Chapter 7: Criminal Law and Procedure

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CHAPTER 7

Criminal Law and Procedure

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§7.1. Trial De Novo. The constitutional foundation underlying the system of trial de novo in Massachusetts was subjected to a frontal assault during the Survey year. The system survived, but there is reason to doubt its continuing validity.

The debate over the wisdom of maintaining a two-tiered system of trial courts has been wide-ranging. One of the chief complaints against the trial de novo system is that it insulates trial judges from any meaningful appellate review. This isolation fosters an environment in which trial judges can, with impunity, ignore the constraints placed upon judges in courts of record. It is exceedingly difficult to obtain relief from even the most outrageous action by a district court judge, short of wiping the slate clean and starting anew in superior court. As several cases decided during the Survey year demonstrated, that option is not always satisfactory to defendants.

I. Enbinder v. Commonwealth

The petitioner in Enbinder v. Commonwealth brought a writ of error seeking relief from the action of a Boston municipal court judge who had found the defendant guilty of larceny and assessed a fine of $10. The petitioner based her complaint on the judge's offer to dismiss the case if she would sign a document releasing the department store and store detective from civil liability. The petitioner contended

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2 See, e.g., Bing & Rosenfeld, supra note 1, at 96-98.


4 Id. at 2117, 330 N.E.2d at 847.

5 Id.
that the judge's offer of a dismissal in return for signing a civil release constituted coercion, which violated the petitioner's constitutional right to a fair trial.\(^6\)

The Supreme Judicial Court did not reach the merits of those claims. Instead, the Court held that, since the conviction in the municipal court was appealed to the superior court and the complaint was then dismissed, a writ of error was unavailable.\(^7\) The Court reasoned that a writ of error tests a judgment in a criminal case.\(^8\) Under the trial de novo system, however, the judgment of the municipal court is deemed vacated once the defendant appeals.\(^9\) Reasoning that, as a result of the defendant's appeal to the district court, there was no "operative judgment" of the municipal court, the Supreme Judicial Court held that a writ of error was unavailable to the petitioner.\(^10\)

Nevertheless, the petitioner in Enbinder argued that even absent an "operative judgment," a writ of error should issue since it was her only remedy in the case.\(^11\) The petitioner noted that, under existing tort doctrine, the guilty verdict in the municipal court would act as a bar to a civil suit against the store and its detective for malicious prosecution.\(^12\) The Court, however, was not inclined to extend the traditional scope of the remedy afforded by writs of error.\(^13\) Instead, the Court suggested that the petitioner's remedy lay in the tort law rather than an extension of the scope of review exercised by the Supreme Judicial Court by means of writs of error.\(^14\)

The absence of a definitive judgment traditionally has been relied

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\(^6\) Id. at 2118, 330 N.E.2d at 847. The petitioner claimed that the judge's action violated her right to a fair trial under both article 12 of the Declaration of Rights of the Constitution of the Commonwealth and the fourteenth amendment to the United States Constitution. Id.

\(^7\) Id. at 2118, 330 N.E.2d at 848.

\(^8\) Id. at 2119, 330 N.E.2d at 848. G.L. c. 250, § 9, which governs the issuance of writs of error in criminal cases, provides: "A judgment in a criminal case may be re-examined and reversed or affirmed upon a writ of error for any error in law or in fact."


\(^11\) Id. at 2122, 330 N.E.2d at 849.

\(^12\) Id. See Della Jacova v. Widett, 355 Mass. 266, 244 N.E.2d 580 (1969), in which the Court stated that in suits alleging malicious prosecutions, a "conviction in the tribunal to which complaint was made, although reversed on appeal, is conclusive proof of probable cause, unless that conviction (1) 'was obtained solely by false testimony of the defendant' in the action for malicious prosecution, or (2) is 'impeached on some ground recognized by the law, such as fraud, conspiracy, perjury or subornation of perjury its sole foundation.'" Id. at 268-69, 244 N.E.2d at 582, quoting Dunn v. E.E. Gray Co., 254 Mass. 202, 203-04, 150 N.E. 166 (1926) and Wingersky v. E.E. Gray Co., 254 Mass. 198, 201, 150 N.E. 164, 165 (1926).


\(^14\) Id. The Court noted that the petitioner's case might well come within existing exceptions to the rule in malicious prosecution actions and, if it did not, a new exception might be created for bargaining or improper conduct by a trial judge. Id.
upon to justify shielding the district court from any review whatsoever. It is a well-established principle in Massachusetts that "[t]he appeal from the judgment of the District Court vacate[s] that judgment, and renders[s] immaterial . . . all . . . errors and irregularities in the proceedings there." 15

II. COSTARELLI v. MUNICIPAL COURT OF THE CITY OF BOSTON 16

Although the Court in Enbinder noted that it has never expressly rejected this principle, it referred to another case decided during the Survey year, Costarelli v. Municipal Court of the City of Boston, in which the Court indicated that some avenue of review is possible.

The plaintiff in Costarelli petitioned the Court to exercise its powers of superintendence of the lower courts under section 3 of chapter 211 of the General Laws. 17 Costarelli alleged that a judge of the Municipal Court of the City of Boston had announced that he would impose a one-year suspended sentence to the house of correction if the plaintiff did not appeal to the superior court; if, on the other hand, the plaintiff chose to appeal and seek a jury trial, a sentence of one year without suspension would be imposed. 18 The plaintiff contended that when he stated that he intended to appeal, the municipal court judge imposed the one-year sentence. 19

In his petition to the Supreme Judicial Court, Costarelli argued that the trial judge's imposition of a one-year sentence was a penalty for the exercise of his constitutional right to a jury in a trial de novo in the superior court. 20 Therefore, Costarelli asked that (1) the one-year sentence be expunged and a suspended sentence of one year be substituted for it, and (2) that the trial judge be enjoined from taking such action in the future. 21

As in Enbinder, the Court did not reach the merits of the plaintiff's complaint. Noting that at the time of its decision, Costarelli had not yet been tried in superior court, 22 the Court concluded that other

17 Id. at 481-82, 323 N.E.2d at 860. G.L. c. 211, § 3, grants the Supreme Judicial Court the power of "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided . . . ."
18 1975 Mass. Adv. Sh. at 482-83, 323 N.E.2d at 860. The refusal to impose a suspended sentence if an appeal is taken is not uncommon in the district courts. This practice seems to result in large part from a widespread assumption that an appeal cannot be taken from a suspended sentence. See, e.g., Bing & Rosenfeld, supra note 1, at 87. But see Acts of 1975, c. 459, § 2, amending G.L. c. 279, § 1A (a district court may not revoke a suspension of a sentence if a defendant appeals).
20 Id.
21 Id. at 483-84, 323 N.E.2d at 860-61.
22 Id. at 484, 323 N.E.2d at 861.
remedies were available to the defendant. Therefore, the Court refused to exercise its "extraordinary" power of general superintendence. Nevertheless, the Court did state: "We have little doubt that if, in a proper proceeding, the plaintiff sustains his burden of proving the allegations of his petition concerning the manner in which the judge sentenced him, he will obtain appropriate relief therefrom."

The Court did not specify the kind of relief Costarelli could get "in a proper proceeding." Since the sentence of imprisonment that was imposed as a result of Costarelli's appeal would be automatically vacated by the appeal, the gravamen of Costarelli's complaint is not immediately apparent. Since the superior court is free in any case to impose a more severe sentence than that of the district court, it could be argued that if Costarelli were to be found guilty in the trial de novo, he would not necessarily be adversely affected by the action of the municipal court judge.

Nevertheless, Costarelli would seem to be injured in two significant respects. First, since it is always better to be able to say that the district court imposed a suspended sentence, rather than actual jail time, Costarelli would be at a disadvantage in making an argument on disposition in the superior court. Secondly, if Costarelli were to withdraw his appeal, the district court could not resentence him to a more severe sentence than the original one.

Furthermore, although Costarelli was in fact prejudiced by the action of the municipal court judge, it is unclear how he may obtain relief. The only effective remedy for Costarelli would seem to be the reimposition of the suspended sentence. Presumably, the Supreme Judicial Court intended Costarelli's superior court trial to be the "proper proceeding" in which to obtain relief. Yet, all the superior court could do is dismiss the complaint—it has no power in a criminal proceeding to remand a case to the district court with instructions to take specific action. By neither specifying the relief it intended nor the forum in which it could be found, the Supreme Judicial Court did little to ensure that Costarelli obtained an adequate remedy.

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23 Id. at 490, 323 N.E.2d at 862-63.
24 Id. at 490, 323 N.E.2d at 863. The Court stated that its statutory power "should be used sparingly, and should rarely be used in a case where some other practical remedy is available; that on requests to review interlocutory rulings in criminal cases we should use this power only ... to avoid errors which might be irremediable and possibly not curable even by a new trial since the defendants could not thereafter be placed in statu quo ..." Id. at 489, 323 N.E.2d at 862.
25 Id. at 491, 323 N.E.2d at 863 (emphasis added).
26 See G.L. c. 278, § 25.
III. Costarelli v. Massachusetts

During the Survey year, Costarelli also discovered that the United States Supreme Court was not the proper forum in which to obtain relief. While Costarelli's petition was pending before the Supreme Judicial Court, he appealed directly to the Supreme Court. Costarelli challenged the constitutionality of the Massachusetts trial de novo system, alleging that it violated his sixth amendment right to both a speedy trial and a jury trial, as well as the fifth amendment double jeopardy prohibition. The Supreme Court, however, dismissed the appeal. Relying upon the decision of the Supreme Judicial Court in Whitmarsh v. Commonwealth, the Supreme Court held that it was without jurisdiction to hear the appeal since there was a higher state court, the Supreme Judicial Court, that could render a judgment on Costarelli's complaint.

IV. Whitmarsh v. Commonwealth

Whitmarsh, like Costarelli, sought review by the Supreme Judicial Court, under its extraordinary powers of general superintendence, of district court action, and was no more successful in obtaining direct relief. Unlike Costarelli, however, Whitmarsh was given a specific direction as to how relief could be obtained.

Prior to his trial in district court, Whitmarsh filed a motion for a jury trial, which was denied. Whitmarsh was found guilty and appealed to the superior court. Whitmarsh filed a motion in superior court seeking dismissal of the complaint on the grounds that he had been denied a trial by jury in the district court. However, before the motion was acted upon and before the appeal was tried in superior

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28 Costarelli appealed under 28 U.S.C. § 1257 (1970), which provides for Supreme Court review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." Id.
29 421 U.S. at 195.
31 421 U.S. at 195.
33 G.L. c. 211, § 3.
35 Id. at 1408, 316 N.E.2d at 614.
36 Id.
37 Id. at 1404 n.1, 316 N.E.2d at 612 n.1.
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court, Whitmarsh petitioned the Supreme Judicial Court. The Supreme Judicial Court concluded that Whitmarsh was not entitled to relief under section 3 of chapter 211 of the General Laws, since it was not a case in which "no other remedy is expressly provided." The Court reasoned that Whitmarsh had raised the same issue in the district court and in the superior court by his motion to dismiss. The Court then indicated the proper procedure for challenging the district court action: "If his motion were denied, and if he were thereafter tried in the Superior Court and found guilty, the plaintiff would have available to him an opportunity for appellate review of the ruling on his motion as matter of right by saving and perfecting exceptions thereto." Thus, the Court finally indicated the proper procedure for the adjudication of the constitutional validity of the trial de novo system: a motion for a jury trial in district court, a motion to dismiss in superior court, a state court appeal, and ultimately an appeal to the United States Supreme Court.

