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# The Jury EXPERT

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## Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea

by Stephanie West Allen, Jeffrey Schwartz and Diane Wyzga

### INTRODUCTION

Some members of the trial bar have taken a keen interest in a model of trial advocacy that features manipulating jurors by fostering fear. What is this model? It claims you can predictably win a trial by speaking to, and scaring, the primitive part of jurors' brains, the part of the brain they share with reptiles. The theory may sound intriguing on its face, but advocacy is not reducible to mere technique not only because people are much more than their brains, but because advocacy is as much art as science. (If science is relied upon, we think it should be good science, not pop science which presents the brain anatomy incorrectly.) To reduce the human being to a body organ, even the brain, disregards the value of the reflective mind – something no reptile possesses. From time immemorial we have used imagination and supporting evidence in narrative to persuade. A reptile hears no human story. It reacts as a coiling rattlesnake or a slithering lizard. To equate men and women serving on a jury with reactive sub-mammals is both offensive and objectionable. Bringing

together decades of experience, research, and insights in the law, healthcare, social relationships, and narrative we posit an alternative viewpoint for lawyers interested in reevaluating the wisdom of ‘reptiling’ the jury.

As editor of the ABA’s *Law Practice* column “Reading Minds,” Stephanie West Allen asked lawyers to recommend the book that most influenced them professionally. Only one book was consistently recommended: *To Kill a Mockingbird*. Lawyers said the book reminded them of the best that they should be when working in their



chosen profession; they mentioned such qualities as respectful, honest, compassionate, of service.

The legal profession’s foundation is built on such core values. Despite the bad press and unflattering jokes, most of the Bar are ethical people who endeavor everyday to do what is right. Although the definition of right is not always clear, most try to make wise decisions. But litigators are busy. Their schedules overflow. Sometimes they do what seems appropriate without weighing the broader implications. Sometimes they receive poor advice and follow it without discernment. When these conditions prevail that may hamper a lawyer’s good judgment, it is time to take a

wisdom check. Lawyers may want to step back and ask if what they are doing is consistent with their wisest professional selves. Specifically, as related to this article, do they want to follow the reptile model.

Although a lawyer’s good judgment may suffer for many reasons, the reasons are not always discreet, particularly when considering the decision to follow a consultant’s advice. He or she may take a consultant’s advice without adequately evaluating it due to lack of time, lack of attention, or simply because the advice seemed compelling at the time. Regardless, sometimes a lawyer may want to reevaluate the advice of a consultant regardless of why the advice was initially accepted as valid.

Some trial consultants are advising lawyers to speak to juror’s reptile brains, to persuade through fear. When litigators think through the implications of such behavior, some if not many may reevaluate the advice and consider better options. In this article, we share a few points about “reptiling” your next jury to assist the reader in a fully-informed wisdom check.

## A BRIEF CRITIQUE OF REPTILE THEORY

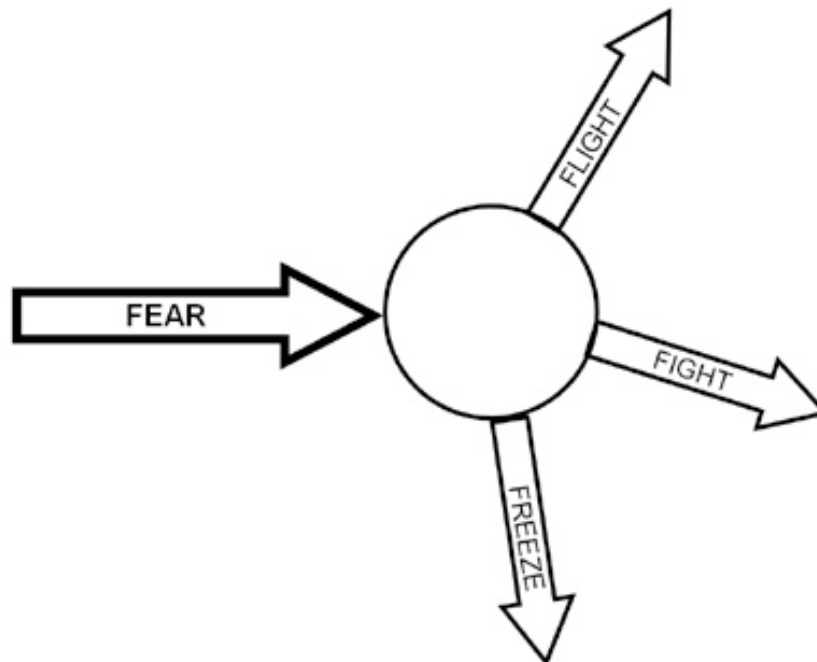
### 1. Basic Assumptions of Reptile Theory Are Incorrect

First and foremost, the basic neuroanatomy presented in some advisors' reptile theory is incorrect. Reptiles do not have fear; they rely on pure habit and instinct. Fear, especially learned fear, emanates from the limbic system, which exists only in mammals. Reptile fans may say, "Who cares about the anatomy if the techniques work?" For us, the mistake triggers threshold skepticism. If reptile consultants are inaccurate about this basic principle, what else in what they put forth may be inaccurate?

### 2. The "Predictable" Fear Response Is Unpredictable

Jurors' brains and minds are not monolithic; their reactions and thought-patterns are diverse. We know that a person will typically respond in one of three ways when frightened. They may fight, flee, or freeze. Obviously, a juror is not likely to flee from the courtroom but her attention may wander or disappear altogether. We are not able to know which response a given juror may have. To gamble on fear in the courtroom is dangerous. It is not predictable.

Below is a diagram that represents this gamble. If a pool player shoots the cue ball towards another ball, that ball can go in several directions. Likewise if a lawyer leads the jury into fear, the results he or she can get are scattered. The result can be flight, freeze, or fight, or one response followed by another. We say forget the balls, get off the pool table, quit the games.



A reptile devotee may argue that the model allows one, using the pool analogy, to be a more accurate pool player. We disagree. You cannot call the pocket using the model. You simply do not know where the fear will go.

### 3. Jurors Recoil When Disrespected

Scaring jurors may be offensive to some trial lawyers, particularly once they take some time to think through the implications of a threat-based approach. For the wisdom check, a lawyer may ask him- or herself, do I appreciate the jurors' service? Do I see them as animals or human beings? Do I want to speak to their reactive brains or their reflective minds? What about these jurors do I appreciate? In what way am I similar to these people? Is animalizing them consistent with how I want to treat my fellow human beings? Do I come across differently when I see jurors as people as opposed to when I see them as animals? Would I like to be seen as a reptile?

In some sectors of our culture, lawyers have a bad reputation. Animalizing jurors is not going to rehabilitate any lawyer's image, let alone the collective image. To some, animalizing may seem disrespectful to the people who participate in jury service. Are jurors smart enough to sense disrespect? We think they are and it's a rare case that can be won if a jury has been treated without respect.

We doubt that Atticus Finch would have been very impressed with being told to treat jurors like reptiles, or would have followed such advice. Finch treated jurors as people of integrity with the ability to be thoughtful and mindful. He focused on their reflective minds capable of human justice, not their unpredictable reflexive brains.

## AN EFFECTIVE ALTERNATIVE: PERSUASIVE NARRATIVE

So, how do you facilitate jurors acting from their reflective minds, not their reactive brains? How do you treat them with respect and integrity and still advocate for your client? One key method is the effective and persuasive use of narrative. Narrative is the general term for a story told for any purpose. We recognize that narrative is a neutral technique which may be used in service to the reptile. We suggest a particular kind of narrative that attends to people as human beings, not snakes. The narrative we suggest is inconsistent with the reptile technique because it focuses on the reflective mind of the juror.

Research has shown that 'attention density' can cause brain cells to fire together, even if these cells were not "communicating" before.<sup>1</sup> 'Attention density' simply means that the more you focus on a particular thing or idea the more dense becomes your attention as a result of the focus. Thus, wherever you place your attention helps mold or shape your brain.

The critical part of narrative is where you direct the attention of the jurors. In a courtroom we want to use narrative in the way that will help guide jurors to our side of the story. Fear-based narrative directs attention in an uncertain and unpredictable manner while thoughtful narrative directs attention toward action grounded in the reflective mind. Narrative shines the mental flashlight of attention which can reconfigure the brain and change behavior.

In short, narrative is 'attention choreography': narrative directs the attention of the juror in ways we suggest are consistent with the respectful aims of treating jurors as the human beings they are. While narrative can be used for whatever purpose you want, we suggest a human-based narrative.

As far back as there have been stories, there have been stories about disputes. One is about the baker who sues a poor man for standing outside his bakery and smelling rolls he cannot afford to buy. The judge agrees that the poor man may have stolen the smells but for the verdict he rattles some coins in his hand and tells the baker to be satisfied with the sound of money as his compensation. Can you sense the fairness in the judge's decision? All we did was tell you a story.

## 1. Narrative Provides A Pattern For Understanding

Whenever we hear or read a story, we journey with the teller into the virtual reality of the story being told. The closer the story is to the struggles and outcomes in our real world, the more likely we are able to be absorbed in this virtual world, and the more likely we are to identify with the characters and how the outcome affects them.

Likewise, in a courtroom in the midst of a heartfelt story artfully told the jurors end up collaborating with the attorney to design the outcome that the attorney has in mind. How does that happen? In order to conserve energy the brain seeks patterns. Part of that pattern-seeking process is looking for information based on what it already knows or recognizes. In fact, if the attorney does not hook the new information of the case into the older or existing patterns in the juror's brain, the brain will reject the information. If the brain rejects the information, the message will not be heard. A well-constructed narrative is one of the surest ways to be certain your message heard.

## 2. Narrative Multiplies the Power of Human Stories

*"If we cannot envision a better world, we cannot create one."*

-Alex Grey

The reptile model of leading with fear to persuade disregards the unique perspective and contributions of each individual. If the lawyer chooses to lead with fear he or she rejects the opportunity to harness the empathy and powers of the individuals who will go on to deliberate the case.

Stories play several roles in achieving justice. As in everyday situations, jurors weigh the significance and accuracy of the competing accounts by comparing them to their own repertoire of stories about how people behave and should behave. Jurors continually ask questions about the differing versions of the stories they hear in the courtroom and react based on how each relates to their own stories.

- How is a given story like others in their world view?
- How are the stories consistent or inconsistent with how they experience the world?
- How are the stories like their expectation of how things ought to be?
- Is this how people and entities behave? What is the same about this behavior and my experiences? What is different?
- And how does each of the stories intersect with the law?

The skillful attorney knows it takes empathy to imagine where those you are trying to persuade are coming from, to anticipate their questions and arguments before they make them. The skillful attorney knows that a thoughtfully crafted story using language with passion, power and precision will address human assumptions underlying the questions and arguments. In short, the skillful attorney knows how to find common ground on fundamental concerns, and persuade based on individual meaning in line with the desired outcome.

Yes, 'safety as survival' may be a fundamental concern. But it is one of many. And it is this 'one size fits all' approach that may be destructive or, at the very least harmful when not thought through. If lawyers must reduce humans to something, reduce them to humanity over reptile.



### 3. **Narrative Focuses Juror Attention**

Trials present a lot of scattered pieces of information. It is a remarkable process when you step back and consider what we demand of each juror: comprehend, sort out, compare, and collaborate. Jurors pick up the pieces of scattered evidence and construct those pieces into narratives. Each juror evaluates the narrative on two levels: first, a personal comparison with stories they know and have constructed from experience, logic, bias, family, culture, and myriad other individual influences and then a collective comparison with the stories of the other panel members. Yet, a verdict based on thoughtfully chosen narrative is a process of each juror's perceptions coming into sharper focus through the jury's decision-making process: individual input filtered through a group decision.<sup>2</sup>

### 4. **Narrative Generates Group Identity**

*"Never doubt that a small group of thoughtful concerned citizens can change the world. Indeed, it's the only thing that ever has."*

*-Margaret Mead*

We are troubled by the thought that lawyers have not considered the implications of what it means to reptile a case, to reptile a client, to reptile a jury. (Although 'reptile' is not a verb, many followers of this model have transformed it into one.) We believe that this approach comes dangerously close to manipulating jurors for a base reason; because the lawyer was offered code words that are supposed to trigger fear. And, if that is accurate does the end justify the means? Absolutely not.

We know from research and experience that each individual in a group hears the same story differently. Despite the individual isolation of hearing the story, narrative unites and generates a sense that individuals hearing the story are connected. In fact, the group will be able to agree on the meaning of the narrative and its 'moral'. The group unites in a common purpose and the effectively presented narrative helps jurors develop a group identity and collective momentum toward a consensus decision.

If the jury is driven by fear (or bias or self-interest for that matter) the jury cannot be counted on for a fair decision. You have got to give them their due, and give the process its due: the jurors will arrive at their decision because of the way they collectively sort out and agree upon the competing narratives. Otherwise, why try cases to a jury at all? A neutral, detached jury with the combined forces of individual and group perceptions is the foundation on which we rest our belief in fair decision-making.

### 5. **Narrative Motivates Action**

*"Only by connecting to a cause larger than oneself can true satisfaction be realized."*

*-Kate Loving Shenk*

One of the ways we remind each other about how we have made a difference is to tell each other stories about times when we have been instrumental in achieving justice. In March of this year, New Yorkers again told the story of the Triangle Shirtwaist Fire of 1911, a disaster which killed upwards of 146 young immigrant women working in a sweatshop that caught fire. Locked doors barred escape from the raging inferno. Fire truck ladders could reach only a few stories. Many women flung themselves out the windows rather than burn to death.

The owners were indicted on charges of manslaughter. The defense blamed the dead girls and women. After deliberating for two hours the jury returned a verdict of not guilty. Public outrage over the decision led to the creation of a Commission to investigate working conditions in New York factories. In turn, the Commission's recommendations led to thirty-six new laws in three years which reformed the state labor code. They called it "the Golden Age of factory reform."

How did this happen? The sheer power of citizens brought about the changes:

*“Out of that terrible episode came a self-examination of stricken conscience in which the people of this state saw for the first time the individual worth and value of each of those 146 people who fell or were burned in that great fire...We all felt that we had been wrong, that something was wrong with that building which we had accepted or the tragedy never would have happened. Moved by this sense of stricken guilt, we banded ourselves together to find a way by law to prevent this kind of disaster....It was the beginning of a new and important drive to **bring the humanities to the life of the brothers and sisters we all had in the working groups of these United States.**”<sup>3</sup>*

## 6. Our Core of Moral Advocacy

*“The great instrument of moral good is the imagination.”*

-Percy Bysshe Shelley

Human beings are ethical creatures. If you have ever been nagged by a guilty conscience, it is your sense of ethics speaking. That sense of unrest gives rise to wonder: what am I to do in this or that situation to move outward beyond selfishness to the larger ideas of community?

And so we are saddened that a core of moral advocacy leading the profession may be threatened by a push toward snakes and fear. We are disappointed that when one of our legal brethren looks out into the venire panel they see neither humans nor allies but row upon row of triangle-headed reptiles.

Instead, what would advocacy be like if we employed the imaginative capabilities of narrative to help us do right by another? Imagination and narrative are necessary in the world of law. Stories, lest we forget underpin the very construction of the law.

Changes in the story of American life are reflected in changes to legislation and the law. As our culture has changed the laws have changed along with the culture. We can cite a few examples such as civil rights, human rights, the right to vote, workplace security, to name a few. Only when the story of America changed did the law follow along. What is the story you are telling to shape the law, to advance the story of American life?

## CONCLUSION

We would like to leave you with this story. In the Protagoras, Plato tells how it was that humans came by moral sense. Two gods were given the task of distributing qualities to each of the animals. Epimetheus gave the best of the qualities to the animals - he had forgotten about the humans. When Prometheus came to check up on how the task was going he found that man had been left naked and defenseless. To help make up for the mistake of oversight, Prometheus stole fire and the mechanical arts from the Gods and gave them to the humans as a way to compensate them. But it was not enough. The humans were too stupid, selfish and mean-spirited. It was looking like the end of the human race, and then Zeus stepped in. He chose to give humans the one gift they needed for survival and greatness. Zeus gave them the gift of a moral sense. And he made sure that he gave it to each one so that each would share in its saving grace. Then, as now it is not fire or our mechanical cleverness or even manipulation that has distinguished us - it is our moral sense.

### Seven Tips For Creating the Motivating Story

1. As you work through the discovery process, always be asking yourself, “Apart from my client’s injury, what is this story really about?” Better yet, draw your story to see the relationships between the cast of characters and their actions. Taking a perspective that begins long before your client’s injury happened will help you begin to connect the dots that will lead you to understanding how the injury was the result of actions.

2. A story is always about a conflict. And the jurors must understand enough about the protagonist, the antagonist and the events to get hooked into the story so they can follow its intellectual and emotional meaning.
3. We expect a story to be about change. In order to meet the jurors' expectation the story must bring to life early on the change you want them to create. This requires you to set up a bridge from the evidence (content) to the context (what situations or circumstances allowed the event to happen) to the emotionally meaningful story your jurors are already carrying in their heads.
4. We expect a story to have a good ending that is in line with how we would write it if we could. A legal story invites the jurors to write the ending. For them to write the ending you want you must invite them at the outset to leave behind a negative, skeptical frame of mind in exchange for one eager to do something positive.
5. We want to discover the message that tells us about the change we could enact so we can make that change happen. If the change message is clear then narrative will help persuade the juror that the change you want them to enact is easily within their grasp. The more we identify with an outcome the more likely we are to use the group identity that narrative fosters to come up with that ending. The message must be the jurors' own idea because it is meaningful to them.
6. We want to identify with the little guy, with the underdog, with the hero of the story. Much of the persuasive power of any story is built upon the fact that the juror identifies with the protagonist. How is your client in your story like the people who will be hearing that story?
7. Test, test and test again. Only by rehearsing your story will you learn whether it will work with the group of jurors you anticipate will hear and act upon your story.

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**Jeffrey M. Schwartz, MD**, research psychiatrist at the School of Medicine at UCLA, is one of the world's leading experts on human neuroplasticity. In addition to over 100 scientific publications, he is author of *The Mind & The Brain: Neuroplasticity and the Power of Mental Force*, and *Brain Lock*, the seminal book on obsessive-compulsive disorder. More information about Dr. Schwartz can be found at his web page.

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Fear graphic provided by **Ted Brooks** of [Litigation-Tech](#).



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<sup>1</sup> Schwartz, J.M. & Begley, S. (2002). *The Mind and the Brain: Neuroplasticity and the Power of Mental Force*. Harper.

<sup>2</sup> Sarat, A. (Ed.) (2009). Stories from the Jury Room: How jurors use narrative to process evidence. *Studies in Law, Politics and Society*, 49, 25.

<sup>3</sup> Frances Perkins, Commission member and later Secretary of Labor in the Roosevelt Administration. Retrieved online from:  
<http://www.law.umkc.edu/faculty/projects/ftrials/triangle/triangleaccount.html>

Normally in *The Jury Expert*, at this point you would see responses from ASTC-member trial consultants. We decided, for this article, we would ask trial lawyers to respond since this piece is directed at trial attorneys. On the following pages (in alphabetical order) we have responses from Mark Bennett, Sonia Perez Chaisson, Max Kennerly and Randi McGinn.

## Response to Atticus Finch Would Not Approve

by Mark Bennett

**Mark Bennett** is a criminal defense lawyer in Houston, Texas, where he practices with his wife Jennifer. Mark also writes the [Defending People](#) blog, where he writes about "the tao of criminal defense trial lawyering".

I see three productive areas for challenges to Reptile Theory. First, the practical: "Does it work?"

The proponents of reptile strategy try to create in jurors' minds a situation in which their survival is somehow endangered:

*Does this mean we take orders from a pea-brained snake? Yes. When we face decisions that can impact the safety of our genes, the Reptile is in full control of our emotions as well as what we think is our rational logic. (Ball and Keenan, Reptile: The 2009 Manual of the Plaintiff's Revolution 19.)*

Allen et al.'s first practical objection to Reptile strategy—that the fear response is unpredictable, so that you don't know what you're going to get when you invoke the Reptile in the courtroom—is, I think, their weak point. In the courtroom, at the end of the trial, jurors are limited in their possible responses: they can decide the case in favor of the one creating the danger, or against her. Whatever other effect summoning the Reptile might have, it's likely (if not called to jurors' attention) to increase emotion against the one successfully cast as a danger.

Allen et al.'s second practical objection to Reptile strategy—that jurors will sense Reptile lawyers' disrespect for them (or at least for their better angels) and will recoil—is stronger. Like much persuasion, Reptile strategy is manipulation to which the people being manipulated might well object, if they were conscious of it. People are less susceptible to appeals to their baser instincts when those appeals are called to their conscious attention. People who realize that lawyers are deliberately creating and exploiting fear might well react negatively. It's not a question of "animalizing" jurors, as the authors put it, for human beings are animals too, but of trying to make jurors make decisions based on fear, an emotion that jurors in the courtroom would rather disclaim.

This, I think, points to one half of the best response to Reptile strategy: show the jury how the Reptile lawyer is trying to manipulate them through fear. ([Two lawyers in Georgia got some attention doing this recently.](#))

The other half of the best response to Reptile strategy is to engage the “higher” reflective brain functions, as Allen et al. suggest, with thoughtful narrative (or, as I have suggested, [with incongruity and complexity](#)).



Either Reptile strategy works, or it does not. Even if it can be disarmed through labeling, thoughtful narrative, and laughter, there are enough success stories from personal injury lawyers applying Reptile theory to trials, as well as from prosecutors playing to jurors’ fears without putting a name on their methods, that it is safe to say that making people afraid works.

