

HIDDEN RACIAL BIAS: WHY WE NEED TO TALK WITH JURORS ABOUT FERGUSON

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As recent tragic events confirm, issues of race frame our national identity and define our capacity to achieve true equality for all individuals. By its very nature and traditions, the law is a profession tasked with confronting inequality and discrimination in our society. As issues of race continue to influence our communities, nation, and world, the legal profession will be charged with leading future discussions on how prejudice and bias affect our clients. Unfortunately, as legal professionals, we still struggle with the question of whether to talk about race in voir dire.¹ This essay discusses our obligation as judges, academics, and practitioners to understand how unconscious racial bias exists in the hidden belief systems of many, if not all, jurors. These actors must also recognize that open dialogue in jury selection is a proven strategy against the effects of individual undetected prejudice. Furthermore, attorneys must concede hidden bias in themselves before fully comprehending the devastating impacts of racial biases. The events of the last four months in Ferguson, Missouri have exposed potential jurors to experiences dominated by issues of race. The opinions, beliefs, and prejudices of future fact-finders will be greatly shaped by how they perceive these events and interpret the issues.

I. “CLASHES, CHAOS” “POLICE AGAIN USE TEAR GAS ON FERGUSON PROTESTERS” *ST. LOUIS POST-DISPATCH* 8-18-2014

On August 18, 2014, I found myself in a routine situation for a career public defender: preparing to select a jury in a criminal case by questioning the citizens of St. Louis County, Missouri. Inside of the courtroom, the setting was normal, but the scene outside the courthouse was anything but ordinary. Nine days previously, less than ten miles from where my venire panel sat, eighteen-year-old Michael Brown was shot and killed by a police officer in nearby Ferguson, Missouri. National and local media had descended upon Ferguson and broadcasted images of nightly confrontations

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¹ See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1591–92, 1607–10 (2013) [<http://perma.cc/VM5C-EZNL>].

between police and demonstrators who firmly believed that an unarmed African-American teenager had been unjustifiably gunned down. Social, Internet, television, and print media were flooded with stories and images of grief, looting, tear gas, political disputes, tactical teams, and burning buildings.

Since the shooting, my assembled panel of potential jurors were exposed to—and in some cases participated in—a national debate on many issues, including how law enforcement and local courts treat people of color and the rights of law enforcement to use force to defend themselves and their communities. On this Monday morning of scheduled jury service, these citizens entered a courthouse that just a few days before—and again the following day—was guarded by a sizeable police presence armed with riot gear and hand ties, poised to repel protesters.

The potential jurors before me all had opinions and experiences concerning how minorities are generally treated by police. Many held views on how police and citizens treated each other on the streets of Ferguson. As a litigator, I needed to know the beliefs, attitudes, and biases of my potential jurors. But I still harbored a very private concern: that this subject was too controversial and too personal, and would become a distraction from the trial. I feared the jurors would resent me and my client for introducing the issue.

It was hypocritical of me to consider avoiding a dialogue about Ferguson with prospective jurors, seeing as I have publicly preached the importance of discussing issues of race in voir dire.² Race was not a major issue in my case, but how my jury viewed law enforcement was an important concern. Yet, I still harbored doubts about saying the word “Ferguson.”

An attorney’s own private fears are just one roadblock preventing him or her from discussing race during voir dire. Some judges prohibit any mention of race by litigators.³ Thus, structural, strategic, and emotional barriers prevent litigators from engaging in an open discussion of race in voir dire. But it remains critically important that actors in the justice system, such as myself, overcome these barriers and address issues of race during the jury selection process. To emphasize this point, this essay surveys psychological research and jury studies that indicate just how large a role race can play in jurors’ decisionmaking processes.

II. VOIR DIRE AND UNCONSCIOUS BIAS

In 2006, social psychologist Samuel Sommers studied the impact of race-related voir dire questions on jurors by simulating realistic trial

² Patrick C. Brayer, Batson, *Empowerment and New Jury Models: The Case for ‘Open Inquiry,’* 33 CHAMPION 26 (2009).

³ Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL’Y 71, 98 (2010) [<http://perma.cc/GN9Q-KV43>].

conditions for mock juries and recording the responses of participants.⁴ Individuals “were less likely to vote guilty before deliberating and gave lower estimates of the likelihood of the Black defendant’s guilt” when asked race-related questions in voir dire.⁵ His results suggest that engaging a juror with questions about race diminishes the effects of embedded individual bias on the trial process. A juror’s decisionmaking system is somehow influenced when reminded to render a judgment “free from prejudice.”⁶ Thus, a simple interactive reminder to a juror to consciously put prejudice aside appears to invite a self-assessment of the individual’s bias and may produce discernable results. Individuals generally fail to perceive their own biases until they are requested to consider issues of race and encouraged to articulate how these issues have framed their experiences and belief system.⁷ Individual and interactive prompting by an attorney during voir dire appears to diminish the impact of individual hidden bias, allowing the facts of the case and the instructions of the court to emerge as the dominant influence on juror decisionmaking.

In addition to the work of researchers, a growing number of legal scholars have identified “race-related voir dire” as a way to moderate a “juror[’s] own racial attitudes” by making race “salient.”⁸ This area of scholarship reframes the goal of voir dire to be the self-identification of implicit bias by each individual juror.⁹ Voir dire can play an important role in defining principles of fairness and equality for each member on the panel, encouraging jurors to avoid subconscious personal prejudice. The interactive nature of discussing the issue of prejudice with jurors makes the goal of avoiding bias “contextually” important, and allows the court or litigator to issue “strong normative goals to avoid bias.”¹⁰ When conducted “in an unhurried, relaxed, and non-judgmental environment,” the resulting dialogue can diminish the impact of “racial attitudes.”¹¹

Racial identity research also explains why the events in Ferguson are a necessary subject for jury selection. When individuals are confronted with an event involving racial issues, their ego selects a “racial identity status,”

⁴ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006) [<http://perma.cc/HTZ4-A9Y6>].

⁵ *Id.* at 606.

⁶ *Id.*

⁷ *See id.* at 606–08.

⁸ Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165, 191 (2011) (quoting 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, 1011 (2003) [<http://perma.cc/YTZ2-P2NE>]).

⁹ *See id.*

¹⁰ *Id.*

¹¹ *Id.*

allowing them to interpret the event.¹² Unfortunately, this identity can lack maturity, and if not confronted with new and meaningful information about race, individuals remain at their original, ego-motivated identity status.¹³ Depending on the maturity of a person's racial identity, their status could range from being oblivious to the existence of racism in society to a belief system where they self-identify and confront individual racist beliefs.¹⁴

The tragic death of Michael Brown and all that followed triggered a quest within many to protect their sense of self and rationalize events absent any substantive dialogue. Because the issues raised by Ferguson will persist in the minds of many jurors, a race-related voir dire acknowledging hidden bias is essential when promoting prejudice-free proceedings.¹⁵

Unfortunately, some judges prohibit any mention of race by litigators. When a judge bans discussions of race during courtroom proceedings, the system facilitates the continued existence of hidden prejudice in the fact-finding process. If race-based attitudes are informing jurors to an extent that is outcome-determinative, legal professionals must be willing to facilitate an open exchange of all beliefs in the jury selection process. But as legal professionals, are we uncomfortable with the concept of unconscious bias? Is it easier to blame unfairness on the overt bigotry of a few, rather than accept the existence of implicit bias in everyone—even ourselves?

III. HIDDEN BIAS AND THE LEGAL PROFESSION

In 2010, Shankar Vedantam explored the world of “the hidden brain” and concluded that the human brain is “designed to be biased.”¹⁶ Individuals distinguish differences in individual faces as a mechanism of survival.¹⁷ Our unconscious mind allows us to make quick judgments regarding the thousands of seemingly identical faces we witnessed as developing

¹² Janet E. Helms, *An Update of Helms's White and People of Color Racial Identity Models*, in HANDBOOK OF MULTICULTURAL COUNSELING 187 (Joseph G. Ponterotto et al. eds., 1995).

