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Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry into Prejudice

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VOIR DIRE OF JURORS: CONSTITUTIONAL LIMITS TO THE RIGHT OF INQUIRY INTO PREJUDICE

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Although the *voir dire* of jurors is one of the most significant mechanisms by which an impartial jury is secured,[1] as a practical matter the right to examine prospective jurors is not unlimited. Vested with great discretion, a trial judge may at some point constitutionally preclude inquiry into possible prejudice, but determining that point has not proved to be easy. Appellate courts have generally failed to adequately consider the concept of the impartial jury or the particular problems of *voir dire*.[2] Thus, trial judges have not had a principled basis on which to exercise control over the conduct of *voir dire*.

In 1976, however, the Supreme Court in *Ristaino v. Ross*[3] directly considered the constitutional limits to *voir dire* and provided a test which could serve as a guide to trial court administration of the

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1. The impartiality of juries is a right guaranteed by the sixth, seventh, and fourteenth amendments to the United States Constitution, in all American courts, state and federal, criminal and civil. The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." Although expressly referring to criminal prosecutions, courts have held that the concept of the impartial jury is implicit in civil trials provided by the seventh amendment. *See, e.g.*, Kiernan v. Van Schaik, 347 F.2d 775 (3d Cir. 1965). Sixth amendment protections were made directly applicable to the states in Duncan v. Louisiana, 391 U.S. 145 (1968), but even before direct incorporation, principles of due process guaranteed a defendant in a state court the right to an impartial jury. *See* Irvin v. Dowd, 366 U.S. 717, 722 (1961).

2. In an analysis of the impartial jury, the Supreme Court concluded: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." United States v. Wood, 299 U.S. 123, 145-46 (1936). Perhaps intimidated by the task of devising modern formulae, the Supreme Court has avoided premising decisions on the sixth amendment. As one commentator noted: "It would seem that the Court increasingly prefers to decide on broader grounds those issues arising with regard to jury trials which by their nature constitute manifestations of the more far-reaching social or political problems of the nation." F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 91 (1951). Thus, the Court has preferred to rest its decisions on concepts of due process and equal protection in areas such as the constitution of the jury pool, Fay v. New York, 332 U.S. 261 (1947), exclusion of jurors for cause, Dennis v. United States, 339 U.S. 162 (1950), and even the parameters of *voir dire*, Ham v. South Carolina, 409 U.S. 524 (1972).

3. 424 U.S. 589 (1976). See notes 72-94 and accompanying text *infra*.

process. The Court suggested that questioning about prejudice must be allowed only in situations where there is some "nexus" between the prejudice feared and the issues likely to arise at trial. In reaching this conclusion the Supreme Court made significant departures from prior analyses of *voir dire*. Not only did the Court establish an extremely narrow constitutional right to inquire into prejudice, but by focusing on the issues at trial, rather than the prejudice of the venire-people, it demonstrated an extraordinary tolerance with prejudice among the jurors who decide a case.

While *Ross* may be a departure, its ultimate destination is unclear since its full significance will not be known until it is applied by trial courts. The particular nature of the "nexus" required to establish a constitutional right of inquiry is not yet certain, and although a cursory reading of the opinion might suggest that there will be only a limited right of inquiry, a deeper analysis indicates a much broader right of inquiry might be available.

THE IMPARTIAL JURY

While the jury performs numerous and sometimes contradictory functions in American society,[4] the "impartial" jury basically performs but one: a reasonable determination of the facts.[5] In *Estes v. Texas*,[6] Chief Justice Warren considered the impact of widespread

4. De Tocqueville observed of the American jury:

> However great its influence may be upon . . . the courts, it is still greater on the destinies of society. . . . The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated. . . . The institution of the jury . . . invests the people . . . with the direction of society. . . . It imbues all classes with a respect for the thing judged and with the notion of right. . . . It makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government.

A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 127-28 (New American Library ed. 1956). *See generally* Apodaca v. Oregon, 406 U.S. 404 (1972); Broeder, *The Functions of the Jury Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954); Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L. J. 1417 (1969). While such functions range from an education in citizenship to the prevention of corruption by prosecutor or judge, perhaps the most interesting, and controversial, element of the jury's functions is the one most in conflict with its role as an impartial trier of facts; it is the element of "nullification." Pursuant to this purpose, the jury rather than being impartial is to inject the bias of the community and temper the application of unpopular laws. *See* United States v. Dougherty, 473 F.2d 1113 (1972).

5. In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court concluded that *the* purpose of the jury was to "prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge.'" *Id.* at 100 *quoting* Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The mechanism by which the jury seeks to achieve this goal is by acting as the arbiter of "objective" facts—that is, by determining that reality to which the abstract law will be applied.

6. 381 U.S. 532 (1965).

publicity on the conduct of a trial. Reviewing the concept and purpose of the jury in the Anglo-American system, he wrote: "Our common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt."[7] Central to the achievement of that purpose is the juror who acts as the "nerve center of the fact-finding process."[8]

For the individual juror to perform this function, he must, in Lord Coke's phrase, stand "indifferent as he stands unsworne."[9] This concept of "indifference" embodies the attributes thought to be necessary for a juror to be impartial, and essentially it involves the capacity to form judgments based solely on the evidence developed at trial.[10] As Justice Frankfurter noted, it is the "free, fearless and disinterested capacity in analyzing evidence which is indispensible if jurymen are to deal impartially with an accusation."[11] The elaborate evidentiary protections which have developed through the course of the common law reflect this conception of a neutral, "sequestered" jury which arrives at a decision on the basis of the evidence filtered through the trial.[12]

A completely impartial jury is, however, impossible. Prejudice

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7. *Id.* at 565.

8. *Id.* at 545.

9. COKE ON LITTLETON 155b (19th ed. 1832). *See* Irvin v. Dowd, 366 U.S. 717, 722 (1961); Ristaino v. Ross, 424 U.S. 589, 596 (1976); *cf.* MASS. GEN. LAWS ANN. ch. 234, §28 (West Cum. 1972) (which allows for the examination of a potential juror to see if he "stands indifferent").

10. Irvin v. Dowd, 366 U.S. 717, 722 (1961). *See also* Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290, 303 (1972) [hereinafter cited as Gutman]. In Turner v. Louisiana, 379 U.S. 466, 472 (1965), Justice Stewart wrote: "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (citing the sixth amendment with emphasis placed on "impartial"). Reviewing the prosecution of Aaron Burr, Chief Justice Marshall commented:

> I have always conceived, and still conceive, an impartial jury as required by common law, and as secured by the constitution, must be composed of men who will fairly hear the testimony which may be offered to them and bring in their verdict according to that testimony, and according to the law arising on it.