V. COMMONWEALTH v. LUDWIG

The defendant in Commonwealth v. Ludwig followed the procedure suggested by the Supreme Judicial Court in Whitmarsh. The case is now on appeal to the United States Supreme Court, and, with the procedural barriers out of the way, the ultimate issue can finally be settled.

The ultimate issue is whether the Massachusetts trial de novo system deprives defendants of their federal constitutional rights. Ludwig claimed that the system subjected him to double jeopardy in violation of the fifth amendment and deprived him of his sixth amendment right to a speedy trial and to a jury trial. Citing Whitmarsh, the Supreme Judicial Court summarily disposed of Ludwig's claims as "untenable."

38 Id. at 1404 & n.1, 316 N.E.2d at 611, 612 n.1. In addition, Whitmarsh designated his petition as an "Interlocutory Appeal." Noting that the only interlocutory appeal available in a criminal case was that provided for by G.L. c. 278, § 28E, which permits a defendant in a felony case to take "an interlocutory appeal from a decision, order or judgment of the superior court determining a motion to suppress evidence prior to trial . . .," the Court held that no such appeal was available since (1) the case involved a misdemeanor rather than a felony, and (2) there had been no "decision, order or judgment of the superior court" on a "motion to suppress evidence." 1974 Mass. Adv. Sh. at 1404-05, 316 N.E.2d at 612.

39 Id. at 1404, 316 N.E.2d at 611-12.
40 Id. at 1406, 316 N.E.2d at 613.
41 Id.
42 Id.
44 Ludwig v. Massachusetts, prob. juris. noted, 96 S.Ct. 354 (1975) (No. 75-377).

http://lawdigitalcommons.bc.edu/asml/vol1975/iss1/11
Although *Whitmarsh* was decided on jurisdictional grounds,\(^{47}\) the Court, in dicta, discussed the constitutional claims.\(^{48}\) The Court noted that although it had considered the jury trial issue with regard to "the similar requirement" of the Massachusetts Constitution,\(^{49}\) it had not previously addressed the question whether the Massachusetts two-tier court system violates the sixth amendment requirement of a jury trial.\(^{50}\)

The plaintiff in *Whitmarsh* argued that, regardless of the Court's holding that the system satisfied the requirements of the Massachusetts Constitution, the sixth amendment has been held, in *Callan v. Wilson*,\(^{51}\) to guarantee a criminal defendant in the federal courts the right to trial by jury "from the first moment, and in whatever court, he is put on trial for the offence charged . . . ."\(^{52}\) Reasoning that the jury trial requirements imposed on the federal system applied in all respects to the states, Whitmarsh contended that the Massachusetts trial de novo system deprived him of his sixth amendment rights.\(^{53}\)

The Court rejected Whitmarsh's contention that the sixth amendment as applied to the states through the fourteenth amendment requires that a criminal defendant receive a jury trial in a state court "in the first instance."\(^{54}\) In reaching its decision, the Court noted the uncertain state of the law with regard to both the meaning of the sixth amendment jury trial provision\(^{55}\) and "the specific instances of its application to the States . . . ."\(^{56}\) Therefore, the Court did not feel con-
strained to conclude either (1) that the United States Supreme Court would, at the present time, construe the sixth amendment as requiring a jury trial "in the first instance" for all criminal offences, or (b) that, even if the Supreme Court reaffirmed the Callan rule with regard to the federal courts, it "would apply such a requirement in equal fashion to the States." 57

Whitmarsh also contended that the trial de novo system violates the double jeopardy clause. 58 He argued that the existence of authority in the superior court judge to impose a more severe sentence than the one imposed by the district court violates the double jeopardy clause. 59 Relying on the Supreme Court's decisions in North Carolina v. Pearce 60 and Colten v. Kentucky, 61 the Supreme Judicial Court rejected Whitmarsh's claim. 62 A similar double jeopardy argument was raised by the defendant in Colten. Colten relied upon the Supreme Court's holding in Pearce, which forbade on due process grounds the imposition, following a successful appeal and reconviction, of a more severe punishment than the one imposed after the first trial. 63 Colten argued that the Kentucky trial de novo system violated both the due process and double jeopardy clauses. 64

The Supreme Court in Colten refused to extend its holding in Pearce to the trial de novo system. 65 In reaching its decision, the Supreme Court rejected Colten's contention that the double jeopardy clause prohibits imposition of a more severe penalty on reconviction. 66 The Supreme Court observed that this claim "ignores [the fact] that a defendant can bypass the inferior court simply by pleading guilty and

1412-15, 316 N.E.2d at 616-18, and cases cited therein.
57 Id. at 1416, 316 N.E.2d at 618-19.
58 Id. at 1417, 316 N.E.2d at 619.
59 Id. Whitmarsh also contended that the "threat of enhanced penalty" "chilled" the exercise of his right to appeal. Id. Noting that this was essentially a claim of denial of due process rather than of violation of the double jeopardy clause, the Court rejected this contention. Id. In reaching its decision, the Court relied on its conclusion in Mann v. Commonwealth, 359 Mass. 661, 271 N.E.2d 331 (1971), that the trial de novo system serves a legitimate purpose. Id. at 666, 271 N.E.2d at 333. In Mann, the Court emphasized that:
[a] defendant not only "gives up nothing by going to trial in the district court" but he actually gains the distinct advantage of a preview of the prosecution's case without having to disclose his own. If he is found guilty he can appeal. If he is found not guilty that is the end of the case because "double jeopardy" precludes an appeal by the State.
Id. at 664-65, 271 N.E.2d at 334.
63 Pearce, 395 U.S. at 729-24. The Court did suggest that the imposition of a greater sentence would be permissible if new circumstances had come to light. Id. at 729.
64 Colten, 407 U.S. at 114.
65 Id. at 119.
66 Id. The Court observed that the same argument had been raised and rejected in the Pearce case. Id., citing Pearce, 395 U.S. at 719-20.
erasing immediately thereafter any consequence that would otherwise follow from tendering the plea.

Thus, the Supreme Judicial Court's analysis of the double jeopardy clause with regard to imposing a greater penalty is correct. However, there is a far greater danger to the de novo system lurking within the double jeopardy clause than the claim so easily disposed of in Whitmarsh.

Quite apart from prohibiting punishing a defendant twice for the same offense, the double jeopardy clause protects a defendant against twice being put in jeopardy. A defendant is put in jeopardy, quite clearly, by the mere fact of a trial, whether or not he will be punished twice. The de novo system makes a defendant go through two trials, and thus may be subject to a double jeopardy challenge based on this, its most obvious, feature.

Jeopardy principles have evolved slowly. Originally, the ban on twice being placed in jeopardy was held to bar a defendant from seeking a new trial based upon errors committed at his original trial. When the concept of appellate review was extended to criminal cases, an issue arose whether the double jeopardy clause permits retrying a defendant whose conviction was reversed. Courts have traditionally held that double jeopardy does not bar a second trial. This result was justified by the concept of "continuing jeopardy." Under this view, jeopardy was perceived as not ending until the accused was acquitted or until his conviction became final. Therefore, a retrial merely continued the jeopardy of the first trial. Although this principle had never been adopted by a majority of the Supreme Court, it was relied upon to justify a number of double jeopardy decisions.

The Massachusetts trial de novo system would seem to fit the concept of "continuing jeopardy." The underpinnings of this concept, however, no longer exist. During the Survey year, the United States Supreme Court rejected the "continuing jeopardy" theory in Breed v. Jones, which dealt with an analogous problem in juvenile proceedings. The Court found that "a more satisfactory explanation

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68 See, e.g., Price v. Georgia, 398 U.S. 323 (1970): "[T]he Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction, not punishment." Id. at 329 (emphasis added).
73 See Green v. United States, 355 U.S. 184, 189 (1957), and cases cited therein.
74 421 U.S. 519, 534 (1975).
75 In Breed, a juvenile was subjected to a delinquency hearing, in which he was declared a delinquent, 421 U.S. at 521-22. When the juvenile court judge subsequently declared him "unfit for treatment as a juvenile," he was tried and convicted as an adult. Id. at 524, 525. For further discussion of the Breed problem, see Rossman, Criminal Law and Procedure, 1974 ANN. SURV. MASS. LAW § 3.3, at 49-56.
[for permitting a retrial] lies in analysis of the respective interests involved.\footnote{76}{421 U.S. at 534.}

The interests involved in allowing retrials are, essentially, fairness to the defendant\footnote{77}{See Illinois v. Somerville, 410 U.S. 458, 463 (1973); United States v. Tateo, 377 U.S. 463, 466 (1964).} and society's interest in being able to secure a final adjudication.\footnote{78}{Id.} Thus, even without the "continuing jeopardy" theory, states would not be barred from retrying those whose convictions were reversed on appeal, so long as a favorable balancing of these interests could be established.

The validity of the trial de novo system under the double jeopardy clause also turns on an analysis of the interests involved. Most assuredly, a defendant who insists on the full panoply of constitutional rights to which he is entitled—including a jury trial—is forced by the state system to be placed twice in jeopardy. It is inconsequential that there is, in the end, only one effective verdict. The double jeopardy clause is cast in terms of trial and conviction, not of the ultimate legal consequences of the verdict.\footnote{79}{United States v. Jam, 400 U.S. 470, 479 (1971); Price v. Georgia, 398 U.S. 323, 331 (1970).} Therefore, that the trial de novo system subjects the accused to two trials renders it constitutionally suspect.

The Supreme Court's decision in \textit{Price v. Georgia}\footnote{80}{398 U.S. 323 (1970).} illustrates the importance of this distinction. The defendant in \textit{Price} was brought to trial on a murder indictment.\footnote{81}{Id. at 324.} The jury, without reference to the charge of murder, found him guilty of manslaughter.\footnote{82}{Id.} The Court of Appeals of Georgia subsequently reversed the conviction and ordered a new trial.\footnote{83}{Id.} The defendant was retried on the murder charge and again convicted of manslaughter.\footnote{84}{Id.}

On appeal, the Supreme Court accepted the defendant's contention that his second trial on the murder charge violated the constitutional prohibition of double jeopardy.\footnote{85}{Id. at 329.} The Court reasoned that the jury's verdict at the first trial amounted to an "implicit acquittal" on the murder charge.\footnote{86}{Id. at 328-29.} Since the subsequent trial placed the defendant in jeopardy a second time on the murder charge, the Court concluded that the resulting manslaughter conviction could not stand.\footnote{87}{Id. at 329.} The Court felt compelled to reverse, even though they observed that the double jeopardy clause would not have prevented a retrial confined solely to a manslaughter charge, rather than a murder charge.\footnote{88}{Id.}
The Supreme Court's decision in *Price* bears directly on the balance of interests test propounded by the Court in *Breed* for purposes of double jeopardy analysis. In *Price*, the state had another alternative to achieve its interest in attaining a final judgment: Georgia could have obtained a valid conviction by limiting Price's second trial to a charge of manslaughter.

