**Sacrifice Control to Learn What Jurors Really Think**

Unless the case is an extraordinary one (and sometimes even if it is), we are given a limited time for jury selection. The fundamental assumption underlying the material in this paper and that presented at the seminar is a simple one: **you will not have enough time or skill to change the minds of jurors who have opinions that are bad for your case.** Indeed, it borders on arrogance to think that you will talk to people you have never met before and be so persuasive as to change a person’s strongly held opinions in the time allowed for jury selection. Instead, it is necessary to prioritize your goals and use the limited time in the most effective way. I have been taught to make the primary goal of jury selection the discovery of the true thoughts, feelings and opinions of the jurors. Everything else is secondary.

The discovery of what jurors actually think requires us to be willing to lose control of what happens in the courtroom. Answers are not scripted in advance. There is no source for impeachment as with cross-examination. We literally have no idea who will say what. It is in reaching this state of partial chaos that people have the freedom to say what they think, and we have the ability to get information to help us select a jury that may acquit.

#  First and Foremost: If you don’t know where you are headed, no road is the right road.

It is critical to understand your purpose as you begin jury selection. The methods described in this paper and at the seminar will only help you accomplish certain goals. These

methods may result in total failure if your goals are different. If you want to lecture jurors about the law, the methods outlined here will not help you. If you want them to tell you what they think about the law, you may find help here. If you want to persuade jurors to change their deeply held beliefs about the world, you won’t find much assistance here. If you want to get jurors to tell you what those beliefs are, and how deeply they are held, read on. If you want to argue your case to the jury, these materials will not advance your goal. If you want to know what jurors think about the arguments you may make at trial, the material here may help you achieve that goal.

As stated above, there is one primary purpose of the method of jury selection described here. That purpose is to have jurors tell you what they really think. When it is done well, secondary goals are also accomplished. For example, you can develop a rapport with jurors by demonstrating that you respect them enough to ask about and listen to their opinions. You may get jurors to argue your case by asking open-ended questions about your theory. You will demonstrate that you care enough about the jury to prepare your material in advance, and go about asking questions in a direct and honest way.

# Introduce What Is Important

The beginning of jury selection presents the chance for a meaningful introduction. It is time to introduce your purpose, not yourself. Such an introduction sets the tone for what is to follow. Here is an example of such an introduction:

# Selecting a jury is a critical part of this process we use to pursue justice. I am proud to stand with Mr. I. B. Innocent and have 12 of you decide this very important case involving and the possible imprisonment of Mr. Innocent. I need to know your feelings, impressions and opinions about issues in this case, and the only way I can learn those things in the time I have is to ask you directly. Please understand that there are no right or wrong answers. Any answer that tells us how you think and feel is the right answer. This critical part of the process depends on one thing – honesty. I will be as honest and direct as I can when I ask about the things that concern me, and I hope you will do the same with me when you respond.

This kind of introduction promises honesty and asks for the same. It emphasizes the fact that jury selection is a critical part of the process, and that it relies on the jurors being open and honest. This type of introduction is useful if followed by questions that are clearly designed to get jurors to say what they think about issues in the case.

# Losing Control - Get Comfortable Being Uncomfortable

After the introduction, it is time to give control of the proceedings to the jurors. If you follow the suggestions below, one thing is certain. Jurors will end up saying some things you don’t like, and some things you really don’t like. We should not be afraid of this result; in fact we should welcome it. Remember our primary purpose. If you decide to ask the jurors questions designed to discover what they really think, the following statements are simply misconceptions based on a faulty premise:

1. If a juror says something horrible about your case or client, anyone else who hears it will automatically agree – sometimes referred to as “tainting the rest of the jury.”
2. Leading questions will elicit what jurors really think
3. Useful information is obtained by asking, “Do you have a problem with...”
4. Jurors will decide your case solely on the evidence.
5. You can get jurors to abandon opinions they strongly believe and have held for years simply by asking questions, or explaining to them why they are wrong.
6. Pop-Quiz questions about the definition of legal terms will not alienate any jurors, and will make you look smart.
7. You are better off not knowing what your jurors really think about your case.

Don’t be restricted by these misconceptions. You are better off knowing what your jurors actually think.