United States v. Burr, 25 F. Cas. 49, 50 (No. 14,692g) (C.C.D.Va. 1807).

11. Dennis v. United States, 339 U.S. 162, 181 (1950) (Frankfurter, J., dissenting).

12. As one commentator noted:

> To the extent that evidence, and not juror bias, determines the verdict, the attorney-conducted voir dire is compelled by the philosophy underlying the common law of evidence; namely, that the jurors' deliberation must be limited to the evidence, thereby preventing them from deciding on the basis of matters not properly before them.

Gutman, *supra* note 10, at 303.

is a basic component of every individual's personality, and this prejudice strikes at the core function of the juror by distorting perceptions of evidence and influencing conclusions ultimately reached.[13] While judges may act as filters for the presentation of evidence, jurors provide their own perceptual filters through which the data presented to them must pass before a legal judgment is reached.

The legal system has slowly acknowledged the subtle effects of prejudice,[14] and various aspects of the jury system reflect attempts to minimize its influence. External influences upon the jury are dealt with in numerous ways ranging from actual sequestration to exclusion of prejudicial evidence. [15] But internal influences—latent prejudices held by the individual and the community—are more difficult to control. The major institutional protections against these internal influences operate through the selection of the pool of potential jurors and the removal of unacceptable venirepeople. These procedures reflect interesting psychological assumptions which the courts have made about the operation of prejudice.

The selection of the venire panel is premised not upon the exclusion but rather on the inclusion of a wide range of prejudices. Recognizing the effect of bias, the courts have attempted to minimize its influence by ensuring a random or balanced representation of conflicting biases in the general population of potential jurors. Thus, the Supreme Court has consistently held that the systematic exclusion of an identifiable class of persons from the venire panel is a violation of equal protection, due process and the right to an impartial jury.[16]

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13. Thus, no thing . . . can create an impression unprejudiced by associations which already exist in the mind. In the light of such facts it is humorous to hear a prospective juror say in examination that he has formed no opinions as to the merits of the case, that he can sit as a fair and impartial juror. This is impossible. His inherent, though possibly unknown prejudices make such impartiality impossible.

M. BROWN, LEGAL PSYCHOLOGY 60-61 (1926), *quoted in* Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1496 n. 19 (1975). *See also* S. Freud, *Psychoanalysis and the Ascertaining of Truth in Courts of Law* (1906) in THE HISTORY OF THE PSYCHOANALYTIC MOVEMENT 115 (1963); See also notes 46 and 88 *infra*.

14. If the courts are reluctant to relinquish belief in the human capacity for perfectability and rationality, it may stem from the practical problems involved in acknowledging human fallibility. See notes 36-48 and accompanying text *infra*. The legal system has accepted the presence of jurors who have formed an opinion or are familiar with the evidence of a case as long as "the juror can lay aside his impressions or opinions and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961). This legal conclusion stems in large part from the recognition by the courts that under any other rule they would not be able to assemble a jury. *See* United States v. Burr, 25 F. Cas. 49, 50-51 (No. 14,692g) (C.C.D.Va. 1807).

15. *See generally* Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349 (1960).

16. *See, e.g.*, Fay v. New York, 332 U.S. 261 (1947); Thiel v. Southern Pacific Co., 328

Furthermore, as the appreciation of the significance of prejudice has increased, this negative command has become a positive pressure to ensure the inclusion of a broad cross section of the community.[17] Despite judicial reliance on equal protection, this insistence that no group be excluded from the venire panel has not developed simply to ensure the joys of jury service to all. Rather, the primary concern has been with the effect of excluding groups with differing perceptions and values.[18]

Once the panel has been selected, the procedures for selection of the petit jury which will try the case operates from a different, and somewhat contradictory, premise. There is no obligation that a cross section of the community be represented on the jury;[19] rather, there is an attempt to exclude all those who have strongly held or extreme prejudices. This is accomplished through the challenge system. Although there is variation in the procedures by which the challenge system operates, the federal system is representative of the general theory.[20] Opposing counsel are allowed to remove prospective jurors either for cause or peremptorily, and it is the clash mandated by the adversary system which is supposed to produce results close to fairness.

A challenge for cause is based upon the bias of the prospective juror. Under present analysis, bias can be either "implied" or

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U.S. 217 (1946); Strauder v. West Virginia, 100 U.S. 303 (1880). *See also* Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1967); Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L. J. 1417 (1969).

> 17. [S]ystematic exclusion of identifiable minorities from jury services has long been recognized as a violation of the Equal Protection Clause, in more recent years the Court has held that criminal defendants are entitled as a matter of due process, to a jury drawn from a representative cross section of the community. This is an essential element of a fair and impartial jury trial.

Johnson v. Louisiana, 406 U.S. 356, 378 (1972) (Powell, J., concurring). In the federal system this obligation has been enacted into law. "It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community." 28 U.S.C. §1861 (Supp. 1976).

18. *See* Peters v. Kiff, 407 U.S. 493 (1972) (allowing a white to challenge the unconstitutional exclusion of blacks from jury service; the Court acknowledged the general harm that follows from an improperly constituted jury); Taylor v. Louisiana, 419 U.S. 522 (1975) (in which the Court allowed a male to challenge the exclusion of women and wrote at length about the different perceptions that women might bring to a jury).

19. *See, e.g.*, Akins v. Texas, 325 U.S. 398, 403 (1945) (applying the petit jury argument in the context of the grand jury).

20. The federal rules for the conduct of *voir dire* are contained in FED. R. CIV. P. 47 and FED. R. CRIM. P. 24, under which prospective jurors may be challenged and replaced with new jurors from a theoretically unlimited pool of veniremen. Representatively, similar state procedures are contained in CAL. PEN. CODE §§1071-78 (West 1970); COLO. R. CRIM. P. 24; N.Y. CRIM. PRAC. LAW 270 (McKinney 1971). *But cf.* ALA. CODE tit. 30 § 54 (Supp. 1973) (providing for the "strike" system in the selection of juries for civil trials, under which parties alternate striking names from a list of prospective jurors until there are only 12 min left).