If *Price* thus stands for the proposition that an otherwise unobjectionable conviction must be reversed on double jeopardy grounds if the trial from which it resulted needlessly placed the defendant twice in jeopardy, the case—particularly in conjunction with *Breed*—bodes ill for the Massachusetts trial de novo system, to which there is clearly an alternative. The pivotal factor is the weight to be accorded the interests involved.

The defendant's interest under the trial de novo system is substantial—avoiding the burden of being subjected to two trials. The state's interest, on the other hand, is "to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available . . . ." The weight of the concomitant state interest in subjecting the defendant to multiple trials is, however, questionable.

The questions can be seen in the Supreme Court's discussion of the double jeopardy implications of a retrial following a mistrial. Although the Court has recognized that there are circumstances in which a mistrial does not bar a second trial, the Court has emphasized that the policy of avoiding multiple trials is so important that exceptions to the principle are "only grudgingly" allowed. Therefore, the Court has sustained the right of the government to retry a defendant following a mistrial only where "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." Circumstances in which a mistrial is necessary to abort a trial that cannot proceed to an error-free conclusion are comparable to those situations involving reversal on appeal for inadvertent error in the initial proceedings; in both cases, the *Breed* "balancing of interests" approach to double jeopardy would not preclude the state from subjecting the defendant to a second trial.

As a stark contrast to inadvertent error, denial of constitutional rights is a built-in feature of the trial de novo system. It is deliberate

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89 See text at notes 73-75 supra.
90 398 U.S. at 329. The Supreme Court noted that, depending upon the construction of several Georgia statutes and upon the power of its courts to fashion remedial orders, Price might, even after the Court's decision, be reindicted or retried for manslaughter under Georgia law. Id. at 332.
error. In the context of mistrials, the Supreme Court has cautioned that "[i]f there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain."\(^95\) The design of the criminal justice system in the Commonwealth may very well be seen as the analogue of the kind of judicial impropriety—or deliberate error—that the Supreme Court has warned will raise the double jeopardy bar.

In sum, the de novo system would run afoul of the ban on double jeopardy no matter what constitutional right were denied in the first-tier trial. The problem is created by the Commonwealth's forcing a defendant to place himself in jeopardy a second time in order to secure a right that is concededly due.

Chief Justice Tauro has recognized Breed's "ominous language,"\(^96\) which forewarns the possible demise of the Massachusetts trial de novo system. The Commonwealth should begin to give serious consideration to alternatives to the system, for the Ludwig case may very well deliver the death blow to the trial de novo structure within the upcoming year.

§7.2. The Role of the Jury in a Criminal Trial. Several cases decided during the Survey year dealt with the proper role of the jury in a criminal trial. The Supreme Judicial Court relaxed the rule that juries should not be informed of the consequences of their verdicts,\(^1\) but strictly limited the right to ask questions concerning juror prejudice on voir dire.\(^2\) The First Circuit, meanwhile, placed itself squarely in opposition to the state courts with respect to the voir dire issue.\(^3\)

I. COMMONWEALTH v. MUTINA\(^4\)

Commonwealth v. Mutina involved an appeal from a murder conviction by a defendant who had presented overwhelming evidence at trial that he was legally insane at the time he committed the crime.\(^5\) A unanimous Court, relying upon its power to review the entire record

\(^{95}\) United States v. Tateo, 377 U.S. 463, 468 n.3 (1964).


\(^{3}\) Ross v. Ristaino, 508 F.2d 754, 756 (1st Cir. 1975).


\(^{5}\) Id. at 392, 323 N.E.2d at 301.
in capital cases in order to ensure justice,\(^6\) concluded that the conviction was against the weight of the evidence and must be reversed.\(^7\)

The Court was divided, however, concerning the problem created by juries who, because of ignorance regarding the consequences of a verdict of not guilty by reason of insanity, may convict in the face of overwhelming evidence to the contrary. The majority of the Court, with three judges dissenting,\(^8\) held that upon request by the defendant, trial judges must give an instruction that explains the process of commitment to which a defendant found not guilty by reason of insanity is subject.\(^9\)

The record in _Mutina_ left no doubt in the Court's mind concerning what must have occurred in the jury room.\(^10\) The defendant did not deny that he committed the murder, and the prosecution did not introduce any independent evidence on the question of criminal responsibility.\(^11\) Instead, the prosecution relied on the "presumption of sanity," its cross-examination of the defendant's witnesses, and the circumstances surrounding the shooting.\(^12\) The Court noted, however, that the two psychiatrists who testified on behalf of the defense were both emphatic in their diagnoses of mental illness.\(^13\)

The trial judge, however, refused the defendant's request that the jury be instructed as to the commitment procedure he would be subject to, if the jury were to acquit him by reason of insanity.\(^14\) Therefore, the jury found the defendant guilty of murder in the first degree.\(^15\) The Court, in attempting to ascertain the basis for the jury's verdict, emphasized that a court-appointed psychiatrist testified that

\(^6\) G.L. c. 278, § 33E, which provides in part:

> upon such consideration [of the law and the evidence] the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence.

_ID_.


\(^8\) Justice Quirico, with whom Justices Reardon and Wilkins joined, concurred in the Court's exercise of its power to grant a new trial. _Id_. at 395, 323 N.E.2d at 302 (dissenting opinion). The Justices dissented, however, from the majority's holding that the defendant in Massachusetts may request an instruction explaining the consequences of a verdict of not guilty by reason of insanity. _Id_. at 395, 323 N.E.2d at 302. The dissenters viewed the majority's holding as a departure from the long-established rule that a jury may not consider the legal consequences of their verdict. Such a departure was criticized on the basis that "[s]pecifically informing the jury of matters beyond their proper scope of concern can only lead the jury to consider such matters and to bring in a verdict they deem necessary to obtain the disposition they think proper for the defendant after that verdict is returned." _Id_. at 409, 323 N.E.2d at 308.


\(^10\) _See id_. at 392-93, 323 N.E.2d at 301-02.

\(^11\) _Id_. at 381, 323 N.E.2d at 297.

\(^12\) _See id_. at 382, 323 N.E.2d at 297.

\(^13\) _See id_. at 381, 323 N.E.2d at 297.

\(^14\) _Id_. at 376 & n.1, 323 N.E.2d at 295 & n.1.

\(^15\) _Id_. at 375, 323 N.E.2d at 294-95.
the defendant was, and would remain, an extremely dangerous person.\textsuperscript{16} Therefore, the Court reasoned, “[t]he jury may well have misunderstood the consequences of such a verdict and may have based their verdict of guilty on fears that the defendant would go free if they acquitted him on the ground of insanity.\textsuperscript{17} The Court then concluded that if the jury had been aware “of the true disposition after a verdict of not guilty by reason of insanity, they might have been more disposed to render a verdict based on the evidence, free from their understandable fears for the safety and security of the public.\textsuperscript{18}

Traditionally, juries have purposely been kept in ignorance of the consequences of their verdicts,\textsuperscript{19} on the assumption that giving this information to the jury would foster result-oriented verdicts, rather than a dispassionate consideration of the evidence.\textsuperscript{20}

The \textit{Mutina} decision did not embrace the concept of result-oriented verdicts.\textsuperscript{21} It was predicated, rather, on an assumption that without the specific information requested by the defendant, result-oriented verdicts are more likely to occur. The instruction providing the “extraneous” information is actually a counterbalance to the erroneous assumptions that the jury may take into its deliberations.\textsuperscript{22}

The Court in \textit{Mutina} saw this case as an example of a generally pervasive set of attitudes that would be found among any jury, and the rule it establishes for future trials is predicated on that example.

The assumptions underlying the Court’s rule can be expressed as a syllogism:

1) Jurors will ignore the weight of the evidence and refuse to return a verdict of not guilty by reason of insanity if they do not understand what will happen to the defendant after such a verdict.

2) Jurors do not in fact understand the consequences of such a verdict.

3) Therefore, jurors will refuse to render such verdicts even when the weight of the evidence requires them.

In order to avoid the consequence of the third step, either the first step or the second must be eliminated. The majority chose to intervene in the second step, by providing the specific information that would dispel the mistaken fears regarding a verdict of not guilty by reason of insanity.

Rather than providing the jury with the knowledge that the defen-

\textsuperscript{16} Id. at 383-84, 323 N.E.2d at 298.
\textsuperscript{17} Id. at 383, 323 N.E.2d at 298.
\textsuperscript{18} Id. at 384, 323 N.E.2d at 298.
\textsuperscript{21} Id. at 390, 323 N.E.2d at 300.
\textsuperscript{22} Id. at 391, 323 N.E.2d at 301.
dant will be subject to whatever control is necessary to ensure the safety of himself or others, the Court might have approached the problem in a more traditional manner. This would entail trying to ensure, insofar as possible under the judicial system, that the jury's deliberations are unaffected by consideration of the legal consequences to the defendant of their verdict. The three dissenting justices adopted such an approach to the problem. They would, in effect, intervene in the first step of the syllogism, by relying on "the giving of appropriate instructions to the jury on what they may and may not consider in reaching a verdict." 23

Neither opinion made any reference to empirical data dealing with the manner in which juries function when faced with an insanity defense. The majority cited examples from those sections of the landmark Chicago Jury Project that dealt with the jury's function in drunken driving and statutory rape cases, 24 to demonstrate that result-oriented verdicts do occur as a consequence of jurors' attitudes. The majority noted that, in such cases, acquittals in the face of overwhelming evidence of guilt commonly result from jurors' disapproval of the severity of the punishment attaching to conviction as well as from other extraneous factors. 25

There is, however, some direct evidence available of the impact upon a jury of an instruction comparable to that which was requested in Mutina. As part of the Chicago Jury Project, Rita Simon conducted a study of the jury and the defense of insanity. 26 During the study, jury panels composed of jurors who were members of an active jury pool listened to a tape recording based on the transcript of an actual trial. The jurors were instructed by a real judge that: their participation, rather than being voluntary, was part of their regular duties as jurors. At the end of the taped trial, the jurors deliberated as a normal jury would. Thirty trials, fifteen with a Mutina instruction and 15 without, were conducted. All of the trials used the same tape recording. 27 The results, as shown by the table below, were conclusive: 28

<table>
<thead>
<tr>
<th>Instruction given:</th>
<th>VERDICT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>NGI</td>
</tr>
<tr>
<td>Yes</td>
<td>9</td>
</tr>
<tr>
<td>No</td>
<td>8</td>
</tr>
</tbody>
</table>

The difference in the outcome of the deliberation is insignificant. In the context of the syllogism used above to analyze the Mutina decision, the question then becomes whether the instruction had no

23 Id. at 409, 323 N.E.2d at 308 (dissenting opinion).
25 Id. at 388-89, 323 N.E.2d at 299-300.
27 Id. at 56.
28 Id. at 92.
effect because of a lack of concern on the part of the juries as to the consequences of a verdict of not guilty by reason of insanity, or because they were already aware of the commitment process.

Lack of concern did not appear to be a significant factor: tape recordings of the juries' deliberations during the experiment demonstrated a substantial interest\(^{29}\) in what would happen to the defendant following an acquittal by reason of insanity. The failure of the Mutina instruction to significantly affect the verdict returned by the jurors would, therefore, seem to be attributable to the jurors' prior knowledge of the effect of an insanity acquittal.