¹³ *See id.* at 186.

¹⁴ *See* Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 166–67 (2004) (discussing Professor Janet Helms' proposal of a “racial identity development model to describe how . . . behaviors[] and interactions with members of different racial groups are reflective of their racial identity. Presenting separate models for whites and persons of color, she proposes a set of ego statuses to describe how racial identity development can range from less mature or sophisticated conceptions of one's racial self in relation to members of a different race, to more mature or sophisticated ego statuses.” (footnotes omitted)) [<http://perma.cc/TC83-7RBH>].

¹⁵ *See* PBS NewsHour: *Shields and Brooks on the Ferguson Ruling, Hagel Resignation* (PBS television broadcast Nov. 28, 2014), available at <http://www.pbs.org/newshour/bb/shields-brooks-ferguson-ruling-hagel-resignation> [<http://perma.cc/LG84-UJ3E>], for a discussion of how the events in Ferguson and the grand jury decision of November 24, 2014 weave into a broader national narrative.

¹⁶ SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* 61 (2010).

¹⁷ *Id.*

infants.¹⁸ Vedantam argues that white Americans are some of the least skilled in cross-cultural and interracial identification because of the ubiquitous worldwide exposure to white American faces through television and other media.¹⁹ “In criminal justice settings, interracial eyewitness identifications are far more prone to error than situations where witnesses and suspects belong to the same race.”²⁰ Unfortunately, the American legal system may be the first to deny the existence of a hidden bias, a denial “premised on the notion that deliberate and conscious thinking are all that matter.”²¹

The developing “hidden brain” is programmed to learn through repeated observations of our world and is prompted to make unconscious judgments based on associations and generalities.²² As infants, our unconscious learning absorbs an American culture where children see thousands of observed interactions, marriages, and friendships segregated by race.²³ The hidden brain “conclude[s] that there must be an unspoken rule in society that forces whites to marry other whites, because everywhere [it] look[s], most of the white husbands seem to be married to white wives.”²⁴ Even when conscious learning is used to counter the prejudicial effects of hidden bias, cultural messages repeatedly communicate to the developing brain that people of color are different from people who are white.²⁵

Researchers have linked this existence of hidden bias to examples of inconsistent sentencing in the criminal justice system. Psychologists at Stanford University found that an individual’s skin tone and other features played a role in sentencing.²⁶ Researchers asked “a large group of independent people who knew nothing about the cases” to rank the faces of individuals convicted of circumstances “serious enough to warrant the death penalty” on the “degree to which they looked stereotypically black.”²⁷ Individuals who appeared more “stereotypically black” were more than twice as likely to have received the death penalty.²⁸ Researchers also concluded the same sentencing disparities did not exist when the defendant

¹⁸ *See id.*

¹⁹ *Id.* at 64.

²⁰ *Id.* at 66.

²¹ *Id.*

²² *Id.* at 72–74.

²³ *Id.* at 72.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 176–77 (discussing a study reported in Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383 (2006) [<http://perma.cc/564W-QYTQ>]).

²⁷ *Id.* at 176.

²⁸ *Id.* at 177.

and victim belonged to the same race.²⁹ Researchers noted that “[s]omething about black-on-white crime activated unconscious stereotypes that linked criminality with race in the minds of jurors.”³⁰

Vedantam concluded that inconsistent treatment of black defendants by the criminal justice system is unlikely to be the result of mass deliberate bigotry and prejudice on the part of judges, lawyers, and jurors.³¹ A more likely explanation is that unconscious bias accumulates and may influence well-intentioned people to render unfair judgments.³² Compounding the problem are members of our legal system who refuse to accept the impact of hidden prejudice, assuming that “biased outcomes result from deliberate bias and that such errors can be overcome by setting up a confrontational system where prosecutors and defense attorneys keep one another honest.”³³ Because of this presumption, our system of justice “is designed to fail regularly.”³⁴

