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NOTE FROM THE EDITOR

Sold Out Flights, Ice Cream, Arbitrators, and Savoring the Work.

As spring moves toward the heat of summer we hope you can take The Jury Expert with you wherever you may go—either reading us online or downloading our pdf file of the entire issue. This issue is a good depiction of the variety in thought, research and advocacy that we bring you in The Jury Expert. Whether it is helping a defendant present more effectively, addressing pretrial publicity, preparing your witness to not fall for that old trick by the opposing attorney, considering the research literature on the female expert witness, thinking about whether PowerPoint is really all that horrible and how to make it more effective, educating yourself on the polygraph, or being aware of the power of moral outrage—you can find it all in this issue of The Jury Expert.

The last few flights I've been on, heading for projects across the country, have been sold out on every leg. While it makes it a little more cramped to work on the flight, it seems to be an indicator of an uptick in business travel that is reflected in many of our calendars. I've been working in this area since 2000 and I still find myself curious, stimulated and intrigued by how seemingly straightforward case facts often are interpreted differently depending on who hears them. It makes for challenging and enjoyable work. I never stop learning.

For the same reason, I enjoy working on The Jury Expert. Academic researchers are busily conducting research with direct relevance to litigation advocacy. My trial consulting colleagues (many of whom have been at this much longer than I) are busily working and learning and thinking and writing practice-oriented articles for us that are relevant and useful. I see this publication as a place where people who don't know each other can come together and share their thoughts and findings in the same virtual space and together, we create a body of knowledge that is current, provocative, and directly relevant to practice.

We just finished a mock arbitration project and I was struck by not only how smart the arbitrators were, but also by how clearly they enjoyed meeting their colleagues rather than working alone as is their typical experience. They ate dinner together. They went for ice cream together. They shared experiences and truly seemed to enjoy each other's company.

That is exactly how I think about The Jury Expert in my head. Many of us work alone. While the work is tremendously challenging, interesting, stimulating and always changing—it can also be lonely. Think of us as a virtual workgroup. Read what we think and write. You can email us. You can comment on our website. You can even eat ice cream while you read. It isn't quite the same as being in the same room but then again, no one will judge you if you have a second helping.

As always, if there are things you would like to read about, let me know! We'll do our best to cover it. See you in the height of summer heat! Our next issue is in August, 2014.

[Rita R. Handrich, PhD](#)
Editor, [The Jury Expert](#)

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Moving From Hapless to Hapful with the Problem Defendant

by *Bronwen Lichtenstein, PhD. and Stanley L. Brodsky, Ph.D.*



Trial consultants and most attorneys are often perceived to be the agents of defendants who are wealthy and able to afford their services. A common accusation is that most trial consultants, and the large law firms that specialize in litigation work, promote the adversarial success of people and organizations already in positions of power and influence. Still, there are many pro bono efforts of trial consultants and law firms, as well as efforts of public defenders and court-appointed counsel, to aid individuals who may fairly be considered lower class in a country that avidly avoids class labels.

The Emma Lazarus poem engraved at the base of Statue of Liberty invites the tired, the poor, the huddled masses, and the wretched to the nation's shores. With much less grace, the tired, poor, and wretched of our society often make their way to the offices of attorneys who seek to defend them in the face of allegations for offenses that are themselves the products of discrimination, undeniable societal schisms, and living conditions and subcultures that poison and stigmatize. We have come to think of these defendants as hapless and unfortunate recipients of social injustice. The broad scope of social injustice is difficult to change. However,

the hapless defendants who become litigants offer an opportunity to make a difference, albeit on a short-term basis with a clientele that poses substantial challenges.

We start with the undeniable fact that many aspects of the U.S. court system have enormous rolling momentum that keeps such hapless defendants uninformed, unprepared, and, for the most part, unsuccessful in their own defense. These defendants are sometimes seen as doomed when defended by public defenders with oppressively heavy caseloads or by court appointed attorneys who have little time to work with them. This article is about the need for quick and effective transformations in representation and interactions so that such defendants have a modestly improved chance of success at their own trials.

Before we move into solutions, some major impediments to success must be noted. Hapless defendants are often irresponsible, difficult to deal with, and even infuriating. That is, they may not show up for appointments as scheduled and often make excuses for their absence. They can appear, when they finally do appear, in dirty clothes, unkempt hair, and they might have poor hygiene. They often do not listen well; in fact, a discussion of legal issues often runs into fatalism, pessimism, or a sense of being distracted, bewildered, or uninterested in what is being said. Information about plea options rarely gets into any nuanced issues, if such attorney-client discussions get into many issues at all. These clients are often insistent about simple and palpably improbable alibis.

Hapless defendants are instantly recognizable by their speech, appearance, gestures, and role-taking. There is the defendant who glares stone-faced at the judge or jury, or who has a poor attitude that serves to alienate everyone. These defendants might ramble, have trouble forming coherent sentences, or they can come across as angry, petulant, or sly. They can look so odd or socially different from other courtroom actors that they fail to elicit sympathy from triers of fact for supposedly objective evaluations of guilt or innocence. In a recent case that we observed in District Court, a house painter with disheveled hair arrived late in torn and spattered t-shirt and overalls, after which the judge curtly adjourned the proceedings and sent him home to clean up. In another case, a young man played up to the crowd by giggling, gesturing, and acting as if it were all a joke. The judge took a dim view of this behavior as well and promptly denied bail and sent him to jail.

Rather than a halo effect, as when an attractive defendant receives a better verdict or shorter sentence because of good looks, charm, and nice manners, the hapless defendant has a horns effect, with measurable negative effects on verdicts and sentencing. In a study of mock juror attitudes, Taylor (2008) found that unattractive defendants drew the short straw compared to more attractive ones, who were less likely to be convicted and more likely to receive shorter sentences. There were racial overtones as well; while Black and White mock defendants were treated equally in terms of the verdict, African-Americans were given longer sentences if they were found guilty. While the attractiveness-leniency bias is well established in such cases, in our recommendations we suggest possible ways in which to counter this unattractiveness effect. Still, the literature is sparse with respect to misbehavior, poor clothing choices, physical differences, or behavioral oddities. The results of the Taylor study suggest that personal or racial biases intensify in the presence of a defendant's personal flaws, but research is needed to investigate the juridical effect of being hapless along with other factors such as race and

social class.

Searcy, Duck & Blanck (2012) state that jurors' hackles are raised when norms of proper demeanor are violated, and evaluations of guilt or innocence will be made accordingly. In terms of self-presentation, Milford (2001, p. 4) wrote "We must devote some of the same care that we put into presenting the law into presenting ourselves." The courtroom is organized into high status and low status people, so it is not surprising that misunderstandings abound, and that unkempt appearance and unpolished behavior, which includes lack of deference to authority, is judged poorly. As a rule, low status defendants will be judged more harshly than high status ones, simply because social power resides in recognizing and acting upon the rules of courtroom etiquette in order to secure the best outcome. Defendants who do not follow the rule "wear to court what you wear to church" jeopardize their case. If they slouch, sneer, or look like a loser, they are more likely to be found guilty as charged.

Before we move to propose approaches with the hapless defendant, we need to acknowledge that class differences and lifelong marginalization from the values of mainstream society can make it tough for people who have little familiarity with or disdain for formal legal proceedings. These deep-seated difficulties and problems are all the more reason to make concerted efforts with such defendants so that justice can be served. With this introduction completed, we now address possible strategies through a series of simple transformations that could be marshaled for use in the courtroom.

There are five working assumptions that underlie these strategies:

1. Nobody can make substantial changes to the fundamental ways in which defendants are hapless. Interventions can only smooth out some rough edges, give pointers for avoiding the obvious faux pas, and outline straightforward steps for putting the best foot forward.
2. The changes that can be made will be brief and transient. The immediate and only goal is to improve the defendants' hearing or trial prospects, not to transform them permanently into socially acceptable, more mannerly people.
3. The best pay-offs require over-rehearsing a narrow range of behavioral self-presentation in court appearances. Three "do's" and three "don'ts" are useful in this regard: Do brush your hair, do brush your teeth, and do be truthful. Similarly, don't be a smart ass, don't look or act angry, and don't be offhand or disrespectful.
4. Many of our judgments are subject to a pervasive attractiveness bias. We will discuss ways to redress this unattractiveness-punitiveness bias, including how to have ready access to clothing that is suitable for the courtroom. In the same sense, one needs to obtain access to grooming allies, such as volunteer or low cost barbershops or hairdressers.
5. It is beyond the reach of most attorneys and court employed psychologists to manage these tasks. For that reason, available community resources may be mobilized to make a difference. Retired persons, community volunteers, and students from both community and two- and four-year colleges are a potential resource for this purpose.

We discuss the application of each of these five assumptions in turn. We begin with topic 1, the

issue of the difficulty of changing the hapless.

1. *Hopeless and Hapless.* Every public defender has stories about the barriers to representing difficult clients. It is not just the unreliability of showing up and issues of body odor and hygiene. With a high proportion of such clients having mental or physical disorders, their attention spans are often limited and their thinking disordered. What to do in order to shift these clients to being hapful (the antonym of hapless) and viewed in a more positive light? In his work with difficult to reach psychiatric clients at the University of San Francisco, Dale McNiel (2013) and his colleagues have implemented the concept of institutional leverage. By using aspects of housing, public assistance, and medical assistance as the levers, they report being able to nudge many of these clients towards using social services. We see related levers available to attorneys and the occasional trial consultants who are involved with the hapless; the challenge is to identify and use the levers that can move clients to attendance and attention. The obvious lever of threatening to withdraw from the case can be surprisingly effective when done right. We are fond of the paradoxical sounding statement, “I only see clients who come to see me.” The nonobvious lever of sharing chocolate candy and fast food motivates some clients. We know one attorney who keeps beer in his office refrigerator as just such an incentive.
2. *Brief and Transient.* Even the most skilled and committed psychotherapists have trouble making substantial and lasting changes in difficult clients (Brotsky, 2011). Instead of thinking about changing hapless clients in major ways, a more realistic aim in the legal context calls for modest expectations. With off-putting clients, the objective should aim at small increments of change. Consider promoting a small modification of angry facial expressions, and moving the client towards a neutral state. Defendants who habitually touch their faces or bodies while speaking can learn to stop. Defendants who look away when being spoken to can accept instruction to look at the judge or other speakers when required. It is unrealistic to aim for permanent changes; major changes are beyond the immediate context. Modest changes for a very short time are reasonable.
3. *Over-rehearsal.* There are cogent reasons to believe that multiple efforts at rehearsing socially appropriate behaviors for these short intervals work well. The defendants come to know exactly what they should be doing. They learn – and practice – to keep their sentences to the point and to keep all speech free of slang or curse words. They are taught how to make just the right amount of eye contact with authority figures. They are videotaped in role play and shown the results, with special emphasis on avoiding “the glare,” “the slouch,” or “the attitude.” They are shown pictures of videos with expressions or behavior that irritate judge or jury, such as chewing gum, sneering, sighing, rolling eyes, frowning, looking bored or distracted, gesturing to friends or family, or making light of proceedings. We have a saying that applies in this context: anything worth learning is worth over-learning. Bourke and Van Hasselt (2001) have reported that such repeated pragmatic and progressive skill-building with adult offenders improves conversational skills, anger management, and problem-solving.
4. *The Attractiveness Bias.* A large literature in social psychology concludes that attractiveness leads to higher teacher ratings, better ratings of employees, more likelihood of help from bystanders, and greater leniency in sentencing offenders. Although the leniency outcome does not apply universally, Lieberman (2002) found that

it is especially potent for triers of facts who make their judgments experientially. Many hapless clients are, to put it kindly, inattentive to appearance. Having a support structure in place to improve clothing, facial appearance, hairstyle, and sanitary elements can mobilize the halo effect of attractiveness. Indeed, we have seen an intellectually disabled and disheveled defendant who was sufficiently transformed that his appearance was almost indistinguishable from the jurors' own courtroom attire (although we note that only a modest change was needed for the rural Alabama county in which the trial took place).

5. *Liaisons*. As already suggested, moving from hapless to hapful would involve making better eye contact, not having hands in pockets, and paying attention. We should add showing respect through body language and speech, and speaking in a modulated voice. To manage the large numbers of hapless defendants, even in the brief efforts and focused changes we have outlined, can be time-consuming for attorneys who are already overcommitted. We suggest setting up liaisons with volunteers or students in criminal justice or psychology practica who would act as courtroom coaches for defendants. Working initially under the supervision of instructors with appropriate background, or with lawyers, the students would spend specific, goal-directed periods of time, which attorneys do not have at their disposal, and would give defendants normatively appropriate ways of looking and presenting in court.

Conclusions

These defendants are people who engage in a process of unknowing self-sabotage that is seeded in social and demographic qualities. We have coined the term *hapful* to counter the notion of the unlucky, socially stigmatized defendant who comes to court. We propose mobilizing transient changes in behavior, improved attractiveness, limited goals, and assistance from helpful others. By becoming hapful for a little while, accused offenders who are often seen as lowlifes or hopeless victims of social injustice might be now presented and briefly re-conceptualized as persons worthy of thoughtful attention and respectful dispositions.

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References

Bourke, M. L. & Van Hasselt, V. (2010). Social problem-solving skills training for incarcerated offenders: A treatment manual. *Behavior Modification, 25*(2), 163-188.

Brodsky, S.L. (2011). *Therapy with coerced and reluctant clients*. Washington, DC: American Psychological Association Books.

Leiberman, J.D. (2002). Head over the heart or heart over the head? Cognitive experiential self-theory and extralegal heuristics in juror decision making. *Journal of Applied Social Psychology, 32*(12), 2526-2553.

McNiel, D.E., Gormley, B., Binder, R.L. (2013). Leverage, the treatment relationship, and treatment participation. *Psychiatric Services, May 1*; doi: 10.1176/appi.ps.201200368
10.1176/appi.ps.56.1.37.

Milford, 2001. Nonverbal communication. *Litigation, 27*(4), 2-9.

Searcy, M., Duck, S., & Blanck, P. (2008). Nonverbal behavior in the courtroom. In R. Feldman & R. Riggio, (Eds). In *Applications of nonverbal behavior* (1-36). New York: Lawrence Erlbaum Press.

Taylor (2008). Can't be him your honour – he's gorgeous! *Psychology Review, 13*(3), 31-33.

Are Lab Studies on PTP Generalizable?: An Examination of PTP effects Using a Shadow Jury Paradigm



Don't miss our consultant responses from [Charlotte A. Morris](#), [Ken Broda-Bahm](#), and [Alan B. Shniderman](#) at the end of this article!

The Internet, 24-hour news shows, constant television and online commentary, blogs, and social media have progressively made news coverage more easily available to the public. As such, the influence of pretrial publicity (PTP) on potential jurors has become an increasing concern. This concern is all the more heightened in high profile cases. If that information presents biased, inflammatory, false or incomplete facts about a party in the case, then it has the potential to undermine the constitutional guarantees to trial by an impartial jury (as guaranteed under the sixth amendment) and to due process in both civil and criminal trials. Courts have devised and implemented a number of remedies to help eliminate the potentially biasing effect of PTP and the American Bar Association has developed guidelines to protect against the dissemination of prejudicial information before trial (see [ABA standards, Rule 3.6](#) for specific standards for lawyers dealing with PTP issues).

What Do We Know About PTP Effects?

A significant body of psychological research shows that PTP can affect juror/jury decision making (see [Stebly, Besirevic, Fulero, & Jimenez-Lorente, 1999](#) meta-analysis for a review). Overall the research shows that jurors exposed to negative PTP are more likely to find the defendant guilty as compared to those who are exposed to less negative PTP, or no PTP. Essentially, pretrial publicity may bias potential jurors and impair a defendant's right to be tried by an impartial jury, as guaranteed under the Sixth Amendment. Numerous aspects of PTP could influence potential jurors and their decision making. These include the amount of PTP, the type of PTP, the timing of the presentation of PTP in relation to trial evidence, the lack of appropriate screening measures of exposure for potential jurors and the nature of the PTP itself (Stebly, et al., 1999). In general, research has demonstrated that prejudicial PTP in criminal cases influences perceptions of defendant likeability, credibility, sympathy towards the defendant, perceptions of defendant criminality, judgments of pretrial guilt and final verdicts ([Studebaker & Penrod, 1997](#)).

Concerns About the Research on PTP and What We Did

Judges at times have been reluctant to accept these social science research findings concerning PTP effects. For example, in the change of venue hearing for the Oklahoma City bombing trial of Timothy McVeigh, Judge Matsch had greater faith in his personal experience as a trial lawyer and judge than in the psychological research “consisting of largely simulated trials” ([United States v. McVeigh, 1996](#), p. 1473). In this study, we addressed a number of concerns raised by the courts about the applicability of psychological PTP research to the courtroom: the artificial stimulus materials used in prior research on PTP (by using a real case with real PTP and trial transcripts); the significantly truncated time in research studies between PTP exposure and the verdict (by conducting the study over a 10 week period as a real trial unfolded; the weak nature of PTP used in research (by including more PTP based on actual articles about the case); and, the over-reliance on undergraduate samples (by using community member mock jurors from the trial venue).

Through our research we blended both experimental and case study methods in an attempt to provide both more external and internal validity in testing PTP effects. In this study, we adopted two ways to examine PTP and its influence on juror decision making—non-experimental field studies and laboratory studies that are experimental in nature. Both approaches have their advantages and disadvantages, non-experimental studies in the field make use of actual cases, actual venues, and real PTP, whereas experimental studies allow for greater control.

In addition to examining PTP effects in real time, we tested a number of other important but under-studied effects such as slant of PTP (whether it was pro-prosecution or pro-defense), the amount of PTP exposure, whether PTP effects persisted in the face of evidence presentation and judicial instructions, and how attitudes played a role in juror decision making. In this article, we briefly discuss findings related to the persistence of PTP effects, and the impact of experimental and case study methods on juror decision making. (This paper summarizes a more complete presentation of this overall project contained in Daftary, Penrod, O'Connor, & Wallace (in press, *Law and Human Behavior*).

Do PTP Effects Fade Over Time?

In practice, courts seem to assume that with the passage of time the impact of the media coverage on potential jurors will be reduced. There is a belief that delay can decrease the effects of PTP as the majority of publicity is at the time of the incident and subsequent arrest, but tapers off subsequently (see [Sheppard v. Maxwell, 1966](#)). The research on the persistence of PTP effects however, is limited. [Kramer, Kerr, and Carroll \(1990\)](#) found that the influence of some types of information—specifically factual PTP—decreased over time whereas the effect of emotional PTP seemed to persist over time. [Davis \(1986\)](#) found no difference in the persistence of PTP effects when comparing immediate pretrial exposure to exposure that occurred one week before presenting the trial materials.

Does the Presentation of Evidence Counter the Biasing Effect of PTP?

Courts assume that presentation of evidence will counter any potentially biasing PTP effects. The assumption is that any biasing effect of PTP can be corrected through the presentation of evidence at trial. That is, jurors will disregard what they might have heard through the media, and use only the information presented at trial to make decisions about innocence or guilt. Research on the anchoring heuristic, however, suggests the opposite.

The anchoring effect occurs when exposure to initial information acts as an anchor and people evaluate all subsequent information in light of this starting point (Tversky & Kahneman, 1974). Although presentation of new information might be examined on a numerical scale (Greene & Bornstein, 2003). This theory has been tested extensively in the legal context in relation to damage awards at civil trials (e.g. Chapman & Bornstein, 1996; Greene, Downey, & Goodman-Delahunty, 1999; Marti & Wissler, 2000). In the current context, individuals may use the initial information they learn about the case, usually via PTP, as the anchor and evaluate all subsequent evidence in light of this PTP. Research on the effect of presentation of trial evidence has been limited, and conducted in an experimental context. Studies that have included a more extensive presentation of evidence have revealed mixed results ([Bruschke & Loges, 2004](#)). [Otto, Penrod, and Dexter \(1994\)](#) had participants watch a 2-hour tape of an actual edited evidentiary phase of a trial. They found that trial evidence weakened the effects of character pretrial publicity only and did not influence other types of publicity such as statements made by a neighbor of the defendant, a prior record, or low social status of the defendant. A handful of other studies have used trial simulations lasting approximately 30 minutes (e.g., [Ruva & McEvoy, 2008](#); [Hope et al., 2004](#); [Pritchard & Keenan, 1999, 2002](#); [Ruva et al., 2007](#)), with mixed results.

How Applicable Is the Research on PTP Effects to Real Cases?

