The Jury EXPERT

The Art and Science of Litigation Advocacy

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NOTE FROM THE EDITOR

NEW POLITICAL LABELS, A NEW WORD (PREHABILITATION) AND NEW WAYS TO THINK ABOUT MANY THINGS

As we reach the dog days of summer and triple digit temperatures (and humidity pushing triple digits in some parts of the country), it's a perfect time to sit in air-conditioned comfort with an adult beverage and ponder the plethora of possibilities in this penultimate *Jury Expert* issue for 2014.

You've probably noticed that political labels/designations/self-reports have been shifting over the past while. In truth, they have been shifting for the past two decades and it is only now we can see that clearly. (Isn't hindsight wonderful?) Our lead article takes a close look at just how our identification of our own individual politics has shifted and coalesced into a much more complex picture than is painted by simple Democrat/Republican and conservative/liberal labels. What will it mean for voir dire? What should it mean for voir dire?

Speaking of voir dire, we have a new word in this issue of *The Jury Expert*: "prehabilitation". You know what that is—it happens when jurors are asked leading questions in voir dire as to whether they can be fair despite their admission of potentially biasing attitudes, values, beliefs or experiences. Prehabilitation. It has a nice ring to it–but this article is more about how to avoid prehabilitating than how to do it more often.

But once we get past voir dire, what happens in that jury box? As jurors listen to case narrative, how do they evaluate the despicableness of harmful acts? It isn't just what that horrible, awful person did—it's how the individual juror would feel if they imagine themself doing what the accused did. We know our jurors often place themselves in the midst of a case narrative and this research has important ramifications for our day-to-day work in litigation advocacy.

And what if your defense involves the brain and how it functions or fritzes? You've probably seen the headlines about the CSI Effect being dead when it comes to jury decision-making. Those "pretty pictures" (aka neuro-images) of brains lighting up just aren't as persuasive as they originally were. But something is still seductively alluring about this whole area and you might be surprised at what still makes a difference in juror decision-making in these types of cases.

Other topics in this issue include how novel defenses are perceived by research participants and how what a juror does nonverbally (in terms of behavioral mimicry) might be of interest to you in predicting which side they favor at a particular point in time. And, speaking of novel, why not read about a new way of looking at jury selection from the perspective of game theory? Is there a way you can make those last strikes more effectively using a computer program?

So. This heat and humidity won't last forever. Fall is coming. Sit back. Put your feet up and peruse our virtual pages. As always, feel free to email me with topics you'd like to see in upcoming issues. We'll do our best to cover it!

Rita R. Handrich, Ph.D.
Editor, The Jury Expert

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DEMOGRAPHIC ROULETTE

WHAT WAS ONCE A BAD IDEA HAS GOTTEN WORSE

DOUGLAS L. KEENE, PH.D. AND RITA R. HANDRICH, PH.D.

"Beware of the Lutherans, especially the Scandinavians; they are almost always sure to convict. Either a Lutheran or Scandinavian is unsafe, but if both in one, plead your client guilty and go down the docket. He learns about sinning and punishing from the preacher, and dares not doubt. A person who disobeys must be sent to hell; he has God's word for that." (Clarence Darrow, 1936)

Almost eighty years following Clarence Darrow's distillation of how religion shapes jury behavior, the belief that demographics could be the holy grail for the selection of jurors persists. It is routine for our clients to comment, in the midst of a mock juror deliberation, "Well, it looks like older women are good for us!" and for the associates to quickly add this to their notes for use in the upcoming voir dire. The lingering hope that demographics could predict a juror's eventual vote represents a pesky and persistent belief. Too bad it's hardly ever true.

We are psychologists by training and trial consultants by trade. We pay close attention to popular culture, new social

science research, surveys and polls of randomly selected and representative populations, and we watch the mock jurors in our pretrial research closely. Over the last decade, we have seen a change in juror reports of political affiliation. Those reporting they were either Republican or Democrat began to decrease while those reporting either no political affiliation or being politically Independent began to increase. At the same time, we saw fewer mock jurors reporting they were either "very liberal" or "very conservative"–instead, they simply chose "liberal" or "conservative" or wrote in "it depends". As time passed and the changes continued, we began to see this change as our "new normal". We've written about it a fair amount at our blog, The Jury Room and were pleased earlier this year when Gallup published a nationwide poll showing an all-time high in those identifying as political independents.

So when the Pew Center began to publish the results of their huge (10,013 randomly selected and nationally representative respondents) survey on the 2014 Political Typology, we took notice. This paper represents the beginning of our efforts to apply the Pew Center work (focused on politics) to litigation advocacy. The Pew Center will continue to publish their results throughout the rest of this year. As it is released, we will continue to analyze their findings for applications to our pretrial research, in our recommendations for voir dire and jury selection, and in the crafting of case narratives.

As you will see on the following pages, there are reasons for the shifts we have noted in juror identification of their political affiliations. The attitudinal shift about politics demands that we reconsider our views of what "political ideology" is and the implications for understanding public attitudes and biases in 2014. We no longer have a continuum with liberals and conservatives at opposite ends and moderates in the middle. It's become much more complex. And that requires rethinking our previous ideas of the relationship between nominal demographics (such as political affiliation) with attitudes, values and beliefs.

This paper presents aspects of the Pew findings (in brief) and makes the case for looking at political affiliation/ideology differently. We will introduce you to the "new normal" in understanding the eight different groups of voters Pew has identified and then pull out what we know so far from the June and July 2014 Pew publications on how we can use this new (and still emerging) data in litigation advocacy.

NEITHER REPUBLICAN NOR DEMOCRAT

Mark Zuckerberg, the CEO of Facebook, declared he was neither Republican nor Democrat about a year ago and created a news buzz with this seemingly avant garde position. But (as behooves a social media guru) Zuckerberg is not alone in this position. Historically, most said they were either Republicans or Democrats and a few would say Independent and fewer still said they were unaffiliated. Major party identification has shrunk considerably in the last several years with the majority of our mock jurors now identifying as either non-affiliated or politically independent and the minority still identifying with either the Democratic or Republican parties. We had been watching this shift for almost two years before a Gallup Poll documented it nationally with an article heralding the rise of the American Independent.

Political affiliation used to be predictable. We could expect that the majority of our mock jurors were identified with a major party and a sprinkling would say they were Independent or unaffiliated. Political affiliation is *still* predictable. It's just that now the majority are telling us they are Independent or not affiliated and the mock jurors share a disapproval of government, politicians and big business that is often palpable in the room. When we do find a group where the majority identify as either Republican or Democrat, we look especially closely for other ways they are not representative of the county or venire. It's our new normal.

NEITHER LIBERAL NOR CONSERVATIVE

At the same time self-reports of political affiliations shifted, the mock juror response to the question on liberal versus conservative perspectives also lost any real meaning in most cases. Historically, it was common to have a small percentage of mock jurors describe themselves as either "very conservative" or "very liberal". We paid close attention to those "fringe-dwelling" mock jurors and they were often identifiably different from those saying they were either "liberal" or "conservative".

At this point, it is common for us to see no one endorsing the extremes of liberal versus conservative identities and those who self-describe as "very liberal" or "very conservative" tend to be distinguished (on either end of the spectrum) as attitudinally rigid. What that means for a verdict isn't normally related to the end of the spectrum they self-select, but they are less likely to deliberate with an open mind. We have come to the view that political party affiliation has lost the meaning it used to have, and the question of whether a person is Republican or Democrat (sometimes posed as whether a person is "generally in agreement with [one or the other]") is no longer specific enough. What is more certain is that the way our mock jurors describe their political world view (in terms of political ideology) has shifted and so we have also shifted the way we interpret our research findings and the strategies we recommend for discovery, voir dire, jury selection, and case narrative.

UNDERSTANDING THE NEW IDEOLOGICAL 'NORMAL'

It is both difficult and important to keep constantly attuned to this new reality. We all cling to the validity of our impressions about the world and how different venires are best described. "This venire is predominantly blue-collar Democrats, so they will favor the Plaintiff" or "That county voted for Romney, so they will tilt toward the corporate defendant" are common observations. But that thinking that seemed reliable a decade ago simply doesn't hold water. Just as it is important to continually update our impressions and stereotypes of various generational groups, it is also important to see how the country has changed over the past 20 years with regard to political ideology.

The Pew Center's large scale survey "reveals a complex picture of partisan polarization and how it manifests itself in political behaviors, policy debates, election dynamics and everyday life". The Pew Report contains graphics showing the shifts in partisan polarization over the past 20 years. They include an interactive graph option so you can compare various factors and see how things have changed over the patterns present two decades ago. (Note: We encourage you to explore the interactive graph. It is a good way to solidify the changes in your mind so you remain cognizant of *how things are now*, rather than how they were twenty years ago.)

Democrats and Republicans More Ideologically Divided than in the Past

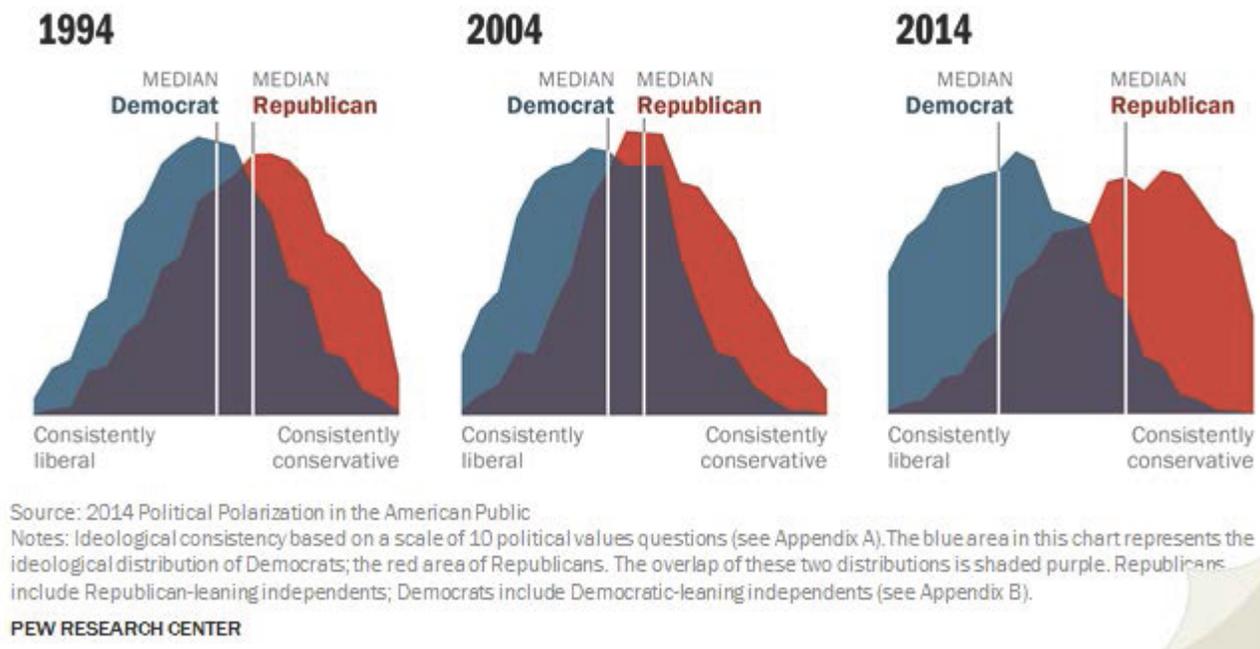*Distribution of Democrats and Republicans on a 10-item scale of political values*

1994

MEDIAN **Democrat**   MEDIAN **Republican**

Consistently liberal — Consistently conservative

2004

MEDIAN **Democrat**   MEDIAN **Republican**

Consistently liberal — Consistently conservative

2014

MEDIAN **Democrat**   MEDIAN **Republican**

Consistently liberal — Consistently conservative

Source: 2014 Political Polarization in the American Public
Notes: Ideological consistency based on a scale of 10 political values questions (see Appendix A). The blue area in this chart represents the ideological distribution of Democrats; the red area of Republicans. The overlap of these two distributions is shaded purple. Republicans include Republican-leaning independents; Democrats include Democratic-leaning independents (see Appendix B).

PEW RESEARCH CENTER

Figure 1

As Figure 1 above illustrates, Democrats and Republicans have moved further and further apart over the past 2 decades when it comes to their ideological perspectives.

Pew interprets the above figure in this way:

> "The overall share of Americans who express consistently conservative or consistently liberal opinions has doubled over the past two decades from 10% to 21%. And ideological thinking is now much more closely aligned with partisanship than in the past. As a result, ideological overlap between the two parties has diminished: Today, 92% of Republicans are to the right of the median Democrat, and 94% of Democrats are to the left of the median Republican."

On the surface, it looks like the polarization should result in more "very liberal" Democrats and more "very conservative" Republicans. The curve describes a sizable block of self-identified extremists as Democrats or Republicans, but this is a distribution that is skewed by a vastly larger non-affiliated middle that is pushing Democrats and Republicans to the extremes. In other words, anyone left who still refers to themselves as Democrat or Republican accepts the polarization, while a growing segment of the country appears to want nothing to do with it.

As a point of comparison, Pew points to 1994 (see Figure 1) when only 8% of politically engaged Democrats were consistent liberals, now 38% have moved to the "liberal tail" of the new bell curve. In 1994, 23% of politically engaged Republicans were consistently conservative, now 33% have moved to the "conservative tail" of the new bell curve. In other words, if you don't feel okay with that "liberal" label, you probably won't want to identify as a Democrat in 2014, even if you have identified as a Democrat in the kinder, gentler past. Similarly, if you believe yourself to be conservative but wince at the label, you are likely going to claim independence and avoid the Republican label. Further, these

extremes of liberal and conservative Americans are not only more likely to vote in elections, they are also more likely to donate financially to political campaigns. Theirs are the voices we hear.

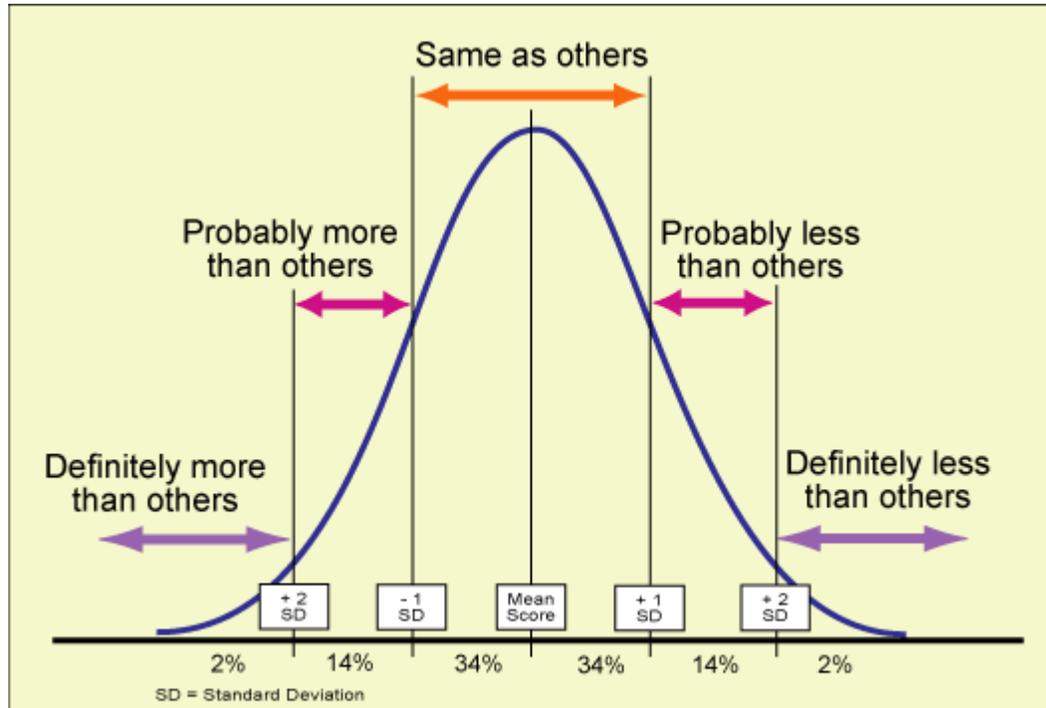**THE MOST CONSERVATIVE AND THE MOST LIBERAL AMERICANS SHOUT THE LOUDEST**

Figure 1A

If you think of the normal bell curve (see Figure 1A) of a statistical distribution, what Pew researchers are saying is that the tails of the bell curve have expanded and the statistical "curve" for political ideology is no longer "normal". That changing statistical curve has strong implications for the political landscape. In essence, Pew says, the most conservative and the most liberal among us are shouting at each other while the more moderate core (i.e., the diverse majority of the nation) watches in exasperated silence.

We conduct research trying to link attitudes and future voting behavior to responses on questions that are acceptable in court. In some cases, litigants hire firms to do research on voting behavior (for both primaries and general elections) as a predictor of how someone will respond to the facts of a case. What we conclude from the Pew findings is, in part, that while voting Democrat or Republican certainly describes past voter behavior, that same question is no longer useful in describing jurors' attitudes, values and beliefs.

Whether it is alienation due to partisan wrangling, or whether it is due to a more informed electorate knowing that they agree with some parts of each party's positions and disagree with both parties on other matters, we can't be sure. One version of this has always been seen in trial venues that are overwhelmingly Democrat or Republican. Asking this question can be virtually meaningless, because the underlying issues still exist on a continuum, even when everyone says the same thing about their party affiliation. But the question of "are you a Democrat or Republican" seems to have lost meaning when looked at alone.

Pew reports that 27% of Democrats and 36% of Republicans view the other party as a "threat to the nation's well-being". These partisans represent the "tails" of the new statistical curve and they are also the loudest, most strident voices in our current political debates (aka polarization). Pew continues by saying the sentiments expressed by those extremes are:

"not shared by all, or even most, Americans. The majority do not have uniformly conservative or liberal views. Most do not see either party as a threat to the nation. And more believe their representatives should meet halfway to resolve contentious disputes rather than hold out for more of what they want. Yet many of those in the center remain on the edges of the political playing field, relatively distant and disengaged, while the most ideologically oriented and politically rancorous Americans make their voices heard through greater participation in every stage of the political process."

Here is the Pew graphic (Figure 1B) illustrating changes in the bell curve from 1994 (in the midst of the Newt Gingrich "Republican Revolution") to the present.

What Polarization Looks Like

Growing Minority Holds Consistent Ideological Views

On a 10-item scale of political values, % who are...
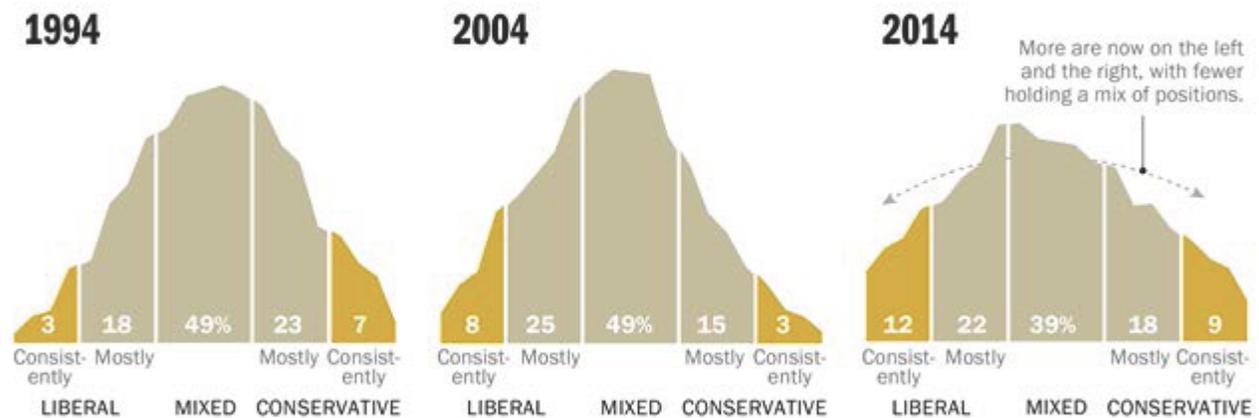
Source: 2014 Political Polarization in the American Public
Notes: Ideological consistency based on a scale of 10 political values questions. (See Appendix A for details on how the scale is constructed and how scores are grouped.)

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Figure 1B

The curve has flattened over the past two decades and many more people are clustered in the liberal and conservative "tails" of the curve. Because Pew surveyed more than 10,000 American adults, they are able to tell us that, in addition to an oddly shaped distribution curve, the moderate center, (which used to be about half of the country), has shrunk by 10%.

At this point, according to the Pew Research Center, the "center" of our new political "curve" is composed of various groups of people who are not consistently liberal or consistently conservative, but truly have little else in common with each other. Apart from the growing company of hard-liners at the ends of the spectrum, there is more diversity of views in the middle than has been seen in the past.

This leads to the conclusion that we need to toss out all our old assumptions about how political views are distributed across the American population. Self-described Republicans ascribe to views that are farther to the right than in the past, and self-described Democrats tilt farther to the left. Not surprisingly, both "tails" choose friends (and when possible, neighbors) that share their political perspectives.

And here's an odd tidbit: while 47.6% of Americans (in 2006) disapproved of a family member marrying an atheist, now 30% of consistent conservatives (those Republicans in the extreme conservative tail of the new curve) and 23% of consistent liberals (those Democrats in the extreme liberal tail of the new curve) would "be unhappy if an immediate family member married" someone from the other political perspective! In 2014, politics is very personal.

By now you may wonder about the 10-item scale Pew uses to create identify the consistency (i.e., liberal or conservative) of political ideology. Some of you will recognize many of these questions as they have been used by Pew since 1994 in nation-wide surveys. The questions are forced choices between two positions: one conservative and one liberal. We don't particularly like forced choice questions and neither do our mock jurors–often writing in "it depends" on questionnaires that box them in, rather than choosing a side.

Items in the Ideological Consistency Scale

Question #	Conservative Position	[OR]	Liberal Position
Q25a	Government is almost always wasteful and inefficient		Government often does a better job than people give it credit for
Q25b	Government regulation of business usually does more harm than good		Government regulation of business is necessary to protect the public interest
Q25c	Poor people today have it easy because they can get government benefits without doing anything in return		Poor people have hard lives because government benefits don't go far enough to help them live decently
Q25d	The government today can't afford to do much more to help the needy		The government should do more to help needy Americans, even if it means going deeper into debt
Q25f	Blacks who can't get ahead in this country are mostly responsible for their own condition		Racial discrimination is the main reason why many black people can't get ahead these days
Q25g	Immigrants today are a burden on our country because they take our jobs, housing and health care		Immigrants today strengthen our country because of their hard work and talents
Q25i	The best way to ensure peace is through military strength		Good diplomacy is the best way to ensure peace
Q25n	Most corporations make a fair and reasonable amount of profit		Business corporations make too much profit
Q50r	Stricter environmental laws and regulations cost too many jobs and hurt the economy		Stricter environmental laws and regulations are worth the cost
Q50u	Homosexuality should be discouraged by society		Homosexuality should be accepted by society

Source: 2014 Political Polarization in the American Public.

Figure 2

Numerous surveys conducted in the past two years have found very similar patterns to the Pew survey. We track national survey data as well as our own research patterns and have seen very similar findings on liberal versus conservative identity, political affiliation or lack thereof, level of political engagement, sense of political discussions as angry and bad-tempered (aka "polarizing") and more. We are grateful to the Pew Research Center for doing a large enough survey that helps us to make sense of shifting data points.

PRESENTING PEW'S NEW POLITICAL TYPOLOGY

Beyond Red and Blue (the new political typology) from Pew Research, deserves careful consideration. Rather than simply asking if the respondent is Democrat or Republican and/or if they are liberal or conservative, the Pew new political typology looks at attitudes and values beneath those partisan labels to identify "cohesive groups" within those descriptors. Figure 3 shows the groupings (based on shared values and attitudes).