If openly discussing issues of race is an essential step in the self-identification of individual prejudice, why are legal professionals reluctant to engage in a jury selection process that considers the existence of hidden bias? The answer to this question may be rooted in the following premise: to find unconscious prejudice in others, we must accept the existence of our own individual hidden bias. When confronted with issues involving race, our ego selects a dominant racial identity status to interpret the event.³⁵ The selection of a status protects our “sense of well-being and self-esteem.”³⁶ As legal professionals, we should be willing to mature in our own personal racial identity status by acknowledging that hidden bias exists in all individuals—including ourselves. We should not let our profession fail to evolve because of a system-wide reluctance to engage our jurors and ourselves in conversations about racism, bias, and prejudice.

IV. REFLECTIONS FOLLOWING THE GRAND JURY DECISION

I walked through a closed, barricaded, and relatively empty St. Louis County Court and Justice Center the morning after the grand jury decision on the case of Michael Brown’s death. As I observed the empty halls, I reflected on how a normal practice day in the life of a legal community had come to a complete stop because of events on the streets—arguably linked to a lack of a meaningful national dialogue on issues of race, prejudice, and bias. I noted the absence of the normal assembly of lawyers, typically

²⁹ *Id.* at 179.

³⁰ *Id.*

³¹ *Id.* at 179–80.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 180.

³⁵ Helms, *supra* note 12, at 187.

³⁶ *Id.*

engaged in spirited discussions about their clients, and I remembered how my colleagues are very effective at promoting nonjudgmental but meaningful discussions between individuals of different beliefs when they select a jury. I also considered the week to follow when thousands of potential jurors will descend on courthouses around the nation, fresh from holiday gatherings but consumed with thoughts about what they observed the previous week in Ferguson and St. Louis County, Missouri. I realized as one practitioner, I can't change the entire voir dire process or lead a national debate, but I can change what I discuss with individual jurors.

As a profession, we can take certain important steps to remain relevant in the face of current events. First, we should discuss the importance of acknowledging issues of race and bias in voir dire. My thoughts have been communicated in this piece, but I appreciate the concerns and insights expressed by Professor Forman in her companion essay³⁷ and eagerly await new scholarship on both sides of this question. Second, we need to identify and eliminate the legal obstacles and emotional barriers that will prevent a practitioner from engaging in a dialogue about race. Professor Joy's essay speaks to the duty of lawyers to identify when and how they should discuss bias in voir dire.³⁸ I strongly agree with his point that litigators must confront their individual fears of addressing race with jurors.³⁹ Third, practitioners need to succeed at what they do best as a community of professionals by advancing and standardizing a trial skill: the effective questioning of jurors about hidden bias, prejudice, and race. Litigators of all disciplines currently rank among the best at moderating and welcoming relaxed, insightful dialogues about individual beliefs. By taking these steps, practitioners and the legal profession as a whole can both protect clients and contribute to a much-needed conversation that will help return relevance and life to every courthouse.

V. CONCLUSION

Open, ugly, and dangerous racism against people of color still exists today and the legal profession must continue to fight against its existence in and impact on our society. However, a lack of outward bigotry does not excuse lawyers from being unmindful of the biases that lurk within. Michael Brown's death reminded us that issues of race, income inequality, and law enforcement continue to dominate our society. Potential jurors will arrive at the courthouse doors with a belief system and subconscious informed by their race-related experiences, and a perceived narrative based on current events. Because many of our potential jurors will be impacted in different ways by this tragedy, we must identify and discuss hidden bias in

³⁷ Sarah Jane Forman, *The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*, 109 NW. U. L. REV. ONLINE 171 (2015).

³⁸ Peter A. Joy, *Race Matters in Jury Selection*, 109 NW. U. L. REV. ONLINE 180 (2015).

³⁹ *Id.*

voir dire and allow the events in Ferguson to serve as a catalyst for honest dialogue—specifically, an open dialogue with our jurors and a reflective dialogue with ourselves.