The Case for Meaningful Voir Dire on Race and Sexual Orientation Bias.[1]

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This article addresses voir dire on race and sexual orientation bias, and suggests how to obtain meaningful inquiry on these issues. Recent United States Supreme Court decisions and some state appellate decisions have greatly restricted attorney-conducted voir dire and the scope of the inquiry. However, at the same time the courts have expanded the prohibition on the discriminatory use of peremptory challenges. This article suggests ways in which this line of cases, along with supporting social science research, can be used to justify and expand meaningful voir dire.

Meaningful Voir Dire on Race

From most any angle, the state court trial of the four police officers charged in the brutal beating of Rodney King, People v. Lawrence Powell, et al. (referred to in this article as Powell) and its aftermath, makes undeniable the complex and explosive state of race relations in the United States of the 1990s.

Real world cross-racial experiences (or the lack thereof), racial attitudes, cultural and social expectations based on racial identity, and the history of racism in the United States, make the fact of race an undeniable, if sometimes unspoken issue in every case involving a person of color. As others [2] have observed, in some cases race is in the forefront of the case. This is clear when the issue is racial discrimination, a hate crime, or a cross-racial crime. In other cases race is the more subtle, but nonetheless inescapable backdrop hanging over the case.

To most observers the matter of race and racial attitudes was a critical backdrop in the trial of the police officers charged with beating Rodney King. Yet, in the state court trial the voir dire concerning race was limited to two questions as contained in the voir dire questionnaire:

The facts in this case will disclose that the alleged victim was Black and the defendants are three White and one Hispanic uniformed police officers employed at the time by the City of Los Angeles. Is there anything about such a scenario that causes you concern? [Please explain]

Have you been exposed to persons who exhibit or have exhibited racial, sexual, religious, and/or other ethnic prejudice? [Please explain]

This represented the sum total of voir dire concerning race conducted in the now famous Simi Valley trial. According to the Los Angeles Times [3], the lawyers were allowed to suggest follow-up questions to the court on the basis of responses to the questionnaire, but none of the attorneys suggested questions that mentioned race.

Venue and the Significance of Voir Dire

When the case was moved from Los Angeles County, the State's most populous and diverse county, to medium-sized suburban, relatively homogeneous (white) and politically conservative

Ventura County, the case could no longer be heard by a group of people diverse in racial and ethnic background and political outlook. Given the status and identity of the defendants, the significance of a meaningful voir dire designed to uncover bias should have been apparent to the prosecution.

Regardless of where the trial was held, it required the kind of meaningful, substantive voir dire that reveals bias, actual or implied, about a variety of topics including race, attitudes toward law enforcement, police authority and accountability, and witness credibility.

Race is one of the most difficult areas to cover effectively in voir dire. However, that problem was compounded in Powell because the tables were turned. In politically conservative Ventura County, the defense had virtually no interest in voir dire which uncovered racism because racism would bolster the credibility of the defendant police officers. However, voir dire about race should have been of tremendous significance to the prosecution. They failed to comprehend the importance of racial biases, and they failed to recognize the probability that pro-law enforcement attitudes in this case would work to the prosecution's disadvantage. Instead, the prosecution chose to employ the myth of "color blindness" in voir dire. When asked about the role racial bias might have played in the jury's view of the evidence, prosecutor Terry White stated that jurors are "supposed to put things like that aside." Los Angeles Times, supra. Such myths usually are comforting to prosecutors, who operate in a world where bias and prejudice often help them win cases. Neither racial prejudice nor pro-law enforcement bias would help the prosecution in Powell.

The difficulty of conducting an effective voir dire which reveals racial bias is not a new phenomenon.[4] (reference under 'conclusion')

Conflicting Authority for Voir Dire on Racial Bias

One basis for more expansive voir dire stems from Batson v. Kentucky, 476 U.S. 79 (1986) and the line of cases which follow this decision. These cases make impermissible the discriminatory exercise of peremptory challenges to exclude prospective jurors solely on the basis of their membership in a cognizable class including race, gender, and religion.[5]

Batson held that the use of peremptory challenges to discriminate against racial minorities violates the Equal Protection Clause of the Fourteenth Amendment. Without some meaningful voir dire, counsel runs the risk of exercising challenges based on stereotypes derived from group identity and in so doing counsel violates the tenets of Batson.