The results of another phase of the experiment support this conclusion. All jurors were required to fill out a questionnaire after the trial had ended. One question concerned the consequences to the defendant of an insanity acquittal. Again, the results were conclusive:\(^{30}\)

<table>
<thead>
<tr>
<th>Instruction given:</th>
<th>ANSWER</th>
<th>Committed Prison</th>
<th>Probation/Freedom</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>93%</td>
<td>3%</td>
<td>4%</td>
</tr>
<tr>
<td>No</td>
<td>91%</td>
<td>3%</td>
<td>6%</td>
</tr>
</tbody>
</table>

Thus, whether the instruction was given or not, almost all of the jurors knew the correct answer.

The results of the Simon study would appear to be useful in determining whether a Mutina instruction would avoid result-oriented verdicts. It is not altogether clear, however, that the Court, even if it had known about the study, would have relied upon it. In Commonwealth v. McAlister,\(^{31}\) the Court dealt with the analogous question of disqualifying jurors who were opposed to capital punishment. In his opinion on behalf of the unanimous Court, Justice Reardon, who dissented in Mutina, disparaged such studies:

> These studies freely acknowledge the methodological defects inherent in such experiments. The most serious difficulty, of course, is that all of these studies were outside of actual trials. No such simulated cases can reproduce the great responsibility which exists when "in the solemnity of a court room a defendant is tried and his reputation and his liberty or his life are at stake."\(^{32}\)

Nevertheless, if the Simon study is valid, the problem of result-oriented verdicts, such as the one in Mutina, can be approached from a different perspective. The Mutina verdict may simply be a case of the short end of the law of averages catching up with a particular defendant to produce a jury that did not possess the knowledge that the

\(^{29}\) Id. at 144-60.
\(^{30}\) Id. at 93-94.
Simon study indicates most jurors have. Lacking this knowledge, the jury may have convicted because of fear of the consequences of an acquittal by reason of insanity. Thus, although a *Mutina* instruction may not do any good in most cases, it cannot do any harm either. Furthermore, in those cases where the instruction does present new information to the jury, it may avert a result-oriented verdict.

The dissenters in *Mutina* did not deny that giving such an instruction might eliminate some result-oriented guilty verdicts. Their main objection was that the instruction might encourage compromise result-oriented verdicts of not guilty by reason of insanity in cases where the evidence and the law would justify a guilty verdict. The Simon figures, however, suggest that the probability of such an effect is minimal, since in almost all of the study's cases the presence, or absence, of the instruction had no demonstrable influence on the ultimate verdict.

Nevertheless, more substantial issues underlie the Court's divided opinion in *Mutina*: (1) whether the instruction would prevent more result-oriented verdicts than it would foster, and (2) whether the Commonwealth's system of criminal justice can better tolerate result-oriented verdicts of not guilty by reason of insanity than of guilty. Neither the majority nor the dissenting opinion directly addressed these important considerations.

The results of the Simon study suggest an additional question: if the *Mutina* jury was, in fact, aware of the consequences of an insanity acquittal, how should the judicial system respond?

If the jury knew about the commitment process, the guilty verdict in light of overwhelming evidence of insanity suggests either that they did not trust the process or that they disagreed with the concept that persons who are not mentally responsible should not be criminally punished. In either event, jurors with these attitudes will present a stumbling block to a fair trial.

A possible solution would be to instruct the jury that they should not consider the legal consequences to the defendant of their verdict. Yet, cautionary instructions, as both the majority and the dissent recognized, are never entirely successful.

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33 The dissenters never directly addressed this issue. Nevertheless, in light of their concurrence in remanding the case for a new trial, the dissenting Justices would seem to have agreed that the guilty verdict in the *Mutina* case was result-oriented.

34 1975 Mass. Adv. Sh. at 408, 323 N.E.2d at 307 (dissenting opinion). The dissenters also noted that:

[where the defendant's commission of the act in question and his criminal responsibility are both closely disputed matters, an instruction such as that permitted by the court today may well provide the jury with an irresistible temptation to compromise on a verdict of not guilty by reason of insanity.]

*Id.* at 407-08, 323 N.E.2d at 307 (dissenting opinion).

35 See *text at notes 28 & 30 supra*.

36 *Id*. at 387, 323 N.E.2d at 299.

37 *Id.* at 308 n.9 (dissenting opinion).

§7.2 CRIMINAL LAW AND PROCEDURE

There is, however, a further avenue, which was not examined in *Mutina*, through which the Court can mitigate the effect of such attitudes on the fairness of a trial. If the attitudes of the jury regarding the commitment process are the potential source of a result-oriented verdict, a more effective prophylactic device than a judge's instructions may be to question jurors in that regard on voir dire. The very foundation of the adversary system is an assumption that the best method for discovering a person's bias is to subject him to questioning, in the form of cross-examination. The need to discover bias on the part of a juror is even more pressing than is the need to expose it in a witness, yet no one would suggest that an adequate substitute for cross-examination on this point would be a judge's instruction to the witness to put any bias aside.

The potential jurors in *Mutina* were, in fact, questioned about whether they could return a verdict of not guilty by reason of insanity. The questions allowed by the judge, however, were very general and did not explore in any depth jurors' attitudes regarding the commitment process or the values inherent in recognizing the defense of insanity. Even if extensive voir dire questioning would not have prevented the result-oriented verdict in this case, the Simon study suggests that such questioning is more appropriate than the instruction authorized by the *Mutina* decision.

II. *COMMONWEALTH v. LUMLEY* and *COMMONWEALTH v. HARRISON*

Although the technique of exploring jurors' attitudes through questions on voir dire may be a promising method for avoiding the kind of result-oriented verdicts exemplified by *Mutina*, it is unlikely to receive a warm reception in the state courts. In two cases decided during the Survey year, *Commonwealth v. Lumley* and *Commonwealth v. Harrison*, the Supreme Judicial Court addressed the issue of voir dire questioning. In both cases, the Court rejected claims by defendants that, under the due process clause of the fourteenth amendment to the United States Constitution, trial judges must question jurors on specific biases: racial bias in *Lumley* and bias against welfare recip-

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41 1975 Mass. Adv. Sh. at 767, 327 N.E.2d at 690. The defendant requested that the trial judge ask the following questions on racial bias:

"2. Will you be influenced in any way, either pro or con, by the race of Clifton Lumley?"

"3. Would you be able to give a black man accused of unnatural sexual acts with white women the same benefit of the doubt that you would give to a white defendant accused of unnatural sexual acts with black women?"

"9. Do you live in an integrated neighborhood?"

"10. If Negroes moved into your neighborhood, would you be more afraid of crime than you are now?"

"11. Would you be able to give a black man accused of unnatural sexual acts with a white woman the same benefit of doubt that you would give to a defendant accused of unnatural sexual acts with a woman of his own race?"
The Supreme Judicial Court has traditionally taken a restrained approach to claims for extensive voir dire rights, leaving the option of permitting such questions entirely within the trial judge's discretion.\textsuperscript{43} Even after the United States Supreme Court held in \textit{Ham v. South Carolina}\textsuperscript{44} that, under certain circumstances state courts must, pursuant to the due process clause, allow questions relating to racial prejudice,\textsuperscript{45} the Supreme Judicial Court continued to refuse to reverse a conviction on the basis of a trial judge's refusal to permit such questions.\textsuperscript{46}

The Supreme Court in \textit{Ham} limited its holding to the facts of the case\textsuperscript{47} and gave no indication of other circumstances in which questioning concerning specific juror prejudices might be constitutionally required. Since \textit{Ham}, the Supreme Judicial Court has viewed due process as requiring voir dire questioning with regard to specific juror prejudices only where a defendant is a "special target for racial prejudice."\textsuperscript{48}

The Court has been very restrictive in its characterization of "special targets." Indeed, Ham, who, according to the Supreme Judicial Court, "rightfully contended that bias, official and covert, was the sole cause and foundation for the prosecution,"\textsuperscript{49} is the only example of such a "target" that the Court has recognized.\textsuperscript{50} Thus, the Court refused to require questioning with regard to specific jury prejudices in both \textit{Lumley}, where a black defendant was charged with robbery, commission of an unnatural and lascivious act, and assault and battery on a white victim,\textsuperscript{51} and \textit{Harrison}, where a black defendant was

\textsuperscript{42} 1975 Mass. Adv. Sh. at 2356, 331 N.E.2d at 877. The questions which the trial judge refused to ask on voir dire concerned:
whether the prospective jurors were aware of feelings of hostility toward persons engaged in peaceful protest of governmental activities, or believed those persons to be unpatriotic or more likely to commit crimes than persons not so engaged; whether they were aware of feelings of hostility toward the welfare or Medicaid system; whether they believed youthful persons had less right to make judgments on governmental activities than other persons; whether they believed the testimony of police officers should by reason of their status be given greater credence than the testimony of others.

\textit{Id.} at 2349-50, 331 N.E.2d at 875.


\textsuperscript{44} 409 U.S. 524 (1973).

\textsuperscript{45} \textit{Id.} at 526-27.


\textsuperscript{47} The Supreme Court stated: "The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias." \textit{Ham}, 409 U.S. at 527 (emphasis added).


\textsuperscript{49} \textit{Id.} at 754, 327 N.E.2d at 685.

\textsuperscript{50} \textit{Id.} at 752, 327 N.E.2d at 685.

\textsuperscript{51} \textit{Id.} at 762-64, 327 N.E.2d at 688-89.
charged with armed robbery arising out of a demonstration in a welfare office.52

III. Ross v. Ristaino53

During the Survey year, the First Circuit demonstrated that it does not share the Supreme Judicial Court's restrictive view of the due process requirements with regard to voir dire questioning. Without deciding whether the Supreme Court's holding in Ham was limited to cases in which the defendant is a “special target” of prejudice,54 the court held that Ham is applicable in a situation where a black defendant is charged with a violent assault upon a white security guard.55

The dispute over the scope of the Ham rule, and the specific instances in which it is applicable, stems from differing views on the desirability of extensive voir dire questioning. The Supreme Court in Ham did not require unrestricted voir dire questioning regarding racial prejudice, even when some racial prejudice questioning is required by due process. Indeed, the Supreme Court left trial judges broad discretion as to the form and number of the questions to be allowed.56

Thus, due process can be served in a manner that is entirely familiar to the criminal justice system: setting out a general right on the part of the defendant and subjecting it to reasonable limitations set by the trial judge. Parallels can be found in the area of cross-examining a witness in order to expose bias. Although it is a defendant's constitutional right to present such questions to the jury,57 the trial judge still retains control of the scope of the questioning.58

The Ham opinion does not necessarily require that the voir dire process be controlled solely by the whims of defense counsel. Nevertheless, fear of the potentially adverse effect on trials of opening the door to in-depth voir dire questioning is the major rationale underlying the restrictive view of voir dire rights. The Supreme Judicial Court has

53 508 F.2d 754 (1st Cir. 1974). In a post-Survey year decision, the United States Supreme Court reversed the First Circuit. 44 U.S.L.W. 4305, 4308 (U.S. March 2, 1976) (No. 74-1216). The Court concluded that Ham did not propound “a requirement applicable whenever there may be a confrontation in a criminal trial between persons of different races or different ethnic origins. Id. at 4306. Nevertheless, the court noted that although voir dire questioning relative to racial prejudice was not constitutionally required “the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant.” Id. at 4308 n.9.
54 Id. at 756. The court noted: “Under the view we take of the facts in this case, we are not required to resolve this ambiguity.” Id.
55 Id.
56 409 U.S. at 527.

http://lawdigitalcommons.bc.edu/asml/vol1975/iss1/11
expressed concern about the depth of questioning that might result from the adoption of a more liberal rule. The Court in *Harrison* quoted Judge Learned Hand: "If trial by jury is not to break down by its own weight, it is not feasible to probe more than the upper levels of a juror's mind."\(^9\)

The Court's view, however, is not entirely consistent with the inherent purpose of voir dire questioning. Questioning jurors on voir dire is intended to ensure that jurors will render a fair verdict based upon the evidence. To the extent that a defendant's right to voir dire questioning about specific prejudices is limited, his right to a fair trial may be jeopardized.

