

RACE MATTERS IN JURY SELECTION

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A lot of things matter in jury selection, and often the biggest thing that matters is what a lawyer trying a case fears most—even if that fear is an issue of race or possible juror biases. Patrick Brayer’s essay, *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*,¹ illustrates the importance of confronting one’s fears even when it involves talking about a difficult subject with prospective jurors. In his essay, Brayer discusses the challenges of picking a jury less than ten miles away from Ferguson, Missouri, just days after a police officer shot and killed Michael Brown, an unarmed 18-year-old African-American. Brayer confides in his readers his concern that potential jurors may have harbored biases that would work against their ability to decide the charges against his client fairly, but he had doubts about saying the word “Ferguson.”² While Brayer did not see race as a major issue in the case, how the jury viewed law enforcement was an important concern in his client’s case.³ Brayer’s fear of discussing the jurors’ views about law enforcement is exactly why he needed to talk with jurors about Ferguson.

Whatever the lawyer fears, whether it is an issue of race in the case or unconscious biases in jurors that may affect how they decide the case, the lawyer must address the fears during jury selection. If the lawyer does not explore what the lawyer fears about the case during jury selection, the lawyer has failed to increase the odds that the jury will consider the client’s case fairly.⁴ If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client.

When race matters in a case, it plays a role in the outcome, just like the state’s burden of proof, the credibility of witnesses, the identification of the defendant-client, how the jury views the police involved in the case, or, if the client testifies, how believable the jury thinks the client is. Race matters to this degree because race affects the way jurors view each of these issues.

In this Essay, I address the importance of a trial lawyer discussing the lawyer’s fears about a case, including issues of race, in jury selection. I begin, in Part I, by explaining why race matters and how important race-

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¹ Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors about Ferguson*, 109 NW. U. L. REV. ONLINE 163 (2015).

² *Id.* at 164.

³ *Id.*

⁴ See GERRY SPENCE, WIN YOUR CASE 114–24 (2005).

salient jury selection is, especially when race is not an obvious issue in the case. Part II argues that discussing Ferguson with the panel of prospective jurors, or venire, was a necessary subject for jury selection in Brayer's client's case. Finally, in Part III, I suggest how an attorney such as Brayer could approach discussing Ferguson with the panel of prospective jurors.

I. RACE MATTERS

Race can matter in jury selection because race continues to matter in the United States. While we hear a lot about the United States being post-racial, the Implicit Association Test (IAT) demonstrates that race influences the way we perceive and behave even when we are unaware of the influence of race.⁵ Over fourteen million people have taken the IAT, and “[s]eventy-five percent of those who have taken the race IAT have demonstrated implicit racial bias in favor of Whites.”⁶ Research using the IAT shows that approximately forty percent of African-Americans also have a pro-White bias.⁷ Ignoring race when it is a salient issue in a case, therefore, may give a green light to the implicit biases jurors may hold.

Research by Samuel Sommers and Phoebe Ellsworth into implicit bias suggests that making race salient in jury voir dire can reverse the effects of implicit bias and influence the jurors' perceptions of the trial and their decisions.⁸ In this study, mock jurors received two different versions of voir dire questionnaires: one set of jurors were asked about their racial attitudes and racial bias in the legal system, and the other set of jurors were not.⁹ To the jurors who discussed race, the researchers posed race-relevant questions like the following: “The defendant in the case is African-American and the victims are White. How might this affect your perceptions of the trial?”¹⁰

⁵ *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html> [<http://perma.cc/B369-USG3>]. Implicit bias refers to unintentional bias that stems from “attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.” Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012) [<http://perma.cc/S2FW-B587>]. The Implicit Association Test (IAT) is a social psychology test that seeks to measure implicit attitudes and prejudices “by having people quickly categorize stimulus words using two response keys. In racial IAT studies, the stimulus words are names that are racially stereotyped (e.g., Jamal and Sue Ellen)” Allen R. McConnell & Jill M. Leibold, *Relations among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 435 (2001) [<http://perma.cc/YQ2N-4BLX>].