The 2014 Political Typology: Polarized Wings, a Diverse Middle

| | Percent of ... | | |
	General public	Regist. voters	Politically engaged
	%	%	%
The Partisan Anchors	36	43	57
● Steadfast Conservatives	12	15	19
Socially conservative populists			
● Business Conservatives	10	12	17
Pro-Wall Street, pro-immigrant			
● Solid Liberals	15	17	21
Liberal across-the-board			
Less Partisan, Less Predictable	54	57	43
● Young Outsiders	14	15	11
Conservative views on government, not social issues			
● Hard-Pressed Skeptics	13	13	9
Financially stressed and pessimistic			
● Next Generation Left	12	13	11
Young, liberal on social issues, less so on social safety net			
● Faith and Family Left	15	16	12
Racially diverse and religious			
● Bystanders	10	0	0
Young, diverse, on the sidelines of politics	100	100	100
N	10,013	7,999	4,767

2014 Political Typology. Figures may not add to 100% because of rounding. The politically engaged are registered to vote, closely follow public affairs and say they always or nearly always vote.

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Figure 3

The first group (*The Partisan Anchors*) are the groups occupying the extreme liberal and conservative positions on "the new curve" of political ideology. The Steadfast Conservatives and the Business Conservatives are consistently Republican and the Solid Liberals are consistently Democrat.

A second group (*Less Partisan, Less Predictable*) is composed of the Young Outsiders, the Hard-Pressed Skeptics, the Next Generation Left, and the Faith and Family Left. These groups make up the center but they are *not* consistently moderate or even in agreement with each other on major issues.

Finally, a third group (the *Bystanders*) is disengaged and not even registered to vote. The Bystanders report they are more interested in celebrities than politics.

Seeing the Pew typology makes it clear why a juror's nominal political party affiliation is not a good predictor of much of anything. It is especially important to do this "drill down" on attitudes when doing applied research (such as for insight into litigation) because the issues that affect a case may not show up in a broad question about political affiliation. For instance, a personal injury lawsuit may touch a generally conservative juror in a personal way, causing her to go against her political party with regard to a jury verdict. A strongly liberal Democrat voter might have very unliberal views in a patent case due to opposition to the very notion of patents.

There is simply too much diversity in values, attitudes and beliefs underlying the endorsement of those partisan labels to be able to use Democrat or Republican party affiliation as a descriptor. Pew is slowly publishing the results of their massive survey throughout the year 2014 but we think it's important enough to alert you to early on so you can monitor the new information as it comes out. Pew offers you the opportunity to take their political typology quiz to see which group you would belong to based on your responses.

THE ROLE OF AGE IN POLITICAL PERSPECTIVE

Figure 4

Political Typologies Shift with Age

Percent of Americans in each age bracket who are...

	18-29 years of age	30-49	50-64	65+
Steadfast Conservatives	4%	9%	16%	21%
Business Conservatives	6%	9%		
Young Outsiders	19%	14%	12%	11%
Hard-Pressed Skeptics	9%	13%	11%	9%
Next Generation Left	19%	14%	15%	14%
Faith & Family Left	10%	14%	9%	8%
Solid Liberals	16%	14%	15%	20%
Bystanders	17%	12%	15%	13%
			6%	3%
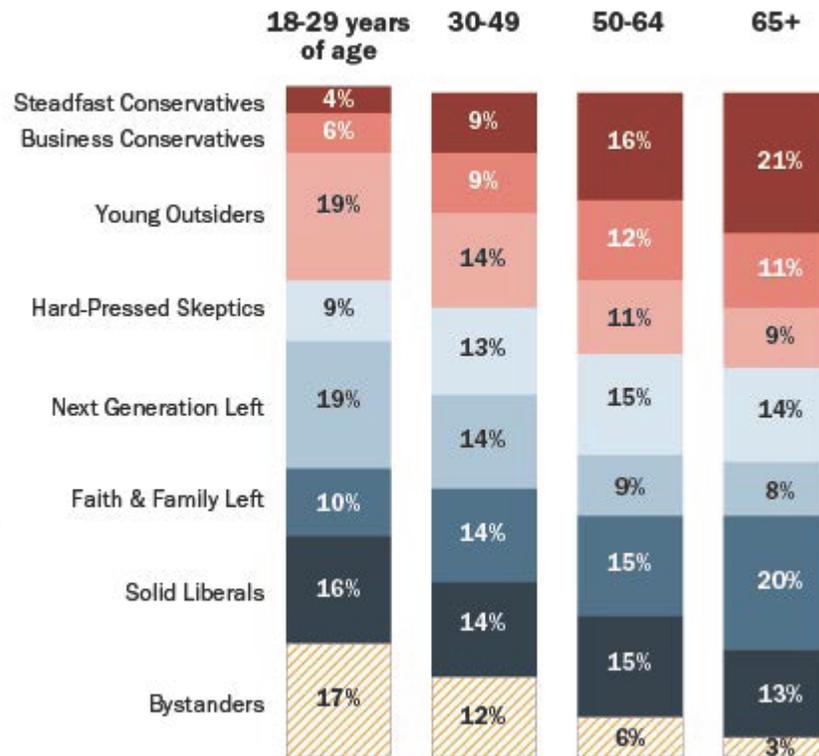
Source: 2014 Political Typology
PEW RESEARCH CENTER

Age also plays a role in political attitudes but it is not just the simplistic "young equals liberal and old equals conservative" equation long heard. Pew gives us a much more nuanced picture of the relationship between age and politics by offering a view of age and the political typology groups.

"Looking at the youngest American adults, those ages 18 to 29, nearly one-in-five are what we call Young Outsiders — GOP leaners who favor limited government but are socially liberal. Almost exactly the same percentage are what we've termed the Next Generation Left, who tilt more to the Democrats but are wary of social-welfare programs. And many (17%) are Bystanders — not registered to vote, don't follow politics and generally the least politically engaged. That's the biggest share among all age brackets, though perhaps not entirely surprising."

Among the implications of this is that if the litigation involves awarding large sums of money for non-economic injuries (pain and suffering, mental anguish, et cetera), otherwise liberal-leaning young jurors might show up on the conservative side of damages discussions. At the same time, if it is a case involving prosecution for marijuana possession, an otherwise conservative young juror might be reluctant to punish.

If you are interested in looking more closely at how the eight typology groups differ on issues related to politics and elections, views of the US and our economy, government and economic policy, foreign policy and security, domestic policy, religion and society, or even demographic information, Pew has a very nice interactive tool on their website.

WHAT DOES ALL THIS MEAN FOR TRIAL LAW?

This is a work in progress and we will continue to refine and add to our thoughts as Pew publishes more information over the course of 2014, but we can put out some preliminary data we find useful for all phases of trial. There are some

strange bedfellows uncovered in this survey and it could be important to identify who agrees with whom as we go about our day-to-day tasks with this new political typology (rather than our old ideas about Republicans and Democrats and liberals and conservatives) in mind.

Pew's focus is understandably on what this typology means for upcoming elections (as many pollsters failed miserably in predicting 2012 election outcomes). Our focus, not surprisingly, is on how their data might inform us for litigation advocacy. The table on the following pages summarizes attitudes, values and beliefs of each typology group as well as the often unpredictable groups with which they share values and beliefs in common.

Table 1

Typology Group	Attitudes, Values and Beliefs	Strange bedfellows [useful in matching case themes]	Additional data points
Steadfast Conservatives *[Socially Conservative Populists].* Largely white (87%) and male (59%). 67% are aged 50+. Tend to be more downscale and pessimistic than Business Conservatives. 53% agree with Tea Party. 28% unhappy if family member married someone of a different race.	Staunch critics of government and social safety net. Most likely to say they are angry with the US government. Socially conservative. 50% support path to citizenship for immigrants and 74% believe homosexuality should be discouraged. Skeptical of big business and Wall Street. Wary about US international engagement and think free trade agreements are a bad thing for the US.	Agree with Business Conservatives and Solid Liberals that government should not collect telecommunication data as part of anti-terrorism efforts. Agree with Hard-Pressed Skeptics that immigrants are a burden on US society and 42% of Steadfast Conservatives support deporting all illegal immigrants. Agree with Business Conservatives and Faith and Family Left that abortion should be illegal in all or most cases. Agree with Faith and Family Left and Business Conservatives that marijuana should not be legalized. Agree with Business Conservatives, Next Generation Left and Young Outsiders that US has made sufficient changes to give blacks equal rights with whites.	12% of population. Strongly ideological and politically engaged (they vote and give money to candidates). Reliable Republicans: Government should be smaller and play less of a role in economy.

Typology Group	Attitudes, Values and Beliefs	Strange bedfellows [useful in matching case themes]	Additional data points
Business Conservatives [*Pro-Wall Street, pro-immigrants*]. Largely white (85%) and male (62%). 53% aged 50+. 55% agree with Tea Party. Most likely to self-describe as Libertarian (although only 27% do so). Most affluent group: 45% have income of $75K or more, with 28% at $100K+.	Share critical perspective of government with Steadfast Conservatives but support Wall Street, business and immigration reforms (72% favor path to citizenship). Moderate on social issues. 31% believe homosexuality should be discouraged and 58% believe it should be accepted. Positive about US taking active role in world affairs and free trade.	Agree with Solid Liberals and Steadfast Conservatives that government should not collect telecommunication data as part of anti-terrorism efforts. Agree with Faith and Family Left and Steadfast Conservatives that abortion should be illegal in all or most cases. Agree with Faith and Family Left and Steadfast Conservatives that marijuana should not be legalized. Agree with Next Generation Left, Steadfast Conservatives and Young Outsiders that US has made sufficient changes to give blacks equal rights with whites.	10% of population. Strongly ideological and politically engaged (they vote and give money to candidates). Reliable Republicans: Government should be smaller and play less of a role in economy. More wealthy and optimistic than Steadfast Conservatives Prefer to live in suburbs.

Typology Group	Attitudes, Values and Beliefs	Strange bedfellows [useful in matching case themes]	Additional data points
Solid Liberals *[Liberal across the board].* 41% under age 50, most educated group (52% college grads and 21% graduate degrees), and 69% white. 83% say government should do more to help needy even if it means taking on more debt.	Liberal attitudes toward business, government, economics, race (80% think racial discrimination is main reason blacks cannot get ahead these days), homosexuality, abortion. Less than 10% endorse: "It is necessary to believe in God in order to be moral and have good values." Optimistic about US future and say America's future success is linked to its ability to change, rather than its reliance on long-standing principles.	Agree with Business Conservatives and Steadfast Conservatives that government should not collect telecommunication data as part of anti-terrorism efforts. Agree with Faith and Family Left, Next Generation Left and Young Outsiders that stricter environmental laws are worth the cost.	15% of population. Strongly ideological and politically engaged (they vote and give money to candidates). Reliable Democrats. Prefer urban living and activities.

Typology Group	Attitudes, Values and Beliefs	Strange bedfellows [useful in matching case themes]	Additional data points
Young Outsiders [Conservative views on government but not on social issues]. 73% white, 48% male and 52% female. Younger group: 30% are under age 30, 48% under age 40 and most are under 50 years of age.	Support environmental regulation and have liberal views on social issues. BUT also support limited government (76% say government cannot afford to spend more to help needy). 81% think "poor people today have it easy because they can get government benefits without doing anything in return."	Agree with Faith and Family Left, Next Generation Left and Solid Liberals that stricter environmental laws are worth the cost. Agree with Business Conservatives, Steadfast Conservatives and Next Generation Left that US has made sufficient changes to give blacks equal rights with whites.	14% of population. Lean Republican but less politically engaged than first three groups. Tendency to dislike both main political parties and labeled as 'wild cards' in the political process.
Hard-Pressed Skeptics [Financially stressed and pessimistic]. 51% are age 50 and older. 61% white, 20% black, and 9% Hispanic. 9% college grads and only 32% work full-time. 56% family income less than $30K.	Battered by economy and resent government and business. Back government support for poor and needy (71% endorse: "The poor have hard lives because government benefits don't go far enough to help them live decently").	Agree with Steadfast Conservatives that immigrants are a burden on US society. 31% of Hard-Pressed Skeptics support deporting all illegal immigrants.	13% of population. Less politically engaged than first three groups but lean Democrat although Pew sees them as 'wild cards' in the political process. (Hard-Pressed Skeptics report less interest in politics than any other typology group.)

Typology Group	Attitudes, Values and Beliefs	Strange bedfellows [useful in matching case themes]	Additional data points
Next Generation Left *[Youngest of typology groups, liberal on social issues, less so on social safety net].* 68% white and 15% Hispanic. 52% under age 40, 74% have some college coursework completed and 38% are college grads.	Young, relatively affluent, very liberal on social issues like same sex marriage and abortion. Reservations on cost of social programs (39% say government should do more to help needy). Support affirmative action but strongly reject idea that racial discrimination keeps blacks from getting ahead. Less than 10% endorse: "It is necessary to believe in God in order to be moral and have good values." More supportive of Wall Street than other Democrat groups (56% say it helps more than it hurts the economy).	Agree with Faith and Family Left, Solid Liberals and Young Outsiders that stricter environmental laws are worth the cost. Agree with Business Conservatives, Steadfast Conservatives and Young Outsiders that US has made sufficient changes to give blacks equal rights with whites.	12% of population. Lean Democrat. Less politically engaged than first three groups. 53% describe themselves as "moderates" (highest in any group). These are the Millennials and younger Gen X: they embrace diversity, are positive about role of government, and upbeat re: personal futures and future of the country.

Typology Group	Attitudes, Values and Beliefs	Strange bedfellows [useful in matching case themes]	Additional data points
Faith and Family Left [Racially diverse and religious]. 41% white and non-Hispanic, 30% black, 19% Hispanic, and 8% other or mixed race. 18% are foreign born. 31% less than age 40. One of the least educated groups: 54% have only a HS education and only 18% are college grads. 45% earn less than $30K annually.	Confident government and federal programs will address nation's problems. Very religious, think society is changing too fast including acceptance of homosexuality and nontraditional family structures (only 37% favor same sex marriage). 85% say religion is very important. 91% endorse: "It is necessary to believe in God in order to be moral and have good values." 51% want the government to do more to protect morality (highest percentage of any typology group). 73% say: Compassion and helping others are core values.	Agree with Solid Liberals, Next Generation Left and Young Outsiders that stricter environmental laws are worth the cost. Agree with Business Conservatives and Steadfast Conservatives that abortion should be illegal in all or most cases.	15% of population. Lean Democrat. Less politically engaged than first three groups. Less affluent, less educated and older than other Democratic-oriented groups. Support affirmative action programs but just 13% believe racial discrimination keeps blacks from getting ahead.

Typology Group	Attitudes, Values and Beliefs	Strange bedfellows [useful in matching case themes]	Additional data points
Bystanders *[Young, diverse, on sidelines of politics].* 38% less than age 30. 48% white, 32% Hispanic, 10% black.	Not registered to vote and pay little attention to politics. More likely to say they are interested in celebrities and entertainment than the public overall (64% vs. 44%). 66% think of themselves as an "outdoor person."		10% of population. Politically disengaged. Little interest in business and finance and, not surprisingly, government and politics.

CONCLUSION

As stated earlier, this collection of demographic, attitudinal and lifestyle details by political typology is a work in progress. This new information (an amplification of patterns we have seen growing for years) is very useful. Will it signal the end of using demographics to guide voir dire and jury selection? Almost certainly not. Partly this is the fault of the courts, which in most venues are becoming increasingly restrictive of time and scope of questions to jurors. If litigants cannot ask substantive questions, they are left to rely on the broad impressions, which are often wrong and are generally based on stereotypes rather than knowledge of individual biases.

The other reason reliance on misguided demographics is not likely to go away in spite of the data making its ineffectiveness clear, is that pulling together a more insightful approach to jury selection is difficult. It is an exercise that requires a different skill set than that required in any other phase of successful trial practice. It can be done, and in many trials demographics are largely a side detail, rather than the main source of data. But like the research that describes the patterns, it is complicated, and requires careful planning.

We believe it is important to read and understand new information (whether from polls, surveys or social science research) as it is released and so are always looking for reliable data (you will see a lot of what we read written about on our ABA-award-winning blog). As Pew reports additional data from this survey, we will refine our summary table and accompanying pretrial research questions to help us continue to identify what makes a difference *now*, rather than what made a difference years, or even decades, ago.

The new Pew Political Typology report contains valuable information that is well worth your time to read and apply to your day-to-day work in litigation advocacy. Read it, understand it, and make sure you have your hand on the pulse of the venire as it is today rather than assuming things are as they have always been. After all, that would mean women and minorities are good for the Plaintiff and White men (especially Clarence Darrow's Scandinavian Lutherans) are good for the Defense. It could be true, or not, but it clearly isn't something to bank on.

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Paul Begala comments on "Demographic Roulette"

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To be sure, serving on a jury and voting in an election are very different things. As a political strategist, I'd love to be able to select the voters for my elections, then lock them in a box and control the information they receive. At the same time, there are similarities – one of them being the persistence of myths in a time of data.

As a Democrat, I believe in science. Unlike many of my Republican friends, I believe in evolution and gravity and photosynthesis – even electromagnetism. I also believe in the new data analytics that are revolutionizing politics.

Drs. Doug Keene and Rita Handrich have done a great service in analyzing the new Pew voter research through the prism of jury selection. It is undeniably true that the parties are further apart than they have been in decades. It is not true that this is caused by equal and opposite movement by each party. President Obama is excoriated as a socialist for pushing policies that just a few years ago were mainstream Republican ideas. His Affordable Care Act was conceived by the right-wing Heritage Foundation as an alternative to HillaryCare. It was midwifed by Newt Gingrich and raised by Mitt Romney. Similarly, the Obama immigration plan was the George W. Bush immigration plan just a few years ago, and the Obama cap & trade legislation was developed and supported by numerous Republicans, including John McCain.

The GOP, on the other hand, has lurched from mainstream conservativism to John Birch-like fanaticism. Does any believe Dwight Eisenhower, who battled the Birchers in his day, would be comfortable in the Republican Party today? Or that Ronald Reagan, who as governor signed the biggest tax increase in California history, and as President signed the biggest tax increase in American history (as well as amnesty for undocumented residents) could survive the wrath of the Tea Partiers today?

And yet…

And yet, if you look carefully you will find skepticism of corporate power among Tea Party populists. You will find discomfort with Obama's drone policy, and his surveillance policy, among loyal liberals. You'll find the proverbial Tea Party retiree who wants to "keep government out of my Medicare." And you'll find right-wing conservatives who want to reduce sentences for non-violent drug offenses.

The problem is, too many of us have retreated to our own highly partisan corners. Our neighborhoods are increasingly segregated by ideology, our churches too. And Lord knows our news media has so many specialized and often biased

outlets that people can live in their own hermetically sealed bubble. As a former government official and current political commentator, I would like to see legislative maps drawn with no regard to partisan impact. I'd like to see people reach out of their media comfort zone. I'd like to see compromise and consensus rewarded by voters, instead of treating those who reach across the aisle as pariahs.

Of course, I'd also like the see the Houston Astros win the World Series, and that ain't happening anytime soon.

So perhaps the best I can hope for is a healthy dose of skepticism – of my own views. It seems to me that for anyone who believes he/she is in sole possession of *The Truth*, it's time for a check-up from the neck up. But then again, I could be wrong about that.

Drs. Keene and Handrich's article reminds us all that people are complex creatures. Any political strategist – or lawyer – who thinks she/he can color us all bright blue or blood red needs to buy a new box of crayons.

IF IT FEELS BAD TO ME, IT'S WRONG FOR YOU

THE ROLE OF EMOTIONS IN EVALUATING HARMFUL ACTS

IVAR HANNIKAINEN, PH.D., RYAN MILLER, AND FIERY CUSHMAN, PH.D.

*D*on't miss the consultant responses below: Ken Broda-Bahm; Alison K. Bennett.

1. INTRODUCTION

Many hours away from the nearest land mass, a cruise ship turns over due to the rough sea. Stan and six other passengers make it onto a small lifeboat. However, the lifeboat is over its maximum capacity and it is quickly filling up with water. Soon the lifeboat will sink altogether. So Stan pushes an elderly person off the lifeboat and into the rough waters. The elderly person drowns, while the lifeboat manages to stay afloat and the other five passengers survive.

However hypothetical this situation may seem, it embodies a more fundamental issue that arises commonly in the law: whether, and when, an act of harm can be justified. It is a plain fact that Stan killed a person—the difficult and pivotal issue to assess is whether he acted with reasonable justification. This same question has been studied intensively over the last fifteen years by psychologists: How do humans go about deciding when harmful behavior is justified by the benefits it brings about? Of course, the aim of the psychological research is not to prescribe how people *should* answer that question; rather, it is to describe the mental machinery that they use, whether rightly or wrongly.

A remarkable body of evidence indicates that our minds are often divided between two types of machinery, reason and emotion, which together shape the way we think and behave. The influence of reasoning processes on our moral thinking can often be quite simple: All else being equal, we tend to favor whatever course of action leads to the greatest amount of benefit in the long run (Bartels, 2008; Greene, Nystrom, Engell, Darley & Cohen, 2004; Moore, Clark & Kane, 2008; Paxton, Ungar & Greene, 2012). So when we reason about cases like the lifeboat dilemma, we tend to judge that Stan did the right thing in saving more lives. But the influence of emotions on moral judgment is far more fickle. For instance, we tend to have a stronger emotional reaction to harming a person in an up-close and personal way (for instance, pushing them off a boat) than in a distant and impersonal way (for instance, failing to keep sufficient life-preservers on board a boat; Crockett, Clark, Hauser & Robbins, 2010; Greene, Sommerville, Nystrom, Darley & Cohen, 2001; Koenigs et al., 2007; Youssef et al., 2012). So when emotions are guiding our thinking we are more likely to condemn what Stan did, even though it was the lesser of two evils.

Understanding the contours of our moral emotions is a matter of manifest practical significance, influencing the way we make decisions as citizens but also as policy-makers, judges, advocates and jurors. In our research, we distinguish two hypotheses about the basis of our emotional aversion to harm. On the one hand, moral condemnation is often thought to derive from empathy toward the innocent victim. This is a popular assumption in moral philosophy, and is present also in the Golden Rule (i.e., "Do unto others as you would have them do unto you"). According to this perspective, one focuses on the victim's pain and suffering and subsequent feelings of empathy drive the conclusion that what Stan did to her was wrong. In our research, we draw attention to an alternative possibility: When one considers an immoral act, perhaps one actually focuses on the aggressor's deed: i.e., one imagines what it would be like to forcefully push an elderly lady to her death. This process results in a feeling of aversion to the action itself, which motivates the attitude of moral condemnation (see Miller & Cushman, 2013). In sum, when we condemn a violent act carried out for the greater good, are we moved mainly by the victim's suffering or, rather, by an aversion to what the aggressor did?

2. FINDINGS

Our first challenge was to devise a method to separate harmful actions from their outcomes in order to isolate the corresponding aversions they are proposed to elicit. Our purpose in doing so was to differentiate individuals with high levels of action aversion from those with low levels of action aversion, and likewise for high versus low levels of outcome aversion, and then compare their moral judgments. So, we compiled a list of hypothetical scenarios in which apparently harmful actions are performed in special circumstances where they do not lead to harm: such as 'stabbing a fellow actor in the neck during a play using a stage knife with a retractable blade,' or 'shooting a bullet at a consenting friend while he's behind a bulletproof glass'. Conversely, we also compiled a list of hypothetical scenarios in which an individual is harmed but this harm is not caused by someone else's action: for example, 'seeing someone step on broken shards of glass,' or 'hearing a frightened child crying'. We asked participants to tell us how "upsetting" they would find each of these situations, and thus we were able to separately measure people's sensitivity to harmful actions versus outcomes.