"actual." Implied bias is often defined by statute,[21] and its operation is based on the presumption that certain relationships between litigants and prospective jurors are likely to result in the partiality of the juror.[22] Only the relationship need be shown, bias will be implied by law. Although statutory and variable, the relationships typically involve either family or finance.[23]

Actual bias includes all other circumstances indicating a lack of impartiality. In somewhat circular terms, the Supreme Court has defined actual bias as the "existence of a state of mind, on the part of the juror, which leads to a just inference in reference to the case that he will not act with entire impartiality."[24] If that state of mind can be proved to the satisfaction of the trial judge, numerous prejudices can form the basis for this challenge.[25]

There are, however, significant practical limitations on the effective use of a challenge for cause. Not only is it difficult to prove bias, but there is reluctance on the part of judges to, in effect, "adjudicate" an individual as being prejudiced. Furthermore, unsuccessful, and even successful, challenges for cause can produce resentment among the jurors.[26]

The peremptory challenge alleviates these difficulties by allowing the removal of prospective jurors for any or no reason. "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable."[27] As the Supreme Court has indicated, it is "an arbitrary and capricious right."[28] Although the constitutional basis of peremptories is uncertain,[29] the Court has recognized

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21. *See, e.g.*, CAL. PEN. CODE § 1074 (West 1970).

22. The reason for disqualifying a whole class on the ground of bias is the law's recognition that if the circumstances of that class in the run of instances are likely to generate bias, consciously or unconsciously, it will be a hopeless endeavor to search out the impact on the mind and judgment of a particular individual.

Dennis v. United States, 339 U.S. 162, 181 (1950) (Frankfurter, J., dissenting).

23. Justice Frankfurter, after describing the logic of implied bias, wrote: "That is the reason why influences of consanguinity or fiscal interest are not individually canvassed." *Id.*

24. Hopt v. Utah, 120 U.S. 430 (1887).

25. *See generally* 72 A.L.R.2d 905 (1960) (challenge of jurors for racial, religious, economic, social or political bias in civil trials); 54 A.L.R.2d 1204 (1957) (to the same effect in criminal trials).

26. *See* Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 526 (1965) [hereinafter cited as Broeder]; Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1500 (1975).

27. Swain v. Alabama, 380 U.S. 202, 220 (1965).

28. *Id.* at 219, *quoting* Lewis v. United States, 146 U.S. 370, 378 (1892).

29. *Compare* Stilson v. United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; a trial by an impartial jury is all that is secured.")

the important role of the peremptory challenge in ensuring an impartial jury.[30]

VOIR DIRE

Trial Court Discretion

The right to an impartial jury is ultimately dependent on the individual members of the community who are selected to sit as jurors, and it is during the *voir dire* that the legal system first focuses on the prospective jurors as individuals.[31] This questioning of prospective jurors serves a three-fold purpose: (1) to determine whether they meet statutory qualifications, (2) to determine the existence of a bias which would subject a prospective juror to a challenge for cause, and (3) to provide the information necessary to make an intelligent use of peremptory challenges.[32] Although the procedure of *voir dire* may vary among jurisdictions, a common factor is the enormous discretion given the trial judge to control the process.[33] Under the federal system, a judge has the discretion to decide whether he or the lawyers will conduct the *voir dire*.[34] If conducted by the judge, the attorneys are allowed to submit supplemental questions for the court's consideration, but again the judge has broad discretion to determine what questions will actually be asked of the venirepeople.[35]

The responsibility placed upon the trial judge reflects the enormous practical problems involved in *voir dire*. "The reasons for vesting the trial court with this discretion are obviously, first, to see that voir dire examination actually is effective in obtaining an impartial jury, and second, to see that this result is obtained with reasonable expedition."[36] While the major purpose of *voir dire* is, of course, to

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with Pointer v. United States, 151 U.S. 396, 408 (1894) ("The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused.").

30. *See* Swain v. Alabama, 380 U.S. 202 (1965).

31. While most of the information about venire people is obtained during *voir dire*, there are other mechanisms. *See* J. MOORE, FEDERAL CIVIL PROCEDURE Para. 24.03 n.7 (discussing government's use of a "jury book" containing the voting record of individuals who have served as jurors); Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839 (1969).

32. *See* Krueter v. United States, 376 F.2d 654, 656-57 (10th Cir. 1967); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 382 (1969).

33. *See, e.g.*, N.Y. CRIM. PRAC. LAW § 270.15(1) (McKinney 1971): "The scope of the examination is within the discretion of the court, and the court may disallow statements or questions by either party that are irrelevant to the examination or repetitious." *Compare* People v. Buckner, 180 Colo. 65, 504 P.2d 669 (1972); State v. Dalton, 254 Iowa 96, 116 N.W.2d 451 (1962); State v. Oliver, 247 La. 729, 174 So.2d 509 (1965); Grogg v. State, 231 Md. 550, 191 A.2d 435 (1963); Darr v. Buckley, 355 Mich. 392, 94 N.W.2d 837 (1959).

34. FED. R. CRIM. P. 24(a).

35. *Id. See, e.g.*, Spells v. United States, 263 F.2d 609 (5th Cir. 1959).

36. *The Jury System in the Federal Courts*, 26 F.R.D. 409, 465-66 (1960).

aid in the discovery and removal of biased jurors,[37] the process is not without cost. Probably the major objection to *voir dire* is the amount of time and money which is expended on the procedure.[38] The questioning of prospective jurors can last for days and may even take longer than the trial itself.[39] With a growing concern for the congestion of court dockets, such objections become increasingly significant. Furthermore, there is a recurrent complaint that when lawyers are allowed to conduct the *voir dire* they use the forum to ingratiate themselves with the venirepeople and indoctrinate the jurors with their theory of the case.[40]

Perhaps there would be greater consensus that time should be spent on *voir dire* if there were some assurance as to the usefulness of the procedure. The conclusion of one empirical study was that the "*voir dire* was grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove unfavorable."[41] While subtle and extensive questioning may be useful in uncovering latent bias,[42] such sophistication is rare.[43]

Extensive *voir dire* may be of limited practical significance in any event. Venirepeople do not always tell the truth on *voir dire*—in such a public setting there is the obvious temptation not to admit to being prejudiced.[44] Even if questions are answered with full honesty,

37. "The judgment that the court must exercise in finding 'disqualification for bias', . . . is a psychological judgment." Dennis v. United States, 339 U.S. 162, 181 (1950) (Frankfurter, J., dissenting).

38. *See* People v. Crowe, 8 Cal.3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973); Levitt, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 922-24 (1971) [hereinafter cited as Levitt]; Craig, Erickson, Friesen & Maxwell, *Voir Dire: Criticism and Comment*, 47 DENVER L. J. 465 (1970) [hereinafter cited as Craig].

39. *See* Levitt, *supra* note 38, at 923 n. 28. *But see* Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1514 n. 91 (1975).

