

## GUILTY BY REASON OF INSANITY: WHY A MALIGNED DEFENSE DEMANDS A CONSTITUTIONAL RIGHT OF INQUIRY ON VOIR DIRE

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### INTRODUCTION

Stephen C. Stanko said he had no memory of strangling his live-in girlfriend, Laura, to death.<sup>1</sup> To the charges that he beat and robbed Laura, raped her teenage daughter, and slit the girl's throat, his explanation was that he "simply snapped."<sup>2</sup> As the case against him proceeded to trial, his attorneys prepared what may have been the only defense available: insanity. To make the case, the defense assembled a team of medical experts to scan Mr. Stanko's brain, examining both its structure and functionality.<sup>3</sup> Based on their findings, the defense intended to show that medical complications arising shortly after Mr. Stanko's birth damaged a section of his brain, rendering Mr. Stanko—as one doctor put it—a psychopath.<sup>4</sup>

Presenting this medical evidence to the jury would take nearly three days.<sup>5</sup> Before that, though, the defense would have to confront a challenge of an altogether different sort: selecting jurors willing to consider the doctrine that insanity, as the law defines it, should excuse a defendant from punishment. This would not be simple. Studies have consistently shown that the public is deeply suspicious of the insanity defense.<sup>6</sup> A 2001 study,

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<sup>1</sup> Troy Roberts, *Murder on His Mind*, CBS NEWS, 1 (Jan. 11, 2007, 4:53 PM), [http://www.cbsnews.com/8301-18559\\_162-2352668.html?](http://www.cbsnews.com/8301-18559_162-2352668.html?)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Jennifer L. Skeem et al., *Venirepersons's Attitudes Toward the Insanity Defense: Developing, Refining, and Validating a Scale*, 28 *LAW & HUM. BEHAV.* 623, 624 (2004); see also HENRY F. FRADELLA, *MENTAL ILLNESS AND CRIMINAL DEFENSES OF EXCUSE IN CONTEMPORARY AMERICAN LAW* 15-17 (2007) (noting that public opinion regarding the insanity defense remains "overwhelmingly negative"); NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 215 (2007) ("Many see it as an abused area of law, a 'loophole' that defendants use to attempt to escape responsibility."); COREY J. VITELLO & ERIC W. HICKEY, *THE MYTH OF A PSYCHIATRIC CRIME WAVE PUBLIC PERCEPTION, JUROR RESEARCH, AND MENTAL ILLNESS* 96-101 (2006) (discussing the effects of public mental illness bias on juror behavior). See generally Valerie P. Hans, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 *CRIMINOLOGY* 393 (1986).

to cite just one example, found that 79 percent of participants believed the defense is often abused and poses a threat to public safety.<sup>7</sup> For defendants like Mr. Stanko, who faced the death penalty,<sup>8</sup> these perceptions can be critical. Researchers have found that attitudes toward the insanity defense are “powerful predictors” of verdicts in insanity cases, at times mattering more to the outcome of a case than even a manipulation of the facts.<sup>9</sup>

Voir dire,<sup>10</sup> the traditional practice of questioning prospective jurors before impaneling them, exists to uncover attitudes of this sort.<sup>11</sup> It is the mechanism that preserves a defendant’s right to an impartial jury under the Sixth Amendment.<sup>12</sup> It also safeguards the right to due process under the Fifth and Fourteenth Amendments.<sup>13</sup> Though the voir dire process varies from one jurisdiction to another,<sup>14</sup> one constant is that trial judges wield enormous discretion in determining which questions will be asked and whether a potential juror’s answers warrant excusal.<sup>15</sup> In South Carolina, where the Stanko trial took place, courts permit the attorneys to recommend questions, but the attorneys are not entitled to ask them. The trial judge has the power to select the questions and pose them to the prospective jurors.<sup>16</sup>

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<sup>7</sup> Jennifer L. Skeem & Stephen L. Golding, *Describing Jurors’ Personal Conceptions of Insanity and Their Relationship to Case Judgments*, 7 PSYCHOL. PUB. POL’Y & L. 561, 604 (2001).

<sup>8</sup> State v. Stanko, 658 S.E.2d 94, 96 (S.C. 2008).

<sup>9</sup> Skeem et al., *supra* note 6, at 645.

<sup>10</sup> Voir dire is a French phrase that has been variously translated as “to speak the truth,” or “to see what he or she says.” See Jon Van Dyke, *Voir Dire: How Should It Be Conducted to Ensure that Our Juries Are Representative and Impartial?*, 3 HASTINGS CONST. L.Q. 65, 65 (1976); see also 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3(a) (3d ed. 2007).

<sup>11</sup> See WARREN FREEDMAN, THE CONSTITUTIONAL RIGHT TO A SPEEDY AND FAIR CRIMINAL TRIAL 81 (1989) (“The thrust of the voir dire is to ferret out prejudice or bias which can interfere with the fair trial right of the criminal defendant.”); RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 129 (2003) (noting that all American jury trials involve some voir dire questioning).

<sup>12</sup> Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion); cf. LLOYD E. MOORE, THE JURY 167-68 (1973) (“Any person who has observed the process of questioning jurors by skillful counsel cannot doubt the value of *voir dire* in eliminating the eccentric, prejudiced and unqualified juror.”). The Constitution requires voir dire questioning in criminal cases. Morgan v. Illinois, 504 U.S. 719, 729 (1992) (“[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.”); FREEDMAN, *supra* note 11, at 81.

<sup>13</sup> 16C C.J.S. *Constitutional Law* § 1633 (2005).

<sup>14</sup> In about a third of the states and in the federal courts, the trial judge conducts the questioning or allows the attorneys to ask the questions. Another third of the states leave the questioning to the attorneys. In the rest of the states, the court conducts the examination and lawyers “supplement[] the questioning.” JONAKAIT, *supra* note 11, at 130.

<sup>15</sup> *Mu’Min v. Virginia*, 500 U.S. 415, 424 (1991); see also FED. R. CRIM. P. 24(a)(2)(A) (limiting examination of prospective jurors to questions “that the court considers proper”).

<sup>16</sup> S.C. CODE ANN. § 14-7-1020 (1976); see also *Selection of the Jury*, S.C. JUDICIAL DEP’T, <http://www.judicial.state.sc.us/jurorinfo/jurorSelection.cfm> (last visited Nov. 3, 2012) (noting that the judge starts the question of the jurors to gauge their ability to serve); Bobby G. Frederick, *Attorney Conducted Voir Dire*, TRIAL THEORY: A S.C. CRIM. DEF. BLOG (Nov. 21, 2008, 8:23 PM),

The United States Supreme Court has found that the Constitution will at times require voir dire questioning on a particular topic, provided the risk of juror prejudice appears significant.<sup>17</sup> Yet, in the last half century, the Court has identified only three topics for which the Constitution mandates such questioning: race,<sup>18</sup> ethnicity,<sup>19</sup> and the death penalty.<sup>20</sup> The Court has not considered whether the Constitution requires inquiry into other controversial subjects,<sup>21</sup> though it did find in the early 1970s that a bearded criminal defendant did not have an unmitigated right to probe for bias against his beard.<sup>22</sup>

In Mr. Stanko's trial, the defense sought to press a prospective juror to discuss her views on the insanity defense.<sup>23</sup> The trial judge sustained the prosecutor's objection.<sup>24</sup> The defense, the judge said, could proffer a question about affirmative defenses in the aggregate, but it could not ask specifically about the insanity defense.<sup>25</sup> The Supreme Court of South Carolina affirmed, declaring that the judge's general questions on the jurors' impartiality and their willingness to apply the law were adequate to protect the defendant's constitutional rights.<sup>26</sup>

This Comment takes a different view. It argues that the Sixth Amendment Impartiality Clause and the Fifth and Fourteenth Amendment Due Process Clauses give defendants invoking the insanity defense a per se right to question prospective jurors about their willingness to accept the defense.

Part I explores the constitutional dimensions of the voir dire examination. The Supreme Court has repeatedly asserted that voir dire must be "ad-

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[http://www.trialtheory.com/jury-trials/attorney\\_conducted\\_voir\\_dire/](http://www.trialtheory.com/jury-trials/attorney_conducted_voir_dire/) (stating that, in South Carolina, the judge generally asks several questions of the jury pool during voir dire).

<sup>17</sup> See, e.g., *Mu'Min*, 500 U.S. at 424 (requiring inquiry into potential juror racial prejudice); see also Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 669 (2004) ("The defense counsel's request did not focus on 'immaterial matters' but rather on prejudice that 'would disqualify a juror.' The trial court erred in failing 'to ask any question which could be deemed to cover the subject' of racial prejudice." (footnote omitted) (quoting *Aldridge v. United States*, 283 U.S. 308, 311 (1931))).

<sup>18</sup> *Ristaino v. Ross*, 424 U.S. 589, 596-97 (1976); *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973); *Aldridge*, 283 U.S. at 314-15.

<sup>19</sup> *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) (plurality opinion).

<sup>20</sup> *Morgan v. Illinois*, 504 U.S. 719, 731 (1992).

<sup>21</sup> *United States v. Jeffery*, 631 F.3d 669, 673-74 (4th Cir.), cert. denied, 132 S. Ct. 187 (2011).

<sup>22</sup> *Ham*, 409 U.S. at 528. The defendant was a bearded civil rights worker who claimed that law enforcement officers framed him. Justice Douglas, dissenting in part, argued that members of the public closely associated facial hair with the counterculture and might, indeed, harbor some prejudice against a bearded defendant. *Id.* at 529-30 (Douglas, J., concurring in part and dissenting in part).

<sup>23</sup> *State v. Stanko*, 658 S.E.2d 94, 95 (S.C. 2008).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 96-97.

equate,<sup>27</sup> but it has been loath to create minimum standards for the process.<sup>28</sup> Mostly, the Court has affirmed the principle that trial judges maintain wide discretion to define the scope of questioning.<sup>29</sup> Its posture leaves judges free to restrict questioning for a host of reasons, including the desire to speed up the proceedings,<sup>30</sup> or to stop attorneys from indoctrinating jurors.<sup>31</sup>

The risk that inadequate voir dire will jeopardize a defendant's constitutional rights is especially acute when the case involves a matter as controversial as the insanity defense. Part II explores the public's antipathy toward the defense, both historically and at present. These attitudes are well documented,<sup>32</sup> and they are regularly on display in the aftermath of high-profile crimes.<sup>33</sup> They were, for instance, in full view in the days after the July 2012 massacre in a Colorado movie theater, as many online commentators bemoaned the seeming inevitability that the gunman, James Holmes, would invoke the insanity defense.<sup>34</sup> The January 2011 shooting of US Rep.

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<sup>27</sup> *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Turner v. Murray*, 476 U.S. 28, 37 (1986) (plurality opinion); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion).

<sup>28</sup> See Jeffrey M. Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry into Prejudice*, 48 U. COLO. L. REV. 525, 534 (1977) (noting that the Supreme Court has heretofore "suggested an open-ended principle which contained few hints as to its limits").

<sup>29</sup> *Id.*

<sup>30</sup> Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 548 (1975); Serena Kafker, Comment, *The Defendant's Right to an Impartial Jury and the Rights of Prospective Jurors*, 48 U. CIN. L. REV. 985, 989 (1979).

<sup>31</sup> JOHN GUNTHER, *THE JURY IN AMERICA* 50-51 (1988); see also Rachael A. Ream, *Limited Voir Dire: Why It Fails to Detect Juror Bias*, 23 CRIM. JUST., Winter 2009, at 22, 25 (2009).

<sup>32</sup> See *infra* Part II.

<sup>33</sup> See Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 943 (1987) (noting that following highly publicized trials in which the insanity defense is implicated, the public "becomes outraged at the spectacle of an apparently guilty defendant 'beating the rap'"); Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1377 (1997) [hereinafter Perlin, *Borderline*] (describing negative public reaction to high-profile trials involving the insanity defense); Simon Wessely, *Anders Breivik, the Public, and Psychiatry*, 379 THE LANCET 1563, 1563 (2012) (noting that in the wake of mass violence in Norway perpetrated by defendant Anders Breivik, "the majority of the Norwegian public saw a label of schizophrenia as allowing Breivik to avoid having to answer to his crimes, and worse, that a psychiatric diagnosis raised the spectre that he could be free again").

<sup>34</sup> E.g., Jamie Koehnke, Comment to *Report: James Holmes Asked Jailhouse Worker How 'Dark Knight' Ends*, EXAMINER.COM (July 25, 2012), <http://www.examiner.com/article/report-james-holmes-asked-jailhouse-worker-how-dark-knight-ends> ("[L]et him be dealt with by the victims families [sic] instead of some stupid defence! [sic]"); Grape Soda, Comment to *Accused 'Dark Knight' Killer James Holmes Charged with 24 Counts of Murder, 116 of Attempted Murder*, NYDAILYNEWS.COM (July 30, 2012), <http://www.nydailynews.com/news/national/accused-dark-knight-killer-james-holmes-charged-24-counts-murder-116-counts-attempted-murder-colorado-article-1.1124920?comment=true> ("This guy is faking crazy and he isn't doing a good job of it. Put the needle in and put this sick dog down as fast as possible."); Ms. Sunflower, Comment to *James Holmes Spitting at Correction Officers, Forcing Use of*

Gabrielle Giffords in Arizona evoked similar responses.<sup>35</sup> One TV personality, a judge with a syndicated TV show,<sup>36</sup> posted a video three days after the Arizona shooting declaring, “It’s about time we get insanity out of the criminal courts and try to decide, ‘Did he do it, or didn’t he?’”<sup>37</sup> The Arizona gunman, Jared Lee Loughner, pleaded guilty,<sup>38</sup> but media speculation that he would invoke the insanity defense reinforced the commonly held, but erroneous,<sup>39</sup> impression that evildoers frequently try to escape punishment by claiming unaccountability.<sup>40</sup>

Many courts have acknowledged the public’s discomfort with the insanity defense.<sup>41</sup> Still, while trial judges generally permit questioning on the

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*Spit Guard*, ABCNEWS.COM (July 24, 2012), <http://abcnews.go.com/US/james-holmes-spitting-correction-officers-forcing-spit-guard/comments?type=story&id=16844456#UWg2HbWHu2A> (“I, for one, think he is faking it about being insane. He knew what he was doing and still does . . . the authorities should kill him NOW and be done with it !!!!!”).

<sup>35</sup> See, e.g., David L Dempsey, Comment to *Long Odds for Loughner Defense Options in Ariz. Trial*, USATODAY.COM (last updated Jan. 19, 2012, 4:32 PM), <http://usatoday30.usatoday.com/news/ion/story/2012-01-19/jared-loughner-incompetent-defense-giffords/52680512/1> (“All of the preparation and planning that Loughner did before the shootings prove that he knew exactly what he was doing and is competent to stand trial for his crimes. --- He should have a speedy trial, sentencing and execution. ---- Stop wasting TaxPayer [sic] money treating and boarding this mass murderer.”); Newsterl, Comment to *Insanity Defense Difficult for Jared Loughner*, CBSNEWS.COM, [http://www.cbsnews.com/\\_162-7232682.html#postComments](http://www.cbsnews.com/_162-7232682.html#postComments) (Jan. 11, 2011, 12:30 AM) (“Who cares, it’s [sic] no excuse, he shot and killed 6 people, too bad for him and his defective brain, it’s agood [sic] time then to recycle him and send him back to his maker with a big stamp on his forehead that says: ‘DEFECTIVE, returned to maker’ FRY HIM.”); Pete, Comment to *The Insanity Defense*, SLATE (Jan. 11, 2011, 6:59 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/01/the\\_insanity\\_defense.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_insanity_defense.html) (“His mental condition does not matter. Executing justice is not only primarily about the accused. It is about the victims, the bereaved, the community and society at large.”).

<sup>36</sup> Gayle Jo Carter, *Judge Pirro Roots for the Underdog in Court, on TV*, USATODAY.COM (last updated Sept. 5, 2010, 7:26 AM), [http://www.usatoday.com/life/television/news/2010-09-04-judge-pirro\\_N.htm](http://www.usatoday.com/life/television/news/2010-09-04-judge-pirro_N.htm).