Participants were also instructed to make a number of judgments about the morality of killing one person to save many, in situations like the lifeboat case presented above. We then asked: Are participants' judgments about these cases predicted by their aversion to actions or to the outcomes they cause? In a first experiment, we found that *both* measures predicted the extent to which participants condemned the moral dilemmas. Moreover, analyses showed that both measures made independent and complementary contributions to people's moral judgments. This suggests that when judging the morality of a violent act one is moved not only by a concern for the harm being done, but also by an aversion to the action being performed.

Our first set of participants filled out both sections of the survey in a single testing session. This led to the worry that

participants might have grasped the aim of our study and subsequently altered their responses. So, in our next experiment, we recruited a group of participants who had judged a set of moral dilemmas approximately two to three years ago. We asked these participants to complete our measures of action and outcome aversion. This time we found that, whereas action aversion remained strongly correlated with moral judgment, participants' aversion to outcomes did not. Together with the results of our first experiment, these findings suggest that the aversion to harmful action plays a remarkably robust role, and perhaps even a greater role than empathy, in the moral condemnation of violence.

Even though our action aversion items described behaviors that were indeed physically harmless, it occurred to us that participants' aversions may not have been due strictly to the performance of the action. 'Making rude gestures at a friend behind his back' does not bring about harm to the friend. However, it may result in other bad outcomes, like the disapproval of potential onlookers, which participants may have been concerned about. It is possible, therefore, that our 'action' aversion items were in fact eliciting certain kinds of outcome-based concerns. So, in our third experiment, we took extra care to select three items which we thought precluded these concerns altogether.

In order to obscure the purpose of our research, we made two further amendments to the design of our study. First of all, rather than having participants complete *both* sets of items, we had one group complete our action aversion items and another, separate group complete the outcome aversion items. Second, we placed these three items of interest ("How upset would it make you to see someone shut their own finger in a car door?" or "How upset would it make you to curse angrily at an old woman as part of a movie script?") within a longer list including 21 "distractor" items, like "How upset would it make you to get a flat tire on the way to your wedding?" or "How excited would you be if scientists discovered life on another planet?". This time the results strongly favored a selective role for action aversion. In other words, when participants faced situations where someone actively harmed another in order to save a greater number of lives, their moral judgments were predicted by how they would feel performing harmless acts with violent features, but not by how upsetting they would find it to witness harmful outcomes.

Across the previous experiments we observed a robust relationship between people's aversion to harmful action and their tendency to condemn harm. Yet, in our research, we were interested in making a further *causal* inference: i.e., we wanted to know whether the aversion to action influences ourmoral judgments about it. Our final experiment was designed to test this related causal claim. To do so, we asked people to judge the aversiveness and moral permissibility of different methods of mercy killing. Our thinking was the following: Mercy killings vary in the amount of suffering the patient experiences prior to his death: a person infected with anthrax will die after very great and prolonged suffering, while electrocution may yield minimal suffering and an almost sudden death. They vary also in the degree to which the mercy killing would be disturbing to perform, even in a pretend context. Pretending to slit another person's neck would be much more disturbing than simply administering a fake poisonous solution, even if one knew that both actions would cause no harm. So, we asked a group of participants how upsetting these mercy killings would be to perform (as part of a movie plot), and a separate group of participants to rate how much suffering the patient would experience. Averaging these responses gave us an approximation of the level of action and outcome aversion for each method of mercy killing. A third group of participants judged how morally permissible it would be to conduct each of these kinds of mercy killings.

Our results showed that *both* the aversive character of the performance of a mercy killing and the degree of suffering experienced by the patient strongly predicted the moral wrongness of the mercy killing. In fact, these effects appeared to be independent of each other and explained almost all the variability in people's moral judgments. Additionally, unlike previous experiments, this study enabled us to directly link the action and outcome aversion elicited by an action to moral judgments about *that same action*. This suggests that the degree of suffering attributed to the victim, along with the aversion associated to the performance of a harmful action, shape our moral judgments about it.

3. IMPLICATIONS

These results cast some doubt on prevailing assumptions about morality. It is widely believed that the opposition to harmful behavior is motivated by an empathic feeling towards the victim. Here we uncover a different, and perhaps even greater, influence on our moral thinking, based in an aversion to the aggressor's action. In conjunction with other recent studies, our results suggest that when judging third-party infractions, we imagine what it would feel like to perform the behavior oneself. In some cases, this process yields a feeling of aversion that contributes to our judgment that the behavior was wrong: "If it feels bad to me to do it, it's wrong for you to do it".

This may have some important implications for litigation in criminal law. In addition to the harm done to the plaintiff, jurors frequently take into account aspects of the manner in which the harm was done. Some of these features of a crime may reasonably aggravate the offense, by reflecting the defendant's *mens rea,* ill intentions or criminal character. But, as we saw, a juror may also condemn a criminal offense more severely as a result of a personal feeling that it would be disturbing to do what the defendant did. This is remarkable in at least three respects.

First, certain kinds of cases that are psychologically disturbing may be criminalized more severely than other cases that are not equally disturbing, even when the latter bring about more harm. Second, sentencing for aggressive crimes may depend to a surprising degree on how much the juror is upset by imagining the defendant's crime. Indeed, ongoing research finds reliable differences in the degree to which people use their own feelings of aversion as a basis for judging others (Hannikainen, Miller & Cushman, in prep.) Therefore, more 'emotional' jurors may condemn these psychologically disturbing, violent cases more severely than judges who are, at least in theory, less easily swayed by their emotions.

Third, our findings suggest that jurors' decisions may be readily influenced by an attorney's attempt to focus attention on the performance of the harmful *action*. It is common in courtroom settings for the prosecutor to direct the juror's attention towards the victim's damages (or for the defense attorney to direct juror attention to the plaintiff's damages). This is done, of course, in order to elicit his or her feelings of sympathy, with the goal of winning the case, aggravating the sentence, or increasing the settlement. Our research indicates that directing attention to the defendant's wrong-doing and, in particular, to the feelings associated with performing his or her action, may influence the juror at least as much. This influence on decision-making is relatively less recognized among psychologists, and may perhaps be more overlooked in the courtroom as well.

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ANOTHER REASON FOR PLAINTIFFS TO GET PAST THE VICTIM FOCUS...

The center of the story in a plaintiff's case has been shifting in recent years. This shift is due to better understanding of the ways jurors make moral judgments in evaluating parties. The transition is also thanks in part to fresh perspectives like the Reptile encouraging trial lawyers to tell stories that induce jurors to move beyond empathy, responding instead to more direct and personally-relevant appeals. The findings shared in this article by Hannikainen, Miller, and

Cushman add to this discussion and, in my view, buttress the reasons for plaintiffs to move beyond traditional but dated ways of framing their cases.

The focus of the present article is on the ways research participants decide a given behavior is harmful. The team finds that participants' own projected aversion to an action can be a better predictor of moral condemnation than the perceived consequences for the victim. Instead of simply assessing consequences, we also evaluate by testing whether we ourselves would feel bad engaging in those actions. The article ends with a brief discussion of the implications of this research for criminal law and the criminal jury. My goal in this brief comment is to extend this discussion by adding some thoughts on the message for civil plaintiffs and, by extension, for civil defendants as well. Ultimately, I think the study adds to the reasons plaintiffs have for embracing a relatively new way of framing cases, while suggesting some ways that defendants should adapt as well.

HOW TO BE AN 'OLD SCHOOL' PLAINTIFF

Conjure up a picture of the stereotypical plaintiff's attorney addressing a jury, and the image will center on a few strong implicit features of the message:

· *This case is about sympathy...*

· *The center and the starting point for this story is the plaintiffs themselves...*

· *We're hoping that you'll identify with and care about these victims, and that will motivate you to give a big award...*

To Hannikainen, Miller, and Cushman, this focus jibes well with what has been the traditional perspective on moral evaluation, which "is often thought to derive from empathy toward the innocent victim". The problem, as revealed in this study, is that this kind of simple empathy is neither the only nor the strongest motivator. The consequences for the plaintiff still matter, of course. That is your damages case. But it is not, it seems, the dominant factor in motivating the average juror to side with you. Instead, these studies suggest jurors are likely to focus at least as much on the defendant's actions themselves and how justified jurors would feel in performing those actions themselves.

Those evaluations are made in a research context and should be tested in trial simulations. But it is reasonable to believe that the dynamic focusing on action-aversion would be as strong or even stronger in the courtroom. In a trial context, jurors are already primed these days to believe the messages of the tort reform movement: Juries are too easily moved by sympathy, too quick to translate injury to blame, and too open to the ideas of deep pockets and jackpot justice. Not wanting to be one of *those* juries, the panel is apt to react negatively if the message comes too early or too strongly that this case is about an injury and the sympathy they are supposed to feel about that injury. In the case presentation process, sympathy and a victim-focus backfires. Adding in the current study results, there are more reasons to say "No" to the old school style of presentation.

TRANSITIONING TO THE 'NEW SCHOOL' PLAINTIFF

The article also helps in clarifying what the new school would be. The answer is to focus on the action from the perspective of the actor. Intuitively, plaintiffs might think, "I don't want jurors to identify with the defendant" but a personal aversion to the action itself seems to be a crucial step in moral evaluation. When trying to decide whether a given action is blameless or blameworthy, evaluators don't simply look at the consequences of the action. Instead, they imagine what it would be like to perform that action and do a gut check on whether it would feel right or not if they did.

In a trial context, the focus on the action itself puts the defendant in the center of the story. It is jurors' contemplation

of that action which will be the source of the aversion that would motivate a verdict. "When judging third-party infractions," the team concludes, "we imagine what it would feel like to perform the behavior oneself. In some cases, this process yields a feeling of aversion that contributes to our judgment that the behavior was wrong. 'If it feels bad to me to do it, it's wrong for you to do it.'"

To encourage that style of evaluation, plaintiffs should set the stage for jurors to try on that decision for themselves. If, in their own idealized projection, jurors would believe that they *never* would have acted as the defendant did, and if that action would feel wrong even in the contemplation, then they'll be primed to condemn it, *and* to believe that it had compensable consequences.

Of course, this has a "What Would You Do?" feel to it, so counsel couldn't embrace that message directly without running afoul of the "Golden Rule" objection. But centering the story on the decision-making and adding personalization and concreteness to that part of the story can serve as an invitation for jurors to assume that role. In addition, in oral voir dire, attorneys will have a legitimate right to ask about relevant attitudes and experiences, and that inquiry can also get jurors started in thinking about the decision from their own perspective.

WHAT THIS MEANS FOR DEFENDANTS

The traditional civil defense focus of pulling jurors back to the facts, the law, and the evidence works quite well against the 'old school' plaintiffs who are aiming for a sympathetic focus on the consequences alone. Against the 'new school' types who want the defendant's actions and not the plaintiffs' injuries in the center of the spotlight, defense counsel need a new emphasis. Most basically, that means telling a positive story about the defendant's commitments, choices, and actions so that jurors contemplating those behaviors for themselves will feel justification and not aversion. Or defendants might take an initially aversive act and try to make it less aversive by desensitizing jurors to it, for example, through repetition as the defense was reported to have done with the police beating video in the Rodney King civil trial.

But one critical way in which defendants might benefit from the researcher's findings on action aversion is by applying it back on the plaintiffs. We know from experience that jurors' tendency to ask "What would I have done in their shoes?" cuts both ways, and can easily lead to critical scrutiny of the plaintiff's own actions. In an employment case, for example, it is nearly inevitable that every employed juror will see themselves as a kind of expert on what should happen in the workplace. Applying an idealized standard, they'll tell themselves that they would have worked harder, documented more, or complained sooner if they were in the plaintiff's circumstances at work. In other words, that same tendency to feel aversion as they consider an action applies to *all* the actions under evaluation within the case story, and not just the defendant's.

CONCLUSION

The bottom line is that as the research on moral judgment and a number of related fields continues to bloom, practical litigators need to keep pace. That might mean the death of the idea that there is a time-honored, tried-and-true way to try cases. Not only does every case differ, but new studies are continually improving our practical understanding of evaluation, decision-making, and persuasion. This article from Hannikainen, Miller, and Cushman is a good contribution.

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Response to "If It Feels Bad to Me, It's Wrong for You: The Role of Emotions in Evaluating Harmful Acts"

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nationwide civil and criminal litigation consulting experience. Her specialties include witness communication train-ing, jury research in the form of focus groups and mock trials, and jury selection.

This journal article purports to examine the mental machinery behind how humans decide when harmful behavior is justified by the benefits it brings about. The authors designed and conducted four experiments to study the issue and concluded that both action aversion – aversion to the act of harm itself, and outcome aversion – aversion based on empathy for the victim, could be viewed as independent effects to explain differences in moral judgments. This hypothesis is interesting and bears study, as it could have profound implications for trial strategy for both criminal and civil law, some of which were outlined in the paper.

On the positive side, the experiments were inventive and the authors' hypothesis appears to be worthy of further research. So, as a preliminary study, this article merits further discussion and adds value. On the other hand, the con-clusions of the first three experiments were difficult to connect to the hypothesis, which was to examine the men-tal processes people use to decide when harmful behavior is justified by the benefits it brings about. The scientific methodology, which was lightly discussed, bears questioning as well. The fourth experiment appeared to test the authors' hypothesis, but the conclusion that "the effects… explained almost all the variability in people's moral judg-ments" could be viewed as over-reaching. Another concern is the implication reached after all four experiments, that "when judging third-party infractions, we imagine what it would feel like to perform the behavior itself." The basis for this conclusion or connection to the findings of any of the experiments escaped me.

This study reminds me of experiments that preceded the seminal 2012 study[1] of whether nonverbal information significantly increase the accuracy of people's judgments of trustworthiness. Prior to the 2012 study, numerous stud-ies had been conducted to explore and test the issue, but all were flawed because they could not accurately isolate judgments of nonverbal information from other effects, such as the likability of the people giving examples of the nonverbal cues. In the 2012 DeSteno study, the authors were able to isolate the effects for testing by using a robot programmed to act out different facial expressions and nonverbal body cues, which removed the issue of if the par-ticipants were influenced by people illustrating different facial expressions and nonverbal behavior or actions, or the nonverbal actions alone. It took a number of years to reach the best experiment design to test the hypothesis, and this study may be a good preliminary step in testing the intriguing hypothesis proposed by the authors. To that end, if this study leads to the study of the effect of action aversion versus outcome aversion on moral judgments, it will have served a very useful purpose.

[1] DeSteno et al. (2012) Detecting the trustworthiness of novel partners in economic exchange, *Psychological Science* XX (X) 1-8.

NEUROIMAGERY AND THE JURY

JILLIAN M. WARE, JESSICA L. JONES, AND N.J. SCHWEITZER, PH.D.

Don't miss the consultant responses below: *Ekaterina Pivovarova and Stanley L. Brodsky; Adam B. Shniderman; Ronald K. Bullis*
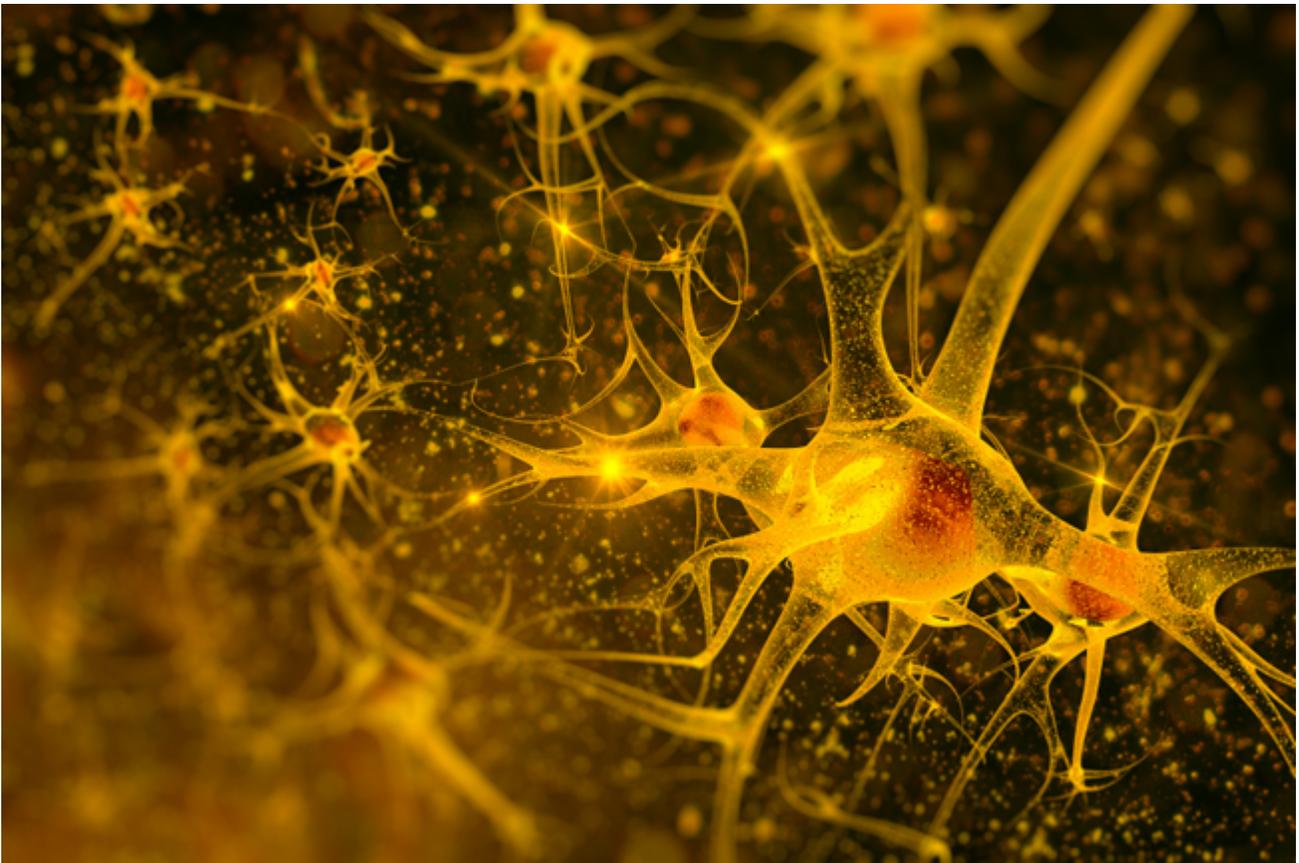
Technological advances in the field of neuroscience have raised concerns in both the academic and legal communities pertaining to how people evaluate this type of evidence. Neuroimages, such as those produced by MRI and fMRI scanners, provide sophisticated, tangible representations of otherwise complex and abstract physiological processes; as such, inexpert viewers may find this type of visual aid particularly alluring when offered as support for a particular scientific claim. It was thus feared that the public, including jurors, may find neuroimages to be particularly persuasive forms of evidence, thereby impeding their ability to make unbiased decisions (see, e.g., Shniderman, 2014 for additional discussion of the possible ramifications of such neuroscience effects).

EARLY RESEARCH IDENTIFIES A "NEUROIMAGE BIAS"

Several early, and now well-cited, articles seemed to support the notion of the 'seductive' power of neuroimaging. McCabe and Castel (2008) investigated the persuasive influence of brain images on the perceived credibility of cognitive neuroscience data. Participants read fictional articles summarizing brain imaging studies. The articles were paired with either a brain image or bar graph illustrating the brain activity described in the studies. The researchers found that articles that were presented with a brain image were judged to be more credible than the same articles presented with a bar graph conveying substantively identical information to that conveyed in the neuroimage. In a later study, McCabe and Castel (2011) bolstered these findings with results indicating that fMRI readings were judged to be a more convincing measure of lie detection than other non-neuroscientific technologies. The results of both studies suggested that the credibility afforded by laypersons to the conclusions drawn from neuroscience research was due to something inherently persuasive in the neuroimages themselves.

Other research has indicated that the mere presence of neuroscientific information can have an unduly influential effect on decision-makers. When laypersons and beginning neuroscience students were asked to judge the quality of both good and bad explanations of psychological phenomena, those explanations that were paired with neuroscience information were judged to be more satisfying than those that were not, even though the neuroscience information provided was irrelevant to the actual explanation itself (Weisberg, Keil, Goodstein, Rawson, & Gray, 2008). No difference in satisfaction ratings was found between good explanations that were paired with neuroscience information and those that were not. Bad explanations that were paired with neuroscience information, however, were judged to be more satisfying than bad explanations that contained no neuroscience information, suggesting that the addition of extraneous neuroscience information can fool laypersons into believing that they have received a scientific explanation for a particular phenomenon, even when they have not. Importantly, when neuroscience experts were asked to judge these explanations, no effect of neuroscience was found. Furthermore, the addition of irrelevant neuroscience information decreased the perceived quality of good explanations for the experts, indicating that extended exposure and education may be necessary for laypersons (i.e., jurors) to be able to correctly interpret neuroscience information.

To examine the influence of neuroevidence in a legal context, Gurley and Marcus (2008) assessed the effects of neuroimaging evidence on juror decision-making in insanity trials. Participants read a case study in which a murder defendant was diagnosed with either a psychotic disorder or psychopathy. The presence of neuroimaging evidence to substantiate this diagnosis was manipulated, as was the timing of the onset of the disorder (onset due to a traumatic brain injury (TBI) or onset not specified). The authors found that psychotic defendants were more likely to be found not guilty by reason of insanity (NGRI) than psychopathic defendants. Both the presence of TBI testimony and neuroimaging evidence made a NGRI verdict more likely, with the presence of both a neuroimage and TBI testimony increasing the odds of a NGRI verdict over and above either form of evidence alone. These findings lent credence to the notion that jurors may look for, and be especially persuaded by, evidence that provides concrete support for causal claims about a defendant's behavior; in this case, testimony about a brain injury, after which a person's behavior observably changed, and a neuroimage that provides tangible proof of a diagnosis that affects a person's ability to control their behavior.

MORE RECENT RESEARCH: NOT SO FAST...

In the past few years, several pieces of research have sought to replicate and extend the early findings. These studies, however, failed to find support for the idea that neuroimages unduly influence jurors. Schweitzer, Saks, Murphy, Roskies, Sinnott-Armstrong, and Gaudet (2011) investigated the impact of neuroimages offered as evidence in a *mens rea* defense. Across four experiments, while neuroscience-based expert testimony was found to be more persuasive than clinical psychological or family/anecdotal evidence, the neuroimages themselves were found to have no special impact on verdicts, sentences, or perceptions of the defendant's culpability over and above verbal expert neuroscience

testimony. In concert with these findings, Greene & Cahill (2011) found that the presence of neuroscientific testimony dramatically reduced the likelihood of participants imposing a death sentence on the defendant, but the form of the neuroevidence (brain image or neuropsychological testimony) made no difference.

These null effects hold in other contexts, as well. Gruber and Dickerson (2012) found that images representing brain activity are not evaluated as more credible or reasonable than other types of images placed above popular science news articles about neuroscience findings. Schweitzer & Saks (2011) found that while participants who viewed a neuroimage were more likely to render a NGRI verdict relative to participants who received clinical psychology testimony or no expert testimony at all, the neuroimage condition did not differ from conditions that included other forms of neuroscience testimony. Further, a replication of the original McCabe and Castel (2008) study found that brain images exert little to no influence on the extent to which people agree with the conclusions of a news article (Michael, Newman, Vuorre, Cumming, & Garry, 2013). Other recent findings suggest that fMRI images have no influence on judgments of research credibility and worthiness relative to bar graphs or photographs (Hook & Farah, 2013). Taken together, the results of these studies support the conclusion of Schweitzer and Saks (2011) that it is the entire package of neuroscience evidence, and not the neuroimage itself, that exerts a persuasive influence on jurors, suggesting that initial concerns over the persuasive impact of neuroimages were unfounded.