Courts have been skeptical about the applicability of existing research in the laboratory to real

world settings. At the same time research has shown the validity and applicability of laboratory research (see [Bornstein, 1999](#), comparing student and community jurors, and mode of trial presentation). The applicability of experimental research to what happens in the real world is something that psycholegal researchers struggle with (e.g., Bornstein, 1999; [Bray & Kerr, 1995](#)). The courts have been skeptical at times of accepting psychological research findings that are not “realistic” ([Diamond, 1997](#)). PTP research in the laboratory has revealed a clear link between exposure of biasing PTP and juror/jury decisions. To show this link, and maintain experimental control, researchers have been forced to give up a certain amount of external validity (the extent to which research can be generalized to other situations/people). Courts have used the artificial nature of the exposure to PTP to reject laboratory findings because they do not mimic what happens in the real world. Thus, in this study we made an effort to close the gap between purely experimental manipulations of PTP variables in the laboratory and loosely controlled field studies to help demonstrate the external validity of laboratory research; in an attempt to convince the courts of the psychological reality of PTP effects on real-world decision making.

The Current Study

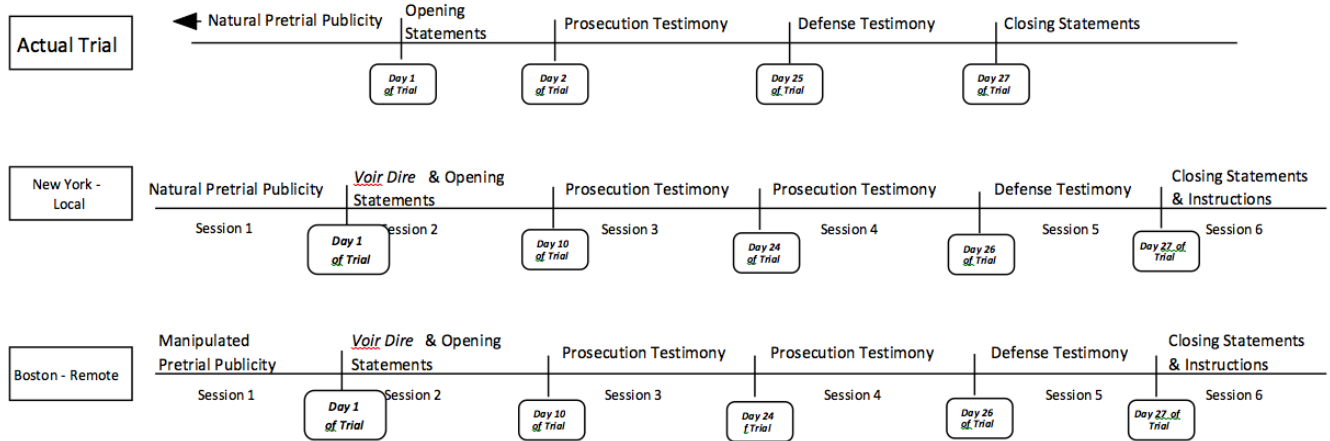
Our goal was to (1) examine the durability (persistence) of PTP effects from exposure to verdict and, (2) to focus on the comparability of the effects of PTP presented experimentally versus the effects which occurred naturally over the course of pretrial PTP exposure and consideration of actual criminal trial evidence. To do this we used a shadow jury methodology that tracked an actual criminal trial as it proceeded in New York City, and used that case in two parallel conditions – a “Natural Exposure” condition (for participants in New York city) and an “Experimental Exposure” condition (for participants in Boston).

In the current work, the entire study was conducted online. We selected a high profile case (described below) in which there was substantial pretrial publicity. Before the start of the actual trial, we recruited mock jurors from the **natural venue** where the case took place and jurors were being exposed to PTP naturally (New York City) and another sample of mock jurors from the **experimental venue** (a venue where jurors were not naturally exposed to PTP: Boston). Mock jurors in the NYC area were exposed to this information starting at 14 months prior to the trial when the incident took place. Their exposure consisted of anything they might have voluntarily read/seen/heard about the case. The sample from the experimental venue was exposed to the same type of PTP information that the natural venue was exposed to but with a few exceptions. We manipulated what the experimental sample was exposed to, to test the influence of bias (pro-prosecution and pro-defense) and amount of exposure (5 vs 10 newspaper articles). Also, they were exposed to the PTP 2 weeks before the start of the trial.

Participants were recruited online via an advertisement placed on craigslist.com and jury eligibility was determined. Those who met jury eligibility criteria were invited to participate in the study via email. The entire study was conducted in six sessions, online. We assessed participant familiarity with the case and took this into consideration during our data analyses. There were six “trial” sessions conducted over a period of 10 weeks. In each session, participants were exposed to new trial testimony (see Figure 1 for how sessions parallel the actual trial) and asked to fill out a questionnaire. After each session participants were instructed

with pattern New York State judicial admonitions, to avoid the media and any coverage regarding the trial during the duration of the study. At the end of session 6—after rendering verdicts—participants were queried on media exposure during the course of the study.

Figure 1. *Timeline of Trial and Study Progression*



Target Case

The target case for this study was a case tried in the Supreme Court of Queens County, New York, *The People of the State of New York v. Michael Oliver, Gescard Isnora, and Marc Cooper*. The defendants, undercover police officers with the New York Police Department were charged with manslaughter in the death of Sean Bell on the night before his wedding. On the night of the incident the police officers were staking out a nightclub in Queens with the intent to uncover a prostitution ring. At the end of the night, when the club was closing, one officer witnessed an argument between a friend of Sean Bell and another patron of the club in which he thought he overheard Sean Bell’s friend say that he was going to his car to get a gun. The police officer radioed his colleagues for back-up. Instead of waiting for his back-up to arrive, the undercover officer approached Sean Bell’s car with his gun drawn. According to the defense, when Bell and his companions saw a man approaching them with a gun drawn they revved the engine and tried to escape. In the process, the car scraped the officer’s leg. Around the same time, the back-up van arrived and witnessed this event. The two officers in the van and the officer on the street opened fire on the car with Bell and his friends, firing a total of 50 shots. Bell’s two friends survived – one with 19 shots to his body, but Bell’s injuries were fatal.

A number of aspects of this case made it particularly suitable for the current study— 1) there was extensive media coverage surrounding this case that revealed support both for the prosecution and for the defense; 2) the defense filed a change of venue motion with the court claiming that the jury pool had been contaminated due to the extensive media coverage; and 3) the prosecution filed a motion in response, citing PTP that was supportive of the defense case.

Participants

Natural exposure (NYC). We recruited 130 participants in the local venue, and our final sample consisted of 115 participants (12% attrition). Of the 115 participants, we had 84 (73%) females and 31 (27%) males. The average age of the participants was 36.92 ($SD = 12.53$) years, with a range of 18 to 72. The sample was ethnically diverse with 66 Caucasians (57.4%), 22 African–Americans (19.1%), 9 Hispanics (7.8%), 7 Asian-Americans (6.1%), and 11 (9.6%) who identified as other. Additionally, 43.5% ($n = 50$) of the participants were college graduates, 24.3% ($n = 28$) were high school graduates only, 19.1% ($n = 22$) had a post graduate degree, 10.4% ($n = 12$) had some graduate school training, and 2.6% ($n = 3$) had some high school education. Finally, 85% of the participants were familiar with the Bell case.

Experimental exposure (Boston). We recruited 177 participants in the remote venue and our final sample consisted of 156 participants (13% attrition). Of the 156 participants, we had 104 (67.7%) females and 70 (32.3%) males. The average age of the participants was 33.25 ($SD = 120.32$) years, with a range of 18 to 67. The sample was primarily Caucasian ($n = 187$, 86.2%), 11 African –Americans (5.1%), 11 Asian-Americans (5.1%), 4 Hispanics (1.8%), and 4 (1.8%) who identified as other. Additionally, 38.7% ($n = 84$) of the participants were college graduates, 23.5% ($n = 51$) were high school graduates only, 21.2% ($n = 45$) had a post graduate degree, 15.7% ($n = 34$) had some graduate school education, and 0.9% ($n = 2$) had some high school. Finally, 5% of the remote participants were familiar with the Bell Case.

Finding 1: Slant of the Pretrial Publicity Influenced Mock Jurors' Decision Making.

Regardless of exposure modality (natural in NYC or controlled in Boston) exposure slant had a significant effect on verdict. That is, those who were exposed to high pro-prosecution PTP were more likely to find the defendants guilty than those exposed to pro-defense slanted PTP. These findings support previous findings in the literature (see Stablay et al., 1999).

In the natural (NYC) sample 72.4% of those who were classified as being prosecution biased found the defendants guilty on at least one count, and only 40.6% of those classified as being defense biased found the defendants guilty on any counts.

In the controlled sample (Boston) 62.8% of those who were exposed to pro-prosecution PTP found the defendants guilty on at least one count, and compared to this, only 40% of those exposed to pro-defense PTP found the defendants guilty on any counts.

Finding 2: PTP Had the Same Influence on Mock Jurors' Decision Making Regardless of Exposure Modality (Natural or Controlled)

We hypothesized that the PTP would have the same influence on mock jurors' decision making regardless of exposure modality (natural or controlled), which speaks to the external validity of laboratory studies. To test this we examined the differences in verdict for the natural exposure sample and the controlled exposure sample. Overall, there were no differences in outcomes based on exposure modality.

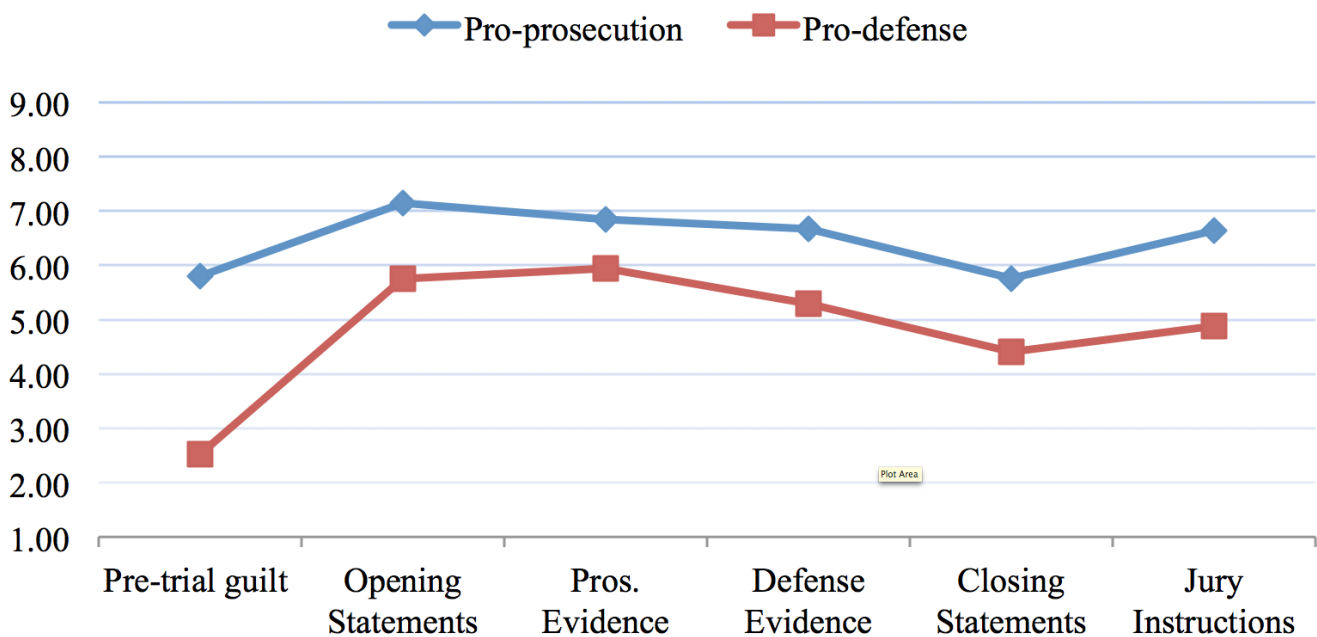
That is, those who were exposed to pro-prosecution PTP naturally (NYC) had similar verdicts to those who were exposed to pro-prosecution PTP in the controlled exposure condition (Boston).

Similarly, those who were exposed to pro-defense PTP naturally (NYC) had similar verdicts to those who were exposed to pro-defense PTP in the controlled exposure condition (Boston).

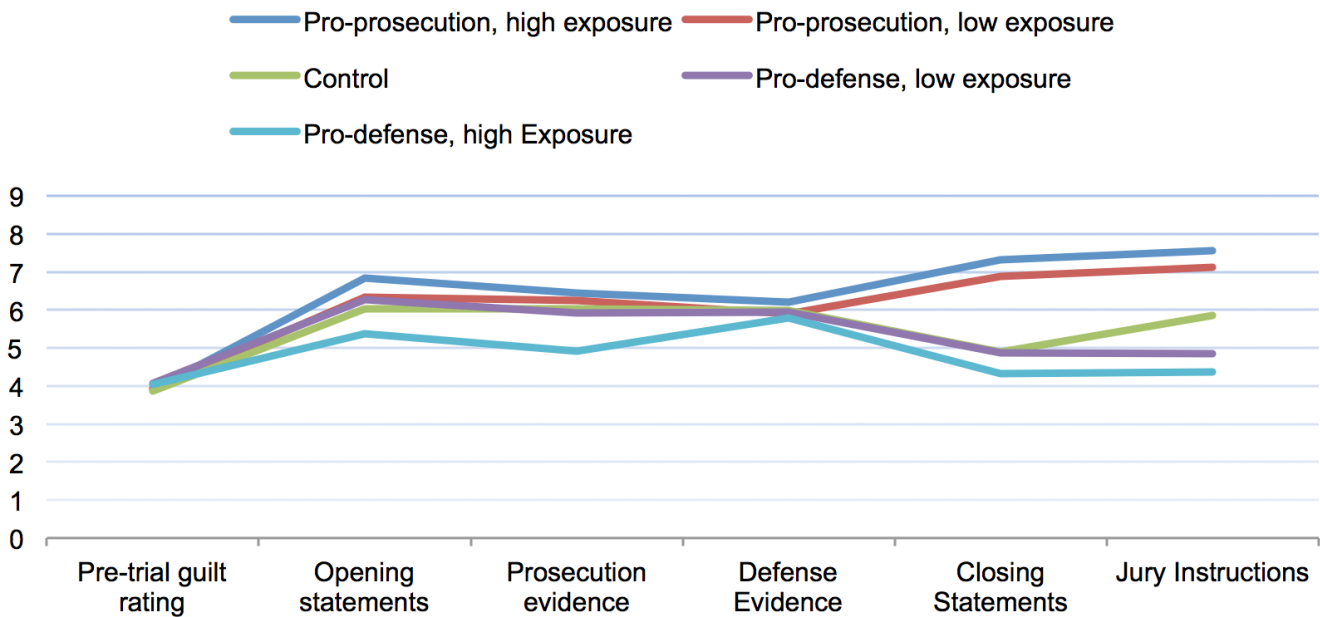
This provides support for the hypothesis that bias functioned in the same manner across modalities. Therefore we can say with some assurance that PTP exerted its influence similarly regardless of whether it was experimentally or naturally presented.

Finding 3: Biasing Effects of Pretrial Publicity Persisted Throughout the Duration of the Trial and Influenced Final Verdicts.

Exposure to pretrial publicity biased mock jurors in the direction they were exposed (pro-defense or pro-prosecution) and this effect persisted throughout the trial. Figure 2 shows guilt leanings at various stages of the trial for those in the natural exposure condition, and Figure 3 shows guilt leanings for those in the controlled exposure conditions. As expected, there were no significant differences in pretrial leanings of guilt (these leanings were taken prior to any PTP exposure), across different levels of exposure.



The next set of leanings was obtained after opening statements (this was post-PTP exposure); and as expected, there was a significant difference in guilt leanings based on exposure level—those who were exposed to pro-prosecution PTP were more likely to rate the defendants as being guilty (on a scale of 1-9 ranging from not guilty to definitely guilty), whereas those who were exposed to pro-defense PTP were more likely to rate the defendants as not guilty.



This pattern continued throughout the presentation of evidence, closing statements, and judicial instructions. Overall, initial exposure to PTP affected perceptions and led participants to evaluate all subsequent evidence through this biased lens.

Conclusions and Legal Implications

In this study we found a significant effect of pretrial publicity on decision making in both the natural and controlled exposure conditions, and these effects persisted throughout the course of the trial—in the face of trial evidence and admonitions to disregard.

In practice courts rely on admonitions to disregard information with the aim that it will lead jurors to set aside prejudicial PTP when making decisions; this approach was not supported here. Despite the fact that participants were instructed to base their decision making on trial evidence alone, the PTP they were exposed to influenced their final verdicts. Thus, presentation of trial evidence may not eliminate a PTP effect which will continue to persist in the face of evidence. Moreover, jury instructions, which have long been assumed by the court to act as a safeguard against PTP failed to protect against (indeed, did not reduce) PTP’s influence in this study.

A primary goal of this study was to enhance the generalizability of PTP research by examining the influence of natural, non-manipulated exposure to PTP all the way through to post-trial verdicts. We tested whether findings in our field-based design shadowing an actual, ongoing trial, would match those in the laboratory. Indeed, we found no significant differences in the biasing effects of PTP that occurred naturally, and that which was manipulated. This should lead to an increased confidence by the courts in relying on the findings of PTP research conducted in controlled, experimental scenarios

We also found that a common safeguard used by the courts—continuances – might not be

effective in reducing PTP effects. Participants in our natural condition were exposed to PTP approximately 14 months prior to the trial (when the incident took place), and despite this time delay, the influence of PTP persisted. This provides evidence for the strong influence that PTP can have on decision making in the trial context, and that continuances might not protect against the harmful effects of PTP.

The judiciary does recognize the harmful effects of PTP and safeguards have been put in place to protect against these, but our findings show that many might not work. Additionally, judges at times disregard social science research due to what they believe is its lack of external validity (see, e.g., [Lockhart v. McCree, 1986](#)). The current study was one attempt to address some of these concerns by having community member participants, using an actual case with real PTP, and using natural as well as controlled exposure to PTP. Thus, given the overall body of research on PTP publicity, and our current findings, we can safely conclude that PTP does in fact influence judgments in the courtroom. The next step then is to develop strategies to combat this effect, and encourage courts to acknowledge the deleterious effects of pretrial publicity on potential and actual jurors.

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Maureen O'Connor (moconnor@jjay.cuny.edu) is the Executive Officer of the Doctoral Program in Psychology at the [Graduate Center of the City University of New York](#), and Professor and former Chair of the Psychology Department at [John Jay College of Criminal Justice](#). Her research interests are in the intersection of psychology, gender, and law. She is a member of the bar in Arizona and Washington, D.C. She has held numerous governance positions in the Society for the Psychological Study of Social Issues (SPSSI), including President, and also an elected member of the American Psychological Association's Policy and Planning Board, an APA and SPSSI Fellow, and long-time member of the American Psychology-Law Society.

[1] See Daftary-Kapur, T., Penrod, S. D., O'Connor, M., & Wallace, D. B. (in press). Examining pretrial publicity in a shadow jury paradigm: Issues of slant, quantity, persistence, and generalizability. *Law and Human Behavior*, for a complete presentation.

Response from Charlotte A. Morris:

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Does This Elephant Make My Room Look Fat?

My response to the article and the study is less like an essay and more like a collection of related questions and thoughts. To wit:

- As a general proposition and in cases of all types, my attorney-clients and I have to assume that bias always exists. Whether it comes in the form of a response to pre-trial publicity or lives in the pre-existing attitudes, personal experiences and beliefs of potential jurors, we approach every trial knowing there is an elephant (at least one) in the room and we will have to address it. We know that evidence and instructions are not sufficient to overcome bias so we must come equipped with our most persuasive arguments, well-prepared witnesses, and excellent demonstratives too.
- I really like that the study was done to convince the courts that what we learn in controlled social science research is applicable to real-world settings, because I see results in real trials that match what I learn in small group research every year. In fact, this article makes the best case possible for running small group research to find out what the bias is and to test our best efforts to overcome it.
- I had the following questions about the research that are not fully answered in this article (some of which may be found in the full [Law and Human Behavior](#) article).
 1. The sample in both the natural and experimental conditions varies quite a bit from census data for Queens County, NY on two reported demographics: gender and education. Beyond census data, though, I'd also want to know from practicing lawyers in the venue what the venire "looks like" and whether these samples reflect real-world conditions. Knowing that demographics alone are not often predictive of jury behavior, I wonder how much – if any – this could matter?
 2. The article mentions exposure to pre-trial publicity in the form of newspaper articles and I have to wonder if that's an accurate reflection of the way most people get their news today? In fact the authors note this in the first sentence with a comment about the "Internet, 24-hour news shows, constant television and online commentary, blogs and social media."
 3. How was pre-trial exposure in the natural condition measured both in terms of type and

quantity? The authors report assessing “participant familiarity” with the case but don’t specify the measurements they used and participants in this condition are not grouped according to categories such as “low” or “high” exposure (Figure 2).