40. *See* A.B.A. Standards Relating to the Prosecution Function § 5.3; A.B.A. Standards Relating to Trial by Jury § 2.4; Broeder, *supra* note 27; Note, *Voir Dire in Federal Criminal Trials: Protecting the Defendant's Right to an Impartial Jury*, 48 IND. L. REV. 267 (1972); note 38 *supra*.

41. Broeder, *supra* note 26, at 505.

42. For an example of involved and fruitful questioning on *voir dire*, see MINIMIZING RACISM IN JURY TRIALS: THE VOIR DIRE CONDUCTED BY CHARLES R. GARRY IN *People of California v. Huey P. Newton* (1969).

43. The records of the cases appealed to this court in which rulings made while impaneling a jury have been involved, indicate that there is an increasing tendency to prolong the proceedings inordinately by allowing counsel on either side to indulge in tedious examination of jurors, apparently with no definite purpose or object in view, but with the hope of eliciting something indicating the advisability of a peremptory challenge, and that the supposed privilege of doing this has been greatly abused.

People v. Edwards, 163 Cal. 752, 753, 127 P. 58 (1912).

44. As it happened, one prospective juror in the *Ross* trial, when asked if he harbored

studies indicate that there is often a considerable discrepancy between attitudes held and behavior elicited.[45] Furthermore, despite efforts to ensure that the venire panel represents a cross section of the community, this is often not the case, and the exclusion of a biased juror is likely to result in the substitution of a person just as biased. One study found that in selecting the venire panel "the result was usually a largely homogeneous venire, not so much as to occupation or economic status—though the occupation and income levels were considerably above average—but as to basic values."[46]

Considering the doubts as to the usefulness of *voir dire*, one begins to wonder about the practical significance of whether a particular question need be asked.[47] But those doubts should not lead to the conclusion that the problem in defining the limits to *voir dire* is irrelevant. While *voir dire* may not be completely effective in discovering prejudice, there are additional objectives, both proper and improper, which it serves.[48] Furthermore, it is still the primary mecha-

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any prejudice, admitted to racial prejudice and was excused. However, one commentator, reflecting on the limitations of *voir dire*, noted:

> A lawyer simply cannot anticipate many of the factors in the jurors' backgrounds which will affect their thinking and there is a broad area in which perspicacity will not help anyway. Legal rules preclude many questions and other questions cannot be asked because of the danger of offending. Again, veniremen do not always tell the truth when questioned.

Broeder, *supra* note 26, at 505.

45. Studies suggest that people do not always act in ways which are consistent with the attitudes that they express. Thus, in one famous study, 92% of motel managers queried by mail stated that they would not serve Chinese, yet virtually all did provide service when a Chinese couple personally requested to be served. *See* COLLINS, SOCIAL PSYCHOLOGY 80 (1970); B. SEIDENBERG & A. SNADOWSKY, SOCIAL PSYCHOLOGY: AN INTRODUCTION 146 (1976).

46. Broeder, *supra* note 26, at 505.

47. A complaint often directed against *voir dire* is that lawyers use it to indoctrinate jurors to their view of the case. See note 40 *supra*. One wonders whether questioning jurors about their prejudices is likely to result in sensitizing them to the possible effect of prejudice on their verdict.

The task of bringing the influence of prejudice to the attention of the jury is properly a function of the judge. *See, e.g.*, Dukes v. Waitkevitch, 536 F.2d 469 (1st Cir. 1976). One court commented on this relationship between inquiry during *voir dire* and instructions from the bench: "The government suggests that the court's instructions during the voir dire and throughout the trial created an atmosphere of impartiality and reinforced the voir dire. Certainly there are situations where instruction to an impanelled jury would cure weaknesses in the voir dire." United States v. Dellinger, 472 F.2d 340, 368 n. 41 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). But this does not confront the question of constitutionally mandated inquiry. Jury instructions "can never be a substitute for essential inquiries into the areas of seemingly probable prejudice of the veniremen." *Id.*

While jury sensitization may not be a substitute for inquiry during the *voir dire*, if sensitization is the actual objective of both lawyer and court, then analysis of the constitutional limits to *voir dire* is incomplete without some consideration of this effect and alternative ways of achieving it. It is possible that there is a broader constitutional obligation connected with jury instructions than with *voir dire*.

48. Certainly the legal community does not consider *voir dire* to be irrelevant. *See, e.g.*,

nism by which prejudicial attitudes are revealed[49] and is thus an essential—if imperfect—element of the challenge system.

Limits to Discretion Before Ross

Courts, in their analyses of the challenge system and *voir dire*, have done little to provide a principled basis upon which a trial judge may exercise discretion. Catch-phrases have been substituted for a discussion of the issues involved. Thus, discretion is said to be limited only by the demands of "essential fairness" and is reviewable only for its "abuse."[50] While there is a consensus that a certain amount of surface information about venirepeople must be made available,[51] case by case treatment has produced little consistency.[52]

The Supreme Court has fostered this situation through its own inadequate analysis. In the past it has suggested an open-ended principle which contained few hints as to its limits. The Court appears to have reasoned that if challenges for cause and peremptory challenges are necessary to ensure an impartial jury, then freedom to question must also be necessary to ensure the proper use of those challenges.

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1 BUSCH, LAW AND TACTICS IN JURY TRIALS (1959); Bodin, Selecting a Jury (Prac. L. Inst., Trial Prac. 1948); GOLDSTEIN, TRIAL TECHNIQUE (1935).

49. See note 48 *supra*. See also note 40 and accompanying text *supra*.

50. "We recognize that there is no generally accepted formula for determining the appropriate breadth and depth of the voir dire, except that the court's discretion is subject to the essential demands of fairness." United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973), *quoting* Aldridge v. United States, 289 U.S. 308, 310 (1931); *accord*, Ham v. South Carolina, 409 U.S. 524 (1973) (dictum); United States v. De Pugh, 452 F.2d 915 (10th Cir. 1971), *cert. denied*, 407 U.S. 920 (1972); United States v. Napoleone, 349 F.2d 350 (3d Cir. 1965); Kiernan v. Van Schaik, 347 F.2d 775 (3d Cir. 1965); Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959).

51. "Litigants . . . have the right, at the least, to some surface information regarding the prospective jurors. Such information may uncover ground for challenge for cause. If it does not, it will be available in the intelligent use of the peremptory challenge. . . ." Kiernan v. Van Schaik, 347 F.2d 775, 779 (3d Cir. 1965). *Accord*, United States v. Dellinger, 472 F.2d 340 (7th Cir. 1970), *cert. denied*, 410 U.S. 970 (1970); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950) *aff'd*, 341 U.S. 494 (1951); State v. Oliver, 247 La. 729, 174 So. 2d 509 (1965).

