Some General Observations on Jury Selection/De-selection as it

Pertains to the Middle East Conflict

SDNY Jury Analysis

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I recently participated in the Jury Selection and trial strategy process for the Terrorism related trial at the Southern District of NY. These observations are based upon the author’s years of experience working in the venue and, in particular, the insurance coverage matter resulting from the destruction of the WTC. These observations are not based upon actual focus group studies using the facts of this particular case due to the lateness of when I started to participate. Hence, these observations should be considered more of a “heuristic” approach to understanding the jury, both for the purposes of selection as well as later thematic development. Though in the actual case I addressed opening (and closing) statement themes, Judges Instructions, verdict form, for the most part, I will not address this in my analysis (those issues are more case specific). We know, from the benefit of hindsight of the outstanding verdict, that we did, in fact, have a successful strategy for jury selection as a part of the overall superb job of lawyering both pre- and at-trial. In one case, I was able to research, after the trial my analysis of the issue around juror nullification based upon being Jewish and our approach was confirmed as being correct.

Let me spend a little time explaining some of the principles I use in approaching jury selection. The core of my approach is to determine jury attitudes and selection based upon their values and beliefs (VB) and how that impacts their decision process. I like to say that: “Facts follow feelings”. VB is formed from ones overall life experiences and influences by significant people in their life. Typical demographic analysis (married, race, religion, age, work, etc.) have some influence however one cannot determine VB’s just based upon demographic characteristics. So, two African-American women who live not far from each other who write about their Church and both have been to Israel does not mean they will hold similar views on the conflict. In fact, during Voir Dire, we actually had this example and it was clear that one would have been biased towards the Palestinian Narrative and the other saw Israel in a positive light.

The second process at work is how general biases affect how people think. The two most significant biases for a trial (and there are many to consider) is Confirmation Bias and Hindsight Bias. Confirmation Bias essentially holds that people hear information in such a way to confirm their prior held positions – very much part of facts following feelings. The second bias is that we use our prior experience as a way to filter what we hear even though the new facts make this situation different.

A third part of the analysis is to consider the “riskiness” of the choice selection based upon 1. Dominance of the person (for example, a white 55 year old, professional male will have more sway in the jury than a 21 year old male college student) and 2. Whether the prospective juror will be perceived as something of a “life experience subject matter expert”. So the most risky decision to make is whether to accept someone who is a middle age professional white male who is Jewish and active with Israel. If we get this person wrong, we lost the jury. So, I would err on de-selecting this person unless he/she says something so confirmatory for our case that, for sure, the other side with de-select. Otherwise, be wary.

I also keep in mind one other point. In terms of a random sampling of people and VB, the vast majority of people – somewhere between 80 and 90% do not hold very strong views either for or against – they will have views but they will not be held to the point where Confirmation bias is just too strong. The jurors of this group – approximately divided between the two views of who is right in this conflict are very approachable. You want to use proper framing arguments that the people who support your view argue with the other group in the jury room. We want to eliminate the bad “tail” of this bell curve and the other side will eliminate the other tail. So jury selection is an efficient process to give us the large sampling of “frame-able” jurors under the bell curve. It’s our job to manage this selection process by understanding the very damaging VB and eliminate those jurors while being very cautious of the types of jurors, I mentioned earlier, who may hijack the case due to dominance or perceived experience/expertise.

One last comment on trial strategy. Once one has their jury, it is very important to consider the VB issues in order to construct appropriate “framing” approaches, analogies, metaphors and stories that will best assist your juror advocates to argue the case in the jury room and shift the jurors who are negative to consider that in THIS CASE they may decide for us while keeping their overall   
VB intact. One does not try to change the jurors but rather provide them a way to consider this case from a different perspective as supported by your advocates in the jury room and still maintain an internal sense of consistency. So we are not trying to “convince” you to make a decision in our favor but to feel comfortable holding a somewhat oppositional viewpoint but feeling comfortable that you may decide differently in this case.