<sup>37</sup> judgejp, *Judge Pirro on Jared Loughner’s Possible Insanity Defense*, YOUTUBE (Jan. 11, 2011), <http://www.youtube.com/watch?v=QrUFvfQ6M2c>.

<sup>38</sup> Richard A. Serrano, *Jared Loughner Pleads Guilty to Killing 6 in Tucson Shooting*, ORLANDO SENTINEL (Aug. 7, 2012, 5:08 PM), [http://articles.orlandosentinel.com/2012-08-07/news/la-na-nn-jared-loughner-plead-guilty-20120807\\_1\\_loughner-tucson-community-giffords-aide](http://articles.orlandosentinel.com/2012-08-07/news/la-na-nn-jared-loughner-plead-guilty-20120807_1_loughner-tucson-community-giffords-aide).

<sup>39</sup> Less than 1 percent of felony defendants plead not guilty by reason of insanity. VIDMAR & HANS, *supra* note 6, at 215.

<sup>40</sup> See Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 LAW & HUM. BEHAV. 117, 120 (1999).

<sup>41</sup> See, e.g., *United States v. Torniero*, 735 F.2d 725, 734 (2d Cir. 1984) (“The insanity defense has never been free from controversy, criticism, and revision.”); *People v. Stack*, 493 N.E.2d 339, 344 (Ill. 1986) (“Although the insanity defense upon which the defendant relied is a well-recognized legal defense, it remains a subject of intense controversy.”); *In re Commitment of Edward S.*, 570 A.2d 917, 928 n.13 (N.J. 1990) (discussing public antipathy towards to insanity defense).

defense,<sup>42</sup> appellate courts in some jurisdictions refuse to require this.<sup>43</sup> Part III examines the reasons courts in these jurisdictions have declined to recognize a *per se* right of inquiry, and why courts in as many as nine other jurisdictions now require such questioning.<sup>44</sup>

Part IV reviews the Supreme Court's findings that certain other controversial topics—namely, communism,<sup>45</sup> racism,<sup>46</sup> and the death penalty<sup>47</sup>—warrant special treatment on *voir dire*. The Court has devoted special attention to racial prejudice, above other controversial subjects,<sup>48</sup> and in this area it has found that defendants have a constitutional right of inquiry when the special circumstances of the case present a significant likelihood that, absent questioning, the jurors would not be impartial.<sup>49</sup> The Court's decisions support the principle, espoused in Part V of this Comment, that the Constitution requires *voir dire* questioning under two conditions: first, when the potential bias is pervasive, and second, when the subject of the bias cannot be separated from the facts of the case. In all cases, the insanity defense will necessarily satisfy both of these criteria.

#### I. VOIR DIRE'S ROLE IN PRESERVING THE CONSTITUTIONAL GUARANTEE OF AN IMPARTIAL JURY

The opportunity to question would-be jurors is an essential feature of the American criminal justice system.<sup>50</sup> Without it, trial judges would be unable to fulfill their duty to remove veniremen who cannot render an im-

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<sup>42</sup> *State v. Kelly*, 285 A.2d 571, 578 (N.J. Super. Ct. App. Div. 1972) (“[U]nder the relaxed practices of *voir dire* examination indulged over the years throughout the country, trial judges have fairly generally allowed inquiries into jurors’ attitudes toward various defenses, including insanity.”).

<sup>43</sup> James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 IND. L.J. 163, 166-67 (1984); see *United States v. Cassidy*, 571 F.2d 534, 538 (10th Cir. 1978); *United States v. Cockerham*, 476 F.2d 542, 543-44 (D.C. Cir. 1973) (per curiam); *Padgett v. State*, 307 S.E.2d 480, 481 (Ga. 1983); *Kelly*, 285 A.2d at 578-79; *State v. Avery*, 337 S.E.2d 786, 796-97 (N.C. 1985); *State v. Vinson*, 215 S.E.2d 60, 69 (N.C. 1975), *vacated in part on other grounds*, 428 U.S. 902 (1976); *Commonwealth v. Biebighauser*, 300 A.2d 70, 75 (Pa. 1973); *Commonwealth v. Trill*, 543 A.2d 1106, 1112-13 (Pa. Super. Ct. 1988); *State v. Stanko*, 658 S.E.2d 94, 96-97 (S.C. 2008).

<sup>44</sup> See *United States v. Allsup*, 566 F.2d 68, 70-71 (9th Cir. 1977); *Fauna v. State*, 582 S.W.2d 18, 19 (Ark. 1979); *Washington v. State*, 371 So. 2d 1108, 1109 (Fla. Dist. Ct. App. 1979); *People v. Pasch*, 604 N.E.2d 294, 306 (Ill. 1992); *Stack*, 493 N.E.2d at 344-45; *Commonwealth v. Seguin*, 656 N.E.2d 1229, 1232 (Mass. 1995); *State v. Olson*, 480 P.2d 822, 825 (Mont. 1971); *State v. Wallace*, 131 P.2d 222, 240-41 (Or. 1942); *State v. Sanders*, 242 S.E.2d 554, 558 (W. Va. 1978), *overruled on other grounds* by *State v. Honaker*, 454 S.E.2d 96 (W. Va. 1994).

<sup>45</sup> See *Morford v. United States*, 339 U.S. 258, 259 (1950) (per curiam).

<sup>46</sup> See *Ristaino v. Ross*, 424 U.S. 589, 596-98 (1976); *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973); *Aldridge v. United States*, 283 U.S. 308, 314-15 (1931).

<sup>47</sup> See *Morgan v. Illinois*, 504 U.S. 719, 731 (1992).

<sup>48</sup> See Gaba, *supra* note 28, at 535-36.

<sup>49</sup> *Ristaino*, 424 U.S. at 596.

<sup>50</sup> *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion).

partial verdict.<sup>51</sup> Yet, the tendency of trial judges to curtail questioning has prompted many commentators to allege the process often fails to serve its purpose.<sup>52</sup>

#### A. *Impartiality*

A criminal defendant, no matter what his defense, has a fundamental right to an impartial jury.<sup>53</sup> The Sixth Amendment Impartiality Clause declares this is so.<sup>54</sup> However, because the clause neglects to say what makes a juror impartial,<sup>55</sup> interpretations of the text have evolved over time.<sup>56</sup> At common law, an impartial juror was one who had no familial connection to the parties or any financial stake in the outcome of the case.<sup>57</sup> Today, courts and legal scholars read the impartiality requirement to mean that jurors should not know anything about the case at hand.<sup>58</sup>

In its own attempts to define impartiality, the Supreme Court has frequently turned to Lord Coke for guidance, invoking his statement that “a juror must be as indifferent as he stands unsworne.”<sup>59</sup> The Court has not taken this to mean that jurors should be agnostic on all matters related to the case before them.<sup>60</sup> The Court accepts that jurors bring their thoughts and

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<sup>51</sup> *Id.*

<sup>52</sup> See Babcock, *supra* note 30, at 558-63; Ream, *supra* note 31, at 25-26; Jay M. Spears, Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1504-08 (1975).

<sup>53</sup> U.S. CONST. amend. VI; see also Miller v. North Carolina, 583 F.2d 701, 706 (4th Cir. 1978) (“Nothing is more fundamental to the provision of a fair trial than the right to an impartial jury.”).

<sup>54</sup> U.S. CONST. amend. VI. The impartiality requirement applies to the states through the Fourteenth Amendment. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976).

<sup>55</sup> *United States v. Wood*, 299 U.S. 123, 145-46 (1936).

<sup>56</sup> Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1618-21 (2011).

<sup>57</sup> *Id.* at 1618-19.

<sup>58</sup> *Id.* at 1619.

<sup>59</sup> See *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (quotation omitted); *Turner v. Murray*, 476 U.S. 28, 33 (1986) (quotation omitted); *Smith v. Phillips*, 455 U.S. 209, 225 n.1 (1982) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 551 (1976) (quoting *Irvin*, 366 U.S. at 722); *Ristaino*, 424 U.S. at 596 (quotation omitted); *Ross v. Massachusetts*, 414 U.S. 599, 600 (1973) (mem.) (Marshall, J., dissenting) (quotation omitted); *Ham v. South Carolina*, 409 U.S. 524, 531 (1973) (Marshall, J., concurring in part and dissenting in part) (quoting *Irvin*, 366 U.S. at 722); *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971) (quoting *Irvin*, 366 U.S. at 722); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (quoting *Irvin*, 366 U.S. at 722); *Irvin*, 366 U.S. at 722; *Reynolds v. United States*, 98 U.S. 145, 154 (1878) (quotation omitted).

<sup>60</sup> *United States v. Burr*, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807) (No. 14692g) (“Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required.”); see also Babcock, *supra* note 30, at 548 (noting that it is acceptable for jurors to be familiar with the claim at hand, so long as they agree to act in an unbiased manner).

experiences with them into the jury box.<sup>61</sup> However, as Chief Justice Marshall stated, courts may not impanel a juror who harbors “strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them.”<sup>62</sup>

Courts have identified a similar command in the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>63</sup> One of the principal purposes of due process, the Supreme Court has said, is to “insure [the] essential demands of fairness.”<sup>64</sup> In a jury trial, due process guarantees to every defendant a jury willing and able to render a decision based on nothing other than the evidence before it.<sup>65</sup>

### B. *The Right to an Adequate Voir Dire*

A chief purpose of the voir dire examination is to provide the parties with a basis for challenging would-be jurors, whether for cause or peremptorily.<sup>66</sup> The court, in turn, has a duty to remove any juror who indicates he or she cannot follow the law because of a bias or preconception.<sup>67</sup> This is true whether the bias pertains to race,<sup>68</sup> ethnicity,<sup>69</sup> sex,<sup>70</sup> or other factors.<sup>71</sup> It

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<sup>61</sup> See *Skilling v. United States*, 130 S. Ct. 2896, 2925 (2010) (“Jurors . . . need not enter the box with empty heads in order to determine the facts impartially.”); see also GUNTHER, *supra* note 31, at 49 (noting that a cause challenge cannot be solely based on a juror’s knowledge or opinion about the case).

<sup>62</sup> *Burr*, 25 F. Cas. at 51.

<sup>63</sup> *Peters v. Kiff*, 407 U.S. 493, 501 (1972) (“Long before this Court held that the Constitution imposes the requirement of jury trial on the States, it was well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law.”); see also 16C C.J.S. *Constitutional Law* § 1633 (2005) (“It is a basic requirement of due process that an accused who has requested a jury trial be tried by a panel of impartial and indifferent jurors.”).

<sup>64</sup> *Ham v. South Carolina*, 409 U.S. 524, 526 (1973).

<sup>65</sup> *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

<sup>66</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion); see also WALTER E. JORDAN, *JURY SELECTION* § 3.01 (1980) (stating that the purpose of voir dire is to determine the state of potential jurors’ minds to ensure a fair and impartial jury). There are two methods of challenging prospective jurors during voir dire. A challenge for cause asserts that a prospective juror is not impartial. A peremptory challenge, by contrast, requires no justification. Typically, parties have a limited number of peremptory challenges. VIDMAR & HANS, *supra* note 6, at 87.

<sup>67</sup> See 50A C.J.S. *Juries* § 368 (2012); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 158-59 (2010) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

<sup>68</sup> See Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 222-23 (2001); see, e.g., *Commonwealth v. Clark*, 846 N.E.2d 765, 773-74 (Mass. 2006) (holding that the trial court should have excused a juror who said she believed African Americans as a group were more likely than people of other races to commit crimes).



is equally true of attitudes that would interfere with a juror's willingness to apply an affirmative defense, like the insanity defense.<sup>72</sup>

The Supreme Court has said that the constitutional right to an impartial jury entitles a defendant to "adequate" voir dire.<sup>73</sup> It has not, however, issued clear guidelines on just what makes an examination adequate.<sup>74</sup> Rather, the Court's preference has been to accord trial judges considerable latitude over the scope of voir dire.<sup>75</sup> It permits this discretion, it has said, because a trial judge must rely on his own perceptions if he is to fulfill his obligation of impaneling an impartial jury.<sup>76</sup>

A defendant may, of course, argue on appeal that the judge abused his or her discretion.<sup>77</sup> Appellate courts, however, rarely upset the trial judge's

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<sup>69</sup> See, e.g., *Commonwealth v. Long*, 647 N.E.2d 1162, 1165 (Mass. 1995) (holding that a judge committed reversible error in failing to strike a juror who indicated he "might not be able to decide the case fairly" because the defendant was Cambodian).

<sup>70</sup> TED A. DONNER & RICHARD K. GABRIEL, *JURY SELECTION: STRATEGY AND SCIENCE* § 33.1 (3d ed. 2000) (stating that gender bias may be a proper reason for excusing prospective jurors).

<sup>71</sup> See, e.g., *United States v. Torres*, 128 F.3d 38, 44-45 (2d Cir. 1997) (affirming a judge's decision to excuse for cause two jurors who said that, based on their prior experiences with drug dealers, they would not credit a drug dealer's testimony); *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir. 1976) (finding error where a judge refused to strike a juror who voiced a strong aversion to labor unions).

<sup>72</sup> See, e.g., *Moore v. State*, 525 So. 2d 870, 872-73 (Fla. 1988) (per curiam) (holding that the trial judge committed reversible error in declining to excuse for cause a juror who said his view of the insanity defense would probably prevent him from following the court's instruction); *State v. Papasavvas*, 751 A.2d 40, 56-58 (N.J. 2000) (holding that the trial court erred when it qualified two jurors who expressed reservations about the insanity defense); *State v. Leonard*, 248 S.E.2d 853, 856 (N.C. 1978) (holding that the trial court erred in refusing to strike for cause three prospective jurors who indicated they would not be willing to find the defendant not guilty by reason of insanity even if the defendant introduced evidence demonstrating she was insane at the time of the killing).

<sup>73</sup> *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) see also JONAKAIT, *supra* note 11, at 129 (stating that voir dire questioning "is constitutionally required in criminal cases in order to meet the Sixth Amendment requirement that jurors be 'impartial'").

<sup>74</sup> See *Skilling v. United States*, 130 S. Ct. 2896, 2917 (2010) ("No hard-and-fast formula dictates the necessary depth or breadth of voir dire."); *United States v. Wood*, 299 U.S. 123, 146 (1936) (stating that "the Constitution lays down no particular tests" for impartiality and that the "procedure is not chained to any ancient and artificial formula"); see also Gaba, *supra* note 28, at 534 (noting that courts have not established a strong foundation for when a trial judge can exercise discretion).

<sup>75</sup> *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991) (stating that trial courts have "wide discretion . . . in conducting voir dire in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias"); *Aldridge v. United States*, 283 U.S. 308, 310 (1931) (stating that the trial court has "broad discretion as to the questions to be asked" during voir dire); *Connors v. United States*, 158 U.S. 408, 413 (1895) (stating that a "great deal" of voir dire inquiry "must, of necessity, be left" to the trial court's discretion); see also FED. R. CRIM. P. 24(a)(2) (requiring the court to allow the parties' attorneys to ask or submit voir dire questions "that the court considers proper").

<sup>76</sup> *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (plurality opinion).