52. Courts have repeatedly had to deal with requests to inquire into various prejudices, and although the facts of each case may offer an opportunity to distinguish results, the conclusions by the courts have not demonstrated great consistency. Particularly troublesome areas of prejudice have included race (*compare* King v. United States, 362 F.2d 968 (D.C. Cir. 1966) (requiring inquiry into racial prejudice in crimes involving criminal defendants) *with* Rivers v. United States, 270 F.2d 435 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960) (in which it was not error to refuse to inquire into racial prejudice)), credibility of police testimony (*compre* Chavez v. United States, 258 F.2d 816 (10th Cir. 1958), *cert. denied*, 359 U.S. 916 (1959) (requiring venirepeople to be asked if they would give more weight to police testimony) *with* Gorin v. United States, 313 F.2d 641 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963) (in which such inquiry was not required)), religion (*compare* Horst v. Silverman, 20 Wash. 233, 55 P. 52 (1898) *with* Gold v. United States, 378 F.2d 588 (9th Cir. 1967)), and the insurance coverage (*see generally* Annot., 4 A.L.R.2d 761 (1949)).

In *Dennis v. United States*,[53] the Supreme Court considered a challenge to government employees serving as jurors in the trial of Communists. While the Court concluded that government service was not per se a ground for exclusion, it indicated that actual bias could always be investigated on *voir dire*. Justice Minton wrote: "The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact.[54] . . . Preservation of the opportunity to prove actual bias is a guarantee of defendant's right to an impartial jury."[55] In *Swain v. Alabama*,[56] the Court reviewed the use of peremptory challenges and the right to obtain information for their exercise. A broad right of access to information was suggested: "The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories. . . ."[57]

Analytical confusion is perhaps inevitable in a system which in theory allows a juror to be challenged and removed for virtually any demonstrable bias; it is hard to define limits when dealing with the limitless human capacity for prejudice and self-deception. But judges must make daily decisions in this complex area, and despite a lack of legal or psychological principles, the cases suggest that two approaches were being used to provide some guidance to trial judges.

Per Se Rule. Obviously, the easiest approach to the problems of *voir dire* is to always allow certain types of questions to be asked. This approach has been suggested as a way of dealing with inquiry into various possible prejudices of recurring concern,[58] but it was only in the area of racial prejudice that a per se right of questioning seemed to have developed. In *Aldridge v. United States*,[59] the Supreme Court reversed the murder conviction of a black man because the trial judge refused to allow inquiry into possible racial prejudice. A large number of federal circuits had interpreted *Aldridge* as creating a right to inquire into racial prejudice in all criminal cases where the defendant was black.[60] Although the right to an impartial jury is

53. 339 U.S. 162 (1950).

54. *Id.* at 168.

55. *Id.* at 171-72.

56. 380 U.S. 202 (1965).

57. *Id.* at 218-19.

58. In United States v. Robinson, 475 F.2d 376 (D.C. Cir. 1973), Judge Leventhal indicated that he thought questions about prejudice should always be asked in "matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact." *Id.* at 381. These matters included, in addition to racial prejudice, situations involving wagering, use of intoxicants, testimony of a person that he had lied to another, and religious minorities. *Id.* at 381 n. 9.

59. 283 U.S. 308 (1931).

60. *See* King v. United States, 362 F.2d 968 (D.C. Cir. 1966); United States v. Grant,

not in principle limited to the exclusion of any particular prejudice, the trend was to distinguish inquiry into racial prejudice from inquiry into all other forms of prejudice.

Probability of Prejudice. It seems obvious that a significant factor in a judge's decision about the limits to *voir dire* is the probability that questioning will actually discover prejudice, and courts have consistently demonstrated a concern with the probability that a particular juror may be prejudiced. In his dissent in *Ham v. South Carolina*,[61] Justice Marshall acknowledged the state's interest in expediting trials, and concluded that this interest "bulk[s] larger as the possibility of uncovering prejudice becomes more attenuated."[62] In *United States v. Dellinger*,[63] the Court of Appeals for the Seventh Circuit concluded that questioning on *voir dire* must be allowed "into the areas of seemingly probable prejudice of veniremen."[64]

The difficulty with this approach involves the determination of when that threshold of probability has been reached.[65] Justice Marshall, in *Ham*, suggested that the courts allow litigants to present evidence showing how extensive a particular prejudice was in a community. Judge Leventhal, in *United States v. Robinson*,[66] advocated a similar general framework. He concluded that where certain types of prejudice, such as racial prejudice, are generally recognized as existing in a community, then questioning must be allowed:

> When the matter sought to be explored on *voir dire* does not relate to one of those recognized classes, it is incumbent upon the proponent to lay a foundation for his question by showing that it is reasonably calculated to discover an actual or likely source of prejudice, rather than pursue a speculative will-o-the-wisp.[67]

Such a foundation would form the basis for a trial court's determination as to whether there was an adequate probability that a prospective juror was in fact prejudiced.

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494 F.2d 120 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974); United States v. Robinson, 485 F.2d 1157 (3d Cir. 1973); United States v. Robinson, 466 F.2d 780 (7th Cir. 1972); United States v. Carter, 440 F.2d 1132 (6th Cir. 1971); United States v. Gore, 435 F.2d 1110 (4th Cir. 1970).

61. 409 U.S. 524 (1972).

62. *Id.* at 533 (Marshall, J., dissenting).

63. 472 F.2d 340 (7th Cir. 1970).

64. *Id.* at 368 n. 41.

65. For some judges that threshold may be quickly reached: "So long as race prejudice exists, even in relatively few persons, there is a substantial chance that one of those few will appear in court as a venireman." State v. Higgs, 143 Conn. 138, 143, 120 A.2d 152, 154 (1956).

66. 475 F.2d 376 (D.C. Cir. 1973).

67. *Id.* at 381.