Aside from the practical objections that Allen et al. raise, there are interesting aesthetic and ethical questions relating to Reptile theory in trial.

Fear is never a pretty thing, and scaring jurors to win a jury trial is ugly. In itself this isn’t much of an objection to Reptile theory—however we order our obligations as lawyers, our duty to the client

certainly trumps any responsibility we might feel to the Spirit of Beauty.

But fear is ugly to us for a reason: our brains didn’t evolve to live with it for more than a few minutes at a time. The fear mechanism that Reptile lawyers would exploit evolved to deal with immediate dangers—the prowling sabertooth, the noise in the dark, the snake on the path—that could be dealt with in minutes through fight or flight. We weren’t made to be afraid for hours at a time, much less days or weeks.

Chemically, fear involves the production of cortisol, long-term exposure to which is harmful to our health. It raises levels of anxiety and depression, impairs memory, drives blood sugar out of whack, lowers bone density, raises abdominal fat, and may speed Alzheimer’s. Building a trial strategy around a physiological reaction that is toxic when it is sustained is unfair to and exploitative of our jurors.

If you had a client who could benefit from your playing to jurors’ fears would it matter whether the tactic were nasty or harmful to jurors? Or must the duty to the client transcend these particular ethical and aesthetic considerations? Allen et al. invoke Atticus Finch, who “treated jurors as people of integrity with the ability to be thoughtful and mindful.” Finch might well have rejected Reptile theory on grounds practical, aesthetic, or ethical. But then the only time we saw Atticus in trial, *he lost*.

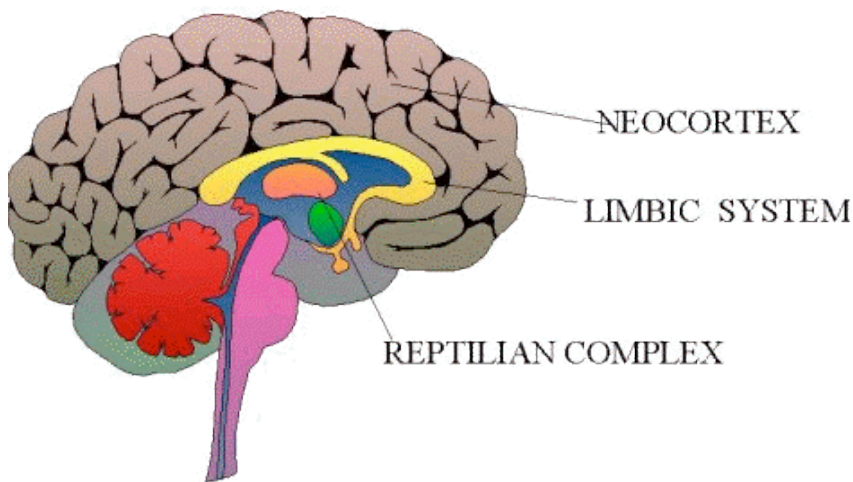
## Response to Allen, Schwartz and Wyzga

by Sonia Perez Chaisson

**Sonia Perez Chaisson** is a Los Angeles Plaintiffs trial attorney who is often called at the last minute to co-counsel complex civil and criminal cases. She also facilitates cutting edge workshops for fellow attorneys and is a 2003 graduate of the Trial Lawyer's College.

It's challenging to respond to an article when the article misunderstands Reptile trial advocacy and then attacks it on the basis of that misunderstanding. The article blasts the Reptile method as insulting to and manipulative of jurors for being fear-based and disrespectful of jurors. It makes me wonder how familiar the article's authors are with it. Reptile methods lead with justice and the well-being of the community – the two founding fundamentals of western law.

Equally perplexing is the article's argument that the pro narrative approach is an alternative to Reptile. Even the authors are conflicted about this; they say, "We recognize that narrative is a neutral technique which may be used in service to the Reptile." I wholeheartedly agree. The narrative method is one of the many time-tested tools for good advocacy -- and works well with the Reptile method precisely because it is in itself a Reptilian technique! The article is off-base in proposing the use of story as an *alternative* to the Reptile. One includes the other, as the Reptile's originators clearly and repeatedly teach.



The article worries that Reptile fans may say "Who cares about the anatomy if reptile techniques work?" True; that's what we say. We care not at all about brain anatomy and solely about whether the Reptile works. As a trial lawyer whose clients depend on me for justice and whose livelihood depends on whether or not I obtain justice and get paid, I care more about whether the Reptile works than about quibbles over labels for brain anatomy. Until the advent of the Reptile and its related methods such as those taught at TLC, we have all seen case after meritorious case "defensed" to death because plaintiffs' counsel, just like Atticus Finch, lacked the tools to reach

unfairly biased jurors—a skepticism that comes into civil justice today from years of dishonest propaganda by the insurance industry, corporate interests, and the Karl Roves of the world. We are relieved that we now have something as powerful and honest as the Reptile, and that the research and field testing of it continues.

Reptile works. Atticus Finch, despite good intentions, lost. So an innocent man suffered. Had Finch known Reptilian methods he'd probably have won—and for all the right reasons. The results of Reptilian advocacy—when deployed by trial attorneys mastering it and not merely reading about it and its complementary methods -- such as those long taught at the Trial Lawyers College -- have restored sanity to an arena poisoned by decades of bogus tort "reform" attacks.

It is disturbing not merely that the article exhibits a misunderstanding of Reptilian advocacy, but that the article dismisses it with little regard to the results and feedback from trial attorneys across the country who are reporting its frequent and unprecedentedly successful results. The dirty tactics, and the power and resources of insurance company giants are now meeting their match. My understanding of the mission of Reptile advocacy is to return justice for civil plaintiffs by enlisting the Reptilian forces of truth, juror empowerment, and positive – not negative – juror motivation. The Reptile is not about fear; it is tort “reform” that is about fear. The only fear in Reptilian advocacy resides within the defense. Reptile advocacy and its complementary methods give to individuals hurt by negligence and to jurors a voice with which they are now, finally, consistently able to speak truth to power.

## Response to Allen, Schwartz and Wyzga

by Max Kennerly

**Maxwell S. Kennerly** is a litigation and trial lawyer at The Beasley Firm in Philadelphia, Pennsylvania. He represents individual plaintiffs in personal injury and malpractice cases, and represents businesses in breach of contract and fraud cases.

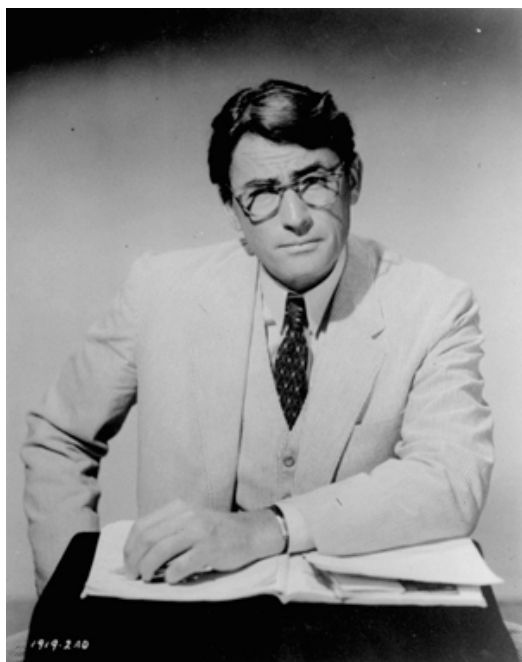
Maybe Atticus Finch wouldn't approve of the "reptile" methodology, but let's not forget: he lost his case. Justice was not done for Tom Robinson.

Allen, Schwartz and Wyzga reference Atticus Finch not once but twice, for good reason: his ghost haunts trial lawyers, civil and criminal. Whenever we grow weak or greedy, Atticus is there, staring at us, understanding but disappointed. He is the archetype of the great lawyer, ethical and empathetic, with an unwavering devotion to duty.

But let us not forget the meaning of Atticus' story. Atticus not only established reasonable doubt that Tom Robinson was guilty, but affirmatively proved that Robinson's accusers were liars. The jury cared not one bit; instead, driven by bigotry — a product of the so-called "reptile brain" — they convicted him nonetheless. As compelling a role model as Atticus is, if we are to accept that he limited himself in his means of advocacy, then he is also a cautionary tale about the downside of imposing such limits on ourselves.

Allen, Schwartz and Wyzga also reference the criminal manslaughter trial of the owners of the Triangle Shirtwaist Factory, a case which, too, presents a cautionary tale for trial lawyers. There, two of the most reviled men in New York City, on trial for causing a calamity so horrible the screams of its victims still reverberate ninety-nine years later, were acquitted in less than two hours of jury deliberation.

The reasons for the acquittal are many, but chief among them was the testimony of Kate Alterman, one of the workers on the ninth floor. With minimal prompting by prosecutor Charles Bostwick, Alterman gave a harrowing and uninterrupted account of the fire, of hiding in the toilet, of watching the manager's brother trying and failing to open the Washington Street side elevator door before "throwing around like a wildcat" at a window from which he wanted, but was too afraid, to jump, of watching the ends of her friend Margaret's hair began to burn, of covering her face in dresses not yet burned, of another lady holding Alterman back in a panic, and of running through a door that "was a red curtain of fire" before escaping to the roof.



Defense counsel Max Steuer ignored half of Irving Young's Ten Commandments of Cross-examination — "be brief," "use only leading questions," "avoid repetition," "disallow witness explanation," and "limit questioning" — and asked, "now tell us what you did when you heard the cry of fire." Alterman complied, in virtually the same words she had used before. Steuer asked her to describe it again, which she did, in virtually the same words she had used before.

She had been coached. The jury could not forgive the prosecution's manipulation. As Allen, Schwartz and Wyzga correctly note, "it's a rare case that can be won if a jury has been treated without respect."

I bought a copy of *Reptile* by David Ball and Don Keenan on the strength of Ball's prior work, *Damages*, a level-headed and comprehensive text that should be read by every civil trial lawyer. Allen, Schwartz and Wyzga tell plaintiff's lawyers to ask themselves, "apart from my client's injury, what is this story really about?" *Reptile* provides an answer: at trial, a plaintiff's lawyer's "primary goal" is "to show the immediate danger of the kind of thing the defendant did — and how fair compensation can diminish that danger within the community."

Simple enough, and not particularly novel. Consider how Charles Bostwick closed his criminal prosecution: "Safety and all was on the other side for her and the others, and this safety was kept from [Margaret]. Why? To prevent these defendants, who had five hundred people under their keeping—their lives—from the paltry expense of a watchman." He need only have been in a civil trial and have added a line about compensation to have adhered to the *Reptile* method, nearly a century before it had that moniker. (One might say he lost his case by being too 'reptilian.')

I still do not understand why Ball and Keenan made themselves a target with such a provocative title or why they made the supposed inner monologue of the reptile one of the recurring themes of their book. The advice given in book — primarily straightforward ways to keep a case focused on "the immediate danger of the kind of thing the defendant did" — would have been just as useful, and a lot less controversial, without the pop science "reptile brain" references. Indeed, I doubt that Ball and Keenan would quarrel with Allen, Schwartz and Wyzga's conclusion that "advocacy is as much art as science." Apart from the "reptile" hook, Ball and Keenan thankfully spend little time attempting to ground their advice in science. It's art, pure and simple.

In the field of advocacy, little has changed since the publication of Aristototele's *Rhetoric* two and a half millenia ago. "There are, then, these three means of effecting persuasion. The man who is to be in command of them must, it is clear, be able (1) to reason logically, (2) to understand human character and goodness in their various forms, and (3) to understand the emotions—that is, to name them and describe them, to know their causes and the way in which they are excited." Whatever label we give our particular means of exciting the emotions — such as Ball and Keenan's "reptile" or Allen, Schwartz and Wyzga's "moral sense" — we must be careful not to miss the forest for the trees.

Advocacy is an art driven by language and emotion, not a science driven by data and testable hypotheses. Although it is always folly to attempt to manipulate a jury, advocates must remain open to all of the rhetorical tools available to them, and must adapt to the case at hand, sometimes by focusing on "the immediate danger of the kind of thing the defendant did," sometimes by crafting a "persuasive narrative" through "attention choreography," and sometimes by mixing those approaches.

As Atticus Finch said, "The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box." Courage, he said, is "when you know you're licked before you begin but you begin anyway and you see it through no matter what," and he saw Tom Robinson's case through by trying to focus the jury on "the immediate danger" of his accuser's perjury and of convicting an innocent man.

Maybe Atticus was a "reptile" after all.

## Response to Allen, Schwartz and Wyzga

by Randi McGinn

**Randi McGinn** is a verbal alchemist who takes client's life stories and, if she tells them truly and well, turns them into justice. She is the senior partner in a five woman, one man law firm in Albuquerque, New Mexico.

The world of trial practice is not a choice between "Reptile-lawyers" and "Narrative lawyers." Good trial lawyers should learn all they can about both approaches and use the colors from each of the two crayon boxes appropriate to the individual case facts. Rather than be fearful of the "new" ideas in the research on how unconscious primitive emotions drive a juror's decision-making, lawyers can incorporate that knowledge into their narrative approach to telling the story of the case.

The research on decision-making does not espouse simply punching the "fear" button. Such an elementary approach to a complex subject is like shaking up a carbonated soda bottle and hoping it will only spew on your opponent, rather than drenching you both. Fearful people do not always make rational decisions and, instead of going where you want to direct them, sometimes do a lemming run over a cliff or reject the political party that got them so worked up and create a Tea Party.

The better decision-making approach is to appeal to our sense of survival – both as individuals and as a community. This means creating a narrative in which the juror can imagine that they or their family members might be in the same "zone of danger" which caused harm to the injured person – a narrative story which ends with the juror as a hero or shero, making themselves and their community safer.

One need not choose between these two approaches. The best story for a juror is always the one which quickly becomes about themselves.



## Allen, Schwartz and Wyzga reply to the trial attorneys

Recently, one of us took a road trip north on the 5 freeway to Half Moon Bay, California. The 5 Freeway passes through some of California's prime growing fields. Here is where you will see the California Aqueduct running along in its concrete cradle.

Some of the fields bordering the 5 Freeway were lush and green; others were dry and dusty. Every few miles a sign was pegged into the ground. The signs read the same: "Congress Created Dust Bowl." Could it be? Did Congress create these acres of dirt? Perhaps it was environmentalists? Or politicians? Or even subsidized farmers? There was no way to know. Driving past those signs was a single story: "Congress Created Dust Bowl."

Narrative is the way we relate to each other. When we are our best selves narrative is used to help us see each other more clearly, bridge the divides and, most importantly, begin to solve our problems while fearing one another less.

And yet, narrative can be used as the big lie. This is the danger of the single story. Single story narrative is the same as the big lie when it is a narrative based on fear, manipulation and limited vision. Hitler was a masterful storyteller. His single story was the rise of the (useful) Aryan race through execution of the (useless) Jews.

Our lives, our cultures, are composed of many overlapping stories. And the danger is that if we hear only a single story about another person or entity, we risk a critical misunderstanding. The single story robs people of their dignity because it assumes only one approach. The single story is not untrue so much as it is incomplete. A single story is unworthy of belief and untrustworthy because it is incomplete.

Likewise, when we demand people to follow us we disallow the opportunity for thinking men and women to participate in problem solving. By making demands on jurors to behave in a certain way we treat them as if their passions, their drives, their needs can be manipulated. Conversely, when we invite jurors to collaborate with us in coming to a resolution, we become partners.

It is this very notion of entering into a collaborative relationship with the jury that drives us to recommend viewing jurors as allies not enemies. We invite lawyers to be willing to look at the jury of peers as thinking thoughtful people who desire to collaborate to a verdict in a community of truth.

One reviewer commented that narrative works when it embraces the story of the community. We agree. And the story of a community can be based on shared common views that are courageous, collective, and creative. When we fully integrate a heartfelt story artfully told with the power of thoughtful advocacy, civility, and respect for the process of litigation we have not weakened ourselves. Rather, we have earned the right to speak for those who cannot speak for themselves.

And that was the point of the Triangle Shirtwaist Fire story: to demonstrate that despite the outcome the people of the community were responsible for the Golden Age of reform in the New York sweat shops. The people of the community saw the lie of the single story that immigrants, especially immigrant girls and women are as fungible as beans in a jar, as disposable as cold ashes from yesterday's fire.

Another reviewer claimed that while a narrative is nice, we need the ugliness of fear as the rationale to win. This same reviewer decried using Atticus Finch as the model because "the only time we met him - he lost." Here's a question: what Negro man living in Alabama in the Deep South in 1933 accused of raping a white woman would have stood a chance at winning? The beauty of this fictional story which has continued to haunt us all these years is that a white man stood up to defend Tom Robinson against all odds. Atticus risked it all. The

miracle is that a trial took place before Robinson was lynched. One reason being that Atticus sat up the night outside the jail under the light of a street lamp to keep that mob at bay.

Moreover, it is blatantly absurd to state, as one reviewer did, that “had Atticus known Reptilian methods he probably would have won.” Really? In 1933? In Alabama? Where a Negro man in the Deep South was called ‘boy’? And the court of justice was carried out by men wearing hoods in the nighttime? The Dream Team of King Solomon, Thurgood Marshall, and Justice John Paul Stevens could not have rescued Robinson in a court of law.

We find it sad and disheartening that several of the reviewers did fault Atticus for not winning. How about recalling what he did do, what he did accomplish, and why his children were told to stand as he passed by. That is the kind of lawyer we are looking for. The one who will be thoughtful toward the Reptile theory and consider what it means to tell something other than the single story of fear.

One may claim that the Reptile has a point to make. Let’s keep it in perspective: its claim is fear-based narrative. Its claim is the single story. Its claim is that when lawyers regard their clients, their juries, their opponents as air-breathing, cold-blooded, egg-laying, scaled animals - who by the way do not experience fear - then somehow that combination will make these lawyers better than the legions of tort-reformers who have attacked them.

The writers of the article paid their money for the book and then read it. It is an unfair assumption to “wonder how familiar the authors are with the theory” just because we do not agree with the theory. This is not to say that there are not a few gems of wisdom buried in the book. But they lie dormant under the mud of the overall approach - the danger of the single story.

Moreover, this same reviewer proudly asserts, “The article worries that Reptile fans may say ‘Who cares about the anatomy if reptile techniques work?’ True; that’s what we say. We care not at all about brain anatomy and solely about whether the Reptile works.” To that we must reply that if lawyers do not care about the science of the theory, they do not care about the facts and if they do not care about the facts they have undermined their own legal credibility.

There are claims that Reptile theory works. But who would introduce that? And where is the evidence? Who has personal knowledge that leading with fear is what sold the bill of goods to the jury? There is no study that says, as one reviewer pointed out, “It works.” What works? And how do we know? Short of anecdotal reports there is no proof.

When a lawyer is fully integrated into his client’s story, he brings together knowledge and heart. He takes experience and information into the court battle to seek the justice his client lays claim to. Because both sides claim justice. And when it comes right down to it justice is just us creating a narrative that embraces a community, that calls people together to figure out a problem, and to help with redress.

The Reptile theory masquerades as the furtherance of good. We object. To lead with fear returns us dangerously close to the danger of the single story: that unless you are afraid, very afraid, and act on your fear, life as you know it will disappear and you and your loved ones along with it. Enough of fear - we are calling for good and thoughtful men and women who question the integrity of such an outmoded approach.

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## The Shrinking Strike Zone: Avoiding Problems During Jury Selection in the Age of *Batson*

By Sean G. Overland

Is your race-neutral explanation enough to survive a *Batson* challenge? In February, the Supreme Court handed down its decision in the case of *Thaler v. Haynes*, the latest in a string of cases originating with *Batson v. Kentucky* in 1986. In *Batson*, the Court outlawed the use of race-based peremptory challenges during jury selection. Attorneys can no longer strike racial minorities from a jury without an acceptable “race neutral” explanation for the strike. The intent of *Batson* was to eliminate the discriminatory use of peremptory challenges that often resulted in all-white juries in many parts of the country.

Despite its noble intent, the *Batson* decision has been widely criticized as vague, unclear and difficult to enforce. Indeed, since 1995, all of the Supreme Court’s rulings on the *Batson* line have been clarifications of the *Batson* procedures, including what constitutes a discriminatory peremptory challenge and what are acceptable, race-neutral explanations for a challenged strike. After briefly describing the history of the *Batson* line and the three-step process involved in a *Batson* hearing, I discuss the most recent *Batson* decisions and offer some tips to help attorneys avoid *Batson* problems during jury selection.



### Expanding the Scope of *Batson*: The First Ten Years

Following *Batson*, the Court handed down a series of rulings expanding the decision. In 1991, the Court decided *Edmonson v. Leesville Concrete Company*, which extended *Batson*’s ban on race-based peremptories to the parties involved in civil litigation. *Edmonson* involved a black construction worker who sued his employer for negligence after sustaining a workplace injury. During jury selection, the defendant company used two of its three peremptory challenges to remove black jurors from the panel. The plaintiff objected, citing *Batson*. The court overruled the objection, pointing out that *Batson* applied only to prosecutors in criminal trials. However, the Supreme Court reversed the decision of the lower court, thereby including civil trials within the jury selection rules established under *Batson*.

The following year, the Court outlawed race-based peremptories made by criminal defendants. *Georgia v. McCollum* involved the trial of three white defendants charged with assaulting a black couple. The defense attorney admitted that he planned to strike all of the black jurors from the panel and the prosecution objected. The trial court upheld the strikes, as did the Georgia Supreme Court, but upon review, the U. S. Supreme Court reversed.