CURRENT DIRECTIONS IN NEUROIMAGE BIAS RESEARCH

With these two sets of experiments painting contradictory pictures, it is clear that the impact of neuroimage evidence on decision makers is anything but straightforward. Some current and ongoing research, however, is attempting to explore this complex picture. Saks, Schweitzer, Aharoni, & Kiehl (2013) conducted a study to examine the impact of neuroimages in the penalty phase of capital murder trials. The authors found that the addition of a neuroimage led psychopaths, but not schizophrenics, to be judged as less responsible for their actions and less likely to be given a death sentence, relative to conditions in which neuroscience testimony was presented without an image. These findings suggest that the net effect of neuroimage evidence may depend on the type of diagnosis to which the neuroimage is proffered.

Baker, Schweitzer, Risko, and Ware (2013) attempted to investigate one potential mechanism underlying this occasional neuroimage bias by examining how people physically look at neuroimages. Using an eye-tracking device, the authors found that while people do differentially attend to images (spending *less* time examining a neuroimage versus a graph depicting the same information), these differences did not predict subsequent legal decisions.

In another attempt to reconcile inconsistencies in the neuroimage literature, Schweitzer, Baker, and Risko (2013) performed a series of five experiments designed to identify the conditions most likely to elicit a neuroimage effect. The findings suggested that the persuasive effects of neuroimages may be present only when decision makers have something to which they can compare a neuroimage. Specifically, laypeople who read a scientific argument involving a neuroscientific claim were equally persuaded by that argument regardless of whether a neuroimage accompanied it. However, when those same laypeople went on to read a second scientific argument, the neuroimage effect emerged: people who had seen a neuroimage in the first argument were unimpressed by the second argument if it did not also contain a neuroimage, and people who had not seen a neuroimage with first argument were then quite impressed with the second argument if it did contain a neuroimage. This, of course, has direct implications for how neuroimage effects may play out in a trial: If a single expert testifies to a single fact using neuroimagery to support it, that neuroimage is unlikely to have any real impact; however, if an opposing expert is subsequently called to testify regarding that same fact, he or she would be well advised to include neuroimagery – to level the playing field if the first expert did use neuroimages, and to best the first expert if not.

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TOWARDS WARINESS BETWEEN ATTORNEYS AND NEUROSCIENCE CLINICIANS

Ware, Jones and Schweitzer reviewed the equivocal research findings about the impact of neuroimages on juror decision-making. It appears that early concerns about the potentially mesmerizing powers of brain pictures have not been fully realized in empirical studies. The authors reasonably conclude that juries do not appear to be swayed by the presentation of images *per se*, but may be influenced by the use of neuroscientific (and neurological) explanations as compared to other types of expert testimony (e.g., clinical). Psychiatrists and psychologists have proffered clinical explanations about medico-legal questions for over a century. Why then should neuroscientific testimony be more influential than clinical testimony to juries in some situations?

One possibility is that neuroscience offers a unique and qualitatively distinct explanation of behavior. This, of course, is true of *some* medico-legal issues. For instance, detection of tumors, brain lesions, and traumatic brain injury, and differentiation between types of dementia are inherently reliant on neurological and neuropsychological examinations. This type of testimony has been presented in court numerous times and is not considered controversial. In contrast, using neuroimaging to identify psychopathy is novel and controversial. Research is only now beginning to identify brain correlates that may aid standard clinical procedures in diagnosing psychopathic traits. At this time, however, there is an absence of cross-validated empirical work, standardized procedures and understanding of how neuroscientific methods improve our ability to detect psychopathy and other types of psychopathology. Furthermore, it remains unclear what neuroscientific explanations could offer, in contrast to other types of testimony, towards addressing questions of competency, insanity, and sentencing.

Alternatively, juries could be impacted by neuroscientific explanations exactly because of their "seductive" power. The original concerns about neuroimages may simply have been too specific. It may be that the field as a whole can be mesmerizing. There is no doubt that neuroscience research has transformed our understanding of the brain and human behavior and has produced remarkable findings. Still, it is a fairly new field. Legal and science scholars have repeatedly voiced concerns about applying neuroscience findings prematurely to medico-legal contexts.

Many questions remain about how juries perceive and interpret neuroscientific evidence as a whole. Rather than encouraging attorneys and forensic clinicians to blindly embrace neuroscience, we urge caution before proceeding pell-mell down this path. Attorneys and trial consultants alike need to have a cogent understanding of how neuroimaging evidence is used and if alternative, less controversial, methods could be utilized instead. Conversely, clinicians should not reach for the newest explanation in place of established mainstream answers. That is, both attorneys and clinicians should practice mutual wariness when it comes to the use of neuroscientific evidence.

We disagree with the authors' conclusion that to "level the playing field" an expert "would be well advised to include neuroimagery." As participants in the judicial system, the primary concern of the expert should be to engage in responsible, valid and empirically supported assessments based on probative legal-psychological issues rather than focusing

on the tactics of the opposing expert. There is still much to learn about neuroscience and at this point it is unclear what such a broad, amorphous field can offer in answering medico-legal questions. Attorneys should not feel obligated to hire neuroscientists to answer questions usually handled by forensic clinicians. As for experts, they have ethical standards that mandate use of well-established scientific practices.

Neuroscience has much potential in elucidating human behavior. We should await the measured and proper application of those research findings to legal issues. In the meantime, as attorneys, trial consultants, clinicians, and academics, we should all proceed cautiously.

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The authors' summary of the current state of knowledge highlights a point I made in a previous TJE article – *proceed with caution*. Neuroscience and genetics have enjoyed a rise to prominence in the legal community. Yet, relatively little is known about how these disciplines will impact the law and legal decision makers. Many proponents have suggested that these two disciplines hold the key to better understanding human behavior and more appropriately addressing criminal conduct. Skeptics have feared neuroscientific or genetic evidence would have an inappropriate impact on jurors. Two key studies served to further these fears (see, Weisberg et al., 2008 and McCabe & Castel, 2008). However, as the authors note, empirical evidence in this emerging intersection is murky and inconsistent. Efforts to replicate Weisberg and McCabe and Castel's findings have largely failed. Subsequent experiments, focused on jury decision making, have also produced inconsistent results.

Scientists are just scratching the surface of understanding the brain. As the authors' summary of findings implies, psychologists are not much farther along in understanding how jurors react to neuroscientific and genetic evidence. Results from early studies suggest the evidence could be favorable to criminal defendants. However, offering evidence of a brain injury/dysfunction/disorder may also backfire. We are yet to truly understand how and, even more importantly, when and why neuroscientific evidence impacts jurors. With these mixed experimental results, and failure to successfully penetrate the walls of the courtroom (see e.g., fMRI lie detection) many neuro-advocates are becoming more conservative in their predictions – recognizing that neuroscience has maturing to do before it is ready for use in courtrooms. The brain may have become a cultural icon – a sex symbol in its own right. But, I urge consultants and lawyers to share these scholars' caution. Until more systematic research is conducted, and results replicate, we don't know how jurors will react to the evidence or how to best use the evidence to serve clients needs. As Stephen Morse writes – avoid irrational NeuroLaw exuberance.

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RESPONSE TO "NEUROIMAGERY AND THE JURY"

I'll briefly describe why I think the article addresses trial needs of attorneys and then offer a couple of thoughts on further discussions occasioned (at least for me) occasioned by the article.

It is no secret that neuroscience does and will increasingly have significance for attorneys. Neither is it a secret that images related to forensic science can have powerful impacts on juries and on judges. The article alerts lawyers to an important nuance in the general discussion of neuroimaging and juror influence.

The article also gives clear history on how juries may have shifted their views somewhat over the time when neuroimaging has been used in trials—relatively brief as that time might be.

Nuances about how juror perceive neuroimages is important because lawyers will want to base their tactics using neuroimages with this nuance in mind. Being aware of this shift might alert attorneys to take both the newer and older views into tactical considerations in deciding how more precisely to use neuroimages. Overall, the article places lawyers on notice to be mindful about their use of neuroimages.

Toward this end, the article offers specific suggestions on how attorneys might use neuroimages if the first expert does or does not use images on the stand. This is an example of how their preceding history can play out at trial. This concluding paragraph can prompt product thinking on other issues lawyers might face in using neuroimages.

For example, are there aspects of the trial process (even at sentencing) where brain images are more helpful than others—such as the sentencing phase?

Or what are some questions lawyers might ask a neuroimaging expert whom they are considering as a witness?

Or what are some of the general lines of questions that lawyers might ask an opposing expert to refute the impact or predictability or diagnostic potential of brain scans?

This article gives valuable insights into the nuances of using neuroimages. These insights will be increasingly important, as the article notes, as jurors become ever more accustomed to neuroimages and their experiences and expectations change over even relatively short periods of time. The article is well worth reading whether you have used neuroimages in the past or not.

I am guided in this response by the following law review articles which might be beneficial to others for further reading in this timely area:

Choe, S. (2014). Misdiagnosing the Impact of Neuroimages in the Courtroom. 61 *UCLA L. Rev*. 1502.

Blume, J. & Paavola, E. (2011). Life, Death, and Neuroimaging: The Advantages and Disadvantages of the Defense's Use of Neuroimages in Capital Cases -Lessons from the Front. 62 *Mercer L. Rev*. 909.

Compton, E. (2010). Not Guilty by Reason of Neuroimaging: The Need for Cautionary Jury Instructions for Neuroscience Evidence in Criminal Trials. 12 *Vand. J. Ent. & Tech. L*. 333.

PREDICTING JURORS' VERDICT PREFERENCE FROM BEHAVIORAL MIMICRY

MATTHEW GROEBE, PH.D., GAROLD STASSER, PH.D., AND KEVIN-KHRISTIÁN COSGRIFF-HERNANDEZ, M.A.

The first time trial counsel learns of a jury's verdict preference, it is too little too late – the jury has finished deliberating and their verdict is being read to the court. It would be helpful to identify the current verdict preference of the jurors before the trial is over, or if possible, before the trial has even commenced. Such knowledge could lead to more effective jury selection and a more informed and directed approach to presenting one's arguments during trial. In other words, knowing the current verdict preference of various jurors affords an attorney the opportunity to "read the tea leaves" and adjust his or her trial strategy based on real time feedback. The main question is how to ascertain a juror's verdict preference at any particular point during trial. One possible solution is by monitoring the jurors' nonverbal behaviors, specifically the degree to which the jurors mimic the attorneys throughout the trial.

WHAT IS MIMICRY?

Mimicry is broadly defined as an unconscious reaction of imitating other peoples' behaviors, movements, postures, and facial expressions (Chartrand & Bargh, 1999). One key component of mimicry is that it occurs outside of conscious awareness. Thus, those engaging in mimicry (i.e., mimickers) are unaware that they are replicating the behaviors of someone else (i.e., the mimickee). Mimicry can be differentiated from imitation, which is a conscious process and requires deliberate intention.

The second component of the definition is that there are many different stimuli one can mimic. This includes the facial expressions of others, such as anger, happiness, or sadness. For instance, people tend to smile more when exposed to happy faces, and they tend to display more facial sadness when exposed to sad faces (Dimberg et al., 2000). Mimicry of various facial expressions can also facilitate emotional mimicry via emotional contagion. An example of this is how we are more likely to smile when we see a smiling, happy face. Due to facial feedback mechanisms, our smiling in turn makes us feel happy and thus we adopt the emotion of our interaction partner (Lundquist & Dimberg, 1995). A third type of mimicry is verbal mimicry, in which people adopt each other's accents, speech rate, and hesitations (Cappella & Planalp, 1981). The final type of mimicry, and the primary focus of this study, is behavioral mimicry, which refers to the adoption of the mannerisms, posture, gestures, and motor movements of one's interaction partner (Chartrand & Bargh, 1999). An example would be shaking one's foot when one's interaction partner is shaking her foot or leaning forward when one's interaction partner is leaning forward.

The term "chameleon effect" refers to the passive and unintentional tendency to adapt to our social surroundings and match the behaviors of others in our social environment (Chartrand & Bargh, 1999). Humans are very adept at altering behaviors to blend in with our surroundings, and as mentioned earlier, we are not aware of our tendency or of others' tendencies to engage in this behavior. Mimicry plays such an integral role in our daily lives that it has become an automatic process able to occur without the specific intent of the mimicker.

THE EVOLUTIONARY BASIS OF MIMICRY

The presence of mirror neurons suggests that we are pre-wired with the ability to mimic. These are neurons that fire both upon perceiving another person engage in an action, and upon oneself engaging in that same action (Chartrand & van Baaren, 2009). For instance, perceiving someone else perform a certain behavior such as leg crossing automatically activates our own motor representation of crossing our own legs, thus making it more likely that we engage in that action. The mirror neuron system supporting mimicry is so deep-rooted that one-month-old infants have been shown to smile, open their mouths, and stick out their tongues when they see someone else doing the same (Meltzoff & Moore, 1977). By nine months of age, this ability has rapidly progressed to the ability to mimic more abstract emotional expressions such as joy, sadness, and anger (Termine & Izard, 1988). These findings suggest that there are particular behaviors that we are more prone to mimic, and that mimicry is something that occurs at all ages.

In addition to the biological evidence on mirror neurons, evolutionary psychology also helps explain the purpose of mimicry. Humans are social animals (Aronson, 1999), and our daily lives are filled with social interactions with loved ones, colleagues, acquaintances, and strangers. Given the importance of other people in our daily lives, we are strongly motivated to ensure that our social interactions are successful.

In our less predictable and more dangerous evolutionary past, our ancestors lived in a harsh and unforgiving environment where individuals who were alone were at a survival and reproductive disadvantage (Buss & Kenrick, 1998). In order to survive and reproduce, individuals were forced to rely on others to complete necessary survival activities – e.g., hunting, gathering, protecting against predators, or raising offspring (Lakin et al., 2003). Harmonious group living was therefore essential to early human survival. Individuals who were able to maintain cordial group relationships were more likely to be included in the group and survive (de Waal, 1989). On the contrary, individuals who were

unsuccessful at maintaining good standing with the group were unlikely to survive. So any behavior that increased the odds of remaining in one's social group would be selected for, whereas any behavior that decreased those odds would be selected against. Individuals who were able to maintain successful group relations passed on their social strategies and techniques (including nonconscious behaviors such as mimicry) to future generations.

Before the advent of language, nonverbal behaviors carried significant weight in portraying our inner perspectives to others. It has been theorized that mimicry connotes the message of "I am like you" to the mimickee (Lakin et al., 2003). Over time, these nonverbal behaviors became automatic and thus able to occur without conscious awareness, thereby freeing up valuable cognitive resources. While initially having a survival value by facilitating communication between two people, mimicry eventually evolved to serve a "social glue" function, helping to increase affiliation, bind people together, and create harmonious group relationships (Lakin et al., 2003). It is to these positive interpersonal consequences of mimicry that we turn next.

IMPLICATIONS OF MIMICRY

Mimicry has been shown to have numerous positive effects, both upon the mimicker and the mimickee. In an interaction, those who have been mimicked report a greater liking of their interaction partner if they were mimicked than they do if they were not mimicked, which in turn brings them closer together (Chartrand & Bargh, 1999). Mimickees also report that an interaction with a partner who mimicked them went more smoothly than an interaction with a non-mimicking partner. It is important to highlight that people are not consciously aware of the presence or absence of mimicry, and they do not ascribe its presence or absence as a reason for their feelings about their interaction partner. In sum, people are unknowingly bound closer together via behavioral mimicry.

The link from mimicry to liking is not a one-way street. There is a bidirectional relationship between mimicry and liking, such that we tend to mimic people we like more than people we do not like (Stel et al., 2010). In a persuasion context, salespeople who mimic the customer are more successful at selling their product than salespeople who do not mimic the customer (Tanner et al., 2008). Furthermore, when listening to a message intended to be persuasive, people who are mimicked during the presentation of the message report more agreement with the message than people who are not mimicked (Bailenson & Yee, 2005). Research also suggests that individuals are more easily persuaded by those whom they like (Cialdini, 2001). To that end, if mimickers are more likely to mimic a target they like, it follows that they are more easily persuaded by that target and are therefore likely to be receptive to messages from that target.

MODERATORS FOR AMOUNT OF MIMICRY

Mimicry is context-dependent and is moderated (i.e. increases or decreases) depending on the identity of the mimickee. As noted above, we tend to mimic those we like to a greater extent than those we do not like (Stel et al., 2010). Thus, we tend to mimic targets we view favorably to a greater extent than targets we view unfavorably. We also show increased behavioral mimicry towards targets who hold similar attitudes, whether those attitudes are something mundane such as preference for a hypothetical vacation destination (van Swol & Drury, unpublished) or something more entrenched and strongly held such as preferences for a candidate in a presidential debate (McHugo et al., 1991). Thus, the research is clear that mimicry is not indiscriminately applied to the same degree to all targets. Instead, it is (nonconsciously) directed towards favored targets. To that end, it is a very subtle indicator of liking for a target and receptivity towards that target's message.

RESEARCH AIM

The goal of this research was to identify a way to assess jurors' current verdict preferences in a discreet and unobtrusive manner. It was hypothesized that the extent to which a juror mimics an attorney would predict his or her verdict

preference. For example, jurors who are in favor of the defense will mimic the defense attorney more than jurors who are not in favor of the defense. This information can be helpful in two phases of trial. During *voir dire*, it is important to be able to identify jurors who are initially favorable to your side, or at least uncover and remove jurors who are initially predisposed to favor the opposing side. This is particularly important because of the strength of primacy effects, in which initial impressions and preferences hold inordinate influence in one's final decision (Asch, 1946). To the extent that those initial leanings can be identified, that could go a long way in empaneling a favorable jury.

Behavioral mimicry can also be assessed during evidence presentation. If an attorney wants to know how jurors are responding to her presentation, she can take note of jurors' mimicry behaviors. This can be done by performing a few distinct potentially mimicable behaviors (e.g. rubbing her face, putting her hands together) and then observing the extent to which the jurors mimic those behaviors. If there is a noticeable amount of mimicry on behalf of the jurors, it could potentially indicate agreement with or receptivity to the message, whereas a lack of mimicry could potentially indicate disagreement with the message and a need to alter one's message. To sum up, the purpose of the research was to explore a unique way of assessing a juror's current verdict preference via the nonconscious process of behavioral mimicry.

METHODOLOGY

Videotapes from pretrial focus group research for six civil trials were used to conduct this study. (Videotapes were provided by Kevin-Khristián Cosgriff-Hernandez of Tara Trask, LLC.) The length of the videotapes varied, and four segments from each focus group were coded – an early segment from each side (e.g. plaintiff opening statement, defense opening statement) and a late segment from each side (e.g. plaintiff closing statement, defense closing statement). Thus, there were segments in the middle of the focus group that were not coded due to time and budgetary constraints. The segments always followed the format of plaintiff segment one, defense segment one, plaintiff segment two, and finally defense segment two. The videos followed a split-screen format, in which one camera was focused on showing all of the mock jurors. Mock jurors were seated, generally in a configuration of eight mock jurors in a row and three rows deep. Another camera focused on the presenting attorney, who was standing as he or she delivered the presentation. At the bottom of the screen was a time counter, so at any given moment in the segment it was possible to identify both the attorney's and the jurors' nonverbal behaviors.

A list of pre-determined potentially mimicable behaviors was created. This list included various behaviors that could be performed by both seated, silent mock jurors and a standing, presenting attorney. Thus, behaviors such as leg crossing and extensive hand gesturing were not included. Sample mimicable behaviors included face rubbing, posture shift, arm touching, and clothes adjusting. Several commonly held indicators of nonverbal agreement (smiling, forward lean, and head nodding) and nonverbal disagreement (arm crossing and head shaking) were also included. Attorneys and laypeople alike often believe that there are certain nonverbal behaviors that are indicative of agreement or disagreement with a speaker (Bousmalis et al., 2009). These variables were therefore included as well to explore whether behavioral mimicry was a better predictor of verdict preference than these commonly held indicators of nonverbal agreement and disagreement.

One group of coders went through the videos and focused on the nonverbal behaviors of the mock jurors. The nonverbal behavior of 43 mock jurors was coded across the six focus group videos. These mock jurors were clearly visible in the camera frame and they were all in the front row of their respective focus groups. This was done for convenience because the nonverbal behavior of these mock jurors was always captured on camera. The coders viewed the predetermined segments for each video, noting particular nonverbal behaviors as well as the time at which they occurred. The coders did not pay attention to the attorneys as they were giving their presentation. All videotapes were muted to reduce the chances of the coders being influenced or distracted by the attorney's presentation.

A separate coder went through the same segments of the six videos, focusing on the nonverbal behaviors of the attorneys. The attorney for the plaintiff and the attorney for the defense always remained the same throughout each of the six focus groups. This coder viewed the same pre-determined segments for each video, noting particular nonverbal behaviors as well as the time at which they occurred. The coder only paid attention to the attorneys, not the mock jurors during coding. Again, all videotapes were muted.
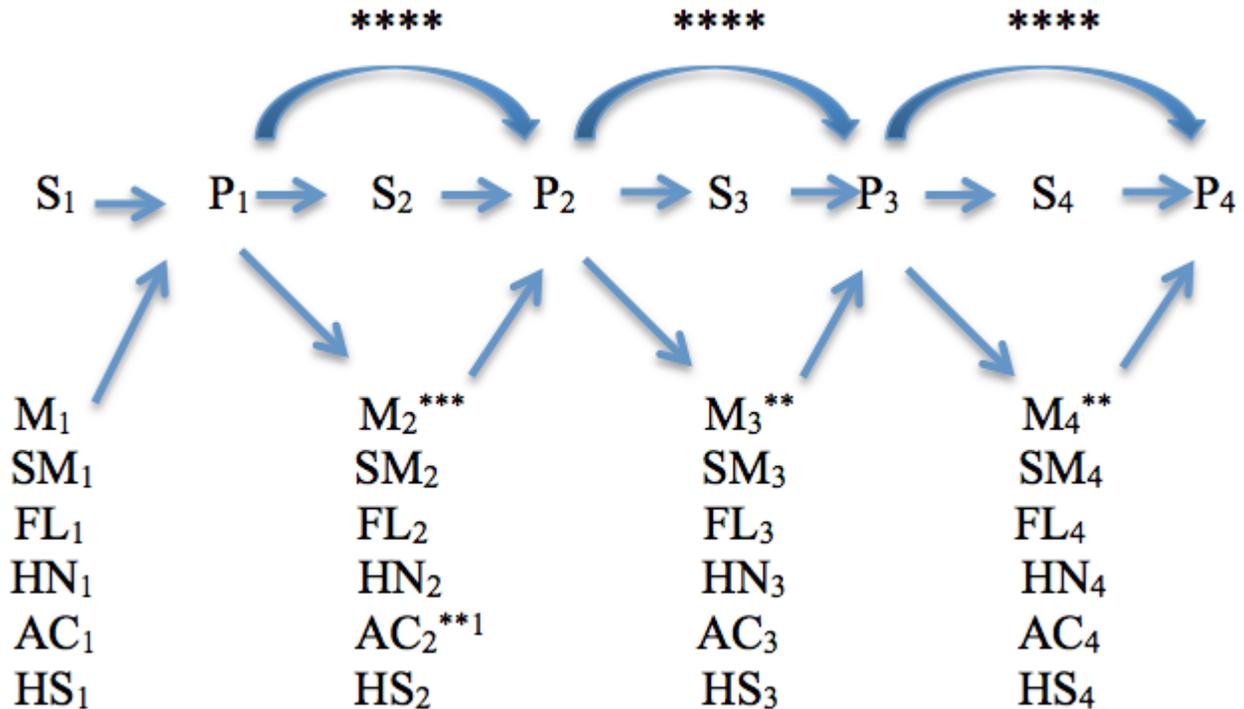
After the mock jurors' and attorneys' behaviors had been coded, their behaviors were matched up to calculate a mimicry score for each segment for each mock juror. Mimicry was defined as a mock juror's behavior replicating the attorney's behavior and occurring no later than ten seconds after the attorney's behavior. For example, if the attorney rubbed her face at 14:35 into the video and a mock juror rubbed her face at 14:40 into the video, it was counted as an instance of mimicry. However, if the attorney rubbed her face at 14:35 and the mock juror rubbed her face at 14:47, this was not counted as an instance of mimicry. Furthermore, certain commonly held nonverbal agreement behaviors (head nodding, smiling, forward lean) and nonverbal disagreement behaviors (head shaking and arm crossing) were categorized on their own as separate from behavioral mimicry, unless they occurred within ten seconds of the same behavior performed by the attorney, in which case they were classified as instances of mimicry.