In *Lumley*, the Court recognized that, as a practical matter, trial judges should freely grant defendants' requests that prospective jurors be questioned concerning specific prejudices.\(^6\) As a matter of right, however, a defendant in the Commonwealth must rely on the broad questions that are encompassed in section 28 of chapter 234 of the General Laws.\(^6\) These questions reach only the "upper level" of a juror's mind: whether prospective jurors have an interest in the case, have formed an opinion concerning it, or have any bias or prejudice toward either side.\(^6\) The Supreme Judicial Court has, thus, placed itself well on the safe side of the line between order and chaos.

The dissenting judge in *Ross v. Ristaino* expressed similar concerns regarding the effect on trials of expansive voir dire.\(^6\) He foresaw the opening of a Pandora's box, with untold difficulty in determining the limits of defense counsel's attempts to discover the "innermost workings of [the jurors'] minds..."\(^6\) He suggested that "[t]o obtain such a picture the *voir dire* might well more properly be relegated to the psychiatrist."\(^6\)

Ambitious defense techniques already include using psychologists to assess jurors' behavior during the voir dire process.\(^6\) Defense tactics in jurisdictions that allow wide-ranging questioning of jurors are predicated in large part on using the voir dire as a vehicle for establishing a successful defense.\(^6\) Although such an expansive type of voir dire may be criticized as providing a means by which the defense may "hand-tailor" a jury, that consequence is only an incidental result of a more fundamental purpose. As the Court recognized in *Mutina*,

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\(^1\) G.L. c. 234, § 28.

\(^2\) Id.

\(^3\) See 508 F.2d at 759 (dissenting opinion).

\(^4\) Id.

\(^5\) Id.


result-oriented verdicts do occur as a result of juror attitudes.68 Accepting this as a basic premise, the criminal justice system has at its disposal a technique for counteracting an underlying cause of these unlawful verdicts. If a juror is prejudiced, neither an instruction from a judge that he should put aside his prejudices, nor a general question concerning whether he is capable of doing so is as likely to avoid result-oriented verdicts as asking more specific questions designed to reveal the nuances of the juror’s beliefs. Indeed, as the dissenting judge in Ross v. Ristaino recognized, “[t]he mere ‘obtaining [of] jurors’ assurances of impartiality is insufficient’ [to test that impartiality].”69 Therefore, before yielding to speculation on the potential dangers of more expansive voir dire, the Court should focus upon its concomitant benefits.

§7.3. Pre-Trial Discovery. During the Survey year, the Supreme Judicial Court further expanded the scope of pre-trial discovery in criminal cases. In Commonwealth v. Lewinski,1 the Court discarded the requirement of a showing of “particularized need” as a condition for providing defense counsel with prior statements of prospective prosecution witnesses.2 Earlier, in 1974, the Court in Commonwealth v. Stewart3 took similar action with regard to the production of grand jury minutes.4 Thus, a defendant in the Commonwealth may now, without a showing of “particularized need,” obtain both grand jury testimony and prior written statements of prosecution witnesses.

The mortal wound to “particularized need” was administered by Stewart. Thus, its lingering death, which culminated in Lewinski, came as no surprise. The concept of “particularized need” first arose in the context of requests by defense counsel for access to the grand jury testimony of prosecution witnesses.5 Grand jury testimony was long shrouded behind a perceived need for absolute secrecy about the grand jury’s proceedings.6 Secrecy was deemed necessary to ensure a free flow of information, to protect against tampering, and to guard against the dangers of accusations made without the knowledge of the accused.7 Traditionally, only a showing of “particularized need”—more specifically, the need to impeach a prosecution witness by comparing his trial testimony with contrary evidence given to the


2 Id. at 1784, 329 N.E.2d at 746.
4 Id. at 525-26, 309 N.E.2d at 474.
7 See K. SMITH, CRIMINAL PRACTICE AND PROCEDURE § 621 (1970) [hereinafter cited as SMITH].
grand jury—would overcome these considerations. 8

The major difficulty with the "particularized need" test was that it often required the impossible. 9 Defense counsel could only obtain access to the grand jury minutes by demonstrating that they were inconsistent with the witness's testimony during the trial. 10 The defense, however, was not allowed to review the minutes to see if an inconsistency existed. Since defense counsel, being denied access in the first instance could not point to the particular portion of the grand jury minutes that he relied upon to demonstrate the inconsistency, he was forced to demonstrate indirectly the likelihood that one existed. The most typical method was to point out contradictions or other weaknesses in the witness's actual trial testimony. 11 Thus, "particularized need" was likely to be demonstrated only in those cases where access to grand jury testimony was of least assistance: when the witness's credibility was already poor.

Furthermore, even when "particularized need" was shown, the trial judge often examined the grand jury minutes himself to determine if an inconsistency did in fact exist. 12 In effect, this practice placed the judge in the uncomfortable role of defense counsel. 13

Although the Court in Stewart noted that the subject of access to grand jury minutes would be dealt with by the proposed Rules of Criminal Procedure, 14 it felt the matter to be of such urgency that an immediate judicial resolution was required. 15 The Court explicitly recognized the principle that "[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts." 16 Therefore, since the need for secrecy with regard to the grand jury testimony of a witness who had already been questioned in open court was, in most

13 See Stewart, 1974 Mass. Adv. Sh. at 524-25, 309 N.E.2d at 474; Commonwealth v. De Christoforo, 360 Mass. 531, 554, 277 N.E.2d 100, 114-15 (1971) (dissenting opinion), quoting Dennis v. United States, 384 U.S. 855, 875 (1966): "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."
15 1974 Mass. Adv. Sh. at 525, 309 N.E.2d at 474. The Court emphasized, however, that the committee remained free to adopt a rule "that may deviate from this statement." Id.
cases, highly debatable, the Court in Stewart discarded the “particularized need” test. The Court then held:

Hereafter, on the defendant’s motion, the [trial] court will routinely order the Commonwealth to supply defense counsel with the grand jury testimony of the defendant himself, and with the grand jury testimony of any person called as a Commonwealth witness which is related to the subject matter of his testimony at trial.

Nevertheless the Court added that if, in specific cases, special precautions were warranted, the Commonwealth could request any necessary limitations. Furthermore, although the Court established absolute deadlines for the furnishing of grand jury testimony—prior to the close of their direct testimony at trial for witnesses’ statements and prior to the commencement of the trial for the defendant’s own statements—it urged both sides to agree beforehand on a reasonable timetable.

With Stewart as a background, the Supreme Judicial Court’s decision in Lewinski was inevitable. Prior to trial, defense counsel in Lewinski moved for disclosure of statements given to the police by the three key prosecution witnesses. Under then-existing practice, the trial judge had wide discretion to allow or disallow such discovery, and, in any event, a showing of “particularized need” was required.

On appeal, the Supreme Judicial Court declared:

Henceforth a defendant may, without such a showing, apply, by motion, for discovery of the prior written statements of prosecution witnesses which are available to the prosecution and are related to the subject matter of their testimony at trial; and if the motion is granted, the statements will be delivered to defense counsel not later than the close of that testimony. Written statements for this purpose include any statement made by the witness and in some definite way approved by him, a transcript of a contemporaneous verbatim or substantially verbatim stenographic or other recording of an oral statement by the witness, and a written report consisting of a statement by the witness.

18 Id. at 525-26, 309 N.E.2d at 474.
19 Id.
20 Id. at 526, 309 N.E.2d at 474.
21 Id. at 526, 309 N.E.2d at 475.
23 Id. at 1781-82, 329 N.E.2d at 746.
24 Id. at 1784-85, 329 N.E.2d at 746-47 (footnote omitted). The Court apparently requires that the prosecution furnish only a transcript, and not the recording upon which it is based. The possibility exists that where the Commonwealth has a recording that it did not transcribe, the requisite discovery may be frustrated. The opinion should not be given a restrictive interpretation that would permit this kind of evasion.
The Lewinski rule is similar to that of Stewart in several respects. As with grand jury minutes, the prosecution may move to limit discovery if a valid reason—such as potential danger to a person mentioned in the statement—exists. Furthermore, as in Stewart, the Court urged counsel to establish reasonable timetables for delivery of statements. Indeed, the Court suggested that, in the case of witnesses whom the prosecution would definitely call, it might be feasible to arrange for delivery of statements prior to trial.

Nevertheless, the Supreme Judicial Court held that the trial court’s denial of Lewinski’s request for disclosure of statements by the prosecution’s witnesses did not require reversal of his conviction. The Court cited two reasons for this holding: (1) the defendant’s failure to renew his motion at the close of the direct testimony of the witnesses, and (2) the availability of other means by which to obtain the substance of prior statements by the witnesses. Thus, Lewinski became a vehicle through which the Court changed existing law, without overturning the underlying conviction; the Court had embraced a similar opportunity in Stewart, where it found that the error in denying access to the grand jury minutes was harmless to the defense’s ultimate concerns.

The rule enunciated in Lewinski represents a significant advance in ensuring the free flow of information prior to trial. This, in turn, allows defendants to make more informed decisions on pleas, permits more thorough trial preparation, and encourages more efficient trial proceedings.

The rule will not be without its own difficulties. The major problem will stem from uncertainty over the breadth of the term “witness’s statement.” This problem is mitigated in part by the similarity between the Supreme Judicial Court’s definition and that of the proposed Rules of Criminal Procedure, which in turn is closely patterned upon that of the federal Jencks Act. Thus, there is a body of law to rely upon in working out the new procedure.

One of the first changes wrought by Lewinski will be in the practice surrounding production of police reports. Police reports are not public documents routinely subject to inspection. Consequently, the

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25 Id. at 1785, 329 N.E.2d at 747. The Court indicated that other valid reasons that could warrant denial or limitation upon the furnishing of witness's statements might be the lack of relation of the statement to the witness's statement in court and commingling of the witness's remarks with the prosecutor's work product in a given report. Id.
26 Id. at 1786, 329 N.E.2d at 747.
27 Id.
28 Id. at 1781-82, 329 N.E.2d at 746.
29 Id. at 1782-83, 329 N.E.2d at 746.
issue whether the defense may compel their disclosure in a criminal case has traditionally hinged upon a showing of "particularized need." 34 Under Lewinski, however, if the police officer who wrote the report will testify at trial, as he will in almost every case, any written report authored by the officer must be provided to the defense. 35 The opinion specifically defines "statement" to include both statements definitely approved by the witness and "a written report consisting of a statement by the witness." 36 Any fair interpretation of these phrases would include a report authored by the witness himself. This has been the federal practice 37 under the Jencks Act. Furthermore, aside from formal reports, the rule is also broad enough to include informal notes of a police officer who will be a witness at trial.