The Court has expanded the list of prohibited peremptories to include strikes based on gender and ethnicity. *J.E.B. v. Alabama* banned strikes based on gender. In *J.E.B.*, prosecutors struck all of the male jurors in a paternity and child-support case against a male defendant. The all-female jury found that the defendant was the father and therefore owed child support to the mother. On appeal, the Court ruled that peremptory strikes made solely on the basis of gender, like those based solely on race, violated the Equal Protection Clause of the Fourteenth Amendment. The Court’s ruling in *Hernandez v. New York* extended *Batson* protections to Latinos. And in *Powers v. Ohio*, the Court decided that any litigant, regardless of race, may make a *Batson* objection.

**Expanding *Batson***

Case in <i>Batson</i> Line	Result
1986: <i>Batson v. Kentucky</i>	Banned peremptory challenges based solely on juror’s race
1991: <i>Powers v. Ohio</i>	Expanded protections to defendants of any race
1991: <i>Hernandez v. New York</i>	Expanded ban to peremptory strikes based on ethnicity
1991: <i>Edmonson v. Leesville</i>	Expanded ban to civil litigation
1992: <i>Georgia v. McCollum</i>	Expanded ban to strikes made by criminal defendants
1994: <i>J.E.B. v. Alabama</i>	Expanded ban to strikes based on gender

**Batson in Practice**

A *Batson* challenge to a peremptory strike involves a three-step process.



1) A litigant wishing to challenge one or more of the opponent’s strikes must first demonstrate a prima facie case of discrimination in the use of those peremptories.



2) If a prima facie case is established, the attorney who made the challenged strike must offer a race-neutral (or gender-neutral, as the case may be) explanation for the peremptory.



3) Finally, in step three, the judge must decide whether the challenged peremptory was the result of purposeful race or gender discrimination.

Although the Court outlined the three steps of a *Batson* challenge, the ruling only vaguely defined the standards to be used during each of the three steps. As a result, lower courts have had to develop their own *Batson* standards. In his research on lower courts’ implementation of the *Batson* rules from 1986 to 1993, Mililli (1996) identified at least eight different standards in use by lower courts for establishing a prima facie case of

discrimination during the first stage of a *Batson* hearing. The eight different methods ranged from a judge simply ensuring that a “sufficient number” of minorities sit on a jury, to more sophisticated analyses that compared the percentage of peremptory challenges used against minority citizens with the percentage of minorities in the jury venire (pp. 471-472). Millili’s (1996) study found that in most *Batson* hearings (62%), the court found in the first step of the hearing that there was a *prima facie* case of discrimination.

In the second stage of a *Batson* hearing, the attorney must provide race neutral explanations for the challenged strikes. However, what constitutes an acceptable “race neutral” explanation was left undefined in the original *Batson* decision. As a result, most trial judges and appeals courts have granted attorneys a great deal of leeway with their explanations. Raphael and Ungvarsky (1994) looked at over 2,000 *Batson* hearings conducted between 1986 and 1992 and found that judges rejected only a very small percentage of explanations. In fact, the only “explanations” that were often rejected were either no explanation at all or the attorney admitting that the strike was based on the juror’s race. Raphael and Ungvarsky (1994) found twelve common categories of race-neutral explanations that judges typically accepted, including the juror’s prior experience with the criminal justice system, age, occupation, marital status, demeanor, education, socio-economic status and religion, among others. In fact, Raphael and Ungvarsky (1994) found that, “there are a number of cases in which courts accepted as a neutral explanation the prosecutor’s statement that she struck a juror because, among other reasons, the juror was black” (p. 236). Millili’s (1996) study found that trial courts accepted attorneys’ neutral explanation in 78.4% of *Batson* hearings. As a result, only about 17% of *Batson* objections are eventually sustained. Ironically, Millili (1996) found that the highest rate of successful *Batson* challenges (53% success rate) are made against peremptories used to strike white jurors.

The original *Batson* decision also failed to prescribe a remedy for a *Batson* violation. The decision mentions two possible remedies, but endorses neither of them. One possible remedy is to replace the entire venire and repeat the jury selection process. However, replacing the entire venire might give attorneys a perverse incentive to make discriminatory peremptory strikes, in the hope that the second venire might be “better” for their case than the first. The other option is to reinstate the struck jurors. However, this option raises questions about the impartiality of those jurors, as they will have probably witnessed their dismissal, and may hold a grudge against the litigant who struck them.

#### Clarifying *Batson*: Supreme Court Decisions from 1995 to 2010

Almost ten years passed after the original *Batson* decision before the Supreme Court offered some guidance on its implementation. The Court’s short per curiam opinion in *Purkett v. Elem* (1995) weighed in on the nature of an acceptable “race neutral” explanation during the second step of a *Batson* hearing, and the Court’s ruling came as something of a shock. *Purkett* involved peremptory strikes used by a state prosecutor to remove two black jurors from a Missouri robbery trial. When the defense objected to the strikes, citing *Batson*, the prosecutor offered the following race-neutral explanation:

I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to be not a good juror for that fact, the fact that he had long hair hanging down shoulder-length, curly, unkempt hair. Also he had a moustache and goatee type beard. And juror number twenty-four also has a moustache and goatee type beard. Those are the only two people on the jury...with facial hair...And I didn’t like the way they looked, with the way the hair is cut, both of them. And the moustaches and the beards look suspicious to me (p. 765).

The Supreme Court upheld the prosecutor’s strikes and stated that race-neutral explanations need be only that: race-neutral. The explanations need not be “persuasive or even plausible” (p. 768). The *Purkett* decision seemed to make a *Batson* challenge nothing more than a mild procedural hassle for attorneys wishing to use their

peremptory challenges as they saw fit. However in 2005, the Court revisited *Batson* and began handing down rulings seeking to clarify and strengthen the *Batson* rules.

In the first of these decisions, *Johnson v. California*, the Court held that California's standard for evaluating a prima facie case of discrimination in the first step of a *Batson* hearing was too restrictive. California had required attorneys raising a *Batson* objection to show a "strong likelihood" of discrimination in the use of the strikes. Under *Johnson*, the Court ruled that just an "inference" or even a "suspicion" of discrimination was enough to establish a prima facie case of discrimination. The Court therefore struck down California's more demanding requirement. In the second case in 2005, *Miller-El v. Dretke*, the Court overturned a murder conviction because an explanation given by the prosecutor for a peremptory strike used against a black juror also applied to white jurors who were not struck from the jury.

In March of 2008, the Court decided *Snyder v. Louisiana*, holding that the judge in *Snyder's* first-degree murder trial erred when he allowed the prosecutor's peremptory challenge of a black juror. The juror in question, Mr. Jeffrey Brooks, was a student teacher at the time of jury selection and initially explained to the court that jury duty would be a hardship for him because it would interfere with his teaching responsibilities. However, the court contacted Mr. Brooks's school and received permission for him to miss work. Nonetheless, the following day, the prosecutor struck Mr. Brooks. When defense counsel objected, the prosecutor explained the strike:

he's one of the fellows that came up at the beginning [of voir dire] and said he was going to miss class. He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase (pp. 5-6).

The Court rejected this explanation as unpersuasive, pointing out that Mr. Brooks seemed satisfied when informed that the dean would "work with him" to make up any missed student teaching. The Court also pointed out that other jurors had more pressing work and family conflicts that would certainly make them eager to avoid a lengthy trial, yet these jurors were not stricken by the prosecutor. The Supreme Court held that, "the explanation given for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was *Batson* error" (pg. 5). *Snyder* seems to re-affirm *Miller-El*, in which the Court held that an explanation for a challenged strike will fail if the explanation also applies to other jurors who were not struck.

The most recent Supreme Court decision in the *Batson* line came last month. *Thaler v. Haynes* stems from the trial of Anthony Haynes, who was convicted of murdering a police officer in Texas. Two judges presided over the jury selection for Haynes' trial. The first judge heard the questioning of the jurors, but another judge presided over the attorneys' use of their peremptory challenges. The defense objected to the prosecutor's peremptory strike of an African-American juror, citing *Batson*. During the subsequent *Batson* hearing, the prosecutor claimed that the juror's demeanor seemed "somewhat humorous" and "not serious." The judge, who was not present during the questioning and who had not seen the juror's demeanor, accepted the prosecutor's explanation and overruled the defendant's *Batson* objection. Haynes was convicted, but on appeal, a federal Appeals Court granted Haynes a new trial. However, the Supreme Court reversed that decision, ruling that a trial judge need not personally observe a juror's demeanor in order to rule on a demeanor-based explanation for a challenged peremptory strike.

While *Thaler* may seem to be a relatively minor technical decision, it may have important consequences for attorneys and trial consultants. First, *Thaler* reverses a recent trend toward restricting the scope of acceptable race-neutral explanations. Recall that *Snyder* rejected speculative juror hardship as an acceptable race-neutral explanation, and *Miller-El* rejected explanations for challenged strikes if the explanation also applied to jurors who were not struck. Second, *Thaler* could be seen as sanctioning the expanded use of demeanor-based explanations for challenged strikes. Juror demeanor includes a wide range of juror actions and statements, potentially giving attorneys greater flexibility in the use of their peremptory challenges.

## Clarifying *Batson*?

Case in <i>Batson</i> Line	Result
1995: <i>Purkett v. Elem</i>	"Long hair" and "goatee beards" are acceptable explanations
2005: <i>Johnson v. California</i>	Lowered California's standard for prima facie case to "inference" or "suspicion"
2005: <i>Miller-El v. Dretke</i>	Race-neutral explanations are not acceptable if they apply to jurors not struck
2008: <i>Snyder v. Louisiana</i>	Speculative juror hardships are "unconvincing"
2010: <i>Thaler v. Haynes</i>	Judges need not observe a juror's demeanor in order to rule on demeanor-based explanations for challenged strikes.

### Implications for Attorneys and Trial Consultants

So where does *Batson* currently stand? The most recent decisions, particularly *Snyder* and *Miller-El*, have tightened the standards for what constitutes a race-neutral explanation in the *Batson* process. However, there remain some pitfalls to avoid. Consider the following tips if you anticipate a *Batson* challenge while exercising your peremptory challenges.

- Whenever possible, use a written juror questionnaire during jury selection. Juror questionnaires not only give attorneys and trial consultants a great deal of information about jurors' attitudes and life experiences, but jurors' written answers are a valuable resource for clearly explaining challenged strikes in the event of a *Batson* hearing. Jurors are also more likely to answer questions truthfully and thoughtfully when writing their answers on a confidential questionnaire than when asked to talk about themselves in open court.

If facing a *Batson* challenge:

- Provide as many reasons as possible for the decision to strike the juror.
- Make sure that the reasons offered for the strike do not also apply to jurors who remained on the panel.
- Take careful notes on juror demeanor during questioning, as trial courts and the Supreme Court have accepted juror demeanor as an acceptable race-neutral reason for a strike.
- Remember that a juror's perceived hardship is not a persuasive race-neutral justification for a challenged strike.

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All graphics and tables in this article created by **Jason Barnes** of [Barnes and Roberts](#).

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## The Biggest Bully In the Room

by Trisha Renaud

Jurors these days seem to make news almost as much for their misbehavior as for the decisions they make.

First, there are a multitude of stories about jurors who refuse to follow the rules and use Google to satisfy their curiosity or hop on Facebook to share their opinions with all their Facebook “friends.” Occasionally, however, somewhat more lurid tales of jurors behaving badly are reported in the press. These accounts of jury room conduct feature everything from incivility to threats to physical violence.

Consider these recent examples of deliberations-turned-ugly:

2008. Miami. After issuing a guilty verdict in four murders on a charter boat, three jurors announced that their verdicts had been the product of badgering and bullying. They described how some jurors had pounded their fists on the table and shouted repeatedly.

2008. Washington. During deliberations in the federal corruption trial of Alaska Sen. Ted Stevens, jurors demand that one of their number be removed. They wrote the judge to complain that the juror in question was “being rude, disrespectful and unreasonable. She has had violent outbursts with other jurors and jurors are getting off course.”

2009. New York. Lawyers waiting on a verdict in the suit against Merck over its osteoporosis drug Fosamax heard loud shouts multiple times coming from the jury room. One juror sent the judge a note that read, in part: “I am being intimidated, threatened, screamed at, as well as verbally insulted that I am stupid because I do not agree. I have had 2 physical threats against me, a chair thrown and a verbal threat to beat me up. I need a police escort out of here. And I am afraid to come back ...”

2009. New Orleans. A juror on the murder trial of rapper Corey “C-Murder” Miller said she changed her vote to guilty in order to end deliberations and stop the other jurors from tormenting a younger juror. “This thing had to come to an end for this girl’s health, her sanity,” the juror told the Times-Picayune. “They literally made this 20-year-old girl so violently ill. ... She couldn’t function anymore.” Added the juror: “My time in deliberations was a vacation in hell. People turned into monsters.”

2009. New York City. In the high-profile Astor trial, one female juror reported that she felt personally threatened by another female juror who moved menacingly toward her and flashed “gang signs” her way. Other jurors now dispute her account.

2010. Detroit. After a mistrial in a political corruption trial, jurors described six nightmarish days of deliberations. “There was yelling and screaming and there were fights,” the foreman told the press. Another juror



reported that the lone holdout – the only African-American on the panel – slammed down a binder on the table, accusing the others of wanting to “hang the black man.” The holdout now reports receiving harassing telephone calls and mail.

And, lest anyone think such conduct is only a recent phenomenon, consider this extreme example from two decades ago:

1990. Chicago. During deliberations over the fate of accused murderer Madison Hobley, the jury foreman, a police officer, produced a gun, laid it on the jury table and announced “We’ll have a verdict.” The jury convicted Hobley, but he was later pardoned by the Illinois governor after revelations of police misconduct, including torture to extract confessions.

So just how common is jury room bullying? While vigorous argument and a push for unanimity are a natural part of deliberations, how often does the debate turn to incivility or does the pressure become coercive? And, most importantly, what can be done to prevent it?

A 2001 British study into many aspects of jury decision-making interviewed 312 jurors from 48 New Zealand trials.<sup>1</sup> In six trials, some jurors reported feeling intimidated during deliberations. This typically occurred when the foreperson was ineffective at managing deliberations and a juror with a dominant personality took over the discussion. In four cases, jurors reported that such domineering jurors had free rein to insult and denigrate other jurors.

Yet virtually no research existed on the extent of jury room intimidation until earlier this year when Australian academic Judith Fordham of Murdoch University released the results of several years of research. The study was commissioned by Australian authorities after concerns were raised that jurors had been intimidated into acquitting defendants in several high-profile trials.

Fordham was allowed unprecedented access to conduct post-trial interviews with Western Australian jurors. The study included questionnaire information from 913 jurors who served on 218 randomly chosen trials, as well as 58 jurors from 17 “targeted” trials involving prior allegations of juror intimidation. In addition to the survey on jurors’ trial experiences, 130 jurors were interviewed in person.

Her findings were released April 1 in a report called “Juror Intimidation? An investigation into the prevalence and nature of juror intimidation in Western Australia.”<sup>2</sup> On the key question – did jurors feel uneasy, threatened or unsafe during or after the trial – 14.3% of jurors in the random trials said yes. In the small group of jurors from the targeted trials, a much higher percentage – 33% – said yes.

Nonetheless, Fordham found that incidents of actual intimidation (rather than felt intimidation) were relatively rare and these threats emanated mostly from the accused person on trial. She concluded there was no evidence in most cases that such intimidation affected verdicts. However, incidents of perceived intimidation were much more frequent.

Fordham also found no correlation between either gender or age in who reported intimidation.

An unexpected finding was what occurred in the jury room: The most common form of intimidation was bullying from other jurors. Also, effective intimidation – the type of coercion that would cause a juror to later regret a vote – was more likely to occur in the jury room. In 8 of 11 instances, intimidation from other panel members caused jurors to change their vote.



Some jurors also reported discomfort about others' conduct during deliberations. Of jurors from the random trials, 24% reported being uncomfortable with statements of other jurors, 14.2% with offensive statements of other jurors, 12.9% with another juror's shouting, and 15.7% with another juror's emotional intensity.



No doubt, by the time jurors get to the point of deliberating, some are already stressed. They've had to deal with disruption in their life and possibly the loss of income. Some are distressed over the nature of the evidence, while others worry about the decision they must now make.

A 1998 survey of jurors conducted by the National Center for State Courts found that on short (one to three days) trials, more than a quarter of jurors reported feeling stress, while on trials lasting more than 21 days, nearly all – 96% report stress.<sup>3</sup> The NCSC report found that symptoms of stress could include increased anxiety, frustration, anger and hostility, and that deliberations were particularly stressful for most jurors.

Despite universal agreement that incivility and intimidation should never be part of a juror's experience, there has been little discussion about how to address the problem. The British study cited above noted that those jurors who felt coerced by another juror had received no advice from the court on strategies for dealing with such situations. Given that jurors naturally look to the judge for guidance on what is expected of them, the bench is a logical place to begin. One judge has written recently about the obligations of judges to ensure civility during deliberations.

“Jury deliberations should not be a free for all,” writes Milwaukee County Circuit Court Judge John DiMotto in his blog *Bench and Bar Experiences*. “They should not emulate a WWE ‘Raw’ television show.”<sup>4</sup>

DiMotto says that, in both jury selection and in jury instructions, judges should tell jurors what is expected of them. And along with the usual instructions about not discussing the case or conducting independent research, judge should emphasize that jurors must treat each other with civility and respect. “It is the responsibility of the judge to convey this information to the jury early on, and often, during trial,” says DiMotto.

Judges may want to urge jurors to set ground rules for deliberations. Such rules might include no shouting, no interrupting, no insults and no ridiculing of other jurors' views. In addition, jurors should be instructed to report abusive or coercive conduct to the court when it occurs, not after the verdict. While neither the court nor attorneys can dictate how jurors organize their deliberations, offering procedural suggestions may defuse the frustrations that often arise when jurors don't know how to proceed.

A number of courts make use of a pamphlet of The American Judicature Society entitled *Behind Closed Doors: A Guide for Jury Deliberations*. Along with suggestions for structuring deliberations, it features guidelines for civil discourse, including respecting others' opinions and a prohibition on bullying.

Lawyers can also contribute to setting a tone of civility by raising the issue in *voir dire* (where such questions are allowed) and in closing argument. Describing to jurors what happens when they retire to the jury room – in terms of sharing views, listening respectfully to each other, and learning from each other's wisdom – can serve as a reminder of the need for calm discourse, particularly in emotional or high-profile cases.

In voir dire, attorneys may want to secure jurors' commitment that, if selected, they would be willing to examine the evidence and patiently listen to the views of other jurors in striving to reach a verdict. Even if attorneys hope to encourage dissenters on the panel, the questions in voir dire and the message in closing argument can be to urge those jurors to be steadfast, but calm.

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<sup>2</sup> Fordham, Judith. *Juror Intimidation? An investigation into the prevalence and nature of juror intimidation in Western Australia*. Report submitted to the Attorney General of Western Australia. Edited version published April 1, 2010.

[http://www.department.dotag.wa.gov.au/\\_files/juror\\_intimidation.pdf](http://www.department.dotag.wa.gov.au/_files/juror_intimidation.pdf)

<sup>3</sup> *Through the Eyes of the Juror: A Manual for Addressing Juror Stress*, National Center for State Courts 1998, [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_JurorStressPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_JurorStressPub.pdf) appendix at: [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_JurorStressAppendPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_JurorStressAppendPub.pdf)

<sup>4</sup> DiMotto, John. *Judge's Responsibility to Encourage Juror Civility*. Bench and Bar Experiences. January 26, 2010.

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## Less Bad News: What Defense Advocates Can Learn from the Duke Lacrosse Case

by Robert M. Entman and Kimberly A. Gross

In covering the infamous Duke lacrosse case, journalists received enormous criticism for the way they allegedly convicted the defendants in the press. Yet the practice is hardly unusual. Standard media routines and practices often contribute to undermining the presumption of innocence, particularly with high profile crimes. Still, in other respects this particular case was atypical, involving national media attention, a prosecutor engaged in misconduct, affluent white young men in the role of the accused and a poor black woman as the accuser. Although most crimes do not garner the attention devoted to the accusations in this case, crime news in general may also have deleterious effects on the presumption of innocence. Research shows that typical media coverage of crime reinforces stereotypes of black and Latino defendants.<sup>1</sup> We argue this contributes to a weaker presumption of innocence for minority defendants, regardless of the amount of publicity. This article assesses the implications of social science research on media, race and crime to draw out lessons for professionals who must deal with the volatile nexus of publicity and race in the criminal justice system.

### JOURNALISTIC ROUTINES, RACE AND PRETRIAL PUBLICITY

Many of the traits present in the Duke lacrosse media coverage characterize not only crime coverage, but news generally. These include over-reliance on public officials, overuse of standardized story scripts and familiar stereotypes, and “pack journalism”—the tendency for reporters from competitive news organizations to converge on the same framings. When applied to crime news, these media routines generally assist the prosecution in publicizing claims of guilt.



Perhaps the most important prerequisite to achieving balanced news coverage of any matter is having reliable and credible sources competing to advance alternative narratives. Without such equally legitimate forces contending to tell their alternative versions, media coverage is *usually* one-sided and arguably unfair to at least some participants. News of criminal cases often does not meet the requirement of two credible sides working to advance alternative narratives. Unlike in news of policy debates over, say, Social Security, healthcare, or the environment, there is no institutionalized party system to provide a two-sided debate that journalists can reflect in their coverage. The result is that crime news is almost always heavily slanted toward the prosecution.