<sup>77</sup> 3 ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 24:63.

decisions.<sup>78</sup> The Supreme Court has, in fact, discouraged appellate courts from second-guessing trial judges' decisions about voir dire.<sup>79</sup> The Court reasoned that appellate courts, hearing or seeing nothing beyond the trial record, cannot appreciate the factors that influence the judge's appraisal, such as the potential juror's tone of voice, body language, or candor.<sup>80</sup>

### C. *Restrictions on Voir Dire Questioning*

Many trial judges, if not most, allow for more questioning than the constitutional minimum.<sup>81</sup> Courts may, however, use their vast discretion to cut off certain lines of inquiry.<sup>82</sup> In many instances courts have barred attempts to ask prospective jurors whether they would be willing to "follow the law"—that is, to apply a legal doctrine that bears on the case.<sup>83</sup> For instance, the vast majority of federal circuits permit judges to bypass voir dire questioning on the burden of proof and the presumption of innocence.<sup>84</sup>

Courts justify these prohibitions on several grounds.<sup>85</sup> A common claim is that questions tailored to elicit potential jurors' attitudes or opinions are unnecessary because the court almost always poses a general question along the lines of, "Is there any reason why you could not render a fair and impartial verdict based on the evidence in this case?"<sup>86</sup> This assumes

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<sup>78</sup> *United States v. Jeffery*, 631 F.3d 669, 673 (4th Cir.), *cert. denied*, 132 S. Ct. 187 (2011); *see also* Richard J. Crawford & Daniel W. Patterson, *Exploring and Expanding Voir Dire Boundaries: A Note to Judges and Trial Lawyers*, 20 AM. J. TRIAL ADVOC. 645, 649 (1997) (stating that "judges who impose voir dire parameters will almost always be affirmed in the appellate courts"); Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1663 n.17 (2000) (citing *Mu'Min*, 500 U.S. at 427; *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)); Anne M. Payne & Christine Cohoe, *Jury Selection and Voir Dire in Criminal Cases*, 76 AM. JUR. TRIALS 127, § 26 (2000) ("The exercise of discretion by trial judges under a system of court-conducted voir dire has been accorded considerable deference by appellate courts . . .").

<sup>79</sup> *Rosales-Lopez*, 451 U.S. at 188-89.

<sup>80</sup> *Skilling v. United States*, 130 S. Ct. 2896, 2918 (2010).

<sup>81</sup> JONAKAIT, *supra* note 11, at 129-30.

<sup>82</sup> JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION* 406 (2d ed. 1990).

<sup>83</sup> *See generally* Gold, *supra* note 43, at 163.

<sup>84</sup> *See United States v. Jeffery*, 631 F.3d 669, 674 (4th Cir.), *cert. denied*, 132 S. Ct. 187 (2011); *United States v. Beckman*, 222 F.3d 512, 518 & n.2 (8th Cir. 2000); *United States v. Sababu*, 891 F.2d 1308, 1325 (7th Cir. 1989); *United States v. Miller*, 758 F.2d 570, 573 (11th Cir. 1985); *United States v. Price*, 577 F.2d 1356, 1366 (9th Cir. 1978); *United States v. Wooton*, 518 F.2d 943, 946 (3d Cir. 1975); *United States v. Gillette*, 383 F.2d 843, 849 (2d Cir. 1967); *Grandsinger v. United States*, 332 F.2d 80, 82 (10th Cir. 1964) (*per curiam*). The Sixth Circuit is the exception to this rule. *See United States v. Hill*, 738 F.2d 152, 153 (6th Cir. 1984).

<sup>85</sup> *See* GUNTHER, *supra* note 31, at 52-53.

<sup>86</sup> *See Cordero v. United States*, 456 A.2d 837, 842-43 (D.C. 1983) (stating that some courts have chosen to address the possibility of juror bias against the insanity defense and other controversial subjects by "outlining the facts [of the case] and then asking prospective jurors, in effect: 'Would you be prejudiced against the defendant because of the specific controversial matter in this case?'""); *see, e.g.,*

that potential jurors who do in fact harbor an unshakable bias or preconception are likely to volunteer an answer to blanket, catch-all questions of the latter sort. Many scholars reject this assumption.<sup>87</sup> Experience shows that prospective jurors often need some prompting before they will answer a question in open court.<sup>88</sup> A would-be juror may fail to understand what it means to be impartial, or he may not appreciate the extent to which his bias would tend to affect his decisionmaking.<sup>89</sup> For that matter, he may not even realize he is prejudiced.<sup>90</sup>

Courts also contend that voir dire questioning on an area of law is unnecessary because jurors take an oath to uphold the law.<sup>91</sup> Trial court judges presume jurors will honor their oath and apply the law as instructed.<sup>92</sup> This

State v. Stanko, 658 S.E.2d 94, 97 (S.C. 2008) (holding that a refusal to ask potential jurors about the insanity defense was not error where the court asked “if anyone had bias or prejudice regarding the case” and “confirmed that each qualified juror would apply the law as charged, even if they disagreed with it, which necessarily includes the law of the insanity defense”).

<sup>87</sup> See Rosales-Lopez v. United States, 451 U.S. 182, 203 n.8 (1981) (Stevens, J., dissenting) (“It is equally clear that, although trial judges have broad discretion to formulate *voir dire* questions, the general question whether there was any reason ‘why you could not sit in this case as a fair and impartial juror’ is not an adequate substitute for a specific inquiry; if it were, trial judges might be well advised simply to ask that question and nothing else.” (citation omitted)); see also Bennett, *supra* note 67, at 160 (“As a district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answer that they think I want, and they almost uniformly answer that they can ‘be fair.’”); Gold, *supra* note 43, at 179 (stating that general inquiries “almost invariably invoke an affirmative response [and] fail to direct the venireman’s attention to the specific issues which are likely to be the subject of controversy” (citation omitted)).

<sup>88</sup> See Griffin v. State, 389 S.W.2d 900, 902 (Ark. 1965) (“All trial lawyers, and all students of the science of jurisprudence, know that *general* questions directed to the jury panel, or to individual jurors, by a judge who at the beginning of the trial has no special information regarding the issues, or the relationship of the parties, or the attending circumstances, sometimes fail to elicit answers which may cause even the most conscientious juror to reveal an existing prejudicial status.” (quoting Mo. Pac. Transp. Co. v. Johnson, 126 S.W.2d 931, 934 (Ark. 1939))).

<sup>89</sup> Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 844 (2012).

<sup>90</sup> See Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 143-45 (2010); Roberts, *supra* note 89, at 844. Even if a juror does realize he is prejudiced, he may be too uncomfortable to admit it in court. See United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977) (“[F]requently, jurors are reluctant to admit actual bias . . .”).

<sup>91</sup> See United States v. Beckman, 222 F.3d 512, 519 (8th Cir. 2000) (“[T]his court should and does assume that a jury, sworn by oath to follow the law, did, in fact, do so.”); United States v. Price, 577 F.2d 1356, 1366 (9th Cir. 1978) (“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.” (footnote omitted)); United States v. Wooton, 518 F.2d 943, 946 (3d Cir. 1975) (“[I]t is not necessary to inquire as to whether a juror will refuse to do that which he swears or affirms he will do.”).

<sup>92</sup> See, e.g., Padgett v. State, 307 S.E.2d 480, 481 (Ga. 1983) (noting that the trial judge, at the close of the trial, instructed the jury on the insanity defense and declared that the law forbids conviction if the jury finds the defendant was insane at the time of the offense).

assumption, however, does not square with evidence that jurors often fail to understand the court's instructions,<sup>93</sup> or that some jurors choose to ignore them.<sup>94</sup>

A frequent complaint in jurisdictions where the lawyers conduct the questioning is that lawyers try to exploit the opportunity to address the jury.<sup>95</sup> Studies have shown that, in jurisdictions where lawyers conduct voir dire questioning, the attorneys frequently try to impart their views to the panel.<sup>96</sup> Cunning attorneys may go even farther, wording their questions in a way that might induce jurors to commit themselves to a position before they have heard any evidence.<sup>97</sup>

Mostly, though, judges restrict voir dire questioning to conserve time.<sup>98</sup> It is not unprecedented for voir dire to stretch on for days.<sup>99</sup> Occasionally, questioning lasts longer than the trial itself.<sup>100</sup> Judges are under no obligation to let the examination drag on indefinitely,<sup>101</sup> though their discretion reaches its constitutional limit when restrictions on questioning impinge upon the defendant's constitutional right to a fair trial.<sup>102</sup>

<sup>93</sup> Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 163 (1989) (citing studies indicating that jurors fail to comprehend half of the instructions they receive); Gold, *supra* note 43, at 172.

<sup>94</sup> Gold, *supra* note 43, at 178 ("The assumption that jurors will follow the law appears to be based primarily on wishful thinking.").

<sup>95</sup> See *State v. Manley*, 255 A.2d 193, 202 (N.J. 1969); see also Michael R. Glover, Comment, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708, 714 (1982); Spears, *supra* note 52, at 1508.

<sup>96</sup> GUNTHER, *supra* note 31, at 50-51; JORDAN, *supra* note 66, § 3.08; Crawford & Patterson, *supra* note 78, at 647.

<sup>97</sup> See, e.g., *State v. Stanko*, 658 S.E.2d 94, 96 (S.C. 2008) (rejecting questions that "veer[] close to allowing the parties to stake out a jury").

<sup>98</sup> See Raymond Brown, *Peremptory Challenges as a Shield for the Pariah*, 31 AM. CRIM. L. REV. 1203, 1210 (1994) ("If you take too much time, especially in jury selection—"Because you know counsel, I could take the first twelve people and try this case"—then you have offended that sense of progress required by a public understandably frightened by crime."); see also *Ter Keurst v. Miami Elevator Co.*, 486 So. 2d 547, 550 (Fla. 1986) (Adkins, J., dissenting) ("Many trial judges are developing ingenious plans to limit the time of jury selection in order to expedite cases and increase the case count for an individual circuit.").

The Supreme Court expressed its displeasure with prolonged jury selections in *Fay v. New York*, saying, "[O]ne of the features which has tended to discredit jury trials is interminable examination and rejection of prospective jurors." MICHAEL SINGER, *JURY DUTY* 21 (2012) (quoting *Fay v. New York*, 332 U.S. 261, 271 (1947)).

<sup>99</sup> WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE* 164 (2002); JORDAN, *supra* note 66, § 3.08.

<sup>100</sup> JORDAN, *supra* note 66, § 3.08. Professor Albert W. Alschuler points to an extreme case, where the lawyers questioned more than one thousand potential jurors over a four-month stretch before they finally settled on twelve. Alschuler, *supra* note 93, at 157.

<sup>101</sup> VIDMAR & HANS, *supra* note 6, at 93. In felony-level trials, voir dire lasts an average of 3.8 hours in state courts and 3.6 hours in federal courts. *Id.* at 89.

<sup>102</sup> JORDAN, *supra* note 66, § 3.10.

## II. THE NEED FOR ADEQUATE VOIR DIRE QUESTIONING ON THE INSANITY DEFENSE

The ability to press jurors on their willingness to follow the law is critical when the law is controversial, and few laws are more controversial than the insanity defense.<sup>103</sup> Remarkably, the controversy over this defense has been simmering for no less than two centuries.<sup>104</sup>

### A. *Cause for Controversy*

It is easy to see why the insanity defense does not sit well with some people. A defendant who pleads not guilty by reason of insanity does not deny committing the proscribed act.<sup>105</sup> Yet, his defense is a total defense; if successful, it will excuse him from all punishment, as if he had done no wrong at all.<sup>106</sup>

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<sup>103</sup> CHARLES PATRICK EWING, *INSANITY: MURDER, MADNESS, AND THE LAW*, at xvii (2008) (“The insanity defense is probably the most controversial doctrine in criminal law.”); MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 3 (1994) [hereinafter PERLIN, *JURISPRUDENCE*] (“No aspect of the criminal justice system is more controversial than is the insanity defense. Nowhere else does the successful employment of a defense regularly bring about cries for its abolition . . . .”); Borum & Fulero, *supra* note 40, at 119 (“The insanity defense is one of the most controversial areas in the criminal law, and is plagued by many myths and public misperceptions.”); Homer D. Crotty, *The History of Insanity as a Defence in English Criminal Law*, 12 CALIF. L. REV. 105, 105 (1924).

<sup>104</sup> Mickenberg, *supra* note 33, at 943; Scott O. Lilienfeld & Hal Arkowitz, *The Insanity Verdict on Trial*, SCI. AM. MIND (Jan. 10, 2011), available at <http://www.scientificamerican.com/article.cfm?the-insanity-verdict-on-trial> (“[T]he idea of offenders being deemed legally innocent is hard for the public to swallow.”). Critics of the “wild beast” test of insanity, propounded in 1724, claimed it was “inaccurate and misleading because it focused on perceptions and was too demanding in its insistence on total mental incapacity.” NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW* 279 (1995).

<sup>105</sup> See WAYNE R. LAFAVE, *CRIMINAL LAW* § 7.1(a) (4th ed. 2003). Andrea Yates, for instance, confessed to drowning her five children in a bathtub. Nevertheless, because a jury eventually found her not guilty by reason of insanity, she sits today in a secure psychiatric facility, rather than in prison. EWING, *supra* note 103, at 145-59.

<sup>106</sup> See 21 AM. JUR. 2D *Criminal Law* § 45 (2008).

The test for insanity varies from one jurisdiction to another. The majority of states and the federal government follow some variation of the *M’Naghten* rule. *Clark v. Arizona*, 548 U.S. 735, 750-51 (2006). This test requires a defendant to prove that he was suffering from a mental disease or defect at the time of the offense. The defendant must also prove he did not know that his actions would have consequences, or he did not know his actions were legally or morally wrong. LAFAVE, *supra* note 105, § 7.2(b)(3)-(4).

A few jurisdictions supplement the *M’Naghten* rule with the “irresistible impulse” test. *Id.* § 7.3. This test excuses criminal conduct when a fact-finder concludes that a mental disease rendered the defendant “powerless” to control his actions. 21 AM. JUR. 2D *Criminal Law* § 54 (2008); see EWING, *supra* note 103, at xviii (describing a defendant suffering from an irresistible impulse as one who is “unable to adhere to the right even though he knew the act was wrong”).

The doctrine evolved from one of the foundational precepts of criminal law: before there can be punishment, a person must deserve it.<sup>107</sup> An accused lacking a blameworthy state of mind is not culpable and therefore ought not to face criminal sanctions.<sup>108</sup> As a federal judge once put it, “To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow [it.]”<sup>109</sup>

These notions of desert were anything but new when the doctrine of insanity emerged in its modern form in the nineteenth century.<sup>110</sup> Still, judg-

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Roughly one quarter of the states shun *M’Naghten* altogether, offering instead a version of the American Law Institute’s Model Penal Code (“MPC”) insanity test. *Clark*, 548 U.S. at 751. Under this standard, a defendant is not criminally liable for his conduct if “at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” MODEL PENAL CODE § 4.01 (1985).

A few states combine elements of the *M’Naghten* and MPC tests. *See Clark*, 548 U.S. at 751. One state, New Hampshire, distinguishes itself as the lone adherent of the *Durham* test. *Id.* at 751; *see also* Cameron Kittle, *Tough Road for Insanity Defense in NH*, NASHUA TELEGRAPH (Mar. 6, 2011), <http://www.nashuatelegraph.com/news/911350-196/tough-road-for-insanity-defense-in-nh.html>. This test challenges the jury to find, first, whether the defendant had a mental illness or defect at the time of the offense, and, second, whether the defendant’s conduct was a “product” of that illness. *State v. Plante*, 594 A.2d 1279, 1283 (N.H. 1991).

In recent decades, many state legislatures have propounded an alternative to the traditional verdict of not guilty by reason of insanity, enabling juries to find a defendant “guilty but mentally ill.” Yuval Melamed, *Mentally Ill Persons Who Commit Crimes: Punishment or Treatment?*, 38 J. AM. ACAD. PSYCHIATRY L., 100, 101 (2010). Typically, a defendant found guilty but mentally ill receives medical and psychiatric treatment until his mental health improves, at which point he must serve out the remainder of his sentence in prison. *Clark*, 548 U.S. at 752 n.19.

<sup>107</sup> ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 9-10 (1967); DONALD H.J. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES* 3 (1983); DAVID A. JONES, *CRIME AND CRIMINAL RESPONSIBILITY* 43 (1978); 1 ROBERT W. RIEBER & HAROLD J. VETTER, *THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE* 45 (1978); *see also* MODEL PENAL CODE § 4.01 cmt. at 169 n.12 (1985) (“[A] person who lacks substantial capacity to appreciate the forbidden nature of his conduct or to conform to the law’s requirements cannot be regarded as morally blameworthy in any significant sense.”).

<sup>108</sup> Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 800-01 (1985).

