.

136. For instance, if the veniremen had been questioned on their willingness to follow the judge's instructions on self-defense, the judge would have to decide whether to allow an additional inquiry focusing on that portion of the self-defense doctrine which allows a person to use force to defend himself even though an avenue of retreat is open.

Again, the judge would decide whether to allow the additional inquiry. These decisions as to the scope of the voir dire would be subject to appellate review, with an abuse of discretion being found if the procedure used failed to create a reasonable assurance that prejudice, if present, could be discovered.

This proposed *per se* rule has the advantage of insuring that a defendant will be able to obtain a jury at least verbally committed to following each relevant rule of law. This procedure could usually be conducted in a relatively short amount of time. The judge would maintain his discretion to prohibit improper or inordinately extensive questioning and, when necessary, to expand the inquiry beyond that minimally required.

One of the dangers involved in establishing a *per se* rule, however, is the possibility that trial and appellate judges will take the attitude that the right to inquire into jury bias against the law begins and ends with the minimally required procedure. Therefore, any appellate decision or legislative action establishing a *per se* rule should make it clear that there will be cases in which the failure to allow an inquiry beyond that minimally required would constitute reversible error.

Another approach is to determine the necessity of an inquiry by assessing the likelihood that the inquiry would expose bias. For instance, the California Supreme Court recently held in *People v. Williams*[137] that a reasonable inquiry should be permitted into a potential juror's willingness to apply any legal doctrine which was likely to be relevant at trial. The court went on to state, however, that reversal would be required only if the doctrine actually turned out to be relevant and only if "the excluded question is found substantially likely to expose strong attitudes antithetical to defendant's cause."[138] The trial court's discretion to control the examination by cutting off argumentative or overly lengthy questioning was left intact.[139]

The minimal inquiry concerning the jurors' willingness to follow a specific rule of law will generally take little time and create no prejudice to the parties. It is therefore preferable to allow this basic inquiry without requiring a showing that the question is likely to expose bias. However, if California courts are not reluctant to find that a question is "substantially likely" to expose bias,[140] the rule announced in *Williams* would have much the same effect as a *per se* rule. Under either approach, appellate review of lower court rulings on the scope of voir dire will frequently have to be done on

137. 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981).
138. *Id.* at 410, 628 P.2d at 879.
139. *Id.* at 408, 628 P.2d at 877.
140. In *Williams* the court held that a question concerning the rule allowing a defendant to use force to defend himself without retreating was substantially likely to uncover jury bias so that its exclusion required a new trial. At present, there are no subsequent California opinions which have applied the "substantial likelihood" test to a proposed voir dire question relating to a rule of law. Perhaps California trial courts are now routinely allowing such inquiries.

a case-by-case basis under the guidance of a rather vague standard. Because the proper scope of a voir dire examination will necessarily be determined more through the exercise of judicial discretion rather than by the application of precise rules, the particular standard applied may be less important than the courts' recognition of the legitimacy of voir dire questions relating to rules of law.

CONCLUSION

Jury antipathy towards a rule of law, like racial hostility or exposure to pretrial publicity, can compromise a criminal defendant's right to have his case decided by an impartial jury. Voir dire questions relating to rules of law are not inherently improper, and any attempted abuses of the voir dire process can easily be controlled by the trial judge. An inquiry probing veniremen attitudes toward specific legal principles will be much more effective at exposing bias than an inquiry directed to the prospective jurors' general willingness to abide by the judge's instructions. The interest in expediency cannot take priority over the duty to impanel an impartial jury. In any event, an inquiry into venireman willingness to abide by specific rules of law can usually be accomplished expeditiously. If trial and appellate courts recognize these principles, judicial discretion to control the scope of the voir dire examination can be exercised in a sound manner.