In reporting crime stories, journalists typically rely on law enforcement officials' views, downplaying the defense perspective while minimally acknowledging the innocence presumption.<sup>2</sup> Although relatively few crimes receive sustained media attention,<sup>3</sup> when they do, research shows coverage often includes information deemed prejudicial under American Bar Association (ABA) guidelines. One study measuring the extent of pretrial publicity on Los Angeles television news found that nineteen percent of the defendants in crime stories were associated with at least one category of potentially prejudicial information as defined by the ABA.<sup>4</sup> Another study found that twenty-seven percent of suspects in crime stories were described using prejudicial information.<sup>5</sup> Most of this information was cited to law-enforcement officers and prosecutors. The heavy reliance on these sources, with their self-interest in publicizing the guilt of those arrested and indicted, along with the perception that defense attorneys are more naturally biased than prosecutors representing putatively blind justice, helps explain the frequency of prejudicial publicity.

In most instances, media routines and news coverage place poor black and Latino defendants, whose individual crimes do not receive the high visibility attained by the Duke lacrosse case, at a disadvantage as well. Research suggests people of color are more likely to be subjected to negative pretrial publicity.<sup>6</sup> Beyond coverage of specific crimes, news more generally places African American defendants at a disadvantage because of the strong cultural associations built—particularly by local television news—between blacks and crime, danger and guilt. *Even in the absence of specific prejudicial publicity about a given defendant's case, then, the racial and ethnic patterning of crime news may prejudice potential jurors against minority defendants.*



Kang (2005) uses the metaphor of the “Trojan Horse Virus” to describe how local television news can, without viewers’ awareness and without intent on the part of news producers, create and reinforce associations between blacks and violence in the minds of citizens.<sup>7</sup> These stereotype-based responses are often automatically, quickly, and unconsciously triggered, and go on to affect a wide range of sentiments.<sup>8</sup> For example, exposure to images of black, male defendants increases whites’ punitive attitudes toward crime, as well as their tendencies to blame individual rather than social factors for

law-breaking.<sup>9</sup> Because whites tend to generalize in this way, any poor black (or Latino) defendant—even without media attention to his or her specific case—has received a kind of negative pre-trial publicity.

## DISCUSSION AND IMPLICATIONS

The Duke lacrosse case provides a particularly vivid and compelling example of a more general dilemma for the administration of justice. The Duke lacrosse players do not typify crime-news defendants. To the extent that criminal defendants ever enjoy a chance to have their sides presented in equal measure to the prosecution's, the Duke lacrosse players occupied a more promising position than most. Even in the Duke lacrosse case early (but not later) coverage favored the prosecution, and journalists seemed to rely on stereotypes and recipes for crime news that caricatured and misrepresented the three players accused as well as the whole team. But the defendants enjoyed upper-middle class status and financial resources, and there was compelling evidence for their innocence once DNA test results became available; this led to later publicity that actually emphasized not merely the presumption but the likelihood of innocence. Poorer racial minorities—and less affluent whites—can rarely afford the sort of legal representation that helped the Duke students generally obtain more positive coverage after the initial weeks of negativity. Indeed, for most poorer minority defendants, there is usually no second phase to balance initial stories almost always slanted against them.

Based on our findings related to media coverage of this case and the prior research on media coverage of crime more generally, we suggest some possible lessons and remedies, in full recognition that their practical implementation and acceptance may be problematic.

### 1. Find Ways to Balance Coverage and Combat Pack Journalism

One of the most important lessons for both lawyers and journalists is the way normal news routines—including over-reliance on public officials (specifically the prosecution and police), overuse of familiar stereotypes and standard scripts, and pack journalism—can combine with a determined government official to facilitate pro-prosecution slant in news of alleged crimes. Rightly or wrongly, media routines are such that to yield balanced coverage, two competing sides must have approximately equal skill and resources. The imbalanced perspective in crime news, facilitated by over-reliance on biased public officials, is compounded in high profile cases by the fact that the prosecution often has strong career incentives to maximize publicity for crime-fighting successes. In such cases, journalists have an additional responsibility to search out alternative narratives. At the same time, lawyers must be aware that few reporters covering a case like this—especially those from national news organizations parachuting into a local scene—have the time to do the intensive reporting (to investigate documentary evidence, to interview ordinary citizens, or to otherwise probe alternative sources of information) to generate anything but the most cursory alternative narratives on their own. The Duke case also highlights how, in the current culture of soft news and cable shout-fests, high profile criminal cases will be taken up by cable news personalities and commentators. These individuals are not necessarily bound by journalistic conventions of objectivity.

The tendency toward a pro-prosecution slant in coverage poses a dilemma for those seeking to administer justice. One way to get more balanced coverage would be for the prosecution to refrain from speaking to the press. Criminal law enforcement agencies should adopt stronger rules governing interaction with the press for

both prosecutors and the police. Individual attorneys working a specific case have limited leverage to compel such cooperation. But it seems feasible for attorneys to use initial court proceedings and other early contacts with prosecutors and police to remind them of the dangers in pretrial publicity. Sometimes the publicity can backfire, as it surely did for Durham DA Mike Nifong. Even for less visible trials, professional embarrassment, change of venue or even successful defense appeals are among the pitfalls faced by the prosecution. And at least in theory, the prosecution is bound by the same professional responsibility to ensure fair trials as judges and juries.

Another way to get more balanced coverage is for the defense to provide journalists with narratives that challenge the prosecution. Defense lawyers in recent years have widely recognized that in high-profile cases they need to compete in the media to counter the prosecution bias.<sup>10</sup> Of course in any given high profile case, whether the defense would want to compete in the public arena would depend on the specific details of the case.

In addition, defense advocates should point to ethical guidelines from the ABA discouraging *both* sides from speaking to the press. As illustrated in the *Gentile* case, which dealt with the right of the defense to speak to the media, one of the problems for defense attorneys appears to arise from American Bar Association standards discouraging *both* sides from speaking to the press. In a media-saturated culture that includes 24/7 access to breaking news and to unrestrained speculation on the Internet, outright prohibition of publicity becomes ever more difficult to enforce. In light of this, defense attorneys should organize and press the ABA to revise its guidelines. Any new standards must take into account the modern structure of the media while ensuring equitable enforcement for both sides.

## 2. Frame Your Media Narrative Early in the Process

When lawyers do engage the media debate they should bear in mind the importance of the early framing contest. Early framing is important because first impressions establish stereotypes that are difficult to dislodge. Early on in the Duke case, Durham D.A. Michael Nifong claimed that the players were not cooperating, and this theme was picked up by reporters and columnists. Editorial writers and columnists often invoked the term “wall of silence” to describe the team. This helped to feed the impression that “they have something to hide” and “they think they are above the law.” In fact, the team captains initially cooperated by giving statements to the authorities and volunteering to take polygraph tests. Yet these facts did not fit conveniently into the initial frame and therefore did not receive narrative prominence. In this instance, given journalistic values, it is not surprising that a resonant, symbolic meme like “wall of silence” trumped the detail that some Duke players were cooperating with the prosecutor. Should defense attorneys find their clients subject to similar treatment, we recommend they directly and publicly challenge damaging simplifications with their own simple factual narrative. Such efforts should include social media (such as Facebook and Twitter), blogs, websites, and email lists, not just the old-fashioned newspaper and broadcast outlets. The newer media can bypass established, cozy relationships between reporters and public officials.

### 3. Recognize the Role of Defendants' Race

Beyond this, for typical criminal defendants, particularly minorities, whose stories do not get prominent and sustained media play, the concern may be less about PR strategy than about the potential effects of the implicit crime-violence-black stereotype perpetuated by crime coverage in general. Ultimately, this problem could be more consequential because it has the potential to influence many more defendants. Racial minorities are subject to multiple layers of prejudice: they can face institutionalized, pro-prosecution media bias that may be applied to their specific case, *and* the anti-minority stereotypes perpetuated by so many other media productions.



One practical if partial solution with respect to juries might be for judges routinely to include explicit warnings based on social-science research. Judges could instruct that jurors, particularly white jurors considering the guilt or innocence of African Americans and other nonwhites, bring to their roles unconscious mental associations that may prejudice deliberations. A judge's directives could also make clear that this is not a matter of accusing whites of being racist, and similar instructions should apply to African American, Latino, and Asian jurors so they can be more-or-less race neutral. The point is for everyone to think through cultural schemas that encourage unconscious mental associations. Most whites, for example, are not outright racists; few think of themselves as racist and most seek rather to prove to themselves that they are not. Research has shown the best way to combat unconscious racism is by explicitly telling people what might be happening in their minds subconsciously. Some research suggests that awareness of this context can moderate the effects of the unconscious, negative associations in decision-making.<sup>11</sup>

We also recommend that defense attorneys representing minority clients take into account the ongoing and general prejudicial pre-trial publicity embodied in so many television depictions of crime. Even if a specific client has received little media attention, in *voir dire*, attorneys should ask prospective jurors whether they are frequent viewers of local television news or of such crime reality shows as *Cops*. If so, it might make sense to exclude them from the jury, especially when the attorney has other qualms about them. Odds are habitual viewers have been infected by Kang's "Trojan Horse" virus, suffering from unconscious racial biases that could undermine impartiality.

Another remedy would be training district attorneys, their staffs, police departments, and others involved in the criminal-justice process to understand the social science on unconscious racial stereotyping and decision-making. Furthermore, training these personnel to recognize that their interactions with the press may undermine the presumption of innocence could help mitigate deleterious impacts on defendants' rights. However, police officials, individual officers, and certainly district attorneys have many political incentives to promote one-sided publicity. This may not even be done with the precise intention of prejudicing the jury pool and improving the chances of conviction. Publicity simply promotes an image of competence and achievement that is good public

relations for police and prosecutors. The compelling incentives for the prosecution to manage the media provide yet further reason for the ABA to revisit its guidelines.

#### 4. Encourage Responsible Journalism

Finally, the onus must be put on journalists to alter their behavior. In the Duke case, media personnel bear responsibility for the fact they failed to sufficiently question Nifong's frame. In this instance, the prosecutor's potential ulterior motives were perhaps more obvious than normal. Although journalists paid some attention to the connection between the case and District Attorney Michael Nifong's upcoming election campaign, in hindsight it seems obvious they gave his claims undue deference, perhaps because it seemed literally incredible that a D.A. in the national-media glare would engage in blatant misconduct. This example should remind journalists of the need to recognize the self-interested nature of public officials' pronouncements and claims in criminal cases just as they appreciate—and often report—the self-serving motives of public officials in other policy realms. Journalists should also take into account the structural absence of a legitimate, competing opposition of the sort that helps to promote (though certainly not guarantee) more-balanced presentations of controversies in other policy areas.

The forces that promoted the journalistic shortcomings on exhibit in the Duke lacrosse case are not easily countered.<sup>12</sup> Nor are the forces that reinforce the more general crime coverage that promotes stereotyping and racial animosity. Still, as individuals or through their organizations, lawyers can communicate with journalists, news outlets and professional associations to help them understand the damage done by their unintentional undermining of the innocence presumption. Good could come of the Duke travesty if defense attorneys, journalists, and others in the criminal justice system learn from it. Duke's lacrosse players violated expectations of what criminals look like; perhaps this makes the case a good vehicle for learning by the mostly white power-holders in the system. After all, they can empathize with Duke defendants, who look like them.



Although prejudicial pretrial publicity and troubling coverage associating minorities with crime and violence will likely continue to be the norm rather than the exception, not only education but inevitably increasing diversity among those authorities could ease these burdens. And the changing demographics of media audiences should make it profitable if not vital for news outlets to adjust some of the standard journalistic routines that disadvantage non-whites.



**LESSONS LEARNED FROM THE DUKE LACROSSE CASE**

<p><b>1. Find Ways to Balance Coverage and Combat Pack Journalism</b></p>	<ul style="list-style-type: none"> <li>• Provide alternative narratives that challenge the prosecution’s narrative and the public’s presumptions about the facts.</li> <li>• Press for new, equitable ABA guidelines on contacts with the media</li> </ul>
<p><b>2. Frame Your Media Narrative Early in the Process</b></p>	<ul style="list-style-type: none"> <li>• Get accurate information out in front of misinformation and employ all channels, including blogs, social media and other outlets on the internet.</li> </ul>
<p><b>3. Recognize the Role of Defendants’ Race</b></p>	<ul style="list-style-type: none"> <li>• Voir dire on jurors’ exposure to and agreement with general stereotypes of crimes and criminals.</li> </ul>
<p><b>4. Encourage Responsible Journalism</b></p>	<ul style="list-style-type: none"> <li>• Educate journalists on their professional obligations—and economic self-interests—to mitigate the unintended consequences of standard operating procedures; suggest new practices.</li> </ul>

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A longer and more detailed description of this research was published in *Law and Contemporary Problems* 71 (Autumn 2008) <http://law.duke.edu/journals/lcp>.

## ENDNOTES

<sup>1</sup> See for example, Robert M. Entman & Andrew Rojecki (2000) *The Black Image in the White Mind: Media and Race in America* Chicago: University of Chicago Press; Travis L. Dixon & Daniel Linz, *Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News*, 50 J. COMM., Spring 2000.

<sup>2</sup> See Michael Welch, Melissa Fenwick & Meredith Roberts, *Primary Definitions of Crime and Moral Panic: A Content Analysis of Experts' Quotes in Feature Newspaper Articles on Crime*, 34 J. RES. CRIME & DELINQ. 474, 474, 488 (1997); Celeste Michelle Condit & J. Ann Seltzer, *The Rhetoric of Objectivity in the Newspaper Coverage of a Murder Trial*, 2 CRITICAL STUD. MASS COMM. 197, 197 (1985).

<sup>3</sup> Ralph Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 JUDICATURE 162, 165 (1988).

<sup>4</sup> Travis L. Dixon & Daniel Linz, *Television News, Prejudicial Pretrial Publicity, and the Depiction of Race*, 46 J. BROADCASTING & ELECTRONIC MEDIA 112, 127–29 (2002).

<sup>5</sup> Dorothy J. Imrich et al., *Measuring the Extent of Prejudicial Pretrial Publicity in Major American Newspapers: A Content Analysis*, 45 J. COMM. 94, 94 (1995).

<sup>6</sup> Dixon & Linz, *supra* note 3, at 128–29. Accounting for the race of the victim, they find that a black defendant with a white victim more than doubles the odds of prejudicial pretrial information appearing; a Latino with a white victim more than triples the odds that prejudicial information will be aired when compared with a white defendant and white victim.

<sup>7</sup> See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1553–54, 1562–63 (2005). Kang draws on psychological work on implicit attitudes in describing how coverage may be detrimental. Implicit-attitudes research shows that whites express some explicit preference for their own group but much greater levels of implicit preference. *Id.* at 1506-1514. Even individuals who honestly self-report positive attitudes toward individuals in other racial categories may hold implicit negative attitudes toward that group.

<sup>8</sup> *Id.* at 1515–48.

<sup>9</sup> See e.g. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM J. POL. SCI. 560 (2000).

<sup>10</sup> See generally John Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of their Clients*, 7 COMM. L. & POL'Y. 77 (2002); Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811 (1995).

<sup>11</sup> See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989); TALI MENDELBERG, *THE RACE CARD* (2001) 209-36; Kang, *supra* note 26 at 1528-35.

<sup>12</sup> See Rachel Smolkin, *Justice Delayed*, 29 AM. JOURNALISM REV., Aug.–Sept. 2007, at 20.

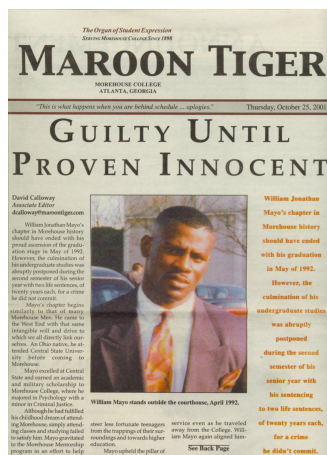
**We asked three experienced trial consultants to offer their reactions to Entman and Gross. On the following pages, Alan Tuerkheimer, Sonia Chopra and Andrew Sheldon offer their responses. Following their responses, Entman and Gross give a final reply.**

## Alan Tuerkheimer responds to Entman and Gross

**Alan Tuerkheimer, M.A., J.D.** brings his background in psychology and the law to his role as litigation consultant. He has extensive experience conducting jury research including focus groups, mock trials, and venue attitude surveys and has worked with trial teams across the country on *voir dire* and jury selection, trial observation, shadow juries and post-trial interviews.

The article sheds light on two distinct perspectives on the criminal justice process. On the one hand, advice is given to defense attorneys about how to negate what is described as a pro-prosecution slant in the media. The aim is to level the playing field – or even tilt it in a pro-defendant angle - in order to enhance the prospect of winning an acquittal. In essence, then, we might say that this concern is strategic in nature. The other viewpoint contemplates appropriate policy directives directed toward accurate trial outcomes. By diminishing the effects of juror bias, we enhance the odds of determining what truly occurred in any given case. Ascertaining where these concepts align is a challenge, as each of these goals is typically quite distinct. With this in mind, it is important to consider the following question: across the criminal justice system, which is comprised of a wide array of actors with vastly different objectives, what is the impact of prejudicial pre-trial publicity? Only then can we begin to assess the steps to be taken, and by whom.

The authors roundly condemn prosecutors for their public disclosures of information, and the media for reflexively propagating the one-sided message. It is important to remember, however, that the public has a right to learn about crimes that occur and the evidence that supports the charges against those charged with committing these crimes. As a result, the DA faces the delicate task of protecting the rights of the accused to a fair trial while, at the same time, satisfying disclosure obligations (which quite frequently result in the material's public dissemination) and keeping the electorate adequately informed of ongoing criminal proceedings. Nifong is certainly not the only DA to cross the line, but others are far more responsible in their approach. Regardless, pre-trial juror exposure to a pro-prosecution narrative is, to some extent, an intractable feature of our criminal justice system, and one which must be reckoned with.



From a defense advocacy perspective, the strategy of fighting fire with fire (here, matching narrative with narrative) raises a number of potential pitfalls. An aggressive campaign to spread an alternative story risks losing during *voir dire* prospective pro-defense jurors – i.e., jurors who have formed opinions based on exposure to pre-trial publicity generated by a defense attorney.

Moreover, it may not be wise for the defense to publicly commit to any particular version of events, given that inconsistencies during trial will surely be capitalized upon by the prosecution. Many legal commentators believe the wisest defense attorneys do not say a word in public about the circumstances surrounding their client's case. There are many examples of defendants who have been disadvantaged by something they or their attorneys said to the media. In short, there may be a tension between wanting to frame the story before trial and maintaining the flexibility so critical for effective trial advocacy. One other consideration is that, if the defense achieves the prosecution's

level of media discourse, the chances of changing the venue are increased. This may be the goal, but if a venue change is not considered beneficial, defense attorneys should be careful about talking to the media. ASTC has a white paper on changing venues, which can be helpful for determining a proper course of action (or inaction) when a venue may be tainted.

The issue of how the media covers criminal cases – and how this coverage in turn influences jurors - is complex. One aspect of this inquiry not expressly considered by the authors is crime victim demographics. Sensational

crimes, those garnering extensive national media attention, are typically those involving white victims (who are in, in fact, not the most common victims of crime). An excellent illustration of this disconnect is found in the contrasting treatment of domestic homicide victims who are white and professional, as opposed to those who are poor women of color.

Celebrity defendants raise a set of distinct issues of their own. Take, for instance, the prosecution of Kobe Bryant. Here, quite unlike the Duke lacrosse case, the media responded to the state's accusations by skewering the alleged victim. Recall that the national press essentially trashed the accuser – portrayed as a “slut” out to collect a large civil judgment by lying about a rape - until she decided that she was no longer interested in cooperating with the prosecution. In this case, the defense did successfully air its competing narrative and, in the end, Kobe Bryant walked free - but many continued to feel that he had gotten away with something that the ordinary man on the street would not have. Kobe Bryant's legal team offered competing narratives that would germinate doubt in jurors' minds; hence, from the defense perspective, the strategy was a success. As a policy matter, however, we might be wary of a system that incentivizes the deployment of the media in this manner. Here, as in many other trial-related considerations, the chosen end – acquittal or justice – may dictate the best path forward.

## Response to Less Bad News

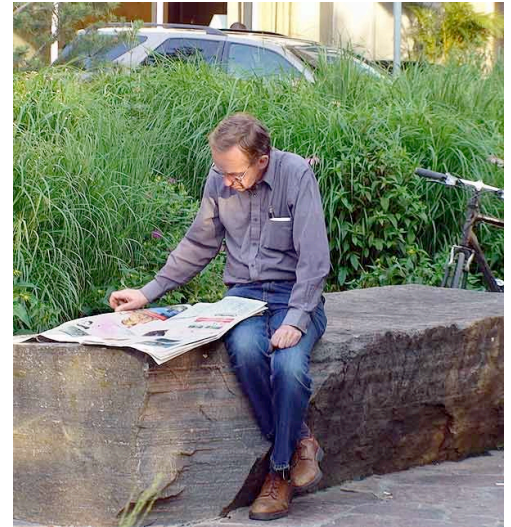
by Sonia Chopra

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The authors' primary contention is that media coverage of crimes results in the dilution of the presumption of innocence, particularly for minority defendants. The idea that negative pretrial publicity is prejudicial to criminal defendants is pretty much irrefutable at this point. Countless empirical studies have demonstrated that exposure to pretrial publicity impacts perceptions of guilt and can influence the way evidence is perceived and utilized. Common sense and one's own experience as a media consumer tell us that media coverage of criminal activity is slanted towards the prosecution. Rarely are stories about criminal defendants accompanied by any assertion that the suspect is innocent, that there are alternative suspects, that exculpatory evidence exists, that police did a sloppy investigation, and so on. In jury selection for criminal cases where there has been pretrial publicity, I have never witnessed a juror mentioning the defendant's possible innocence as part of what they had read, seen or heard about the case. In fact, as Entman and Gross explain, media coverage is usually full of the type of statements deemed prejudicial by the American Bar Association.