Ham v. South Carolina

The analytical confusion which existed in the law regarding the basis for evaluating the limits to *voir dire* was perhaps best reflected in the Supreme Court's opinion in *Ham v. South Carolina*.[68] Ham, a black civil rights worker, was charged with possession of marijuana. He claimed that the police were "out to get him," and although issues of racial prejudice seemed likely to be involved in the trial, the judge denied a defense request to ask prospective jurors certain questions about possible prejudices. These included questions relating to racial prejudice and prejudice against people with beards.[69]

The Supreme Court found that the failure to allow questioning into possible racial prejudice constituted reversible error. Justice Rehnquist's majority opinion concluded that, given the state's statutory framework establishing challenge for cause, the failure to allow inquiry into racial prejudice violated the due process requirement of fairness. Significantly, this conclusion was not premised on due process alone; the fourteenth amendment's special concern with prejudice against blacks was an essential element of the Court's holding. The majority did not justify this decision in terms of the guarantee of an impartial jury—Justice Rehnquist's opinion failed even once to use the word "impartial." Rather, the conclusion was based on the notion that "a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race. . . ."[70]

The arbitrariness of this analysis was confirmed by the Court's treatment of the request to inquire into prejudice against people with beards. Prohibition of such inquiry was not error. The Court wrote that it could not "constitutionally distinguish possible prejudice against people with beards from a host of other possible similar prejudices. . . ."[71] The distinction between racial and tonsorial prejudice was not made because the Court considered the latter prejudice less likely to be held by a prospective juror. Nor was the distinction made because the Court felt that prejudice against people with beards was less likely to influence the jurors. Beards were not distinguished

68. 409 U.S. 524 (1972).

69. The relevant questions that were proposed were:

> 1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race? 2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'? 3. Would you disregard the fact that this defendant wears a beard in deciding this case?

Id. at 525 n. 2.

70. *Id.* at 526-27.

71. *Id.* at 528.

because they were indistinguishable. Although Justice Marshall would have offered the defendant the opportunity to demonstrate that prejudice against people with beards was present in the community, that approach was apparently rejected by the majority.

Ham must be considered the nadir of the Court's analysis of the constitutional limits to *voir dire*. While the conclusion of the Court was not unreasonable, the manner in which it reached that result was. Not only did the Court reject Justice Marshall's general test which focused on the likelihood that venirepeople held a particular prejudice, but it required inquiry because of a special historical concern for racial prejudice. In so doing, the Court not only expressed an unacceptably narrow view of the fourteenth amendment, it also ignored the fundamental purpose of *voir dire* compelled by the sixth amendment—the discovery of any prejudice that might affect the impartiality of the jury.

RISTAINO V. ROSS

In *Ristaino v. Ross*,[72] the Court explicitly addressed the issue of the constitutional limits to inquiry into prejudice on *voir dire*.[73] Ross,

72. 424 U.S. 589 (1976).

73. The case had a long appellate history before the Supreme Court finally reached the merits of the issue. After Ross' conviction and affirmance on appeal by the Supreme Judicial Court of Massachusetts in Commonwealth v. Ross, 361 Mass. 665, 282 N.E.2d 70 (1972), the Supreme Court released *Ham v. South Carolina*. In Commonwealth v. Ross, 410 U.S. 901 (1973), the Court vacated and remanded the case for reconsideration in light of *Ham*.

In Commonwealth v. Ross, 363 Mass. 665, 296 N.E.2d 810 (1973), the Supreme Judicial Court of Massachusetts affirmed Ross' conviction concluding that the Supreme Court's decision in *Ham* had been restricted to the particular facts of that case. Ross, unlike Ham, was not a "special target for racial prejudice." *Id.* at 672, 296 N.E.2d at 816. While a judge must make inquiry prior to *voir dire* to determine if racial prejudice seems likely to enter into the issues of the trial, absent such issue a general inquiry into prejudice on *voir dire* will be sufficient. *See* Note, *Exploring Racial Prejudice on Voir Dire: Constitutional Requirements and Policy Considerations*, 54 B.U. L. REV. 394 (1974).

The Supreme Court denied a writ of certiorari and refused to consider the conclusion of the Massachusetts court. Ross v. Massachusetts, 414 U.S. 1080 (1973). Justice Marshall, in a bitter dissent joined by Justices Douglas and Brennan, sharply disagreed with the Massachusetts court and the failure of the Supreme Court to grant review. See notes 80-82 and accompanying text *infra*.

Considering a writ of habeas corpus, the Court of Appeals for the First Circuit reversed Ross' conviction. Ross v. Ristaino, 508 F.2d 754 (1st Cir. 1974). Refusing to decide whether *Ham* had announced a broad rule, the court nonetheless concluded that the "likelihood of infection of the verdict (by racial prejudice) was at least as great as in *Ham*." *Id.* at 756. The factors which the court considered important included the presence of a white victim and his status as a security guard.

The dissent, worried about the "Pandora's box of potential evil" opened by the majority's opinion, doubted whether, in fact, there was any relation between a proposed question about racial prejudice and the "ultimate desideratum"—the uncovering of racial prejudice in prospective jurors. *Id.* at 758. See note 48 *supra*.

a black man, was accused of assaulting a white security guard. Although requested by counsel, the state court trial judge refused to inquire into the possible racial prejudice of the venirepeople.[74] Instead, he limited his questioning to the general inquiry, required by state statute, into possible bias.[75]

The Supreme Court did not consider the trial court's actions to be a violation of Ross' constitutional rights. Although the Court had required similar questioning in *Ham*, that case was distinguished on the basis of its special facts. Because of Ham's civil rights activity and his defense that he was being framed, "[r]acial issues . . . were inextricably bound up with the conduct of the trial."[76] In *Ross*, on the other hand,

> [t]he mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*. . . . The circumstances thus did not suggest a significant likelihood that racial prejudice might infect Ross' trial.[77]

The Court held that constitutional demands of due process could be satisfied by a "generalized but thorough inquiry into the impartiality of the veniremen."[78] In a footnote, the Court suggested that while its holding defined minimum constitutional limitations, a wiser course would be to allow such questioning: "Under our supervisory power we would have required as much (i.e. mandating inquiry) of a federal court faced with the circumstances here. The States are also free to allow or require questions not demanded by the Constitution."[79]

Justice Marshall, joined by Justice Brennan, dissented,[80] assert-

74. The question proposed by Ross was: "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" 363 Mass. at 667 n. 4, 296 N.E.2d at 812 n. 4 (1973).

75. MASS. GEN. LAWS ANN. ch. 234, § 28 instructs the court to question, upon motion of either counsel, potential jurors as to possible bias including whether the potential juror is "sensible of any bias or prejudice." In 1973, an amendment to the statute was added which allows more particular questioning about bias if "as a result of the impact of considerations" a decision may be influenced by factors including "possible preconceived opinions toward the credibility of certain classes of persons." As one commentator has noted, the Supreme Judicial Court's opinion in *Ross* would probably be consistent with the amendment since it was concerned with the "impact of considerations." *See* Note, *Exploring Racial Prejudice on Voir Dire: Constitutional Requirements and Policy Considerations*, 54 B.U. L. REV. 394 (1974).

76. 424 U.S. at 597.

77. *Id.* at 597-98.

