DePaul Law Review

Volume 58
Issue 3 *Spring 2009: Symposium - Media, Race, and the Death Penalty*

Article 6

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Andrea D. Lyon

MIXED MEDIA: POPULAR CULTURE AND RACE AND THEIR EFFECT ON JURY SELECTION

*Andrea D. Lyon**

INTRODUCTION

It is a tautology to say that the media affects how we perceive crime, the accused, and the players in the criminal justice system.[1] Many have decried media portrayals of criminality, particularly in certain demographic groups defined by age, gender, socioeconomic status, and race.[2] The purpose of this Article is not to repeat those poignant and important observations, but rather to assume them to be true and ask what this means for the practitioner trying to pick a jury while representing someone facing the death penalty.

Selecting a jury in a capital case is difficult enough, but facing the issue of race and its insidious symbiotic relationship with the business of news[3] makes jury selection even more complex. Jury selection in a capital case is far more complicated and difficult than in an ordinary case.[4] It is beyond the scope of this Article to fully discuss the negative effects of death qualification, or how excluding people opposed to the death penalty increases the likelihood of conviction and decisional errors.[5]

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* Associate Dean for Clinical Programs; Clinical Professor of Law; and Director of the Center for Justice in Capital Cases at DePaul University College of Law. I wish to thank my research assistant, Elizabeth Turillo, for her invaluable assistance.

1. *See* R. Lance Holbert et al., *Fear, Authority, and Justice: Crime-Related TV Viewing and Endorsements of Capital Puninshment and Gun Ownership*, 81 JOURNALISM & MASS COMM. Q. 343 (2004); Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004).

2. *See, e.g.*, Bandes, *supra* note 1, at 587.

3. Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 447 (2006); Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601, 603 (1992).

4. *See* Andrea D. Lyon, *But He Doesn't* Look *Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After* Atkins v. Virginia, 57 DEPAUL L. REV. 701, 701 (2008); ANDREA D. LYON ET AL., ILLINOIS CAPITAL DEFENSE MOTIONS MANUAL (2d ed. 2005); Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991); Andrea D. Lyon, *Defending the Life-or-Death Case*, LITIG., Winter 2006, at 45.

5. *See, e.g.*, Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984); *see also* Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984).

In *Witherspoon v. Illinois*, the United States Supreme Court initially held that the prosecution in a capital case has the right to exclude, for cause, anyone who could not consider giving the death penalty.[6] Subsequent cases[7] modified *Witherspoon*'s "automatic" and "unmistakably clear" language,[8] allowing the exclusion for cause only when a juror unqualifiedly expressed his unwillingness to consider the death penalty.[9] This modification changed the dynamics of jury selection by making it easier for the prosecution to exclude jurors for cause, but it also complicated matters. First, jurors who are "substantially impaired" by virtue of their anti-capital punishment views must be identified.[10] Second, jurors who are "substantially impaired" by virtue of their *pro*-capital punishment views must also be identified.[11] Third, venire members who are substantially impaired in considering lawful mitigating evidence must be identified.[12]

In addition to the defendant's right to an adequate voir dire to permit the identification of unqualified jurors, the Constitution affords a defendant in a capital case the right to an impartial jury for trial and capital sentencing.[13] Selecting an impartial jury is a laudable but difficult goal. The news and entertainment portrayals of racial groups further complicates this task because of their effect on jurors' perceptions.[14] While courts have often stated their concern with racial

6. 391 U.S. 510 (1968).

7. *See* Adams v. Texas, 448 U.S. 38 (1980); Wainright v. Witt, 469 U.S. 412 (1985).

8. *Witherspoon*, 391 U.S. at 522 n.21.

9. *Compare Witherspoon*, 391 U.S. at 515 n.9, 522 n.21, *with Adams*, 448 U.S. at 45 ("*prevent or substantially impair* the performance of his duties as a juror" (emphasis added)), *and Wainwright*, 469 U.S. at 424 ("standard is whether the jurors' views would '*prevent or substantially impair* the performance of his duties as a juror'" (emphasis added)).