Of course, what I describe above is only short-hand for much more in-depth analysis as VB impacts both perceptions of liability and damages. One also needs to consider the order of how jurors are placed in the box, function of alternative jurors, decision making reflected in Instructions and Verdict Form, among a number of other factors.

Let’s explore some of the VB issues as we saw them in this case:

1. We need to be most wary of people who see the world in a number of ways:
   1. “Shit happens” – this is different than C and D in that one believes bad stuff is always happening to people so why should it be any different here. Usually, this type of value-belief may provide for liability but the person will apply their value-belief in order to reduce damages.
   2. Contextualizers (this was a tough time to be a Palestinian – one man’s terrorist is another’s freedom fighter – or, why did these victims put themselves in harm’s way by traveling to Israel). You see all type of contextualization as “left leaning” people try to square their beliefs with the facts that may be quite inconvenient.
   3. “This will not change or fix anything” (may hold liability but limit damages)
   4. Related to the prior point: “money cannot change what happened.. it will not bring anyone back.”

B is the most troublesome in terms of getting a juror to unanimously agree to liability. A, C and D may manifest during the liability discussions but I am most concerned with how this plays out with damages.

Given what I just wrote, in terms of work engagement, we need to be wary of social workers, psychologies, therapists who may see this case in some type of psychological context. Avoid “free thinking” types such as artists and musicians. Be very wary of liberal Jews. Of course all these groups will not say that what was done was OK – they will renounce Terrorism, but they will contextualize this situation given their sentimentalities towards Palestinian grievances. We need to somehow watch out for people with “grievances”. Maybe a jury question to obliquely get to this: “have you suffered a highly unfair act against you in the past where you still feel strongly about your grievance and lack of justice. Please explain. Would you try to settle this grievance any way possible? Please explain.”

1. We want people who are “personal responsibility” types without the contextualization. These terrorists had a choice and they made a decision with the support of the PLO and PA and now there are consequences. Personal responsibility says that everyone has a choice how to conduct their life regardless of whatever history or excuses in life they have. Cause and effect. Murder and consequences.

(This is quite the opposite from the typical plaintiff case where you want “other responsibility types”, i.e., people who blame others, i.e., the defendant. Typically, the defendant wants personal responsibility types, i.e., the plaintiff should have been more careful, etc. Because of the nature of this case, my gut tells me that roles get reversed: you want personal responsibility types who will not allow contextualizing of terror acts and the defendants are going to want the “blame others” (Israel is also at fault) jurors… it is a very interesting switch. Part of the reason for this, I believe, is because there were no actions on the part of the Plaintiff to cause their injury or death – unless you believe just visiting Israel makes you a contrib. I would love an instruction that basically stipulates that the Plaintiffs had no obligation or responsibility towards preventing the act of Terror. That the act of terror itself and who is responsible for its implementation and support are the ONLY issues to be decided in this case.

One interesting jury question could be: Do you believe there are situations where violence and murder are justified due to some “cause”? Please elaborate under what circumstances this behavior would be acceptable. Another way to approach this is: “In a case where someone commits murder, should the perpetrators childhood be a factor in determining his innocence or guilt? “

1. One needs to think about who ends up in a 3 months trial: employees, teachers, public service workers (such as Health Aids and Nurses), retired people, people between jobs, artists and other part time type of workers, etc. As I said earlier, be wary of the “helping” professions as well as those who are outside of the “standard social structure”
2. In terms of damage mitigation types, there needs to be some questions in this regard, for example, “Do you think damages awards in many cases are too high? If yes, why do you think this happens and why do you feel the way you do about these damages awards.”
3. You want people who believe in law and that the law should be followed and violators should be punished.
4. As part of your framing of the case, the jury needs to understand that the defense will, in essence, be putting Israel and the Middle East conflict on trial. This is not the case. You will be instructed by the Judge to focus just on the acts of Terror, murder and injury – that these acts were encouraged and supported by the PLO and the PA – and the damages the PLO and PA must pay to right the horrible injustice perpetrated on these innocent civilians. Your thoughts as to the ME conflict, its origins, where it is going and any justifications one-way or another, are completely not on trial here.