Verdict preference was assessed after each focus group segment. Mock jurors were asked which side they currently favored after each segment (plaintiff or defense) as well as how easy it would be to change their opinion on a 1 (my opinion cannot be changed) to 4 (my opinion would be very easy to change) scale. From this, a composite score was calculated to create verdict preference after each segment. The composite verdict preference scale ranged from -4 (very strong pro-plaintiff preference) to +4 (very strong pro-defense preference). Verdict preferences assessed after the second defense segment were considered to be the final pre-deliberation preference, or in other words, the verdict preference jurors would hold going into deliberation.

RESULTS

Behavioral mimicry predicted mock jurors' verdict preference on a segment by segment basis (R^2 for the mimicry scores ranged from .06 to .13, depending on the segment). In other words, within any given segment, knowing how much the mock juror mimicked the attorney was a statistically significant predictor of what his or her verdict preference might be following that segment. For example, mock jurors who mimicked the defense attorney to a greater extent during the first defense segment had stronger pro-defense verdict preferences following that first defense segment than mock jurors who mimicked the defense attorney to a lesser extent during the first defense segment. While behavioral mimicry was not a strong predictor of verdict preference on a segment by segment, it was still statistically significantly associated with verdict preference, suggesting that mimicry is an important factor to consider, at least as a temporary indicator of agreement. See Figure 1 below for a more detailed summary of the relationship between the variables included in the analyses.

Figure 1. An analysis was conducted to determine the relationship between prior preference, mimicry behavior, nonverbal agreement behaviors, nonverbal disagreement behaviors, and subsequent preference. Analyses were conducted on a segment-by-segment basis. The exception was that prior verdict preference for segment 1 could not be included because there was no prior preference for this first segment. Note that there are six predictors (M_n, SM_n, FL_n, HN_n, ACn, and HS_n) included in each segment, S_n. Significant regression coefficients are marked with an asterisk.

$$\overset{****}{\overset{\displaystyle\frown}{}} \qquad \overset{****}{\overset{\displaystyle\frown}{}} \qquad \overset{****}{\overset{\displaystyle\frown}{}}$$

$$S_1 \rightarrow P_1 \rightarrow S_2 \rightarrow P_2 \rightarrow S_3 \rightarrow P_3 \rightarrow S_4 \rightarrow P_4$$

M_1	$M_2{}^{***}$	$M_3{}^{**}$	$M_4{}^{**}$
SM_1	SM_2	SM_3	SM_4
FL_1	FL_2	FL_3	FL_4
HN_1	HN_2	HN_3	HN_4
AC_1	$AC_2{}^{**1}$	AC_3	AC_4
HS_1	HS_2	HS_3	HS_4

Sn = Segment (segments 1 and 3 for plaintiff presentations; segments 2 and 4 for defense presentations)

Pn = Preferences (Preferences 1 and 3 after plaintiff presentations; preferences 2 and 4 after defense presentations)

Mn = Total mimicry behavior for a given segment

SMn = Total smiling behavior for a given segment

FLn = Total forward lean behavior for a given segment

HNn = Total head nodding behavior for a given segment

ACn = Total arm crossing behavior for a given segment

HSn = Total head shaking behavior for a given segment

** p<.05 ***p<.01 ****p<.001

[1] This is likely the result of a type I error. By chance alone we would expect 5% of the predictors to be significant. As there were 27 individual predictors throughout the segment-by-segment analyses, a type I error is not unlikely.

Although mimicry predicted verdict preference on a segment by segment basis, overall mimicry counts across the four coded segments did not predict final pre-deliberation preference, $F(2,40) = 0.66$, *ns*. However, this is not surprising because there were segments in between the first plaintiff and defense segments and the second plaintiff and defense segments that were not coded due to time and budgetary constraints. Stated otherwise, certain mimicry data that would help predict a mock juror's final pre-deliberation verdict was not coded and included in the analyses. Without this information, the ability to predict final pre-deliberation verdict was compromised.

While behavioral mimicry predicted mock juror verdict preference on a segment by segment basis, the individual commonly held nonverbal agreement and disagreement behaviors were not statistically significant predictors of verdict preference. Thus, forward lean, smiling, head nodding, head shaking, and arm crossing within a given segment

did not predict verdict preference when it was assessed subsequent to that segment. This suggests that unlike these commonly held nonverbal indicators of agreement and disagreement, knowledge about a juror's behavioral mimicry can provide a clue as to a juror's current verdict preference.

IMPLICATIONS AND RECOMMENDATIONS

The results suggest that mimicry is a moderately strong predictor of verdict preference. However, it is important to stress that the results suggest that mimicry is a predictor of *temporary* verdict preference. In other words, jurors who are mimicking a particular attorney during her presentation are likely more receptive to her message and thus more likely to be currently siding with that attorney at that point than jurors who are not mimicking that attorney as she gives her presentation. Given the findings that mimicry scores within a given segment predicted verdict preference subsequent to that segment but not on an overall basis, these results caution against relying too heavily on mimicry as an indicator for whether a juror will ultimately enter deliberations supporting a particular side. From running focus group research, it is clear that many mock jurors change their minds as they are presented with new evidence. Thus, even though a juror may be mimicking an attorney and appear receptive towards that attorney's message, new information later presented by the opposing side might change that juror's preference and they may end up favoring the other side.

This research found no support for the idea that there are certain nonverbal indicators of agreement or disagreement that can provide reliable information about one's preference. Thus, attorneys should be skeptical of relying too heavily on these nonverbal indicators of agreement and disagreement as true indicators for a juror's current preference. One possible reason for the lack of support may be due to the formality of the courtroom. Jurors may be aware that they should not display overt agreement and disagreement towards either side during the course of the trial. Another possible explanation is that there could be multiple reasons a juror engages in certain nonverbal behaviors (Frederick, 2006). For example, crossing one's arms could signal disagreement with the speaker, but it could also be because the juror is cold or it is just a comfortable way to rest one's arms. Behavioral mimicry, on the other hand, is an entirely nonconscious process and is less controllable. Furthermore, as mentioned earlier, people are not aware of the meaning behind mimicry. Thus, they do not know that by mimicking another person, they are in a sense showing their positivity towards that person. Mimicry is therefore a more promising avenue for providing a snapshot into one's current preference than relying on certain nonverbal agreement or disagreement behaviors as an indication of one's current preference.

The findings from this research can be employed during *voir dire*. The primary goal of jury selection is to remove jurors biased against one's side. A secondary goal is retaining favorable jurors. To achieve this, one can note (with the help of co-counsel and/or trial consultants) the extent to which certain potential jurors mimic each of the attorneys as they conduct *voir dire*. Jurors who display little mimicry for your side and extensive mimicry of the opposing attorney may come in to the trial predisposed to favor the other side. While their oral responses to questions might not reflect this, these jurors may be monitoring their responses and they may be potentially harmful. And given that behavioral mimicry is a nonconscious process, many jurors may not be consciously aware that they are initially biased towards a particular side. Thus, mimicry could provide a guide as to suitable candidates for peremptory challenges, or else targets for follow up questions to establish cause challenges. Conversely, jurors who mimic your side to a great extent during *voir dire* may be initially predisposed to favor your side and attempts should be made to rehabilitate any of their questionable responses. In this manner, mimicry can help elucidate jurors' initial proclivities, thereby helping you select a more favorable jury during *voir dire*.

Jurors' behavioral mimicry can also be assessed at various points throughout trial to provide a quick test of how jury members are responding to certain arguments. If you are presenting an argument and the jurors are mimicking you

less than before, that could suggest that these arguments are not resonating and you should change your strategy sooner rather than later. This would of course require you to be open to tailoring your arguments during trial, which attorneys are often hesitant to do, but it could give you the opportunity to make changes to parts of your case that are not resonating with the jury before deliberations begin, thereby increasing the chances of victory. If you are interested in how your current arguments are resonating with jurors you can even conduct a quick test by performing a few potentially mimicable behaviors (e.g. face rubbing) and then taking note of the extent to which your behaviors are subsequently mimicked by members of the jury. It is important to try this and practice reading others' behavioral mimicry before implementing it in the courtroom. Like anything else, practice will make it easier to read others' behavioral mimicry, allowing for less cognitive effort to be spent on reading the jurors' behaviors and allow more attention to be paid to trying your case.

Finally, although the focus of this research was on the extent to which jurors mimicking the attorneys can predict verdict preference, mimicry can go the other way as well. As alluded to earlier, there are many positive benefits conferred upon the mimicker (e.g. increased liking, perception of a smoother interaction, increased persuasiveness). While developing rapport with potential jurors is a tertiary goal during jury selection, it is a very important goal during the course of the trial. To the extent that a presenting attorney can mimic the nonverbal behaviors of the jurors throughout the trial, it can help develop rapport and endear the attorney to the jurors, making the jurors more receptive to the attorney (Tooher, 2009). It should be noted that theoretically this would not be an instance of mimicry. Rather, given its deliberate nature, this would be an instance of imitation. As such, it would have to be done very subtly and in a non-obvious manner. When consciously perceived by the target as deliberate imitation, there can be a backlash and all of the positive benefits will disappear.

In sum, this research provides attorneys with a tool they can use in court to help deselect unfavorable jurors during *voir dire* and to assess the effectiveness of their case on a moment-to-moment basis. While mimicry will not magically win your case, it can confer that slight needed advantage at trial. Instead of waiting until the verdict has already been announced to learn of the jury's finding, this research points to behavioral mimicry as a means of ascertaining the current mood of the jury before it is too late.

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FAVORITE THING: MIND MAP

BRIAN PATTERSON

While certainly not new, one of my favorite tools when starting a new project is the **mind map**. From wikipedia:

> A mind map is a diagram used to visually organise information. A mind map is often created around a single concept, drawn as an image in the center of a blank landscape page, to which associated representations of ideas such as images, words and parts of words are added. Major ideas are connected directly to the central concept, and other ideas branch out from those.

I use it to brainstorm and organize my thoughts and tasks, and find that the non-linear structure works better for me than outlining. It encourages free association while maintaining order.

If you don't want to go the pencil and paper route, a wide range of software is available, from free to pricey. XMind is a free application available on the Mac and PC. Mindmup, also free, is cloud based. I primarily use MindNode on the Mac and iPad, which costs $19.99. But there are dozens of others available via online search.

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THE UBIQUITOUS PRACTICE OF "PREHABILITATION" LEADS PROSPECTIVE JURORS TO CONCEAL THEIR BIASES

MYKOL C. HAMILTON, PH.D., EMILY LINDON, B.S., MADELINE PITT, B.S., AND EMILY K. ROBINS, B.S.

Don't miss the consultant responses below: **Charli Morris**; *Diane Wiley.*

The sole legal purpose of voir dire is to expose bias in prospective jurors so as to seat a fair, impartial jury (Law.com). However, many practices and psychological pressures conspire together to reduce the likelihood of achieving this purpose. For example, attorneys not only attempt to sway prospective jurors to their side during voir dire, but both judges and attorneys attempt to rehabilitate any biases they detect (although of course attorneys really just want to excuse those who are biased in the "wrong" direction). Unfortunately, there is evidence that most rehabilitation attempts are ineffective. For example, according to Macpherson (2014), by instructing jurors that they must set aside any knowledge, experiences, attitudes, or beliefs that might bias them, the court "asks jurors to do the impossible." Humans are

not robots. We are notoriously bad at preventing our biases from influencing us. Furthermore, we strongly but erroneously believe that we *can* control our biases (Nisbett & Ross, 1980), thus we are likely to tell judges and attorneys that we can be fair and open-minded even if we cannot.

Community pressure exacerbates the problem. Yet judges rarely give this consideration sufficient weight. When they insist that impartial jurors can be identified in a community in which pretrial publicity and/or shared beliefs and attitudes are major factors, they are probably engaging in wishful thinking. In testifying as an expert witness concerning the results of change of venue surveys I have conducted, I have seen judges respond something like this even when 70% or more of the survey respondents have admitted a guilty bias: "Since some respondents didn't say he's guilty, all we have to do is put *those* people on the jury." I feel as though all I have to do is listen closely and I will hear echoes of the judge's thoughts, "And if you don't believe me, just ask them."

Both common sense and decades of scholarly research demonstrate that such claims are probably based largely on naïve pipe dreams, because, among other problems:

1. Most people are unaware of how much their attitudes affect their behavior in general (Nisbett & Ross, 1980), due perhaps to the introspection bias and the bias blind spot (Shniderman, 2013), let alone how strong the biasing effect of pretrial publicity on their opinions about a court case can be (Moran & Cutler, 1991). Even mock jurors who *promise* to be impartial and to disregard pretrial publicity show bias in their decisions (Dexter, Cutler, & Moran, 1992).

2. People are disturbingly unsuccessful at setting aside bias (assuming they are aware of their bias in the first place). Unconscious processes such as confirmatory information searching (Swann & Read, 1981), belief perseverance (Ross, Lepper, & Hubbard, 1975), conformity to others' attitudes (Asch, 1955), cognitive load (Gilbert & Hixon, 1991), the backfire effect (Cox & Tanford, 1989; Sue, Smith, & Pedroza, 1975), cognitive dissonance (Festinger, 1957), and plain old poor recall may all contribute to this lack of self-understanding.

3. If #1 and #2 aren't hurdles in a particular instance, that is, if the prospective juror is aware of her own biases and knows how hard they are to set aside, unless she confesses to her biases, it will be difficult if not impossible to detect them. Humans don't generally want to admit that they are imperfect (as in, unable to be completely fair and impartial), and humans, even attorneys, judges, and legal consultants, are terrible lie detectors (as in, unable tell whether those who claim impartiality are dissembling, fooling themselves, or both; Miller & Stiff, 1993; Vrij, 2000; Kressel & Kressel, 2004).

4. On top of all that, in highly publicized cases, sensationalistic stories increase community pressure on jurors (Robertson & Tumminello, 1996). Lawyer and former Massachusetts governor Foster Furcolo wrote, in *The Thirteenth Juror* (1968),"It is impossible for any criminal defendant to escape the influence of the 'thirteenth juror,' the climate of public opinion, especially if he is charged with an especially notorious crime, for no juror can ever entirely escape community pressure." And in *Stack and Sway,* Neil and Dorit Kressel (Kressel & Kressel, 2004) quote the appellate panel in the Amadou Diallo case: "This is not a simple matter of asking the jurors if they could put aside any opinions that [they] may have formed. Instead, it would also be necessary to ascertain whether they could face their friends and neighbors in the event of an acquittal," p. 194.

5. Once prospective jurors report for voir dire, new pressures emerge. In *The Persuasive Edge*, Richard Crawford and Charli Morris (2006) describe the juror's courtroom phenomenology. They say the juror faces "a judge perched high on a bench…; an armed deputy standing guard over the proceedings; a court reporter taking down every spoken word; a room full of lawyers dressed in suits; and all eyes focused on the jury box." p. 43. How could

such a setting not push a prospective juror toward the 'right' answers, toward trying to appear intelligent and responsible…?"

To measure the effects of voir dire pressures, I have performed several naturalistic and laboratory studies. For example, one study was based on a 2010 change of venue survey I conducted for the defense in a highly publicized case in Kentucky—the "pontoon boat" murder trial of Dr. Stephen Hall. . The judge denied the COV motion, which allowed us (Hamilton, Augustus, and Melloan, 2011) to compare admissions of anti-defendant bias in our 400 COV survey respondents to those of the 44 individual voir dire interviewees.

Before I describe the study, it is important to note that early in my consulting work I began to suspect that even anonymous COV surveys under-predict guilty bias. But why? Shouldn't they have low social/legal desirability pressure? They occur weeks or months before jury selection, respondents presumably don't feel the surveys are terribly important, and they do not take place in a courtroom setting. My suspicions were based on the fact that in the surveys I had conducted so far, many respondents who said they thought the defendant was innocent or had no opinion nevertheless predicted that the defendant would be convicted and that the local community wanted him or her to be convicted. I suspected this meant that, in their heart of hearts, these respondents leaned toward guilty. It is simply more comfortable to project a guilty bias onto others than to admit it of oneself.

Moreover, the most frequent explanation respondents gave for leaning toward innocent was, "Because a person is innocent until proven guilty." That response likely reflects a (professed) *willingness* to consider the evidence before coming to a definite decision rather than an affirmative belief in the defendant's innocence. Americans know how central the presumption of innocence principal is to the American justice system, and are loath to admit that they personally doubt that a defendant is innocent. In sum, there is probably considerable legal/social desirability pressure even in anonymous COV phone surveys.

The hypothesis for our 2011 study connected to these issues. However strong the social/legal desirability pressure might be in a survey, we predicted that the pressure in voir dire would be measurably greater. Confirming the hypothesis, more than two-and-a-half times the proportion of COV survey respondents (57%)[1] as venirepersons (22%) admitted that they believed Hall was guilty. The samples were equivalent in their familiarity with the case—91% of both groups had read or heard about the infamous pontoon boat case. Therefore, our results suggested that something about the voir dire process caused prospective jurors to conceal their guilty bias at a much greater rate than the survey respondents had.

We believed that although the seriousness of the courtroom setting and the importance of jury duty undoubtedly contributed to the increase, the problem lay predominantly in the way the judge and attorneys phrased their questions and statements. They engaged in a practice we dubbed premature rehabilitation, or *prehabilitation*. Before each prospective juror even had an opportunity to admit to bias, the judge and attorneys began trying to remedy *potential* bias, signaling the legally and socially desirable, "correct," responses to questions about a juror's responsibility to be impartial, fair, and open-minded and to set aside biases.

For example, the judge introduced every interview with statements such as (emphasis ours): "This is the portion of the trial that talks about pretrial publicity… about what you heard and its effect on your **ability** to **keep from forming a preconceived notion**, and your **ability to look at the other side of the story**" and, "Keep in mind that it is **your duty** to presume that the defendant is innocent unless his guilt is proven beyond reasonable doubt." The attorneys also phrased many questions prehabilitatively: "Are you **capable of remaining objective** in this case?"

It is hard to imagine that under these circumstances anyone, unless they were actively trying to get out of jury duty, would admit that they might have difficulty keeping an open mind or might struggle to fulfill their duty as a juror. To

express such doubts is to say, essentially, "No, I can't follow the law. I don't believe in the American justice system. I'm not willing to set aside my prejudices. I'm a bad citizen. In fact, I'm a rotten person."

The Hall analyses and experimental research we will discuss later provide evidence that prospective jurors conceal their biases in voir dire, and furthermore, that prehabilitation contributes to the problem. The next logical question was: Is prehabilitation a common practice or was it peculiar to the Hall case? The current study is a first effort to answer this question.

We performed a content analysis of 604 voir dire interviews from 11 high profile cases in California, Colorado, Illinois, Indiana, Kentucky (2 cases), Missouri, Mississippi, Texas (2 cases), and Saskatchewan, Canada. Based on content analysis in the Hall case, we predicted that most or all judges would engage in prehabilitation in their introductions to voir dire and/or questioning of prospective jurors. In addition, based on the Hall content analysis and on the fact that it is in the prosecution's and plaintiff's attorney's interest for anti-defendant prospective jurors to hide their biases, we predicted that prosecutors and plaintiff's attorneys would engage in prehabilitation. And finally, although it isin the defense's interest to engage in rehabilitation but not prehabilitation, the defense attorney in the Hall case did ask prehabilitative questions, therefore we assessed defense attorney prehabilitation as well.

METHOD

We obtained transcripts or video recordings of voir dire for 11 cases—10 U.S. trials and one Canada trial. All but one were criminal cases. We assessed the frequencies of three kinds of statements and questions uttered by the judges and attorneys:

The first type we called **Bias Discovery,** which involvedprobing for bias without signaling socially desirable answers, and doing so before any rehabilitation attempts had been made. For example, an attorney might ask, "Do you have any feelings one way or the other about the likelihood that X committed this crime?"

Rehabilitation, or attempting to remedy bias a prospective juror has confessed to. "You've said that certain information you heard on the TV news may make it difficult for you to be completely fair. Do you think you would be able to overcome those feelings if you were seated on the jury?"

Prehabilitation, orattempting to remedying potential bias, thus signaling socially desirable responses to subsequent bias questions. "You seem like a reasonable person. Do you think you'll be able to keep an open mind and base your opinion solely on evidence that's presented in court?"

For individual voir dire, we classified an utterance as prehabilitative rather than rehabilitative only if someone had exerted social desirability pressure on the particular juror in question. For general voir dire, we counted an utterance as prehabilitation if the judge or one of the attorneys had exerted pressure in questioning the group.

RESULTS

All 11 judges (100%) gave prehabilitative introductions to prospective jurors. Every judge prehabilitated all venirepersons in at least one way (100%). The most frequent forms of prehabilitation by judges involved discussion of the ability to remain fair and impartial (7/11 cases; 64%) or the ability to put aside pretrial information (4/11 cases; 36%).

In 8 of the 11 cases (73%), prosecutors used prehabilitative wording in their statements, questions, or both. In 6 of 11 cases (55%), defense attorneys directed prehabilitative questions/statements to prospective jurors. Attorneys emphasized themes similar to those that judges focused on, but other themes appeared as well. For example, many asked questions along the lines of, "Will you be able to follow the law?" or "Can you put aside your preconceived biases?"

DISCUSSION

Previous studies by my student colleagues and me (Hamilton, 2010; Hamilton, et al., 2011; Hamilton, et al., 2013; Robbins et al., 2012) have demonstrated that prehabilitation in voir dire leads prospective jurors at best to temporarily suppress bias and at worst to falsely claim that they are devoid of bias. The present study shows that prehabilitation may well be universal in U.S. courtrooms (and that it at least occurs in Canada). We found that the voir dire process commonly places social/legal desirability pressure on prospective jurors through judges' introductions and questions and through attorney questioning. With insufficient regard for accuracy, attorneys and judges exert pressure on prospective jurors to declare, even before they have revealed any bias, that they can be impartial, set aside pretrial information, and follow the law by presuming innocence. Given how clearly and repeatedly judges and attorneys communicate their expectations, it is not surprising that prospective jurors rarely admit to bias.

All of that leaves us with this very important question—what can we do about it?

Trial consultants, legal scholars, and lawyers have all discussed general techniques for eliciting honest answers from prospective jurors. For example, a relaxed demeanor and a friendly approach may help. As Angela Dodge said in *Winning at Jury Selection*, a good voir dire performance may require "putting on the Mister Rogers sweater" p. 58 (although that can be taken too far).

In addition, trial consultants, attorneys, and researchers have discussed how to compose truth-eliciting voir dire questions. For example, instead of asking yes or no questions that force prospective jurors to respond in the absolute, Crawford and Morris (2006) suggest some answers on 1-10 scales, which allows for a weaker commitment. One can then probe for the true strength of people's feelings. And Trisha Renaud quotes Robertson, Yokum, and Palmer (cited in Renaud, 2012), who suggest that attorneys ask prospective jurors to "…imagine not having read that damaging newspaper article or not having had that bad experience with the police… Or ask the juror if he or she believes that someone else who holds a similar opinion or has had a similar experience might have difficulty being impartial."