4. Similarly, was there any attempt to control for the amount of exposure to PTP in the natural condition? A judge who wants to dismiss the importance of the findings in this study would likely say that there are already remedies for excluding people who report having the greatest amount of exposure. Or were the results analyzed in such a way that might account for the varying amounts of PTP exposure among participants (particularly those in the natural/local condition)?
 5. The dissertation also mentions the potentially biasing effects of post-venire publicity (PVP) – meaning continued exposure to information about the case even after the jury has been sworn – and I had the same thought about participants in this study: if we assume that research participants (like real jurors) sometimes ignore the instructions of the Court, were participants also assessed throughout the study for potential PVP exposure (apart from what was given to them in session 4 of 6) and, if so, what difference (if any) did it make? PVP is perhaps the more pressing issue of our day and the authors note the paucity of research on the subject. We all want and need to know more; I currently tell my clients to assume the worst, that at least some jurors will do at least some homework outside of trial and we have to plan discovery and trial strategy accordingly.
- I agree with the conclusions and legal implications as briefly stated in the article, especially that continuances may not be a suitable remedy in cases where there has been significant PTP. I would take this a step-further. Pre-trial publicity and its potential to interfere with the goal of seating an impartial jury is – and has long been – the basis for seeking improved voir dire conditions (supplemental juror questionnaires, attorney-conducted voir dire, additional peremptory strikes, more latitude on motions to challenge for cause, etc.). I find that most lawyers still need our support and encouragement to file the appropriate motions for these (see [Jurywork: Systematic Techniques](#)). Many courts are still reluctant to give attorneys enough latitude during voir dire to fully explore potential bias. And many lawyers still don’t have the skills or comfort to conduct *voir dire* with ease, particularly on the thorniest issues in a case. (I am also curious to know more about what the dissertation refers to as “voir dire packets” that were given to research participants and how those compare to jury selection in the real trial.)
 - When we start with the assumption that pre-existing bias can and will matter to jury decision-making, litigators must have both the permission of the court and the appropriate tools for conducting thorough and effective *voir dire*. Beyond simply finding out if and how much exposure to PTP potential jurors have, *voir dire* is the first opportunity we have to address it head-on. Lawyers need good questions for generating candid conversation on the issues that are both helpful and harmful to their client and to their case. Talking directly about PTP as a source of bias could be useful too. Consider a series of questions that might follow a discussion of what/how much jurors already know about the case:

- Raise your hand if you’ve ever made a terrible first impression on someone

- before? I know a lawyer who still tells the story of his first law firm interview during which the tail of his dress shirt was poking through the open zipper of his suit pants. I don't even know if he got that job because all he ever tells is the story about how terrible he felt making that first impression. Anyone else have a similar story about you or someone close to you?
- Do you think you overcame that bad first impression? Why or why not? How do you know?
 - How did things turn out?
 - What did you learn from that experience?
 - What about the opposite: Raise your hand if there has ever been a time when someone else made a bad first impression on you? What happened and how did things turn out? What did that experience teach you?
 - What can someone do to overcome something as powerful as a bad first impression?
 - Do we have to be open to more information in order to give someone the opportunity to recover from making a bad first impression?
 - How many of you would say you think you have a strong gut feeling about people and your first impression is almost always right? Tell us about that. Have you ever been wrong? How hard is it for someone to change your mind about that first impression you have?
- Finally, I would love to see a movement in our courts for judges to explain (in plain English) *why* it is important for jurors to give lesser weight to what they heard about a case outside of the trial (no weight may be an unrealistic expectation given what we know about heuristics). I'm not a lawyer and I didn't go to law school, so while I mostly understand how they work I'm not the best person to explain the rules of evidence. I know for sure that jurors themselves don't know them at all (even if they think they do); they routinely stumble when explaining preponderance of the evidence to each other during deliberations. Why can't judges tell jurors in a very candid way about the protection that the rules provide all parties: that some things a person might know or hear about a case before a trial just don't pass the legal test for admissible evidence in the trial itself. The rules aren't arbitrary, they've been established over time and legal experts (lawyers and judges) work very hard to apply them to the case facts before and during a trial so that the legal decision jurors make will be just according to the law. We have a rather elaborate system for taking justice out of the court of public opinion because that's what our Founding Fathers believed was best and we still agree. Using information we learned outside of court is not unlike playing that old game of "Telephone" where distortions and distractions always interfere with the message.

I do believe that jurors take their oath and their job seriously in the vast majority of cases and I think they would be better served by talking about their bias (and its many potential sources) and getting common sense explanations for the instructions they must follow in order to overcome it. Assuming they cannot overcome it, attorneys and their trial consultants must also put together a case that embraces the elephant in the room.

Response from Ken Broda-Bahm:

Dr. Ken Broda-Bahm provides research and strategic advice on cases across the country, applying a doctorate in communication and 17 years of experience. He is lead author for [Persuasive Litigator](#), an ABA Journal Blawg 100 publication with more than 400 articles on practical judge, jury, and arbitrator persuasion, has trained and consulted in 19 countries around the world and is a Past President of the American Society of Trial Consultants.

Strengthening the Argument on Pretrial Publicity

It is often helpful to think of research, not simply as descriptive knowledge, but as an argument. The current article by Daftary-Kapur, Penrod, O'Connor and Wallace is one such example. Placed in context, the scholarship speaks to an ongoing debate. On one side are those who are attuned to the social science and see that the amount, type, and timing of pretrial publicity has a direct and measurable effect on jury decision making. On the other side are those who place unwarranted faith in jury instructions or in small separations in time or geography to address that influence.

Entering that debate, this article can be appreciated for making a novel bottom-line argument:

Problem: Courts are not sufficiently heeding the social science on pretrial publicity, believing it to be too far removed from real conditions.

Solution: The present study compares the strength and persistence of pretrial publicity in both natural and experimental conditions, contemporaneously following an actual trial.

Implication: The fact that the study finds comparable results in both natural and experimental settings suggests that courts should be giving greater weight to the already substantial body of literature on the biasing effects of pretrial publicity.

It is exactly the right move, in my opinion, to take aim at the reasons being offered by courts in order to discount the research. By offering a direct comparison between natural exposure and experimental exposure in a setting that more directly parallels the time frame of an actual trial, the authors will at least make it easier for litigants to offer credible change of venue motions and harder for judges to disregard the research that undergirds those motions.

But one cannot expect this or any study to be a final answer either. To the extent that judges can be expected to challenge this study, as they have challenged other studies, it makes sense for the authors to address these objections up-front in a very direct way. In more complete presentations in the academic press (I believe the authors have another article based on this research in press with *Law and Human Behavior*), the authors should provide the data and the descriptions of methods that more forcefully address the foreseeable responses.

What Would the Doubters Say in Response to This

Research?

Viewing the research in that context as an argument, it is helpful to think about how the argument would be answered by those who want to keep downplaying the effects of pretrial publicity or to maintain solutions that are often largely symbolic.

Here is what I think the doubters can say:

They'll Say the Pretrial Exposure is Not Like Natural Exposure

“Courts have used the artificial nature of the exposure to PTP,” the authors note, “to reject laboratory findings because they do not mimic what happens in the real world.” So a central selling point is that the study is fixing that by including the “natural exposure condition” of New York City where the trial was taking place. But to me, at least, there is a question of how the researchers measured natural exposure. In the method section they write, “We assessed participant familiarity with the case and took this into consideration during our data analyses,” but that doesn’t fully clarify what natural exposure means in this case. Instead, the analysis (e.g., comparing figures 2 and 3) seems to be classifying the naturally-exposed New Yorkers as either prosecution-biased or defense-biased from the start, presumably as a result of pretrial publicity. But the amount, form, timing, and salience of that publicity all seems to be undescribed, at least in this shortened description of the research.

To really help address courts’ rejection of prior research, the current article should be giving this point central emphasis. There should be some way, for example, to operationalize whether — in participants’ recollection at least — the pretrial publicity has been high, moderate, low, or nonexistent. It should be possible to record a perception of whether that publicity has tended to favor the prosecution, the defense, neither, or both. Without that emphasis, the local/natural exposure component of the research could be dismissed as simply showing that those who were biased at the start of the trial continued to be biased throughout the trial.

They'll Say The Study's Trial Is Not Like the Actual Trial

A second essential way in which the research seeks to improve on prior research is by following or ‘shadowing’ an actual trial. In that context, doubters may point to the fact that the method relies on online 30-minute summaries at six points over the ten weeks of trial. When compared to the trial itself, of course, that is just a small slice of information. But when compared to prior research, that is a huge step forward. The authors and others who are applying this research can point to the ecological validity of this study in paralleling the trial in some essential respects.

- Careful summaries were created by researchers attending every day of the trial.
- Exposure was not a one-shot deal, but lasted as long as the actual trial.
- The nature of the information added followed the trajectory of the real trial.

No, it isn't perfect – research never is – and the ideal would be to have an actual “shadow jury” physically attending every day of trial. But the authors' method still offers a dramatic improvement over the method of giving an article and a one-page trial summary. The researchers' 30-minute summaries can never cover the full trial, but it can do much better than researchers have done using more artificial experimental measures.

Importantly, the article shows that *adding similarity* to the method does not cause the effects of pretrial publicity to diminish. Instead, the researchers appear to show that a study incorporating a number of changes in the direction of greater realism will reveal the same basic pattern that the simpler experimental studies have been showing all along. That reinforces the main point: Pretrial publicity is a powerful and persistent source of bias.

They'll Say Ability to Follow Instructions Will Win Out

Of course, no article of faith appears to be stronger among judges than the belief that jurors will understand, apply, and adhere to the instructions. If a mountain of studies show that pretrial publicity biases jurors (and we are getting there), then some judges will still respond, “Well, then I'll ask them to set aside that bias and keep the ones who promise they can.” As much as that promise can be a fairy tale (since it assumes that potential jurors both know and can control their biases), that promise still works to satisfy many trial and appellate judges.

So one critical function of research studies like the present one is to underscore that the bias persists, even in the face of the instructions. In that light, the article could substantially clarify how the research participants were told to disregard pretrial publicity in advance and screened on the basis of their professed willingness to do so. The researcher mentioned the repeated instruction “to avoid the media and any coverage regarding the trial *during* the duration of the study,” (emphasis added) but were they told and did they promise, in advance, to set aside any influence of the publicity that they had been, either naturally or experimentally, exposed to? That is an important point that should be answered in the text of the article.

Admittedly, I am making my own argument in this comment: Research should argue. So to anticipate possible counterarguments, let me say that, no, that doesn't mean the researcher should be invested or biased. A good researcher follows the facts. But when the facts give you an answer – say, telling you that the earth is not “young” or that anthropogenic climate change is a present reality -- then the researcher as a communicator has an interest in fashioning an argument that at least makes life as hard as possible for those who would deny its conclusions. Minimizing the effect of pretrial publicity is not in the same category as creationism or climate change denial, but the underlying dynamic can be seen as similar.

This article can be a weapon in the battle against those who would favor ease over fairness when it comes to pretrial publicity. At the same time, the research description should be reoriented to more forcefully address the likely reactions to the study and more fully defends the realism that is central to its advantage. Because the study at the heart of the article is likely to have a continuing life in future publications, I believe it can be made into an even stronger argument by more clearly addressing the three points above.

Adam B. Shniderman responds:

[Adam B. Shniderman](#) is a doctoral candidate in Criminology, Law and Society at the University of California, Irvine. He specializes in the use of scientific evidence in courts, focusing on neuroscientific evidence, and following completion of his Ph.D. this spring, he will be an Assistant Professor of Criminal Justice at Texas Christian University.

The authors' findings reinforce what many of us have long sensed – the implicit psychology that the legal system adopts with respect to PTP, among other evidentiary issues, is outdated and inadequate. The system demands and believes that jurors can identify biasing information, put that information into a box, and consciously choose to set aside that information and those biases to make an unbiased decision about the case. These assumptions are problematic. As decades of psychological research have shown, bias operates unconsciously and, as a result, people are poor at identifying the reasons for their decisions and at identifying their own biases.

The legal system's lack of recognition of psychological advances in understanding judgment and decision making leads to difficulties for lawyers attempting to address the effect of PTP. Because of the system's flawed assumptions, the standard for challenging a juror for cause during *voir dire* because of PTP exposure can be difficult to meet, leaving lawyers to use their precious few peremptory challenges or empanel a juror who may be biased by damaging press. Furthermore, the system's efforts to minimize the effect of PTP on empaneled jurors do not eliminate the effect of exposure.

The authors' findings are consistent with what a large and growing psychological literature on PTP have long found – the variety of techniques the legal system employs to address the potential bias stemming from PTP – *voir dire*, the presentation of evidence, judicial admonishments, and continuances (increasing time from exposure) are inadequate to eliminate the effects of PTP. In fact, these efforts may even exacerbate the issue, as some research has found with respect to judicial instructions and admonishments. These types of instructions can draw attention to the inadmissible information, including PTP, and increase its salience in jurors' decision making. (Think about when someone tells you – “Don't look down.” or “Don't think about the pink elephant in the room.”)

The legal system hesitates to adapt and respond to growing psychological knowledge about PTP arguing that mock jury experiments lack the ecological validity (the extent to which a laboratory experiment approximates the “real world” being studied) to be believed. The authors' findings mark an initial effort to demonstrate that this concern is unfounded - “laboratory” experiments assessing the effects of PTP and measures designed to counter its effect *do* reflect the real world.

So, what does this mean for the system, lawyers, and consultants? What do we do to empanel a jury and minimize the effect of PTP?

Systemically, the standard for challenging jurors could change to better reflect the current state of psychological research on bias in judgment and decision making – i.e., by lowering the bar for excusing for cause anyone with *any* potential bias from PTP exposure. However, as I mentioned in a [previous issue](#), in an age of the 24-hour news cycle fascinated with trials, the proliferation of (often inaccurate) information through social media, and ready access to information through smartphones and tablets, empanelling a venire with no exposure to PTP may be impossible, even in cases that don't rise to the level of O.J., Casey Anthony, Jodi Arias, or George Zimmerman. Furthermore, civically disengaged individuals with no exposure or social awareness are likely not the jurors we want serving.

It's unlikely that this solution is in our near future. Aside from the practical considerations, demonstrating that experiments approximate the real world is likely insufficient to change the system's implicit "politics," psychology, and policies with respect to jury selection and PTP. The legal system and social science have a tenuous relationship and a complex history, even in the face of overwhelming evidence that the system assumptions are wrong. The judicial system's use of social scientific information, and particularly psychological research findings is mixed, even when real cases support the findings. For example, the system has been slow to respond to changes suggested by decades of eyewitness identification and memory research -- even though three-quarters of wrongful convictions involve some sort of mistaken eye-witness identification (supporting the social science research), few jurisdictions have made substantial changes to their lineup procedures to better reflect the state of psychological knowledge.

But trial lawyers are not without options.

First, lawyers can employ the debiasing strategies I have discussed in a [previous issue](#).

Second, lawyers can use bias to their advantage.

Decades of research on confirmation bias and motivated reasoning demonstrate that the processing of information and the weighing of evidence is significantly influenced by prior beliefs and feelings. People tend to unconsciously undervalue (when an objective measure of evidentiary value can be determined), devalue, or cast aside information that is inconsistent with their beliefs or does not support a desired conclusion. Though no research has been done on the implications of these psychological phenomena for PTP, their truth and impact is so widespread it is difficult to hypothesize they would not hold true for PTP (and the authors' findings leave me with the feeling that controlling for general criminal justice attitudes would explain a fair amount of the influence of PTP on jury verdicts).

Thus, the impact of PTP should be, at least to some extent, dependent on general attitudes towards the criminal justice system. Those who are pro-defense should value negative PTP significantly less than those who are pro-prosecution, decreasing its influence on the evaluation of subsequent pieces of evidence, and eventually on verdict choice.

A number of validated scales have been developed that could be converted for use in *voir dire* to assess jurors' general criminal justice attitudes to seek out those that are pro-defense:

[The Juror Bias Scale \(Kassing & Wrightsman, 1983\)](#)

[The Revised Legal Attitude Questionnaire \(Kravitz, Cutler, & Brock, 1993\)](#)

[The Pretrial Juror Attitude Questionnaire \(Lecci & Myers, 2008\)](#)

Keep in mind that these are not a panacea, eliminating all potentially unfavorable jurors who have been negatively influenced by PTP. The predictive power of these scales is good, but not as strong a predictor of outcome as general death penalty or insanity defense attitudes are in those cases.

Beware of the Tricks Used to Encourage a Witness to Volunteer

by Dr. Merrie Jo Pitera



Most witnesses do not understand the purpose of a deposition and believe their job is to teach the questioning attorney everything they know; indeed, many believe if they did any less, they “wouldn’t be telling the truth.” But a witness who talks too much, either in deposition or trial, can be a liability because volunteering information can potentially highlight vulnerabilities for the other side. Witnesses need to be educated about the purpose of a deposition – i.e., it is a fact-finding opportunity for opposing counsel, not an interview or a casual chat. Given this purpose, it is the opposing attorney’s burden (and job) to ask the *right* question, not a witness’ job to help and offer more than was asked. The first step in the process of getting a witness to stop volunteering too much information is educating the witness about the strategies opposing counsel might use to goad new (and sometimes even experienced) witnesses into talking a bit too much, thereby opening up potential and unexpected vulnerabilities for the case.

While there are many strategies opposing counsel typically employ, the primary ones to watch out for are summarized below.

- **Acting nice and friendly.** Witnesses must always be wary of a “friendly” opposing

counsel. Of course, there is a possibility the attorney really is a nice person, but chances are she is merely being friendly as a strategy to disarm the witness. Virtually every witness has psyched himself up for an abrasive adversary. When he instead meets someone who is very friendly, he drops his guard and wants to be friendly and helpful in return. He believes if he offers short answers, he will be the one perceived as being the abrasive obstructionist.

- Specifically, a witness should be cautious of chatty conversations initiated by opposing counsel on breaks and off camera. These conversations are designed to find some common ground with the witness in order to get him to drop his guard. A similar incident happened in a case I consulted on that was a few weeks from trial. I was hired because this witness didn't have the "witness gene" and did an "awful" job during his deposition as he "talked way too much and opened up unnecessary rabbit holes" that the defense now had to deal with. My job was to "fix him."

While reviewing the deposition video, one thing was clear, the plaintiff attorney found common ground that ultimately had the effect of relaxing the witness and consequently, he over-volunteered. During this corporate representative's initial witness prep session, counsel had profiled the plaintiff attorney to be an obnoxious jerk. On the day of the deposition, instead of using his usual persona, the plaintiff's counsel started the deposition using a cordial tone. About three questions in, when asking about where the witness had received his Master's degree, the plaintiff attorney commented that he *also attended* the same institution. Not only were there *decades* between their attendance, but the witness attended virtually and received a long-distance degree. Despite never having stepped foot on campus, the witness still felt a kinship with the plaintiff's attorney. Their shared alma mater provided the plaintiff attorney an opportunity to exploit their "common" experience as it had the immediate effect of disarming the witness. That is, he started calling the attorney by his first name (an absolute "No No" in deposition or trial behavior) and began to offer additional information beyond the scope of the question in order to be helpful to his "frat brother." Exactly the desired effect the plaintiff attorney was seeking as many vulnerabilities were volunteered via the witness' long-winded responses. This attorney clearly did his homework and figured out something in common with the witness, exploiting it to his advantage.

- **Putting a long pause between the witness' answer and the next question.** Sometimes an attorney will pull a "Columbo" act and look like she is fumbling around trying to organize her notes or "thinking" of the next question when in reality, she is intentionally inserting a pregnant pause. Those gaps are ever so uncomfortable because we have been socialized in this part of the world to fill in gaps of silence. The witness usually has the urge to fill the silence by adding to his previous answer, even after his answer was complete. Because the witness' focus tends to be on the last answer given, the pause helps compel him to fill in the silence with *new information*. Educating your witness to become "comfortable with silence" takes practice but is vital.
- **Playing "dumb."** Not only do attorneys utilize the disorganized Columbo approach, they also play the "I am uneducated about this subject matter so please teach me more about it" role. We all know any attorney worth her salt will either have researched the

witness' topic or will have a specialty in the area herself. By “playing dumb” about the topic, she compels the witness' natural tendency to teach her about the subject matter he knows so much about. When a witness hears an attorney say something like, “I really don't understand this technology. Could you please help me understand?” it should be a signal that the attorney is hoping the witness will step into a teacher role and will volunteer more information about the subject matter than necessary. This puts the witness in the role of a teacher, which will be difficult to break out of if he is not aware of this tactic in advance.