<sup>109</sup> *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945); *see also* Francis A. Allen, *The Rule of the American Law Institute’s Model Penal Code*, 45 MARQ. L. REV. 494, 500 (1962) (“Clearly, it is neither just nor expedient to subject persons to punishment and condemnation who, because of mental disorder, are incapable of responding to the threats and commands of the law.”).

<sup>110</sup> *See* Michael S. Moore, *Legal Conceptions of Mental Illness*, in *CONTROVERSIES IN CRIMINAL LAW* 125, 127 (Michael J. Gorr & Sterling Harwood eds., 1992). The principle that insanity excuses wrongdoing has roots in ancient Hebrew law. Anthony Platt & Bernard L. Diamond, *The Origins of the “Right and Wrong” Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227, 1258 (1966). *See generally* Samuel S. Kotek, *The Image of the Insane in Ancient Jewish Lore*, in *PSYCHIATRY AND LAW* 77, 77 (Amihay Levy et al.

es of that era were reluctant to embrace the defense.<sup>111</sup> Some refused to accept that insanity was a disease.<sup>112</sup> In an 1816 case, for example, a woman charged with murder pleaded insanity, claiming she was possessed by the devil.<sup>113</sup> The judge warned the jury to scrutinize the defense with “no ordinary degree of caution.”<sup>114</sup> “Insanity,” the judge said, “is a defence often resorted to, and in most cases, when every other ground has failed.”<sup>115</sup> The jury found the defendant guilty, and the judge ordered her hanged.<sup>116</sup>

Observers commonly alleged that defendants would fake insanity to escape punishment.<sup>117</sup> In 1873, a prominent New York attorney declared, “Many a murder is now committed upon a cold-blooded calculation of the chances in favor of escaping the just consequences, through the convenient and elastic defence of insanity.”<sup>118</sup> The defense, he claimed, was so often abused that “people are beginning to be alarmed lest there be not sane persons enough left to try the criminals.”<sup>119</sup>

A common concern was that jurors would have difficulty distinguishing feigned insanity from the real thing.<sup>120</sup> The task would only get harder,

eds., 2002) (noting that legal insanity was discussed in the second century). In Talmudic times, deaf mutes, children under the age of 12 or 13, and the insane were exempt from liability. Kottek, *supra*, at 82. Hebrew law declared that idiots and lunatics were not criminally responsible because they could not distinguish good from evil. THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE 3 (1985). Similar principles prevailed under the Lex Cornelia in Sulla’s Rome (c. 100 B.C.), which did not hold the insane accountable for homicide. Platt & Diamond, *supra*, at 1229-30.

<sup>111</sup> ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 49 (Da Capo Press 1983) (1838) (“The doctrine of moral insanity has been as yet unfavorably received by judicial authorities, not certainly for want of sufficient facts to support it, but probably from that common tendency of the mind, to resist innovations upon old and generally received views.”).

<sup>112</sup> Crotty, *supra* note 103, at 105-06 (quoting an English judge as saying, in 1862, “The introduction of medical opinions and medical theories into this subject has proceeded upon the vicious principle of considering insanity as a disease.”).

<sup>113</sup> Platt & Diamond, *supra* note 110, at 1252.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* Years later, in a closing argument for a defendant pleading insanity, the prominent defense attorney and future secretary of state William H. Seward lamented the disrepute of the insanity defense. “We labor, not only under these difficulties, but under the further embarrassment that the plea of Insanity is universally suspected. It is the last subterfuge of the guilty, and so is too often abused.” WILLIAM H. SEWARD, ARGUMENT OF WILLIAM H. SEWARD, IN DEFENCE OF WILLIAM FREEMAN 9 (1846).

<sup>116</sup> Platt & Diamond, *supra* note 110, at 1252.

<sup>117</sup> RAY, *supra* note 111, at 338. In an 1884 case involving the insanity defense, a juror professed during voir dire examination that he was averse to “feigned defences of that character.” *Butler v. State*, 97 Ind. 378, 388 (1884). A few years later, a Pennsylvania juror declared, “I believe that insanity is used as a means of securing acquittal of the party where there is really no insanity; that it is used where there is no ground for it; that when a man has no other plea, and an attorney has no other plea, he puts in the plea of insanity . . . as his last hope.” *Hall v. Commonwealth*, 12 A. 163, 164 (Pa. 1888).

<sup>118</sup> HENRY L. CLINTON, DEFENSE OF INSANITY IN CRIMINAL CASES: ARGUMENT OF HENRY L. CLINTON 6 (1873).

<sup>119</sup> *Id.* at 3.

<sup>120</sup> RAY, *supra* note 111, at 338.

it was said, as defense attorneys increasingly relied on the “expert” testimony of psychiatrists and psychologists, whose ranks were purportedly rife with frauds and charlatans.<sup>121</sup> Some claimed unscrupulous mental health professionals routinely propounded unconfirmed theories in an attempt to whitewash the defendant’s conduct.<sup>122</sup> The role of these experts, whose services were beyond the means of poor defendants, contributed to a view that insanity was a rich man’s defense.<sup>123</sup>

Other critics claimed that a defendant accused of a heinous or gruesome crime would find a ready refuge in the insanity defense because jurors would tend to assume he must have been insane to do what he did.<sup>124</sup> The syndicated newspaper columnist Walter Lippmann once argued that crafty lawyers, like the one who told the jury his client was “as crazy as a bedbug,” had succeeded in deceiving the public.<sup>125</sup> Lippmann wrote:

There have been instances in recent years where a defendant who was plainly guilty of murder has escaped the death penalty by convincing the jury that he committed such an atrocious and revolting murder that no sane man could have done it. Ordinary jurors as well as a large part of the newspaper reading public are rather easily influenced by the argument that such a horrible murder could not have been committed by any one in his right mind. They cannot imagine themselves committing it. They cannot think of any one they know who might have committed it. So they are bowled over by the lawyers and the psychiatrists who tell them that the details of the crime are so gruesome that the defendant cannot possibly be guilty under the law . . . .<sup>126</sup>

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<sup>121</sup> ALBERT S. OSBORN, *THE MIND OF THE JUROR AS JUDGE OF THE FACTS, OR, THE LAYMAN’S VIEW OF THE LAW* 194 (Fred B. Rothman & Co. 1982) (1937); *see also* HARLOW M. HUCKABEE, *LAWYERS, PSYCHIATRISTS AND CRIMINAL LAW* 100-01 (1980) (describing common attacks on psychiatrists by lawyers and judges).

<sup>122</sup> OSBORN, *supra* note 121, at 194; *see also* JOHN STARRETT HUGHES, *IN THE LAW’S DARKNESS: ISAAC RAY AND THE MEDICAL JURISPRUDENCE OF INSANITY IN NINETEENTH-CENTURY AMERICA* 117-19, 122 (1986) (citing the commonness of contradictory scientific testimony and its tendency to confuse jurors).

<sup>123</sup> *See* OSBORN, *supra* note 121, at 194; *see also* David L. Bazelon, *The Dilemma of Criminal Responsibility*, 72 KY. L.J. 263, 273-274 (1983); Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Cases?*, 42 AKRON L. REV. 885, 902 (2009).

<sup>124</sup> There is evidence that some modern-day jurors make precisely this assumption. *See* RALPH ADAM FINE, *ESCAPE OF THE GUILTY* 209 (1986) (“There is a natural tendency to think, ‘He’s got to be crazy,’ especially if the crime was particularly heinous or grisly.”); Wessely, *supra* note 33, at 1563 (“The inexplicable can only be explained as an act of insanity, which by definition cannot be rationally explained.”). For instance, in a 1995 case in Massachusetts, five prospective jurors declared during voir dire that, in their view, a person would have to be insane to kill his wife and two children, as the defendant did. *Commonwealth v. Seguin*, 656 N.E.2d 1229, 1232 n.4 (Mass. 1995).

<sup>125</sup> Walter Lippmann, *Crazy as a Bedbug*, *CORPUS CHRISTI TIMES*, July 7, 1937, at 8.

<sup>126</sup> *Id.*



Research shows the old myths about the insanity defense persist to this day.<sup>127</sup> A 2001 study found that nearly 80 percent of jurors believed that defendants frequently abuse the insanity defense, and that defendants who plead it successfully pose a threat to public safety.<sup>128</sup> The results were consistent with surveys from the 1980s showing that an overwhelming majority of people maintain the defense is a loophole allowing dangerous criminals to return to society unpunished.<sup>129</sup>

Some of the resistance is ideological.<sup>130</sup> Professor Michael L. Perlin has said that, to a person with an authoritarian world view, the insanity defense is a “worst-case disaster fantasy.”<sup>131</sup> People who favor swift and certain punishment of lawbreakers are likely to view the defense as rewarding deviants for breaking the law.<sup>132</sup> This may not be a minority view. Roughly half of the respondents in a 1986 poll advocated abolishing the insanity defense.<sup>133</sup> Slightly more than half said “the insane should be punished just like everyone else when they break the law.”<sup>134</sup>

Would-be jurors who do not reject the insanity defense on ideological grounds might nevertheless be inclined to suspect a defendant of malingering.<sup>135</sup> The belief that defendants frequently feign insanity is, according to Professor Perlin, “perhaps the most compelling and dominating myth in all of criminal procedure.”<sup>136</sup> The truth, he says, is that there is hardly any evidence that malingering has ever posed a significant problem.<sup>137</sup> Perlin points

<sup>127</sup> See Michael L. Perlin, *Mental Illness, Crime, and the Culture of Punishment*, in 2 THE INSANITY DEFENSE: THE AMERICAN DEVELOPMENTS: THE ROLE OF MENTAL ILLNESS IN CRIMINAL TRIALS 125, 129-30 (Jane Campbell Moriaty ed., 2001); Wallace A. MacBain, *The Insanity Defense: Conceptual Confusion and the Erosion of Fairness*, 67 MARQ. L. REV. 1, 7-9 (1983).

<sup>128</sup> Skeem & Golding, *supra* note 7, at 604-05.

<sup>129</sup> Hans, *supra* note 6, at 403 (finding that 89.2 percent of respondents “agree[d] that the insanity defense is a loophole allowing too many guilty people to go free,” while 88.7 percent said it “allows dangerous people out on the streets”).

<sup>130</sup> Indeed, some members of the public disapprove of the very notion that a mental state should absolve a wrongdoer of criminal liability. See, e.g., *Hanna v. Price*, 245 F. App’x 538, 544-45 (6th Cir. 2007) (finding error where a federal prosecutor told the jury during his closing argument, “I don’t think we can allow fixations of the mind to allow anyone to destroy another person and to be excused by reason of saying they’re insane”).

<sup>131</sup> Perlin, *Borderline*, *supra* note 33, at 1400.

<sup>132</sup> *Id.*

<sup>133</sup> Hans, *supra* note 6, at 400.

<sup>134</sup> *Id.* at 402.

<sup>135</sup> FRADELLA, *supra* note 6, at 16; PERLIN, JURISPRUDENCE, *supra* note 103, at 4. Here, the media perpetuate a misimpression. Reporters covering a trial often recount at length the grisly details of the crime but provide only brief summaries of the expert testimony describing the defendant’s mental state. These accounts can leave the impression that defendants are attempting to exploit the insanity defense to evade responsibility. VIDMAR & HANS, *supra* note 6, at 219.

<sup>136</sup> Perlin, *Borderline*, *supra* note 33, at 1380.

<sup>137</sup> *Id.* at 1409.

to an eight-year study finding that more than 80 percent of insanity acquittees were indeed schizophrenic.<sup>138</sup>

Likewise, the commonly held belief that a successful insanity plea leads to the defendant's prompt release is unfounded.<sup>139</sup> In most states, the immediate consequence of a not-guilty-by-reason-of-insanity verdict is admission to a psychiatric hospital to determine whether the acquittee is continuing to suffer from mental illness and poses a danger to the community.<sup>140</sup> In the vast majority of cases, the evaluation results in commitment.<sup>141</sup> An acquittee may remain committed longer than he or she would have spent in prison if convicted, though it is not clear just how often this happens.<sup>142</sup> Some researchers have found that the average insanity acquittee remains confined for nearly twice as long as the typical defendant following a conviction on equivalent charges.<sup>143</sup> Others have found the confinements tend to be of equal length, while still others concluded that insanity acquittees spend less time in confinement than convicts do.<sup>144</sup>

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<sup>138</sup> PERLIN, JURISPRUDENCE, *supra* note 103, at 111.

<sup>139</sup> FRADELLA, *supra* note 6, at 42; VIDMAR & HANS, *supra* note 6, at 215-16; VITELLO & HICKEY, *supra* note 6, at 97-98. *Contra* Grant H. Morris et al., *Whither Thou Goest? An Inquiry into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 SAN DIEGO L. REV. 1058, 1068 (1977) (finding that "most jurors who have not been instructed on the [not-guilty-by-reason-of-insanity] consequences assume correctly that the [not-guilty-by-reason-of-insanity] verdict results in mental institution confinement"). Courts could tailor jury instructions to disabuse jurors of any such misimpressions about the consequences of a successful insanity plea. Yet, many courts do not. Joseph P. Liu, Note, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 COLUM. L. REV. 1223, 1227-29 (1993).

<sup>140</sup> See *Foucha v. Louisiana*, 504 U.S. 71, 99 (1992) (Kennedy, J., dissenting); Borum & Fulero, *supra* note 40, at 119-21; Robert D. Miller, *Automatic Commitment of Insanity Acquittes: Keeping Up With the Jones?*, 30 J. PSYCHIATRY & L. 59, 59-60 (2002); Rebecca V. Stredny et al., *Evaluator Agreement in Placement Recommendations for Insanity Acquittes*, 30 BEHAV. SCI. & L. 297, 297 (2012); Stephen A. Young et al., *Commitment Versus Confinement: Therapeutic Passes in the Management of Insanity Acquittes*, 30 J. AM. ACAD. PSYCHIATRY & L. 563, 563 (2002); John B. Scherling, Note, *Automatic and Indefinite Commitment of Insanity Acquittes: A Procedural Straitjacket*, 37 VAND. L. REV. 1233, 1234 n.8 (1984).

<sup>141</sup> Miller, *supra* note 140, at 59-60; see also Larry Cunningham, *New York's Post-Verdict Scheme for the Treatment of Insanity Acquittes: Balancing Public Safety with Rights of the Mentally Ill*, 25 J. C.R. & ECON. DEV. 81, 85 (2010) (reporting that, in New York, post-acquittal evaluations usually find the acquittee has a dangerous mental disorder, prompting an initial six-month commitment order followed by further evaluations).

<sup>142</sup> Eric Silver et al., *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 LAW & HUM. BEHAV. 63, 65 (1994).

<sup>143</sup> Borum & Fulero, *supra* note 40, at 120, 121 n.7.

<sup>144</sup> Silver et al., *supra* note 142, at 65; see also Barbara E. McDermott & John W. Thompson Jr., *The Review Panel Process: An Algorithm for the Conditional Release of Insanity Acquittes*, 29 INT'L J.L. & PSYCHIATRY 101, 102 (2006) (citing research showing that some insanity acquittees serve less time than defendants convicted on similar charges, while others serve more time).

It is clear, though, that the public dramatically overestimates the frequency of insanity pleas.<sup>145</sup> Insanity cases are especially likely to generate media coverage, which can feed the perception that the defense is more common than it actually is.<sup>146</sup> In reality, few defendants plead not-guilty-by-reason-of-insanity.<sup>147</sup> Only about 1 percent of felony defendants invoke the defense.<sup>148</sup> Those who do are taking a considerable risk. According to one study, a defendant who pleads insanity and loses is likely to spend more time in prison than a convict who did not raise the plea.<sup>149</sup>

The public also overestimates the proportion of insanity pleas that prove successful.<sup>150</sup> The truth is that the defense fails far more often than not.<sup>151</sup> A year-long study of insanity pleas in Baltimore found the defense resulted in a finding of not guilty by reason of insanity in only 10 percent of cases where it was invoked.<sup>152</sup> Notably, the success rate for defendants pleading insanity in murder cases is no better than it is for defendants charged with lesser crimes.<sup>153</sup>

#### B. *How Attitudes Toward the Insanity Defense Affect Case Outcomes*

The public's misgivings about the insanity defense are not harmless. Research indicates they have the power to sway jury verdicts.<sup>154</sup> Studies have shown a strong correlation between jurors' attitudes toward the insanity defense and their likelihood to convict.<sup>155</sup> One study involving mock ju-

<sup>145</sup> Perlin, *Borderline*, *supra* note 33, at 1395.