⁶ Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1572 (2013) [<http://perma.cc/VM5C-EZNL>].

⁷ *Id.* at 1572 n.105.

⁸ Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026–27 (2003) [<http://perma.cc/JYN5-ZR4U>].

⁹ *Id.* at 1026.

¹⁰ *Id.* at 1027.

Another question was, “In your opinion, how does the race of a defendant influence the treatment s/he receives in the legal system as a whole?”¹¹

The purpose of these race-relevant questions in jury questionnaires and other race-relevant questions asked during jury selection is not to identify racial bias in particular jurors, but rather to cause prospective jurors to think about their attitudes toward race, social norms against prejudging someone on the basis of race, and institutional biases in the justice system.¹² Surfacing issues of bias during jury selection helps jurors consciously guard against implicit biases. In their study, Sommers and Ellsworth found that both White and African-American jurors were less likely to vote to convict African-American defendants after the race-relevant voir dire.¹³

This research suggests that talking about race in voir dire, through questionnaires or during the verbal questioning of jury selection, may be important when the only racial dimension of a case is the race of the defendant. In these instances, jurors will be less likely to consider the possibility of their biases than in instances when race is an obvious issue in a case.¹⁴ In other words, when the issue of race is obvious in a case, it is *less important* to do a race-relevant voir dire.

In addition to research demonstrating that race-relevant voir dire is important, research into jury trials demonstrates that juries formed out of all-white jury pools convict African-American defendants more often than white defendants.¹⁵ This phenomenon is eliminated when at least one African-American is in the jury pool.¹⁶ This suggests that the presence of African-Americans in the jury venire can have an effect on outcomes at trial even when African-Americans are not on the jury.¹⁷ Combined, race-relevant voir dire and African-Americans in the jury pool may be the two most important factors in overcoming jurors’ implicit biases.

While race-relevant voir dire can be very important, at present, there are only two types of cases in which the accused is entitled to question prospective jurors about racial bias: a capital defendant accused of an interracial crime is entitled to have a defense lawyer inform prospective jurors of the race of the victim and to ask questions that probe racial bias;¹⁸ and when the facts in a case are such that it would be a violation of due

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 210 (2001) [<http://perma.cc/9XS5-R99Z>].

¹⁵ Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019 (2012) (basing findings on an empirical study of all felony trials in two Florida counties during five-and-a-half and ten-year periods) [<http://perma.cc/K6KA-49ZV>].

¹⁶ *Id.*

¹⁷ *Id.* at 1021.

¹⁸ *Turner v. Murray*, 476 U.S. 28, 36–37 (1986) [<https://perma.cc/FAM4-2JDS>].

process to deny questioning on the issue of racial bias.¹⁹ In other cases, race-relevant voir dire depends on the discretion of the trial judge.²⁰ Although discretionary, many jurisdictions give lawyers wide latitude in questioning prospective jurors.²¹ Thus, it is important for defense counsel to advocate for race-relevant voir dire where such practices are barred. And, where the system allows, the zealous advocate faces an ethical and strategic imperative to raise issues of race during voir dire.

II. DISCUSSING FERGUSON WITH THE JURY VENIRE: SPEAKING THE TRUTH TO SEEK THE TRUTH

Brayer states that his fear of discussing Ferguson with the jury venire was not primarily a fear of discussing race, but rather a fear about bringing up Ferguson as a touchstone for discussing jurors' views of law enforcement. Brayer states that jurors' attitudes about law enforcement were potentially important to his case. Ferguson and the issues Ferguson triggers may be important topics to explore with jury venires in other cases, not only in the St. Louis area, but also in other communities.