- **Expressing disbelief or shock at your response.** An attorney who provides a surprised retort to an answer is using this strategy to put the witness on the defensive such that the witness feels the need to expand his answer to justify it. For instance, when the questioning attorney responds with a surprised, “Really?” the witness gets the impression that something must have been “off” about his answer or that he didn't communicate it clearly. The danger is that a witness usually feels the need to defend what he said, and as a result, volunteers information that was beyond the scope of the original question.
- **Asking the same question repeatedly.** One of the most common pet peeves for witnesses is being asked a repeat question. Witnesses already feel put out and inconvenienced by having to give a deposition. Then, to make matters worse, the opposing attorney, over the course of the deposition or maybe in succession, asks the same question multiple times (or possibly with slight changes). In addition to frustrating the witness into taking a tone by answering sarcastically, “I have already answered that question,” many witnesses end up volunteering additional information. This happens primarily because the witness wants the attorney to move on. They believe by adding new information the attorney will be satisfied and stop asking the question. Instead, the new information typically opens up new lines of questioning that may expose additional vulnerabilities, as well as increasing, among other things, the length of the deposition.

The job of witnesses is to provide the information asked, not engage in a “brain dump” of everything they know. Witnesses who stay focused on the question not only help their case, but they also help keep their depositions shorter – the less they volunteer, the fewer rabbit holes the opposing attorney can go down. Educating your witnesses to these strategies before the deposition will help them guard themselves against the tricks opposing counsel play in an effort to get witnesses to volunteer information and stray off course.

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The Emotional Components of Moral Outrage and their Effect on Mock Juror Verdicts

by Liana Peter-Hagene, Alexander Jay, and Jessica Salerno



Don't miss our the consultant responses from [Jill Holmquist](#) and [Jason Barnes](#) at the end of the article.

When we ask jurors to judge a defendant for his or her crime, we are often also asking them to evaluate a moral transgression. Committing a murder, for example, violates not only a law, but also society's deep-seated sense of moral right and wrong. The cold, cognitive realization that a *law* has been broken is therefore accompanied by an emotional reaction to the *moral* violation, often conceptualized as "moral outrage." Therefore, jurors' verdict decisions might be influenced not only by careful consideration of evidence, testimony, and reasonable guilt standards (i.e., assessments of legal guilt), but also by jurors' more intuitive, emotional responses to the defendant's moral transgression (i.e., moral outrage). But what is moral outrage, exactly? We know intuitively that moral outrage has a strong emotional component, but what emotions are involved? Does the extent to which jurors feel morally

outraged by a criminal act predict the likelihood of their reaching a particular *guilt* verdict? And if so, does this mean that guilt verdicts are susceptible to the potential prejudicial effects of moral outrage and its emotional components? We will draw upon social psychological research and our own research findings ([Salerno & Peter Hagene, 2013](#)) to discuss the implications of the emotional side of moral outrage for jury decision making in service of informing attorneys' and judges' decisions about the potentially prejudicial effect of emotionally evocative evidence. More specifically, we will discuss how the combination of jurors' anger and disgust produces moral outrage, which in turn can make jurors more likely to vote guilty. Finally, we will discuss the legal implications of these findings for the use of evidence that can arouse both anger and disgust in jurors.

Moral Outrage and Legal Decisions

Given that laws were codified to reflect societal views of what behavior is right and wrong, broken laws often reflect behaviors that society finds immoral. Thus, illegal behavior is often behavior that would be considered immoral by the majority of jurors. Unlike judgments of fact, which can be largely dispassionate and cold, moral judgments have a strong emotional component (Darley & Pittman, 2003; Haidt, 2003; Rozin, Lowery, Imada, & Haidt, 1999). Therefore, psychological research about how people react to moral transgressions emotionally might provide insight into how jurors' emotional reactions to a crime might affect their verdict decisions.

Research in moral psychology has demonstrated that when people witness moral transgressions, they react with moral outrage. Moral outrage has been defined as a constellation of cognitive (e.g., attributions of blame), behavioral (e.g., desire to punish), and emotional (e.g., anger) responses to perceived wrongdoing (Fiske & Tetlock, 1997; Skitka, Bauman, Mullen, 2004; Tetlock, Kristel, Elson, Green, & Lerner, 2000). Moral outrage is a very important concept that legal professionals should be aware of, given that it predicts many legally relevant behaviors, such seeking retribution for perpetrators and compensation for victims (Carlsmith, Darley, & Robinson, 2002; Lotz, Okimoto, Schlosser, & Fetchenhauer, 2011; Tetlock et al., 2000). Generally speaking, the more moral outrage legal decision makers experience, the more they will punish the offender. Many consider moral outrage to be our way of assessing the amount of harm committed (Carlsmith et al., 2002), in order to exact the proportionate (i.e., correct) level of retribution. In other words, the more moral outrage we feel, the more harm we perceive had been done, and the more punishment is necessary to counter the harm and restore the balance of justice.

In our own research, we have found several legal contexts in which moral outrage is a powerful force in punishment decisions. When judging juvenile sexual offense cases, people who read about a more severe offense (i.e., a rape case) compared to a less severe offense case (i.e., sexual harassment) experienced more moral outrage toward the offender, which in turn made them support more punitive sex offender registration policies (Salerno, Najdowski, Stevenson, et al., 2010). We have also found that *reducing* moral outrage can make jurors *less* supportive

of harsh punishment. More specifically, when politically conservative jurors read about a “gay panic” defense (in which a murder defendant claimed the victim provoked him by making a gay sexual advance) they experienced less moral outrage, relative to when they read a similar provocation defense that did not include the gay advance. As a result of this reduced moral outrage they were more likely to downgrade their sentence from murder to manslaughter (Salerno, Najdowski, Bottoms, et al., in press). In other words, when a murder victim violated conservative jurors’ traditional sexual values by making a gay advance on the defendant (i.e., a perceived moral transgression), the jurors were less morally outraged at the defendant for killing the victim, which in turn led them to be more lenient. Thus, it is clear that moral outrage increases the likelihood of punitive decisions. These findings inspired us to investigate what the emotional components of moral outrage are and how they might influence jurors’ *verdict* decisions—despite the legal system’s ideal that guilt judgments be driven by rational thought, rather than emotion (Bandes, 1999).

The Emotional Components of Moral Outrage: A Unique Combination of Anger and Disgust

What emotions are we feeling when we are “morally outraged” by others’ actions? An intuitive response is to characterize moral outrage as anger. It is, after all, called moral “outrage.” Thus, it is no surprise that moral outrage researchers have focused on anger—in fact, some researchers even question the existence of “moral outrage,” considering it to be indistinguishable from anger (Batson et al., 2007; O’Mara et al., 2011). Some researchers even measure moral outrage by merely asking people how angry they are about a moral transgression (e.g., Batson et al., 2007, 2009; Laham et al., 2010; O’Mara et al., 2011; Skitka, 2002; Tetlock et al., 2000).

We hypothesized—along with others (Jensen & Petersen, 2011; Mullen & Skitka, 2006)—that the conceptualization of moral outrage as merely anger might miss another important emotional component: moral disgust. Anger is only one of several moral emotions that people experience when witnessing a moral transgression, other moral emotions experienced include disgust and contempt (Darley & Pittman, 2003; Haidt, 2003; Rozin, Lowery, Imada, & Haidt, 1999). Experiencing disgust can make people judge moral transgressions more severely (see Russell & Giner-Sorolla, 2011)—even when the disgust is elicited by something unrelated to the transgression. For example, when people were exposed to a disgusting smell they rendered more punitive judgments for a moral transgressor—even though the smell was completely unrelated to the case they were judging—relative to when they were not exposed to the disgusting smell (Schnall, Haidt, Clore, & Jordan, 2008). In fact, people react to moral violations with disgust more consistently than with anger (Hutcherson & Gross, 2011). Given the prominent role of disgust in moral judgments, we tested whether moral outrage might be a combination of both anger *and* disgust, rather than merely a moral form of anger.

Present Research

The emotional components of moral outrage. Our first goal was to test our hypotheses that

(a) disgust, along with anger, is a necessary component of moral outrage, and (b) anger and disgust do not arouse moral outrage independently of each other, but rather it is the unique *combination* of anger and disgust that predicts how much moral outrage is experienced. We tested this theory in two very different types of scenarios that were likely to arouse moral outrage: a rape case and a civil case against the Westboro Baptist Church for picketing the funeral of a dead soldier with signs reading “God loves dead soldiers.” We found that the combination of our participants’ anger and disgust predicted how much moral outrage they felt toward the offender in both cases, confirming that disgust is also a central part of moral outrage in addition to anger. Critically, we also found that the effect of one emotion on moral outrage depended on the other. For example, when people felt angrier, they felt more moral outrage—but only if they were also experiencing at least moderate disgust. That is, even though people often think that anger and moral outrage are the same thing, people’s anger was completely unrelated to moral outrage if the person was not experiencing disgust along with anger. This was also the case for disgust: when people felt more disgusted, they felt more moral outrage—but only if they were also experiencing at least moderate levels of anger. In other words, we could not predict how morally outraged someone would be from how angry they were, without also knowing how disgusted they were.

The results of this study confirm that moral outrage is not just anger: Disgust and anger are both emotional components of moral outrage, and are intimately linked in their ability to predict people’s moral outrage in response to a moral transgression. Next, we tested whether these emotional components of moral outrage increased jurors’ confidence in a guilty verdict in a case that included emotionally disturbing trial evidence.

The emotional components of moral outrage and verdicts. The second study was designed to test whether we would find the same results in the context of a mock trial scenario, and determine whether there were downstream consequences to experiencing anger, disgust, and moral outrage on jurors’ verdicts. Participants viewed evidence and trial summary from a murder case. The evidence presentation including gruesome post-mortem photographs that we expected would rouse jurors’ anger and disgust. Next, they read pattern jury instructions for murder, and chose a verdict. They also reported how disgusted and angry they felt in response to the victim’s injuries, and how morally outraged they were by the defendant.

We found, consistent with our first study, that the combination of jurors’ anger and disgust predicted their moral outrage. Specifically, we again found that the angrier people were, the more moral outrage they felt—but this relationship existed only when they were also feeling at least moderate disgust. In this second study, however, we found that participants’ disgust was an even more consistent predictor of moral outrage than was anger: The more disgusted the participants were, the more moral outrage they experienced—this relationship existed regardless of how much anger they felt; even when they were feeling *no* anger.

Importantly, experiencing moral outrage made jurors more confident in a guilty verdict. The combination of jurors’ anger and disgust started a chain reaction, such that these emotions increased moral outrage, which in turn, made them more confident in a guilty verdict. Again, the effect of one emotion depended on the other. Specifically, even though all of the participants saw the same trial evidence, we found that the angrier they felt, the more moral outrage they

experienced, which in turn made them more confident the defendant committed the crime—but this pattern existed only when they were also experiencing at least moderate disgust.

We again found that disgust was an even more consistent predictor than was anger: The more disgusted the jurors felt, the more moral outrage they experienced, which in turn made them more confident the defendant was guilty—this pattern existed regardless of how angry they were (even if they were experiencing *no* anger). This finding was consistent with other researchers' findings that disgust might increase punitive tendencies to a greater degree than does anger (Russell & Giner-Sorolla, 2011).

To be clear, all participants saw the same evidence, but their emotional reactions led them to different levels of confidence in a guilty verdict. This study suggests that increasing one emotion (e.g., anger) increases jurors' reliance on the other emotion (e.g., their disgust-based "gut" reactions) in deciding on verdict. In short, the combination of anger and disgust that jurors experienced determined how much moral outrage they felt, which in turn determined how certain they were of the defendant's guilt.

Legal Implications

Several concerns about rousing jurors' anger and disgust in the courtroom have been raised, including (a) the potential that these emotions might prejudice jurors against the defendant and (b) that these emotions might be a detriment to jurors' ability to carefully process information and to make thoughtful, reasoned judgments. According to the Federal Rules of Evidence, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." (Federal Rules of Evidence, 2006). The advisory notes to this rule explain that unfair prejudice "means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Thus, judges often have to decide whether the probative value of gruesome photographs of murder victims, for example, outweigh their prejudicial effect. Our results join an existing body of research to inform judges' decisions about whether emotionally disturbing evidence should be admissible in court. Equating "emotional" and "prejudicial" can sometimes be problematic in this context (Bandes & Salerno, in press) and, as experimental psychologists, it is not our place to judge what evidence is probative and what evidence should be considered prejudicial in court. What our research findings *can* do is address the two concerns about emotionally evocative evidence by providing information about how jurors' emotions affect their judgments to help judges make more informed admissibility decisions.

Relevant to the first concern that these emotions might prejudice jurors against the defendant directly, prior research has demonstrated that gruesome photographs of murder victims (versus verbal descriptions) made mock jurors more angry, which in turn made them more likely to vote guilty (Bright & Goodman-Delahunty, 2006). Even viewing color (versus black and white) crime scene photographs made mock jurors more punitive (Oliver & Griffitt, 1976; Whalen & Blanchard, 1982)—an effect difficult to explain through probative value and likely explained better through the prejudicial effects of anger and disgust. In our study, the mock jurors all saw the same evidence—but it was the extent to which they reacted to the gruesome photographs with

anger and disgust that increased their moral outrage and, in turn, their confidence in a guilt verdict. Thus, different jurors will judge the same case differently depending on their emotional reaction. This suggests that jurors with heightened disgust sensitivity (Jones & Fitness, 2008), for example, might make more punitive judgments.

Our results also provide information regarding the second main concern with anger and disgust-eliciting evidence. In addition to increasing jurors' punitive tendencies directly, these emotions can change their decision making processes as well, by encouraging superficial information processing and reliance on intuition and stereotype. We found that rousing one emotion (e.g., anger) made jurors rely more on their "gut reactions" (i.e., disgust) when deciding on a verdict. Thus, one type of emotional response to disturbing evidence can lead them to rely more on other intuitive, emotional responses. Evidence that elicits both anger and disgust might lead to jurors relying more on quick, less effortful, and more intuitive judgments. Other social psychological research provides further support and explanations for this phenomenon. When people feel angry and/or disgusted they tend to feel more certain that their decisions are correct (Smith & Ellsworth, 1985; Tiedens & Linton, 2001; Russell & Giner-Sorolla, 2011). This heightened certainty can make people less motivated to process information carefully and to consider alternative decisions (Tiedens & Linton, 2001), less responsive to additional information (Russell & Giner-Sorolla, 2011), and can also increase their reliance on non-relevant, prejudicial factors such as racial stereotypes (Bodenhausen, Sheppard, & Kramer, 1994).

Given these [unintended consequences of rousing jurors' emotions](#) (Salerno & Bottoms, 2010), lawyers and judges need to carefully consider the effect of jurors' emotions on not only their ultimate verdicts, but the decision making process through which they arrive at these verdicts. More specifically, judges should be informed about these effects when weighing the probative versus prejudicial effect of emotionally disturbing evidence. Further, our findings also inform judges that they need to be particularly wary of evidence that might elicit disgust, given that it was a more consistent predictor of moral outrage and verdict confidence than was anger.

Defense attorneys should be wary of gruesome evidence presented by the prosecution (or any evidence that might elicit anger and disgust toward their client) as it might unduly bias the jury against their clients. Further, prosecutors should tread cautiously in the presentation of emotionally evocative evidence, which may be excluded on the basis of legal prejudice. Prosecutors should also be aware of the ways in which the effects of emotions on jurors' judgments are not always straightforward. That is, although generally anger and disgust make people more punitive, they also increase people's certainty in their own beliefs or biases (Smith & Ellsworth, 1985; Lerner & Tiedens, 2006). Thus, in more ambiguous trials or in trials where the defendant is also a sympathetic figure, prosecutors' efforts to elicit anger and disgust (via photographic evidence or otherwise) might backfire and make jurors more confident in an acquittal if that is the way in which they were leaning. In conclusion, lawyers and judges need to be aware of the effects of anger, disgust, and moral outrage on jurors' judgments in order to make more informed decisions about emotionally disturbing evidence in court.

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Endnote

¹ Portions of this article are adapted from Salerno, J. M., & Peter-Hagene, L. C. (2013). The interactive effects of anger and disgust on moral outrage and jurors' verdicts. *Psychological Science*, 24, 2069-2078.

References

- Bandes, S. A. (1999). *Passions of law*. New York, NY: New York University Press.
- Bandes, S. A., & Salerno, J. M. (in press). Emotion, proof and prejudice: The cognitive science of gruesome photos and victim impact statements. *Arizona State Law Review*.
- Batson, C. D., Chao, M.C., & Givens, J. M. (2009). Pursuing moral outrage: Anger at torture. *Journal of Experimental Social Psychology*, 45, 155-160.
- Batson, C. D., Kennedy, C. L., Nord, L., Stocks, E. L., Fleming, D. A., Marzette, C. M.,
- Lishner, D. A., Hayes, R. E., Kolchinsky, L. M., & Zerger, T. (2007). Anger at unfairness: Is it moral outrage? *European Journal of Social Psychology*, 37, 1272-1285.
- Bodenhausen, G. V., Sheppard, L. A., & Kramer, G. P., (1994). Negative affect and social judgment: The differential impact of anger and sadness. *European Journal of Social Psychology*, 24, 45-62.

Bright, D., & Goodman-Delahunty, J. (2006). Gruesome evidence and emotion: Anger, blame, and jury decision-making. *Law and Human Behavior, Special Issue: Emotion in legal judgment and decision making*, 30, 183-202.

Carlsmith, K. M., Darley, J. M., & Robinson, P. H. (2002). Why do we punish?

Deterrence and just deserts as motives for punishment. *Journal of Personality and Social Psychology*, 83, 284-299.

Darley, J. M., & Pittman, T. S. (2003). The psychology of compensatory and retributive justice. *Personality and Social Psychology Review*, 7, 324-336.

Federal Rules of Evidence (2006). Retrieved March 27, 2014 from <http://www.supremecourt.gov/orders/courtorders/frev06p.pdf>.

Feigenson, N., & Park, J. (2006). Emotions and attributions of legal responsibility and blame: A research review. *Law and Human Behavior, Special Issue: Emotion in legal judgment and decision making*, 30, 143-161.

Fiske, A. P., & Tetlock, P. E. (1997). Taboo trade-offs: Reactions to transactions that transgress the spheres of justice. *Political Psychology*, 18, 255-297.

Haidt, J. (2003). The moral emotions. *Handbook of Affective Sciences*, 852-870.

Hutcherson, C. A., & Gross, J. J. (2011). The moral emotions: A social-functionalist account of anger, disgust, and contempt. *Journal of Personality and Social Psychology*, 100, 719-737.

Jensen, N. H., & Petersen, M. B. (2011). To defer or to stand up? How offender formidability affects third party moral outrage. *Evolutionary Psychology*, 9, 118-136.

Laham, S. M., Chopra, S., Lalljee, M., & Parkinson, B. (2010). Emotional and behavioral reactions to moral transgressions: Cross-cultural and individual variations in India and Britain. *International Journal of Psychology*, 45, 64-71.

Lerner, J. S., & Tiedens, L. Z. (2006). Portrait of the angry decision maker: How appraisal tendencies shape anger's influence on cognition. *Journal of Behavioral Decision Making*, 19, 115-137.

Lotz, S., Okimoto, T. G., Schlosser, T., & Fetchenhauer, D. (2011). Punitive versus compensatory reactions to injustice: Emotional antecedents to third-party interventions. *Journal of Experimental Social Psychology*, 47, 477-480.

Mullen, E., & Skitka, L. J. (2006). Exploring the psychological underpinnings of the moral mandate effect: Motivated reasoning, group differentiation, or anger? *Journal of Personality and Social Psychology*, 90, 629-643.