<sup>146</sup> Borum & Fulero, *supra* note 40, at 120.

<sup>147</sup> Hans, *supra* note 6, at 393 (“[T]he enormous controversy and debate about the insanity plea stand in marked contrast to the relatively few defendants who employ it.”). Most insanity acquittals occur by way of plea agreement. Skeem & Golding, *supra* note 7, at 605.

<sup>148</sup> Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L., Dec. 1991, at 331, 334; *see also* Borum & Fulero, *supra* note 40, at 120 (“[O]n average the insanity defense is raised in less than 1% of all felony cases . . .”).

<sup>149</sup> Silver et al., *supra* note 142, at 69. The increase in detention time was 22 percent. *Id.*

<sup>150</sup> *See* Hans, *supra* note 6, at 406 (“Respondents also believe that an average of 36.33 of every 100 defendants who employ the insanity defense are successful.”); *see also* Lincoln Caplan, *The Insanity Defense, Post-Hinckley*, N.Y. TIMES, Jan. 18, 2011, at A24 (“A study of eight states from 1976 to 1987 documented that the defense was employed in less than 1 percent of criminal cases and only a quarter of those defendants were acquitted by reason of insanity.”).

<sup>151</sup> Callahan et al., *supra* note 148, at 334-35 (finding that juries acquitted roughly one in four defendants pleading not guilty by reason of insanity).

<sup>152</sup> Jeffrey S. Janofsky et al., *Defendants Pleading Insanity: An Analysis of Outcome*, 17 BULL. AM. ACAD. PSYCHIATRY & L., June 1989, at 203, 210.

<sup>153</sup> Borum & Fulero, *supra* note 40, at 120.

<sup>154</sup> Skeem & Golding, *supra* note 7, at 562.

<sup>155</sup> *See* Brian L. Cutler et al., *Jury Selection in Insanity Defense Cases*, 26 J. RES. PERSONALITY 165, 180 (1992); Skeem et al., *supra* note 6, at 625.

rors suggested that these attitudes can influence the outcome of a case even more than altering the fact pattern does.<sup>156</sup>

“Jurors,” it is often said, “are not blank slates.”<sup>157</sup> They tend to apply their own “norms and values” to a case.<sup>158</sup> In insanity cases, jurors rely on preconceived notions of how an insane person would likely behave, whether or not those notions comport with legal standards.<sup>159</sup>

Jurors also base their decisions on the severity of the charge.<sup>160</sup> A 1995 study found that potential jurors were significantly less likely to find a defendant not guilty by reason of insanity when the charge was murder than when the charge was shoplifting, even when the defendants displayed identical symptoms.<sup>161</sup> The presumed consequences of the verdict are likewise important. Research shows jurors strongly consider the likelihood that an acquittal would allow the defendant to return to the streets.<sup>162</sup> The mistaken belief that insanity acquittees are promptly released after trial can pressure jurors to vote to convict.<sup>163</sup>

The influence of juror beliefs remains strong even when a judge explicitly instructs the jurors to lay aside their preconceptions and follow the law.<sup>164</sup> At times, the court’s instructions to the jury can themselves be problematic.<sup>165</sup> “Research tends to show that jurors comprehend only about 30

<sup>156</sup> Skeem et al., *supra* note 6, at 625.

<sup>157</sup> Skeem & Golding, *supra* note 7 at 561; *see also* JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 22 (1987) (“In practice, however, the existence of prejudicial attitudes and opinions in the community, often the result of pretrial publicity, may prevent a defendant from obtaining a fair and impartial jury.”); Gaba, *supra* note 28, at 527-28 (“A completely impartial jury is, however, impossible.”).

The very idea that jurors ought to be ignorant inspired a well-known quip from Mark Twain: “We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don’t know anything and can’t read.” JONAKAIT, *supra* note 11, at xx (citing FRED R. SHAPIRO, *THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* 222 (1993)). A similar concept formed the basis of a joke that circulated during the O.J. Simpson trial: “Knock knock . . . Who’s there? . . . O.J. . . . O.J. who? . . . Congratulations, you’re on the jury!” Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995).

<sup>158</sup> VIDMAR & HANS, *supra* note 6, at 216.

<sup>159</sup> *See* SUSAN ESTRICH, *GETTING AWAY WITH MURDER* 30 (1998) (reporting that mock studies have found jury instructions on a jurisdiction’s insanity test make almost no difference in conviction rates); MAEDER, *supra* note 110, at 106-10; Skeem et al., *supra* note 6, at 625.

<sup>160</sup> Liu, *supra* note 139, at 1241-42.

<sup>161</sup> Daniel S. Bailis et al., *Community Standards of Criminal Liability and the Insanity Defense*, 19 LAW & HUM. BEHAV. 425, 440 (1995).

<sup>162</sup> Liu, *supra* note 139, at 1241-42.

<sup>163</sup> *Id.* at 1242.

<sup>164</sup> Skeem & Golding, *supra* note 7, at 562.

<sup>165</sup> MAEDER, *supra* note 110, at 103-05.

[percent] of jury instructions on the insanity defense.”<sup>166</sup> Even carefully worded jury instructions garner a comprehension level of just 50 percent.<sup>167</sup>

### III. LOWER COURTS’ SPLIT ON DEFENDANTS’ RIGHT OF INQUIRY

Despite everything we know about the public’s discomfort with the insanity defense, arguments for a per se right to question potential jurors about the defense have met with mixed results at the appellate level. At least seven appellate courts, including two federal courts, have upheld refusals to permit questioning on potential jurors’ attitudes toward the defense or their willingness to consider the defense.<sup>168</sup> Another nine have ruled oth-

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<sup>166</sup> Borum & Fulero, *supra* note 40, at 126; *see also* Brooke Butler, *NGRI Revisited: Venirepersons’ Attitudes Toward the Insanity Defense*, 36 J. APPLIED SOC. PSYCHOL. 1833, 1834 (2006) (“[R]esearch has consistently suggested that jurors have a great deal of difficulty comprehending jury instructions, legal standards of insanity notwithstanding.”).

<sup>167</sup> Borum & Fulero, *supra* note 40, at 126.

<sup>168</sup> *See* United States v. Cassidy, 571 F.2d 534, 538 (10th Cir. 1978) (holding that the failure to ask voir dire questions about the insanity defense was not an abuse of discretion); United States v. Cockerham, 476 F.2d 542, 543-44 (D.C. Cir. 1973) (per curiam) (holding that the court was not obligated to ask proffered questions about the insanity defense during an otherwise lengthy voir dire “[a]bsent any indication in the record that would negate the presumption of prospective jurors’ impartiality toward the defense”); Padgett v. State, 307 S.E.2d 480, 481 (Ga. 1983) (finding no abuse of discretion where a judge refused the defendants’ “technical, legal questions” on the insanity defense but asked the jurors whether they were “willing to follow the instructions of the court, even if [they] did not personally agree with the law” (quotation omitted)); State v. Moore, 585 A.2d 864, 877 (N.J. 1991) (criticizing but affirming a trial court’s decision denying the defense’s request to ask potential jurors about their attitudes toward the insanity defense); State v. Kelly, 285 A.2d 571, 578-79 (N.J. Super. Ct. App. Div. 1972) (“[Courts] would not be well served by a rule which mandates inquiries of prospective jurors concerning their attitudes as to substantive defenses, particularly insanity . . .”); State v. Avery, 337 S.E.2d 786, 796-97 (N.C. 1985) (stating that “[i]t was within the trial court’s discretion to determine” that questions about the insanity defense “were improper in that they were hypothetical and tended to ‘stake out’ the jurors and cause them to pledge themselves to a future course of action”); State v. Vinson, 215 S.E.2d 60, 69 (N.C. 1975) (holding that a trial court’s refusal to permit voir dire questioning on the insanity defense was a proper exercise of discretion), *vacated in part on other grounds*, 428 U.S. 902 (1976); Commonwealth v. Biebighauser, 300 A.2d 70, 75 (Pa. 1973) (holding that a judge’s refusal to permit questions about the insanity defense was not “a palpable abuse of discretion”); Commonwealth v. Trill, 543 A.2d 1106, 1112-13 (Pa. Super. Ct. 1988) (“It is now settled law in Pennsylvania that a trial court’s refusal to permit the accused to question prospective jurors on voir dire about the juror’s views of the insanity defense or their potential prejudice against the defense will not constitute palpable error warranting a reversal.”); State v. Stanko, 658 S.E.2d 94, 96-97 (S.C. 2008) (“The Constitution, after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury.”). *But see* State v. Harris, 662 A.2d 333, 341 (N.J. 1995) (stating that, in a capital case, a trial court must “permit a full opportunity to ask prospective jurors about their attitudes toward insanity and mental-health defenses”).

erwise, holding that defendants must have the opportunity to make at least a minimal inquiry into jurors' willingness to apply the defense.<sup>169</sup>

#### A. *Jurisdictions Refusing to Grant a Right of Inquiry*

Courts have not uniformly accepted the proposition that insanity is a controversial defense.<sup>170</sup> The Supreme Court of South Carolina, in fact, flatly rejected this claim when Stephen Stanko asserted it in 2008.<sup>171</sup> Other appellate courts have affirmed a trial judge's voir dire restrictions without any mention of public opinion toward the insanity defense.<sup>172</sup>

Two courts, the District of Columbia Circuit Court of Appeals and the Supreme Court of New Jersey, recognized the public's reservations about the insanity defense while still declining to hold that trial courts must permit voir dire questioning on the subject.<sup>173</sup> The New Jersey court has in fact repeatedly observed that public discomfort with the insanity defense threatens a defendant's right to a fair trial.<sup>174</sup> Nevertheless, in *State v. Moore*,<sup>175</sup> the court deemed the trial court's voir dire adequate despite the judge's

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<sup>169</sup> See *United States v. Allsup*, 566 F.2d 68, 70 (9th Cir. 1977) ("Allsup had the right to have prospective jurors questioned about their ability objectively and fairly to evaluate the evidence of insanity or lack of mental capacity."); *Fauna v. State*, 582 S.W.2d 18, 19 (Ark. 1979) ("Here we are of the view that the jurors' assurances to the court that they would follow the law did not focus their attention or attitude upon the issue of insanity sufficiently . . ."); *Washington v. State*, 371 So. 2d 1108, 1109 (Fla. Dist. Ct. App. 1979) ("[T]o prohibit a voir dire examination of prospective jurors concerning [the insanity] defense is error."); *People v. Pasch*, 604 N.E.2d 294, 306 (Ill. 1992) ("When raising an insanity defense, the defendant has the right to have potential jurors asked whether they have any feelings concerning this particular defense." (citing *People v. Stack*, 493 N.E.2d 339, 344-45 (Ill. 1986))); *Stack*, 493 N.E.2d at 344-45; *Commonwealth v. Seguin*, 656 N.E.2d 1229, 1232 (Mass. 1995) ("The jurors' answers to the judge's questions concerning the insanity defense demonstrate the wisdom of making such an inquiry in a case in which the defendant may assert a lack of criminal responsibility."); *State v. Olson*, 480 P.2d 822, 825 (Mont. 1971) ("How could the defendant be assured of an impartial jury without questioning each juror to see if he could understand [the defense of insanity] and accept it?"); *State v. Wallace*, 131 P.2d 222, 240-41 (Or. 1942) ("[The defense] had not examined the jurors concerning their attitude on the insanity defense, which was a clear right of both parties if insanity was to be in issue."); *State v. Sanders*, 242 S.E.2d 554, 558 (W. Va. 1978) ("Upon request, the court in this case should have asked the jurors in voir dire whether they have a bias or prejudice against psychiatrists or against persons suspected of having a mental disease or defect."), *overruled on other grounds by State v. Honaker*, 454 S.E.2d 96 (W. Va. 1994).

<sup>170</sup> See, e.g., *Stanko*, 658 S.E.2d at 96.

<sup>171</sup> *Id.*

<sup>172</sup> See *Cassidy*, 571 F.2d at 538; *Padgett*, 307 S.E.2d at 481; *Avery*, 337 S.E.2d at 796-97.

<sup>173</sup> *Cockerham*, 476 F.2d at 544 n.2; *Moore*, 585 A.2d at 877. *But see Harris*, 662 A.2d at 341 (citing *Moore* for the proposition that, in a capital case, a trial court must "permit a full opportunity to ask prospective jurors about their attitudes toward insanity and mental-health defenses").

<sup>174</sup> See *State v. Papasavvas*, 751 A.2d 40, 56-57 (N.J. 2000); *Harris*, 662 A.2d at 341; *Moore*, 585 A.2d at 881; *In re Commitment of Edward S.*, 570 A.2d 917, 928 n.13 (N.J. 1990).

<sup>175</sup> 585 A.2d 864 (N.J. 1991).

refusal to permit questioning on prospective jurors' attitudes toward insanity and mental-health defenses.<sup>176</sup>

Decisions denying defendants a right of inquiry typically assert that trial judges have considerable discretion over the scope and length of the voir dire process.<sup>177</sup> The decisions affirm several reasons for cutting off questioning. For instance, a judge may decline to permit a question if she believes it would only confuse the venire.<sup>178</sup> Judges are also wary of lawyers' attempts to exploit the opportunity to address the venire. Lawyers, they note, have a history of slipping arguments into their voir dire questions, or "staking out" a juror by prompting him to commit himself to a position before the trial has even started.<sup>179</sup>

A New Jersey appellate court asserted there is no reason to presume prospective jurors will be knowledgeable about the insanity defense, so it would be unfruitful to pose questions about it during voir dire.<sup>180</sup> A rule requiring a voir dire inquiry on the insanity defense would, according to the court, necessitate a pre-trial explication of the jurisdiction's test for insanity.<sup>181</sup> The court was unwilling to impose such a requirement.<sup>182</sup>

In Stanko's case, the Supreme Court of South Carolina reasoned that a general inquiry on juror prejudices can make specific questioning on the insanity defense unnecessary.<sup>183</sup> The court found it sufficient to ask the veniremen whether anyone among them has a bias or prejudice related to the case and to dismiss prospective jurors who admit they could not be fair.<sup>184</sup>

### B. *Jurisdictions Granting a Right of Inquiry*

In some jurisdictions, the growing recognition that members of the public are often unreceptive to psychiatric testimony and to the insanity defense has prompted courts to rethink the rules of voir dire.<sup>185</sup> This was the

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<sup>176</sup> *Id.* at 877-78. The Supreme Court of New Jersey did, however, recommend courts permit voir dire questioning on the insanity defense in future capital cases. *Id.* at 881-82.

<sup>177</sup> *See, e.g.*, *State v. Vinson*, 215 S.E.2d 60, 69 (N.C. 1975), *vacated in part on other grounds*, 428 U.S. 902 (1976); *Commonwealth v. Biebighauser*, 300 A.2d 70, 75 (Pa. 1973); *State v. Stanko*, 658 S.E.2d 94, 96 (S.C. 2008). As always, though, the trial court's "discretion is 'subject to the essential demands of fairness.'" *United States v. Jackson*, 542 F.2d 403, 413 (7th Cir. 1976) (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)).

<sup>178</sup> *See Vinson*, 215 S.E.2d at 68.

<sup>179</sup> *See Padgett v. State*, 307 S.E.2d 480, 481 (Ga. 1983); *State v. Avery*, 337 S.E.2d 786, 797 (N.C. 1985); *Vinson*, 215 S.E.2d at 68; *Biebighauser*, 300 A.2d at 75; *Stanko*, 658 S.E.2d at 97.