Citing California's precursor to Batson, People v. Wheeler, 22 Cal.3d 258 (1978), the California Supreme Court observed:

[U]nless counsel is given a significant opportunity to probe under the surface to determine the potential jurors' individual attitudes, he may be relegated to a Catch-22 alternative of making his decision on the superficial basis we held impermissible in Wheeler, or making it on no basis at all.

... Moreover, little psychological insight is needed to realize that the setting in which voir dire is conducted creates additional pressures for the venireman to answer questions as he believes the judge would have him answer, or in conforming to the answers of the preceding panelists. In Irwin v. Dowd, 366 U.S. 717, 728 (1961), the Supreme Court observed, `No doubt each juror was sincere when he said he would be fair and impartial ... but the psychological impact requiring such a declaration before one's fellows is often its father.'
People v. Williams, 29 Cal. 3d 392, 403, 405 (1981).[6]

Another line of cases supporting latitude in voir dire appears in United States v. Robinson, 475 F.2D 376 (D.C., Cir., 1973), and a line of Federal cases cited therein:

The defense must be given a full and fair opportunity to expose bias or prejudice on the part of venire men. Morford v. United States, 339 U.S. 258 (1950). The possibility of prejudice is real, and there is consequent need for a searching voir dire examination, in situations where, for example, the case carries racial overtones, or involves other matters concerning which the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact. Still other forms of bias and distorting influence have become evident, through experience with juries, and have come to be recognized as a proper subject for voir dire. An example is the problem that jurors tend to attach disproportionate weight to the testimony of police officers.
Robinson, at 380-381.

While Batson and Robinson lend support to arguments for meaningful inquiry in voir dire, a more recent case poses a significant obstacle. In Mu'Min v. Virginia, 112 S. Ct. 13 (1991), the United States Supreme Court addressed the issue of extensive and prejudicial pretrial publicity in a case which involved a defendant convicted and sentenced to death for the murder of a woman, while the defendant was out of prison on work detail. Although the opinion did not address issues of race, it did make mention of the defendant's Islamic faith. The restrictive ruling in Mu'Min provided fuel to restrict meaningful voir dire on race, pretrial publicity and other issues. The big problem with Mu'Min is that the court assumed that jurors can be relied upon to be the judges of their own character, biases and prejudices.

At trial, defense counsel submitted a list of proposed voir dire questions and requested individual voir dire. The trial court ruled that voir dire would begin in the presence of the full venire, but on the matter of publicity, prospective jurors would be questioned in small groups if their initial responses warranted further inquiry. However, the trial court refused to ask any of the questions proposed by the defense as to the content of the pretrial publicity, choosing instead to ask a series of leading, close-ended questions, which telegraphed the "correct" answers:

- Would the information that you heard, received, or read from whatever source -- would that information affect your impartiality so that you could not be impartial?

- Is there anyone that would say what you've read, seen, heard or whatever information you may have acquired from whatever the source, would that affect your impartiality so that you could not be impartial?

- Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about the case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?

- [I]n view of everything you've seen, heard or read, or any information from whatever source that you've acquired about this case, is there anyone who believes you could not become a juror, enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

In the end, eight of the twelve trial jurors admitted having prior knowledge of the case, but due to the restrictive questioning the court knew nothing about the nature and extent of that information. Nonetheless the United States Supreme Court affirmed the conviction and found:

Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. In Aldridge and Ham we held that the subject of possible racial bias must be "covered" by the questioning of the trial court in the course of its examination of potential jurors, but we were careful not to specify the particulars by which this could be done. We did not, for instance, require questioning of individual jurors about facts or experiences that might have led to racial bias. Petitioner in this case insists, as a matter of constitutional right, not only that the subject of possible bias from pretrial publicity be covered--which it was--but that questions specifically dealing with the content of what each juror has read be asked.... [W]e hold that the Due Process Clause of the Fourteenth Amendment does not reach this far, and that the voir dire examination conducted by the trial court in this case was consistent with that provision.