Thornier problems will arise with respect to notes or reports by one person that contain statements by a second person—for example, where a police officer or assistant district attorney questions a witness and takes notes on the witness's statements. The Lewinski definition of written statements covers several situations in which such statements would be routinely discoverable: (1) where the witness definitely approved the statement, for example, by signing it or attesting to it after having it read back to him; (2) where a verbatim or substantially verbatim, contemporaneous transcript of the witness's statement was made; and (3) where the witness's statement is contained in a written report.

This last category is the most unclear. If the Court intended it to include only a report in fact written by the witness whose statement it contains, the last category would seem to add nothing to the first category. If, on the other hand, the report must contain a contemporaneous, substantially verbatim account of the witness's statement, the third category duplicates the second. Thus, nonverbatim, recollected accounts of a witness's statement contained in a report written by an investigator or assistant district attorney would seem to be encompassed by the third category, even when those statements are not adopted by the witness himself. 38

The question then becomes: what is a report? More specifically, if an actual police report qualifies, do less formal documents fit within the

34 In the past, trial judges were vested with discretion in granting access to police reports. Commonwealth v. French, 357 Mass. 356, 399, 259 N.E.2d 195, 227 (1970); Leonard v. Taylor, 315 Mass. 580, 583-84, 53 N.E.2d 705, 707 (1944). Under the more recent cases on access to statements or reports, the exercise of this discretion would seemingly turn on a showing of "particularized need." See Lewinski, 1975 Mass. Adv. Sh. at 1781-82, 329 N.E.2d at 746, and cases cited therein.


36 Id. The Court defined "written statements" to include: "any statement made by the witness and in some definite way approved by him, a transcript of a contemporaneous verbatim or substantially verbatim stenographic or other recording of an oral statement by the witness, and a written report consisting of a statement by the witness." Id.

37 See, e.g., United States v. Cleveland, 477 F.2d 310, 316 (7th Cir. 1973).

38 In this respect, the Lewinski rule would seem to be broader than the Jencks Act, which limits discovery to only the first two categories. See 18 U.S.C. § 3500(e) (1970).
definition? Similarly, if the Court intended to broaden the scope of
discovery allowed by the Jencks Act to include nonverbatim accounts,
did it intend to make this extension such a limited one by restricting it
only to formal reports?

The trend of recent recommendations on criminal discovery is to­
ward a very liberal definition of the kind of statements that must be
produced. The ABA Standards Relating to Discovery and Procedure
Before Trial refer merely to “relevant” written or recorded
statements.39 The commentary explicitly states that the term includes
“generally any utterances of the statement-giver which are recorded
by any means in whole or in part, and regardless of to whom they
were made . . . .”40

The Uniform Rules of Criminal Procedure adopt a similarly broad
approach. The rules place an automatic duty on the prosecutor to
allow defense counsel access to all “matters within the prosecuting
attorney’s possession or control which relate in any way to the case,
including statements . . . .”41 These recommendations have been for­
mulated this broadly not only as a means of accommodating a
philosophical view that wide-ranging discovery promotes the ends of
justice, but also in reaction to attempts by law enforcement officials to
evade discovery standards by using terms such as “substantially ver­
batim” or “contemporaneously.” One example of such tactics is “the
practice engaged in by some law enforcement officials of destroying
original notes, after transforming them into secondary transcriptions,
in order to avoid the rigors of cross-examination based upon such
materials.”42

In the context of Lewinski, the term “report” should be given an in­
terpretation consistent with the Court’s desire to provide broad op­
opportunities for pre-trial discovery.43 Therefore, notes taken by agents
of the Commonwealth in interrogating witnesses during the course of
an investigation, as well as official reports, should be within the scope
of the Lewinski rule.

One objection raised by the prospect of broad discovery is that the
notes taken by a prosecutor in interrogating the witness are “work
product.” The Lewinski opinion itself notes that work product may be

39 ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING
[hereinafter cited as ABA STANDARDS].
40 Id. at 61-62.
41 NAT’L CONF. OF COMM’S OF UNIF. ST. LAWS, UNIF. RULES OF CRIM. PRO., Rule 421
(1974) [hereinafter cited as UNIFORM RULES].
42 ABA STANDARDS, supra note 39, at 62.
43 The Court in Lewinski stated that it was abandoning the “particularized need” re­
quirement “for reasons similar” to those which it expressed in Stewart. 1975 Mass. Adv.
Sh. at 1784, 329 N.E.2d at 746. In Stewart, the Court noted that “[i]n our adversary sys­
tem for determining guilt or innocence, it is rarely justifiable for the prosecution to
have exclusive access to a storehouse of relevant facts.” 1974 Mass. Adv. Sh. at 525, 309
excised from the material made available to the defense.\textsuperscript{44} The work product exception should not, however, swallow up the rule. Work product represents the legal research or opinions of the prosecutor, and not the information he elicits from a witness.\textsuperscript{45} Thus, if a prosecutor observed in his notes that a witness was not entirely credible, the remark could be excised. Notes on the actual statement of the witness should not.

Although adding to the arsenal of the defense, \textit{Lewinski} does not represent an entire disaster for the prosecution. The opinion suggests that trial judges may require as a condition of granting a motion for discovery that defense counsel turn over any statements he has from the same witnesses.\textsuperscript{46} Furthermore, discovery is a two-way street, and such practices as requiring the defense to provide a notice of alibi or a notice of a defense of insanity are made constitutionally palatable by requiring broad disclosure by the prosecution.\textsuperscript{47}

\textbf{STUDENT COMMENT}

\textbf{§7.4. Instructing the Jury on the Consequences of an Acquittal by Reason of Insanity: \textit{Commonwealth v. Mutina}.}\textsuperscript{1} Defendant Harry Mutina was charged with murder in the first degree.\textsuperscript{2} The evidence left little doubt that the defendant had committed the crime.\textsuperscript{3} At the trial, the prosecution presented no evidence concerning the defendant’s mental capacity, but relied instead on the presumption of sanity.\textsuperscript{4} The defense, however, presented a great deal of evidence, in-

\textsuperscript{44} 1975 Mass. Adv. Sh. at 1785, 329 N.E.2d at 747.
\textsuperscript{45} Cf. \textit{Uniform Rules}, supra note 41, at 98.

\textit{2} Id. at 375-76, 323 N.E.2d at 295.
\textit{3} Id. at 392, 323 N.E.2d at 301.
\textit{4} Id. at 376, 323 N.E.2d at 295. The presumption of sanity allows the jury to find that the defendant was sane at the time of the alleged crime even though the only evidence presented on the issue indicates that the defendant was insane. \textit{Commonwealth v. Smith}, 357 Mass. 168, 178-80, 258 N.E.2d 13, 20-21 (1970). In explaining why evidence of insanity does not necessarily override the presumption when no evidence of sanity has been submitted, the Court in \textit{Commonwealth v. Clark}, 292 Mass. 409, 415, 198 N.E. 641, 645 (1935), observed “the fact that a great majority of men are sane, . . . may be deemed by a jury to outweigh, in evidential value, testimony that he is insane.”

In \textit{Mutina}, the Court questioned the continuing validity of the presumption of sanity when only evidence of insanity is presented in light of the United States Supreme Court’s decision in \textit{In re Winship}, 397 U.S. 364 (1970). In \textit{Winship}, the Supreme Court held that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” Id. at 364. The \textit{Mutina} Court raised but declined to answer the question whether the “beyond a reasonable doubt” standard and the “presumption of sanity” standard could reasonably coexist, since there was a danger that the presumption of sanity might shift the burden of proof to the defendant. 1975 Mass. Adv. Sh. at 382 n.2, 323 N.E.2d at 297 n.2.
cluding testimony by two psychiatrists, that showed that the defendant was legally insane at the time of the murder.\(^5\) At the close of the trial, the defense attorney requested the judge to instruct the jury as to the consequences for the defendant of a verdict of not guilty by reason of insanity.\(^6\) The proposed instruction was:

In the event that the defendant is found not guilty by reason of insanity, the district attorney or other appropriate authority may petition this Court under our statutes for his commitment to a facility for the care and treatment of mentally ill persons, or commitment to Bridgewater State Hospital for care and treatment. If upon such petition the Court finds that the defendant is mentally ill at the present time, and that his discharge would create a likelihood of serious harm to himself or others, then the defendant would be committed to a facility, or to strict custody in Bridgewater State Hospital in appropriate cases. The order of commitment is thereafter periodically reviewed by the courts of the Commonwealth.\(^7\)

The trial judge refused to give the instruction and the jury found the defendant guilty of murder in the first degree.\(^8\)

On appeal, the defendant assigned as error (1) the trial judge's refusal to give the requested instruction, and (2) the judge's denial of his motion for a new trial.\(^9\) The Supreme Judicial Court found no basis for reversal in either of the defendant's assignments but nonetheless granted the defendant a new trial on the ground that the verdict was against the weight of the evidence.\(^10\) Exercising its power under section 33E of chapter 278 of the General Laws, which requires the Court in a capital case to go beyond the assignments of error and consider the case as a whole, the Court found the verdict unsupported by the evidence: there was strong evidence of the defendant's lack of criminal responsibility, but no affirmative evidence of his sanity.\(^11\)

As to the requested instruction the Court then HELD: on retrial and in all future trials and retrials where the defense of insanity is fairly raised, a defendant is entitled to an instruction regarding the consequences of a verdict of not guilty by reason of insanity. Such an instruction shall be given at the request of the defendant, or at the request of the jury, if the defendant does not object.\(^12\) In a separate

\(^6\) Id. at 376, 323 N.E.2d at 295.
\(^7\) Id. at 376 n.1, 323 N.E.2d at 295 n.1. This instruction was based on G.L. c. 123, § 16. Commitment under this statute is discretionary and is reviewed periodically.
\(^8\) Id. at 375, 323 N.E.2d at 294-95.
\(^9\) Id. at 376-77, 323 N.E.2d at 295.
\(^10\) Id. at 377, 323 N.E.2d at 295.
\(^11\) Id. at 383, 323 N.E.2d at 298.
\(^12\) Id. at 393-94, 394 n.12, 323 N.E.2d at 302, 302 n.12.
opinion, three judges agreed that the defendant should have a new trial, but disagreed that the requested instruction should be given. 13

By so holding, the Supreme Judicial Court has adopted a position that has been adopted previously by only a small minority of jurisdictions in the United States. The United States Court of Appeals for the District of Columbia Circuit in *Lyles v. United States* 14 was the first court to allow the giving of such a commitment instruction to the jury. The court in *Lyles* held that the jury will be so instructed unless the defendant affirmatively requests that the instruction not be given. 15

Courts in Alaska, 16 Indiana, 17 Michigan, 18 and Nevada 19 have followed the reasoning of the court in *Lyles* and held that in cases where the defense of insanity has been fairly raised, the jury, at least under certain circumstances, must be informed of the consequences of an acquittal by reason of insanity. In addition, courts in Connecticut, 20 Florida, 21 Vermont, 22 and Wisconsin 23 have held that the charge may be given at the discretion of the trial judge.