# Self-Disclosure Creates More Juror Disclosure

If you want jurors to reveal their thoughts and opinions on sensitive topics, you need to be prepared to reveal your own. What negative thoughts or presumptions did you have when you first got the case? What prejudices have you been influenced by or acted on in your life? Are there kinds of cases where you could not be a fair juror? Have you ever pre-judged someone, and found out later you were wrong? If you ask jurors about a sensitive topic, making a self-disclosure relating to your opinions or experiences on that topic may encourage jurors to respond with less hesitation. If you are perfect, and have no bias, prejudice or pre-conceptions, use a relative, as in “I adore my mom, but when it comes to , she always thinks . Has anyone else ever had similar thoughts?”

Self-disclosure is a powerful tool to give jurors permission to say things they may think you don’t want to hear. You can even invent an experience or opinion, and it can still be true. One of the great lessons we learn from storytellers is that a story can be true, not because it happened, but because it has the truth in it. The point is to let jurors know that they are not the only ones who hold certain viewpoints.

# Create the Right Atmosphere for Juror Disclosure

If the exchange of honest opinions is the primary goal of voir dire, we are required to make jurors comfortable talking about their actual thoughts and feelings. Think about creating this atmosphere in the courtroom by using the following process:

1. Narrow the focus of the questions to issues related to your theory and theme of the case.
2. Identify the issues you are afraid of in your case.
3. Try to think about the issue and recognize your fear of the issue.
4. Share your feelings about that issue with the jurors. E.g. “I am afraid that you could never believe that the police would lie in a criminal trial.”
5. Invite the jury to share their feelings about the issue with you.
6. Accept and even honor the jurors’ answers as gifts that they have given you,

## especially if the answer is horrible for your case.

1. Continue to elicit the jurors’ feelings even though you don’t always like the answers.
2. Don’t explain things to jurors; let them explain things to you.
3. If an extremely negative opinion is expressed, don’t try to rebut the opinion yourself. Ask other jurors if anyone disagrees or has a different view. Let the jurors start a debate about the opinion.
4. Don’t show by words or body language that you think an idea expressed by a juror is vile or disgusting. Thank the juror for having the courage to tell the truth, and perhaps indicate, “I think other people feel that way, too. Does anyone else on the panel have similar thoughts?”
5. Trust that in this honest, unguarded, and uncontrolled conversation you will gain the information needed to intelligently exercise your peremptory challenges.

# Jury Selection Is Not Cross-Examination (except for one exception)

If we want to know what jurors really think, we must ask questions that allow jurors to say whatever they want. The open ended questions generally thought of as “direct examination “ questions are an example of useful questions for jury selection. However, there is a striking difference between jury selection and direct examination. The difference is that we have never met the people we are questioning, have never interviewed them about their opinions in advance, and have no idea what they will say. This is the state of affairs results in total lack of control and predictability about the responses to our questions, and it gives us the best and most useful information about potential jurors. Use questions like these:

Why do you feel that way?

What experiences have you had with ?

How have you formed those opinions?

What had the greatest influence on your opinion? Where have you gotten your information about this?

What do you mean? Tell me more? Explain? Please describe. How do you feel about people who don’t believe as you do? How does that affect your view of this case?

What was your reaction?

What do people in your neighborhood or at your job or church feel about this? Why do you smile when you say that?

How strongly do you feel about this? Why don’t you believe as juror #2 does?

What else should we know about your views?

This system requires you to prepare like you would for an opening, closing or witness examination. What topics do you want to cover? Is the form of all your questions designed to get jurors to talk about what they think? What will you say if jurors bring up certain topics (“Does your client have a prior record…”)? How much time can you spend on each topic? This kind of preparation can help you guide the chaos to achieve your goal.

There is one exception to the use of leading questions in jury selection. When honing in on a challenge for cause, or defending against one, leading questions are very helpful. Whether challenging a juror for cause or defending against a challenge, the tone used should be respectful. In making a challenge, leading questions can help summarize how long the juror has held an opinion, how strongly they hold it, and how it is not changed by the discussion in jury selection. In defending against a challenge, you can emphasize how the juror can still be fair despite the opinion.

# If You Don’t Ask, a Judge Can Never Say “Yes”

Preparation will also help you think openly about ways to get more attorney conducted jury selection. File a motion seeking the right to ask all prospective jurors a specific list of questions. Ask that time spent developing a challenge for cause not be charged against the defense. Have your questions prepared so that if you are shut down you can file the questions you would have asked with the court. Offer to trade 15 minutes of your opening and closing for an additional half hour during voir dire.

Use the law whenever possible. Per *Batson v. Kentucky* neither side can engage in race based striking. It is impossible to effectively challenge the prosecution’s use of challenges against minorities or to defend against a prosecution challenge to our strikes without receiving meaningful information from each minority juror, and even this information is meaningless unless nonminority jurors have been asked similar questions. Therefore, the decision to restrict questions asked of potential jurors may deny a defendant his or her rights under Batson.