10. Morgan v. Illinois, 504 U.S. 719, 729 (1992).

11. *Id.* at 729 (venire must be questioned regarding pro-capital punishment, potentially disqualifying views).

12. *Id.* at 738. "Presumably, under today's decision a juror who thinks a 'bad childhood' is never mitigating must also be excluded." *Id.* at 744 n.3 (Scalia, J., dissenting).

13. U.S. CONST. amend. XIV; *Morgan*, 504 U.S. at 727 (majority opinion).

14. Adam Hime, *Life or Death Mistakes: Cultural Stereotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Execution*, 82 U. DET. MERCY L. REV. 181, 209 (2005); Franklin D. Gilliam Jr. et al., *Where You Live and What You Watch: The Impact of Racial Proximity and Local Television News on Attitudes About Race and Crime*, 55 POL. RES. Q. 755, 757–59 (2002).

prejudice, particularly in the context of jury selection,[15] judicial "fixes" have proved ephemeral.[16]

II. POPULAR CULTURE'S EFFECT ON PERCEPTION

If you ask most people where they get their information about the criminal justice system, they won't say newspapers, civics class, or even news magazines. Instead, they will say the local news and television programs, particularly the ubiquitous and long-running *Law & Order* television program and its spinoffs.[17] These programs have predictable qualities to them—there is a victim, a bad guy (the "perp"), and the forces of good who arrest or exact revenge on him.[18] The bad guy is defined solely by the act with which he is charged, not as a person who is both good and bad, or hateable and loveable. The victim is similarly more than one thing,[19] but she has a chance of being portrayed as something more than the recipient of criminal wrong—she might be an honor student, or the mother of five, or a long time factory worker.[20] Portrayals in the news are no different.[21]

While no one deserves to be violently attacked, those who are attacked are not always without some fault or participation in what happened to them. For example, a person who is robbed at gunpoint is the victim of an awful crime that should be punished. It is relevant to our understanding of the crime, however, that the victim was flashing money around in a poor neighborhood while buying drugs. It doesn't mean he "deserved" to be robbed—no one does. Where he is and what he is doing is not irrelevant, however. Similarly, it is relevant that the robber was a twelve-year-old breadwinner for a family of

15. Beginning with *Furman v. Georgia*, 408 U.S. 238 (1972), and continuing through *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court has struggled with this issue, acknowledging in *McCleskey* that the statistical evidence "indicates a discrepancy that appears to correlate with race." *McCleskey*, 481 U.S. at 312. Declining to overturn an entire capital sentencing system due to this improper influence, the Court has attempted to tackle the problem in other ways. Principal among them is requiring special procedures in jury selection. *See generally* Turner v. Murray, 476 U.S. 28 (1986).

16. Andrea D. Lyon, *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647, 1654–55 (2004).

17. Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1, 3–5, 10 (1995), *available at* http://www.albany.edu/scj/jcjpc/vol3is1/perceptions.html.

18. David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 809 (1993).

19. Paul Colomy & Laura Ross Greiner, *Making Youth Violence Visible: The News Media and the Summer of Violence*, 77 DENV. U. L. REV. 661, 672–73 (2000).

20. *See generally* Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645 (2003).

21. Colomy & Greiner, *supra* note 19, at 672–73.

seven children, with his thirteen-year-old sister as the primary caretaker. There were no adults on the premises—the various fathers were uninvolved with the children, and the mother was an addict. I represented this young man later in his life after he was (forcibly) recruited into a gang.[22] Did he commit a crime? You bet. Did his victim's actions contribute to his choice of victim? Absolutely.

III. JUROR "SCRIPTS"

When a juror comes into a courtroom, he does so with certain scripts in his head.[23] His life experiences, upbringing, and education all help him to function in the world, and that means that he expects certain events to happen a certain way.[24] If the elevator light shows "up," one expects that the elevator is going up.