Brayer states that on the day of jury selection, just a few days after Michael Brown's death and the subsequent protests, potential jurors likely had to walk by police barricades and an increased security presence to enter the courthouse.²² For those potential jurors, "Ferguson" was a code word for how police treated persons of color or what their views and opinions were on the subject. Brayer says he needed to know the potential jurors' beliefs and potential biases, but that he feared the subject was too private or too personal, or could be a distraction.²³ Brayer was afraid to utter the word Ferguson.²⁴

For Brayer's client, and for other persons accused of crimes, effective representation means having a lawyer who is not afraid to share his or her fears with the jury. It is through this process that effective jury selection takes place. Fears worth discussing with the jury include potentially troubling factual issues in a case, but also issues of race or, in the case of Ferguson, events in the local or national community that potential jurors may see implicated in the case at hand. Ferguson had to be on the minds of

¹⁹ *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) [<https://perma.cc/D3AV-Q3GC>]. In *Ham*, the defendant was a well-known African-American civil rights activist charged with possession of marijuana whose defense was that the law enforcement officials had framed him on the drug charge and were "out to get him" for his civil rights work. *Id.* at 524–25.

²⁰ *Lee*, *supra* note 6, at 1592.

²¹ *See, e.g., State v. Holley*, 877 A.2d 872, 876 (Conn. App. Ct. 2005) (stating that "[t]he court should grant such latitude as is reasonably necessary to fairly accomplish the purposes of the voir dire" (quoting *State v. Ross*, 849 A.2d 648, 681 (Conn. 2004) [<https://perma.cc/XW7D-BQZ8>] [<https://perma.cc/4FBS-GPJZ>]).

²² Brayer, *supra* note 1, at 164.

²³ *Id.*

²⁴ *Id.*

those potential jurors, and they likely thought it was in the minds of each other and on the minds of the judge and the lawyers trying the case. If for no other reason, mentioning Ferguson and forming appropriate questions about how it might affect their views in deciding the case would have shown the jury venire that Brayer was being honest with them.

The term *voir dire*, used to describe the process of jury selection, comes from the Anglo-Norman “[t]o speak the truth.”²⁵ If some event, like Ferguson or a different issue of race, matters in a client’s case, the defense lawyer should acknowledge the issue to speak truthfully with the jury venire. By speaking truthfully, the lawyer has the best opportunity to obtain truthful and useful responses from the prospective jurors.²⁶ Many colleagues and I have seen and experienced the failure to acknowledge what the lawyer fears, whether it is race or any other troubling issue in a case, which lets the lawyer’s silence create a false, detached environment for the trial. In such an environment, the defense lawyer essentially engages in a tacit agreement with the judge and prosecutor to keep silent on an issue—perhaps the very issue that could drive a verdict of guilt for the client. A trial lawyer knows the importance of saying what is true to the jury, even when the truth involves one of those subjects that we are taught to never talk about, such as money, politics, religion, or sex. In a civil case, a lawyer, whether representing the plaintiff or defendant, has to find the right language to discuss money damages with the jury, and this discussion has to start with jury *voir dire*. In employment discrimination cases, the political views of a government employee, the religion of a client, or an allegation of sexual harassment can be an underlying issue in the case. A lawyer with such a case would be failing his or her client not to raise such a relevant issue during *voir dire* and to explore possible juror biases. The same is true when race is a potential issue in a case. The lawyer has to evaluate whether and how to discuss race or other potentially uncomfortable subjects with prospective jurors in order to develop an effective jury selection strategy.

As Brayer discusses, unconscious biases can influence jurors to make unfair judgments. This fear, that the jury might judge his client unfairly, had to trump Brayer’s own fear that certain *voir dire* discussion topics might be too personal or cause the jurors to dislike him and his client. As he explains in his essay, he had to, and defense lawyers generally have to, confront their own unconscious or hidden biases first, in order to uncover these biases in others.

III. HOW TO DISCUSS FERGUSON

Brayer does not tell us how he discussed Ferguson, but I am going to suggest one way he could have started that conversation with prospective

²⁵ SPENCE, *supra* note 4, at 112; BLACK’S LAW DICTIONARY 1805 (10th ed. 2014) [<http://perma.cc/7G7V-SPUT>].