# Sample Questions

In any set of written materials on jury selection, it is expected that the author will include some sample questions. While some sample questions are included below, it may be more valuable to identify the kinds of questions that will help us discover the true attitudes of jurors. In general, there are at least 5 kinds of questions that are useful in encouraging jurors to talk about their true thoughts and feelings. First, as already mentioned, direct examination questions that call for open-ended answers. These questions usually begin with words like who, what, how, why, explain, or tell me about .

The next kind of question could be characterized as an opinion poll. Make a statement of fact (“All police officers tell the truth when they testify.”). Then ask jurors to raise their hands if they agree (or disagree). Once jurors have identified where they stand on the issue, ask them to tell you why they think as they do.

Third, try a stem question such as “teenage boys are .” Ask the jurors to fill in the blank, and ask why they chose the description they offered. This kind of questioning may give you ideas about language to use in the trial to deal with the issue addressed in the question.

Fourth, ask jurors if they can imagine something critical to your case (Can you imagine why a person might be frightened of an unarmed man?) If they cannot imagine why such a thing may occur, they may be disinclined to accept your theory of the case.

Finally, the use of scaled questions can help you test the strength of a juror’s belief. Make a statement and ask jurors to classify their view on the statement as 1-strongly agree; 2- agree; 3- neutral; 4-disagree; 5- strongly disagree. You will get some useful information from the jurors’ choice about how to classify their opinion on the matter addressed in the question. You may get additional information by asking jurors why they rated their belief as they did.

The sample questions below are most valuable as a beginning point for you to develop your own questions for use in jury selection. Keeping a notebook of sample questions is a valuable resource, because some issues will be the same from case to case.

# Client demeanor in the courtroom

Imagine you have been arrested and charged with (crime). You have been waiting for trial for (time since charge to 1st day of trial), and finally your day in court comes. How would you look when jurors walked into the courtroom? Afraid? Worried? Confident? Defensive? Brave? Why?

If an innocent person is brought to trial how is (s)he supposed to look when the jury walks in? How did (client) look to you when you walked in? What was your first impression?

# Self Defense:

How many of you have ever had to defend yourselves or risk being physically harmed? Tell me what that was like? How afraid were you?

Tell me about the time you were most afraid for your life - or for the life of a loved one: Can you think of situations that might cause a person to feel fear or terror? Describe?

Can the mere threat of being assaulted cause a person to feel fear or terror?

Under what circumstances is a person justified in acting in self defense? In taking the life of another person?

There is a bumper sticker that says: “I’d *rather be judged by 12 than carried by 6*.” How do you feel about this quote?

A famous Supreme Court Justice, Oliver Wendell Holmes, once said, *“The law does not require detached reflection in the presence of an upraised knife.”* What do you think?

What is Holmes’s point?

What is the difference in your mind between a criminal assault and self-defense?

## (If there are multiple stab wounds or bullets fired:)

Diallo case: cops shot 41 times - and when put on trial, jurors found that the police had been right to shoot because they feared for their lives. Is it possible to shoot (stab, hit) a person more than once, and still have it be self defense? Why?

Can trained police officers feel so threatened by an unarmed man that they were justified

in emptying their guns before they could feel safe? How does this case affect your view of self-defense? How does the case affect your view of a case where a civilian inflicts multiple stab wounds or fires multiple shots and then claims self defense?

How can an unarmed person pose a very real physical threat?

Tell me about a situation - perhaps an emergency or an accident - where you did something you wouldn’t have thought you were capable of?

Do you think you could use deadly force against another person if you felt your life was threatened? Why or why not? What if the life of your child (mother, father, spouse) was threatened?

# Self Defense in Domestic Violence:

Have you ever been frightened by someone you loved? What were the circumstances? How did you feel? How do you think it was different than being frightened by a stranger?

Have you or someone you’re close to ever been beaten/hit/slapped by a spouse, boyfriend or girlfriend? Or accused of such an act? What were the circumstances? How did you react? If it was you who was the victim, what did you do? Would you handle it any differently today?1

What have you read or seen about domestic violence? What opinions do you have about what you learned?

Why does battering occur? [ Suggestions: jealousy, financial problems, alcohol, substance abuse, mental illness ]

How do you feel about a woman who stays in a home where her husband or boyfriend is beating her? What keeps women from being free to leave these situations? How might repeated beatings change a woman’s emotional and mental state? How might repeated beatings damage a woman psychologically?