- Oliver, E., & Griffitt, W. (1976). Emotional arousal and 'objective' judgment. *Bulletin of the Psychonomic Society*, 8, 399-400.
- O'Mara, E. M., Jackson, L. E., Batson, C. D., Gaertner, L. (2011). Will the real moral outrage stand up? Distinguishing among emotional reactions to a moral violation. *European Journal of Social Psychology*, 41, 173-179.
- Rozin, P., Lowery, L., Imada, S., & Haidt, J. (1999). The CAD triad hypothesis: A mapping between three moral emotions (contempt, anger, disgust) and three moral codes (community, autonomy, divinity). *Journal of Personality and Social Psychology*, 76, 574–586.
- Russell, P. S., & Giner-Sorolla, R. (2011). Moral anger is more flexible than moral disgust. *Social Psychological and Personality Science*, 2, 360-364.
- Salerno, J. M., & Bottoms, B. L. (2009). Emotional evidence and jurors' judgments: The promise of neuroscience for informing psychology and law. *Behavioral Sciences and the Law: Special Issue: The Neuroscience of Decision Making and Law*, 27, 273-296.
- Salerno, J. M., & Bottoms, B. L. (2010). Unintended consequences of toying with jurors' emotions: The impact of disturbing emotional evidence on jurors' verdicts. *The Jury Expert*, 22, 16-25.
- Salerno, J. M., Najdowski, C. J., Bottoms, B. L., Harrington, E., Kemner, G., & Dave, R. (in press). Excusing murder? Conservative jurors' acceptance of the "gay panic" defense. *Psychology, Public Policy, & Law*.
- Salerno, J. M., Najdowski, C. J., Stevenson, M. C., Wiley, T. R. A., Bottoms, B. L., Vaca Jr., R., Pimentel, P. S. (2010). Psychological mechanisms underlying support for juvenile sex offender registry laws: Prototypes, moral outrage, and perceived threat. *Behavioral Sciences and the Law*, 28, 58-83.
- Schnall, S., Haidt, J., Clore, G. L., & Jordan, A. H. (2008). Disgust as embodied moral judgment. *Personality and Social Psychology Bulletin*, 34, 1096 – 1109.
- Skitka, L. J., Bauman, C. J., & Mullen, E. (2004). Political tolerance and coming to psychological closure following the September 11, 2001, terrorist attacks: An integrative approach. *Personality and Social Psychology Bulletin*, 30, 743-756.
- Skitka, L. J. (2002). Do the means always justify the ends, or do the ends sometimes justify the means? A value protection model of justice reasoning. *Personality and Social Psychology Bulletin*, 28, 588-597.
- Smith, C. A., & Ellsworth, P. C. (1985). Patterns of cognitive appraisal in emotion. *Journal of Personality and Social Psychology*, 48, 813-838.

Tetlock, P. E., Kristel, O. V., Elson, S. B., Green, M. C., & Lerner, J. S. (2000). The psychology of the unthinkable: Taboo trade-offs, forbidden base rates, and heretical counterfactuals. *Journal of Personality and Social Psychology*, 78, 853-870.

Tiedens, L. Z., & Linton, S. (2001). Judgment under emotional uncertainty: The effects of specific emotions on information processing. *Journal of Personality and Social Psychology*, 81, 973-988.

Whalen, D. H., & Blanchard, F. A. (1982). Effects of photographic evidence on mock juror judgment. *Journal of Applied Social Psychology*, 12, 30-41.

Jill Holmquist responds:

Jill Holmquist is a trial consultant and President of Forensic Anthropology, Inc. ("FAI") where she works with Dr. Martin Q. Peterson, one of the pioneers in trial consulting. She is also an attorney licensed in California and Nebraska. FAI provides trial consulting services nationally for plaintiff and defense counsel in cases that range from personal injury suits to complex business transactions and patent infringement suits.

Authors Liana Peter-Hagene, Alexander C. Jay and Jessica M. Salerno present their important findings that the emotions of anger and disgust combine to affect the degree of moral outrage people feel regarding case facts, as well as the degree of certainty they feel regarding their verdicts. They also discuss the more consistent role of disgust in affecting moral outrage and verdict certainty, at least in a murder case involving gruesome photographs. Their research raises both theoretical and practical questions.

In theory, legal decision-making should be free of emotion. It's a tradition passed down from the time of Plato and Aristotle, who saw reason as superior to emotion.^[1] From this intellectual history, we developed jury instructions that require jurors to only consider the evidence and warn against basing decisions on the basis of passion, prejudice or sympathy.^[2]

While prejudice should play no role^[3], is it reasonable to expect jurors to decide cases solely on the basis of evidence without emotion, particularly when emotion seems to be fundamental to morality?

Aristotle taught that pathos, *i.e.*, emotion, was a crucial component of persuasive speech.^[4] In spite of admonitions to lawyers that they ought not appeal to emotion and the admonition to jurors to avoid passion, prejudice or sympathy, lawyers have long used emotional pitches to persuade jurors.

Even courts have recognized that "relevant evidence is inherently prejudicial."^[5] This recognition implicitly underlies the qualification of "unfair" prejudice in evidence rules dealing with the probative value of evidence being outweighed by (unfair) prejudice, as in Federal Rules of Evidence, Rule 403, which the authors cite.^[6] We recognize that evidence has both logical and emotional power, so we ask judges to temper the effects of that evidence when the prejudicial value outweighs its probative value. However, as the authors point out, the comment to Rule 403 indicates it is the emotional component that judges are concerned with.

The authors seem to agree that this concern is justified. They indicate their results can help "inform judges' decisions about whether emotionally disturbing evidence should be admissible in court." Certainly the fact that disgust reactions to gruesome photographs help solidify certainty about verdicts or that color crime scene photographs have the effect of making juror decisions more punitive causes some concern. But does it mean we should only use black and white photographs or we should bar especially gory photographs from the jury? The balancing test of Rule 403 gives judges discretion but rarely do they make these decisions affirmatively

when the photographs have some probative value.

The other concern they raise is the more general one that “emotions might be a detriment to jurors’ ability to carefully process information and to make thoughtful, reasoned judgments.” Jonathan Haidt’s research supports that caution. According to his research, “moral judgments are initially the product of non-conscious automatic intuitive processing” and that “conscious reasoning then takes place and is typically occupied by the task of justifying whatever intuitions that happen to be presented to the consciousness in a biased, non-truth seeking way.”^[7]

But, if this is how human reasoning actually works, I think it begs the larger question of whether we ought to acknowledge the actual and perhaps legitimate role emotion plays in juror decision-making.

From a practical standpoint, the authors suggest tactics that attorneys might want to use, regardless of whether emotions “should” play a role in decision-making.

Obviously, a prosecutor will generally want to use graphic photographs to provoke disgust and anger in a murder case. A similar strategy might work for a personal injury attorney whose client has suffered catastrophic injuries for which there is graphic visual evidence. Conversely, defense attorneys in low impact car collisions want jurors to see the relative lack of damage to vehicles in order to cast doubt on the extent of a plaintiff’s alleged injuries.

Attorneys in criminal and civil cases involving gruesome injuries may want to select jurors who have “heightened disgust sensitivity”, although as the authors note, disgust reactions might backfire under certain circumstances.

It’s important to note that the authors’ results differed from the scenario testing to the mock trial testing. In the first two scenarios, anger and disgust were interdependent. In the mock trial, disgust operated independently of anger. Perhaps it had to do with photographic evidence, which was apparently not used in the scenarios. Or maybe the distinction between the results relates to the topics being discussed: rape and Westboro Baptist protesters in the scenarios versus murder in the mock trial. Murder would likely be considered a much greater moral transgression than would carrying signs that demean the deaths of soldiers.

Clearly, attorneys want to elicit moral outrage in jurors, regardless of what type of case is involved or what side they are on. But it raises a chicken and egg problem: which comes first, the violation of a moral imperative or the feelings of disgust (or disgust and anger), which then trigger a moral outrage?

Can attorneys create moral outrage with strategic moral framing of issues or gory photographs? Or must there be some fundamental violation of morality in order for that framing or photographic evidence to be most effective? And what other moral emotions motivate jurors to render particular verdicts or award damages? I hope the authors will pursue these questions.

Notes

[1] Jonathan Haidt (2003) “The moral emotions”, in R. J. Davidson, K. R. Scherer, & H. H. Goldsmith (Eds.), *Handbook of affective sciences*, 852-870.

[2] For example, Hawai'i Civil Jury Instructions, Instruction 2.5, states: “It is your duty and obligation as jurors to decide this case on the evidence presented in court and upon the law given to you. You must perform your duty and obligation without favoritism, passion, or sympathy for any party in the case, and without prejudice against any of the parties.” California Criminal Jury Instructions § 200 provide the following form: “Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant[s] or alleged victim[s], based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, [or] socioeconomic status (./) [or _____ *[insert any other impermissible basis for bias as appropriate].*” In contrast, in Nebraska, one of the preliminary instructions to the jury is simply “Do not allow sympathy or prejudice to influence you.” NJI2d Civ. 1.00.

[3] I refer here to the pernicious type of prejudice, such as racial prejudice.

[4] Aristotle, *Rhetoric*, Book 1, Part 1.

[5] See, e.g., *U.S. v. McRae* (5th Cir. 1979) 593 F.2d 700, 707 and *U.S. v. Merrill* (11th Cir. 2008) 513 F.3d 1293, 1301.

[6] Fed.R.Evid., Rule 403 states in full: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Most, if not all, states have similar rules.

[7] Jonathan Haidt, *Bias and Reasoning: Haidt's Theory of Moral Judgment* (retrieved 4/22/14 from http://www.smatthewliao.com/wp-content/uploads/2010/10/liao_bias_and_reasoning.pdf) I note that the intuitive processing of emotions is not limited to disgust, which the authors refer to as a “gut” reaction. I think anger is equally a “gut” reaction.

Jason Barnes responds:

Jason Barnes, a.k.a. “The Graphics Guy” is a graphic designer and trial consultant based in Dallas, Texas. He has been practicing visual advocacy since 1990 and has worked in venues across the country. He specializes in intellectual property and complex business litigation cases. You can read more about Mr. Barnes and how he can help you tell better stories in the courtroom at his webpage and on his blog, www.igetlit.com.

Recognizing that feelings of disgust can trigger prejudicial emotional responses in jurors is only the first step. We must then determine whether we will harness this powerful effect or resist it.

Our position on that question, perhaps not surprisingly, is largely driven by which side of the courtroom in which we are seated. Prosecutors or plaintiffs will likely wish to harness the emotional response that disgust provokes. Defendants, on the other hand, will likely wish to oppose the introduction of evidence that holds such power over the human mind.

I prefer to take a practical view and present several images for consideration. We can first assess the original image for its visceral effect. Then, we can assess the same image as processed in ways that attempt to moderate this influence.

Example 1: The authors note that images containing gore as shown in the Image 1 below have the power to disgust and can lead to emotional bias in what should be objective deliberations. Suppose that the prosecutor in a criminal trial wished to use the image to establish the position of the body (head towards the open cabinet) or presence of the WD-40 spray can. This photo would certainly do that, but the Defendant could object and propose that the second version, Image 2, rendered in black and white be used instead.



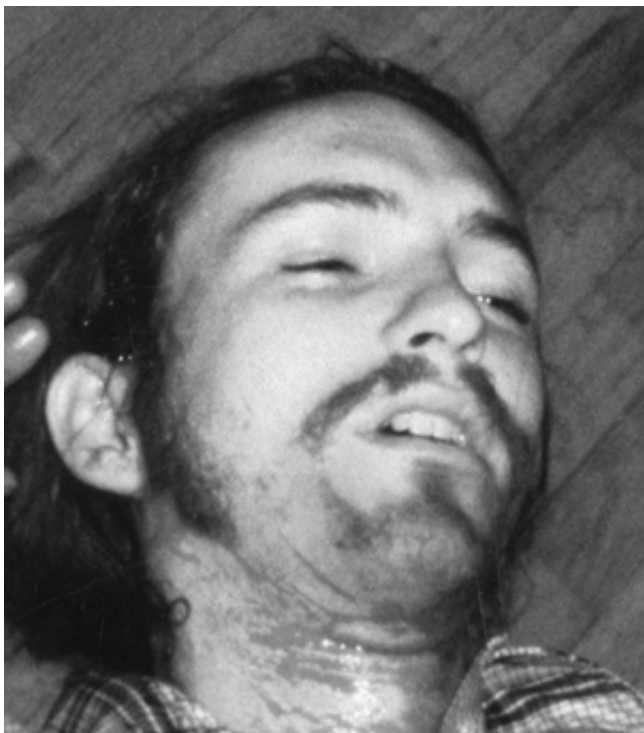
In Image 2, the body position or spray can is still clearly visible to the viewer but the lack of gore substantially changes the overall impression of the image. One may argue that the evidentiary value is preserved but the prejudicial elements are removed or minimized.



Example 2: Suppose in another case the following image of a murder victim, Image 3, was shown to the jury. But maybe the prosecutor wanted to show it to each eye-witness for the stated purpose of identifying the victim. The defense could object and suggest that the prosecutor use Image 4 in its place.



In Image 4, the cropped, black and white image of the victim's face is easily identifiable without inclusion of the prejudicial blood and without repeating the image of the victim splayed across the floor.



Example 3: Consider the following video depicted in Image 5 (here in the form of an animated gif but the principle will be the same for any video) in which we see a scene taken from the popular HBO program, *House of Cards*. We see, repeatedly, security camera footage of a young woman as she falls in front of and is run over by a subway train. Even though it is in black and white, and maybe because of the sterility of that mode, it is particularly ghastly. The image of the actual impact of the train upon the body is incredibly powerful. The repetitive looping only magnifies the effect.



However, if we take the motion out of the equation and present the still frame of Image 6, the moment just before impact, the prejudicial, disgust-inducing effect is controlled to a remarkable degree.



Though image processing can be a powerful tool, like any tool, it can be misused. I would never recommend the complete removal of blood from an image. To remove all the blood would be misleading and could result in a loss of credibility for the attorney and/or client responsible. However, judicious, thoughtful and deliberate use of these techniques can help attorneys meet the challenges of imagery that holds the power to disgust.

Women as Expert Witnesses

by Michelle A. Jones, M.A., J.D. and Tess M.S. Neal, Ph.D.



Don't miss our consultant responses from [George Kich](#), [Lisa Decaro](#), and [Katherine James](#) at the end of this article.

The power I exert on the court depends on the power of my arguments, not on my gender.

-Justice Sandra Day O'Connor

Historically women have been excluded from the courtroom and subjected to prejudicial treatment on the rare occasions when they did take part in legal proceedings (Price, Recupero,

Strong, & Gutheil, 2004; Walters, 1994). Luckily times have changed, and women are increasingly found in court—as lawyers, judges, trial consultants, and expert witnesses. There remains, however, concern that women might be perceived differently from men when they enter court. Our focus in this article is the potential challenges facing women experts, and how biases can be reduced so triers of fact look at the power of experts' data and opinions rather than their gender.

One of the co-authors recently undertook a comprehensive review of the psychological and empirical legal literature to answer one very important question: does a man or a woman make a better expert witness (Neal, 2014)? The answer is complicated, and this article will discuss important findings from research conducted in this area. We first provide an overview of important theories on gender, then describe findings of the research on gender in the courtroom, then discuss the implications of that research and remaining questions, and end with practical advice for lawyers, trial consultants, and experts.

Stereotypes and Roles

It is important to discuss major theories on gender at the outset of this article, because they provide a framework in which to analyze the specific research findings on women as expert witnesses.

One key concept is gender role stereotypes. Gender role stereotypes, which are prevalent in our culture, are our expectations for what men and women should be like. For example, one study found that words such as competence, assertion, and rationality were commonly associated with men (Broverman, Clarkson, & Rosenkrantz, 1972). Accordingly, men were viewed as being logical, able to make decisions easily, and often acting as leaders. In contrast, warmth and expressiveness were characteristics commonly associated with women, and corresponding feminine features included being illogical, having difficulty making decisions, and rarely acting as a leader (Broverman et al., 1972; Helgeson, 2009). Not surprisingly, masculine features were often deemed more desirable than feminine features (Broverman et al., 1972; Helgeson, 2009).

Researchers used these findings to develop comprehensive theories about gender. One example is social role theory, which is based on the idea that people have different expectations for how men and women should behave (Eagly, 1987). According to social role theory, men and women will be perceived negatively if they behave contrary to those expectations. Indeed, research has shown that prejudice results when stereotypes about a person's group do not match beliefs about what is needed to succeed in a given social role (e.g., Eagly, 2004; Eagly & Karau, 2002). In other words, when members of a group—women, for example—enter roles that are stereotypically mismatched to characteristics ascribed to their group, those members may be subjected to prejudice. This is true even if the individual in question is viewed favorably. For instance, although a female corporate executive may be viewed positively, she will not be viewed as positively as an equivalent male executive (Eagly & Koenig, 2008). This occurs because there is a conflict between the stereotypes associated with women (warm, caring) and the more aggressive and competitive stereotypes associated with the masculine role this female

corporate executive occuppies.

Some studies have shown that men may be more influential and persuasive than women, particularly when they occupy traditionally masculine roles (Eagly, Makhijani, & Klonsky, 1992). And, unfortunately, women may face a catch-22 when they occupy roles that are traditionally seen as more masculine. If a woman occupies such a role, the conflict that creates will negatively affect perceptions of her, but acting in a more masculine way by using more assertive language or adopting a more directive interpersonal style may also lead to negative perceptions (Eagly et al., 1992). As you can imagine, this may have significant implications for women who occupy roles in our legal system, roles traditionally associated with masculine characteristics.

Gender in the Courtroom

We focus on two specific issues relating to women in the courtroom: (1) how often women report gender discrimination and (2) how women experts are perceived by judges and juries. Research on these issues reveals bias may be at work.

Regarding the first issue, surveys continue to find that women working in the court system—including women experts—often report gender discrimination (Price et al., 2004; Riger, Foster-Fishman, Nelson-Kuna, & Curran, 1995). In the past, women were retained as experts less frequently than men, although this trend may be slowing (Walters, 1994). Additionally, studies commissioned by federal and state courts have found that women believe they are perceived negatively in the courtroom. For example, a Minnesota task force found that more than half of the female attorneys surveyed believed judges assigned more credibility to male experts than to female experts (Minnesota Supreme Court Task Force for Gender Fairness in the Courts, 1989). The Ninth Circuit and the Texas Supreme Court had similar findings (Coughenour et al., 1994; Texas Supreme Court Gender Bias Task Force, 2004). These surveys suggest women themselves believe gender bias is present in the courtroom.

Researchers have studied various aspects of the second issue but have not found a clear-cut answer yet as to whether judges and juries perceive women experts in a more negative manner than men. Some studies have shown that an expert witness's gender affects the perception of their credibility, and some studies have shown that gender does not have an effect. A closer look at this literature indicates that context may be an important factor.

Neal (2014) points to three studies that found expert gender does not affect credibility. For example, Titcomb-Parrott, Neal, Wilson, and Brodsky (in press) examined how an expert's gender might affect sentencing in a capital case, where the expert testified about the defendant's likelihood of reoffending. Their mock jury study indicated gender had no effect on perceptions of the expert's credibility or on sentencing decisions.

Other studies, however, have found that gender does affect juror decision-making. In one recent study, mock jurors were exposed to a criminal murder trial with cross-examination testimony from a forensic psychologist (Larson & Brodsky, 2010). The mock jurors rated male experts as more likeable, believable, trustworthy, confident, and credible than female experts.

In a different study, mock jurors were presented with a civil case and found that testimony from a female automotive engineer expert witness elicited higher compensatory damages than testimony from a male expert (Couch & Sigler, 2002)

What should we make of these seemingly conflicting results? The answer may lie in the specific context of the case. That is, women experts may outperform men in certain kinds of cases or situations, and vice versa. For example, in one study male and female experts testified in an antitrust case involving a “masculine” field like construction or a “feminine” field like women’s clothing (Schuller, Terry, & McKimmie, 2001). The researchers found that male experts were more persuasive when the case involved a masculine field. Similarly, other studies have found that women experts may outperform men when the case involves a more feminine area such as cosmetics sales (e.g., McKimmie, Newton, Terry, & Schuller, 2004; Schuller & Cripps, 1998). In other words, the degree to which the expert’s gender and the type of case agree (what researchers call “gender congruency”) may be important in determining whether a male or female expert will be more credible and persuasive.

The complexity of the case also may be important. A study using the same antitrust case mentioned before found that male experts were more persuasive—they elicited higher damage awards—than female experts when the testimony was complex (Schuller, Terry, & McKimmie, 2005). Interestingly, they also found female experts were more persuasive when the testimony was not complex.

Another factor to consider is whether the timing of the testimony makes a difference. This was examined in a mock juror study involving a battered woman who had killed her abuser and claimed self-defense (Schuller & Cripps, 1998). The researchers wondered whether presenting expert testimony about battered woman syndrome *before* the defendant’s testimony would provide jurors with a framework for understanding the battered woman’s thoughts and actions. Findings revealed that jurors did impose more lenient sentences when the expert was a woman and testified early, but gender did not matter when expert testimony was presented later in the trial.

A juror’s expectations about appropriate gender roles also may be important. Neal (2014) described a series of studies showing that expert gender may matter, but only when the expert violates the jury’s expectations for the expert’s behavior. For example, one recent study found that unlikable male experts were viewed more positively than unlikable female experts (Neal, Guadagno, Eno, & Brodsky, 2012). This suggests likability—a characteristic often expected of women—is particularly important if the testifying expert is female. That is, women experts may fare poorly if they are not viewed as both likable and competent, and this may be because such women are perceived as violating gender expectations. Another study demonstrated that jurors perceived male experts to be more credible when they maintained a high (assertive) level of eye contact, but the credibility of female experts was not affected by the amount of eye contact they made (Neal & Brodsky, 2008). This again suggests gender expectations are at work.