For those not familiar with the ABA guidelines defining content with “a substantial likelihood” of prejudice, they include references to 1) the prior criminal record of a suspect or defendant; 2) the character or reputation of a suspect or defendant; 3) the opinion of the lawyer on the guilt of the defendant, the merits of the case or the merits of the evidence in the case; 4) the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement; 5) the performance of any examinations or tests, the accused's refusal or failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; 6) the identity, expected testimony, criminal record or credibility of prospective witnesses; 7) the possibility of a guilty plea; and 8) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.<sup>1</sup> Thinking about cases you have seen in the media, this list of *prejudicial* subjects essentially defines the typical press coverage of most criminal cases. One of the reasons so much of the reporting can contain these prejudicial statements is that the ABA guidelines appear to be rarely enforced for prosecutors, and law enforcement officers of course are not bound by the guidelines at all.

Entman and Gross argue that a more balanced representation of the facts is essential in combating the prejudicial impact of pretrial publicity and while I wholeheartedly agree, I don't realistically see the landscape of crime reporting changing any time in the near future. While the authors acknowledge that the prosecution and law enforcement have incentives to provide slanted coverage, and that journalists may not have the time or inclination to get both sides of a story, they suggest that defense counsel can and should (where feasible) provide a competing narrative. The primary problem with this approach as I see it is one of source credibility.



Statements from law enforcement officers and prosecutors, who are often seen as an extension of law enforcement, are given more credibility and weight than basically anything a defense attorney could provide. We know this in part from the way jurors talk about law enforcement personnel and attorneys in jury selection. In any given criminal case there will be a sizable faction of potential jurors who say that they would find law enforcement officers to be more credible and give their testimony more weight than civilian witnesses. We also routinely ask jurors to rate their opinions of law enforcement, prosecutors, and defense attorneys as being “very positive” “somewhat positive” “somewhat negative” or “very negative.” Guess which occupation most frequently receives a negative reaction? While maybe one or two jurors might have had a negative experience with law enforcement and thus rate law enforcement officers less favorably, prosecutors are almost universally well regarded. Juror comments explaining their ratings usually reference the “honesty” of prosecutors and the “protective” nature of their role. In contrast, a sizeable percentage of potential jurors in any given case will indicate negative opinions of defense attorneys, especially in contrast to their opinion of prosecutors. Typical responses include the idea that defense attorneys will do anything for money and that they represent clients they know are guilty and are therefore unscrupulous. Even when a Michael Nifong comes along to sully the good name of prosecutors, he is seen by most as an exception to the rule and not indicative of the profession as a whole. For example, in a juror questionnaire from September 2007 (a few months after all charges in the Duke case were dropped) one potential juror who wrote “Nifong is a prick” when asked his opinion of prosecutors, still rated his opinion of the profession as “neutral.” What about this juror’s opinion of criminal defense attorneys? “Negative. Never met a defense attorney who would let his/her conscious get in the way of a winning argument.”

Like the defendant who chooses not to take the stand, defense attorneys face a Catch-22. Those who offer “no comment” can be portrayed as having no exculpatory information to provide on the one hand, but those who do choose to comment in the press have their statements discounted as being biased and self-serving. Had the defense attorneys for the Duke lacrosse players spoken out early to counter Nifong’s portrayal of the players as “uncooperative,” many people would have written off the statements as “high paid attorney” spin. Part of the media narrative of the case was that these defendants were wealthy, white men, which plays into the commonly held idea that money is what gets not guilty verdicts, not factual innocence.

What I think is most novel and helpful about Entman and Gross’ article is the discussion of the more generalized pretrial publicity effect, the idea that portrayals of minority defendants in the news negatively affects defendants even in trials that do not receive vast amounts of pretrial publicity. This group of defendants, those who are charged with crimes in trials that are not high profile and do not receive lots of press, who have appointed counsel or public defenders with limited financial resources, are often at the greatest disadvantage, as they don’t have the “remedies” to prejudicial pre-trial publicity afforded defendants in cases with more media coverage.

While it is always important for attorneys to consider the salience of race and ethnicity when representing a defendant who is a racial or ethnic minority, the authors’ suggestion that defense counsel pay attention to

potential jurors' consumption of not only news media, but also crime reality shows such as *Cops* is valuable. Overrepresentation of minority criminal suspects and stereotypical portrayals of crime are not limited to news and reality TV however, so I like to broaden the inquiry and ask how often jurors view other crime-based talk shows and dramatized TV crime shows as well. Someone who is a fan of Nancy Grace is only consuming prosecution media and is most likely learning a script of courtroom drama which is generally biased against criminal defendants. It can also be informative to ask jurors what it is they like about these shows. Jurors who say they like how fast the bad guys get caught, who talk about how realistic the story lines are, and/or who show deference to and respect for law enforcement may be more likely to fall victim to the "Trojan Horse Virus" Entman and Gross mention.

Although I'm skeptical of the chances that courts will in fact adopt the author's suggestion that judges instruct jurors about the potential for unconscious racial bias to factor into their decision making, I certainly agree that would be a step in the right direction. In the interim, defense attorneys should begin getting this idea across to jurors during the jury selection process. Explaining that we all have biases, many of which we are not even conscious of but which can affect the way we judge cases and perceive evidence can be a good introduction to questioning on race. Where allowed, attorneys could inform jurors that part of the reason we may hold stereotypical views has less to do with being "racist" and more to do with what we are exposed to in the media, through our own individual experiences, and our background and upbringing. I agree with the authors that having a discussion about race and the potential for racial bias at least brings the issue to the forefront, and perhaps as a result jurors who serve could have a heightened sense of awareness for the potential for stereotyping to color their judgment.

Perhaps I'm a cynic, but I am not hopeful that education of law enforcement officers, prosecutors, or even journalists will do much to change the nature of crime reporting and media coverage of criminal cases. As the authors mention, prosecutors and law enforcement have little incentive to change the status quo. The problems with sloppy journalism and the pressure to get the story first in this 24 hour news cycle go beyond crime reporting and are instead endemic. At least for mainstream media outlets, mere education about the one-sidedness of headline making news that sells papers and gets viewers is unlikely to change the profession. The best chance defenders have is to take matters into their own hands, calling attention to biased reporting in any given case and making the potential for racial bias salient in the minds of the jury, with the hopes that they will consciously work hard to avoid their unconscious biases.

Finally, although the Duke case is an outlier in many ways, the jury eligible public incorporates messages from these high profile cases into their own schemas of what the criminal justice system is all about. Defense attorneys can use the lessons from Duke to remind potential jurors that the media is not always right, arrests and accusations are not tantamount to guilt, and sometimes even prosecutors break the rules.

## Endnotes

- [1] American Bar Association. American Bar Association: Fair Trial and Free Press (3d ed., 1992)
- [2] Remedies for extensive pretrial publicity include change of venue, extended individual voir dire, additional peremptory challenges, judicial instruction and trial delay. None have proven particularly effective in reducing the negative impact of prejudicial pretrial publicity, but some procedural remedies, such as individual voir dire, could be beneficial to defendants for other reasons, particularly in cases where sensitive issues like race are being discussed.

## Response to:

## Less Bad News: What Defense Advocates Can Learn from the Duke Lacrosse Case

by Andrew M. Sheldon

**Andrew Sheldon, JD, PhD** began trial consulting in 1984 after careers as a lawyer and as a psychotherapist. His involvement in the retrials of 8 civil rights murder trials led to his continued study of racial issues in litigation of all kinds.

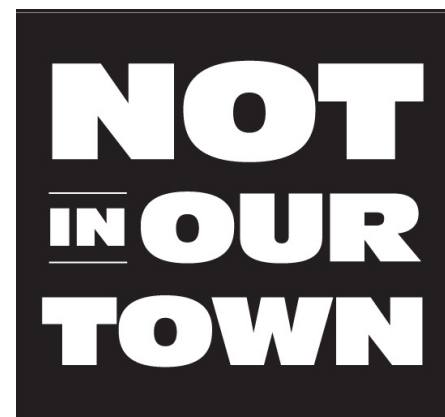
Entman and Gross have proposed remedies for racial bias in juries that are thought-provoking and certainly helpful to those of us who deal with the issue in jury selection. Since I am not a journalist and since I do not advise my lawyer clients about how to impact the community through the media, I am only going to review their suggestions that I as a trial consultant might offer.

I have thought of a way to evaluate their proposals. My evaluative invention is a hypothetical, racist juror named Sauer who is number 13 in a 40 person jury panel. Inventing Sauer gives me a vehicle for evaluating the Entman/Gross suggestions, an instrument, a lens that lets me get a little closer to the realities that I as a jury picker must deal with each week. By this device, I mean no disrespect to the authors. In fact, I am grateful to them for applying their considerable talents to the issues that racism brings into our system.

Sauer is white, just turned 39, is married to Mary Alice who is a teller at the bank, and has four children. Sauer went to school in North Carolina with African American and Hispanic children. He never liked any of it, not that he had to sit next to “them” in school, not that they were even in the same cafeteria line, not that “they” were sitting in the same lunchroom with him. If Sauer had learned one thing, he had learned not to go around spewing his racial hatred in public. He just kept quiet about it. And now Sauer, if he is chosen to be on this jury, may have to judge the guilt or innocence of an African American accused of beating to death a white convenience store clerk.

The authors suggest that the judge explicitly warn Sauer’s jury panel that, based on social science research, it is known that people harbor “unconscious mental associations” that may prejudice them in jury deliberations involving African Americans. Sauer listens to this warning and, while he’s not so sure what “unconscious” means, he guesses that the judge may be talking about him and his feelings about Blacks. He’s heard people warn him not to “be racial” a lot and it’s nothing new to him. He works with Blacks and while he doesn’t have a beer with them, he doesn’t think of himself as prejudiced. He just thinks Blacks are more likely to be violent than Whites. He makes no move to alert the judge to his thoughts.

Entman and Gross suggest that the judge might also assure the jury panel that he or she is not accusing anyone of being a racist. The hope is that speaking openly about racial issues may “moderate the effects of the unconscious, negative associations in decision-making.” Using Sauer the Imaginary Juror as my lens for evaluating this suggestion gives me no solace. Having grown up with people who think and feel like Sauer, having dealt with adults who think and feel like Sauer, I doubt seriously that the judge’s admonitions will cause this juror to raise his hand and responsibly own his inability to be fair in this situation, even though the authors cite research that claims otherwise. One does not, after all, openly own racist views, especially not in open court surrounded by strangers with diverse ethnic, cultural, and religious views. Sauer stopped doing that a long time ago. “No reason to stir people up,” he might say.



Moreover, Sauer may not even connect his racism to his inability to be fair, perhaps the meanest issue of all, because it allows racism to flourish in the face of a judge bearing down on jurors who hedge about their ability to be absolutely fair. (In my firm, we fondly call this judge-led journey “the Magical Mystery Tour” as the juror swears he or she can and will be fair even when its clear the juror is not at all sure he or she can follow through on the promise.) Like Sauer, many people do not seem to associate their own fairness with their biases.

Entman and Gross recommend next that the lawyer representing a minority client use voir dire questions to ferret out viewers of television shows (e.g., *Cops*) that perpetuate negative racial stereotypes. Experience tells me that, short of a private response on a supplemental juror questionnaire, parallel lines of voir dire questioning that appear to be asking about, as in this case, TV-viewing habits have a somewhat greater chance of successfully exposing bias than more direct, frontal strategies. Still, this is a very iffy proposition in light of the common courtroom practice of either avoiding the topic of racism altogether or of truncating voir dire to the point that it is pointless.

The authors next suggest that the law enforcement community (D.A.’s, police) receive training “to understand the social science on unconscious racial stereotyping and decision-making.” While this “remedy” for racism is laudable and while we hope our law enforcement friends are sensitive to the many flavors and varieties of racial bias in their communities, I do not believe it adequately confronts the intractable nature of embedded racism in modern America.

To be candid, while I applaud the authors for making these suggestions for dealing with racial bias in our juries, I have difficulty accepting the suggestions as effective. In a culture like ours where racism is so much a part of the fabric of our daily lives<sup>1</sup> (see, for example, the widespread “belief” that President Obama was not born in the United States), much more is required. Perhaps the most impressive of the suggestions made by these authors is that both sides in a case stop trying the case in the media. I would support that recommendation.

<sup>1</sup> As one index of the existence of embedded racism, the studies that show that Whites overestimate the numbers of African Americans in the population (E.g., citations in Sigelman and Niemi, *Innumeracy About Minority Populations*, JSTOR, Vol. 65, No. 1 (Spring, 2001), pp. 86-94).

## Entman and Gross reply to the trial consultants

We want to thank Sonia Chopra, Andrew Sheldon and Alan Tuerkheimer for their thoughtful comments and challenges.

Although in many ways it is unusual, we use the Duke case to highlight and draw attention to what we see as the larger structural problems causing media coverage of criminal activity to slant toward the prosecution. As Chopra notes, the list of content with a substantial likelihood of prejudice “essentially defines the typical press coverage of most criminal cases.” We see this as particularly detrimental in the case of poor people of color. They are often doubly disadvantaged because the general pattern of crime news leaves many prospective jurors, police and prosecutors predisposed to associate blacks with crime and guilt irrespective of how a minority defendant’s own case is covered (and even if it’s not covered at all).

Chopra notes that “one of the reasons that so much reporting contains these prejudicial statements is that the ABA guidelines appear to be rarely enforced for prosecutors” and do not bind law enforcement. Perhaps the best option to address this is simply for the prosecution to abide by the rules and refrain from trying cases in the media. While there may be some public interest served by reporting on crimes as Tuerkheimer notes, this does



not extend to a need for prosecutors and police to promote their case in the press. Although Nifong is an extreme case, district attorneys and law enforcers have a professional responsibility to protect the rights of the accused when deciding what information to provide as well as how and when to convey it. Journalists should also take seriously the possibility that their coverage may be undermining the rights of the accused as it misinforms the public. Outside the realm of crime, journalists routinely take into account the self-serving career and bureaucratic interests that often shape and distort officials' talking points. The same skepticism should apply in criminal cases, and the same solution: guided by their own professional norms, seek out a balanced story.

Beyond this, we suggest that defense attorneys may need consider, *where possible and appropriate for the individual case*, providing a compelling alternative narrative in those instances where a case reaches high levels of media attention. The commentators correctly point out some of the challenges involved in this. We agree with Tuerkheimer that this strategy “raises a number of potential pitfalls” that must be considered by the defense. Most important, as Tuerkheimer writes, it is not always wise for the defense to commit publicly to any particular version of events. We agree there can be a tension between wanting to frame a story before the trial and maintaining flexibility. However, in high profile cases dominated by the prosecution narrative, not providing any account does lend itself to the interpretation that there is no exculpatory information.



Turkheimer also suggests that when the defense achieves parity with the prosecution in media discourse, this will enhance the chance of changing the venue, which may not be desirable. We find this argument less compelling. From the defense perspective, we suspect that the alternative in a high-profile case – one-sided publicity favoring the prosecution – may be equally problematic in

terms of ensuring an impartial jury pool. If the point is that a two-sided story might generate more total publicity and thus contaminate more jurors, the solution is a reduction in all publicity, rather than letting the prosecution side continue to dominate coverage.

Of course, Chopra rightly notes that the low credibility of defense attorneys poses a problem when they try to engage the media to ensure more balanced coverage. She suggests that defense attorneys face a catch-22; those who say “no comment” appear to have no exculpatory information and those who do speak have their statements discounted as biased. While many write off the defense comments, we suspect others would be more open to the defense narrative if only it is given voice. Furthermore, the low credibility of defense attorneys may be reinforced by media depictions in movies and TV shows that simultaneously reinforce the credibility of law enforcement and the mental association of darker-skinned individuals with crime and guilt. Not much can be done about lawyers' negative reputations in general, though perhaps the defense bar might consider more general public relations efforts as a tactic that could spill over to augment their own credibility.

While we believe that defense attorneys in high profile cases must bear in mind media routines that lead to one-sided coverage, we are ultimately more concerned with the “pretrial publicity” effects yielded by routine media portrayals of minority defendants. The day-in, day-out coverage of crime may be just as likely to taint the jury pool in a more insidious way. Sheldon, using the hypothetical racist juror “Sauer” suggests skepticism about some of the suggestions we offer to lessen the potential deleterious effects of routine crime news. We do not believe that the juror Sauer will suddenly alert the judge that he should be removed from the panel or that he will suddenly be less prejudiced. What the literature shows is that when individuals are made aware, they tend to base decisions less on these unconscious stereotypes. Obviously there is no guarantee, but the idea is getting the notion out into the open. Sheldon's comments do raise important interpersonal communication and deliberative dimensions to our suggestions that we view as positive. If judges explicitly instruct jurors as we propose, it might

discourage Sauer from openly expressing his more racist views during jury deliberation. It could also empower other jurors to argue if Sauer does raise ostensibly non-racial “empirical facts” that do play on racial stereotypes. Perhaps Sheldon fears such warnings might actually boomerang, stiffening the resolve of jurors like Sauer to apply what they sincerely see as non-racial empirical facts (“blacks don’t work as hard as whites”) to their decisions. This would seem to be a question worthy of research.

As the comments suggest, no matter what they do, attorneys cannot eliminate, but only ameliorate, racism and its effects. Chopra notes that messages from the Duke Lacrosse case itself likely informed audiences’ ideas about criminal justice. Defense attorneys can use the case “to remind potential jurors that media is not always right, arrests and accusations are not tantamount to guilt, and sometimes even prosecutors break the rules.” We couldn’t agree more.

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## Beneath the Robes and Behind Closed Doors: Why Supreme Court Justices Behave as Jurors

by Ryan A. Malphurs

[Ryan Malphurs, Ph.D.](#), is an Associate Litigation Consultant for [Tara Trask and Associates](#). Ryan's background in Communication and research at the Supreme Court enables him to offer general trial consulting services as well as assistance in the construction and delivery of appellate arguments.

During a recent visit to the Supreme Court I was fortunate enough to witness Justice Breyer grabbing breakfast from the Court's cafeteria. He moved quietly through the public who largely remained unaware of his presence except for the handful of law students and Court watchers who gawked at his arrival. Justice Breyer smiled politely at the staring faces and patiently waited to prepare his tea and cereal like everyone else. As he left the cafeteria, he passed a large group of men and women excitedly debating the upcoming morning's oral arguments. An overtly gregarious woman stood up and stretched; ignoring others in the cafeteria, she accidentally struck the passing Justice Breyer, spilling her coffee and his tea over the front of his shirt and pants. Clueless of Stephen Breyer's position, she grabbed a napkin and laughing to her friends began to dab at his shirt while apologizing for her carelessness. A consummate gentleman, Justice Breyer told the woman not to worry and quickly left the cafeteria, passing a pale-faced middle-aged man leaning against a column. The woman turned to the pale faced gentleman and half laughing proclaimed "Honey, I feel so bad. I just spilled coffee all over that old man." "No" the man expelled through gritted teeth, "you just spilled coffee all over Justice Breyer." He turned out to be the arguing counsel in the morning's first case.