<sup>180</sup> *State v. Kelly*, 285 A.2d 571, 577-79 (N.J. Super. Ct. App. Div. 1972).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 578.

<sup>183</sup> *Stanko*, 658 S.E.2d at 97.

<sup>184</sup> *Id.*

<sup>185</sup> *See People v. Stack*, 493 N.E.2d 339, 344 (Ill. 1986); *Commonwealth v. Seguin*, 656 N.E.2d 1229, 1232 n.5 (Mass. 1995).

case in Massachusetts, where decades of decisions rejecting calls for a right of inquiry on the insanity defense came to an end in 1995.<sup>186</sup> That year, the Supreme Judicial Court announced a new rule, pursuant to its general superintendence authority over the state's lower courts: when a defendant invokes a variant of the insanity defense, the trial judge must, at the very least, ask each prospective juror whether she has any opinion that would prevent her from finding the defendant not guilty by reason of insanity.<sup>187</sup> The court framed its position as a response to mounting evidence of public discomfort with the insanity defense following the controversial acquittal of John W. Hinckley Jr., the gunman who attempted to assassinate President Reagan.<sup>188</sup>

The Massachusetts court did not address the prudential arguments that judgments opposing a right of inquiry sometimes advance.<sup>189</sup> Other courts, though, have refuted some of the most common contentions.<sup>190</sup> In *People v. Stack*,<sup>191</sup> the Supreme Court of Illinois rejected the claim that potential jurors would be unable to express their views on the insanity defense before the judge has instructed them on it.<sup>192</sup> The court noted that it is common during voir dire to ask whether prospective jurors will follow the court's instructions on the law, even though the court has not, to that point, issued any such instructions.<sup>193</sup>

The Illinois court also rebutted the claim that merely asking whether potential jurors could follow the court's instructions is sufficient.<sup>194</sup> A question that broad, the court said, does not adequately protect a defendant invoking a defense as controversial as insanity.<sup>195</sup> The Supreme Court of Arkansas was equally dubious of "follow the law" questions.<sup>196</sup> In *Fauna v. State*,<sup>197</sup> the court remarked, "There are very few people bold enough to say that they will not follow the law."<sup>198</sup>

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<sup>186</sup> *Seguin*, 656 N.E.2d at 1232.

<sup>187</sup> *Id.* at 1233.

<sup>188</sup> *Id.* at 1232 n.5. A federal jury, applying the Model Penal Code standard of insanity, found Hinckley not guilty by reason of insanity in 1982. Valerie P. Hans & Dan Slater, *John Hinckley, Jr. and the Insanity Defense: The Public's Verdict*, 47 PUB. OPINION Q. 202, 202 (1983). Hinckley's lawyers claimed he was under the delusion that shooting the president would win him the affection of film star Jodie Foster. Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 7 n.23 (1988).

<sup>189</sup> *Seguin*, 656 N.E.2d at 1231-33.

<sup>190</sup> See *Fauna v. State*, 582 S.W.2d 18, 19 (Ark. 1979); *People v. Stack*, 493 N.E.2d 339, 344 (Ill. 1986).

<sup>191</sup> 493 N.E.2d 339 (Ill. 1986).

<sup>192</sup> *Id.* at 344.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Fauna v. State*, 582 S.W.2d 18, 19 (Ark. 1979).

<sup>197</sup> 582 S.W.2d 18 (Ark. 1979).

<sup>198</sup> *Id.* at 19.



The opinion in *Fauna* neglects to explain the legal basis for the rule it advances.<sup>199</sup> Other opinions recognizing a right of inquiry seem to treat the right as a *fait accompli*, asserting its existence without identifying its source in the law.<sup>200</sup> Among the courts that did provide legal grounds for their decision, the legal bases varied. West Virginia's high court cited a state statute.<sup>201</sup> The Supreme Court of Montana invoked its state constitution, which, like the federal constitution, guarantees an impartial jury in all criminal trials.<sup>202</sup> Only the Illinois court expressly linked the defendant's right of inquiry to the US Constitution.<sup>203</sup>

#### IV. OTHER AREAS OF PREJUDICE FOR WHICH THE CONSTITUTION REQUIRES INQUIRY ON VOIR DIRE

The Supreme Court has never ruled on whether a defendant in an insanity case has a constitutional right to question potential jurors about the defense.<sup>204</sup> It has, however, considered whether the Constitution demands voir dire questioning to help counsel identify preconceptions and biases concerning other matters.<sup>205</sup> These cases, while reinforcing the principle that trial judges must have ample discretion over the process,<sup>206</sup> make clear that the Constitution compels trial courts to permit a question if failing to ask it would render the trial fundamentally unfair.<sup>207</sup> To date, the Court has identified three subjects so controversial that, under certain circumstances, a par-

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<sup>199</sup> *Id.*

<sup>200</sup> See *Washington v. State*, 371 So. 2d 1108, 1109 (Fla. Dist. Ct. App. 1979) (concluding without explanation that the trial court's refusal to permit examination on the insanity defense was error); *State v. Wallace*, 131 P.2d 222, 240-41 (Or. 1942) (stating only that both parties have a "clear right" to examine jurors' attitudes toward the insanity defense).

<sup>201</sup> *State v. Sanders*, 242 S.E.2d 554, 557 (W. Va. 1978), *overruled on other grounds by State v. Honaker*, 454 S.E.2d 96 (W. Va. 1994).

<sup>202</sup> *State v. Olson*, 480 P.2d 822, 824-25 (Mont. 1971).

<sup>203</sup> *People v. Stack*, 493 N.E.2d 339, 344 (Ill. 1986) ("[A] defendant's sixth and fourteenth amendment rights to an impartial jury are diminished when jurors are prejudiced against an appropriate verdict of not guilty by reason of insanity." (citation omitted)).

<sup>204</sup> See *Gold*, *supra* note 43, at 169.

<sup>205</sup> See *Morgan v. Illinois*, 504 U.S. 719, 731-34 (1992) (holding that a trial court in a capital case must permit inquiry into veniremen's views on capital punishment); *Mu'Min v. Virginia*, 500 U.S. 415, 431-32 (1991) (holding that a defendant in a widely publicized case was not entitled to press potential jurors for details about relevant news reports they had seen or heard before trial); *Ristaino v. Ross*, 424 U.S. 589, 596-97 (1976) (holding that voir dire questioning on racial prejudice is constitutionally required when racial issues are "inextricably bound up with the conduct of the trial"); *Connors v. United States*, 158 U.S. 408, 413 (1895) (holding that a defendant accused of stealing ballot boxes on the day of a congressional election did not have the right to have potential jurors questioned on their political affiliations).

<sup>206</sup> See *Morgan*, 504 U.S. at 729-30; *Mu'Min*, 500 U.S. at 427; *Ristaino*, 424 U.S. at 594-95; *Connors*, 158 U.S. at 413.

<sup>207</sup> *Mu'Min*, 500 U.S. at 425-26.

ty has a constitutional right to question prospective jurors about them: communism,<sup>208</sup> racism,<sup>209</sup> and the death penalty.<sup>210</sup>

#### A. *Communism*

The anti-communist fervor of the McCarthy era raised a question: does an avowed communist, on trial for crimes related to his political activities, have a right to probe the venire for anti-communist sentiment? The question was distinctly relevant in the courts of Washington, D.C. There, the venires drew from a sizeable population of federal employees, some of whom were required, as a condition of employment, to take a loyalty oath.<sup>211</sup> The loyalty order charged federal agencies and department heads with ensuring the termination of “disloyal” employees.<sup>212</sup> In *Morford v. United States*,<sup>213</sup> where the government charged an officer in a supposedly subversive organization for failing to turn over files to the House Committee on Un-American Activities,<sup>214</sup> the Supreme Court ruled that it was a mistake to deny the officer the chance to interrogate prospective jurors about the loyalty order.<sup>215</sup>

The opinion was short and made no express references to the Constitution. However, the Court cited *Dennis v. United States*,<sup>216</sup> decided just two weeks earlier, for declaring that the “opportunity to prove actual bias is a guarantee of a defendant’s right to an impartial jury.”<sup>217</sup> Years later, in a concurring opinion identifying a constitutional right to question prospective jurors on racial bias, Justice Douglas interpreted *Morford* and *Dennis* as guaranteeing a right to question potential jurors about possible prejudices they may harbor against a communist defendant.<sup>218</sup>

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<sup>208</sup> *Morford v. United States*, 339 U.S. 258, 259 (1950) (per curiam).

<sup>209</sup> See *Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (plurality opinion); *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (plurality opinion); *Ristaino*, 424 U.S. at 596-97.

<sup>210</sup> *Morgan*, 504 U.S. at 733-34.

<sup>211</sup> *Dennis v. United States*, 339 U.S. 162, 169 (1950).

<sup>212</sup> *Id.*

<sup>213</sup> 339 U.S. 258 (1950) (per curiam).

<sup>214</sup> See *Morford v. United States*, 176 F.2d 54, 56-57 (D.C. Cir. 1949), *rev'd*, 339 U.S. 258 (1950); Kent B. Millikan, Note, *Congressional Investigations: Imbroglio in the Court*, 8 WM. & MARY L. REV. 400, 406-07 (1967).

<sup>215</sup> *Morford*, 339 U.S. at 259 (1950) (per curiam). *But see* *Ruthenberg v. United States*, 245 U.S. 480, 482 (1918) (holding that three defendants accused of draft dodging during World War I were not prejudiced by the trial court’s refusal to ask prospective jurors whether they distinguished between socialists and anarchists).

<sup>216</sup> 339 U.S. 162 (1950).

<sup>217</sup> *Morford*, 339 U.S. at 259 (per curiam) (quoting *Dennis v. United States*, 339 U.S. 162, 171-72 (1950)).

<sup>218</sup> *Ham v. South Carolina*, 409 U.S. 524, 529 (1973) (Douglas, J., concurring in part and dissenting in part).

## B. *Racism*

In its *voir dire* jurisprudence, the Supreme Court has singled out racial prejudice, among other types of biases, for special treatment.<sup>219</sup> This particular form of prejudice, it has noted, provided the inspiration for the Fourteenth Amendment and its guarantees of due process and equal protection.<sup>220</sup> In view of those guarantees, the Court has held that the Constitution requires a trial court to inquire into racial bias during *voir dire*, but only under certain “special circumstances.”<sup>221</sup>

### 1. A First Look: *Aldridge v. United States*

In a 1931 case, *Aldridge v. United States*,<sup>222</sup> the Court imposed a limit on a federal trial judge’s discretion to restrict inquiries on *voir dire*.<sup>223</sup> The exercise of this discretion, the Court said, must be subject to the “essential demands of fairness.”<sup>224</sup> Here, in the case of a black man charged with murdering a white police officer, the Court held that the trial judge committed reversible error in refusing defense counsel’s request to ask prospective jurors whether race might influence their verdict.<sup>225</sup> “Despite the privileges accorded to the negro,” the Court said, “we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry.”<sup>226</sup>

Chief Justice Hughes’s repeated use of the word “impartial” throughout the *Aldridge* opinion might appear to be an invocation of the Sixth Amendment.<sup>227</sup> Yet, the only express reference to constitutional rights appears in a footnote.<sup>228</sup> Decades later, while revisiting the issue of racial prejudice in jury trials, the Supreme Court said *Aldridge* did not assert a consti-

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<sup>219</sup> Gaba, *supra* note 28, at 535 (“[I]t [is] only in the area of racial prejudice that a per se right of questioning seem[s] to have developed.”).

<sup>220</sup> Gold, *supra* note 43, at 169 n.41.

<sup>221</sup> *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (plurality opinion) (internal quotation marks omitted).

<sup>222</sup> 283 U.S. 308 (1931).

<sup>223</sup> *Id.* at 310-311.

<sup>224</sup> *Id.* at 310.

<sup>225</sup> *Id.* at 309-10, 314.

<sup>226</sup> *Id.* at 314 (footnote omitted).

<sup>227</sup> Goode, *supra* note 17, at 670 (internal quotation marks omitted).

<sup>228</sup> *Aldridge*, 283 U.S. at 311 & n.1 (noting that a black defendant’s “right to a trial by a fair and impartial jury is as fully guaranteed to him under our constitution and laws as to the whitest man in Christendom” (quoting *Pinder v. State*, 8 So. 837, 838 (Fla. 1891))).

tutional requirement.<sup>229</sup> Rather, the decision was based on “the Court’s supervisory powers over the federal courts.”<sup>230</sup>

## 2. Constitutional Dimensions: *Ham v. South Carolina* and *Ristaino v. Ross*

The Court eventually did find a constitutional right to inquire into racial prejudice.<sup>231</sup> The defendant in that case, *Ham v. South Carolina*,<sup>232</sup> was a “young, bearded Negro” and prominent civil rights activist accused of marijuana possession.<sup>233</sup> Ham claimed the police officers framed him because of his civil rights work.<sup>234</sup> Upon voir dire, his lawyer sought—unsuccessfully—to have the court ask two questions on racial prejudice, plus another question asking whether the prospective jurors could overlook Ham’s beardedness.<sup>235</sup>

The Supreme Court first determined that, under the circumstances, the Fourteenth Amendment Due Process Clause required at least a minimal inquiry on the subject of race.<sup>236</sup> Then-Justice Rehnquist, writing for the Court, observed that “a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race.”<sup>237</sup> Refusing Ham’s request to probe for racial bias contravened that purpose.<sup>238</sup>

Prohibiting an inquiry about Ham’s beard, on the other hand, was no error at all, the Court found.<sup>239</sup> While acknowledging the possibility that one or more of Ham’s jurors might have harbored a prejudice against his beard, the Court declared itself unable to “constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices.”<sup>240</sup>

Two justices, Douglas and Marshall, separately asserted that the refusal to probe for biases against facial hair was error. Each framed the issue as a matter of fairness.<sup>241</sup> To Justice Marshall, the first African American

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<sup>229</sup> *Ham v. South Carolina*, 409 U.S. 524, 526 (1973).

<sup>230</sup> Goode, *supra* note 17, at 670.

<sup>231</sup> *Babcock*, *supra* note 30, at 547 n.11.

<sup>232</sup> 409 U.S. 524 (1973).

<sup>233</sup> *Id.* at 524-25.

<sup>234</sup> *Id.* at 525.

<sup>235</sup> *Id.* at 525-26.

<sup>236</sup> *Id.* at 526-27.

<sup>237</sup> *Id.*

<sup>238</sup> *Ham*, 409 U.S. at 527.

<sup>239</sup> *Id.* at 528.

<sup>240</sup> *Id.* at 527-28.

<sup>241</sup> Justice Douglas said that, in an era of cultural upheaval, many people viewed hair growth as a symbol of rebellion, and the failure to grant the defense’s request to “make the most minimal inquiry to expose such prejudices” casts doubt on the fairness of the trial. *Id.* at 530 (Douglas, J., concurring part and dissenting in part). Similarly, Justice Marshall contended that an “absolute ban on questions de-

justice on the Supreme Court,<sup>242</sup> the distinction between racial prejudice and other forms of bias was immaterial:

We have never suggested that this right to impartiality and fairness protects against only certain classes of prejudice or extends to only certain groups in the population. It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict.<sup>243</sup>

Justice Marshall said the right to an impartial jury is a fundamental right predating the incorporation of the Sixth Amendment.<sup>244</sup> With this right, he said, comes the right to ask pertinent questions on voir dire.<sup>245</sup> The majority, by contrast, did not make any mention of the Sixth Amendment and so left some uncertainty as to just what types of questions the impartiality clause might require on voir dire.<sup>246</sup>

Three years later, in *Ristaino v. Ross*,<sup>247</sup> the Court declared that *Ham* did not mandate voir dire questioning on racial bias in every case involving a defendant and victim of different races.<sup>248</sup> Rather, due process only requires such questioning when, under the “special circumstances” of the case,<sup>249</sup> there is a significant likelihood of bias without it.<sup>250</sup>

To the *Ristaino* Court’s way of thinking, *Ham* satisfied the “special circumstances” requirement because of the defense he invoked.<sup>251</sup> His assertion that he was framed because of his civil rights activities all but assured the jury would hear about those activities as the trial unfolded.<sup>252</sup> “Racial issues therefore were inextricably bound up with the conduct of the trial.”<sup>253</sup>

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signed to uncover prejudice” against people with beards fails to achieve “a proper balance between the competing demands of fairness and expedition.” *Id.* at 534 (Marshall, J., concurring in part and dissenting in part).