One last consideration is whether jury deliberations impact these gender effects. At least one study (an extension of the antitrust cases described above) examined this issue (McKimmie et al., 2004). It found that experts were more persuasive when the expert’s gender and the case

type agreed (i.e., both were “feminine” or both were “masculine”), and this effect was magnified when the jurors were asked to deliberate together before reaching a verdict.

Explaining the Research

What do we make of all these findings, some of which appear to conflict with each other? Theories based on gender congruency may hold part of the answer (Eagly, 2004; Eagly & Karau, 2002). A woman is more likely to face prejudice when she is playing a more masculine occupational role. This may explain why the type of case seems to matter in determining whether an expert is perceived as credible or persuasive. Indeed, it also may shed light on a study finding that women accounted for 75% of the experts involved in education controversies but only 4% of corporate cases and 0% of contract cases (Walters, 1994). Likewise, it may help explain why attorneys often seek female experts for cases involving sexual harassment or rape (Price et al., 2004).

Lingering Problems and Questions

Unfortunately women experts may face a trade-off between their professional role and these gender role expectations. On the one hand, if they fulfill society’s expectations that women are warm, caring, and non-assertive, they may be perceived as a less competent expert. On the other hand, if they adhere to their professional role expectations—often associated with masculine characteristics such as assertiveness—they may violate society’s expectations for their gender and be perceived negatively as a woman (Cuddy, Fiske, & Glick, 2004; Eagly et al., 1992). Some of the studies described above lend support to this hypothesis and suggest that gender stereotypes may affect an expert’s credibility or even the ultimate outcome in a case.

In presenting this research, we do not intend to paint a hopeless picture. Many questions remain, and times appear to be changing as more and more women enter the legal field as lawyers and experts. All of the studies discussed above have limitations, and more research is needed to determine precisely when and how an expert’s gender may affect triers of fact. For example, more research is needed to determine what effect jury deliberations may have on the perceptions of male and female experts. Nor do we have a clear picture of how a juror’s own gender might affect his/her perceptions of male and female experts. Likewise, additional studies could shed light on whether altering speech, behavior, or appearance to fit gender stereotypes affects a woman’s credibility as an expert. And we found no studies that examined how expert gender might impact settlements or plea bargains.

Equally important, researchers may be able to shed light on how gender biases can be corrected. For example, future studies could examine whether jurors will correct for potential bias when they are made aware of that possibility (e.g., Wegener & Petty, 1997).

Practical Advice

So what are lawyers, trial consultants, and experts to do while they wait for societal norms to

change and gender bias to be eliminated from the legal process? In choosing and working with experts, attorneys and trial consultants may want to consider the context of the case. Does it involve a “masculine” field like construction or taxes? If so, a male expert may have a slight advantage. In contrast, female experts may be perceived as more credible and persuasive if the case involves a more “feminine” issue such as child custody or sexual assault. The complexity of the testimony is another factor to consider: men may have an advantage in presenting complex testimony but women may have an advantage when the data is not complex.

Both male and female experts should think about gender role expectations as they prepare for trial. This also may be important for trial consultants who work with experts prior to trial. For example, men may want to maintain high levels of eye contact to enhance their credibility and appear assertive (Neal & Brodsky, 2008). In contrast, women may want to focus on appearing likable by using informal speech, minimizing technical jargon, smiling when appropriate, and using inclusive language (Brodsky, Neal, Cramer, & Zeimke, 2009; Neal et al., 2012; Nagle, Brodsky, & Weeter, 2014). Finally, women may want to consider how they will be perceived if they adopt masculine characteristics while also serving in the expert witness role, which has traditionally been seen as a masculine social role. Some of the research suggests that women adopting a masculine professional role should demonstrate feminine traits (e.g., Carli, LaFleur, & Loeber, 1995; Eagly et al., 1992; Reid, Keerie, & Palomares, 2003).

We hope there will soon come a day when research on expert witness gender is moot—a day when the power of one’s argument is the only influence on the trier of fact, as Justice O’Connor so eloquently stated. Until then, however, professionals operating in the legal system should be mindful of potential gender biases and how those biases might affect an expert’s credibility and/or the ultimate outcome in the case. While there is no “one size fits all” answer, professionals should continue to monitor the psychological literature, and apply relevant findings to the specific case and individual expert involved.

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Tess M.S. Neal, Ph.D., is a National Science Foundation postdoctoral research fellow at the University of Nebraska Public Policy Center. She is both a researcher and a clinician. She obtained her Ph.D. in clinical psychology at The University of Alabama and completed a clinical-forensic postdoctoral residency at the University of Massachusetts Medical School. Her research interests focus on basic human judgment and decision making in applied contexts.

References

- Brodsky S. L., Neal T. M. S., Cramer, R. J., & Zeimke, M. H. (2009). Credibility in the courtroom: How likeable should an expert witness be? *Journal of the American Academy of Psychiatry and the Law*, *37*, 525–32.
- Broverman, I. K., Vogel, S. R., Broverman, D. M., Clarkson, F. E., & Rosenkrantz, P. S. (1972). Sex-role stereotypes: A current appraisal. *Journal of Social Issues*, *28*, 59–78.
- Carli, L. L., LaFleur, S. J., & Loeber, C. C. (1995). Nonverbal behavior, gender, and influence. *Journal of Personality and Social Psychology*, *68*, 1030–1041. doi:10.1037/0022-3514.68.6.1030
- Couch, J. V., & Sigler, J. N. (2002). Gender of an expert witness and the jury verdict. *The Psychological Record*, *52*, 281–287.
- Coughenour, J. C., Hug, P. Jr., Patel, M. H., Bird, T.W., Hensler, D. R., McKeown, M.M.,...Shields, H. Jr. (1994). The effects of gender in the federal courts: The final report of the Ninth Circuit gender bias task force. *Southern California Law Review*, *67*, 741–1080.
- Cuddy, A. J. C., Fiske, S. T., & Glick, P. (2004). When professionals become mothers, warmth doesn't cut the ice. *Journal of Social Issues*, *60*, 701–18. doi:10.1111/j.0022-4537.2004.00381.x
- Eagly A. H. (1987). *Sex differences in social behavior: A social-role interpretation*. Hillsdale, NJ: Erlbaum.
- Eagly, A. H. (2004). Prejudice: Toward a more inclusive understanding. In A. H. Eagly, R. M. Baron, & V. L. Hamilton (Eds.), *The social psychology of group identity and social conflict: Theory, application, and practice* (pp. 45–64). Washington, DC, US: American Psychological Association. doi:10.1037/10683-003
- Eagly, A. H., & Karau, S. J. (2002). Role congruity theory of prejudice toward female leaders. *Psychological Review*, *109*, 573–598. doi:10.1037/0033-295X.109.3.573
- Eagly, A. H., & Koenig, A. M. (2008). Gender prejudice: On the risks of occupying incongruent roles. In E. Borgida, & S. T. Fiske (Eds.), *Beyond common sense: Psychological science in the courtroom* (pp. 63–81). Malden, MA: Wiley-Blackwell.
- Eagly, A. H., Makhijani, M. G., & Klonsky, B. G. (1992). Gender and the evaluation of leaders: A meta-analysis. *Psychological Bulletin*, *111*, 3–22. doi:10.1037/0033-2909.111.1.3
- Helgeson, V. S. (2009). *Psychology of gender* (3rd ed.). Upper Saddle River, NJ: Pearson.
- Larson, B. A. & Brodsky, S. L. (2010). When cross-examination offends: How men and women assess intrusive questioning of male and female expert witnesses. *Journal of Applied Social*

Psychology, 40, 811–30. doi:10.1111/j.1559-1816.2010.00599.x

McKimmie, B. M., Newton, C. J., Terry, D. J., & Schuller, R. A. (2004). Jurors' responses to expert witness testimony: The effects of gender stereotypes. *Group Processes and Intergroup Relations*, 7, 131–143. doi:10.1177/1368430204043724

Minnesota Supreme Court Task Force for Gender Fairness in the Courts. (1989). Final Report. *William Mitchell Law Review*, 15, 826–948.

Nagle, J. E., Brodsky, S. L. and Weeter, K. (2014), Gender, smiling, and witness credibility in actual trials. *Behavioral Sciences and the Law*, 32, 195–206. doi:10.1002/bsl.2112

Neal, T. M. S. (2014). Women as expert witnesses: A review of the literature, *Behavioral Sciences and the Law*, 32, 164–179. doi:10.1002/bsl.2113

Neal, T. M. S., & Brodsky, S. L. (2008). Expert witness credibility as a function of eye contact behavior and gender. *Criminal Justice and Behavior*, 35, 1515–1526. doi:10.1177/0093854808325405

Neal, T. M. S., Guadagno, R. E., Eno, C. A., & Brodsky, S. L. (2012). Warmth and competence on the witness stand: Implications for credibility of male and female expert witnesses. *Journal of the American Academy of Psychiatry and the Law*, 40, 488–497.

Price, M., Recupero, P. R., Strong, D. R., & Gutheil, T. G. (2004). Gender differences in the practice patterns of forensic psychiatry experts. *Journal of the American Academy of Psychiatry and Law*, 32, 250–258.

Reid, S. A., Keerie, N., & Palomares, N. A. (2003). Language, gender salience, and social influence. *Journal of Language and Social Psychology*, 22, 210–233. doi: 10.1177/0261927X03022002004

Riger, S., Foster-Fishman, P., Nelson-Kuna, J., & Curran, B. (1995). Gender bias in courtroom dynamics. *Law and Human Behavior*, 19, 465–480. doi: 10.1007/BF01499338

Schuller, R. A., & Cripps, J. (1998). Expert evidence pertaining to battered women: The impact of gender of expert and timing of testimony. *Law and Human Behavior*, 22, 17–31. doi: 10.1023/A:1025772604721

Schuller, R. A., Terry, D., & McKimmie, B. (2001). The impact of an expert's gender on jurors' decisions. *Law and Psychology Review*, 25, 59–79.

Schuller, R. A., Terry, D., & McKimmie, B. (2005). The impact of expert testimony on jurors' decisions: Gender of the expert and testimony complexity. *Journal of Applied Social Psychology*, 35, 1266–1280. doi: 10.1111/j.1559-1816.2005.tb02170.x

Texas Supreme Court Gender Bias Task Force (2004). *Guidelines for practicing gender neutral*

courtroom procedures. Austin, TX: Texas Center for Legal Ethics and Professionalism. Available at <https://www.supreme.courts.state.tx.us/rules/pdf/GenderNeutralCourtroomProcedures-NoCovers.pdf>

Titcomb-Parrott, C., Neal, T. M. S., Wilson J. K., & Brodsky, S. L. (in press). Differences in expert witness knowledge: Do mock jurors notice and does it matter? *Journal of the American Academy of Psychiatry and the Law*.

Walters, A. P. (1994). Gender and the role of expert witnesses in the federal courts. *Georgetown Law Journal*, 83, 635–664.

Wegener, D. T., & Petty, R. E. (1997). The flexible correction model: The role of naïve theories of bias in bias correction. *Advances in Experimental Social Psychology*, 29, 141–208. doi: 10.1016/S0065-2601(08)60017-9

George Kich Responds:

[George Kitahara Kich, PhD.](#), is a **Litigation & Jury Consultant at George Kich Consulting where he provides focus group research, jury selection assistance and works in preparing witnesses. Along with more recent writing and presentations on jury dynamics, questionnaire development and persuasion, he has written book chapters and articles on race and gender (e.g., “In the margins of sex and race: Difference, marginality, and flexibility”; “ Being different together in the university classroom: Multiracial identity as transgressive education”) and, most recently, when the weather is good, he has been developing his stone carving techniques.**

Women as Expert Witnesses by Michelle Jones and Tess Neal was both difficult and troubling to read (everything they report about the impacts of gender bias and expectations is true!), but also encouraging in its attempts to touch on how to manage these biasing factors in the courtroom. As any trial consultant can tell you, we are often asked how gender plays a role in jury selection. How well do the judge, the experts, the attorneys and/or the consultants fit into gender norms that will resonate with the specific jurors? Although this area of research and practice varies by case type, venue and the personalities involved, their basic response at the end is to stay aware of relevant gender and bias research, know what gender bias might be triggered by the case itself, and then use common sense and witness prep to help make sure the message of the witness gets across.

They start this interesting paper with Justice Sandra Day O’Connor’s quote (“The power I exert on the court depends on the power of my arguments, not on my gender.”), which they agree at the end of the paper is an expression of aspiration and courageous intent against overt and implicit biases and stereotypes about gender. The truth is that no one’s gender can be removed from one’s statements. This is true for the men on the Supreme Court as well. The intersectionality problem is that the men’s arguments are considered just “argument” where the women’s statements are labeled and considered as arguments coming from women, and

therefore both suspect and burdened by their gender. Men believe, in concert with others, that their arguments are objective, come from rationality and not embedded in their sex.

I had an initial problem with the research question itself, since the framing of the question itself is complicated. Who's standard is being used to evaluate this question? Who's perspective does this question come from? How do you parse out what embedded mind-set a person has, who is trying to "answer" this question? I was relieved and glad that they set the stage with the Broverman research from the 60s and 70s, since it still has meaning for us today.

I was intrigued by the "eye contact," the case type mismatch with gender expectations about who should be an expert, and the "use of informal speech" research they cited, and wondered about follow-up studies with different kinds of cases. Also, do different research juries respond differently to experts after they have modified their speech, appearance and demeanor? How much does a person have to conform, before they are heard "just on the power" of the expert testimony?

The relational drama of the courtroom stage has also been impacted by the following that I have seen:

- male attorneys who act condescendingly toward their own female experts;
- women being brought in to a case without any direct authority, and only as the result of an obvious pandering to attorneys' own gendered biases, and more.

I think the researchers would agree that the bottom line in working with any witness is to start from the assumption that jurors want to understand and will appreciate any expert who helps them make sense of the evidence, the justification for the decisions being asked of them and the standards for evaluating things like fault, contracts or patents, for instance. If these basics are not managed or presented well, the gender expectations multiply and truly diminish the expert's impact.

Lisa Decaro responds:

Lisa DeCaro is a nationally recognized trial consultant, trial advocacy teacher, and keynote speaker. She is the co-founder of Courtroom Performance, Inc., a trial consulting firm specializing in the defense of civil cases, and co-author of *The Lawyer's Winning Edge: Exceptional Courtroom Performance* (Bradford Publishing, 2004).

Women I work with – whether they are lawyers or witnesses – consistently ask me: "Are jurors judging me differently because I'm a woman? I've heard they are all going to talk about my shoes and my hair, instead of my experience! Will that hurt me?" Male attorneys, on the other hand, ask, "The client wants us to hire a female expert for this case. Do you think that would help?"

For the past 18 years, my answer to both questions has been a very unsatisfying "It depends."

Based on this paper, it looks like my unsatisfying answer is still accurate.

As Jones & Neal point out, gender bias is still alive and well. From the perspective of what we do as trial consultants (helping lawyers and witnesses to navigate the potential minefields of communication under extremely stressful circumstances), the most obvious way in which gender bias interferes with the pursuit of justice in the courtroom is by confusing the issue. Many a successful trial lawyer, who happens to be a woman, is spending an inordinate amount of time deliberating over her choice of shoe or haircut, instead of rehearsing her opening statement. A brilliant engineer has to prove to the jury that she is sufficiently “feminine,” while simultaneously proving that she can hold her own in a traditionally male field.

That this is shocking and unfair is beside the point. Like any bias we face in the courtroom, we are unlikely to eliminate gender role stereotypes or gender bias in our jury during the course of trial. So it becomes our task to use “social role theory” and gender role stereotypes to our advantage. Aside from “being the change we want to see in the world,” what can we do to help these professional women express their very educated arguments or opinions in a way that is persuasive regardless of the bias that likely exists somewhere within the trier(s) of fact?

In my work, I constantly find that a witness is most persuasive when she – or he – is willing to tell her truth honestly – and as her best self. That means *no acting, please*. Much of the time, that also means undoing hours of *bad* witness prep that left the witness feeling like she had to say “the right thing,” color her hair, and generally behave like someone else. Connecting with another human being – particularly when that human being is in a group being told to judge your veracity by your demeanor – is impossible through that veil. The witness must be willing to speak to the group as herself, not as an actor playing a role.

Anyone who has ever been told to “just be yourself,” knows that it is much easier said than done, particularly in a stressful situation. When we add onto that research which shows that certain traits are considered positive for men, and negative for women, and vice versa, it’s enough to turn a good witness into a deer in the headlights.

That said, the perceptions of the trier(s) of fact are not just important – they are vital. And there are certain behaviors that affect those perceptions in a negative way. That is very real, and “just being herself” is not effective if the witness is portraying herself in a way that triggers negative perceptions by the judge or jury, even if those perceptions are not accurate. A knowledgeable, educated, intelligent, woman who presents herself in a way that causes the jury to disregard or misunderstand her opinions is not an effective witness.

It’s up to us – those who prepare the witness to navigate this experience – to wade through the research, determine what it means for the witness in front of us, and help that person express herself effectively, *while* being true to who she is.

The good news for expert witnesses is that there is a traditionally feminine role that they are being asked to fill: The role of *teacher*.

Fifteen years ago, in a small (and not very progressive) Texas town, we prepared a female

doctor to testify as an expert for the first time. She was an impressive woman – the head of cardio-thoracic surgery at one of the top teaching hospitals in the country. She knew her stuff, and she had a strong and clear opinion in this case. She was a youngish woman (mid-forties) in an older man’s role. And, she had a heck-of-a New York accent. Did I mention we were in a small town in Texas?

At first, she was very concerned with proving to the jurors that she was, indeed, an expert in this field. She had to establish that she knew just as much – in fact, more – than the older male experts on the other side. The result was that she appeared to be trying too hard. She was “acting” like what she thought they wanted to see: Authoritative, tough, aggressive. I asked her to think of her role as that of a teacher: To teach those jurors something that they can then teach to their family at the dinner table.

On the witness stand, she was perfect. She connected with the jurors. Using terms and examples which they could readily understand, she taught them all so much about cardio-thoracic medicine that they couldn’t take their eyes off her. Mid-way through cross-examination, when opposing counsel told her to stop teaching (“That question only requires a yes or no answer, Doctor.”), she told him helpfully, “Actually, that’s a pretty complicated question. I could teach the jury about what you’re asking, if I can just use that white board behind you and draw a few diagrams...”

The case settled very favorably for her client, that afternoon.

Whether to hire a female expert in a man’s field is a complicated question. But if she can use that white board to *teach* us the answer, she might just use those gender stereotypes of “social role theory” to her advantage.

Katherine James responds:

[Katherine James, MFA](#) is a trial consultant based in Culver City, CA. Her specialization is *live communication skills*. She specializes in making witnesses "not do that anymore and do this instead" in cases and attorneys to be the best they can be in live and virtual workshops. Read more about her company ACT of Communication at the [website](#).

I have worked with expert witnesses of both genders in all kinds of subject matters in all kinds of cases for three decades. I think that to imply that women should be relegated to “girls” subjects, like fashion and men to “boys” subjects, like math is not only very dangerous, but also terribly, terribly wrong.

Let’s start with wrong first, because it is easy.

Why wrong? Because the best expert for this case might very well be a woman. I say this because we all know that the bias (and the researchers of this article point this out) leans toward “let’s just go with the guy”. And the best guy for the job might very well be a woman.

Off the top of my head, I can think of two experts with whom I've worked that blow this "girls = fashion, boys = math" theory right out of the water. The best fashion merchandising expert I've ever worked with, bar none, is a man. The best CPA expert – a woman. But – make no mistake – most male lawyers are much more comfortable hiring another man as both their fashion merchandising expert and their CPA. Yep. That's what makes it wrong...bordering on dangerous.

Why dangerous? We could sit around anxiously waiting for the world to catch up to the truth. Or we can just present the truth to the world: "This woman is the best expert and we brought you the best expert." If not now, when? It is funny that trial consulting was at one time almost exclusively made up of women. If you remember those days, you might remember how hard many guys were working to convince lawyers that they had "our" traits and were "as good" in this profession. Nothing wrong with that – all is fine in love and commerce. But let's not lose sight of what we know about women as professionals in the wonderful world of the law from our own experience: WE ARE REALLY GOOD.