Below are my own suggestions for how attorneys and judges can encourage veracity. I base my recommendations on questions I have developed for use in my COV surveys, on experiments in which I have compared bad techniques to (what I hoped were) better techniques developed for the experiments, and finally, and this is only a bit tongue in cheek, on whatever I see as the opposite of the bad techniques I have observed in the courtroom.

QUESTION TECHNIQUES FOR ATTORNEYS (AND/OR JUDGES):

- The first few times I conducted a COV survey, I asked the innocent/guilty question only in this standard way: "In your opinion, is X guilty or innocent (counterbalanced order) of the murder of Y?" But then, because of my suspicion that many people were simply unwilling to admit a guilty bias, I added a second guilt/innocence question in subsequent surveys, one designed to simulate the "water cooler" approach, or more exactly, the "if-you-were-standing-around-the-water-cooler-with-a-bunch-of-coworkers-would-you-opine-that-the-defendant-is-innocent-or-guilty?" approach. For the telephone surveys I worded the question a little more scientifically as well as more simply: "If you had to say right now that you lean one way or the other about X's guilt or innocence, which way would you lean?" Invariably, whatever percentage of people had answered the standard guilt/innocence question with probably or definitely guilty, an additional 10%-15% said they *leaned toward* guilty. In voir dire, an attorney could use the survey's "lean" question, or even the more literal water-cooler version question.

- I also use explicit or implied rating scales to ask the guilty bias questions (and several others) in my COV surveys. For example, answers on the guilty bias questions are on an implied 1-4 scale, from definitely innocent to definitely guilty.

- I ask projective questions about community opinions and community pressure in my telephone surveys on 6-point Likert scales (disagree strongly through agree strongly). Such questions are designed to allow respondents to project onto others answers they themselves might perceive to be legally/socially undesirable. Once they have answered such questions in the affirmative, they may feel more comfortable stating their own opinions, even strongly. Variations of my COV survey projective questions can certainly be used in voir dire:

    ◦ The Z County community wants X to be found guilty.

    ◦ If you served on the jury, most people would expect you to find X guilty of this crime.

    ◦ X will be convicted of murdering Y.

Two other possible projective style questions: "In talking to friends and family about the case, have you gotten the feeling that they have formed some opinions about the case?" and "Has some of the news coverage you mentioned reading given you cause to be skeptical about the defendant's claims of innocence?" The latter question puts the onus on the media rather than on the prospective juror—it's not "have you developed biases against the defendant based on the news coverage?", which implies that it's the prospective juror's fault. It's not even "has the coverage led you to be skeptical?", which puts the person in a passive, I've-been-manipulated light.

In addition, experiments by Hamilton, et al. (2013) and Robbins et al. (2012) showed that non-prehabilitative questions directed toward the respondents' own feelings promote honest answers more than do questions with typically prehabilitative phrases such as, "Since it's your duty to remain objective…" or "Given the importance of an impartial jury…" We exposed participants to media coverage about cases then asked them the questions with or without the prehabilitative phrases. They answered on 6-point scales from very easy to very difficult or from definitely will to definitely will not. Below are the non-prehabilitative versions of the questions. Again, such questions could be used in voir dire.

- If you were to serve on the jury in X's trial could you assume he is innocent until proven guilty beyond a reasonable doubt?

- In your honest opinion, how easy or difficult would it be for you to put aside any preconceived notions about this case?

JUDGES' INTRODUCTIONS TO THE VOIR DIRE PROCESS:

My 2013 experiment was a mock voir dire study with professional actors playing the roles of judge and attorneys. (One actor happened to also be an attorney, which helped with verisimilitude.) Participants were significantly more likely to admit to anti-defendant bias when the judge used our non-prehabilitative introduction:

"We're here to get a feel for what kind of information is out there in the media about this case. We're also interested in hearing how you, personally, feel about the case as well as what you think community perceptions are. There are no right or wrong answers and we want you to feel as comfortable as possible sharing your honest thoughts and opinions. Please remember that you are sworn to tell the truth about those feelings and opinions."

Note that the only admonitions or explanations the judge gave had to do with honesty. He said nothing about a juror's duty to be impartial and objective, presume innocence, put aside pretrial information, and so forth.

In a paper-and-pencil study (Robbins et al., 2013) we contrasted typical prehabilitative judge instructions with instructions that employed a variation on the water-cooler approach. The water-cooler approach resulted in significantly more admission of bias. In this experiment, the water-cooler instructions were:

"Imagine the following scenario. A few months from now, you are standing around with some friends and acquaintances in [the dining hall], in your dorm, or somewhere else on campus. Someone brings up the Trayvon Martin case and everyone starts talking about what they've read and heard, giving their opinions about what really happened. Assume that over the months since Trayvon was killed, you have seen the information you just read [a transcript of an ABC news story] and you have also read several newspaper articles about the case and seen quite a few TV news stories about it. One of your friends says, 'I have a survey I'd love for you to fill out for me. In my Sociology class we're trying to figure out what Centre students think about the case. Would you mind answering these questions for me?'"

With some adjustments, such a scenario might be useful for judges who want to introduce voir dire in a way that will encourage candidness.

The questions and judge instructions I have discussed above could very well help attorneys and judges to elicit honest responses from prospective jurors. However, if you think that eliminating prehabilitation is an uphill battle, you are correct.

Although individual attorneys can improve their own questioning so as to avoid prehabilitation, they have little control over what judges and opposing attorneys do. Also, avoiding prehabilitation oneself, once anyone in the courtroom has begun the prehabilitation process (or has even begun the *rehabilitation* process if it is group voir dire) may be useless. The bell has been rung. Does this mean that one should just prehabilitate along with everyone else, just to make sure they get their licks in? Not necessarily.

Urging prospective jurors not to fall for opposing counsel's manipulation-through-prehabilitation might be effective. "While Mr. Zelbenhausermansmith has lectured you to death on the importance of being objective, probably to the point where you fear admitting any negative feelings you might have about the defendant, let me assure you that the goal of the court is to understand your true feelings, not bully you into…"

Or one might be able to solve the prehabilitation problem right *before* voir dire if the judge is highly motivated to seat an unbiased jury. An attorney knowledgeable about prehabilitation issues might be able to convince the judge to avoid prehabilitation in his or her introductory remarks and to disallow prehabilitative questions.

Finally, maybe we consultants can contribute to more widespread change. We need to get the word out broadly when we assist in jury selection, offer CLE workshops, or write for legal audiences. (Literally get the word out—prehabilitation.)

In closing, a hopeful fact. Not all judges believe that rehabilitation of biases (let alone prehabilitation of biases) is effective. MacPherson (2014) discussed a court decision in which the majority opinion contained the following statements about jurors' ability to set setting aside biasing information:

"Any lawyer who has spent time in our courtrooms … has experienced the frustration of prospective jurors expressing extreme bias against his or her client and then recanting upon expert questioning by his opposition, which generates such embarrassment as to produce a socially and politically correct recantation. When a juror expresses his or her unease and reservations based upon actual life experiences … it is not appropriate for the trial court to attempt to 'rehabilitate' a juror into rejection of those expressions."

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Author note: The second, third and fourth authors are recent graduates of Centre College. The authors would like to thank two other undergraduate students, Hillary Moore and Leah E. Storch, BS for their contributions to the writing of this article and to the research reported herein.

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[1] Given the 91% familiarity rate in the community, the press's sensationalized stories about Isabel Hall's death and the anti-defendant bias of the news and television coverage, 57% seemed low—it is this kind of result that makes me believe that COV surveys under-predict guilty-bias.

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IF IMPARTIAL IS IMPOSSIBLE: HOW DID WE GET HERE AND WHAT ARE WE TO DO?

When I met Mykol Hamilton at the ASTC Conference in June of this year, I told her this is just the kind of research I like to see. We want social science experts working on empirical studies to give us the ammunition we need to convince judges and lawyers that what they are doing in the courtroom may be counterproductive. The irony of prehabilitation is that the repetitive use of questions such as, "Do you think you can be fair and impartial?" or its cross-examination cousin, "You could be fair and impartial, couldn't you?" serves only to create a jury selection process that is itself neither fair nor impartial.

As I prepared to comment on the article, I decided to look more closely at the history of the language of "fair and impartial" to see if I could find out why we began using that phrase in the first place (and then abusing it). In a 1988 journal article "In Search of the Impartial Jury", law professor and author James J. Gobert provides some context for this discussion.[1]

A QUICK HISTORY

The sixth amendment of the U.S. Constitution provides an accused "the right to an impartial jury" in federal courts, which was then extended to state courts, and then incorporated into the due process clause of the fourteenth amendment. Gobert points out in his first footnote that, "The seventh amendment provides for a jury trial in many civil cases. Unlike the sixth amendment, no guarantee of impartiality is explicitly mentioned in the seventh amendment."[2]

The Gobert article traces a fascinating narrative of how we arrived at a system which favors "impartiality" in the first place. Jurors in the earliest trials were in fact witnesses, with direct knowledge of the facts. "Not until a relatively late stage in the evolution of the jury did presentation of evidence to persons unacquainted with the facts replace decision making by persons who knew the facts." Then the "ideal juror" became "the one who had no knowledge of the facts and no interest, financial or otherwise, in the outcome of the case".

Since the early days of trial by jury in England, impartial has also been taken to mean indifference, neutrality, detachment, openness. And indeed there is an argument that we can create an "impartial" jury made up of "partial" jurors by

virtue of the fact that one juror's partiality toward one side may cancel out the partiality of another juror toward the opposition.

Importantly, despite the thorough treatment of the history of jurisprudence on the question of impartiality, the word "fair" is hardly used and it is not yet clear how the pairing was first made or why it has persisted. It may be simply because the Articles of our Constitution do not use the word.

THE PRACTICAL REALITY

Despite changes and variations in the meaning (or interpretation) of the words, we know there are at least four possible conclusions we could draw if indeed "fair and impartial" are the two most important criteria by which potential jurors are evaluated for their fitness to serve:

1) A juror could be fair while she is also impartial

I am the perfect juror.

2) A juror could be fair even if he is partial

I can manage my bias just fine, thank you very much.

3) A juror may be unfair because she is also partial

It's true, I probably should not sit on this case.

4) A juror may be unfair while he is also impartial

It's not your client or your evidence I don't like, it's the way you presented your case.

Some lawyers and judges know enough of the effect of asking about "fair and impartial" that they change the language only slightly after the judge has introduced it. They say impartial means "unbiased" or "without prejudice," thinking these are less buzz-worthy words (they are not). Others are more colloquial in their approach, as in, "Do you think you might have just one thumb on the scale to tip it in one direction or the other?" or "Does this mean my client starts just slightly behind that line at the starting blocks?" But substitute "bias" or "prejudice" in the four possible conclusions above and you will still find truth in all of them.

WHAT IF WE COULD SPLIT THE PHRASE AND TALK ABOUT THE WORDS SEPARATELY, OR MAYBE NOT AT ALL?

It seems to me that "fair" is the part we could all agree on and this is where I think most judges get it mostly right in their initial comments to the jury. The parties deserve a fair trial. They deserve fairness from the Court, from counsel, and from the jury. Fundamentally this might mean that the rules will be applied and followed; that the playing field – once inside the courtroom at least – starts out level; or that to the extent we think we can eliminate arbitrariness or randomness in a trial, we attempt to do so.

But that leaves us with the impossibility of impartial. Even if they could, we can't really expect people to set aside their bias when they will often be instructed in the end that they may use their common sense and life experience to determine what is reasonable or ordinary on the questions of negligence and damages[3].

What if we just stopped using the word 'impartial' altogether, or at least after the judge has made the initial introduction? Couldn't we just we make a collective motion *in limine* to exclude the word from our voir dire vocabulary?

WHAT ELSE CAN WE DO?

BETTER ACCESS TO JUDGES

As a trial consultant I've spent twenty years in courtrooms but I still rarely get direct access to judges. Some of my most memorable experiences in trials have come when judges talk to me during recesses about who I am, what I do, and how I help. But those circumstances are too rare in part because I work throughout the country on a wide variety of case types, so I don't see the same judges every month or even every year. I'm not present for the motions practice of a case. It's also true that many of my clients don't want to broadcast my presence or role in their case at the time of trial, when my advice and assistance on these very issues for jury selection is the most valuable and may also be the most instructive for judges who recognize the problems we have when we do it the way it has always been done.

What I'm hoping is that attorneys who read *The Jury Expert* will see this as a call to arms. Invite jury experts to present at seminars for judges so we can share the research. Or consider sharing research articles like this one with judges that you serve and speak with in your honorary groups such as ABOTA or ACTL. Or after the trial is over, suggest to the judge that a trial consultant was instrumental in your effective, efficient voir dire and offer to set up an opportunity for us to meet.

"STOP SCREWING IT UP FOR ALL OF US"

This article highlights all-too-common errors often seen in the courtroom. Hamilton and her colleagues are exactly right: lawyers who hope to hide or bury the bias that they believe will work *for them* are doing it wrong. Trial consultants who help them do it this way are aiding and abetting. Not only does the technique contribute to the problem identified by the research, but sometimes lawyers are mistaken about whether a juror's similar life experience or attitude makes them favorable or unfavorable.

In every jury selection I attend, we talk in our huddle about the fact that jurors who seem to be most *like* our client can be our best friend or worst enemy. It takes a lot of really good open-ended questioning on a wide range of issues to figure out what the likelihood for either will be.[4] It can dangerous to lock someone in with the "fair and impartial" qualification on any topic before she is fully vetted.

HOW TO ESTABLISH SOLID CAUSE CHALLENGES THAT ARE REHABILITATION-RESISTANT

I agree with all of the author's suggested strategies for changing the language of our approach to bias in the courtroom: the "water-cooler" approach, "projection" questions, explicit or implied rating scales, and open-ended questions free of "prehabilitative" words or phrases.

I typically include in the voir dire I prepared for clients a set of questions that are specifically labeled "Establishing Cause Challenges" so that an attorney can flip to the formula on any topic of her choosing during the jury selection process. These are the essential elements.[5]

1. ESTABLISH THE EXTENT OF JURORS' POTENTIAL FOR PARTIALITY

You do this with the "exhaustion technique" that you learned for deposing witnesses, to expand the juror's initial answer as far and wide as possible.

2. QUANTIFY IT

While I appreciate scaled response items that use words like "definitely" or "very" or "strongly" I find that many jurors are reluctant to adopt the language of a question if it makes them seem too extreme or closed-minded. Instead, I like

the good old 10-point scale. I find that when we argue the cause challenge to a judge, and the number seven or higher on the scale is attached to an attitude or belief that indicates bias against our client, judges typically agree. It is a plain-spoken and simple way to rate the intensity of sometimes complicated feelings or beliefs.

3. GET IT ALL DOWN

The technique for building a better cause challenge requires attorneys to be methodical and slow down, so that essential words spoken by a juror are recorded by the consultant assisting counsel. That way, when you approach the bench to make the motion for cause, you are reading back into the record exactly what the juror said rather than something that sounds like your interpretation of the bias.

4. ADD IT ALL UP

Once you have committed the juror's answers to your long list of questions designed to exhaust the reach and scope of a juror's inability to be fair, you want to deliver it in a narrative to the judge and on the record. If you don't win the motion and you have to use your precious few strikes to remove a juror, you may have a good record for an appeal.

HERE'S HOW IT WORKS

The method described generally in fours steps above yields powerful results for succeeding on a motion to dismiss for cause. In one North Carolina case, I recall us finding a prospective juror who reported work experience for the large, multi-national corporation on the other side of an employment dispute. By the time we had used the exhaustion techniques, quantified the bias and got it all down, we had the following to say about the juror on the record when we added it all up to make our challenge for cause:

> "Your honor, Mr. Jones first told us that he was no longer employed by Acme. Then he told us he had worked his entire career at Acme, some 36 years, and Acme had been his "only full-time employer after college." When asked if he was still close to people who used to work or currently work for Acme, he revealed that his nephew, his sister-in-law, and his daughter all work (or have previously worked) for Acme. When you add up the number of years he and his family members have worked for Acme so far, he has a combined total of 87 years of family allegiance to Acme.

> Furthermore, when asked to rate his satisfaction with work at Acme he rated it a 9.5 overall with similarly high favorable ratings (and none less than 7 on a scale of 1 to 10) for things like pay, benefits, employee relations, quality of products and quality of service.

> He told us he'd been a "loyal" employee of Acme and that Acme had "recognized his loyalty" over the years with bonuses, pay increases, and opportunities for advancement.

> And finally, your Honor, after attempting to assure us that he could be "fair and impartial," when asked if he would be able to talk openly to his loved ones who still work for the company if he served on a jury that ruled against Acme, he hesitated, and said, he "just didn't know." Ultimately, when asked if he was in our shoes – representing a person who was in a legal dispute with Acme – whether he would recommend to the client that he himself should remain on the panel, he grinned as others on the panel snickered, and said, "I guess probably not."

Had we wasted any time cross-examining him on his ability to be fair and impartial we might not have had such a compelling record to make or saved ourselves a peremptory strike.

[1] Gobert, James J. (1998). In Search of the Impartial Jury." Journal of Criminal Law and Criminology: Vol 79, Issue 2 Summer.

[2] Although, he points out, it is generally understood that the framers did not intend to distinguish civil cases in a way that would exclude the requirement of impartiality.

[3] In civil cases.

[4] Of course this is most likely to occur in State courts where attorney-conducted voir dire is not strictly limited. It would be easy to believe that rehabilitation occurs more frequently in Federal courts where attorneys are not allowed to conduct voir dire and its effects are more pronounced.

[5] A sample outline of questions you can use in any case is available upon written request to Charli Morris.

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This article is long overdue and I love the new word. Kudos to Mykol C. Hamilton, Emily Lindon, Madeline Pitt, and Emily K. Robbins. "Prehabilitation" and "Rehabilitation" are two of the worst problems we face in jury selection. It's right up there with "Raise your hand if you're biased and prejudiced."

My "favorite" juror example of the problem of rehabilitation is from a woman in Massachusetts in a very high profile case where Vietnam War anti-war activist Susan Saxe was charged with felony murder by virtue of having participated in a bank robbery where a police officer was killed. The judge agreed to let the attorneys ask a couple questions. The juror, who said she had read all about the case had assured the judge that she "could be fair". With lawyer questioning, she eventually said that "we all know the girl was there, the question is whether she's guilty." Of course, legally, if she was there, she was guilty. If the questioning had stopped when the juror said she could be fair, this juror could have ended up sitting. But this is like so many situations, as the authors point out, where the jurors don't really know what it is that constitutes an opinion or a prejudice and where they assume that their opinions and prejudgments are just "normal" and shared by everyone.

We at NJP have also experienced the situation where we have a good sense of the amount of bias in a jurisdiction because of a venue evaluation survey, but attorney voir dire is limited and the number of jurors admitting to bias is much smaller than we would expect.

Many of the suggestions that the authors make to educate judges about the problems with prehabilitation and rehabilitation are good, but it will be a long while before most judges are willing to change their approach. Sadly, as the authors state, some judges and prosecutors in particular are happy with things the way they are. Many judges believe that jurors can, in fact, put aside their prejudices and prosecutors are more than happy to have jurors who already are predisposed against the defendant. That said, most criminal defense attorneys would be happy to have someone prejudiced "for" their clients, but that's almost never even a possibility (unless you believe jurors who really believe in the presumption of innocence are biased). And the same is obviously true in civil cases. Lawyers want to have jurors who are predisposed to their side. Judges are the ones who should not be promoting this culture of rehabilitation, but they do for a variety of reasons. And in order to get rid of both prehabilitation and rehabilitation, we will have to

change the culture far more than is likely possible in the near future. But of course, that doesn't mean we shouldn't keep trying.

Another issue we should talk to our attorneys about is when they should try to rehabilitate jurors themselves. I often cringe in court when "my" attorney is heavy handedly trying to rehabilitate a juror and arguing to the judge that someone should be kept who is obviously prejudiced against the other side. The jurors see this and I think these battles where a juror is being heavily cross examined encourages other jurors to not want to say anything "wrong". It also turns the process into a game, wastes time and encourages the judge to not use his or her common sense, but wait to see if the attorney is clever enough to get the juror to say the magic words. There are times where it's best to just say, we agree your honor, and move on. Or, at a minimum, ask to do the questioning at the bench so the other jurors don't think the attorney is a hypocrite or even abusive.

I've suggested for years that attorneys file motions in relation to jury selection asking for Supplemental Juror Questionnaires and other good voir dire practice procedures in their cases in order to get the judges used to it and because you never know when a judge will surprise you and grant your motion. If these motions outline some of the problems of prejudice or sensitive issues that the attorneys expect might arise, it may help the judge to begin to think of those issues as problems to deal with during voir dire. It's important to remember that the judges don't know your case as you do and are usually not thinking about any but the most obvious areas of prejudice. Including data can also help the judge to take an issue seriously. For example, it's not hard to find studies showing what percentage of people have either themselves or had family members who have been abused as evidence for the need for an SJQ or at least questioning out of the hearing of the others.

Trial consultants should suggest to the attorneys that when they have a higher profile case or a case with particularly sensitive issues that they incorporate some of the data mentioned in this article and material from case cites – especially the quote from Judge Bennett – into their motions for jury selection procedures. The legal field seems to be one of the last fields to recognize developments in brain and psychological studies. It's up to us to educate our attorneys so they can educate the judges. I am reminded about how it took decades for Supplemental Juror Questionnaires to catch on, although the "science" behind them – that jurors are more likely to reveal personal experiences and attitudes on paper than in open court was pretty clear.

We should also be telling our lawyers and the judges that they shouldn't tell the jurors that they are not asking questions to "pry into their personal affairs". This is another example of conditioning the jurors to be afraid of what is going to happen in voir dire and withhold their true feelings.

We will still be dealing with prehabilitation and rehabilitation in the years to come and the best way to counter it in court is with good questioning.

One of my pet peeves is when attorneys reinforce the idea that the jurors CAN put their prejudices behind them and unwittingly begin to rehabilitate the jurors who have said they have biases and prejudices against the attorney's client. There's a lot of training to be done.

I know that we all know that we need to be careful with the words that we use. While I agree with the tone of many of the authors' suggested questions, their word choice could be better.

I particularly like the question the authors suggest to be used after a juror has talked about having feelings about a case or parties. Asking "how easy or difficult" makes the juror think and doesn't allow them to just say yes or no. Unfortunately, we need to stress this kind of construction because most attorneys are locked into yes/no formulations:

• In your honest opinion, how easy or difficult would it be for you to put aside any preconceived notions about this case?

But it's better to not use "preconceived notions" unless the juror has used that phrase. It has negative connotations as most people don't want to admit that they have preconceived notions.

However, I have a problem with the following question from the authors – one which we hear repeatedly in voir dire:

• If you were to serve on the jury in X's trial could you assume he is innocent until proven guilty beyond a reasonable doubt?

A closed ended question in this instance is more likely to get you a yes answer. What most jurors – and many attorneys apparently – don't realize is that a defendant is entitled to be presumed innocent UNLESS and until proven guilty beyond a reasonable doubt. Instead ask:

"Given your feelings/experiences, HOW HARD will it be for you to presume that Mr. X is innocent UNLESS the prosecutor can prove he is guilty beyond a reasonable doubt".

I hope the authors were being tongue-in-cheek when they suggest that an attorney say:

"While Mr. Zelbenhausermansmith has lectured you to death on the importance of being objective, probably to the point where you fear admitting any negative feelings you might have about the defendant, let me assure you that the goal of the court is to understand your true feelings, not bully you into…"

It does not make sense to trash the opposing lawyer, in fact, you should reframe and include him or her in your statements that everyone here – the judge, the other lawyer and I – all want them to tell us how they really feel.

"We need jurors who are objective, as Mr. Zelbenhausermansmith has said. And part of being objective is to tell us if you have any negative feelings about the defendant or anyone else involved in this case. You're the only one who can tell us what your feelings are and if you can't be objective or impartial, or have any questions about whether you can be objective or impartial, we can talk about that."