The limitations of judge-conducted voir dire, the use of close-ended questions which can be answered with a simple yes or no response, and the unreliability of jurors' self-assessments of impartiality were discussed in an amicus brief filed by the National Jury Project. Justice Marshall cited elements of the amicus brief in his dissent.[7]

Relying upon Mu'Min, some courts have found the trial judge's voir dire on race to be harmless, in part because the parties failed to object or to offer their own follow-up questions.[8]

Social Science Support

The willingness of some trial and appellate courts to ignore the fact and effects of racism is shocking. Social science research is replete with studies of racism. A few of the many reference works include: Schuman, Steeh & Bobo, Racial Attitudes in America (Harvard University Press 1985); Wellman, Portraits of White Racism (Cambridge University Press 1977); and Wright, Black Robes White Justice (Lyle Stuart Inc. 1987).

Research in the area of eyewitness identification and memory provide a bountiful number of studies on the effect of cultural expectations or racial stereotypes.[9] In a now fifty-year-old study on rumor transmission, Allport and Postman in The Psychology of Rumor (Henry Holt and Co.) divided participants (subjects) into over forty small groups of five or six people. In each group

one subject was shown a picture of a scene in a New York City subway. In the sketch a black man wearing a three-piece suit and tie is standing talking with a white man who is holding a razor blade and dressed in blue collar attire. Other passengers are seated nearby. The subject then describes the content of the picture to a second subject, who tells a third subject and the process continues through a chain of five or six people. In over fifty percent of the groups the last subject in the rumor chain reported that the black man, instead of the white man, held the razor. Several of these subjects reported that the black man brandished the knife wildly or used it in a threatening manner toward the white man. Allport and Postman observed:

Whether this ominous distortion reflects hatred and fear of Negroes we cannot definitely say.... Yet the distortion may occur even in subjects who have no anti-Negro bias. It is an unthinking cultural stereotype that the Negro is hot tempered and addicted to the use of razors and weapons.

In The Alchemy of Racism and Rights (Harvard University Press 1991), law professor Patricia Williams considers the case of Bernard Goetz, involving an incident which did transpire in the New York City subway:

What struck me, further, was that the general white population seems, in the process of devaluing its image of black people, to have blinded itself to the horrors inflicted by white people. One of the clearest examples of this socialized blindness is the degree to which Goetz's victims were relentlessly bestialized by the public and by the media in New York: images of the urban jungle, with young black men filling the role of `wild animals,' were favorite journalistic constructions; young white urban professionals were mythologized, usually wrapped in the linguistic apparel of lambs or sheep, as the tender, toothsome prey.
Id. at 74.

Williams pondered what might have happened had the scene been reversed and a lone black man found himself amid a crowd of noisy white teenagers; had the black man, like Goetz, explained to police that one had tried to panhandle money from him and another had asked him, "How are you?" as Goetz described, and explained to the police that he could tell from their "body language" that they wanted to "play with him, like a cat plays with a mouse". Williams rightly asks, "Who would have believed this black man?"

The Federal Trial of the Police Officers

Two years after the state court trial in Powell, the four police officers were tried for civil rights violations in United States v. Stacey Koon, et al. (referred to here as Koon). The Koon trial was conducted in Los Angeles, and resulted in convictions of two of the four officers. A number of factors may have influenced this result, public response after the state court verdict, a different team of lawyers for the prosecution, coming from the local United States Attorney's office and the Criminal Section of the Civil Rights Division, who brought a new approach to the prosecution, the impact of television coverage of the state court proceedings, and a more thorough voir dire on race and the case-specific issues.

The National Jury Project assisted the prosecution in the Federal case in preparing for trial and an extensive voir dire questionnaire was filled out by prospective jurors. Our pre-trial research

informed us that racial attitudes correlated with whether individuals thought the Los Angeles Police Department used unjustified force against citizens, and whether in this case the police would have treated King differently had he been white.