Similarly, the potential juror walks in to a courthouse with expectations about crime, courts, and criminals. However, such life experiences, upbringing, and education are not necessarily where he gets those expectations. In all likelihood, he has little or no contact with the criminal justice system personally, has not studied it in school, and was not brought up around people with personal or educational knowledge about it.[25] Where will those expectations come from? His experiences will come from the news and television crime drama.[26]

Even assuming a juror has no particular political viewpoint about crime, has no hidden agendas, and is otherwise a blank slate, social science tells us that he will believe "dark is dangerous,"[27] police always get the right guy, and prosecutors are knights in shining armor.[28] Even if this hypothetical juror intellectually knows better, the only stories he has heard on the subject are from news and television, almost certainly not from his own experience or that of anyone close to him.

So this potential juror will not know that a young black man from a tough neighborhood learns early to run whether or not he has done

22. To protect his privacy, I choose not to use his name.

23. SUNWOLF, PRACTICAL JURY DYNAMICS: FROM ONE JUROR'S TRIAL PERCEPTIONS TO THE GROUP'S DECISION-MAKING PROCESS 119 (Lexis Nexis Group 2004); Richard K. Gabriel, *Values, Beliefs, and Demographics in Selecting Jurors*, ATLA-CLE, Winter 2002, at 49.

24. *See generally,* SUNWOLF, *supra* note 23.

25. Harris, *supra* note 18, at 786.

26. *Id.*; Ray Surette, *The Media, the Public, and Criminal Justice Policy*, 2 J. INST. JUST. INT'L STUD. 39, 43 (2003).

27. Beale, *supra* note 3, at 459.

28. Sarah Eschholz, *Crime on Televison—Issues in Criminal Justice*, 2 J. INST. JUST. INT'L STUD. 9, 9–11 (2003).

anything wrong.[29] The juror will not experience a rite of passage to adulthood in which his father or mother explained to him how to behave when (not if) he is stopped by the police—to not make any sudden moves and use the words sir or ma'am to avoid getting shot.[30] He won't know of anyone doing someone else's time, or how easy it is to be mistaken for someone you are not.[31] In other words, a potential juror's life history will not help him to look critically at the news or crime drama, and he likely will be unaware of its effect on him.[32]

IV. PRACTICAL SUGGESTIONS

What does a defense attorney do under these circumstances? First, she must conduct voir dire effectively and make good use of whatever information she gets. In accordance with a defendant's right to an impartial jury and to identify unqualified jurors during voir dire, an attorney should "ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath."[33] A capital prosecution demands that exacting standards be met to ensure that the entire process is fair. The "fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."[34] Both parties need access to information concerning the po-

29. Mia Carpiniello, *Striking a Sincere Balance: A Reasonable Black Person Standard For "Location Plus Evasion" Terry Stops*, 6 MICH. J. RACE & L. 355, 357–70 (2001); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 455–70 (1996). *But see* California v. Hodari D., 499 U.S. 621, 623 n.1 (1991). Justice Scalia criticized the State's concession "[t]hat it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police" as it is "not self-evident, and arguably contradicts proverbial common sense." *Id.* (citing *Proverbs* 28:1 ("The wicked flee when no man pursueth.")).

30. WANDA M. LEE, AN INTRODUCTION TO MULTICULTURAL COUNSELING 75 (1999).

31. United States v. Wade, 388 U.S. 218, 228 (1967); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 260 (1991).

32. Kimberlianne Podlas, *As Seen on TV: The Normative Influence of Syndi-Court on Contemporary Litigiousness*, 11 VILL. SPORTS & ENT. L.J. 1, 19–23 (2004).

33. People v. Cloutier, 622 N.E.2d 774, 781 (Ill. 1993). *See also* Michael P. Toomin, *Jury Selection in Criminal Cases: Illinois Supreme Court Rule 431—A Journey Back to the Future and What it Portends*, 48 DEPAUL. L. REV. 83 (1998); McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554–55 (1984).

34. Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (quoting Gardner v. Florida, 430 U.S. 349, 363–64 (1977) (White, J., concurring)).

tential jurors that is accurate and thorough.[35] It is an established principle that "the juror's assurances that he is equal to this task [of laying aside preconceptions] cannot be dispositive of the accused's rights."[36] Thus, the court must allow a probing inquiry into the juror's beliefs and prejudices. Moreover, the exceptional and irrevocable nature of the death penalty demands that an attorney must conduct voir dire carefully, as a trial court's refusal to allow certain voir dire questions requires reversal of the death sentence.[37]

A capital defense attorney therefore must ask for attorney-conducted voir dire, a questionnaire, and adequate time to question jurors. She must also learn to find out what people think, why they think it, and how deeply their opinions run. Studies consistently show that a lawyer is far more likely to get good information from jurors if she asks questions herself; thus, it is important to request attorney participation in voir dire in every case.[38] A good questionnaire will also help to get information from the juror that he or she might be unwilling to say in public.[39] For example, a person who has a negative view of criminal defense attorneys may be unwilling to say so to a criminal defense attorney, but will likely answer honestly on a questionnaire. Additionally, the questionnaire will narrow the focus of the in-court questioning and save time.

While the trial court has the primary responsibility for examining prospective jurors and has the discretion to dictate the manner and scope of voir dire,[40] those procedures must simply provide a reasonable assurance that prejudice, if any, would be discovered to uphold the court's exercise of discretion in accepting or excusing that juror for cause.[41] Of course, getting good voir dire is only the first step. Knowing what to do with it is the real challenge. How does one go about

35. *See* United States v. Walker, 160 F.3d 1078, 1083 (6th Cir. 1998) ("It is a basic requirement of due process that a defendant in a criminal case receive a fair trial by a panel of impartial, indifferent jurors." (internal quotation marks omitted)); United States v. Rigsby, 45 F.3d 120, 122 (6th Cir. 1995).

36. Murphy v. Florida, 421 U.S. 794, 800 (1975).

37. *See* Turner v. Murray, 476 U.S. 28 (1986).

38. Lee Smith, *Voir Dire in New Hampshire: A Flawed Process*, 25 VT. L. REV. 575, 580–82 (2001).

39. Steven K. McCallister & Kieran J. Shanahan, *Jury Selection*, 33397 NBI-CLE 38, 43 (2006) (noting that most people indicate that their greatest fear is public speaking).

40. People v. Williams, 645 N.E.2d 844, 850 (Ill. 1994); Mu'Min v. Virginia, 500 U.S. 415, 423, 451 (1991).

41. People v. Peeples, 616 N.E.2d 294, 311 (Ill. 1993); Darbin v. Nourse, 664 F.2d 1109, 1112–15 (9th Cir. 1981).

discovering hidden biases, especially if those biases are largely unconscious?[42]

This is where the questioner needs to be patient, listen well, and ask for specifics. For example, if I were to ask a potential juror if she considers crime to be a major problem in our country and that juror were to answer affirmatively, what do I really know? I know the conclusion, but I don't know why this particular juror has drawn it. Does she think crime is bad, or does she see a lot of it on the news? Does a family member rant about it all the time, or is she related to a law enforcement officer? Is the potential juror a victim herself? I would need to ask why and then get the story underlying the reason to determine not only what may have happened in this juror's life to cause her to come to this conclusion, but how deep her conviction runs.[43] If this is a person who has been deeply scarred by violent crime, and I am defending a death penalty prosecution, this may not be the right case for that particular juror.[44] Similarly, as questioners, we must avoid jumping to conclusions ourselves. A person who likes to read murder mysteries or watch horror movies is not, as a result, bloodthirsty, or a thrill-seeker.[45] You have to ask good questions, and more importantly, *listen* to the answers.

V. CONCLUSION

Jury selection in a capital case is a daunting endeavor, and discerning the scripts and biases of the potential jurors in voir dire might appear at first glance to be impossible. By being aware of these influences in our own lives and creating and taking advantage of good voir dire, however, questioners can explore what influences potential jurors. Practitioners can thus give a capital defendant the chance to be judged on the merits, rather than by the stereotypes of our society.

42. Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 227–28 (2005).

43. 1 JURYWORK: SYSTEMATIC TECHNIQUES § 2:27 (2d ed., 2007).

44. People v. Johnson, 575 N.E.2d 1247, 1254 (Ill. App. Ct. 1991).

45. Molly Stuart, *Using Psychological Measures to Avoid Impermissible Classifications Under* Batson, 22 AM. J. TRIAL ADVOC. 423, 441–42 (1998).