This note will first analyze the basis for the traditional viewpoint that it is not proper to give such an instruction to the jury, and then consider whether juries do need such an instruction. It will next explore the reasoning of the Supreme Judicial Court and the courts of

13 *Id.* at 395, 323 N.E.2d at 302 (dissenting opinion).
15 *Id.* at 728-29.
16 Schade v. State, 512 P.2d 907, 918 (Alaska 1973) (the jury will be so instructed when requested by the defendant).
17 Dipert v. State, 259 Ind. 260, 286 N.E.2d 405, 407 (1972) (normally such an instruction is not permitted, but the defendant is entitled to a curative statement or charge by the judge when an erroneous view of the law on this subject has been planted in the jurors' minds).
18 People v. Cole, 382 Mich. 695, 720-21, 172 N.W.2d 354, 366 (1969) (the jury will be so instructed upon a request by the defendant or by the jury).
19 Bean v. State, 81 Nev. 25, 33-34, 398 P.2d 251, 256-57 (1965), *cert. denied*, 384 U.S. 1012 (1966) (the court held it was error to refuse the commitment instruction, if the defendant requests it); Kuk v. State, 80 Nev. 291, 300, 392 P.2d 630, 634-35 (1964) (the court may so instruct the jury even if the defendant objects).
20 State v. Wade, 96 Conn. 238, 243-44, 113 A. 458, 460 (1921) (whether such an instruction should be given is for the trial judge in the exercise of his sound discretion to determine).
21 McClure v. State, 104 So.2d 601, 604 (Fla. App. 1958) (Fla. R. Crim. P. 3.390(a) states that the judge "must include in said charge the penalty fixed by law for the offense for which the accused is then on trial." In *McClure* the trial judge refused to instruct the jury as to the consequences of a verdict of not guilty by reason of insanity. The appellate court held that this was not reversible error since the statute is directory, not mandatory.).
22 State v. Hood, 123 Vt. 273, 276-77, 187 A.2d 499, 501 (1963) (The court strongly indicated that it did not favor the giving of the commitment instruction. However, it left this decision to the trial judge, provided that if the instruction is given, the full import of the commitment instruction must be explained to the jury.).
23 State v. Shoffner, 31 Wis.2d 412, 428-29, 143 N.W.2d 458, 465-66 (1966) (the Wisconsin Supreme Court stated that it would leave the matter to the discretion of the trial judge, although it would prefer that the charge be given).
those other jurisdictions that permit the giving of such an instruction. It will be submitted that, on balance, the better policy is to permit the instruction to be given. Lastly, this paper will consider the circumstances under which the instruction should be given and the appropriate form for such an instruction.

The large majority of jurisdictions have traditionally been of the view expressed by the dissenters in Mutina, and have held that it is improper to give such an instruction. Justice Quirico, writing for the dissenters, reasoned that a commitment instruction does not assist the jury in determining the issue of guilt or innocence and that knowledge of the prescribed penalty may influence the jury "to return a verdict designed to result in a particular penalty rather than one based on the facts and the law of the case." The dissent in Mutina thus represents the traditional view that the function of the jury is to find the facts and that therefore the jury should not concern itself with the consequences of its verdict. The dissenters in Mutina believed that no extra-evidentiary considerations should be permitted to divert the jury's attention from the factual question of whether or not the defendant is sane. They reasoned that the issue of insanity does nothing more than present another factual question to the jury. Furthermore, although the jury may in fact consider other matters besides the strictly factual questions presented to it, the jury has no right to concern itself with such other matters. Therefore, an instruction, such as the one approved in Mutina, would only encourage the jury to consider questions not properly before it.

As expressed by the Mutina dissenters and other courts adhering to this view, one of the strongest arguments against giving such an instruction to the jury is that it tends to invite compromise verdicts. In Mutina the defendant's commission of the homicide was apparently

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27 Id. at 402-03, 323 N.E.2d at 305 (dissenting opinion).

28 Id. at 401 n.7, 323 N.E.2d at 305 n.7 (dissenting opinion). See also Lyles v. United States, 254 F.2d 725, 733 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958) (dissenting opinion).

29 Lyles v. United States, 254 F.2d at 733 (D.C. Cir. 1957) (dissenting opinion).


not strongly contested.\textsuperscript{32} The dissenters reasoned, however, that in a case where both the defendant's sanity and his commission of the act are seriously disputed, the jurors may decide to compromise on a verdict of not guilty by reason of insanity since they know on the basis of the instruction that the defendant will neither be imprisoned nor released to the streets.\textsuperscript{33}

Some courts have taken the view that an instruction like the one approved in \textit{Mutina} is actually prejudicial to the defendant. In \textit{State v. Boham},\textsuperscript{34} an Ohio appellate court affirmed the trial judge's refusal to give such an instruction on this basis. The court suggested that if the jury were instructed fully as to the commitment procedure and then felt that this procedure was not satisfactory to insure that the defendant would not be a menace to society, the jury might find the defendant guilty even though it believed he was insane.\textsuperscript{35} Another possible danger is that a jury that believed a defendant was mentally ill but not guilty of the charges against him might find him not guilty by reason of insanity rather than acquit him in order to insure that he would receive some treatment.\textsuperscript{36} Thus, the jury might not base its verdict on the factual question of whether or not the defendant committed the crime charged but, instead, on what it thought would be best for the defendant in light of his overall mental health. As an alternative to a commitment instruction the dissenters in \textit{Mutina} proposed the giving to the jury of an appropriate instruction on what it may and may not consider in reaching a verdict.\textsuperscript{37} Thus, the jury would be instructed that under no circumstances should it consider the consequences of its verdict. The purpose of this instruction would be to make it clear to the jury that it is the court's province to determine the appropriate treatment for the defendant.

There has been a great deal of debate whether juries really do need an instruction such as the one in \textit{Mutina}. Those opposed to the giving of such an instruction argue that juries do have a basically sound understanding of the consequences of an acquittal for insanity.\textsuperscript{38}

A study at the University of Chicago using experimental juries drawn by lots from local jury pools attempted to determine whether juries do benefit from a commitment instruction.\textsuperscript{39} Thirty "juries" lis-

\textsuperscript{32} 1975 Mass. Adv. Sh. at 392, 323 N.E.2d at 301.
\textsuperscript{33} Id. at 407-08, 323 N.E.2d at 307 (dissenting opinion).
\textsuperscript{34} 29 Ohio App. 2d 142, 152, 279 N.E.2d 609, 615 (1971).
\textsuperscript{35} Id. at 151, 279 N.E.2d at 614-15.
\textsuperscript{37} Id. at 409-10, 323 N.E.2d at 308 (dissenting opinion).
\textsuperscript{39} R. Simon, \textit{The Jury and the Defense of Insanity} (1967). The experimental juries were drawn by lot from local jury pools in Chicago, St. Louis, and Minneapolis. The study was conducted by having the experimental jury listen to recorded transcripts of actual edited trials. These films included the lawyers' opening and closing statements, the judge's instructions to the jury, and the testimony of all the witnesses. A judge then explained to the jurors that although their verdicts would have no practical consequences, the court was very interested in the study. A juror's service in this project was not voluntary; it was part of his regular period of jury duty. Id. at 36-37.

http://lawdigitalcommons.bc.edu/asml/vol1975/iss1/11
tended to a case in which the defendant was charged with housebreaking and the defense of insanity was raised. Half of the juries were given a commitment instruction similar to the one approved in *Mutina*. The other half were given no such instruction. Of the fifteen juries that were given the instruction, nine found the defendant not guilty by reason of insanity, two found him guilty, and four were unable to reach a verdict. Of the juries that were given no commitment instruction, there were eight verdicts of not guilty by reason of insanity, three guilty verdicts, and four hung juries.

These same juries were given a questionnaire after they had delivered their verdicts. One of the questions was: "In a criminal case like this one, what do you think happens to the defendant when the jury returns a verdict of not guilty by reason of insanity?" Of the jurors who had received the commitment instruction, 93 percent said the defendant would be put in a mental institution, 3 percent said he would be placed in prison, and 4 percent said he would be placed on probation or set free. Of the jurors who were not given the instruction, 91 percent said he would be placed in a mental institution, 3 percent said he would be placed in prison, and 6 percent said he would be placed on probation or set free. The results of this study tend to support the view that a commitment instruction is not really necessary, since the vast number of jurors in the sample pool did have a basic understanding of the consequences of an acquittal for insanity.

The Court in *Mutina* and other proponents of the commitment instruction argue that it is unrealistic to assume that jurors' verdicts are based only on a consideration of the factual evidence presented at the trial, with no consideration of the consequences of their verdicts. In a number of situations cited by the Court, juries frequently refuse to disregard the consequences of their verdict. It is extremely difficult, for example, for the state, despite the strength of its evidence, to obtain a conviction in a drunken driving case where the conviction leads to an automatic license suspension. The jury is aware of the inconvenience caused by a license suspension and it takes this awareness into account in reaching its verdict. Juries are also commonly unwill-

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40 *Id.* at 46-47.
41 *Id.* at 92.
42 *Id.* at 93.
43 *Id.* at 94.
44 The conclusion of those making the study was as follows:

While the data show that a commitment instruction is not specifically needed, we do not offer these results as policy advice. Rather, we think it would be useful precaution to include such an instruction under all circumstances and not leave it to the common sense of the jury. On occasion it can do some good and it can never do any harm.

*Id.* at 96.
47 *Id.* at 387-88, 323 N.E.2d at 299-300.
ing to convict in statutory rape cases in which the defendant and victim are both young and have been involved in a close and continuing relationship with each other. 48

The Court in *Mutina* expressed the view that since juries' verdicts do reflect extra-evidentiary factors, including considerations of the consequences of their verdicts, justice requires that the jurors' knowledge of these factors be factually correct whenever possible. They reasoned that a jury will almost certainly discuss the post-verdict status of a defendant in a case where an insanity plea has been entered, and that such discussion without the benefit of a correct instruction is likely to cause the jury to arrive at an erroneous conclusion. 49

The *Mutina* Court and other courts that have upheld the use of a commitment instruction emphasize that in many cases the jury is not really aware of what may happen when a defendant is acquitted by reason of insanity. 50 As noted above, 51 the results of the University of Chicago study indicate that the large number of jurors in the sample juror pool do understand the meaning of an insanity verdict. Nevertheless, the purpose of a jury instruction should be to insure that not even one jury returns an erroneous verdict due to a misunderstanding. This is particularly true in a case of serious crime where the defendant's life or liberty is at stake.

Furthermore, in spite of what the study may show, there have been some actual instances indicating that a jury may be confused as to the consequences of an acquittal by reason of insanity, and that this confusion may have an effect on its choice of verdict. In a Michigan case, *People v. Cole*, 52 the defendant was charged with the murder of an electric company employee who was attempting to shut off the defendant's electric service for nonpayment. Considerable psychiatric testimony given at the trial cast strong doubt on the defendant's sanity. The trial judge refused defense counsel's request for a commitment instruction. After the jury had deliberated for over an hour, it returned to ask the judge the following question: "Will a verdict of not guilty by reason of insanity insure the defendant of immediate release without further treatment in an institution?" 53 The judge declined to answer the question. After further deliberation the jurors returned on two separate occasions to inform the judge that they were unable to agree on a verdict. On both occasions the judge gave them additional charges on their duty to agree. 54 The jury finally returned a verdict finding the defendant guilty of murder in the second...