Now – a word about those male/female characteristics called out in the article. How do I deal with those? I use the good ones for all experts, and I try to get rid of the bad ones in all experts. It goes like this: NO MATTER WHAT THE SUBJECT MATTER, I work with experts of both genders to make them:

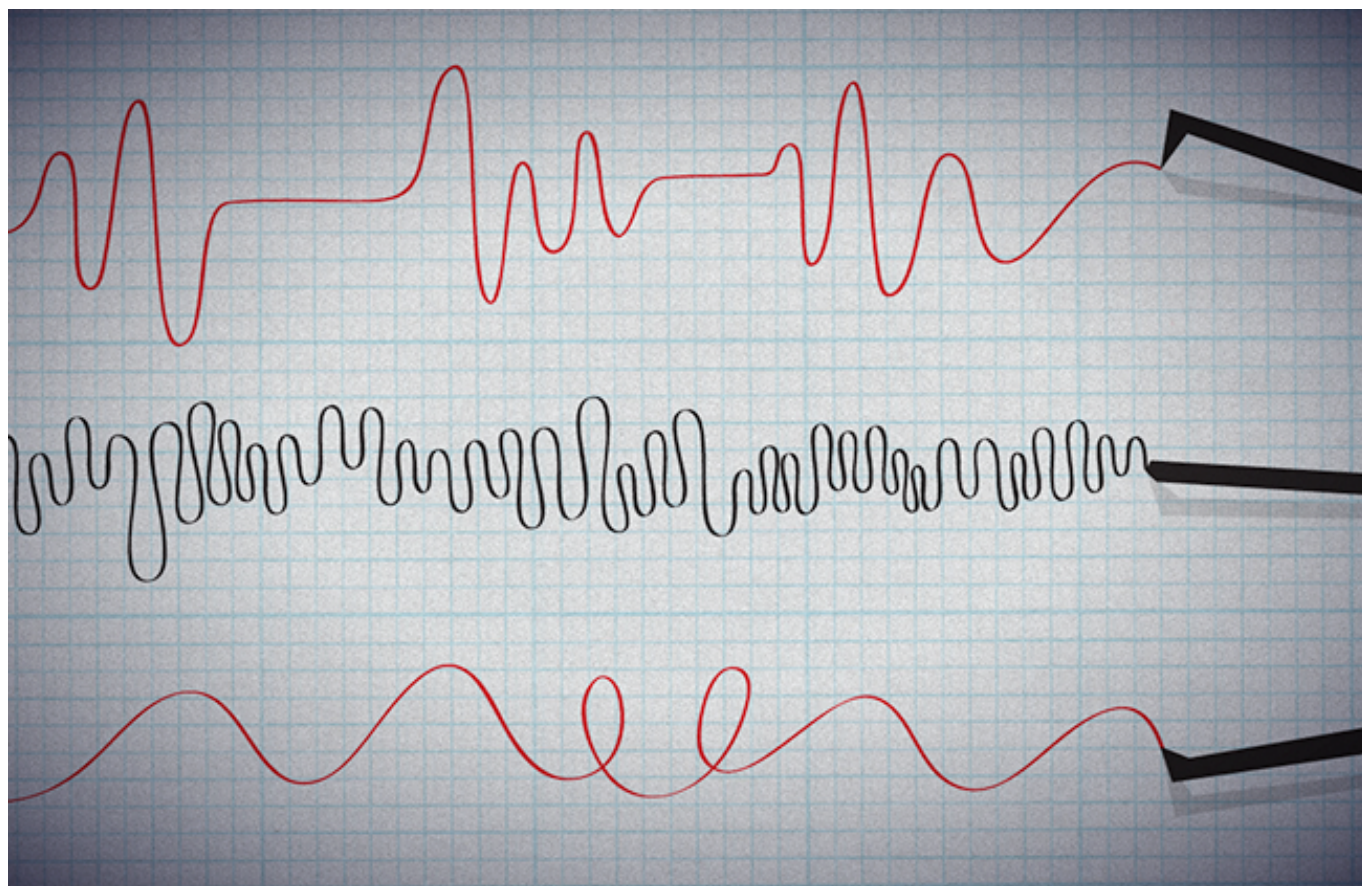
- Warm and caring
- Reasonable (in the article called "logical")
- Expressive
- Able to make great eye contact
- Likeable
- Competent
- Heartfelt love of subject matter (don't think that made the list in the article)

I work to rid EVERY EXPERT REGARDLESS OF GENDER of what the researchers call "masculine" traits, I call it, "let's not do this in front of people" behavior:

- Combative (read "loves to fight")
- Assertive (read "combative with entitlement of brilliance")
- Rational (read "cold and merciless robot")

I find that bringing the "feminine" traits to male experts actually makes them more credible, believable and likeable to jurors. Go figure. And yes, I disabuse female experts of the notion that in order to be successful that they have to embrace all the negative male characteristics that they think they are expected to exhibit. An "Independent" expert didn't come to court to fight with a lawyer. The expert came to teach jurors about a subject that expert is crazy about because that subject is that expert's life's work.

A Polygraph Primer: What Litigators Need to Know



Don't miss our consultant responses from [Adam B. Shniderman](#) and [Holly G. VanLeuven](#) at the end of this article.

The polygraph, an instrument designed to identify deception, first entered the American courtroom more than 90 years ago. In *Frye v. United States* (1923), the D.C. Circuit Court excluded expert testimony about the findings from a polygraph. The court noted that the “systolic blood pressure deception test,” the polygraph, had “not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony....”

Since then, the polygraph and its modern incarnations have continued to incite legal controversy and debate. The public, press and fact finders are no less fascinated with the polygraph now than they were in the beginning of the twentieth century (Keeler, 1930; Myers, Latter, & Abdollahi-Arena, 2006). Overwhelmingly, courts have banned results of polygraph testing in criminal proceedings (*United States v. Scheffer*, 1998). The reasoning for this has largely centered on lack of general acceptance in the scientific community and concerns about prejudicial impact of the findings on the jury (Myers et al., 2006). Nevertheless, the polygraph

continues to be widely used by law enforcement, in employment screenings, and for specific types of forensic assessments, such as sexual offender evaluations (Grubin, 2010). Accordingly, litigators, corporate counsel, and trial consultants need to have a current understanding of the scientific underpinnings of the polygraph, the improvements to the instrument throughout the decades, and the ongoing controversies regarding the interpretation of results.

The Instrument

At its core, the polygraph is a measure of a person's arousal or "fight-or-flight" response. This response is regulated by the sympathetic nervous system (SNS) and is activated during periods of perceived stress. The SNS produces changes in pupil diameter (dilation), increased heart rate and sweating, and constriction of the blood vessels, among other functions. A person engaged in deception is presumed to experience sympathetic arousal due to general anxiety, fear of detection, and worries about the consequences of getting caught. Accordingly, the polygraph was designed to measure changes in the SNS, specifically in systolic blood pressure. This activation was believed to progress along a well-documented curve corresponding to specific periods of the examination and could be distinguished from fear of the examination itself.

Many of the refinements to the polygraph technique have come in the systematizing of signals used to capture the sympathetic response. To boost the ratio of signal to noise (i.e., error) and avoid the problem of having poor tracking of any one mode of detection, early methods came to rely on signals in multiple systems. In addition to the circulatory variables (e.g., heart rate and blood pressure), signals from the respiratory system (e.g., breathing rate, depth, and regularity) and skin (e.g., body temperature and sweating) were integrated to create a multimodal method of detecting deception.

Arguably, the most significant improvements to the polygraph were not in technological advances, but in the standardization of the interview process. David Lykken, Ph.D., a psychologist and former professor of psychiatry at the University of Minnesota, introduced a method of examination known as the [*Guilty Knowledge Test*](#) (GKT; Lykken, 1960). The GKT relies on the assumption that the examinee either has or does not have knowledge of an event that only the guilty party would have. The examiner must also know this "guilty knowledge." In practice, this knowledge often comprises trivial details of a crime or crime scene that were not disclosed publicly, but which would be known to someone present (e.g., the color of a dress or brand of cigarettes used by the victim). In the setting of a polygraph test, elevations in sympathetic nervous system tone in response to items of which the examinee should have no direct knowledge are seen as supporting the possibility that the examinee may be lying. However, since changes in the sympathetic tone during the examination could still be due to general anxiety, the polygraph examination assesses responses to the guilty knowledge in comparison to other control questions.

A typical polygraph examination starts with a pre-test interview to gain some preliminary information, which will later be used for "Control Questions", or CQ. Then, the tester will explain

how the polygraph is supposed to work, emphasizing that it can detect lies and that it is important to answer truthfully. Then a "stimulation test" is often conducted: the subject is asked to deliberately lie and then the tester reports that he was able to detect this lie. Then the actual test starts. Some of the questions asked are "irrelevant" or IR ("Is your name John Smith?"), others are "probable-lie" CQs that most people will lie about ("Have you ever stolen money?") and the remainders are "Relevant Questions ", or RQ ("Did you steal government secrets?"). Question types are alternated throughout the test. The test is "passed" (the subject termed non-deceptive) if the physiological responses during the probable-lie control questions (CQ) are larger than those during the relevant questions (RQ). While this modern version of the polygraph examination still leaves numerous details to the discretion of the examiner, the incorporation of a standard paradigm in the Guilty Knowledge Test (GKT), assessment using a standardized index of sympathetic tone, and a method to calibrate the magnitude of the "relevant" response allows for systematic evaluation of the approach.

Is the Polygraph Valid?

Research on the validity of the polygraph has yielded widely divergent rates of accuracy in detecting deception, some as low as chance and others as high as 95% (Grubin, 2010). This variability can be attributed to lack of a standardized research protocol, lack of consistency in defining terms, the use of different instruments, testing errors, diverse populations. It may also be attributed to the unreliability and invalidity of the polygraph as a whole.

One such persistent critique of the instrument highlights the fact that because each examination requires some individuated questions, this effectively negates the scientific practices of standardization and replication. In response, some researchers have begun to show the efficacy of the polygraph even when standard questions are employed. A 2007 study by Offe and Offe (2007) attempted to show that standardization did not diminish the accuracy of polygraph findings. They enrolled volunteers in a mock crime study and permitted them to decide whether they wanted to participate as guilty or innocent subjects. They used the standard CQT interview method described above, in which relevant questions (RQ) were compared with control questions (CQ). As previously noted, the basic assumption of this method is that guilty subjects will have a greater physiological response to the RQ than the CQ, and that the innocent subjects will have a higher response to the CQ than the RQ. In a typical pretest interview, the CQ is explained as equally significant for the test result in order to shift the focus of concern onto the CQ for innocent subjects, as their broad and vague phrasing is difficult to negate. Among other conclusions, this study demonstrated that explanation of the CQ in the pretest interview resulted in a higher identification rate for guilty and innocent participants, with an overall correct classification rate of 93.3%. Furthermore, the study results indicated that careful calibration of the CQ to an individual subject was not relevant for correct classification, eliminating the need to tailor the CQ questions in an unstandardized manner.

In 2008, Horvath and Palmatier conducted a study that further refined the optimum form for control questions. In that study, participants in a mock theft scenario were randomly assigned to guilt or innocence and were given either exclusive or "time bar" control questions ("Before you were 21, did you ever...?") or non-exclusive or "no time bar" control questions ("Did you

ever...?") Non-exclusive control questions were significantly more effective than exclusive questions for both guilty and innocent subjects, with accuracy rates of 85% and 91% respectively (Horvath & Palmatier, 2008).

As with any research study, the two described above have notable limitations. First, participants should ideally be randomly assigned to groups so as to minimize any self-selection effects. Even if they were, as was the case with the Horvath and Palmatier (2008) study, individuals engaging in research studies (most commonly college students) are often notably different from those involved in the criminal justice studies. Individuals in the criminal justice system have disproportionately high rates of mental illness, substance abuse, and developmental disabilities, all factors that may impact physiological response patterns. Second, the study participants were engaged in mock crime scenarios and therefore the generalizability, or the application of these findings to other settings, is likely limited. This is a significant issue that unfortunately restricts much of social science research from being easily translated to real-life settings, and it may be especially problematic in deception research. Specifically, anxiety in respondents who are feigning guilt may be notably different than those engaged in "real-life" lying. Furthermore, only one type of lying is generally tested in research – denial of the truth. In reality, individuals being questioned may obfuscate their answers, exaggerate or minimize responses, describe events that had occurred prior to time in question, report on hopes or dreams, or simply misremember events. At this time, research has not examined the efficacy of the polygraph to differentiate between different types of lies and the truth.

Finally, the findings from this research may be skewed due to an inflated base rate (Rosenfeld, Sands, & Van Gorp, 2000). A base rate is the proportion of individuals in the population at large who have a particular condition; in this context, the base rate represents people who are going to lie. Naturally, we can never know the precise base rate of lying, but it is likely to be lower than 50% (as is the case with most research). One relevant estimate might be found in the research on malingering, or the feigning of symptoms for secondary gain. Estimates of malingering in criminal settings are generally around 15% and in civil settings approximately 30% (Mittenberg, Patton, Canyock, & Condit, 2002). In contrast, polygraph studies often have a base rate of 50%, with half the participants instructed to deceive. Therefore, even if a polygraph is 90% accurate in a research sample, a much smaller percentage of the actual population will be accurately identified in real-life settings. As the base rate of the phenomenon decreases (i.e., likelihood of lying), it becomes increasingly more difficult to accurately detect the condition. Hence, the actual percent reported in studies is likely to be, at best, somewhat misleading.

Countermeasures

Techniques designed to defeat the accuracy of the polygraph – so-called countermeasures – tend to fall into two basic groups: the suppression of reactions to the relevant questions, and the simulation of inflated reactions to the control questions. In 1994, Aldrich Ames, who was later convicted of spying for the Soviet Union, passed a polygraph test prior to his admission of guilt by resting and relaxing prior to the exam, developing a rapport with the examiner, and trying to maintain calm during the test (Permanent Select Committee on Intelligence, 1994). His approach likely resulted in decreasing arousal in his SNS (or maintaining the same level of

arousal throughout); he therefore managed to avoid detection. Other strategies include practicing controlled breathing during the relevant questions, while inducing tachycardia during the control questions, for example by thinking of something frightening or exciting or by self-induced injury (e.g., pin prick with a concealed sharp object). In this scenario, conventional polygraph analysis will not show a significant reaction to any of the relevant questions and the subject will pass the test.

In practice, the countermeasures described above might result in a respondent being judged as honest. However, other traces of deception may still be detectable. For instance, an individual may be able to suppress changes to his respiratory rate, which is readily monitored and adjustable, while still manifesting changes in other variables, such as skin conductance or pupil diameter. Bailey (2010) suggests that while some individuals are capable of reducing or eliminating a subset of the polygraph response, the volitional control of one signal can result in augmentation of other signals, often with more pronounced than expected. However, this finding has not been investigated or identified in the literature. Finally, exaggerated responses to control questions, using concealed pin-pricks, rapid breathing, or other simulated affective displays, may lead to changes in the arousal response. This too has not been addressed in the literature.

Improving the Polygraph Examination?

Even using conventional polygraph analysis, the utility of the examination can be greatly improved by adhering to key principles and heuristics. In discussing his Guilty Knowledge Test, Dr. Lykken (1998) recommended that for each probe (i.e., question of interest or RQ), an innocent subject should have no more than a 20% chance of testing positive while a guilty subject should have at least an 80% chance of testing positive. Each probe should have five alternatives that are equally plausible to an innocent subject, but, to the guilty subject, are easily distinguishable from the probe and from each other, so that the guilty subject is not confused about which alternative he or she has seen before. In addition, the fact that a guilty subject recognizes a probe “must seem important to the guilty subject,” a condition that should always be realized in a high-stakes criminal investigation context but may not be in laboratory experiments.

F. Lee Bailey, an internationally recognized trial lawyer and life member of the American Polygraph Association, has suggested that an interpretable polygraph examination requires three essential features: (1) the examinee has specific personal knowledge of the information being investigated; (2) the examinee believes or knows his own statements disavowing this knowledge to be false; and (3) the examinee is sufficiently motivated by the outcome of the examination that he will either lie or face some tangible negative consequence (Bailey, 2010). Bailey concedes that scenarios exist in which these conditions are not met and, therefore, a polygraph examination is inappropriate and would be non-interpretable. For additional information on the polygraph and administration, refer to the American Polygraph Association (www.polygraph.org).

The Future of the Polygraph

Although research on the polygraph is inconsistent and has still not gained general acceptance in the scientific community, it continues to be used by law enforcement officials, security teams, and attorneys. The conviction with which these individuals rely on polygraph-based methods in high-stakes settings indicates that one cannot easily dismiss the potential utility of the approach. Thus, while the results of polygraph examinations have had limited success in meeting courtroom evidentiary standards, they have likely affected the outcome of countless cases indirectly through altered testimony, facilitation of other forms of evidence, and out of court settlements.

As such, the polygraph represents an important method for lie detection, both in facilitating our understanding of the biological correlates of lying and in leveraging new technological development on its basic principles. In recent years, technological advances have yielded novel methodologies to identify deception, moving away from reliance on the SNS. One such an instrument is functional Magnetic Resonance Imaging (fMRI), a neuroimaging technique that uses a magnetic field to identify movement in oxygenated blood as a proxy for neuronal activation in the brain. Research using the fMRI has identified enhanced patterns of activity in various brain regions responsible for executive functioning, working memory, and integration of information as being more prominent during deception rather than truthfulness (Christ, Van Essen, Watson, Brubaker, & McDermott, 2008). Nevertheless, the fMRI technique has its own inherent limitations and, like the polygraph, has thus far been deemed inadmissible in the courtroom (Farah, Hutchinson, Phelps, & Wagner, 2014; (*US v. Semrau*, 2012).

Hence, the search for a perfect lie detector continues. Although our technological advances have been unprecedented in the last century, the legal perspective on allowing experts and machines to decipher lying from truth telling has remained unchanged. As noted by Justice Thomas in the *US v. Scheffer* case (1998):

A fundamental premise of our criminal justice system is that ‘the jury is the lie detector.’ *United States v. Barnard*, 490 F.2d 907, 912 (CA9 1973) (emphasis added), cert. denied 416 U.S. 959 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the ‘part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.’ *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891).

Some may find comfort in knowing that secrets of the mind will continue to be outside the purview of the courts, at least for now.

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[Bruce H. Price, M.D.](#) is Co-Founder and Co-Director of Center for Law, Brain and Behavior. He is the Chief of the Department of Neurology at Mclean Hospital and is an Associate Professor in Neurology at Massachusetts General Hospital and Harvard Medical School. His research interests include cognitive and behavioral consequences of neurological and psychiatric diseases, brain dysfunction in violent and criminal behavior, and intersection between medicine, law and ethics. Additional information about Dr. Price can be found [here](#).

References

- Bailey, F. L. (2010, January 21). Comments during the Center for Law, Brain and Behavior's "The Measure of Truth and Deception: The Past and Future of Lie Detection" event.
- Christ, S. E., Van Essen, D. C., Watson, J. M., Brubaker, L. E., & McDermott, K. B. (2008). The Contributions of Prefrontal Cortex and Executive Control to Deception: Evidence from Activation Likelihood Estimate Meta-analyses. *Cerebral Cortex*, *19*(7), 1557–1566. doi:10.1093/cercor/bhn189
- Farah, M. J., Hutchinson, J. B., Phelps, E. A., & Wagner, A. D. (2014). Functional MRI-based lie detection: scientific and societal challenges. *Nature Reviews Neuroscience*, *15*(2), 123–131.
- Frye v. United States*. 293 F. 1013 (D.C.. Cir 1923)
- Grubin, D. (2010). The Polygraph and Forensic Psychiatry. *Journal of the American Academy of Psychiatry and the Law Online*, *38*(4), 446–451.
- Horvath, F., & Palmatier, J. J. (2008). Effect of Two Types of Control Questions and Two Question Formats on the Outcomes of Polygraph Examinations. *Journal of Forensic Sciences*, *53*(4), 889–899. doi:10.1111/j.1556-4029.2008.00775.x
- Keeler, L. (1930). Method for Detecting Deception, A. *American Journal of Police Science*, *1*,

38. Lykken, D. T. (1960). The validity of the guilty knowledge technique: The effects of faking. *Journal of Applied Psychology*, 44(4), 258.

Lykken, D. T. (1998). *A tremor in the blood: Uses and abuses of the lie detector* (Vol. xvi). New York, NY, US: Plenum Press.

Mittenberg, W., Patton, C., Canyock, E. M., & Condit, D. C. (2002). Base Rates of Malingering and Symptom Exaggeration. *Journal of Clinical and Experimental Neuropsychology (Neuropsychology, Development and Cognition: Section A)*, 24(8), 1094–1102.
doi:10.1076/jcen.24.8.1094.8379

Myers, B., Latter, R., & Abdollahi-Arena, M. K. (2006). The Court of Public Opinion: Lay Perceptions of Polygraph Testing. *Law and Human Behavior*, 30(4), 509–523.
doi:10.1007/s10979-006-9041-0

Offe, H., & Offe, S. (2007). The comparison question test: Does it work and if so how? *Law and Human Behavior*, 31(3), 291–303. doi:10.1007/s10979-006-9059-3

Permanent Select Committee on Intelligence, U. H. of R. (1994). *Report of Investigation: The Aldrich Ames Espionage Case*. DIANE Publishing.