The new voir dire questionnaire was designed to include a full battery of demographic, criminal justice and case specific questions. It also contained the following questions on race, which served as useful measures in evaluating prospective jurors [10]:

In general, do you agree or disagree that the riots in Los Angeles following the verdicts in the state court case are the result of the deep frustration and anger many Blacks feel as a result of racial discrimination?

How serious a problem do you think racial discrimination against Blacks is in Southern California?

In general, do you favor or oppose federal laws or affirmative action programs giving preference to women and minorities in employment and education, provided there are no rigid quotas?

How often does it happen these days that a less qualified Black person gets a job or a promotion, only because of affirmative action?

In general, do you think our society treats people of all races equally? [Please explain]

What effects do you think racial or other forms of discrimination have on people who are the targets of the discrimination?

Have you ever been afraid of someone of another race? [Please explain]

Do you think some people use racial discrimination as an excuse for their own shortcomings? [Please explain]

How would you feel if a family member or relative married someone of a different race?

Have you been exposed to persons who exhibit, or who have exhibited racial, sexual, religious, and/or other ethnic prejudice? [If yes, please explain]

Unlike the two questions on race contained in the state court questionnaires, these questions formed a more thorough inquiry into jurors' attitudes about race and experiences.

Meaningful Voir Dire on Sexual Orientation

In cases involving a party or witness who is gay, attitudes toward and experiences with gay people are important areas for exploration in voir dire. Jury trials which bring into focus sexual orientation include some criminal cases, wherein the defendant, witness or victim is gay, or facts relate to same-sex sexual contact; and a wide variety of civil cases including discrimination related to sexual orientation, personal injury claims and, increasingly, cases involving people

with AIDS and discrimination related to HIV status.[11]. A variety of other cases which touch upon sexual orientation are often tried before judges, including divorce and child custody issues.

Discomfort with and bias against gay people is often deeply held and is typically rooted in religious and moral beliefs and fears about homosexuals. While public expression of racial prejudice is generally scorned, laws remain on the books which actively distinguish between the rights of heterosexuals and homosexuals on everything from marriage and sex to military service. Twenty states maintain sodomy laws which make sexual contact between consenting adults of the same sex illegal.[12] The continued existence of such laws highlights some of the problems of bias facing gay litigants, while derisive comments about homosexuals remain the common grist for jokes and perpetuate bias.

A variety of national surveys document the perseverance of certain negative attitudes toward homosexuality. National and some state polls indicate that a majority still believe that homosexuality is morally wrong. There remains widespread discomfort with having gays in certain professions. For example, in a 1994 national poll, nearly 50% say they would object to having a gay doctor or school teacher, and 63% of the respondents expressed the opinion that sexual relations between two adults of the same sex is always wrong.[13]. Survey data can be usefully cited in voir dire motions to demonstrate the need to explore bias in voir dire.

Voir Dire Questions

The following questions can help attorneys and judges reveal and understand prospective jurors' attitudes toward homosexuality and homosexuals. However, because sexual orientation remains a sensitive and stigmatized issue, many jurors may be less than

forthcoming about their true feelings and relevant experiences. Voir dire questionnaires and sequestered follow-up questioning can be useful tools in protecting juror privacy and promoting candor.

Sexual Orientation

- Do you know anyone who is gay? [If yes, please explain.]
- Name three traits which you feel describe gay men or lesbians in general.
- Some people feel a little uncomfortable around people who are gay, how do you feel?
- Do you think gay people still experience any form of discrimination? Why/why not?
- Have you heard the words "faggot" or "dyke"? Do you think these words can be degrading or insulting to people? Would you be insulted or embarrassed if someone called you a faggot or a dyke?
- There is some dispute over the issue of "gay rights"--that is whether gay people are entitled to the same legal protection as other people. What do you think?

- Different religions have differing views about homosexuality. If you practice a religion, what does your religion teach concerning homosexuality? How do you feel about that teaching?