The only way I have found to counter the "put aside" your feelings question is to ask, "HOW are you going to put aside your feelings?" It's a good question and some thoughtful jurors will realize that they can't.

The most helpful thing to do to counter rehabilitation is to get the juror to explore the feelings that they have, where those feelings come from, how long they have felt a particular way, is there a time when they didn't feel that way, why did they change their mind, when they think about it what else comes to mind:

What have you read? What have you seen on TV? Heard on the radio? Have you read about it on the internet? About how many articles and TV news reports have you seen?

Have you talked to other people about the case? Have you heard anyone else talking about the case? What have they said? What have you said?

What do you know about the case?

What do you know about the victim/alleged victim?

What do you know about Mr. Defendant?

What have you thought about this case?

Have you ever thought to yourself, "I think this guy is guilty"? Why?

> IF YES, Has there been anything that has made you feel differently about the case? What was that?

> How do you think you'll be able to put those negative thoughts that you've had out of your mind and be objective and impartial?

> IF NO: You've read and seen and heard a lot about the case. It's all been pretty negative towards the defendant, don't you think? Do you think it's all true?

You've seen and read a lot of negative things about the defendant – have you seen anything good about him or heard anything about what his side of the story is?

> HOW do you think that might affect you? HOW are you going to put all those negative images out of your head?

The key to getting the jurors to open up and be impervious to rehabilitation is to get them to explore what they know and how they feel about it. Questions like, "HOW do you think your feelings might affect you if you were a juror?" and "HOW do you think you'll be able to put that out of your mind?" force them to really think about how hard it might be to actually presume the defendant is guilty or not come into a civil case leaning towards one side or the other.

Finally, if the attorney is conducting voir dire in a group, one good technique is to say to a juror who has expressed negative opinions, "It sounds like you're trying to figure out how your feelings might affect your ability to be objective in this case. I'm going to ask some other people questions and you can think about how this has affected you and how you'll be able to put those feelings aside – then I'll come back and talk to you about whether you think you can be objective." Then the attorney talks to other jurors and comes back to the juror and asks, "What have you been thinking about? HOW do you think your negative feelings about the defendant might affect your ability to presume that he's innocent?".

In criminal cases, keeping the focus on being "objective" and on their ability to presume that the defendant is innocent can be most useful in getting jurors to understand the impact of their feelings.

> "What kind of problems do you think that that experience might cause you in presuming that the defendant is innocent?"

In civil cases, it's the same principle:

> "What kind of problems do you think that that experience might cause you in coming into this case not leaning towards the person bringing the lawsuit/the defendant?"

In my experience, we always have more jurors we'd like get rid of than we have cause challenges or peremptories. In criminal cases, evaluating jurors commitment to basic principles can give us the information to decide who are the best of the worst.

> "We all know that a defendant is supposed to be presumed innocent UNLESS the prosecution can prove that he is guilty. HOW important is it to you that someone be presumed innocent? Why do you feel that way?"

> "We also all know that a defendant cannot be found guilty unless the prosecution can prove she is guilty beyond

a reasonable doubt. HOW important is it to you that the defendant be found not guilty UNLESS the prosecution can prove she is guilty beyond a reasonable doubt? Why do you feel that way?"

Good article, lots of food for thought and good suggestions. Thanks to the authors for raising this and coining a new word!

NOVEL DEFENSES IN THE COURTROOM

SHELBY FORSYTHE AND MONICA K. MILLER, J.D., PH.D.

*D**on't miss the response from consultant Richard Gabriel below, or the authors' reply.*

Novel Defenses present challenges to the legal system as they force the legal system to continually adjust to the realities of society (Falk, 1996). Of the many novel defenses that are brought into the courtroom, some of the most popular include Amnesia, Post-Traumatic Stress Disorder (PTSD), Battered Women Syndrome (BWS), Multiple Personality Disorder (MPD), Post-Partum Depression (PPD), and Gay Panic. Because many of the issues are likely more relevant to women than men, (e.g., women more often experience BWS and PPD), women might be more supportive of those conditions being used as defenses. Women are more sympathetic to people with mental health problems in general (Holmshaw & Hillier, 2000), which might also affect support. Men tend to have more negative attitudes toward gays (Wolff et al., 2012), and thus might be more supportive of gay panic defenses. This study can help attorneys decide whether to use such defenses and how to select a jury. First, we offer a brief description of each of the novel defenses.

AMNESIA

The American Psychiatric Association (APA) defines amnesia as an inability to recall important personal information that is normally not forgotten. Generally, amnesia has three types: dissociative amnesia, organic amnesia, or malingered amnesia (Tysee, 2005). Dissociative amnesia arises from a traumatic or extremely emotional event (Cima, Merkelbach, Nijman, Knauer, & Hollnack, 2001; Kopelman, 1995), while organic amnesia is caused by a neurological defect (Cima et al., 2001). Malingered amnesia is "faked forgetting" to avoid responsibility (Cima et al., 2001). This section discusses the use of amnesia in court, past legal rulings, and relevant psychological research.

USE IN COURT

For over a century, defendants have claimed amnesia or "lack of memory" in criminal cases (Tysee, 2005). Amnesia is typically used in cases involving violent criminal acts (Bradford & Smith, 1979).While the exact number of defendants who claim amnesia is uncertain, it is estimated that nearly half of defendants in homicide cases claim some form of amnesia (Kopelman, 1995; Tysee, 2005). Because individuals commonly feign amnesia, finding genuine situations of amnesia are likely quite rare (Cima et al., 2001), causing courts to approach amnesia cases with caution (Tysee, 2005).

LEGAL RULINGS

Wilson v. United States (1968) might be the most well-known decision on the connection between amnesia and competency to stand trial (Tysee, 2005). After fleeing from a bank robbery, the defendant was involved in a violent crash. He awoke from a lengthy coma and claimed to have no knowledge of the crime. Ensuring the right to a fair trial, the court deferred the case with directions to contemplate the issue again (Tysee, 2005). The court's decision has been praised in academic literature for its well-considered approach (Tysee, 2005). In most cases, courts have been unsympathetic to amnesic defendants. In fact, no court in America has ever found amnesia alone as a bar to competency (Tysee, 2005).

PSYCHOLOGICAL RESEARCH

Although crime-related amnesia can be genuine, it can be a way for criminals to gain sympathy or to advocate a diminished capacity defense (Van Oorsouw & Merckelbach, 2010). Malingered amnesia is hard to detect. Fortunately, tools can help detect deception (Van Oorsouw & Merckelbach, 2010). Some methods include: administering placebos to test an individual's expectancy about memory; measures of psychopathy; using tests, scales, and tasks to test the genuineness of the memory claims; and being sensitive to base-rate information concerning medical disorders related to memory loss (Jalicic & Merckelbach, 2007; Pressman et al., 2007; Salekin et al., 2007; Van Oorsouw & Cima, 2007).

POST-TRAUMATIC STRESS DISORDER

Post-Traumatic Stress Disorder (PTSD), brought on by exposure to life-threatening events, was essentially unrecognized before the Vietnam War (Hafermeister & Stockey, 2010). Unlike previous wars, soldiers endured elongated exposure to trauma, forcing them into a survival mode which caused them to anticipate threats (Hafemeister & Stockey, 2010). While this disorder mainly affects soldiers, others experience it as well, including victims of violent crime. Individuals with PTSD commonly report feeling "on guard", which can lead to over reacting to situations (Hunter & Else, 2013). Symptoms of PTSD include re-experiencing painful memories, effortful avoidance of trauma cues, emotional numbing, and hyper arousal (Bottalico & Bruni, 2012). While criminal behavior is not a direct symptom of PTSD, it can lead to antisocial behavior. This section discusses the use of PTSD in the courtroom, past legal rulings, and what research has discovered about the disorder.

USE IN COURT

While a positive diagnosis of PTSD is essential, it is not always sufficient for the defendant to receive a favorable verdict. A logical connection must be made between the criminal act and the diagnosis of PTSD (Hunter & Else, 2013). The Diagnostic and Statistical Manual of Mental Disorders fifth editions (DSM- V) recognition of PTSD, which includes the cognitive and affective changes related to the disorder, has increased the use of the defense in court (Hunter & Else, 2013). The DSM-IV indicates that PTSD effects mood, cognition, awareness, affect, and physiological responses.

LEGAL RULINGS

In a criminal trial, PTSD is typically used as part of the insanity defense, a diminished capacity defense, or a mitigating factor after being found guilty (Gansel, 2014). These defenses, if recognized, are treated differently among jurisdictions (Slobogin, Rai, & Reisner, 2009). However, the defense is often successful.

Insanity Defense. Using PTSD as part of an insanity defense was successful in *State v. Heads* (1977). The defendant, Charles Heads, shot and killed his brother-in-law while searching for his wife and children who had left him four days prior. In Heads' first trial, the insanity defense failed due to a lack of a medically recognized disorder. However, in a second trial, the defendant was found not guilty by reason of insanity after an expert testified about PTSD.

Diminished Capacity Defense. In jurisdictions that allow the diminished capacity defense, PTSD might be admissible to negate a defendant's *mens rea* for a crime (Slobogin, Rai, & Reisner, 2009). In the 1997 case *State v. Warden* (1997), a defendant charged with first-degree murder presented the diminished capacity defense, as she had PTSD from enduring abuse from her son. On appeal, the Washington Supreme Court reversed the original conviction and sentenced the lesser charge of manslaughter.

PTSD as a Mitigating Factor. In *Porter v. McCollum* (2009), the U.S. Supreme Court ruled that PTSD should be accepted as mitigating evidence. In *People v. Wood* (1982), the defendant successfully argued that he was not guilty by reason of insanity due to PTSD. Sounds in the factory where the defendant worked resembled artillery noises he heard while at war in Vietnam; this triggered a dissociative flashback causing him to kill his foreman.

PSYCHOLOGICAL RESEARCH

The National Center for PTSD estimates that 11% to 20% of Iraq and Afghanistan War veterans have PTSD. Research has shown prosecutors generally show sympathy towards veterans. For example, a University of Alabama study found that overall, prosecutors in four states viewed veterans as less blameworthy for low-level offenses than non-veterans (Wilson, Brodsky, Neal, & Cramer, 2011). Prosecutors also offered veterans more treatment-focused programs, as opposed to incapacitation, than non-veterans (Wilson et al., 2011). Therefore, this defense might work to get a veteran defendant with PTSD a lighter sentence.

BATTERED WOMAN SYNDROME

Battered Woman Syndrome (BWS) results from repeated exposure to forceful physical or psychological abuse from a partner (Walker, 1979), resulting in physical and mental harm (Biggers, 2003). After enduring years of abuse, victims might feel fearful for their lives, leading them to kill their partner. Such situations are the foundations of BWS as a defense. This section discusses the use of BWS in court, past legal rulings and psychological research.

BWS was first introduced as a legal defense in *Ibn-Tamas v. U.S.* (1979) (Meyer, 2012). BWS might be used as a self-defense claim, provocation claim, insanity claim, or diminished responsibility; the self-defense claim is among the most popular. For BWS to be successful as self-defense, four elements must be met. First, the defendant must believe that she was in immediate danger of death at the time of the act. Second, the defendant responding to the threat must have used a reasonable amount of force. Third, the defendant cannot have been the aggressor. Fourth, harming the perpetrator must have been the only opportunity to reach safety (Biggers, 2003).

LEGAL RULINGS

In *Ibn-Tamas v. United States* (1979), the defendant challenged her second-degree murder conviction for killing her husband. The court was unable to determine if the evidence was sufficient enough to be considered as expert testimony. In the second trial, the jury returned a verdict of second-degree murder while armed.

In *R v. Charlton* (2003), BWS was successfully used as mitigation. The defendant who killed her abusive husband had her five-year prison term reduced to three and a half years.

PSYCHOLOGICAL RESEARCH

The most common evidence used for BWS involves the principles of "cycle of violence" and "learned helplessness" (Walker, 1979). The cycle of violence consists of three stages: the tension building stage, acute battering stage, and loving contrition stage (McMahon, 1999). The first stage involves a building of tension resulting in little episodes of violence that are quickly terminated (McMahon, 1999). During this stage, women often rationalize that they might have brought the abuse on themselves (Biggers, 2003). The second stage is when acute physical violence occurs, generally followed by psychological abuse (Walker, 1984). In the final stage, the abuser displays kindness and remorse and usually promises that violence will not happen again (Walker, 1984).

Another psychological theory presented in conjunction with BWS is learned helplessness (McMahon, 1999*)*. Learned helplessnessoccurs when a woman realizes that she is unable to prevent being battered (Walker, 1979). Learned helplessness is associated with the cycle of violence in that repeated escalations of violence leave a woman feeling helpless (Walker, 1979). These two principles help explain the psychological distress individuals can experience which might lead them to respond violently.

MULTIPLE PERSONALITY DISORDER

Multiple personality disorder (MPD) is a dissociative disorder recognized in the DSM-IV. This disorder commonly causes individuals to experience a disruption in consciousness, memory, identity, or perception of the environment (4th ed., text rev.; DSM-IV-TR). Sufferers of the disorder might show the following symptoms: the presence of two or more identities, alter personalities that recurrently take control of the person's behavior, inability to recall information, and disturbances (i.e. complex seizures) (4th ed., text rev.; DSM-IV-TR). This section will discuss the use of MPD in court, along with past legal rulings and psychological research.

USE IN COURT

Since MPD's introduction into the courtroom, individuals within the legal system have remained historically perplexed about the validity of the diagnosis (Smythe, 2005). Defendants with MPD have used both the insanity defense and the involuntariness defense to explain their behavior (Behnke, 1997). A challenge for courts has been figuring out how to apply criminal culpability (Behnke, 1997). Three culpability tests are used in the courtroom: the host test, the

alter test, and the unified test. The host test focuses on the personality which has psychological control over the person the majority of the time (Smythe, 2005). The alter test, which is the most commonly used, focuses on the *mens rea* of the criminal personality at the time of the offense (Smythe, 2005). The unified test, which is less common and does not consider the defendants mental illness, posits that one human body contains one person (not multiple personalities) (Barlow & Durand, 2002).

LEGAL RULINGS

Host Test. In *U.S. v Denny-Shaffer* (1998), the defendant was convicted of kidnapping an infant and taking him across state lines. Initially denied the insanity defense, the appeals court ruled that the host (or dominant) personality was unable to appreciate the wrongfulness of the criminal act. The appeals court further recognized that the term "defendant" could also mean the "host or dominant personality" and his/her appreciation of the crime.

Alter Test. *State v. Grimsley* (1982) involved a defendant convicted of driving under the influence of alcohol. A challenge for the court was figuring out whether the actions displayed by the defendant were voluntary when the defendant was in the state of her alter personality. The defendant claimed that she could not be held responsible due to her being dissociated from her host personality at the time of the crime. Using the alter approach, the court upheld her conviction due to insufficient evidence showing her host personality was unconscious or acting involuntarily.

Unified Test. In *State v. Woodward* (1991),the defendant, charged with four counts of first-degree burglary, four counts of first-degree rape, and eight counts of first-degree sexual offense, switched identities while in court. After being convicted, the defendant argued for a new trial due to the judge refusing the alter's testimony. The court refused reasoning that evidence showed the two personalities were not separate, but one.

PSYCHOLOGICAL RESEARCH

One concern with MPD is malingering. However, research has indicated that individuals are unable to replicate this disorder successfully (Kluft, 1987). A study comparing MPD defendants and malingerers found that malingerers were unable to maintain consistency in an assumed personality's characteristics, voice, and memory. Malingerers tended to display their symptoms overdramatically while true MPD defendants tended to hide their symptoms out of embarrassment (Kluft, 1987). Because malingering is a concern, jurors may be skeptical of defendants claiming MPD.

POSTPARTUM DEPRESSION

Postpartum Depression (PPD) affects up to 30% of new mothers (Chrisler & Johnston-Robledo, 2002). PPD is characterized by sadness, self-blame, loss of control, anxiety, tension, irritability and sleep difficulties (4th ed., text rev.; DSM-IV-TR; American Psychiatric Association, 2000; Tovino, 2007) that can develop as soon as two weeks after delivery and last up to one year (Misiri, 2005). This section discusses the use of PPD in the courtroom, legal rulings, and what research has discovered about the disorder.

USE IN COURT

When presenting PPD in the courtroom, the defendant claims she was mentally disturbed because of her illness. Causation between the disturbance and the criminal act is necessary. However, the problem with requiring a disturbance threshold for mothers who kill their children is determining the appropriate level of disturbance that must be associated to the disease (Kim, 2013).

A memorable PPD case is that of Andrea Yates, the defendant with severe PPD who drowned her 5 children. Using the insanity defense, Yates was convicted of Capital Murder. Yates appealed her conviction and successfully had her verdict overturned in favor of a verdict of not guilty by reason of insanity. Yates had been seeing a therapist for her PPD and had been prescribed medicine prior to her criminal act.

PSYCHOLOGICAL RESEARCH

Perhaps the most popular theory regarding PPD is the hormone-based research claiming that sharp drops of estrogen and progesterone following childbirth causes postpartum illness (Dix, 1985). One study discovered that 62.5% of women with a history of PPD developed significant mood symptoms following childbirth (Bloch et al., 2000). Therefore, an attorney might have success convincing a jury with this research.

GAY PANIC DEFENSE

When a male defendant is charged with killing a gay man, a defense that might be used is gay panic. Defendants using this defense claim that an unwanted sexual advance was made, causing the defendant to panic, lose control, and respond with violence (Dressler, 1995). Because there is no freestanding gay panic defense, this strategy is often used in tandem with a provocation defense, diminished capacity defense, and sometimes insanity defenses (Lee, 2013). This section will discuss the use of the gay panic defense in the courtroom, past legal rulings, and what research has discovered about the condition.

USE IN COURT

Provocation, the most common defense used with gay panic, argues that an unwanted sexual advance from another male provoked the defendant into a heat of passion causing uncontrollable homicidal rage (Lee, 2003). Many males feel they need to conform to gender roles, making them less tolerant towards gay men (Herek, 1986; Wolff et al., 2012). Learning that his partner is actually a man or experiencing an unwelcome advance from a man might thus provoke a man to violence.

A defendant using the diminished capacity defense argues that his criminal behavior was due to a mental disease or defect (Dressler, 2009).With this defense, a murder charge can be reduced to a lesser charge of voluntary manslaughter or second-degree murder (Lee, 2013).

LEGAL RULINGS

Provocation. In *Schick v. State* (1991), the defendant successfully argued he was provoked into a heat of passion from an unwanted sexual advance from another man. The defendant's charge of murder was reduced to voluntary manslaughter.

Diminished Capacity. This defense was successfully used in the 1995 case involving defendant Jonathan Schmitz. Schmitz was a guest on a TV show in which his male friend admitted having a crush on him. Following the television taping, Schmitz killed his friend claiming his actions were justified due to the humiliation he suffered. The first-degree murder charge was reduced to second-degree murder.

PSYCHOLOGICAL RESEARCH

Although some individuals feel the defense promotes homophobia as a reasonable social attitude, banning the defense might not make a difference in individuals' homophobic feelings (Perkiss, 2013). Even if banned, the defense counsel

can still discretely add gay panic claims to their arguments to gain sympathy for the defendant. Also, limiting the defense will not prevent jurors' anti-homosexual bias (Lee, 2008). Research also indicates that juries are in a better position to evaluate the evidence presented by the defense than judges are because jury deliberation involves group debate and discussion (Lee, 2008).

FIGURE 1

Type of Novel Defense	Use in Court	Legal Rulings	Psychological Research
Amnesia	Estimated that nearly half of defendants in homicide cases claim some form of amnesia.	In most cases, courts have been unsympathetic to amnesic defendants.	Malingered Amnesia is hard to detect. Fortunately, tools can help detect deception.
Post-Traumatic Stress Disorder	Recognition in the DSM-V has increased the use of the defense in court.	The defense is often successful.	It is estimated that 11-20% of Iraq and Afghanistan War veterans have PTSD.
Battered Women Syndrome	BWS is most often used as a self-defense claim.	Has successfully been used as mitigation.	The most common evidence used for BWS involves the principles of "cycle of violence" and "learned helplessness".
Multiple Personality Disorder	Individuals within the legal system have remained historically perplexed about the validity of the diagnosis.	The defense is often unsuccessful.	One concern with MPD is malingering. However, research has indicated that individuals are unable to replicate this disorder successfully
Post-Partum Depression	When presenting PPD in the courtroom, the defendant claims she was mentally disturbed because of her illness. Causation between the disturbance and the criminal act is necessary.	Has been successful in claiming not guilty by reason of insanity.	A popular theory regarding PPD is the hormone-based research claiming that sharp drops of estrogen and progesterone following childbirth causes postpartum illness.
Gay Panic	Provocation is the most common defense used with gay panic.	Has been successful in provocation and diminished capacity claims.	Limiting the defense will not prevent jurors' anti-homosexual bias.

OVERVIEW AND METHOD OF STUDY

To assess the public opinion of these novel defenses, a survey of University students was conducted. Participants were surveyed on the 6 novel defenses: Amnesia, Post-Traumatic Stress Disorder, Battered Women Syndrome, Multiple Personality Disorder, Post-Partum Depression, and Gay Panic Defense.

PARTICIPANTS

Five-hundred-eighty-two participants from one University were surveyed regarding their support of 6 novel defenses. Participants ranged in age from 17 to 51 years ($M = 20.85$, $SD = 4.57$) and 63.2% were female.

MEASURES

For each of the novel defenses, participants were given a 2-5 sentence description of the condition (Amnesia, PTSD,

etc.). Then, participants were asked 1) "do you agree that a defendant should be able to use this argument at trial in an attempt to get a not guilty verdict or a lesser sentence" and 2) "do you believe that this condition actually exists?" They responded on a scale from 1 (strongly disagree) to 5 (strongly agree).

FIGURE 2

Type of Novel Defense	Description of defense as seen by respondent
Amnesia	Amnesia is a condition in which the defendant has complete or partial memory loss of the crime. For instance, a person may claim that they "blacked out" and do not remember committing the crime. Thus, the defendant claims that he should be found not guilty or receive a lesser sentence because of his amnesia.
Post-Traumatic Stress Disorder	Post-traumatic stress disorder is the development of various severe symptoms after being exposed to a traumatic event. For instance, a war veteran may experience trauma during war. After he returns from war, he has symptoms such as flashbacks, nightmares, diminished responsiveness to the world, and over alertness. Hearing a noise such as firecrackers or a car backfiring may cause him to have a flashback and believe that someone is shooting at him. This may cause him to shoot a gun and injure someone. Thus, the defendant claims that he should be found not guilty or receive a lesser sentence because of his posttraumatic stress disorder.
Battered Women Syndrome	Battered women's syndrome is a group of symptoms that a woman may experience as a result of the trauma of being repeatedly abused by her spouse over time. She may injure or kill her spouse, sometimes even when he is not immediately abusing her (e.g., while he is sleeping). The defendant claims that she should be found not guilty or receive a lesser sentence because she was experiencing battered women's syndrome.
Multiple Personality Disorder	Multiple personality disorder is a mental illness in which a person has more than one distinct personalities that take turns controlling his behavior. Thus, a defendant may claim that his 'other personality' committed the crime, and thus he should be found not guilty or receive a lesser sentence because of his multiple personality disorder.
Post-Partum Depression	Postpartum depression is a condition that a woman may suffer after she has a child. After giving birth, a woman may experience severe depression which may lead her to injure her child, herself, or commit other crimes. The defendant claims that she should be found not guilty or receive a lesser sentence because of her postpartum depression.
Gay Panic	Gay panic is a reaction a person might have when s/he finds out that her/his significant other or date is actually the other gender than s/he had claimed to be. For instance, the defendant was on a date with a woman; however he finds out that the woman was really a man. The defendant was suddenly overtaken by emotion and kills his date. The defendant claims that he should be found not guilty or receive a lesser sentence because he was experiencing gay panic.