Rosenfeld, B., Sands, S. A., & Van Gorp, W. G. (2000). Have we forgotten the base rate problem? Methodological issues in the detection of distortion. *Archives of Clinical Neuropsychology*, 15(4), 349–359.

United States v. Scheffer, 523 US 303 (1998).

United States v. Semrau, 693 F. 3d 510 (2012).

Adam B. Shniderman responds: [Adam B. Shniderman](#) is a doctoral candidate in Criminology, Law and Society at the University of California, Irvine. He specializes in the use of scientific evidence in courts, focusing on neuroscientific evidence, and following completion of his Ph.D. this spring, he will be an Assistant Professor of Criminal Justice at Texas Christian University.

The authors' excellent primer provides insight into the process of a polygraph examination, the *purported* legal and scientific concerns that have kept polygraph evidence out of courtrooms in many jurisdictions, and the future of lie detection. It is worth noting that contrary to popular belief, only 29 states have articulated a *per se* ban, while 15 states have precedent that allows for the admission of polygraph evidence at the stipulation of both parties. (See, [Shniderman, 2012, p. 442](#) for a list of these jurisdictions) New Mexico stands alone as the only jurisdiction to treat polygraph testimony like other types of evidence.

As the authors note, in those jurisdictions that do exclude polygraph evidence, the objections

fall into two general categories: 1) validity and reliability concerns (scientific concerns) and 2) usurpation of the jury function (strictly legal/policy concerns).

Courts' claims that the polygraph would usurp the jury function are often ambiguous and imprecisely articulated. However, these claims can be divided into two general categories. First, some courts have implied that assessing the credibility of a witness is solely within the province of the jury, and it would be impermissible to let an expert testify about the matter. The Louisiana Court of Appeals articulated this justification for excluding polygraph evidence. "The polygraph has been coined as a 'lie detector.' In other words, its very purpose serves to determine whether a person is telling the truth. In our legal system, this function is precisely within the trier of fact's role" (Evans v. DeRidder, 2001).

Second, courts have expressed concern that jurors would be overwhelmed by the expert examiner's credibility assessment. Courts fear that jurors would simply substitute the expert's judgment for their own in a matter that is essential to any trial – witness credibility assessment. As Judge Gibson wrote in *United States v. Alexander*, "[w]hen polygraph evidence is offered in evidence at trial, it is likely to be shrouded with aura of near infallibility, akin to the ancient oracle of Delphi" (1975). This concern has continued to appear in court decisions decades later.

Court's concerns about error rates, the ecological validity of laboratory studies on polygraph evidence, and its lack of general acceptance are often coupled with more general concerns about the validity of the scientific foundation for polygraph examinations. As the authors point out, the polygraph does not directly detect lies. Instead it operates on the assumption that certain physiological responses occur in an individual when he or she lies (e.g., changes in heart rate, blood pressure, respiration rate, and galvanic skin response). However, these changes may be the result of physiological processes not associated with lying, resulting in false positives.

In this respect, brain-based lie detection technologies are claimed to have an advantage. These emerging technologies detect lies at the source. Two companies began offering brain-based lie detection services in 2006, No Lie MRI of San Diego, CA and Cephos Corp. of Tyngsboro, MA. However, brain-based lie detection has fared no better in the courts than polygraph. Thus far, fMRI lie detection has been deemed inadmissible in the two cases it has been offered (*United States v. Semrau* and *Wilson v. Corestaff Services L.P.*). These two courts have expressed many of the same concerns courts have long expressed regarding the use of polygraph evidence. Additionally, there are some troubling new hurdles to overcome. Perhaps most notably, fMRI lie detection examinations cannot identify any particular question that the subject has been truthful or deceptive to. In *Semrau*, Dr. Steven Laken of Cephos Corp. testified that he could not identify any specific questions that Dr. Semrau had answered truthfully or deceptively. He could only provide an assessment of Dr. Semrau's overall truthfulness (see, Magistrate Tu Pham's opinion, [p. 19](#)). This limitation would seem to undermine the very purpose of using these technologies.

The real question, however, is whether any of these legal or scientific concerns matter for the future of lie detection in courts. Will scientific progress turn the legal tides on lie detection evidence?

I opened with reference to the *purported* legal and scientific concerns that have kept various lie detection technologies out of court. Ultimately, I agree with the authors that lie detection is unlikely to see the inside of the courtroom any time soon. However, I reach this conclusion for different reasons.

In an in-depth analysis of the justifications for excluding polygraph (and by extension fMRI lie detection), comparing polygraph evidence with several other routinely admitted forensic techniques, I concluded that these legal and scientific justifications may simply provide cover for larger cultural phenomena: a systemic bias against defendants and a contentious relationship with lie detection (see, [Shniderman, 2012](#) for this analysis and discussion).

For example, for all the criticism of the unknown and inconsistent error rates for polygraph examination, little is known about the error rates of latent print identification. Even when faced with known cases of misattribution (e.g., [Brandon Mayfield](#)) examiners claim a zero error rate. Yet, scholars are just beginning to test examiners' ability to correctly identify prints using experimental methods. In spite of this and other shortcomings, latent print comparison is heralded as second only to DNA examination. Recent endeavors to exclude latent print analysis on the same grounds that have served to exclude polygraph evidence have failed. Courts simply accept latent print examination on trust ([Cole, 2009](#)).

With respect to general acceptance, courts addressing the admissibility of polygraph have taken a markedly different stance about who constitutes the "relevant scientific community" than they have for other forensic disciplines. For polygraph evidence, the relevant community has been construed broadly to include physiologists, psychiatrists, neurophysiologists and examiners – with examiners' opinions mattering the least (Iacono & Lykken, 2002). In contrast, the courts have so narrowly defined the relevant scientific community for latent print examination that it includes *only* examiners. Courts have actively endeavored to exclude the opinions of others regarding fingerprint evidence ([Cole, 2008](#)).

Ultimately, the significant distinction between polygraph evidence and other forms of forensic scientific evidence is the party seeking to admit the evidence. The nature of the evidence and the constitutional protections for criminal defendants, make polygraph the only forensic evidence almost exclusively offered by the defense. Additionally, Americans have an uncomfortable relationship with lie detection technology. While we have long had an obsession with the ability to detect lies (Alder, 2007), we become uncomfortable at the idea of other people knowing our thoughts. Because of these deep-seated cultural feelings, it seems unlikely that lie detection will ever regularly make its way into courtrooms. Justice Hans Linde of the Oregon Supreme Court stated it best:

I doubt that the uneasiness about electrical lie detectors would disappear even if they were refined to place their accuracy beyond question. Indeed, I would not be surprised if such a development would only heighten the sense of unease and the search for plausible legal objections (State v. Lyon, 1987, p. 234-35).

References:

Alder, K. (2007). *The lie detectors: The history of an American obsession*. Simon and Schuster.
Cole, S. A. (2008). Comment on Scientific Validation of Fingerprint Evidence under Daubert. *Law, Prob. & Risk*, 7, 119.

Evans v. DeRidder Municipal Fire, 815 So. 2d 61, 67 (La. 2002)

Iacono, W. G., & Lykken, D. T. (2002). The scientific status of research on polygraph techniques: The case against polygraph tests. In D. L. Faigman, D. H. Kaye, M. J. Saks, & J. Sanders (Eds.), *Modern scientific evidence: The law and science of expert testimony* (Vol. 2, pp. 483-538). St. Paul, MN: West.

[Shnideman, A. B. \(2012\)](#). You Can't Handle the Truth: Lies, Damn Lies, and the Exclusion of Polygraph Evidence, *Albany Law Journal of Science and Technology*, 22, 433-473.

State v. Lyon, 744 P.2d 231 (Or. 1987).

United States v. Alexander, 526 F.2d 161 (8thCir.1975).

United States v. Semrau, 693 F. 3d 510 (2012).

Wilson v. Corestaff Services L.P., 900 N.Y.S.2d 639 (Sup. Ct., N.Y. County 2010)

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Detecting Lies

The Supreme Court has just heard arguments in *Susan B. Anthony List v. Driehaus* concerning the right to sue over claims of intentional lying in political campaigns.

Earlier, as I prepared to write this review, I googled “detecting lies”. 11,400,000 results popped up.

When I googled “quotes about lies,” there were 80,800,000 results.

Lies are clearly part of the fabric of our lives, but how do we really know when we are dealing with one? By their very nature, lies are deceptive, and we can safely assume that the delivery agents of lies, human or non-human, are deceptive as well. So how can we tell for sure what is

a lie and who is a liar? This is particularly relevant in litigation. In life we pretty much make up our own minds about lies and liars. In law the ultimate trier of fact is the jury and, sometimes, the judge. They are charged with the responsibility of sorting out the truth. Into this milieu, the polygraph – the lie detector - arrives!

The polygraph device, its operators, its input, and its output have been much maligned throughout history. The perennial questions about polygraph results remain:

1. Are they valid? To what extent are the assessments accurate?
2. Are they reliable? To what extent are the assessments consistent?

The research reported here traces the usage of the polygraph through time and cites numerous studies that inquire into the answers to those perennial questions. No matter how they are sliced and diced, the answers to both questions fall somewhere from “inconclusive” to “no.” In the end, polygraph results should be considered neither accurate nor consistent. Yet the authors of this research report state in summary that “while results of polygraph examinations have had limited success in meeting courtroom evidentiary standards, they have likely affected the outcome of countless cases indirectly through altered testimony, facilitation of other forms of evidence, and out of court settlements.”

There is no point re-hashing the excellent summary of the state of Lie Detectors in the 21st century except to point out that that they still have utility in spite of their well-documented limitations. The original Lie Detectors, human beings, also still play a critical role in determining what is true and what is false in spite of *their* well-documented limitations. After all, seated as the jury, human lie detectors remain the triers of fact. Their decisions and judgments, unlike the findings of the widely inadmissible mechanical Lie Detectors, are generally supported and sought after by the Court.

So why bother with a mechanical Lie Detector at all?

To me, the truth is often best seen as a puzzle to be revealed piece by piece. Lie Detector results can be a piece in that puzzle, sometimes fitting perfectly, sometimes not so much. A wise and successful Michigan criminal attorney tells me that he likes to use them, warts and all, because often, if his client passes, the charges are dropped. And if the client fails to pass, the results aren't admissible in his jurisdiction anyway. When I googled “Lie Detector” and brought up all those results, I reviewed many of them. There were many, many suggestions on how to determine if someone is lying or not...many of them were useful and probably about as valid and reliable as the Lie Detector and human beings. I recommend them to you. My personal preference in detecting many types of lies is graphology. In the hands of a skillful graphologist, the lie and the liar can be found out very quickly. However, it must be said that those findings become just another piece in the puzzle on the way to finding truth. To quote from Canadian Poet Laureate Bliss Carman,

I often wish that I could save the world from the tyranny of facts. What are facts but compromises. Facts merely mark the point at which we have agreed to let the investigation cease.

Sometimes solving the puzzle of what is true and what is false requires only one piece, sometimes many. In litigation, the additional pressures of economies of time and other resources demand going with fewer, not more, pieces. How often does it come down to a pure, gut feeling? My guess is very often and that is when you really need to have team members with finely-tuned guts! That is what a good trial consultant is all about, bringing the best elements of the art and the science of trial consulting to a case. I imagine we have all had clients who have hired us simply to be able to say that they have us on the team, “a gun for hire,” possibly jarring the opposition into a more favorable negotiating position. That’s not what we are there for but it is sometimes how we are utilized...an implied threat! Today’s human lie detectors, the members of the jury, bring into the courtroom not only their own common sense but also storylines from popular media such as “The Good Wife,” “NCSI,” “Blacklist,” “Court TV,” and “Scandal” as well as movies, novels, newspapers and TV news. These people know “the rest of the story.” In fact they know the rest of many stories and will be astute judges of truths and lies as a consequence.

Favorite Thing: Sleep Cycle Alarm App



This may be old news to those who are more tech savvy than I am, but I love the new Sleep Cycle alarm app. Even with 2, 3 or 4 hours of sleep per night during trial, I wake more refreshed than without it!

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PowerPoint in the Courtroom: Powerful Points to Consider

by Suann Ingle, M.S.



PowerPoint continues to take a lot of hits lately for being ubiquitous, pointless, overused, over-animated, flashy, over-relied upon and distracting in many different fields – education, healthcare, government, law, corporate life to name only a few. This should surprise no one, especially since it has become so widely used. In a 2012 piece, BusinessWeek estimated one billion installations of the software. That same article also estimated 350 presentations happening every second across the globe. It should also surprise no one that almost as many opinions about its evolving worth have resulted.

Its widespread use is likely similar to what Microsoft Word did to both writing (I type, Voila! therefore I write) and to the lost art of typesetting by hand (if you still double space after a period, you shouldn't). Courtrooms and other venues of dispute resolution are increasingly wired and ready for such presentations. And with an estimated 95% of the presentation software market cornered, PowerPoint is the go-to tool many legal teams use to preview and highlight evidence they expect to come in at trial, and also to sum up the evidence that actually has come in when they argue closing. In addition, they use the software to organize their thoughts, thinking perhaps that they are saving time.

PowerPoint is an incredibly sophisticated and versatile tool, one that in the right hands can also be an effective and persuasive complement to an oral presentation in the courtroom. This essay explores the current use of PowerPoint in courtroom presentations. It imagines a higher level of quality when “beauty” is considered and applied, that differentiates from the expected, safe, pedestrian types of presentations.

If even a fraction of the estimated 350 presentations delivered every second around the world, courtroom PowerPoints serve many, many purposes that can be considered successful. They keep attorneys on track, they summarize for those jurors who are paying little attention, they repeat or echo the words being spoken (for better or worse), they provide a crutch when needed, and they give otherwise bored judges and jurors something else to study when the material itself either isn't all that interesting, or is so foreign as to be completely disregarded. All in all, a quick, easy recipe for mediocrity.

Consider some time and attention, and an eye for the esthetic, and you've just raised your expectations of what PowerPoint might actually do for your case. One of the first things we ask artists to do when creating presentations is to start with something attorneys can't easily create themselves. Stay away from the myriad templates and default fonts. Use deliberately chosen colors, fonts and be free with formatting because creating a visual system for conveying complicated information will often translate to thoughtful, dignified means of communication.

Speakers began supplementing presentations with visuals as soon as it was technically possible. If we really want to explore this without blaming PowerPoint for everything...what exactly were the cave drawings? Weren't they at least evidence that early humans were trying communicate visually with the tools of the day? And do we see anything but pictures on those walls? Though I don't visualize a cave dweller standing up and pointing to “present” anything, if they were, they were doing it all without a clicker... So skip ahead a few years or millennia.

Remember overhead projectors anyone? Teachers used them regularly and wrote with colored permanent markers on transparencies run through copy machines instead of paper. I mention this, because like the classroom, the courtroom too has used whatever means available to “show” or “demonstrate” something to an audience of learners – to help speak to a group at once while directing attention to something other than the speaker.

Technology in the modern era began splintering our attention spans – television commercials, call-waiting – all before the Internet, mobile phones and then smart phones – and as a result, likely caused a restlessness in audiences who began thinking, “surely there must be something more interesting to look at other than the speaker while I am listening” or “what am I missing while I listen to this?” And if you can remember a time before PowerPoint, then you know that it doesn't mean the points on “computer graphic” slides had any more power then. Though they certainly cost more – a slide-producing artist in the early 1980s could easily earn \$25 - \$50 dollars per hour designing slides using \$80,000.00 computers. There were no such thing as templates, and photography studios were busy developing the film that made slides from DOS files on floppy disks. But I digress.

Those of us who remember courtroom presentation aids before PowerPoint (it has been

reported that the use of a blackboard in the courtroom was controversial and the center of debate as late as 1959) might attest to their power. But they weren't easy or fast to make, so they required more time, attention, focus and planning (anyone for cutting and applying large sheets of color tints to large black and white printed and mounted photo paper?). Imagine crestfallen trial teams on the eve of trial when a case had just settled, sitting amidst a multitude of 3x4 foam core exhibits that at best would end up being used for play in backyards.

And perhaps that is why courtroom exhibit boards might be considered even more powerful than what we see in courtrooms today. They didn't "flash" and disappear for one thing. And whoever coined the phrase "A Picture Is Worth A Thousand Words," must have understood that the thousand words had to come before the picture. And that one does not supplant the other, rather one relies on the other to exist.

And, while at first blush it would seem a foregone conclusion that to create the one picture that was worth a thousand words, it would be silly (and possibly infuriating) to think it were easy to do so. I feel compelled to mention here that too many PowerPoint presentations in court look like "a thousand words," all on one slide. Again, I digress.

How does a trial attorney go about getting her arms around the whole idea of PowerPoint in the courtroom? Which, some may say, is at its simplest, a slide projector (on steroids). How does one go about developing a complementary visual presentation that actually helps, rather than hurts your case in front of a judge or jury or both? How does one avoid slide overload?

Here's how: pencil to paper. Don't start with PowerPoint, start with the "thousand words." Refine them, edit them, re-work them, oh heck, sketch them. Arrive at your message, and then commit to a medium that may or may not include PowerPoint.

And know this for certain: there is a place for beauty. You may feel smart for having created slides that are attractive, clever and complete. But more likely, those slides offer a great start, and resemble your script more than the final visuals. We have transformed a fair number of attorney-drafted "slide decks" by transferring their content into the Notes section of the slides so that we could use the slides to complement and reinforce the message rather than be the message.

The legal arguments attorneys deem so urgent and vital that they must be accompanied by something other than your spoken word at the podium, will have a better chance of being persuasive if you choose a visual designer, who thinks about beauty, composition, flow and esthetics to develop your final presentation. Imagine the edge you gain, if you finalize content, and then let it go so that someone else, trained in the esthetic, could take it to the next level with visual comprehension in mind.

You may be thinking, "PowerPoint is so easy, I have begun composing with it, so I'm ahead of pack, already working in the final form" or "we have a young kid who works wonders with PowerPoint – he's fast, creative and so facile with the software." Think about this: The ability to compose in PowerPoint might translate to speed, cleverness, technical skill, but it won't likely translate to clarity and context, one thing you need for sure in the courtroom. And most

importantly, technical savvy alone doesn't put the viewer first, which is the very best way to judge a visual presentation.

Whatever you do, avoid throwing the baby out with the bathwater, and taking the proverbial high road. We have heard many versions of this: "I don't need to think about that stuff. I'm an old-fashioned type of guy. I just need to stand up and tell my client's story without all that fancy technology."

Think long and hard about how that will compare with your adversary, the one using visuals well and with practice. One attorney I spoke with insisted that his recent win was due in large part because his adversary used a bunch of "fancy technology" and he did not.

Eschewing PowerPoint or "fancy technology" just because you have never needed it in the past, or because you think you can outsmart anyone who does, can be a highly risky strategy. Another attorney recently followed up his losing trial with "we were 'out done by a multimedia show,'" he said. "They had a virtual circus on the other side, and I think the jury was entertained and felt as if those attorneys were telling the a complicated story in a way that helped them understand – mind you, even if they didn't."

I am not sure either comment above proves, or disproves the merits of visual communications, but the myriad style choices that come inside presentation software packages like PowerPoint are the culprit here, and part of the reason for the bad press. Flipping, dancing, bouncing and flying bullet points do not a successful oral argument make. But the process of creating them can make you think about your content in a meaningful way. This will become clearer to you if, after composing in PowerPoint until you are happy with the content, you hand it over to a visual designer, one who is well-versed in legal setting usage. Doing so will:

1. Create a more visually understandable and appealing piece of work, and
2. Support you, not supplant you as you argue on behalf of your client.

At a minimum, a visual aid can complement your style and message, whatever it is. And by visual aid, I do not mean your script in large white bullet points on a lovely blue, gradation laden background. I mean carefully choreographed images interwoven with your spoken words that lead to the visual connections your jurors will make. This includes the use of black screens when the time is right, so that your audience is captivated by your words and their meaning alone.

Lastly, if the value of a picture is truly a thousand words, it should be noted that PowerPoint doesn't absolve you of the task to write those thousand words. But it can help you bring them to life with powerful dimension in ways that move people to act in favor of your client.

[Suann Ingle, M.S.](#), has been helping attorneys and executives deliver great presentations since the days before PowerPoint. Working with trial teams in national venues, from pitch to verdict, Suann integrates the principles of graphic design, jury research and

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