78. *Id.* at 598.

79. *Id.* at 597 n. 9.

80. Justice White concurred in the result reached by the majority but not in the logic. He believed that *Ham* had announced a new constitutional rule creating a widespread obligation to allow questioning into racial prejudice on *voir dire* but that the rule should not be applied retroactively. *Id.* at 599. Justice Stevens did not participate in the decision.

ing that the "promises inherent in *Ham* and *Aldridge* will not be fulfilled."[81] In his dissent from the original denial of certiorari in *Ross*, Justice Marshall had written that in analyzing *voir dire* the Court should not be concerned with whether the defendant was a "special target of racism," but rather with the potential for revealing the "bias of the particular jurors who try the accused."[82] Referring to *Ham*, Justice Marshall restated the analysis that the essential demands of fairness, coupled with the special concern for race inherent in the fourteenth amendment, required that inquiry into racial prejudice be available in the trial of a black defendant.

The Significance of Ross

Since the distinguishing factors in *Ham* resulted in racial issues being "bound up" with the conduct of the trial, the Supreme Court seems to have required that a nexus exist between the prejudice feared and the issues of a case. This is a test which seems tailored to the special abilities of a trial judge familiar with the conduct and issues of a trial. To this extent, the majority's opinion in *Ross* represents a strong reaffirmation of the role of the trial judge in the determination of the limits to *voir dire*. Unlike the opinions which preceded it, *Ross* seems to be an attempt to provide practical standards by which a judge can make the recurring decisions on the extent of *voir dire*.

In reaching its conclusion, however, the Court's analysis reflected a radical departure from prior approaches taken by courts. Not only did *Ross* reject arbitrary distinctions based upon the unique status of racial prejudice in the Constitution, but by focusing on the issues of the trial, rather than the possible bias of venirepeople, the court virtually gave constitutional sanction to the presence of biased individuals on a jury.

Racial Prejudice and the Impartial Jury. Ross may be clear on only one point, but on that point it is very clear. The racial identity of the defendant and victim in criminal cases is not constitutionally determinative of the right to question venirepeople about their racial prejudices. Various federal circuits notwithstanding, the Supreme Court disposed of the contention that *Aldridge* and *Ham* had established a per se rule which allowed inquiry into racial prejudice in crimes of violence where the victim was of a different race than the defendant.

In rejecting such a rule the Court appropriately divorced the

81. 424 U.S. at 599 (Marshall, J., dissenting).

82. 414 U.S. 1080, 1083 (1973), *quoting* Aldridge v. United States, 283 U.S. 308, 314 (1931).

analysis of *voir dire* from the fourteenth amendment's traditional concern for blacks. Unlike *Ham*, the majority opinion in *Ross* was premised upon the right to an impartial jury. Since threats to a jury's impartiality can come from many sources, the Court acknowledged that an acceptable analysis of the limits to *voir dire* could not be dependent on the type of prejudice involved. The Court noted that a per se rule allowing inquiry into prejudice

> could not in principle be limited to cases involving possible racial prejudice. It would apply with equal force whenever *voir dire* questioning about ethnic origins was sought, and its logic could encompass questions concerning other factors . . . . In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a per se rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.[83]

While the Court in the past has been more willing to make a "divisive assumption" to ensure an impartial jury,[84] the basic premise that the right to an impartial jury is racially neutral should be beyond dispute.

Significant Likelihood. Judicial concern with prejudice has, in the past, focused on the possibility that a potential juror might be prejudiced, and such concern was the obvious result of a system which allowed for the removal of a prospective juror upon the demonstration of virtually any bias. Thus, in *Aldridge*, and in Justice Marshall's dissents in *Ross* and *Ham*, the focus was on the possibility that bias existed among the jurors who try the accused.

According to the majority in *Ross*, the facts of that case did not establish a "constitutionally significant likelihood" of prejudice.[85] Although the Court used familiar language, *Ross* represents a substantial departure from the analysis used in prior cases. Where other cases had focused on the likelihood that a prospective juror was prejudiced, the Court in *Ross* focused on the likelihood that factors at trial would "intensify" any prejudice that was held by jurors and

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83. 424 U.S. at 596 n. 8 (citations omitted).

84. In Aldridge v. United States, 283 U.S. 308 (1931), the government argued that it might be detrimental to allow questioning of jurors about their racial prejudice. Chief Justice Hughes responded:

> We think 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 elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

Id. at 315.

85. 424 U.S. at 597-98.

thus "distort" or "infect" the trial. Such an analysis shows extraordinary tolerance for the presence of biased jurors, for the Court has indicated that the Constitution is not concerned with whether jurors are prejudiced but rather whether prejudice, when present, will be expressed and actually influence the jury's deliberations.

The test advanced in *Ross* is actually premised on a psychological rather than a constitutional assumption. The Court concluded—presumably by judicial notice since there was no citation—that cases which did not openly confront prejudice "were [less] likely to intensify any prejudice that individual members of the jury might harbor."[86] This assumption does make intuitive sense, and there is some support for the concept in the psychological literature.[87] Perceptions and judgments are more likely to be affected when they are directly involved with prejudices that are held. This psychological assessment underlies the conclusion reached by the Court, and a preoccupation with the test that the Court suggested—a concern with the factual issues of a trial—should not obscure the more fundamental conclusion that it is the "intensification" of prejudice which should be the significant factor in determination of the right of inquiry on *voir dire*.

The Future of Ross

The true significance of *Ross* lies, of course, in the manner in which it will be applied by the lower courts. Given the Supreme Court's analysis, the limits reached will inevitably be narrow. However, the narrowness of those limits will depend on whether the courts simplistically follow the implication of *Ross* that some factual nexus is required before questioning is compelled, or instead focus on circumstances which might produce an intensification of prejudice.

If *Ross* actually requires that there be an *explicit* involvement of prejudice as an issue at trial then the constitutional basis for some mandatory inquiry may effectively have been removed. It is very likely that this interpretation will prevail, and the courts which have considered *Ross* have certainly not read it as broadening the right of

86. *Id.* at 597.