# Mistaken ID:

Tell us about a time where you or someone you know well insisted that he or she was right about a particular fact or event only to learn later that his or her recollection was totally wrong:

1 For questions of a personal nature the use of a questionnaire may be wise.

Who has ever called the wrong waitress over to the table? Who has put their key in the wrong car in a parking lot?

Who has thought they saw someone they knew, only to be right in front of him - in excellent lighting, under no stress, no fear, no hurry, and only at the last second realized you were wrong?

Who has been told they have a double - or who has met someone who you felt looked just like someone else?

What have you heard about the hundreds of people released from prison due to problems with evidence such as ID testimony?

What factors will help you decide whether eye witness testimony is reliable or not?

Why are lookalike contests possible? [Because there are folks who look like, or with makeup can be made to look like Marilyn Monroe, Elvis Presley, etc.]

Who saw the Denzel Washington movie, or heard the Bob Dylan song about the wrongful conviction of an innocent man - Rubin Hurricane Carter - based in part on mistaken identification witnesses? Tell me what you remember? How did that impact your feelings about the risks of eyewitness testimony?

Who read the People magazine article about or watched the PBS Frontline special about rape victim Jennifer Thompson’s honest but mistaken ID of Ronald Cotton - and Cotton’s ultimate release from prison due to DNA testing? How can such a grave mistake happen? How can we guard against it?

There have been over 100 DNA exonerations. That means that over 1200 jurors worked hard, were as honest and careful as you, but were wrong. How can that happen? How can we protect innocent people from wrongful conviction based on honest but erroneous IDs?

# Prior record:

Tell us the worst mistake you or someone you’re close to made by judging a person by his or her past actions:

How many have had a traffic ticket? How would you feel if the police were allowed to have less evidence against you to charge you with running a stop sign the next time around? What would be wrong with that?

Once a person has admitted breaking the law, can they ever be trusted again? Why, or why not?

Have you ever known someone who made a mistake in life and then straightened out?

Tell me about that.

# Defendant Testifying or not:

Tell us the most frightening or difficult time you have ever had speaking in front of a group of people:

Have you ever had to make a speech where your life or your freedom depended on how well you did?

In this corner: here is a seasoned prosecutor - 20 years experience, who will be trying his hardest to make my client look like a liar. In the other corner: my client with an eighth grade education. Is this a fair fight? Why or why not?

If some people on the jury may think that a person who testifies can’t be trusted because their freedom is on the line, and others think that if a person doesn’t testify they are hiding something, how does an innocent person resolve that conflict? Have you ever heard the expression “between a rock and a hard place?”

If an innocent person were charged with a crime, can you imagine circumstances where they might not want to testify? (Not a good witness; not smart or educated; fear; too much pressure…) ”If I advise Mr. Innocent that his testimony is not needed the law doesn’t allow me to tell you my reason. How will you feel about not knowing the reason? Would it be fair to guess or speculate?

# Wrongful accusation:

Please tell me about a time when you (or someone you know) were accused of something that you did not do.

What have you seen, read or heard about innocent people being convicted?

How is it possible that an innocent person can be arrested, charged and brought to trial for a crime he or she did not do?

How do you prove you *didn’t* do/know something? What is my middle name? [After juror says she doesn’t know], Prove it!

How does an innocent man end up accused of ?

Why would a woman lie about a charge of rape?

# Children as Witnesses:

Tell us the most unbelievable story your child or a child you knew well ever told - which turned out not to be true (or maybe you knew it could not be true at the outset):

# Sex cases:

**Rape:**

How does an innocent man end up accused of rape? Why would a woman lie about a charge of rape?

How could a man make an honest and understandable mistake about whether a woman was consenting to sex?

Have you heard of women agreeing to sex and then changing their minds? Why might a woman change her mind and no longer consent to sex?

How might fear of getting caught (fear of getting pregnant, fear of STDs, family or peer pressure, emotional instability, revenge, anger) cause a woman to claim she never said yes after the fact?

# Child molestation:

Self disclose: I have to admit that when I saw the 20 counts of child molestation against Mr. Jones, I felt disgusted and hopeless about the prospect of representing him.

Who else feels disgusted? How can it be that Mr. Jones is sitting in the defendant’s chair wrongly or falsely accused of child molestation?

Given the strong feelings we all have against child molesters, how can Mr. Jones get a fair trial?

Some people say that when you are representing a person charged with one of the crimes we are most fearful of there is a greater danger of a jury making a mistake. How do you feel about this?

What can people do to protect themselves from false charges of child molestation?