When aware of Supreme Court justices, the public often reveres them for their esteemed judicial position, and the Supreme Court preserves and emphasizes this reverence. The Court building's semblance to La Madeleine in Paris and The Pantheon along with the Court's depiction of gods and goddesses inspires a sacred feeling in visitors and those with business before the Court. However, beneath their robes and behind the Court's reverence, solemnity and ritual, the justices are most fully human. Justice Breyer's encounter in the cafeteria quite literally displays the collision between justice and citizen, foregrounding their shared human condition; thus it should not prove surprising that shared qualities link justices and citizen jurors. Aside

from their lofty judicial position, Supreme Court justices have often been highly regarded for the legal knowledge they possess to resolve cases. Although not to the same stature, juries, as the foundation of our judicial system, have also been accorded significant discretion in applying laws. Unfortunately though, both Supreme Court justices and citizen jurors fall prey to human behavior that belies an impartial approach to resolving legal issues. Instead of an objective, impartial, and rational process of decision-making, both justices and jurors reflect a process of decision-making that relies on prior cognitive commitments, generative communication, narrowing of choices, and the elimination of competing alternatives, which scholars have labeled "Sensemaking." This article



presents a dominant model of understanding Supreme Court oral arguments, suggests an improved approach to understanding human decision-making, identifies shared commonalities between Supreme Court justices and jurors, and provides practitioners with suggestions for preventing unpredictable sensemaking behavior.<sup>1</sup>

## Oral Arguments and Human Behavior

To explain judicial behavior, political scientists largely rely on fundamental assumptions of human behavior that draw from economic theory which political scientists call the strategic actor model.<sup>2</sup> The strategic actor model has its roots in the rational actor model or rational choice theory, which proposes that humans weigh all possible options, before selecting the best possible solution. Rational choice theory is “arguably the most popular and fastest growing theoretical orientation in contemporary political science,” and also remains firmly planted within legal studies.<sup>3</sup> Over the years, the rational actor model evolved into the strategic actor model which recognizes that a variety of factors may constrain a human’s decision-making process.<sup>4</sup> Among the most prominent scholars of Supreme Court oral arguments, Professor Timothy Johnson believes the strategic actor model best represents the justices’ decision-making because “when making decisions, policy-oriented justices must account for the preferences of their immediate colleagues, the preferences of actors beyond the Court, and institutional norms and rules that might affect the decisions they can make.”<sup>5</sup> Under the strategic actor model, justices “strive to achieve their most preferred policy objectives” by gathering “information about all the policy choices available to them” and oral arguments “provide a time for justices to gather this information by raising questions concerning legal principles . . . courses of action. . . or a justice’s belief about the content of a policy.”<sup>6</sup> For Johnson, oral arguments play the crucial role of informing justices of policy implications by exploring the consequences of various alternatives.<sup>7</sup> Johnson’s conclusions establish the strategic actor as one of the primary models for Supreme Court decision-making.<sup>8</sup>

However, similar to other scholars studying the influence of Supreme Court oral arguments, Johnson’s use of the strategic actor model eschews substantial scholarly research demonstrating that humans do not behave rationally<sup>9</sup> but rather rely on a variety of processes called sensemaking<sup>10</sup> to process information and solve problems.<sup>11</sup> And ironically but perhaps most importantly, Johnson implements the “strategic actor model” to evaluate oral arguments without accounting for the dynamic role communication plays in the environment of oral arguments.<sup>12</sup> Johnson’s oversight results from his reliance on the strategic actor, which only recognizes human communication as a form of information transmission, known as the transmission model.<sup>13</sup> The strategic actor model and other forms based upon “rational” decision-making fail to capture the significance of communication and the dynamic nature of human decision-making, thus overlooking the rich communicative interaction occurring both within the Supreme Court and trial courts.<sup>14</sup>

## Sensemaking

It seems unusual that scholars studying Supreme Court oral arguments or courtroom communication employ decision-making models that overlook the role of communication because of communication’s centrality within the courtroom. A model of decision-making within the field of Communication, Sensemaking offers litigators and researchers a popular model that accounts for the role of communication in the decision-making process.<sup>15</sup> Where the strategic actor model and rational choice theory claim that humans approach solutions to problems in relatively balanced systematic manner, Sensemaking suggests that humans employ a variety of processes to reduce the uncertainty of an environment and information due to conflicting, excessive, ambiguous, or undesirable information. Humans rely on their background and prior experience to process information in a manner that helps them resolve the issue before them. Sensemakers attain resolutions with 1.) prior cognitive commitments that proved successful in past experiences, 2.) communication that generates consideration and evaluation, 3.) narrowing consideration of alternatives through underlying or overt preferences, and 4.) the elimination of competing alternatives that conflict with preferred outcomes. Humans rely on this combination of cognitive and social mechanisms to manage environmental uncertainty, often created by information overload

and multiple paths of resolution, a common situation within the courtroom. Where the strategic actor articulates universal human behavior, Sensemaking subsumes a wide range of human behavior within a specific circumstance, environmental uncertainty, and proposes that in order to understand how humans “make sense” of the world, we should focus on humans’ selective construction of a solution. As a human process, sensemaking, either deliberate or unintentional, emphasizes the way in which communication enables people to frame problems and reach solutions within uncertain situations, proving an ideal model for understanding courtroom communication.<sup>16</sup>

To further connect Sensemaking to the Courtroom, the trial courtroom offers an exceedingly difficult environment for jurors to understand legal issues, mirroring the environmental uncertainty found surrounding sensemakers (unfamiliar terms, confusing legal concepts, proscribed constrained obligations, information management, sustained attention, and desired resolution attainment). Although for separate reasons, Supreme Court justices also face environmental uncertainty through national expectations, state, federal, and international laws, constitutional constraints, competing opinions from briefs, oral arguments, *amicus curiae*, fellow justices, and clerks. Both jurors and justices face a situation without a “right” answer, but rather where reasonable resolutions reside, and where communication in either written or verbal form, proves essential to decision-making. Justices and jurors mirror a substantial number of Sensemaking qualities, but for purposes of brevity this article addresses three primary areas: prior commitments, information presentation, and interpretation.<sup>17</sup>

## Commitments

Commitments provide the primary foundation through which humans make decisions within environmental uncertainty because they provide decision-makers with markers in a directionless landscape. Previous commitments or values will cause individuals to limit potential resolutions to those which appeal to their commitments. Instead of humans weighing and evaluating all options, people “make sense of the things by seeing a world on which they already imposed what they believe.”<sup>18</sup> When presented with a problem, humans rely on these commitments, “to set the boundaries of understanding from which we may determine how to correct errors or flaws.”<sup>19</sup> However, this problem solving method can be unpredictable because its solution follows from our own personal preconceptions, rather than a consideration of potential possibilities. Even more directly related to our preconceptions, we may first determine a solution or explanation to a problem and then construct a narrative to make sense of how a variable error caused the problem. Juries often reach a decision through this process by starting with a verdict, “and then render that outcome sensible by constructing a plausible story.”<sup>20</sup> Any court case, but in particular intellectual property, medical malpractice, product liability, and forensic accounting cases can prove exceedingly difficult for jurors, not only because of the unfamiliar environment and technical nature of the topic, but also due to the shifting burdens of proof, making these cases ideal sites for sensemaking behavior. The Supreme Court hears very few of the above mentioned cases, but they often hear cases with significant national social and governmental repercussions. Citizens, states, governments, and nations may all present their arguments to the justices who must find a path of resolution among the howling voices. The justices, unlike jurors, have developed voting patterns reflective of personally individual legal philosophies. Court watchers often crudely split the bench between liberal and conservative justices, and this division can be useful in anticipating a justices’ vote, but their philosophy likely draws from underlying personal values that shape their interpretation of laws and the constitution. Although espousing judicial impartiality, justices, like jurors, cannot divorce themselves of their prior experience because it provides the foundation through which they make sense of the world and eventually come to a decision in a Supreme Court case.<sup>21</sup>

Because commitments play a prominent role in humans’ process of information filtering and eventual decision-making, litigators must scrutinize jurors’ backgrounds through supplemental juror questionnaires, seat jurors with advantageous commitments, and present their arguments in such a manner to appeal to jurors’ backgrounds. Simple as the process sounds, few attorneys emphasize all three. Trial consultants significant experience with large numbers of jurors can assist counsel in understanding the influence a juror’s commitments

may have on his or her view of the case. Engaging in research that reveals jurors' reliance on personal commitments, trial consultants have often observed mock jurors drawing upon their experiences and value systems to make sense of a complex case. In a recent research project, one mock juror relied on his background as a motorcycle mechanic to explain the difference in technological products by comparing the products to car engines. Using Sensemaking, the juror developed his own experiential analogy to frame the problem in a manner that made sense to him. The juror advanced this analogy because counsel had not provided jurors with a clear analogy from which they could discern differences between the technological products. In this instance, the juror undermined the attorney's arguments with a simple experiential analogy that generated support from other jurors because it provided a framework of understanding that the attorney had not. Jurors' backgrounds and commitments play a clear role in their evaluation of information, but the communication process through a litigators' presentation should foresee sensemaking and attempt to lead jurors to clear paths of resolution.

## Presentation

Commitments clearly influence jurors' understanding of a case; however, litigators must craft their presentations to address jurors' favorable and unfavorable commitments. Top Supreme Court advocates are part entertainer and part advocate, crafting the ability to both maintain the justices' attentions and advance a well crafted argument that speaks to justices' commitments. The Justices, after all, are a tough audience. Playing to justices or jurors, as a performer plays to the audience, does not just involve maintaining attention, but also requires a concern to prevent information overload. Too often litigators direct little attention to their presentation skills not realizing that skillful presentation and explanation of information ensures juror understanding. Successful communication and message retention require eye contact, voice intonation, physical movement in the courtroom (if possible), and visual aids that remind jurors of the primary points within the argument. Trial lawyers should employ communication strategies that reinforce both visual and audio learners. Without providing jurors with dynamic presentations, or orally walking jurors through arguments step by step without a visual checklist, counsel risks empowering jurors to make sense of the case in their own manner, often by reverting to underlying commitments that may jeopardize the case. In one previous mock juror deliberation, where the defense team had not constructed visual checklists for jurors, jurors confused the burden requirements for infringement and invalidity. In this instance, jurors ignored the Court's written instructions and instead tried to recall the verbal distinctions between the categories, arriving at, to that side's detriment, a less than accurate understanding. Although not a fail-safe, a visual checklist would have likely enabled a more accurate recall process. Additionally, litigators should embrace the role of teacher by providing jurors with strategies to employ in deliberations by way of analogies, narrative frame reductions, or damage discussions. Litigators' presentations should be designed to both communicate clear concepts as well as solve the problem for jurors by offering reasonable resolutions to enable a systematic approach to the legal issues,, preventing jurors from enacting sensemaking. A closing argument should provide jurors with a clear path to resolution, and if litigators have practiced messaging within a specific closing, he or she should not be thrown off path by a litany of arguments from the opposition. Losing sight of your message and strategy at closing could result in a disorganized and flustered delivery that causes jurors to grow suspicious of your case at a time when they should be most confident. When jurors enter deliberations they should have a clear understanding of your case and proposed path toward resolution.



## Interpretation

Sensemaking places a distinct emphasis on the communication process within group discussion because group communication provides the landscape where issues and ideas come to life, are rejected, or even ignored, thereby shaping jurors' consideration of potential resolutions. Commitments and presentations play a prominent role in how individuals evaluate information, but group discussion leaders largely control the interpretation of issues and the eventual resolution of the case. An experienced Supreme Court advocate will tailor their arguments to specific justices whom they believe will advance their point in conference. Specific justices also tend to dominate discussions during oral arguments controlling what issues the justices and advocates explore. Like the justices, observing mock jurors deliberate over complex issues also provides a fascinating window into the communicative process and the role of leaders. Because jurors have been confused by difficult or poor attorney presentations, they enter deliberations with a heavy sense of uncertainty, often relying upon their personal commitments or fellow jurors for a more clear understanding of the issues. Generally, the most confident and assertive individual will persuade the group of his or her position, primarily through the confidence they portray in the understanding of the case, which in turn makes this type of leader either the most advantageous or dangerous individual on the jury because of their capability to swing the group. At times it is painful to observe leaders bullying other jurors or gathering a majority of group support and then individually grinding down opposing jurors. Typically, the leader with a handful of other jurors will have oppositional members one by one explain their opposing positions and then the majority begins asserting its barrage of challenges, creating a pressure-ridden environment that causes most jurors to yield. One mock juror serving as the group's leader and foreperson intentionally left out language in the Court's charge when reading aloud for the group and misconstrued other charges to garner group support. In this instance the leader could have singlehandedly subverted the judicial process in an actual deliberation. Litigators must be attuned to the role of leaders, considering both a person's background as well as his or her personality, and ideally should be confident in the leader's support. Gambling on a leader's support can result in a costly mistake. Here again, a skilled trial consultant can be invaluable in assisting counsel with the identification of leaders. Leaders can be young, old, male, and female and relying on conventional stereotypes may lead to trouble in the deliberation room.

Not only do leaders control a group's consideration of issues, but they may also influence the depth at which jurors support a position. Within Sensemaking, group interpretation of issues through deliberations results in the physical act of speaking that in turns generates greater adherence to concepts. In these instances, generative communication literally generates not only ideas, but also adherence to those ideas. The physical act of speaking plays a key role in the sensemaking process, because speech occupies an important role in clarifying, ordering, and crystallizing human thought as humans alter thoughts in accordance with the reactions of others or with the speaker's own commitments and beliefs. Anyone who has put thoughts on paper knows of the often shifting manner in which words and ideas are ordered, rarely does the first draft remain untouched. Famous writers John Updike and Daniel Boorstin have reflected on the importance writing plays in a human's thought process. Updike described writing as a process that "educates the writer as it goes along,"<sup>22</sup> and Boorstin made a similar comment noting that "I write to discover what I believe."<sup>23</sup> These writers' insights reflect the generative discovery process humans often experience when writing. U.S. Circuit Judge Frank Coffin explains that in legal decisions writing reveals "what's wrong with the act of thinking."<sup>24</sup> The process of writing relates directly to the process of speech as humans use the communication process to refine, revise, and structure their thoughts. Like writing, anyone who has practiced the delivery of a public speech may also realize the shifting nature of their speech as they begin to refine, revise, and structure their material. As jurors or justices wade through complexity and struggle with uncertain resolutions, the generative communicative interactions can shape an individual's and

the group's cognitive consideration and subsequent evaluation of a case. Communication either within the Supreme Court or juror deliberation rooms cognitively influences human understanding of a case.

## Conclusion

Shared human qualities link Supreme Court justices and citizen jurors. The behavior of both groups can be observed through communicative interactions in oral arguments or mock deliberations. Both justices and jurors regularly display sensemaking behavior during cases with high levels of uncertain resolutions, but justices and jurors should avoid sensemaking behavior because the process causes humans to overlook potential paths of resolution by “shortcutting” to an individual’s personal preferences and bypassing other reasonable options. Because humans, through sensemaking, impose their beliefs upon the situation rather than exploring the situation to determine reasonable solutions, humans “don’t see through concepts we see with them, and are sometimes blinded by them.”<sup>25</sup> Humans’ commitments and prior experience enable us to understand and process information in a manner that makes sense to us, and yet these maps may also cause us to overlook potential solutions. Although the justices may be indifferent to correcting their behavior, litigators have a variety of techniques that could prevent jurors from enacting sensemaking. Sensemaking’s danger lies in humans’ unpredictable behavior and the more a litigator can quell the sensemaking process the more influence they will hold in the deliberation room. Ironic as it sounds, litigators should ensure that jurors do not make sense of the situation by way of sensemaking, but rather through a careful consideration of issues and solutions that result from an attorney’s clarifying communication.

## Endnotes

<sup>1</sup> The action of sensemaking is a common everyday process and can be distinguished from the formalized conception of the theory of Sensemaking. In an attempt to distinguish between theory and process, I have capitalized Sensemaking when referring to the specific theory, and left sensemaking in lower case when addressing the everyday process.

<sup>2</sup> The strategic actor model varies with each scientist who employs it, reflecting a process of sensemaking rather than rigid inquiry. For other uses of the strategic actor model in judicial inquiry see Lee Epstein and Jack Knight, *The Choice Justices Make* (Washington DC: Congressional Quarterly Press, 1998). William N. Eskridge, “Reneging on History? Playing the Court/Congress/President Civil Rights Game,” *California Law Review* 79 (1991): 613-84. William N. Eskridge, “Overriding the Supreme Court Statutory Interpretation Decisions,” *Yale Law Journal* 101 (1991): 331-417. John Ferejohn and Barry Weingast, “Limitation of Statutes: Strategic Statutory Interpretation,” *Georgetown Law Review* 80 (1992): 565-587. Raphael Gely and Pablo T. Spiller, “A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases,” *Journal of Law, Economics, and Organizations* 6 (1990): 263-300. Forrest Maltzman, James F Spriggs, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: the Collegial Game* (New York: Cambridge UP, 2000).

<sup>3</sup> Paul K. MacDonald, “Useful Fiction or Miracle Maker: the Competing Epistemological Foundations of Rational Choice Theory,” *American Political Science Review* 97.4 (2003): 551.

<sup>4</sup> Other scholars have expanded the strategic actor model to include the “bounded rationality model” “power and politics model,” and the “Garbage Can model.” For a more extensive discussion of connections to the rational actor model see Kathleen M Eisenhardt, “Strategic Decision and All that Jazz,” *Business Strategy Review* 8.3 (1997): 1-3.

<sup>5</sup> Johnson, *Oral Arguments* (2005): 5.

<sup>6</sup> Johnson, *Oral Arguments* (2005): 24.

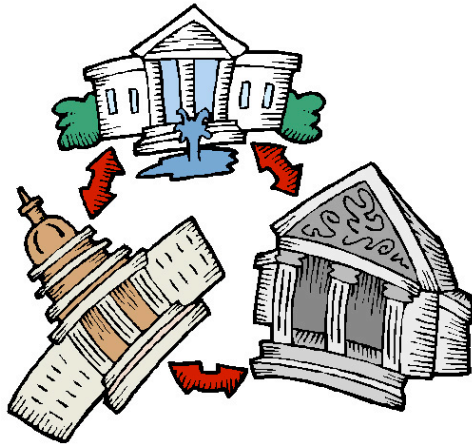


<sup>7</sup> For a more extensive discussion see ch. 2 in Johnson, *Oral Arguments* (2005).

<sup>8</sup> For commentary on the influence of Johnson's study see book reviews by McGuire, Kevin T., "Oral Arguments . . ." *Law and Politics Book Review* 15.2 (2005): 107-109. and Barbara Palmer, "Oral Arguments and Decision Making on the United States Supreme Court" *Justice System Journal* Vol. 26 (2005): 245.

<sup>9</sup> See among others Kahneman, Daniel, Paul Slovic, and Amos Tversky. (Ed) *Judgments Under Certainty: Heuristics and Bias* (Boston: Cambridge UP, 1982). Kahneman, Daniel and Amos Tversky. *Choices, Values, and Frames* (Cambridge: Cambridge UP, 2002).

<sup>10</sup> Briefly, the theory of Sensemaking suggests, in a complex situation where multiple outcomes are possible, humans seek to simplify their decision-making process by eliminating variables which conflict with their personal life experiences.



<sup>11</sup> On the influence and widespread use of Sensemaking see Dennis Gioia and Kumar Chittipeddi, "Sensemaking and Sensegiving in Strategic Change Initiation," *Strategic Management Journal* 12 433-448; Maryl Louis, "Surprise and Sensemaking: What newcomers experience in entering unfamiliar organizational settings," *Administrative Science Quarterly* 25 226-251; Maryl Louis and Robert Sutton, "Switching Cognitive Gears: from habits of mind to active thinking," *Human Relations* 44 55-76; William Starbuck and Frances Milliken, "Executives personal filters: What they notice and how they make sense," *The Executive Effect*. Donald Hambrick (ed). (Greenwich CY: JAI 1998); Karl Weick, *Making Sense of the*

*Organization* (Malden, MA: Blackwell 2001); Karl Weick, *Sensemaking in Organizations* (Thousand Oaks, CA: Sage 1995).

<sup>12</sup> For a discussion of further limitations of the strategic actor model see Segal, Jeffrey and Harold Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. (Cambridge: Cambridge UP, 2002): 312-320.

<sup>13</sup> Johnson fails to consider the rhetorical nature of a justice asking questions or making statements to influence his or her colleagues. He also ignores the tone of justices' statements and questions which may reveal more about a statement's purpose than any other quality. Johnson's study also fails to understand that each case presents unique situations and scenarios. Indeed, the Supreme Court rarely grants certiorari on a topic they have already ruled, and while cases may fall into similar legal categories (death penalty, abortion, freedom of speech, habeas corpus, etc ...) each case often presents unique circumstances that evoke different interactional responses among justices.

<sup>14</sup> Research for this article involved observation of nearly fifty Supreme Court oral arguments and hundreds of observation hours of deliberation groups.

<sup>15</sup> For a list of recent studies see Ruth Blatt, Marlys Christianson, and Kathleen Sutcliffe, “A Sensemaking Lens on Reliability,” *Journal of Organizational Behavior* 27.7 (2006): 491-515. Angelique Du Toit, “Making Sense Through Coaching,” *Journal of Management Development* 26.3 (2007): 282-291. David Henningsen, Mary Lynn Henningsen, and Jennifer Eden, “Examining the Symptoms of Group Think Retrospective Sensemaking,” *Small Group Research* 37.1 (2006): 36-64. Quinetta Roberson, “Justice in Teams: The Activation and Role of Sensemaking in the Emergence of Justice Climates,” *Organizational Behavior and Human Decision Processes* 100.2 (2006): 177-192. Sarah Tracy, Karen Myers, and Scott Clifton, “Cracking Jokes and Crafting Selves: Sensemaking and Identity Management among Human Service Worker,” *Communication Monographs* 73.3 (2006): 491-515. Piers Myers, “Sexed up Intelligence or irresponsible reporting? The interplay of virtual communication and emotion in dispute sensemaking,” *Human Relations* 60.4 (2007): 609-636. Victoria Uren, Simon Shum, and Michelle Bachler, “Sensemaking tools for Understanding Research Literature: Design, Implementation, and User Evaluation,” *Interactional Journal of Human-Computer Studies* 64.5 (2006): 420-445.

<sup>16</sup> Sensemaking, as a theory of decision-making, has been widely employed by scholars across a variety of fields, but Karl Weick’s work extends across the fields of Communication, Psychology, and Business management studies have contributed to the significant diversity by which scholars adopt and use his theory of Sensemaking.

<sup>17</sup> For a lengthy discussion of Sensemaking within Supreme Court oral arguments see Ryan Malphurs, “Making Sense of ‘Bong Hits 4 Jesus’: A Study of Rhetorical Discursive Bias in *Morse v. Frederick*.” *J. ALWD* 7, 2010.

<sup>18</sup> Weick, *Sensemaking in Organizations*, (1995): 15.

<sup>19</sup> Weick, *Making Sense of the Organization*, (2001): 9.

<sup>20</sup> Weick, *Sensemaking in Organizations*, (1995): 11.