²⁶ See SPENCE, *supra* note 4, at 115–16.

jurors. This approach is influenced by, and based on, being in the moment—an approach that many lawyers use consciously or unconsciously, and an approach that Gerry Spence explains very well.²⁷ Being in the moment requires both the ability to focus on what is occurring and the ability to listen not only to what others are saying but also to one’s own thoughts and feelings.²⁸ Being in the moment also includes sharing one’s thoughts and feelings with the jury. Spence maintains that “before you can expect people to reveal their feelings, their biases and prejudices, we must first be willing to reveal our own—openly and honestly.”²⁹

Brayer could have begun by sharing his fear with the jury by stating, “I’m a little afraid here. I’m scared. I walked by the police guarding the Justice Center, just as you did. Ferguson has been on the news nonstop, and it is hard not to think about it. Was anyone else a little fearful entering the Justice Center today?”

At that point, a defense lawyer opens up to the jury. The lawyer is sharing a fear that some jurors are likely feeling. The lawyer is showing the jury that the lawyer is telling the truth, and this should help make it easier for the jury to tell the truth when questioned.³⁰

After posing such a question, and others like it, the jury would likely share their feelings about entering court that day, their reactions to the police barricades and the likely increased security at the courthouse, and their thoughts about the scenes in the news of the police and protestors. From that discussion, a defense lawyer could explore prospective juror views of law enforcement and turn that discussion to issues related to the client’s case. Again, the defense lawyer should start by sharing something about his or her views or possible biases, before probing deeper with jurors. In doing this, the lawyer has to be attuned to juror body language and facial expressions, and especially listen to how prospective jurors respond. As long as the lawyer is tapping his or her own genuine feelings and is being respectful of the prospective jurors, the lawyer should be able to avoid a negative or defensive response.

As long as the defense attorney can tie these questions to an issue in the case, the court should permit the questioning. For example, a case may be reversed when a defense lawyer is not allowed to question prospective jurors regarding pro-law enforcement bias when the only witnesses in a criminal case are police officers.³¹ Many cases turn on whether law enforcement officers followed proper procedures or whether their testimony

²⁷ SPENCE, *supra* note 4, at 114–24. Gerry Spence is a well-known trial lawyer with more than fifty years of experience trying criminal and civil cases. *AAJ Recognizes Trial Lawyers for Excellence*, TRIAL, Nov. 2013, at 48.

²⁸ SPENCE, *supra* note 4, at 114.

²⁹ *Id.* at 116.

³⁰ *Id.* at 115–16.

³¹ See, e.g., *State v. Ritter*, 719 N.W.2d 216, 221–22 (Minn. Ct. App. 2006) [<https://perma.cc/RM6S-LPGA>].

is credible. Prospective jurors' attitudes about law enforcement can be relevant in a large percentage of criminal cases.

The same approach, an approach to confront one's fear when it is a fear about race in a case, is extremely important. As I discussed in Part I of this Essay, perhaps more than many other issues in a case, race matters.

IV. CONCLUSION

Given the importance that race and racial bias may play in certain cases, defense counsel has an obligation to determine when and how to discuss race and racial bias during jury selection in order to be effective. Defense lawyers should ask for juror questionnaires, and ask to insert questions that raise issues of racial bias such as those mentioned above.³² In addition, defense lawyers should ask questions to raise awareness about bias during voir dire.

Especially in times when issues of race are on the minds of potential jurors, such as currently in the St. Louis area due to the shooting of Michael Brown and continuing protests in Ferguson and several other cities over racial injustices, failing to question about bias in some cases may result in stacking the jury against the accused. Brayer's essay about talking to prospective jurors about Ferguson serves as a reminder that, to be effective, defense counsel has to confront his or her fears in a case, whether that is a fear about jurors' attitudes toward the police, or fear about jurors' biases. Failing to do so is not just giving in to one's fears, but may in fact be giving up on your client's chance to have the jury decide the case fairly.

³² See *supra* notes 8–11 and accompanying text.