Why would a child lie? Why would a child manipulate the key adults in their lives?

Who has experience with, or knows something about people who have been affected by child molesting - This may mean you have learned something from TV, a class, or reading, or it may mean that you know someone who has been personally affected by child molest.

At what age do children become curious about the sexual parts of their bodies?

Where can a child gain knowledge of sex other than from being a victim of child molest? What effect does sex on TV, movies, magazines, radio, songs, etc., have on a young child? What are some reasons why a child would falsely accuse a parent of molestation?

What are some reasons why a child would make up a story about sex? What have you heard about false accusations of child molestation?

Which of the following would influence a child to falsely accuse someone of molestation: a bitter divorce, child custody battle, a learning disability, revenge, manipulation by another adult, fear, money, a desire to get attention, affection, or approval; seeing something on TV, having another adult plant some idea in the child’s mind, etc. Why?

What would you want to know about a child before you could decide whether she was telling the truth or not?

Even if we can tell when our own children are lying, how can we tell when it is a child we don’t know?

Have you or someone you’re close to ever worked or volunteered at any job or activity which involved regular contact with children. Please describe your experience. How did this affect your view of children?

What precautions should a person take when a child spends the night?

How can repeating a false story over and over effect how the story comes across? What would you do if a child accused you of sexual molestation?

Some people feel that child protection workers can be too earnest in doing their jobs - sometimes seeing evidence of sexual abuse even though it really could go either way. What do you feel? Why?

How does it happen that the police, a social worker and/or a parent can believe child molestation occurred, but they are wrong?

# Police as Witnesses:

Tell us the worst story you’ve heard about a cop who was a bad cop?

How do you think being trained in testifying, and having testified repeatedly might unfairly enhance the credibility of police testimony? What is the risk to an innocent man if all of his witnesses are untrained witnesses in court for the first time, and all of the state’s witnesses are professional law enforcement officers?

# Police as Friends:

Have you, or any one you’re close to applied for a job with or worked for any law enforcement agencies, such as the local police or sheriff’s department, the FBI, etc.

How often do you see this person? How often do you discuss his job, or his cases? Have you ever disagreed with the way this person handled a case? If you have never discussed his or her job, why not?

If after hearing all of the evidence you felt the defendant was innocent, what reaction would you get from your friend on the police force? How hesitant would you be to tell him you voted not guilty in a criminal case?

# Mental Health Defenses:

What have you heard about the insanity defense?

What is your feeling about the insanity defense? What has brought you to view the insanity defense in this way?

Some say no one should be punished for committing a crime when they were unable to know they were doing something wrong. Others say, the only thing that matters is whether the person committed a crime or not. What do you say? Why?

Some people think that when a person pleads insanity he is just trying to get off. Others feel that a person with a legitimate psychological problem should be treated differently when he has done something wrong. What is your feeling? Why?

How often do you believe criminal defendants rely on the insanity defense?

How often do you believe defendants are found NGBRI?

If the truth is that <1% of all defendants plead NGBRI and less than ½ of 1% actually are found to be NGBRI, how does that affect your opinion of the insanity defense?

Tell me what your experience has been with psychiatrists or psychologists?

Have you or any family or friends ever sought the help of a psychologist or mental health professional? How did that experience affect your feelings about the field of psychology?

Has anyone ever studied or had any training in the field of psychology? Tell me about your experience.

What are your feelings about psychiatric experts in criminal cases?

How might repeated trauma and abuse effect the victim’s mental well being?

Have you heard of post traumatic stress disorder? What have you heard? Can you name a person who you know suffered from PTSD? Tell me what you know.

# Pretrial Publicity:

What have you read or heard about this case? What was your first reaction?

What did you think about what you had read or heard?

How has what you learned affected your thinking about the accused? What impression did you form about the accused?

What friends, family, coworkers have you discussed this case with? What did you discuss?

Did the person(s) you talked to express an opinion to you? If so, what was that opinion? What other opinions did you hear?

How did you react to these opinions? Why?

# The System

Should we change the criminal justice system to make it easier to convict people? How should we change it?

Do criminals have too many rights? Tell me why you feel that way.

Let me change the question a little. Do innocent Americans accused of crimes they did

not commit have too many rights? Why or why not? How do you limit the rights of criminals without limiting the rights of innocent Americans?

What rights would you want if you were falsely accused?

## CONCLUSION

The only bad voir dire is one that has jurors saying yes and no, and leaves you guessing about what they really think. Knowledge is power. Give up control in exchange for knowledge.