<sup>21</sup> This is one reason why Court watchers have raised the issue, with Justice Stevens’ departure, of losing a Protestant justice on the bench. A protestant justice can provide personal insight in a manner similar to Justice Ginsburg informing her male colleagues of a female perspective. See Joan Biskupic, “Ginsburg: Court Needs Another Woman,” *USAToday.com* 10/5/09.

<sup>22</sup> See Remarks from Midland College’s “Distinguished Lecture Series,” <http://www.midlandcollegefoundation.org/news/davidson/updike.php>

<sup>23</sup> See Robert H. Frank. “Students Discover Economics in its Natural State,” [www.NYTimes.com](http://www.NYTimes.com), 9/29/05.

<sup>24</sup> Frank M. Coffin, *The Ways of a Judge: Views from the Federal Appellate Bench*, (New York: Houghton Mifflin, 1980): 57.

<sup>25</sup> Karl Weick and Kathleen Sutcliffe, “Mindfulness and the Quality of Organizational Attention,” *Organization Science* 17.4, 518.

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## Does Jury Size Still Matter? An Open Question<sup>1</sup>

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### ***Historically, Jury Size Mattered***

The right to trial by jury resides deep in the American psyche. It ranks right up there with Mom, apple pie, and the First Amendment. Indeed, a 2006 survey found that more than half of Americans thought the right to jury trials was found in the First Amendment. Of course, the same survey also found that one out of five “agree[d] that the First Amendment grants citizens the right to own and raise pets.”<sup>2</sup> Nevertheless, later the same year, 83% of Americans correctly identified that the “[r]ight to fair and speedy jury trial in criminal cases” was found somewhere in the Constitution and Amendments.<sup>3</sup>

It would likely surprise many Americans to discover that the right to a jury trial does not include a jury of twelve or even a unanimous verdict. Our common law right to a jury trial predates the Magna Carta, which enshrined nearly 800 years ago the right of all free men (yes, men) to judgment by a jury of his peers in criminal cases.<sup>4</sup> This principle was reaffirmed by our Supreme Court in 1898 in the case of *Thompson v. Utah*. The Court wrote,

When Magna Charta [sic] declared that no freeman should be deprived of life, etc., “but by the judgment of his peers or by the law of the land,” it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege “as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.”<sup>5</sup>

As the *Thompson* Court’s quote implies, the belief in the right to trial by jury in criminal cases has moral stature. The Declaration of Independence cited as one of the British Crown’s sins the denial of the right to jury trials.<sup>6</sup> It is a fundamental right of due process which applies to the states under the Fourteenth Amendment.<sup>7</sup>

### ***The Supreme Court Declares Jury Size Does Not Matter***

In 1970, the Supreme Court held in *Williams v. Florida*, that “the 12-man panel is not a necessary ingredient of ‘trial by jury.’”<sup>8</sup> The opinion created a brouhaha that has never fully been settled, even forty years later. The high esteem we hold for the right of the trial by jury likely contributed to this reaction.

The *Williams* Court, however, considered the legal history and determined, because contemporaneous debates and the final versions of the Constitution (and its Amendments) made no specific reference to the number of jurors required, “that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.”<sup>9</sup>

Two eminent Justices dissented from the Court's opinion and its interpretation of history. Justice Harlan castigated the Court for determining that twelve persons "is a historical accident -- even though one that has recurred without interruption since the 14th century—and is in no way essential to the 'purpose of the jury trial'..."<sup>10</sup> He called it a "circumvention of history" entailing "the cavalier disregard of numerous pronouncements of this Court that reflect the understanding of the jury as one of 12 members..."<sup>11</sup> Justice Marshall similarly criticized the Court's departure from "an unbroken line of precedent going back over 70 years."<sup>12</sup>

Many legal scholars also criticized the Court's interpretation. Raoul Berger, a Harvard scholar in American Legal History, said it "strikingly exemplified" the "increasingly free and easy judicial revision of constitutional norms..."<sup>13</sup> The University of Pennsylvania Law Review published a note in which the author stated that the Court was wrong, and therefore *Williams* and its progeny should be overruled and all state and federal courts should return to the twelve-person standard.<sup>14</sup>



Peter W. Sperlich, a Berkeley professor, concurring, opined there were three "casualties of *Williams*: ... history, the American constitutional tradition, and empirical evidence."<sup>15</sup> The latter criticism pertained to the Court's conclusion that the number 12 was, as noted above, "unrelated to the great purposes which gave rise to the jury in the first place."<sup>16</sup> In interpreting the significance of 12 jurors, the Court examined whether the jury's function required 12 people. The Court relied in large part on its own assertions of fact with token reference to empirical evidence.

The Court determined that, historically, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen..." Its role is "to prevent oppression by the Government", specifically, "the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."<sup>17</sup> But, it asserted, that role "is not a function of the particular number" of jurors.<sup>18</sup>

Given the acknowledgment by the U.S. Supreme Court that parties might actually encounter "compliant, biased, or eccentric" judges who fail to rein in "corrupt or overzealous" prosecutors, one might expect greater concern about the effect of reducing jury size. But the Court did somewhat acknowledge its slippery slope, observing that the size "should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community."<sup>19</sup> But, again, it concluded sans evidence that a jury of six could as easily meet these goals as a group of "12--particularly if the requirement of unanimity is retained."<sup>20</sup> The Court then added, "And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size."<sup>21</sup>

Having made these pronouncements, the Court referenced scientific "evidence" in support of its conclusions. The Court addressed the specific criticism that a "12-man jury gives a defendant a greater advantage, since he has more 'chances' of finding a juror who will insist on acquittal and thus prevent conviction." The Court averred that the advantage could tip to the prosecution, explaining,

What few experiments have occurred -- usually in the civil area -- indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.<sup>22</sup>

The Court's opinion struck a nerve in the scientific community, prompting criticism and new research. Hans Zeisel who coauthored *The American Jury* -- a work cited by the Court in *Williams* to support its conclusion<sup>23</sup> -- responded with an article in which he flatly stated that his "findings were quite different" from the Court's interpretation.<sup>24</sup> He further explained why the other studies cited provided "scant evidence by any standards" for the Court's proposition that "no discernible difference" existed between six- and 12-person juries.<sup>25</sup>

Two years after *Williams*, the Court decided that the Constitution permits nonunanimous verdicts in criminal cases.<sup>26</sup> As in *Williams*, *Apodaca v. Oregon* and its companion case, *Johnson v. Louisiana*, overturned hundreds of years of common law and U.S. precedent.<sup>27</sup> In his dissent in *Johnson*, Justice Douglas made that observation and further explained that dispensing with the unanimity requirement diminishes verdict reliability because, just like smaller juries, "nonunanimous juries need not debate and deliberate as fully as must unanimous juries."<sup>28</sup> Permitting a majority decision rather than a unanimous jury decision obviously has the functional effect of reducing jury size. It makes sense, therefore, that the same concerns about jury size apply to the unanimity issue. Therefore, in referencing "jury size" I also include the unanimity issue.

Three years after *Williams*, the Court decided that that six-person civil juries comport with constitutional requirements. In that case, *Colgrove v. Battin*, the court reaffirmed its conclusion in *Williams* and it cited new studies it claimed "provided convincing empirical evidence of the correctness of the *Williams* conclusion."<sup>29</sup>

That assertion compelled Michael J. Saks, whose work has also been cited by the Supreme Court, to pen "Ignorance of Science Is No Excuse," in which he opined, "[t]he quality of...scholarship displayed [by the Supreme Court] would not win a passing grade in a high school psychology class."<sup>30</sup> He criticized the Court for failing to understand "that not all empirical studies are equal.... Studies using poor methods ... can seriously mislead because their findings still may properly be called 'empirical.'" Because of this error, he said, the research cited by the Court did not support its conclusions.<sup>31</sup>



Finally, in 1978, the Court addressed these criticisms. In *Ballew v. Georgia*, the Court had to consider whether the proverbial slippery slope created in *Williams* was too steep. There, the petitioner had been convicted on two misdemeanor counts by a jury of five and he challenged the constitutionality of such a small number.<sup>32</sup> The Court, nominally adopting *Williams*' functional analysis, considered "whether it inhibits the functioning of the jury as an institution to a significant degree."

Despite the *Williams* holding that a jury of six performed its role as well as a larger jury,<sup>33</sup> the Court was confronted with the mounting evidence that small juries do not function like larger juries. The Court admitted that empirical studies "raise significant questions about the wisdom and constitutionality of a reduction below six."<sup>34</sup>

The findings that raised significant questions were:

- (1) smaller juries have less effective group deliberation, so they are more error-prone (in part because jurors exhibit greater reluctance to make important contributions and, as a group, the likelihood increases that they will fail to overcome members' biases);
- (2) smaller juries produce less accurate results and greater variability. In criminal cases, the risk of convicting an innocent person grows;
- (3) as juries become smaller, verdict consistency diminishes, in part because people with minority viewpoints tend to abandon them (again, in criminal cases, this harms the defense);
- (4) minority groups have much reduced chances of being represented in smaller juries; and
- (5) as the Court finally conceded, some scholars (like Zeisel and Saks) exposed "methodological problems tending to mask differences in the operation of smaller and larger juries."<sup>35</sup>

Despite acknowledging "that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members," the Court reaffirmed its decision *Williams*.<sup>36</sup>

As a result of this apparent contradiction, *Ballew* did not dispel the criticism of the *Williams* line of cases.<sup>37</sup> Indeed, the Court's own Justice Powell, tacitly acknowledged that the Court was abandoning its functional equivalence analysis. He conceded that the Court's reasoning in *Williams* made it difficult to justify making a distinction between five and six jurors in *Ballew*, but, he said, "a line has to be drawn somewhere if the substance of jury trial is to be preserved."<sup>38</sup>

### ***The Ongoing Debate Whether Jury Size Still Matters***

Today, controversy over the Court's decisions in *Williams* and progeny persists. Not only do we cherish the institution, but most scientists feel that, under the Court's test, jury size does matter.

Saks continues to vociferously advocate for a return to the 12-person jury.<sup>39</sup> His criticisms stem from the perspectives of both the Court's legal analysis and the empirical data that has been amassed. He argues that if "the functional equivalence test is the proper test, there must be a meaningful burden to convincingly establish that a smaller-sized jury is indeed the functional equivalent of a twelve-person jury."<sup>40</sup> But in finding that a jury of six is the functional equivalent of a jury of 12, yet a jury of five "seriously impair[s] the purpose and functioning of juries in criminal trials 'to a constitutional degree,'" the Court, in his view, "substituted their own naked intuition that a six-person jury was the minimum size of a constitutional jury."<sup>41</sup> Therefore, "no sound basis exists to determine the constitutionally permissible minimum jury size."<sup>42</sup>

He also argues that the empirical evidence fails to support the *Williams* conclusion that a jury of six is as good as a jury of 12.<sup>43</sup>

One of several goals for juries the Court articulated in *Williams* was providing "a fair possibility for obtaining a representative cross-section of the community."<sup>44</sup> But, research demonstrates that small juries are more likely to have no minority representation, regardless of how "minority" is defined.<sup>45</sup> Although the Court has never interpreted the requirement that an impartial jury be drawn from a cross-section of the community to mean every jury must contain representatives of all community groups,<sup>46</sup> research suggests that the absence of minority members does affect the nature, content and outcome of jury deliberations.<sup>47</sup>

Jury size affects the quality of deliberations, which is relevant to the *Williams* goal that juries be “large enough to promote group deliberation.”<sup>48</sup> Smith and Saks state that, although jurors talk more in smaller juries, larger juries allow “more total discussion, more vigorous and contentious discussion, more human resources brought to the discussion, [and] more accurate recall of evidence.”<sup>49</sup>

The *Williams* Court also discussed the ability of jurors with minority views to express them, which is relevant to both the goals. In small groups, it is more difficult for jurors with minority views to express them. It becomes much easier for a person to speak up if they have an ally.<sup>50</sup> In *Williams*, the Court misunderstood this point; it thought “that the critical factor was the ratio of majority to minority members, which would not change merely by cutting the jury size in half.”<sup>51</sup> Jurors holding minority viewpoints will also have greater influence on the majority as their numbers increase.<sup>52</sup>

The *Williams* Court ultimately rested the constitutionality of a smaller jury on its conclusion that a jury’s factfinding reliability “hardly seems likely to be a function of its size.”<sup>53</sup> However, scientists have long argued that larger juries should have more predictable, and therefore, more accurate results.<sup>54</sup> Because a larger jury is more likely to represent the views of the broader community, that has also been considered a measure of a jury’s reliability.<sup>55</sup> In addition, research has demonstrated that larger juries tend to moderate awards, in contrast to smaller juries, which produce more extreme awards.<sup>56</sup>

These same factors come into play when considering unanimity requirements. In *Apodaca*, the Court adopted the *Williams* functional equivalence test. Not surprisingly, the same concerns that attend jury size reduction attend the adoption of majority verdicts. And scholars state that empirical evidence “raise[s] serious questions about the trend toward dispensing with the unanimity requirement.”<sup>57</sup> One of the most disturbing is the concern that nonunanimous verdicts not only shut out minority views about the appropriate verdict, but may actually operate to exclude the views of ethnic and social minorities.<sup>58</sup>

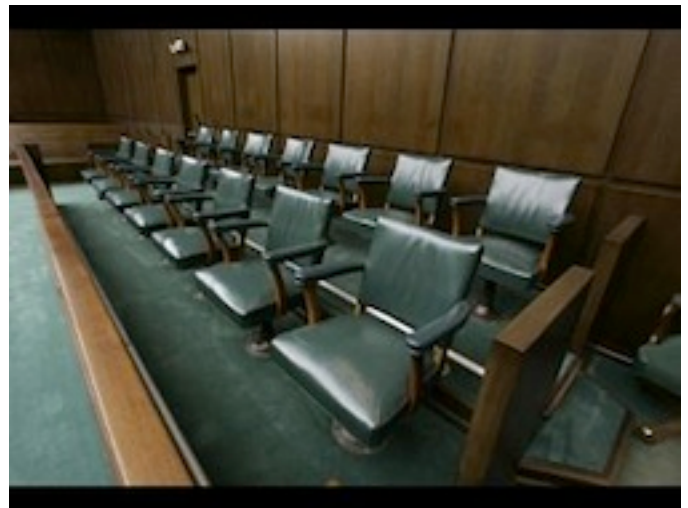
### ***Does Jury Size Still Matter to Trial Lawyers?***

Certainly, some research has contradicted the concerns raised about reducing jury size and allowing majority verdicts. In addition, countervailing concerns about cost and efficiency play a role.<sup>59</sup> The reduction in hung jury rates is one expected effect, although some researchers think that is not likely to yield great benefits because hung juries occur relatively infrequently.<sup>60</sup>

However, trial lawyers—both counsel for plaintiffs and defendants—have greater concern about prevailing, at least in the short term, than about the societal costs of differing jury sizes. Indeed, their advocacy concerns might outweigh any concerns about the constitutionality of the *Williams* line of cases.

Starr and McCormick acknowledged the practitioner’s perspective in advising, “When the attorney is given a choice of jury size, there is no absolute rule to follow.”<sup>61</sup> The composition of each individual jury is relatively uncertain before voir dire begins and, as jurors are eliminated, its complexion changes. It may be difficult to determine whether, in *this* case, jury size matters, particularly when the parties and jurors are homogeneous.

Although the research seems definitive for criminal defense attorneys and possibly attorneys representing clients who are minority members—larger size does matter—does it matter for civil trial lawyers? Does it



matter in cases in which minority status may be less important? Does it matter when bias is largely a matter of pro-defense or pro-plaintiff proclivities? Starr and McCormick observe that the research does not indicate how jury size and pro-plaintiff and pro-defense attitudes interact.<sup>62</sup> How does attorney skill or judge propensity in jury selection affect it? These are complex questions and there is little research that sheds light on them. Thus, we are left with speculation and anecdotal evidence.

Anecdotal evidence, though not empirical, is a start. Previously, I interviewed four attorneys about their preferences and (perhaps predictably) they gave four different responses. So, I welcome your comments and observations.

- Does the 12-person jury still matter to you (or your clients)?
- Does jury size make no difference?
- Do smaller juries confer advantages that you like?
- Do you prefer having nonunanimous verdicts?
- Does your preference differ depending on which party you represent, the venue you're in, or the time allowed for voir dire?
- Do you have strong feelings about the constitutional issues involved?

We want to know: what do you, our readers, think? It's an open question.

## References

<sup>1</sup> Portions of this article are adapted from *Six or Twelve? The History, Science and Practice of the Number in the Box*, 12 *The Nebraska Lawyer Magazine* (July 2009).

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- <sup>17</sup> *Id.*, at 100 (citing *Duncan*, 391 U.S. at 156).
- <sup>18</sup> *Id.* at 100.
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.*
- <sup>21</sup> *Id.* at 100-101 (indicating in a footnote that it was not opining on whether unanimity was constitutionally required) (citations omitted).
- <sup>22</sup> *Id.* at 101-102 (citations omitted).
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- <sup>25</sup> *Id.* at 715 (emphasis added).
- <sup>26</sup> *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972).
- <sup>27</sup> *Johnson* at 382 (J. Douglas dissenting).
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- <sup>29</sup> *Colgrove v. Battin*, 413 U.S. 149, fn. 15 (1973).
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- <sup>31</sup> *Id.* See also, Hans Zeisel and Shari Seidman Diamond, ‘*Convincing Empirical Evidence*’ on the Six Member Jury, 41 U. Chi. L. Rev. 281 (1974).
- <sup>32</sup> *Ballew v. Georgia*, 435 U.S. 223, 227 (1978) (after a 38 min. deliberation).
- <sup>33</sup> *Williams*, 170 U.S. at 353 fn. 28 (The Court wrote, “We have no occasion in this case to determine what minimum number can still constitute a ‘jury,’ but we do not doubt that six is above that minimum.”)
- <sup>34</sup> *Ballew*, 435 U.S. at 232.
- <sup>35</sup> *Id.* at 232-238.
- <sup>36</sup> *Id.* at 239.
- <sup>37</sup> Neither did the Court’s comment a year later, despite holding that a nonunanimous decision in a six-person criminal case was unconstitutional, repeating without disavowing its conclusion in *Williams* that a 12-person jury is no better than a jury of six. *Burch v. Louisiana*, 441 U.S. 130, 135 fn. 7 (1979).

<sup>38</sup> *Ballew*, 435 U.S. at 245-246 (J. Powell dissenting).

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (He also noted that Justice Blackmun, in his *Ballew* opinion, recognized the dearth of evidence supporting functional equivalence.)

<sup>44</sup> *Williams* at 100.

<sup>45</sup> Smith and Saks, *supra n. 40*, at 11, (citing Michael J. Saks and Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 *Law and Human Behavior* No. 5, 451, 457 (1997)).

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<sup>48</sup> *Williams* at 100.

<sup>49</sup> Smith and Saks, *supra n. 40*, at 13.

<sup>50</sup> Nicole L. Waters, *Does Jury Size Matter? A Review of the Literature*, 6 (2004) (citation omitted); Michael J. Saks, *Jury Verdicts: The Role of Group Size and Social Decision Rule*, 17 (1997).

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<sup>52</sup> *Id.* at 13-14.

<sup>53</sup> *Williams* at 100-101.

<sup>54</sup> See, e.g., Irwin A. Horowitz and Kenneth S. Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 *J. of App. Psych.* No. 1, 121, 122 (2002) (citations omitted); Michael J. Saks, *The Smaller the Jury, The Greater the Unpredictability*, 79 *Judicature* 263, 264 (1996) (citations omitted).

<sup>55</sup> Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, LEXSEE 4 DEL. L. REV. 1, 4, 4 *Del. L. Rev.* 1 (2001) (citations omitted).

<sup>56</sup> *Id.*

<sup>57</sup> Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 *N.W.U. L. Rev.* 201, 201 (2006) (referring to civil cases). Hans, *supra*, at 8-10 (reporting on the same concerns as they relate to criminal juries, as well as their extrapolation to civil trials).

<sup>58</sup> Hans, *supra n.55*, at 8.

<sup>59</sup> Waters, *supra n. 50*, at 1-2.

<sup>60</sup> Hans, *supra n.55*, at 10. *Cf.* Saks and Marti, *supra n. 45*, at 456 and Diamond, et al., *supra n. 57*, at 230.

<sup>61</sup> V. Hale Starr and Mark McCormick, *Jury Selection*, §3.06 at 104 (2000)

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# If They Don't Like You They Won't Hear You: An Essay on Persuasive Communication

by Steven E. Perkel

**Steven E. Perkel, DSW, LCSW** is the principal litigation consultant and founder of Trial Strategy-Steven E. Perkel & Associates, LLC, based in Cherry Hill, NJ. He works with members of both the defense and plaintiffs bar in a variety of matters. Steve's expertise in persuasive communication, human behavior in social contexts, graphic arts, strategic planning and qualitative research has helped his clients develop and implement effective litigation strategies. To learn more about Dr. Perkel, visit the [Trial Strategy](#) webpage.

Twenty-three hundred years ago in *Rhetoric*, Aristotle wrote that persuasive speech was dependent on three variables: the speaker, the subject matter, and the listener. More specifically, Aristotle taught us that three key issues impact persuasiveness; the character of the speaker or *Ethos*, the veracity of the argument itself, *Logos*, and the emotional state of the audience or *Pathos*. The principles *Ethos-Logos-Pathos* (which I refer to in this essay as *ELP* which is not to be confused with NLP) provide lawyers with a handy framework for considering persuasive speech and likability.<sup>1</sup> Why persuasion and likability? Very simply, if your audience does not like you they probably will not hear you. If you are not heard it will be virtually impossible to be persuasive and win your case.