<sup>242</sup> Paul Gewirtz, *Thurgood Marshall*, 101 *YALE L.J.* 13, 14-13 (1991).

<sup>243</sup> *Ham*, 409 U.S. at 531-32 (Marshall, J., concurring in part and dissenting in part).

<sup>244</sup> *Id.* at 531.

<sup>245</sup> *Id.* at 532.

<sup>246</sup> Babcock, *supra* note 30, at 547 n.11 (stating, prior to the decision in *Ristaino*, that the *Ham* decision “[a]rguably . . . settles nothing about the types of voir dire questions that may be required” under the Sixth Amendment).

<sup>247</sup> 424 U.S. 589 (1976).

<sup>248</sup> *Id.* at 590.

<sup>249</sup> *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (plurality opinion) (interpreting *Ristaino* as requiring race-oriented questioning under “special circumstances”); *see* Gaba, *supra* note 28, at 526.

<sup>250</sup> *Ristaino*, 424 U.S. at 596.

<sup>251</sup> *Id.* at 596-97.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 597.

The Court found no such nexus in the instant case, even though it, too, involved an interracial crime.<sup>254</sup>

### 3. A Rule for Federal Courts: *Rosales-Lopez v. United States*

Even as it reversed the state court's ruling, the *Ristaino* Court acknowledged it would prefer that judges permit inquiries into racial prejudice, if a defendant so requests.<sup>255</sup> In fact, the Court said that under its supervisory powers, it would have required a federal court to propound such questions under the facts of *Ristaino*.<sup>256</sup> Just five years later, though, in *Rosales-Lopez v. United States*,<sup>257</sup> a plurality of justices relaxed the requirements of voir dire questioning in federal criminal cases.<sup>258</sup> There, a plurality of the Court ruled that rejecting a federal defendant's request for racial or ethnic inquiry will only amount to reversible error when the circumstances of the case—for instance, a crime involving interracial violence—make it reasonably possible that prejudice will infect the jury's verdict.<sup>259</sup>

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<sup>254</sup> In *Ristaino*, a black defendant was charged with assault and battery on a white Boston University security guard. *Id.* at 590.

<sup>255</sup> See *id.* at 598.

<sup>256</sup> *Ristaino*, 424 U.S. at 598 n.10.

<sup>257</sup> 451 U.S. 182 (1981) (plurality opinion).

<sup>258</sup> *Id.* at 192; see also Nancy Lewis Alvarez, Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L.J. 959, 961 (1982) (arguing "that the Supreme Court's recognition that racial inquiry may be constitutionally required has been unduly limited by *Ristaino* and *Rosales-Lopez*"); Barat S. McClain, Note, *Turner's Acceptance of Limited Voir Dire Renders Batson's Equal Protection a Hollow Promise*, 65 CHI.-KENT L. REV. 273, 304 (1989) (arguing that *Rosales-Lopez* was part of a string of Supreme Court decisions shrinking the *Aldridge* and *Ham* rules at the expense of "a minority defendant's constitutional rights at trial").

The defendant in *Rosales-Lopez* was a Mexican American accused of participating in a plan to smuggle aliens into the country. *Rosales-Lopez*, 451 U.S. at 184. The Supreme Court plurality noted voir dire's critical role in preserving a defendant's Sixth Amendment right to an impartial jury but found the Constitution did not require questioning on ethnic prejudice under the circumstances because defense counsel failed to argue the trial would involve alleged racial or ethnic prejudice. *Id.* at 185-87; see also Beverly Petersen Jennison, Note, *Trial Court Discretion in Conducting the Voir Dire Subjected to More Stringent Scrutiny: Cordero v. United States*, 33 CATH. U. L. REV. 1121, 1128 n.43 (1984) ("Although affirming *Rosales-Lopez*'s conviction, the Court took judicial notice of the critical importance of the voir dire in preserving a defendant's sixth amendment right to an impartial jury.").

<sup>259</sup> *Rosales-Lopez*, 451 U.S. at 192-93.

#### 4. Probing for Racism in Capital Cases: *Turner v. Murray*

Five years later, in *Turner v. Murray*,<sup>260</sup> a narrow majority of the Court announced a separate rule for capital cases: a capital defendant accused of an interracial crime is entitled, upon request, to have the court inform prospective jurors of the victim's race and question them on the subject of racial bias.<sup>261</sup> Although portions of the Court's opinion failed to muster a majority, the five justices who joined in the remainder agreed that this newly announced right of capital defendants emanates from the Constitution.<sup>262</sup>

The issue that split the Court was whether the trial judge's refusal to permit questioning on racial prejudice merely invalidated the sentence, or whether it invalidated the verdict as well. With Chief Justice Burger concurring in the judgment,<sup>263</sup> the Court vacated the sentence but left the verdict intact.<sup>264</sup> Justice White, writing for the plurality, said the *Ristaino* "special circumstances" rule still controls during the trial phase.<sup>265</sup> Sentencing, however, presents distinct issues.<sup>266</sup> During that phase, he noted, the court would instruct the jury to consider a number of special factors, including the nature of the offense, the existence of mitigating evidence, and whether the defendant is likely to commit violent crimes in the future.<sup>267</sup> He said that because of the discretion jurors exercise during sentencing, there is a distinct risk an undetected racial prejudice will taint their decision, a risk that becomes unacceptable when the consequence is death.<sup>268</sup>

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<sup>260</sup> 476 U.S. 28 (1986) (plurality opinion). In *Turner*, a black defendant, Willie Lloyd Turner, faced the death penalty in Virginia for killing a white shopkeeper during an armed robbery. *Id.* at 29. On voir dire, the trial judge refused to inform the venire that the victim was white or to ask prospective jurors whether the races of the defendant and victim might affect their decision. *Id.* at 30-31. The jury convicted Turner of capital murder and, after a separate sentencing hearing, recommended a death sentence. *Id.* at 31.

<sup>261</sup> *Id.* at 36-37.

<sup>262</sup> Justice White, writing for a four-justice plurality, declared that failing to question prospective jurors on racial prejudice violated the defendant's constitutional right to an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments and by principles of due process. *Id.* at 36 n.9 (plurality opinion). Justice Brennan, writing separately, ascribed the defendant's right to the Sixth Amendment and "essential demands of fairness." *Id.* at 40 (Brennan, J., concurring in part and dissenting in part) (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)).

<sup>263</sup> *Id.* at 38.

<sup>264</sup> *Id.* at 37 (plurality opinion).

<sup>265</sup> *Turner*, 476 U.S. at 37-38.

<sup>266</sup> *Id.* at 37 (internal quotation marks omitted).

<sup>267</sup> *Id.* at 33-34. The plurality specifically noted that Virginia law includes evidence of insanity among the mitigating evidence a jury may consider during capital sentencing. On this point, the four justices asserted that a racially prejudiced juror might be "less favorably inclined" to consider such evidence. *Id.* at 35.

<sup>268</sup> *Id.* at 35.

Justice Brennan accused the plurality of abandoning fundamental constitutional principles.<sup>269</sup> The Constitution, he argued, is no less demanding of impartiality during the guilt-or-innocence phase of a trial than it is during sentencing.<sup>270</sup>

### C. *The Death Penalty*

A series of Supreme Court decisions in the latter half of the twentieth century affirmed the government's right in a capital case to strike prospective jurors for cause if they indicated their religious or moral principles would prevent them from sentencing a defendant to death, regardless of the facts of the case.<sup>271</sup> To effectuate this right, the state could make requisite inquiries on voir dire.<sup>272</sup> In *Morgan v. Illinois*,<sup>273</sup> the Court found that capital defendants have a corresponding right to ask whether potential jurors would automatically impose the death penalty upon conviction.<sup>274</sup> To refuse a defendant's request to exercise this right would violate the Due Process Clause of the Fourteenth Amendment.<sup>275</sup>

In reaching this conclusion, the Court stated that while the Constitution "does not dictate a catechism for *voir dire* . . . part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors."<sup>276</sup> Merely asking whether a potential juror could uphold the law will not suffice, the Court said.<sup>277</sup> A defendant facing the death penalty must have the opportunity to determine whether prospective jurors are so dogmatic in their views on the death penalty that they could not follow the law.<sup>278</sup>

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<sup>269</sup> *Id.* at 44 (Brennan, J., concurring in part and dissenting in part).

<sup>270</sup> *Id.* at 41.

<sup>271</sup> See *Lockhart v. McCree*, 476 U.S. 162, 165 (1986); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 517-18 (1968).

<sup>272</sup> See *Morgan v. Illinois*, 504 U.S. 719, 722 (1992) (stating that such an inquiry was permitted by *Witherspoon*).

<sup>273</sup> 504 U.S. 719 (1992).

<sup>274</sup> *Id.* at 731. See generally Thomas J. Eme, Note, *Morgan v. Illinois: The Supreme Court Supports the Right of a Capital Defendant to an Impartial Sentencing Jury*, 24 LOY. U. CHI. L.J. 497, 497 (1993) ([T]he Court [in *Morgan*] held that the Due Process Clause of the Fourteenth Amendment grants capital defendants the right to question prospective sentencing jurors on their propensity to vote in favor of capital punishment." (footnote omitted)).

<sup>275</sup> *Morgan*, 504 U.S. at 726.

<sup>276</sup> *Id.* at 729 (citing *Dennis v. United States*, 339 U.S. 162, 171-72 (1950) and *Morford v. United States*, 339 U.S. 258, 259 (1950)).

<sup>277</sup> *Id.* at 734-35.

<sup>278</sup> *Id.* at 735-36.



## V. THE CONSTITUTIONAL RIGHT TO INQUIRE INTO PROSPECTIVE JURORS' WILLINGNESS TO APPLY THE INSANITY DEFENSE

Defendants invoking the insanity defense have good reason to fear that jurors will view the defense with profound skepticism.<sup>279</sup> As Section II.A of this Comment shows, there is considerable evidence that members of the public tend to suspect the worst of insanity defendants and fear the consequences of an acquittal.<sup>280</sup> The prevalence of these views presents a strong argument for requiring trial courts to permit voir dire questioning about the defense. Yet, it is not for this reason alone that insanity pleas warrant a constitutional right of inquiry. *Ristaino* makes plain that mere controversy is not always enough.<sup>281</sup> In non-capital cases, the Constitution demands something more: a nexus between the subject of the prejudice and the conduct of the trial.<sup>282</sup> Insanity cases necessarily satisfy this nexus test.

### A. *Expanding Ristaino Beyond Racial and Ethnic Biases*

Where it is introduced, the affirmative defense of insanity is not merely “bound up” with the conduct of the trial; it is a critical component of the

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<sup>279</sup> See *supra* Part II.

<sup>280</sup> See *supra* Section II.A.

<sup>281</sup> *Ristaino v. Ross*, 424 U.S. 589, 597 (1976). The Court has not made clear just how controversial a subject must be before a court may have to permit questioning about it. *Spears*, *supra* note 52, at 1515-16. It has said that the risk of racial prejudice against a black defendant accused of a violent crime is “sufficiently real” to warrant a right of inquiry. *Mu’Min v. Virginia*, 500 U.S. 415, 424 (1991). It has also determined that beardedness is not sufficiently controversial to warrant a per se right of inquiry. *Ham v. South Carolina*, 409 U.S. 524, 528 (1973). To date, though, the Court has not advanced a test for determining when the likelihood of prejudice is sufficient to trigger a constitutional right of inquiry.

<sup>282</sup> *Ristaino*, 424 U.S. at 597; see *Gaba*, *supra* note 28, at 526.

The Court enunciated this requirement in *Ristaino*, but not coincidentally, the same factor was present a quarter century earlier in *Morford*. See *Morford v. United States*, 339 U.S. 258, 259 (1950) (per curiam). There, as in *Ham*, the potential for prejudice was “inextricably bound up with the conduct of the trial.” *Ristaino*, 424 U.S. at 597. The virulent anti-communism of the McCarthy era and the threat of the loyalty order made it reasonable to suspect some jurors might be prejudiced against the defendant, but that suspicion only took on constitutional significance because of the political nature of the case. See *Goode*, *supra* note 17, at 644-45. The “nexus” test appears to be significant, but not dispositive, in capital cases, too. The application of the death penalty is, of course, “inextricably bound up” with the conduct of the sentencing phase of a capital trial. This framework helps explain the “Solomonic” difference-splitting that so frustrated Justice Brennan in *Turner*. See *Turner v. Murray*, 476 U.S. 28, 44 (1986) (Brennan, J., concurring in part and dissenting in part) (“The Court may believe that it is being Solomonic in ‘splitting the difference’ in this case and granting petitioner a new sentencing hearing while denying him the other ‘half’ of the relief demanded. . . . But King Solomon did not, in fact, split the baby in two, and had he done so, I suspect that he would be remembered less for his wisdom than for his hardheartedness.”). A capital jury’s views on the death penalty should—in theory, at least—have no bearing on its verdict, but its views necessarily become relevant when the time comes for sentencing.

proceedings. A plea of not guilty by reason of insanity sets the terms of the ensuing trial. It shapes the arguments the attorneys will make, and it ensures the jury will have to confront the possibility of excusing the defendant's conduct on psychological grounds.

The *Ristaino* decision itself provides evidence that a defendant's arguments at trial may necessitate a line of inquiry on voir dire.<sup>283</sup> In its analysis of *Ham*, the *Ristaino* Court identified Ham's defense as the critical factor that mandated voir dire questioning on racial prejudice.<sup>284</sup> Ham's claim that he was framed because of his work as a civil rights activist ensured the jury would hear about race during the course of the trial. A defense of insanity has a similar effect: it guarantees the defendant's mental or volitional capacity will be an issue.<sup>285</sup> That being the case, the defense must have an opportunity on voir dire to inquire into potential jurors' views on the matter.<sup>286</sup>

The Court's decision in *Morgan* illustrates another important principle, which is that the right to an impartial jury guards against all forms of prejudice, not only those directed at a minority group.<sup>287</sup> To be impartial, the Court said, a juror must not harbor views that "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"<sup>288</sup> This precept applies not only to a juror's opinions about the death penalty, but to his views on any matter potentially bearing on his judgment in the case.<sup>289</sup>

The demands of impartiality notwithstanding, the Court's jurisprudence on voir dire questioning in capital cases reveals that different factors take precedence when a defendant's life is on the line. In both *Morgan* and *Turner*, the Court dispensed with the need to show a constitutionally significant likelihood of prejudice. In fact, in *Morgan*, the Court did not so much as discuss the likelihood that jurors would reflexively vote to impose the death penalty. Rather, the severity of the looming punishment was the key factor demanding an expansion of constitutional protections.<sup>290</sup>

Given the Court's heightened sensitivity to the risk of juror bias in these circumstances, it ought to follow that in capital cases, at the very

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<sup>283</sup> *Ristaino*, 424 U.S. at 596-97.

<sup>284</sup> *Id.*

<sup>285</sup> For information about the various tests for insanity, see *supra* note 106.

<sup>286</sup> The *Ristaino* Court also argued that the facts of a case can inflame racial prejudices to a point where they are no longer constitutionally tolerable. *Ristaino*, 424 U.S. at 596-97. The insanity defense does not lend itself to this sort of analysis. It is an either/or proposition: either the defense is invoked, or it isn't. There are no "special" circumstances that will make a juror's bias any more likely to infect the proceedings.

<sup>287</sup> See *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992).

<sup>288</sup> *Id.* at 728 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

<sup>289</sup> See OSBORN, *supra* note 121, at 87 ("Any element of proof may be affected by prejudice. This influence must be guarded against by all who give testimony and by all who hear testimony.").