87. Numerous studies of selective perception have indicated that those who are "prejudiced" will misperceive data and have it conform more closely to thier biases. *See, e.g.*, Vidmar & Rokeach, *Archie Bunker's Bigotry: A Study in Selective Perception and Exposure*, 23 JOURNAL OF COMMUNICATION 36 (1974); Cooper & Jahoda, *The Evasion of Propaganda*, 23 JOURNAL OF PSYCHOLOGY 15 (1947); Kendall & Wolf, *The Analysis of Deviant Cases in Communications Research*, in P. LAZARSFELD & F. STANTON, COMMUNICATION RESEARCH 1948-1949 (1949).

inquiry.[88] For example, in *Dukes v. Waitkevitch*,[89] the Court of Appeals for the First Circuit—the court that was reversed in *Ross*—provided the first substantive analysis of the opinion. There, a black man was accused of participation in a gang rape of several white women, and the trial court denied a defense request to inquire into racial prejudice on *voir dire*. It was contended that the sexual nature of the offense constituted "exacerbating" circumstances within the contemplation of *Ross*. The court of appeals responded:

> We do no read *Ross* to accord leeway for such distinctions. Cases suggested by the Court as similar to *Ham* are those in which the charges and defenses explicitly implicate racial issues, and not those which involve racial prejudice, by inference, through the identity of the parties. . . . While interracial rape may be a classic category of racial prejudice, the prejudice inheres in the identities of the parties and not in the specific issues.[90]

If the identity or "status" of the parties is not a ground on which the right of inquiry will be premised then it is difficult to imagine situations in which *voir dire* is constitutionally available. Apparently blacks may not inquire into racial prejudice simply because they are black, and bearded people may not inquire into prejudice simply because they are bearded. While the status of parties can at times be a significant issue in a trial,[91] the Supreme Court may have, in effect,

88. In State v. Gibbs, 228 S.E. 2d 104, 105 (S.C. 1976), the court concluded: "The fact that the appellant was black and the victim white was in no way involved in any issue in the trial and the trial judge properly refused to inject the question of racial prejudice through questions submitted by appellant." United States v. Jeffers, 532 F.2d 1101 (7th Cir. 1976) (no "unusual circumstances" which would create a constitutional right of inquiry); United States v. Floyd, 535 F.2d 1299 (D.C. Cir. 1976) (no showing of special circumstances that would require questioning into possible racial prejudice); People v. Caldwell, 39 Ill. App. 3d 1, 349 N.E.2d 462 (1976) (defendant not a special target of prejudice); Thornton v. State, 31 Md. App. 205, 355 A.2d 767 (1976) ("circumstances of the case" intensify prejudice); *But cf.* United States v. Segal, 534 F.2d 579 (3d Cir. 1976) (citing *Ross* for the propostion that a certain amount of surface information about venirepeople must be supplied and reversing a conviction for bribing an I.R.S. agent as a result of the trial court's failure to allow prospective jurors to be asked if they or their family worked for the I.R.S.).

89. 536 F.2d 469 (1st Cir. 1976).

90. *Id.* at 470-71.

91. While inquiry into possible prejudice may not be constitutionally available when problems of credibility relate solely to the identity of the party, *see* Gorin v. United States, 313 F.2d 641 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963) (no error not to ask prospective jurors if they would give more weight to the testimony of a police officer), distinctions might be drawn on the basis of how closely "identity" was involved with issues in the case. In *Ross*, the victim was a security guard assaulted in the line of duty. While the trial judge did allow inquiry about the prospective jurors' association with the police and private security agencies, it is possible that if he had not allowed the inquiry it would have been constitutional error since the victim's

restricted the constitutional requirement of *voir dire* to political trials in which issues of class, ideology or race are explicitly involved.[92]

If, however, the Supreme Court is concerned with factors that will intensify latent prejudice, then it is possible to argue that numerous factors tied to the conduct of a trial could be significant in determining the right of inquiry.[93] Thus, the court of appeals in *Dukes* may have misconstrued the basic holding of *Ross*. Interracial rape is a situation likely to produce intense responses when racial prejudice is present, and certainly it would be possible to present evidence to a trial court of the psychological literature which analyzes the fundamental sexual implications of racism.[94] To suggest that a black civil rights worker charged with possession of marijuana is more likely to have prejudice distort his trial than a black defendant charged with participation in a gang rape of white women borders on the absurd.

To conclude that the explicit involvement of issues of prejudice at trial is the only situation to which constitutional significance will be attached is to create a "per se" rule of the most arbitrary sort. Yet that may be the result of *Ross*. The limits to *voir dire* are now dependent on the imaginative application of *Ross* by lawyers and trial judges, and arguments which reflect an understanding of the purposes of *voir dire* and the basic premise of *Ross* may help preserve the courts' traditional concern with ensuring "essential fairness."

CONCLUSION

Determination of the constitutional limits to *voir dire* and the

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identity as a security guard, though not his race, was a factual aspect of the trial. Similarly, in United States v. Segal, 534 F.2d 579 (3d Cir. 1976), a case decided after *Ross*, and involving an alleged bribery offer to an I.R.S. agent, the Court of Appeals reversed because the trial court refused to allow the defendant to ask prospective jurors if they were associated with the I.R.S.

92. In United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973), the Court of Appeals, in reviewing the conviction of members of the Chicago Seven, concluded that *voir dire* must include inquiry into prejudices directed at three of the significant aspects of the case: Vietnam protest, youth culture—"hippies, yippies and freaks"—and attitudes toward the police.

93. In fact, the Court of Appeals, in *Ross*, concluded that questions about racial prejudice must be asked because the circumstances were as likely as those in *Ham* to distort a trial. The court further noted:

> If a juror were prone to racial bias, we question whether it is reasonable to conclude that he would confine that bias and its destructive effects on his impartiality, to cases where the defendant was a civil rights leader. That the juror might be particularly prone to vent his bias in such a case in no way supports the conclusion that he would be an impartial juror in the absence of such a special factor, as the due process clause requires.

Ross v. Ristaino, 508 F.2d 754, 756 n. 4 (1st Cir. 1974).

94. *See, e.g.*, S. ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE (1959). *See also* S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); D. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969).

right to an impartial jury involves a complex amalgam of competing interests, but at bedrock rest certain assumptions about the nature and operation of human prejudice. In *Ross*, those interests and assumptions led to several basic conclusions. First, the racial identity of the parties will not be sufficient, in and of itself, to require that questioning into the racial prejudice of venirepeople be allowed. Second, the focus for the trial court in determining whether inquiry must be allowed will be on the nature of the trial and the issues presented and not on the individuals who may act as jurors. Finally, the Court expressed concern with factors that will intensify any prejudice held by jurors and increase the likelihood that their function as fact finders will not be adequately performed.

It remains to be seen how sterile and restrictive an interpretation of *Ross* will evolve. It is possible, perhaps likely, that the narrow construction demonstrated in *Dukes* will predominate. But that is not an inevitable development, and application of the fundamental premises of *Ross* may yet produce a significant role for the Constitution in the determination of the limits for *voir dire*.