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48 *Id.* at 388-89, 323 N.E.2d at 300.
49 *Id.* at 391, 323 N.E.2d at 301.
51 See text at notes 39-44 *supra*.
53 *Id.* at 716, 172 N.W.2d at 364.
54 *Id.* at 716-17, 172 N.W.2d at 364.

http://lawdigitalcommons.bc.edu/asml/vol1975/iss1/11
degree. On appeal the Supreme Court of Michigan reversed and held that in all future trials where the defense of insanity is fairly raised, a commitment instruction must be given by the judge upon the request of the defendant or the jury.

The Cole case is one example of where a proper commitment instruction might have played a crucial role. Although of course it is not certain that the jury's verdict would have been different even if the instruction were given, the Supreme Court of Michigan was sufficiently concerned that a miscarriage of justice might have occurred, that it reversed its longstanding policy against such instructions. In this case the evidence that the defendant had shot the decedent was nearly conclusive, so it was reasonable to infer that the jury's deliberations were focused on the question of the defendant's sanity. That the jurors returned to ask what the defendant's post-verdict status would be if he were acquitted on grounds of insanity shows that this factor must have weighed heavily on their minds.

The Mutina jury may also have been confused about the consequences of an acquittal by reason of insanity. The Court felt compelled to reverse the jury's verdict as against the weight of the evidence, pointing to the strong evidence of the defendant's lack of criminal responsibility and the absence of any affirmative evidence of sanity. The Court suggested that one reason for the improper verdict may well have been the jury's confusion or apprehension about the post-verdict status of the defendant. Furthermore, although the Court did not mention it, the record shows that during voir dire Juror No. 10 was questioned by the trial judge whether he would be able to return an insanity verdict if the evidence warranted it. He replied, "I feel that I probably could, but I have never been faced with this decision before. I do feel that I could. My feeling would be reinforced by some type of clinical report for it and no recurrence." By "no recurrence" the juror apparently meant that he probably could return a verdict of not guilty by reason of insanity if he was assured that steps would be taken to insure that the defendant would not engage in further dangerous conduct. Later, during the trial, one psychiatrist testified over the defendant's objection that the defendant would continue to be dangerous and a menace and that there was a likelihood of further trouble unless the defendant were treated in a maximum security hospital: "The prognosis, as I have stated in writ-

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55 Id. at 700, 172 N.W.2d at 356.
56 Id. at 720-21, 172 N.W.2d at 366.
59 Id. at 383-84, 323 N.E.2d at 298.
60 Brief for Appellant at 2; Brief for Appellee at 10.
61 Brief for Appellant at 2-3; Brief for Appellee at 10.
62 Brief for Appellant at 39-40.
ing, is extremely poor, and the likelihood of further trouble, not only within himself but with society is extremely great. Thus, the Court may have believed that the psychiatrist's testimony would have a strong effect on Juror No. 10 and possibly other jurors who might have found it impossible to acquit the defendant by reason of insanity, if they felt this verdict would mean the defendant would be set free.

As noted above, the facts in Mutina and People v. Cole made these cases particularly appealing ones for the adoption of the new rule in those jurisdictions. It may be asked, therefore, whether decisions in the other jurisdictions that permit the giving of a commitment instruction were prompted by similarly compelling fact situations. This does not seem to be the case. Courts in Washington, D.C., Alaska, and Nevada have adopted a new rule allowing a commitment instruction in apparently unremarkable factual situations. In fact, the Supreme Court of Nevada, in Kuk v. State, allowed the instruction to be given over the defendant's objections.

In addition, not every extraordinary fact situation has persuaded a court to adopt a new rule permitting a commitment instruction. In Brown v. State, the Maryland appellate court refused to allow the giving of a commitment instruction despite a factual situation similar to Mutina and Cole. In Brown, the defendant was charged with assault with intent to commit murder. There was considerable evidence that he was not legally sane. The jury during its deliberation sent the court a note that read: "If Mr. Brown, the Defendant, is found insane by the jury, will he be allowed to go free or will he be put in a mental institution?" The court declined to explain the defendant's post-verdict status and instead replied, "If the defendant is found not guilty by reason of insanity, the disposition will be made by the Court in accordance with the law of Maryland." The defendant was found guilty.

64 The Court gave this aspect of the psychiatrist's testimony as one of its reasons for reversal. Id. at 383, 323 N.E.2d at 298.
65 See text at notes 52-64 supra.
70 Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965), cert. denied, 384 U.S. 1012 (1966);
73 Id. at 463, 260 A.2d at 667.
74 Id. at 464, 260 A.2d at 667.
75 Id. at 466, 260 A.2d at 668.
76 Id. at 463, 260 A.2d at 667.
jury's function of determining the defendant's sanity. 77

Despite the risks perceived by the dissenters in Mutina, it would seem a better policy to give the jury the benefit of the commitment instruction. The dissenters feared, with some justification, that a jury receiving the instruction would base its verdict on an extra-evidentiary consideration: the defendant's post-verdict status. 78 This risk would seem to exist, however, whether the instruction is given or not. The Court clearly believed that this had happened in the Mutina jury's deliberations in the absence of the requested instruction:

The jury, lacking knowledge of the commitment necessarily flowing from a verdict of not guilty by reason of insanity, applied their own standards of justice in arriving at a verdict designed to ensure the confinement of the defendant for his own safety and that of the community. The evidence heard by them and the law given to them clearly played little part in their final verdict . . . . 79

Therefore, since there are risks that a jury may consider extra-evidentiary matters with or without the commitment instruction, a jury informed of the defendant's post-verdict status would seem preferable in the interests of justice.

The same tension between the need to restrict the jury to considering the facts and the desire to eliminate their confusion as to the consequences of their verdict is also present in another class of cases. In capital cases, as in insanity-defense cases, the post-verdict treatment of the defendant is likely to be of acute concern to the jurors. Whereas in a noncapital case, jurors may not be highly concerned with the number of years to which a defendant may be sentenced, in a capital case, a jury's deliberations may well be affected by its awareness of the possibility of a death sentence. Similarly, jurors in a case in which insanity is at issue may well be concerned with the consequences of acquitting a dangerously insane defendant. In both types of cases, therefore, the question arises whether an appropriate instruction is needed to deal with these concerns.

Prior to the decision of the United States Supreme Court in Furman v. Georgia, 80 which eliminated jury discretion in the imposition of the death penalty, this problem generally did not exist. Juries in capital cases in Massachusetts 81 and in most other states 82 were aware of the consequences of their verdicts since they were allowed by statute to

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77 Id. at 466-67, 260 A.2d at 668.
78 See text at notes 27-30 supra.
80 408 U.S. 238 (1972).
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determine whether the defendant if found guilty should receive the death penalty or be imprisoned.\(^\text{83}\)

With the elimination by *Furman* of the jury's role in the imposition of the death penalty, the question then arose whether the jury in capital cases should be given any information about the possible sentences a defendant might receive. In *State v. Waddell*,\(^\text{84}\) the Supreme Court of North Carolina found that since *Furman* removed the question of the imposition of the death penalty from the jury, it was no longer proper to inform the jury of the consequences of its verdict.\(^\text{85}\) The following year, however, the same court decided *State v. Britt*,\(^\text{86}\) a first degree murder case. Although conviction of that offense required a mandatory death sentence, the jury appeared to have been confused and concerned as to what penalty would be given, returning a verdict of guilty with a recommendation that mercy be granted.\(^\text{87}\) On appeal the North Carolina court reversed its previous position and held that if the jury appears confused or uncertain whether one of their permissible verdicts would result in a mandatory death sentence, sufficiently compelling reason exists to allow the trial judge to inform the jury of the consequences of their possible verdicts.\(^\text{88}\)

The reasoning of the North Carolina court seems equally applicable to cases in which the jury may be uncertain about the consequences of an acquittal by reason of insanity. The minority of courts that have recognized the need for an appropriate commitment instruction appear to agree that the danger of jury confusion is the paramount concern and justifies an exception to the traditional limitations on the information to be given to the jury. The dilemma perceived by these courts has perhaps been best expressed by the Supreme Court of Michigan in *People v. Cole*:

This appeal makes it mandatory that this Court choose between: 1) the possible miscarriage of justice by imprisoning a defendant who should be hospitalized, due to refusal to so advise the jury; and 2) the possible "invitation to the jury" to forget their oath to render a true verdict according to the evidence by advising them of the consequence of a verdict of not guilty by reason of insanity. . . . We conclude that the reasons given in support of the first proposition far outweigh the fear of jury integrity expressed in the second proposition.\(^\text{89}\)

The Court in *Mutina* further held that the commitment instruction

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\(^{84}\) 282 N.C. 431, 194 S.E.2d 19 (1973).

\(^{85}\) Id. at 444-45, 194 S.E.2d at 28-29.

\(^{86}\) 285 N.C. 256, 204 S.E.2d 817 (1974).

\(^{87}\) Id. at 268, 204 S.E.2d at 825 (1974).

\(^{88}\) Id. at 272, 204 S.E.2d at 828.

must be given upon the request of the defendant or upon the request of the jury if the defendant does not object.90 The Supreme Court of Vermont has criticized the optional approach: "At its best it tends to give justice... an a la carte quality in which the defendant may make as wily a choice as possible."91 It is submitted that this approach is improper. If the purpose of the instruction is to give the jury the required minimum of information, the instruction should be given in all cases where the defense of insanity has been raised, rather than only when the defendant or jury requests the instruction. Although it may be difficult to conceive of many instances in which the defendant would not want the commitment instruction given,92 it does seem that the better rule would be to require the instruction to be given in all cases where the defense of insanity has been fairly raised. Since the purpose of the instruction is to avoid jury confusion, it should be given in all cases in order to promote society's interest in a fair trial, and not merely in cases where it would aid the defendant's trial strategy.

One issue that was not addressed by the Court in Mutina is the form that the instruction should take. The Court did not prescribe any particular wording for the instruction, and did not require the trial court to give it in the form proposed by the defendant. One objective in drafting an instruction should be to ensure that the instruction gives a fair and balanced picture of the commitment statute.93 The defense and the prosecution may have differing preferences as to how the statute should be presented to the jury. The defense may wish to emphasize the features of the statute that protect the public from a possibly dangerous defendant, whereas the prosecution may wish to stress the conditional nature of the commitment.

In Massachusetts, after an initial commitment period of six months, the defendant may be committed for additional one-year periods by the court.94 The instruction proposed by the defense in Mutina discloses that the commitment is subject to periodic review rather than being of an indefinite nature, so in this respect it appears to be fair.95

It may also be asked how much information the jury should be given in the commitment instruction. One court has dealt with this problem by reading a portion of the commitment statute to the jury.96 The Massachusetts statute on commitment, however, is lengthy and somewhat complex, so that reading it to the jury might not be satisfactory. Since the primary purpose of the instruction is to alleviate the

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92 For discussion of possible reasons why a defendant may not want the instruction to be given, see text at notes 34-36 supra.
93 The commitment statute is contained in G.L. c. 123, § 16.
94 G.L. c. 123, §§ 16(b) and (c).
95 For the text of the proposed instruction, see text at note 7 supra.
jurors’ fears that a dangerous defendant will immediately be set free, the instruction should merely give the jury a basic understanding of what the defendant’s post-verdict status would be. If the instruction goes into greater detail, the jury might become confused or may be tempted to base its verdict on whether or not it approves of the precise provisions of the commitment procedure. Thus, the instruction should inform the jurors about the commitment procedure in general terms but not in such detail that it invites them to pass on the merits of the treatment the defendant will receive after the verdict.

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