Effective application of the *ELP* framework in legal processes suggests that successful lawyers be sincere, credible, and trustworthy (*Ethos*); they must offer arguments that are factually accurate and logical (*Logos*) and finally, effective trial advocates must establish resonant emotional connections with their audiences (*Pathos*). When *ELP* is effectively operationalized, a lawyer is more likely to be perceived as likable by judge and jury.

Character of the Lawyer	<i>Ethos</i>	Lawyer is authentic	} Likeability
Veracity of the Argument	<i>Logos</i>	Facts are credible	
Emotions of Jurors	<i>Pathos</i>	Positive resonance	

The importance of being trustworthy and likable is reinforced by Supreme Court Justice Antonin Scalia when he advises lawyers, “Your objective in every argument... is to show yourself as worthy of trust and affection.”<sup>2</sup> Trust, according to Justice Scalia is won by fairly presenting the facts, honestly characterizing the issues, even those that cut against you and by respecting the intelligence of your audience. I would add that a lawyer who communicates that she respects the importance of the task before jurors enhances her trustworthiness and likability.

On likability Justice Scalia offers the following:



*You show yourself to be likable by some of the actions that inspire trust, ...lack of harsh combativeness... displays of collegial attitudes toward opposing counsel... refusing to take cheap shots... maintaining an unassuming manner ... and perhaps above all, your even tempered good humor.*<sup>3</sup>

Finally, Justice Scalia observes that some people are inherently likable and advises, if you're not — work on it.<sup>4</sup>

## **Ethos: Presentation- of- Self and Likability**

Even though jurors are expected to make decisions based upon the law and the facts presented, their decision-making is influenced by attitudes about specific case issues, observations of the lawyers as they interact, prior experiences, other jurors and emotions. The outcomes of legal processes and decisions as well as likability are affected by a lawyer's presentation-of-self. If a lawyer wants to be seen and treated as a person of positive character, according to dramaturgical theory, she must do more than simply adopt the role of advocate; she must also *play the part*.<sup>5</sup> Playing the part is achieved by dressing appropriately, speaking understandably, arguing honestly and generally behaving in a respectful manner toward jurors, opponents and the court. It is clear that mindfully and ethically managing the presentation-of-self impacts ELP and how a lawyer is perceived in and out of the courtroom.

By now you have figured out that I believe likability is essential to being an effective advocate and I hope you are asking, "How can I use and improve my innate likability to better serve my clients?" The first thing I suggest you do is become comfortable with being in a legal fish bowl where your behavior is visible and fair game to all parties. In legal proceedings, whether you are questioning your expert, observing your opponent cross-examine your client, or listening to the judge explain the law, jurors will watch you like a hawk. This causes anxiety unless you are prepared for it. In addition to being exposed like a goldfish in a glass bowl, jurors will note and evaluate your appearance. They will observe your nonverbal behavior, often giving it more credence than what you say. Your audience will note whether or not you are organized and knowledgeable about all of the facts. Jurors, judges and arbitrators will listen carefully to your choice of words when you speak. Confusing language and complex explanations that are perceived to distract or deceive will alienate your audience. If you are rude, arrogant or sarcastic your audience will be "turned off". With this information in mind how can you ingratiate yourself with your audience and ethically enhance your likability? Recent research helps us answer this question.

Stanley Brodsky and his colleagues identify the following list of verbal and nonverbal factors as being associated with high likability:<sup>6</sup>

- a pleasant, smiling facial expression
- use of "we" or "us" when referring to groups
- demonstration of a less controlling attitude
- physical attractiveness
- use of deferential speech and considerate disagreement (as opposed to aggressive, defiant contradiction)
- low degree of arrogance exhibited in verbal responses (such as acknowledging potential for error)
- use of informal speech (such as referring to an individual by name and use of less technical jargon)
- direct eye contact
- truthfulness (suspicion of lying was negatively associated with likeability)

While this research addresses likability and juror's judgments about the credibility of expert witnesses, I would argue that the same variables have an impact on a lawyer's likability quotient.

Additionally, the social psychological literature provides some important research-based clues on how you can maximize your likability. First, understand the halo effect of presenting yourself in an attractive way. If you have to be in the legal goldfish bowl you better be the most attractive goldfish around. It seems that people who are seen as attractive are also seen as being more talented, kind and intelligent. Another research finding you can favorably apply is letting adversaries, jurors, witnesses, courtroom staff and judges know that you like and/or respect them. If you do this the research indicates that they are likely to reciprocate and view you as worthy of being liked and/or respected.<sup>7</sup> So dress professionally, say hello, and smile - you will enhance your likability and the possibility of winning your case.

Generally speaking, according to social psychological research, people like people who are seen as being similar to them; this rule applies even to jurors and judges. Using the persuasive power of similarity during litigation can be helpful, especially when you view it broadly. For example, *mirroring* is a form of maximizing similarities that can be learned and effectively applied in a variety of matters.<sup>8</sup> Finally, having repeated contact over time can enhance likability because your audience has an opportunity to see you behave correctly and consistently. This is also when playing by the Golden Rule can enhance likability and the possibilities of winning.

### **Ethos: Person-Based Persuasion**

- Know how you want your audience to perceive you
- Behave in ways that are consistent with how you wish to be perceived
- Use understandable, powerful language to serve your client
- Listen carefully and respectfully
- Be polite to jurors, judges, witnesses and opponents
- Use the Golden Rule as your gold standard
- Remember that being persuasive and likable has less to do with your intent than your behavior
- Never lose sight of the fact that jurors' understandings, knowledge and interpretations of a case are ever evolving
- Stay alert for clues that help you infer what they heard rather than assuming they got what you intended for them to get

### **Logos: Logical Persuasion and Credibility**

We have explored *Ethos*, or person-based persuasion and likability. Next we turn our attention to *Logos*, the logic-driven element of the ELP framework that relies on rational processes to persuade. An argument that is logically sound and consistent with the law is compelling; it enhances both credibility and likability. There are several ways to build persuasive arguments that are logical and consistent with the law. Start with the facts, identifying and explaining them clearly and using natural language. Avoid jargon whenever possible. If both sides have stipulated to facts or findings, reference or frame them as examples of agreement and logically use them as well as you can to demonstrate the merits of your position.

If your argument is built on definitions, rules or standards describe what they are, where they come from and why they are important. Be certain to tell the jury how these definitions, rules or standards relate to your client's position. Define all terms as simply as you can without eroding meaning. If your success requires jurors to understand the features of a device, the safety procedures used by your client, the onset and progress of a disease, an error of commission or omission or a violation of an agreement, present yourself in the role of teacher-advocate. This will enable you to take persuasive advantage of a "teaching moment".

Consider using analytic demonstratives but do not rely upon slide shows to replace your conversation with judge or jury. At best demonstratives and electronic media should enhance your capacity to communicate and bolster your relationship with your audience.<sup>9</sup>

If you are relying upon expert testimony to persuade make sure the trial testimony is consistent with the deposition transcript. An expert whose testimony at trial is different than his deposition testimony always is a problem. Similarly, an expert who offers a definitive opinion in an equivocal manner is sending jurors a mixed message. You do not want that to happen! It is essential that your expert's behavior and testimony are behaviorally congruent.

All witnesses and clients need to be supported prior to, during and after testimony. This does not mean coaching them about what to say or how to say it. The best thing you can do is tell clients and witnesses, "Tell the truth. Tell the facts as you know them." In all likelihood they will still be nervous about testifying but when asked by

opposing counsel about pre-trial preparation they can simply say, “Yes, I met with my attorney. She told me to tell the truth”.

Helping witnesses who are strangers to the courtroom adapt to the environment and its unique atmosphere and rituals is always beneficial. Teach witnesses what they can expect to happen when they testify and help them develop a reasonable level of comfort as they anticipate their upcoming appearance. Here is a rule that I have never seen fail... reduce ambiguity and anxiety will also be reduced. By the way this same rule applies to your preparation for trial. If you anticipate various scenarios and plan how to manage them you will be better prepared and will feel less anxious.

The information that a jury is asked to absorb and understand is often complex. The courtroom and its procedures are unfamiliar and the stakes are high for jurors who want to do the right thing, as well as for plaintiffs and defendants. Likable lawyers who help jurors do their jobs while strenuously but logically representing clients have a decided competitive advantage.

#### **Logos: Where Logic and Persuasion Join**

- State and describe the facts confidently to enhance credibility
- Make logical arguments based on the facts
- Affirm the importance of a jury’s task to help establish rapport
- Establish and maintain connections with jurors
- Be prepared, organized, alert and civil
- Remember that likability, while important, compliments logic but never replaces it

Sincerity, likability and credibility start with first impressions. This means maintaining a professional appearance, speaking appropriately, and being unfailingly honest and courteous from the “get-go”. When you demonstrate empathy for the jury’s important job, followed by a logical, fact-based case presentation you establish the foundation for building Pathos: emotional resonance with judge and jury.

#### **Pathos: Emotional Persuasion and Resonance**

Pathos is ethical persuasive communication designed to activate jurors’ emotions. In the ELP framework you can use an effective appeal to Pathos to help jurors identify with the facts, themes, behaviors and outcomes that support your case. Jurors’ emotions are often aroused by a rhetorical device known as a “hook”. An effective hook captures jurors’ interest and causes them to consider things from your viewpoint. But the power of an effective emotional hook will be limited if you do not establish resonance between yourself and jurors. Resonance may be established through the use of storytelling, easily understood demonstratives, good witnesses, respectful but assertive cross-examination and compelling statements of facts. To capture the imagination and good will of your audience, step into their shoes and tailor your presentation so that it resonates with them.

#### **Emotional Intelligence and Resonance**

Good lawyers, like good leaders can hone their emotional intelligence (EI) to facilitate resonant interactions between themselves, judges and jurors. Space does not allow for a comprehensive discussion of EI models and skills in this essay. However, I have taken the major elements of Daniel Goleman’s EI model and modified them to illustrate their heuristic potential for lawyers. Developing the skills related to each element can help you effectively manage professional relationships, courtroom behavior, persuasive communication, and changing circumstances throughout the course of litigation.

#### **Emotional Intelligence and Persuasion<sup>10</sup>**

1. Self-awareness – the ability to know your own emotions, recognize their impact and maximize their value as decision-making guides throughout the litigation process.
2. Self-management – monitoring and controlling your emotions while maintaining the capacity to adapt to changing circumstances.

3. Social awareness – the ability to sense, understand, and effectively react to others' emotions, especially clients, adversaries and jurors.
4. Relationship management– the ability to inspire, influence, and communicate with your audience so as to establish resonance.

### The Likability Formula

The additive impact of combining *Ethos, Logos and Pathos* as described in the ELP framework is high likability. Lawyers who are likable have resonant rather than dissonant relationships; they understand the value of maximizing their emotional intelligence and generally are described as being sincere and credible.



- Likable lawyers are civil to others.
- 
- Likable lawyers are assertive advocates, not bullies.
- 
- Likable lawyers convey empathy.
- 
- Likable lawyers are friendly.
- 
- Likable lawyers balance competence and humility.
- 
- Likable lawyers are excellent self-managers.

Are you a likable lawyer?

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## May 2010 Favorite Things!

Every issue we include a Favorite Thing or two and this issue you know we had to have an iPad! Two favorite things: one free and one not (but very cool nonetheless).

**Daniel Wolfe, J.D., Ph.D.**, a past president and board member of ASTC, is the Director of Jury Consulting for [Kroll Ontrack/TrialGraphix](#), a nationwide litigation consulting firm.

One of my new favorite things is to test my ability at juror profiling with a clever and creative [website](#). The website gives a great succinct history of the *voir dire* process in the United States and even gives the reader some of the guidelines and rules to follow when playing this game. Albeit elementary for some, it is a great tool to use for training beginners and to keep your edge if you consider yourself a pro. Give it a try . . . you might surprise yourself!

**Jill D. Schmid, Ph.D.**, a consultant with [Tsongas Litigation Consulting](#), specializes in the creation and implementation of effective communication strategies, and the design and analysis of research for complex, civil litigation nationwide.

My new favorite thing (along with thousands of others) is my iPad. It means I don't have to haul my laptop around with me to read case documents either on the plane or off; it means the graphics I'm reviewing are still in color; it means I can put together presentations on the go; it means I can download books, magazines, or newspapers with one simple command; and it means I look exceptionally high-tech, gadgety-cool to both my 11-year-old son and fellow travelers.



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## Courtroom Nostalgia: The Rural American Courthouse

Membership in the American Society of Trial Consultants gives access to a collegial email list where members are able to ask questions and share experiences. This week a discussion began on rural courthouses without metal detectors even in this post 9-11 era. As members began to share their experiences in these courtrooms time forgot, it seemed a good opportunity for us to tell these stories to you as well.

Return the favor! If your travels have taken you to rural courthouses time has forgotten—share them with us in the comments section on the website. It's a departure for The Jury Expert to swap stories—but we thought these were good stories to swap.

**Doug Keene**, [Keene Trial Consulting](#)

This week I had a special, nostalgic experience. I drove northeast from Austin, into the farming country that covers most of the east-central part of Texas, through counties where farm animals greatly outnumber people. At the end of the drive I pulled up to a parking space in the town square, walked 50 feet up a sidewalk, and entered a courthouse built in 1892. I walked up the stairs and entered a courtroom that truly could have served as the movie set for "To Kill a Mockingbird". And I did it without going through a metal detector.



A lot of city folks don't realize that there are actually a good number of courthouses that don't have any security other than a bailiff that frankly looks like a Wal-Mart greeter. I thought it would be sort of interesting to see how many of us practice in venues where they employ the same security that they used in 1970. This week it was Milam County, Texas (Cameron), but not long ago it was Fort Bend County (Richmond).

Where in the heartland have you gone without passing through a metal detector?

**Zoe Oakleaf**, [Opinion Research Associates, Inc.](#)

I AM NOT MAKING THIS UP.

In 2006 I had some press releases to give to journalists at the Louisiana State Capitol in Baton Rouge. (We had done a poll showing support for making the state smoke free.) I entered through the ground floor of the capitol building and never went through a metal detector.

Remember this is THE SAME BUILDING where Governor Huey Long was assassinated in the 1930s. The bullet holes are still in the wall.

**Dan Dugan, [Trial Science, Inc.](#)**

Minden, Nevada. July, 2009. They have a metal detector and one officer to staff it, but when I returned from lunch during a jury selection day, I was in the parking lot getting my computer in its case to take in. I saw three men in rather ragged clothing taking uncased rifles out of their trunk. They walk over to another car where three more men in similar garb get out and get more rifles out of their trunk. I stay in my car. The six gunmen start walking around to the side of the courthouse. With a bigger than HUGE lump in my throat I jump out of my car and make a beeline for the front door, waving at the lone security officer. I tell him my observation between gasps for air. He calmly responds, "we have the county and regional firing range in the basement. Those were DEA agents coming in for their shooting certifications." So, for the rest of the afternoon, I felt my feet burning on the floor, hoping none of the agents pointed one of those guns up toward their ceiling/my floor.

**David B. Graeven, [Trial Behavior Consulting](#)**

In a capital case in Southern Ohio I was involved in responding to a transfer of venue motion involving the killing of a police officer. This was the one time I have been retained to oppose transfer. While the hearing on the motion was going, on I was told to remain in the hallway. There was only one courtroom and it was mid-August, no air conditioning. As the day went on, the family of the defendant kept going in and out of the courthouse to smoke and, although there was a metal detector, the check in procedures became more lax. The women would pass their purses outside the metal detector.

I stood on the bench to see what they were doing outside and saw the five family members gathered around their truck and they saw me watching them. They didn't seem happy and gave me the evil eye. There was no way out of the hallway. It seemed suspicious to me. I became more concerned and told the bailiff to check the bags. In hindsight I do not regret that decision.

The next week the defendant escaped from the County Jail ( the jail yard was a cyclone fence with barbed wire) and it was believed his family members assisted. He joined the list of America's Most Wanted and was featured in that show. He was eventually caught living in the woods, pled guilty and was given a life sentence.

**Tara Trask, [Tara Trask and Associates](#)**

Burleson County, TX. Beautiful courthouse in the center of town the way many of those old courthouses are situated. No metal detector--many doors and you could come in through any one you chose. Interestingly, the court reporter is married to the bailiff and they ride to work together every day. This courthouse used to be like the one Doug describes....something out of *Inherit the Wind* or *To Kill a Mockingbird*, but alas someone decided to remodel the inside in the seventies (complete with wood paneling over some of the upstairs windows), and the interior is the worse for it. The staff said it does help keep it cool since they put air conditioning in.



**Tara Trask, [Tara Trask and Associates](#)**

I should note that my own home courthouse of Marin County California does not have metal detectors. Although Marin is largely protected open space, it can hardly be considered rural, both considering its population (250,000) and its close proximity to San Francisco (a few miles). It's particularly interesting that Marin County's courthouse does not have metal detectors given its history. It was designed by Frank Lloyd Wright and was a partial inspiration for Lucas's Star Wars locations. More importantly, in 1970, the courthouse was the scene of an attack by African American political activists led by Jonathan Jackson, brother of Black Panther leader George Jackson. They demanded the release of the "Soledad Brothers". Multiple people, including presiding Judge Haley were taken hostage. During the escape, four people, including Johnson and Haley were killed. It is my understanding that the only other judge to be killed in a courthouse was the shooting in Atlanta in 2005. I've always thought it strange that the Marin Courthouse, of all the courthouses in America, has no metal detectors.

**Sharon Lundgren, [Lundgren Trial Consulting](#)**

This is on the opposite side of the spectrum - the Federal Courthouse in Texarkana has very good security and a metal detector. But it is an interesting courthouse because the State Line runs right up the center of the building, so you chose whether to go through the door on the Texas side or the Arkansas side. It also has a post office on the Texas side of the building and another on the Arkansas side.

The security was rather good and somewhat intimidating. The Federal agents look you directly in the eye and ask you exactly where you are going, and why (perhaps because folks wanting to go up to the Arkansas courtrooms and

Texas courtrooms go in the wrong door). Once you are upstairs, however, you simply walk across the hall to the other state's courtrooms. So we went up the elevator in Texas and came down the elevator in Arkansas. (I have a photo of the building with the state line if anyone is interested).

**Katherine James, [Act of Communication](#)**

I believe I must have worked on THE case that made metal detectors a common sight in Texas courthouses today. It was the summer of 1995 in Bay City, Texas. A civil case that took 10 months to try - so you can imagine that every day pretty much was a slow news day at the courthouse. Yet there was enough money on the line -- 3 billion dollars -- to warrant the press keeping tabs on what was going on. No news for the reporters day after day after day -- until the day that the bailiff dropped his gun in the courtroom. BAM! WHAM!

No one was hurt - but the bullets did ricochet around. News Flash! At last there was something to report! When the AP press service picked up the story and it was simply EVERYWHERE within hours, the judge took the gun away from the bailiff. The poor guy (who never DID figure out who I was and what I did in the trial) was quite chagrined. I'm not saying he was the brightest bulb on the tree, but he did take pride in that badge, uniform and weapon. I don't know if he ever got it back. If he did, I can definitely see the reason to make sure that he couldn't sneak it back into the Courthouse.

But I couldn't help but notice that after that there were metal detectors all over the State of Texas. I'M JUST SAYIN'.

[Lucy M. Keele](#), Keele Litigation Support Services, Inc.



Tuskegee, Alabama. Old, red brick courthouse facing town square. Law office was on another side of the same square. We are talking rural! HUGE case that occasioned the judge to remark that "this is the case of a lifetime for me". Out of town reporters. I could almost see Gregory Peck.

Well, as many cases do, it settled during jury selection, and the judge was so disappointed because he had already called relatives in San Francisco to alert them to "watch the news". He came to the hotel the following morning to personally say goodbye to all attorneys and consultants. It was really quite charming.

If these stories from ASTC-member consultants bring to mind tales of your own—share them with us in the Comment box on the website.

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## Editor's Note

Welcome to the May 2010 issue of [The Jury Expert](#)! It's spring (although in Texas it definitely feels like summer)! This issue we have reptiles in the courtroom (and in a departure from tradition, we have four trial lawyers responding to the article rather than trial consultants); a *Batson* update; a piece on juror intimidation inside the jury deliberation room; an article from two journalists on pre-trial publicity and what defense advocates can learn from the Duke lacrosse case (with responses from three trial consultants); a piece using sense-making theory to discuss how Supreme Court Justices behave like jurors; that age-old question of whether size matters when it comes to juries; an essay on persuasive communication and attorney likability; and finally--a trip across the country (and, kind of, through time) as consultants tell stories about rural courthouses time forgot (and stories about a few other things too).

Of course, we also have a couple of Favorite Things and want to remind you about the upcoming [ASTC conference](#) in beautiful Minneapolis, Minnesota. The theme this year is '[Perfecting Your Game](#)' and it's always a good time for that.

This is the first issue in which we have benefitted from visual graphics experts in pulling together the issue. Special thanks to Jason Barnes ([Barnes & Roberts](#)), Ted Brooks ([Litigation-Tech](#)) and Nate Hatch ([Resonant Legal Media](#)). Click anywhere in this issue of [The Jury Expert](#) for challenging, educative and fun reading for Spring 2010. You'll see us again in July and 24/7 on-line. Read us. Tell your friends and colleagues.

[Rita R. Handrich, Ph.D., Editor](#)

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