<sup>290</sup> *Morgan*, 504 U.S. at 735-36.

least, a defendant invoking the insanity defense has a constitutional right to ask potential jurors about the defense. There is no reason racial prejudice alone should merit such a right. The *Turner* Court did not explain why it should. The plurality's claim that racial biases could infect the jury's "highly subjective" judgment on sentencing applies equally well to other firmly rooted prejudices.<sup>291</sup> The same can be said of the plurality's argument that the risk of racial prejudice is "unacceptable in light of the ease with which that risk could have been minimized."<sup>292</sup> If questioning on racial prejudice is easily accommodated, questioning on the insanity defense should present no greater challenge.

This is not to say that the Court has never provided a reason for singling out racial prejudice among other types of biases. In a 1991 case, the Court asserted that "the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice."<sup>293</sup> Chief Justice Rehnquist, who wrote those words,<sup>294</sup> also wrote the Court's decision in *Ham*.<sup>295</sup> In that case, he observed that "a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race."<sup>296</sup>

This is true. Yet, the Court has repeatedly found that the Due Process Clause protects a defendant from non-racial biases.<sup>297</sup> Over the years, it has determined that due process shields defendants from jurors who are insane,<sup>298</sup> who are intimidated by a threat of violence,<sup>299</sup> or who have a fixed opinion of the case as a result of pre-trial publicity.<sup>300</sup>

The Fourteenth Amendment incorporates nearly all of the protections accorded by the Bill of Rights,<sup>301</sup> including the Sixth Amendment right to

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<sup>291</sup> One concern that animated the *Turner* plurality was the fear that racially prejudiced jurors might be "less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance." *Turner v. Murray*, 476 U.S. 28, 33, 35 (1986) (plurality opinion). The justices noted that capital sentencing required jurors to take into account several statutorily enumerated considerations, including the existence of mitigating evidence "tending to show that the defendant acted under the influence of extreme emotional or mental disturbance, or that at the time of the crime the defendant's capacity 'to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.'" *Id.* at 34 (quoting VA. CODE ANN. § 19.2-262.4(B) (1983)). This language mirrors the Model Penal Code's definition of insanity.

<sup>292</sup> *Id.* at 36.

<sup>293</sup> *Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991).

<sup>294</sup> *Id.* at 417.

<sup>295</sup> *Ham v. South Carolina*, 409 U.S. 524, 524 (1973).

<sup>296</sup> *Id.* at 526-27.

<sup>297</sup> *Peters v. Kiff*, 407 U.S. 493, 501-02 (1972) (plurality opinion).

<sup>298</sup> *Id.* at 501 (citing *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912)).

<sup>299</sup> *Id.* (citing *Moore v. Dempsey*, 261 U.S. 86, 87 (1923)).

<sup>300</sup> *Id.* at 501-02 (citing *Irvin v. Dowd*, 366 U.S. 717, 727-28 (1961)).

<sup>301</sup> *Kraushaar v. Flanigan*, 45 F.3d 1040, 1049 (7th Cir. 1995).

an impartial jury.<sup>302</sup> Together, the Due Process Clause and the Sixth Amendment Impartiality Clause guarantee the government will not deprive a criminal defendant of life or liberty without fair procedures. This is a broad guarantee, of which the freedom from racial prejudice is only a part.

Justice Marshall, dissenting in *Ham*, argued the absence of racial prejudice does not, in and of itself, satisfy a defendant's right to an impartial jury.<sup>303</sup> He said that it makes "little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair."<sup>304</sup> In either instance, the defendant has suffered an intolerable injustice.

The pervasiveness of prejudice against beards—an issue raised in *Ham*—is debatable. Courts and researchers alike, however, have taken notice of the public's negative views on the insanity defense.<sup>305</sup> These views, like the racial prejudice of which Chief Justice Rehnquist wrote, are dangerous—not only because they are sufficiently real, but because they can, at times, have a profound impact on case outcomes.<sup>306</sup>

#### B. *Constitutionally Compelled Questions*

The establishment of a right to question would-be jurors on the insanity defense is not the end of the matter. An issue that remains to be settled is, how extensive must the voir dire questioning be?

Although the *Ham* Court ordered the trial judge to permit questioning on race, it stopped short of dictating the precise number of questions required or the form they should take.<sup>307</sup> These decisions, the Court wrote, are best left to the discretion of the trial judge.<sup>308</sup> In *Mu'Min v. Virginia*,<sup>309</sup> the Court explained that it has historically been "careful not to specify the particulars" by which a constitutionally adequate voir dire might be conducted.<sup>310</sup> For instance, it said, either the *Aldridge* or *Ham* Courts might have required trial judges to question "individual jurors about facts or experiences that might have led to racial bias."<sup>311</sup> Neither Court did.

The *Ham* Court did offer some guidance, though, in nominally approving the two sets of race-related questions proposed by the defendant's coun-

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<sup>302</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>303</sup> *Ham v. South Carolina*, 409 U.S. 524, 531-32 (1973) (Marshall, J., concurring in part and dissenting in part).

<sup>304</sup> *Id.*

<sup>305</sup> *See supra* Section II.A.

<sup>306</sup> *See supra* Section II.B.

<sup>307</sup> *Ham*, 409 U.S. at 527.

<sup>308</sup> *Id.* at 528.

<sup>309</sup> 500 U.S. 415 (1991).

<sup>310</sup> *Id.* at 431.

<sup>311</sup> *Id.*

sel in that case: “Would you fairly try this case on the basis of the evidence and disregarding the defendant’s race?” and, “You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term ‘black’?”<sup>312</sup> Either of those sets of questions “would appear sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain,” the Court wrote.<sup>313</sup>

From a defense lawyer’s perspective, these questions are less than ideal. A prospective juror would have to be supremely self-aware to profess he cannot “fairly try” a case. Even rarer, perhaps, is the venireman who would declare in open court that he has a “prejudice against negroes.” Trial practice manuals are filled with far more probing questions.<sup>314</sup> The Constitution, however, does not compel a particular question merely because it would be “helpful” to the parties’ assessment of juror impartiality.<sup>315</sup> Even in cases involving controversial subjects like race or pornography, a “general inquiry” may be enough to satisfy the minimum requirements of due process.<sup>316</sup> For instance, in *Hamling v. United States*,<sup>317</sup> the Supreme Court was satisfied that general questioning about potential jurors’ views on obscenity was constitutionally adequate in a criminal obscenity trial. It was not necessary to permit an exploration of jurors’ educational, political, and religious beliefs.<sup>318</sup>

In insanity cases, a few general questions about the defense will typically be sufficient to placate appellate courts on review.<sup>319</sup> The Tenth Circuit, for instance, has held it was enough for a trial judge to ask whether any prospective jurors had a fixed view on the subject of mental incapacity.<sup>320</sup> Similarly, in *United States v. Garcia*,<sup>321</sup> the Ninth Circuit found it adequate for the trial judge to directly question some of the potential “jurors regarding their attitude toward the insanity defense and their ability to treat it objectively” while instructing the rest of the panel to speak up if any of them would answer differently.<sup>322</sup>

These cases are useful if one is trying to identify the minimal amount of questioning necessary to satisfy due process. One might also turn to the Supreme Judicial Court of Massachusetts’ decision in *Commonwealth v.*

<sup>312</sup> *Ham*, 409 U.S. at 525 n.2.

<sup>313</sup> *Id.* at 527.

<sup>314</sup> *E.g.*, PUB. DEFENDER SERV. FOR D.C., THE DEBORAH T. CREEK CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL § 23 (2010), available at <http://www.pdsdc.org/LegalCommunity/.aspx>.

<sup>315</sup> *Mu’Min*, 500 U.S. at 425.

<sup>316</sup> *Hamling v. United States*, 418 U.S. 87, 140 (1974).

<sup>317</sup> 418 U.S. 87 (1974).

<sup>318</sup> *Id.* at 140.

<sup>319</sup> See *United States v. Garcia*, 739 F.2d 440, 443 (9th Cir. 1984); *Brundage v. United States*, 365 F.2d 616, 618 (10th Cir. 1966).

<sup>320</sup> See *Brundage*, 365 F.2d at 618.

<sup>321</sup> 739 F.2d 440 (9th Cir. 1984).

<sup>322</sup> *Id.* at 441.

*Seguin*,<sup>323</sup> which required trial judges to ask, at a bare minimum, “whether the juror has any opinion that would prevent him or her from returning a verdict of not guilty by reason of insanity, if the Commonwealth fails in its burden to prove the defendant criminally responsible.”<sup>324</sup> The SJC left it to the trial judge to determine whether follow-up questions would be necessary.<sup>325</sup>

There are many more questions a defense attorney might submit. A trial practice manual prepared by the Public Defender Service for the District of Columbia offers more than two dozen sample voir dire questions about the insanity defense, including:

- \* Are you aware that the law does not hold a person responsible for his act, if he was insane at the time he committed the crime?
- \* Do you disagree with that proposition of law?
- \* Do you feel that anyone who is physically able to commit a crime must be responsible for that crime?
- \* Have you formed any views about the validity of psychiatry or psychology?
- \* Do you have any reservations or feelings that would prevent you from fairly considering the evidence of insanity in this case?<sup>326</sup>

Courts will often grant questions like these, regardless of whether the Constitution requires them to. For example, in *United States v. Jackson*,<sup>327</sup> the trial court asked prospective jurors a series of questions about their familiarity with the fields of psychiatry or psychology, as well as whether any of them had had any personal experiences that might shade their judgment on the question of insanity.<sup>328</sup> The defendant complained even this was inadequate.<sup>329</sup> He failed to persuade the Seventh Circuit, which concluded that the court’s inquiry “provided [the] defendant with a reasonable basis for exercise of the right to challenge.”<sup>330</sup>

### C. *Objections*

Those who charge that voir dire is already too time-consuming might reasonably assert that creating new constitutional rights of inquiry would only drag out the process. There is, however, little risk that the emergence

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<sup>323</sup> 656 N.E.2d 1229 (Mass. 1995).

<sup>324</sup> *Id.* at 1233.

<sup>325</sup> *Id.*

<sup>326</sup> PUB. DEFENDER SERV. FOR D.C., *supra* note 314, §§ 23.36-37.

<sup>327</sup> 542 F.2d 403 (7th Cir. 1976).

<sup>328</sup> *Id.* at 413.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

of a constitutional right in insanity cases would open the door to comparable rights to question prospective jurors about other possible biases. Other biases, such as those directed at a sexual orientation or religion, would not warrant an automatic right of questioning unless, as in *Ham*, there were special circumstances indicating a significant likelihood of prejudice.<sup>331</sup> Likewise, the Court would not likely find that other affirmative defenses, such as self-defense, merit a constitutional right of questioning, as other defenses have never engendered the intense controversy that has long swirled around the insanity defense.<sup>332</sup>

Other arguments for limiting voir dire inquiries are equally inapplicable in this context. The fear that attorneys will use voir dire to inject false issues into a trial may be legitimate in cases of interracial crime,<sup>333</sup> but it has no basis here. The insanity defense, where invoked, cannot be a false issue. It is, rather, an affirmative defense that necessarily merits the jury's consideration. Likewise, the argument that voir dire inquiries are sometimes embarrassing or unreasonably invasive holds greater sway when the questions pertain to race or sex than when the questions concern a technical legal doctrine.<sup>334</sup>

It is true that requiring courts to grant the defense's request to make inquiries on the insanity defense could make voir dire at least a little longer, though probably not by much. The question, as always in these matters, is whether the time is well spent. In *Turner*, the plurality concluded the risk of a biased capital sentencing jury was "unacceptable in light of the ease with which that risk could have been minimized."<sup>335</sup> Similarly, in *Aldridge*, the Court dismissed arguments that permitting questions on racial or religious prejudice would be problematic.<sup>336</sup> The majority declared:

We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to

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<sup>331</sup> See *Ristaino v. Ross*, 424 U.S. 589, 596 (1976). For examples of courts refusing to permit questioning on sexual orientation, see Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 *YALE J.L. & FEMINISM* 1, 9, 14 (2001) (citing *Gacy v. Wilborn*, 994 F.2d 305, 315 (7th Cir. 1993) and *United States v. Click*, 807 F.2d 847, 850 (9th Cir. 1986)).

<sup>332</sup> For example, the Ninth Circuit has held that the defense of insanity warrants inquiry on voir dire, but the defense of coercion does not. *United States v. Jones*, 722 F.2d 528, 530 (9th Cir. 1983) (per curiam) ("In contrast to the insanity defense, the coercion defense is not one concerning which the public is 'commonly known to harbor strong feelings.'"). Similarly, the District of Columbia Circuit has determined a defendant does not have a per se right to ask potential jurors about self defense. *United States v. Robinson*, 475 F.2d 376, 381 & n.10 (D.C. Cir. 1973) ("[I]n many situations, the typical jury take a rather charitable view toward a plea of self-defense, tending to interpret the evidence adduced in a manner distinctly favorable to the accused.").

<sup>333</sup> See *Goode*, *supra* note 17, at 694.

<sup>334</sup> See *Glover*, *supra* note 95, at 717-22.

<sup>335</sup> *Turner v. Murray*, 476 U.S. 28, 36 (1986) (plurality opinion).

<sup>336</sup> *Aldridge v. United States*, 283 U.S. 308, 314-15 (1931).

elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.<sup>337</sup>

Such injuries are not difficult to avert. A brief inquiry will do it.

#### CONCLUSION

Jury deliberations in Stephen Stanko's murder trial lasted two hours.<sup>338</sup> In the end, the jury rejected Mr. Stanko's insanity defense and convicted him of murder, assault and battery with intent to kill, criminal sexual conduct, two counts of kidnapping, and armed robbery.<sup>339</sup> Two weeks later, the same jury recommended a death sentence.<sup>340</sup> Afterward, in an interview with a TV news reporter, one juror said he felt the medical testimony about Mr. Stanko's brain was nothing but a distraction.<sup>341</sup> "I'll be honest with you," the juror said. "[W]hen we went in deliberation with that PET scan and all that computerized stuff they did, I said 'I felt like I'd been dazzled by brilliance and baffled with b.s. That's how I felt.'<sup>342</sup>

To be sure, this Comment does not quarrel with the verdict in Mr. Stanko's case. Its purpose, rather, is to flag an important procedural matter that courts have not addressed in a consistent manner. The refusal to permit voir dire questioning on the insanity defense jeopardizes the defendant's right to an impartial jury and, more generally, a fair trial. Researchers have long since established that the public is uncomfortable permitting mental illness to excuse a defendant of criminal liability. Some would-be jurors are reluctant to acquit a defendant who, by his own admission, has committed the offense of which he is accused. Likewise, some mistakenly assume a successful insanity plea results in the defendant's immediate release, putting a potentially dangerous criminal back out on the street. There is, as well, a pervasive view that defendants frequently feign mental illness when the evidence against them is too overwhelming to refute. The likelihood that jurors will harbor views such as these is not remote, and it is not harmless.

The Supreme Court has rightly recognized that the Constitution will, on occasion, require certain lines of inquiry during voir dire. The Court, however, has failed to convincingly explain why some prejudices and preconceptions warrant this constitutional protection while others do not. This Comment presents two criteria for a constitutional right of inquiry, con-

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<sup>337</sup> *Id.* at 315.

<sup>338</sup> Roberts, *supra* note 1, at 7.

<sup>339</sup> *State v. Stanko*, 658 S.E.2d 94, 95 (S.C. 2008).

<sup>340</sup> Roberts, *supra* note 1, at 7.

<sup>341</sup> *Id.* at 8.

<sup>342</sup> *Id.*



sistent with Supreme Court decisions requiring voir dire questioning on race, communism, and the death penalty. First, the risk of prejudice must be significant. Second, the prejudice must be inseparable from the conduct of the trial. A plea of insanity satisfies both criteria. It injects an element of controversy into the proceedings, and because it demands jurors' consideration, there is ample reason to fear that juror attitudes toward the defense will infect the verdict. Given the risk, why would any court refuse to permit even the most minimal of inquiries? This, too, is a question worth asking.