AIDS/HIV

- In what ways, if any, has the AIDS epidemic touched your life?
- Some people think AIDS is an expression of God's wrath toward homosexuals, what do you think?
- How would you feel about working with a person you know has AIDS or who is HIV-positive?
- What do you think are some of the lessons of the AIDS crisis for our society?
- What is the most important realization you have had about our society as a result of the AIDS crisis?

Social Dynamics Affecting Voir Dire

In trials where the judge narrowly restricts the voir dire and where race, sexual orientation or other sensitive issues are involved, it is imperative that concerned attorneys understand the social dynamics surrounding voir dire. Meaningful discussion of biases, especially racism, has been silenced by a number of factors. These include the dynamics of "social desirability" and "evaluation apprehension." Social desirability leads a prospective juror to tell the court that he or she is a good, fair-minded citizen who is devoid of opinion, attitude, prejudice and for that matter, life experience. Jurors are told, in one manner or another, that unlike everyone else in the courtroom, they are to shed their attitudes and life experiences at the door as one would remove an overcoat.

When all or most of the voir dire is judge-conducted, inhibiting factors exist that discourage honest responses from prospective jurors. The judge is the highest authority figure in the courtroom, and prospective jurors not only respect the judge, they wish to avoid appearing in an unfavorable light in the eyes of the judge. As a consequence, they take from the judge verbal and non-verbal cues as to what behavior and attitudes are expected and acceptable and tend to conform their answers to what they feel the judge wishes to hear.[14]

For most prospective jurors the courtroom is a forbidding and formal place. The language used in many courtrooms is often unfamiliar and riddled with legalese. The juror in group voir dire is seated amongst a large group of strangers, fellow citizens, whose respect, along with the respect of the judge and counsel, the juror wishes to maintain. The juror is often asked long, frequently confusing questions about his/her ability or willingness to adhere to legal concepts he or she may have never before considered. The juror is aware that he or she will be included or excluded from the jury on the basis of his/her responses. How these circumstances affect the quality of information obtained has been the subject of substantial empirical research on the topic of "evaluation apprehension."[15]

The willingness of jurors to appear to be in ideological conformity with concepts such as impartiality, the burden of proof, the presumption of innocence, or reasonable doubt in response to voir dire questions would not be a bad thing if providing the socially desirable response in voir dire actually meant adherence to these concepts as a practical matter. However, jurors bring to the courtroom a set of attitudes and experiences accumulated over a lifetime. Many of these are emotionally charged and deeply held, and some are prejudicial in ways that affect jurors' judgments. Surely people's attitudes about race and sexual orientation number amongst those that are emotionally charged.

Written questionnaires serve to provide counsel with valuable information about prospective jurors. Questionnaires provide jurors a degree of privacy as they supply the court and counsel with information, and this relative privacy serves to undo some of the pressure to provide only socially acceptable answers, as happens in oral voir dire. Jurors are frequently far more candid and expansive in their answers to questions on a questionnaire.

Conclusion

The shortcomings of judge-conducted voir dire are clear; counsel must be prepared to file a motion that explains the areas of prejudice, requests particular voir dire conditions, such as attorney-conducted voir dire, small group or individual sequestered voir dire on particularly sensitive issues, and includes declarations or other supporting documents. Counsel must be prepared to submit voir dire questions and a proposed juror questionnaire, and make a record when the voir dire examination is inadequate.

Finally, the myth of "color blindness," like all other efforts to deny the fact and effect of prejudice, bias and oppression, works only to the benefit of those who are not the object of prejudice. Denying the existence of racism or homophobia does nothing to correct its effects inside or outside the courtroom, but rather undermines and jeopardizes the credibility of the justice system, and serves to compound harm to our clients.

References

[1] Portions of this article have appeared in CACJ Forum, 1992, Vol. 19, No. 4, National Lawyers Guild Practitioner (Summer 1992) No. 3, and Jurywork: Systematic Techniques (Clark Boardman Callaghan, 2d Ed., 1983, updated annually)

[2] "Confronting Racial Stereotypes in Jury Trials," Karen Jo Koonan and Paul Harris, Civil Rights Litigation and Attorney's Fees Annual Handbook, Vol. 9, 1993.

[3] Los Angeles Times, May 31, 1992, at B5.

[4] See, Ginger, "What Can Be Done to Minimize Racism in Jury Trials" 20 Journal of Public Law 427 (1971).

[5] Powers v. Ohio, 499 U.S. 400 (1991); Georgia v. McCollum, 505 U.S. 42 (1992); Edmonson v. Leesville, 500 U.S. 614 (1991); and J.E.B. v. Alabama, 114 S.Ct. 1419 (1994).

[6] While changes in California law brought about by the public initiative process, in Proposition 115, specifically overrode Williams' main point, voir dire for the intelligent exercise of peremptory challenges, the language of Wheeler remains intact.

[7] Mu'Min v. Virginia, 112 S. Ct. 13 (1991), Justice Marshall dissenting, joined by Justices Blackmun and Stevens: "Where, as in this case, a trial court asks a prospective juror merely whether he can be `impartial,' the court may well get an answer that is the product of the juror's own confusion as to what impartiality is. By asking the prospective juror in addition to identify what he has read or heard about the case and what corresponding impressions he has formed, the trial court is able to confirm that the impartiality that the juror professes is the same impartiality that the Sixth Amendment demands." Justice Marshall referenced the voir dire in the murder and bank robbery case of Susan Saxe, referred to in Jurywork: Systematic Techniques, ß 10.03[3], at 10-47 to -49 (2d ed. 1983 & Supp. 1992).

[8] People v. Chaney, 234 Cal.App.3d 853 (1991).

[9] See generally Loftus, Eyewitness Testimony (Harvard University Press 1979); Wells and Loftus, Eyewitness Testimony (Cambridge University Press 1984).

[10] A more extensive list of questions can be found in Jurywork: Systematic Techniques (Clark Boardman Callaghan, 2d Ed., 1983, updated annually).

[11] See Roberta Achtenberg, Sexual Orientation and the Law (1987) and Paul Albert, AIDS Practice Manual: A Legal and Educational Guide, (2nd Edition 1988).

[12] As of February 1994, 14 states had laws making (heterosexual and homosexual) sodomy illegal (Alabama, Arizona, Florida, Georgia, Idaho, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina and Utah). Six additional states had laws prohibiting only homosexual sodomy (Arkansas, Kansas, Maryland, Missouri, Montana and Tennessee.)

[13] Survey conducted by National Opinion Research Center (1,996 respondents). "General Social Surveys, 1972-1994: Cumulative Codebook," Nov. 1994. Data distributed by Roper Center for Public Opinion Research, University of Connecticut.

[14] Social scientists have written on the efficacy of judge-conducted voir dire. See, "Judges' Non-verbal Behavior in Jury Trials: A Threat to Judicial Impartiality" 61 Va. L. Rev. 1266 (1975); Suggs and Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis," 56 Indiana L. J. 245 (1981). Greater candor in response to questions posed by lawyers is also attributed to lawyers asking more specific questions as a result of greater knowledge of the case and to jurors' perceptions of lawyers as being biased on behalf of their clients. For the latter reason, lawyers' participation in the questioning implies a right to the participation of "biased" parties; therefore, "biased" answers become more socially acceptable than when the questions are posed by the

judge. See also, Padawer-Singer, Singer and Singer, "Voir Dire by Two Lawyers: An Essential Safeguard," 57 Judicature 386 (1974) and Jones, "Judge- Versus Attorney-Conducted Voir Dire," 11 Law and Hum. Behav. 131 (1987). See generally, National Jury Project, Jurywork: Systematic Techniques, Clark Boardman Callaghan (2d ed. 1983 & Supp. 1992).

[15] See: Rosenberg, "When Dissonance Fails: On Eliminating Evaluation Apprehension from Attitude Measurement," 1 Journal of Personality and Social Psychology 28 (1965); Collins and Hoyt, "Personal Responsibility for Consequences: An Integration of the Forced Compliance Literature," 8 Journal of Experimental Social Psychology 558 (1972); Festinger, "A Theory of Social Comparison Processes," 7 Human Relations 117 (1954); Schacter, The Psychology of Affiliation (1959).