RESULTS

Overall, means indicated that participants generally believe that all these conditions exist. None of the conditions had means in the "disagree" range. PTSD was the most credible, with a mean of 4.37, indicating that most participants strongly agreed that it exists. Participants also strongly believed that BWS (*M*=3.81) PPD (*M*=3.76), MPD (*M*=3.85) and amnesia (*M*=3.85) exist. Gay panic was not as believable (*M*=2.5), but still was in the neutral range. Thus, participants tend to believe that all of these conditions exist.

Participants most strongly agreed that defendants should be able to use PTSD (*M*=3.24) and BWS (*M*=3.24) at trial. They were approximately neutral in their agreement that PPD (*M*=2.45), MPD (*M*=2.83), and amnesia (*M*=2.43) should be used at trail. In contrast, participants more strongly disagreed that gay panic should be used at trial (*M*=1.85).

T-tests were conducted to determine if the means between males and females differed. Women were more likely than men to believe that PTSD, MPD, BWS, and PPD existed, and to agree that the defendant should be able to use BWS at

trial. In contrast, women are less likely to believe the defendant should be able to use gay panic defense and to believe gay panic exists.

DISCUSSION AND RECOMMENDATIONS

Of the six defenses presented to participants, both males and females were most supportive of PTSD being used in court. Not only are potential jurors supportive of the defense, but prosecutors are generally sympathetic as well (Wilson et al., 2011). PTSD can be successful in both mitigating charges and diminishing capacity. Following PTSD, BWS had strong support for its use in court, with females indicating higher support than males.

Females also showed higher support for the use of PPD in court. BWS and PPD might be most successful with women jurors because they are conditions that affect women more than men, making these two defenses more relatable to women. The gay panic defense showed the least support for its use in court, with males indicating higher support of its use in court than females. The gay panic defense might be more supported by male jurors because they might understand what it is like to attempt to always maintain the male stereotype of being perceived as masculine and dominant.

While both male and female participants believed in the existence of amnesia, they were not supportive of its use in court. Jurors are generally unsympathetic to the amnesia defense (Tysee, 2005), which coincides with current findings that participants did not think amnesia should be used at trial. This suggests that attorneys should avoid using amnesia as a defense in court.

As a whole, participants believe most of the conditions exist, although participants are somewhat less supportive of them being used at trial. Based on the findings from this survey of almost 600 respondents, defense attorneys can be most secure in using PTSD as a defense and least secure in using gay panic. The current research cannot address the strength of the case—it can only address participants' reactions to the defenses in general. If defense attorneys do use one of the conditions, they should be cautious of male jurors—with the exception of the gay panic defense in which case they should be cautious of female jurors.

FIGURE 3

Type of Novel Defense	Perceived Credibility as a Defense	Recommendations for Use
Amnesia	On average, respondents were less supportive of this defense than other defenses.	Not recommended for use.
Post-Traumatic Stress Disorder	On average, respondents strongly supported the use of this defense in court.	Defense attorneys can feel secure in using this defense.
Battered Women Syndrome	On average, respondents strongly supported the use of this defense in court.	Defense attorneys should be cautious of male jurors.
Multiple Personality Disorder	On average, respondents were moderately supportive of this defense.	Not recommended for use.
Post-Partum Depression	On average, respondents were moderately supportive of this defense.	Not recommended for use. Defense attorneys should be cautious of male jurors.
Gay Panic	On average, respondents were not supportive of this defense.	Not recommended for use. Defense attorneys should be cautious of female jurors.

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RESPONSE TO NOVEL DEFENSES IN THE COURTROOM

The first line of this paper is a telling and ironic editorial comment on the nature of this study, "Novel Defenses present challenges to the legal system to continually adjust to the realities of society." In fact, it was so subtle and I have become so blinded by my years of work in the legal field that I almost missed the irony. That the legal system has to be forced to adjust to reality is a sad but understandable truth that many of us deal with on a daily basis.

The legal system has always struggled with the complexities and nuances and psychology, preferring to create artificial meanings for "insanity", "depression", "sociopathy", and even "intent" in order to look for direct causal links to define competence and volition. In fact, the legal system's insistence on labeling and categorizing what cannot be categorized is what leads jurors to be so skeptical of psychologically "novel" defenses.

This skepticism is reinforced by the linguistically self-defeating term "Novel Defenses." I should hope that all defenses are novel to the circumstances of the case. The term "novel" also carries with it both the connotations of "new" and "fictionalized". Both tend to reinforce the concept that defendants and defense attorneys are artificially constructing a defense.

This points out a deeper problem of trying to categorize mental issues and defenses. In fact, in the conclusion of this study, the authors write, "As a whole, participants believe most of the conditions exist, although are somewhat less supportive of them being used at trial." In my experience, I have found that jurors understand that mental conditions can affect behavior. But jurors view these mental issues as both individual and situational. They are deeply skeptical of a mental condition being used as an excuse to "get away with" an intentional crime, hence the reluctance of participants in this study to support a categorical defense, which allows a defendant to pluck "Amnesia" or "Gay Panic" off the store shelf in the *Defenses* aisle.

This skepticism is reinforced by experts attempting to testify about labeled defenses and categorized terms for mental defect and diminished capacity. Jurors have a hard time believing that a test score meeting the DSM definition really tells them whether a defendant was suffering from schizophrenia or PTSD at the time of the alleged crime. Rather, they will judge the mental condition of a defendant based on their actions, other witness' testimony about their actions, character and forensic evidence, their non-verbal behavior in court, and the jurors' own set of norms and appreciation of psychological complexity. They will then construct their own narrative of the mental condition of the defendant and their reaction to the circumstances at the time of the alleged crime. The contrast in the study participants' lack of support for what they consider to be valid mental conditions in trial may also reflect their reluctance to support a policy of applying these defenses to a wide range of cases without knowing about the individual circumstances of the alleged crimes.

This is why it is critical for both defense attorneys and prosecutors to develop extensive lines of questions in both written questionnaires and voir dire on juror attitudes toward psychological defenses. This obviously becomes critical in a death penalty case on the issue of aggravating vs. mitigating factors.

Russell Webster and Donald Saucier published a study called *Angels and Demons Are Among Us: Assessing Individual Differences in Belief in Pure Evil and Belief in Pure Good*. In their research, those who had a belief in pure evil also voiced

stronger support for the death penalty, preemptive military strikes, and support for torture as an interrogation tool. Those people also showed greater racial prejudice, opposed social and pro-racial programs such as Affirmative Action, and did not believe in criminal rehabilitation. Those with a strong belief in pure evil, not surprisingly, believe in a dangerous, hostile, and despicable world. Obviously, these types of jurors will be less receptive to psychological or "novel" defenses.

This study also highlights the fact that veterans are more likely to get lenient plea bargains and sentencing requests for claiming PTSD, illustrating our system's deference toward military service and the greater acceptance of the psychological scars combat trauma, while often minimizing the impact of more domestic forms of trauma such as physical or emotional abuse.

Although this study is a good summary of both the law and research surrounding these specific defenses, readers should understand that university studies typically poll a particular population that is not representative of a jury pool – college students. Additionally, these attitudes are gleaned by asking respondents about whether they felt defendants should be able to use these defenses and whether the described mental conditions actually existed. These answers to the shortened and abstract defenses may change if the respondents were given specific case facts and a specific defendant. It is best to think of this study as a starting point to explore jurors' real attitudes in trial.

More importantly, instead of labeling mental illness to make it fit into a pseudo-scientific or legal category, we should endeavor to develop better clinical understanding for how mental issues affect a specific defendant accused of a specific crime.

REPLY FROM THE AUTHORS TO RICHARD GABRIEL:

Thank you for your response to our article "Novel Defenses in the Courtroom". You are correct in your statement that university studies often poll a population that is not always representative of a jury pool. There have been research studies that both support this statement and refute it. In a study examining the degree to which college student mock jurors' decision-making resembled that of actual jurors, differences were discovered (Hosch, Culhane Tubb, & Granillo, 2011). This included differences in demographics, age, education completed, religious preferences, marital status, voting status, and whether the juror had been a crime victim. Even though differences were noted, the authors did note that student jurors did not differ significantly when remembering evidence, evaluating it, and making decisions as to a defendant's guilt. This study indicates that student mock jurors are generalizable to that of real jury members (community members). A review of relevant research concluded that student mock jurors were in general equivalent to community samples (Bornstein, 1999).

A 2011 issue of Behavioral Sciences and the Law revisited this issue, and generally concluded that the sample matters—but only in some circumstances. The key of course is to determine whether the topic is one in which sample matters (e.g., community samples tend to be older and have had different experiences, which might affect decision-making; see also Chomos & Miller, 2015). Some researchers (e.g., Wiener, Krauss, & Lieberman, 2011) recommend that researchers do preliminary studies using samples of college students (who tend to be cost-effective and easy to access) and then try to replicate their findings with a community sample. Because of the ambiguity in using student samples, future studies should use our study as a springboard to study a more generalizable sample of community members to determine whether these results hold.

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ON THE APPLICATION OF GAME THEORY IN JURY SELECTION

*D*on't miss the consultant responses below: Roy Futterman; Edward P. Schwartz.

When we think of jury selection, we think of jury questionnaires, mock trials, demographic surveys, voir dire, psychological profiling, social media scanning and the like. Significant amounts of time and expense are invested in such activities, especially in high-value and high-profile trials, with the intent of determining the favorability of prospective jurors to a particular theory of prosecution or defense. However, we must keep in mind that rating or ranking of prospective jurors in not an end unto itself, but is undertaken in large part as preparation for the exercise of peremptory challenges. It is the exercise of peremptory challenges that is the topic of this article and we will come to some conclusions regarding challenge strategies that may surprise you.

I became interested in jury selection as a graduate student at Stanford University. While not directly related to my thesis (I was working on a degree in High Energy Astrophysics), the probabilistic and competitive nature of jury selection was within the scope of my interests. In particular, I realized that game theory – the mathematics of competition between multiple players over a common outcome – has a direct application to jury selection. In the case of jury selection, it is common to be in a situation where you must make a decision to exercise a challenge in the absence of complete information, for example, when not all jurors have been examined, when juror ratings are uncertain, when you are unsure of your opponent's preferences, or when replacement jurors are selected at random from the jury pool.

This added degree of uncertainty is probabilistic in nature. I worked out the Game Theory solutions to many common jury selection scenarios including various forms of 'Strike and Replace' and 'Struck' systems, and we have now implemented these solutions in computer software.

It is useful to think of jury selection as a two-step process: Step 1) rate jurors and the jury pool, and Step 2) determine a strategy for the exercise of peremptory challenges. Step 1 has received the bulk of attention among litigators and trial consultants. Indeed, many readers of this article will spend much of their careers applying best scientific practices to obtain meaningful and accurate juror (and jury pool) ratings. Step 1 is the 'bread and butter' of jury selection.

Step 2, when considered at all, is too often relegated to the level of 'rule of thumb', hunch, intuition, or guesswork. While there are many possible challenge strategies ranging from never challenging to flipping a coin, the most common strategy that I have encountered among litigators is what I call 'Pool Average': challenge those jurors whose ratings fall below the average of the jury pool and accept those whose ratings are above the average of the jury pool. While intuitively compelling, 'Pool Average' is not the best strategy, not even by a long shot! Why? It does not take into consideration the possible actions of the opposing party and it does not account for the loss of a challenge that could prove valuable later in the selection process.

Let's look at a concrete example. Suppose that you have one jury seat to fill, you and your opponent each have a single remaining challenge, and the pool is a uniform distribution with an average of 5 on a scale from 0 to 10. You are presented with a juror whom you have rated as a 4. Should you challenge this juror? A 'Pool Average' player would reason that 4 (the juror's rating) is less than 5 (the pool average) so it makes sense to exercise a challenge. Unfortunately, this would be the wrong choice because your opponent still has a challenge available to use should you draw a favorable member from the pool. In a sense, once you have made your challenge, your opponent has two chances – the first replacement and the second, if they do not like the first. It turns out that your best strategy in this situation would be challenge only if the juror has a rating of 3.75 or less.

Decision problems, such as those encountered in jury selection, are solved by generating a 'game tree' representing every possible decision path. Each node of the game tree represents a decision point for a particular party on a particular juror. For example, the first node might represent the choice by the plaintiff to challenge or to accept Juror 1. Each such choice generates a branch to be followed in the case that that choice is made. The leaves of the game tree represent possible final outcomes. A simple game tree for the scenario described in the previous paragraph is shown in Figure 1. This game tree has four decision points leading to three possible outcomes: One representing Juror 1, two representing the first replacement juror, and two representing the second replacement juror.
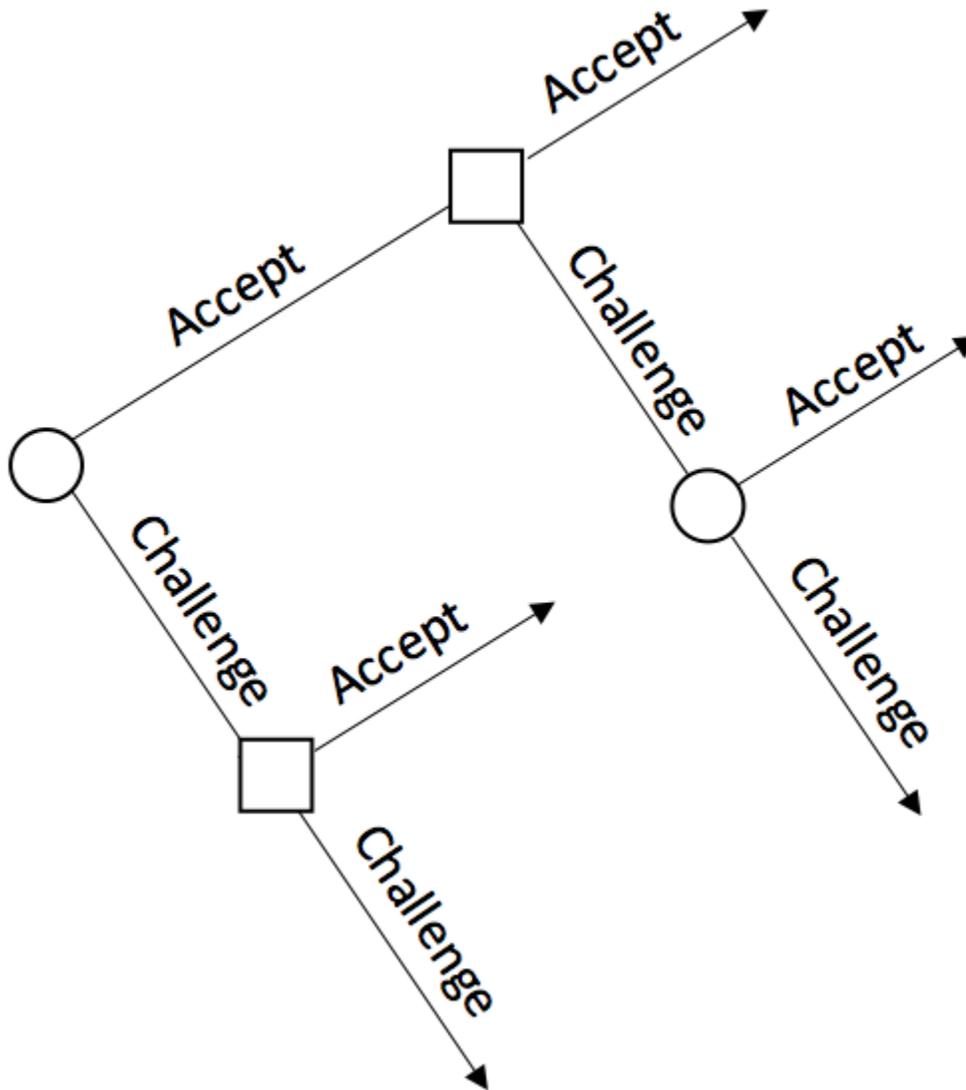
Figure 1. A simple game tree representing the situation where one juror is to be chosen and each side has one available peremptory challenge. Circles represent plaintiff decision points and squares represent defendant decision points. The arrows represent final outcomes. Game trees for larger juries and greater numbers of available challenges are geometrically more complex and require computer software to evaluate.

Game trees become geometrically complex as the number of choices increases. A real-world sequential jury selection game tree with 12 jury seats and each litigant having four peremptory challenges contains over 30 million potential decision points – quite a surprising result. There is no escaping the fact that computer software is required to apply game theory to the exercise of peremptory challenges. Without software, Pool Average or some modification thereof is probably the best that can be done, given the limitations of time and other resources in the courtroom. Using software to identify the best strikes can help you make the best decisions possible at a time when your cognitive resources may be at a low point.

How much difference do game theory strategies make in the final jury selection outcome? Is it really worth optimizing Step 2 or are simple rules of thumb good enough? These are good questions and we set out to answer them.

Following standard procedures for testing game theory strategies, my colleagues and I set up computer programs to represent the actions of the plaintiff and the defendant in various jury selection scenarios. The computer programs played against each other with the defendant always using 'Game Theory' and the plaintiff variously using 'Game Theory', 'Pool Average', 'Coin Toss', and 'Always Accept'. The results of our simulations are summarized in Figure 2.

Coin Toss – randomly deciding whom to challenge – and Always Accept are tantamount to not rating jurors at all, since no rating information is ever used when making challenges. As expected, our simulations show that such strategies fare poorly against an opponent using Game Theory.

Playing Pool Average gives better results since it makes some use of the juror and jury pool ratings. However, it still only performs about half as well as Game Theory in real-world selection scenarios. Put another way, using Pool Average against Game Theory returns about 50 cents for each dollar invested by the client in obtaining meaningful juror ratings. Moving from Pool Average to Game Theory almost doubles the expected jury value in real-world jury selection scenarios.

Our results show that rating jurors (Step 1) and optimizing peremptory challenge strategies (Step 2) are of equal importance to the outcome of the empanelled jury in real-world scenarios. This is so despite the fact that presently, litigants and their consultants can expend the bulk of their efforts on juror ratings and little or none on optimizing challenges.
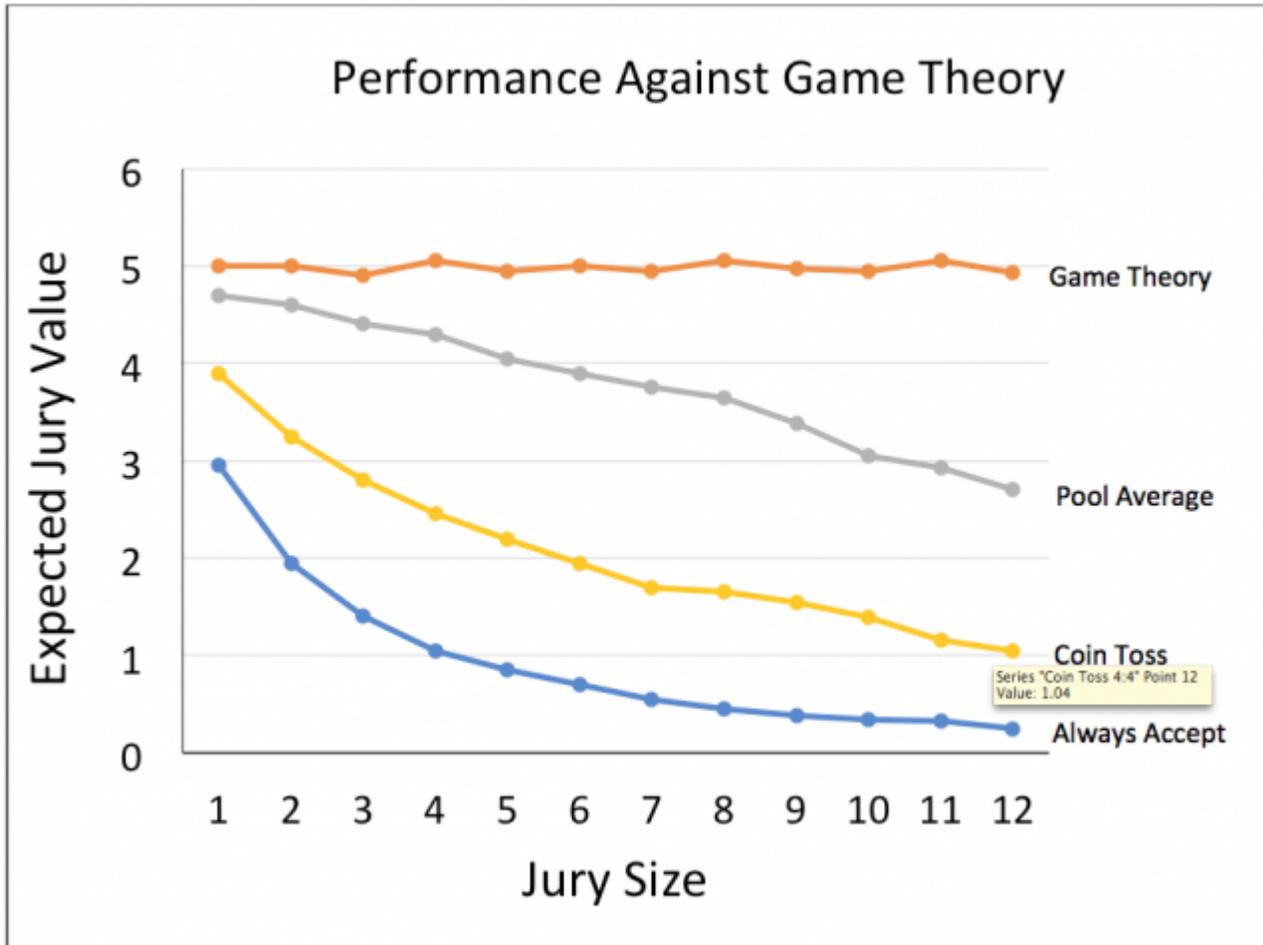
Figure 2. Simulation results for jury selection where defendant uses Game Theory and plaintiff uses either Game Theory, Pool Average, Coin Toss or Always Accept. Jury value is rated on a scale from 0 to 10 with individual jurors selected at random from a uniform pool. The total jury rating is the product of individual juror ratings. Each side has four available peremptory challenges. As expected, Game Theory played against Game Theory gives jury values of 5 indicating that neither side has an advantage. In real-world situations with a jury of 12 seats, Pool Average does only about half as well as Game Theory in obtaining a favorable jury.

Rating jurors is a skill borne of years of study, observation, experience and practice. High value cases call for competent litigators and trial consultants to assist in profiling and rating jurors. However, obtaining accurate and meaningful juror ratings is only half of the story. We have shown that once ratings have been determined, the optimal use of a limited number of peremptory challenges is mathematically calculable using game theory. In many real-world cases, the strategic use of peremptory challenges can make significant differences in the outcome of the selection process and can thereby significantly increase the return on the investment made in rating jurors.

Indeed, the outcome of the trial as a whole could depend on the difference between a single juror and their replacement had they been challenged. We would serve our clients well by considering game theory-based strategies for exercising peremptory challenges. While the details of such strategies vary depending on the particulars of the selection system used in any given jurisdiction, adopting a sound, mathematically rigorous challenge strategy is arguably as important as obtaining accurate juror ratings. Rating jurors may be an art, but exercising challenges is now a science.

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COMMENT ON DAVID CADITZ'S "*ON THE APPLICATION OF GAME THEORY IN JURY SELECTION*"

In his article "*On The Application of Game Theory in Jury Selection*," David Caditz brings the lens of game theory to jury selection. This merger is long overdue (see, for instance, Futterman, R. (2011). Playing the Other Side's Hand: Strategic Voir Dire Technique. *The Jury Expert*), and Caditz' work is as thought-provoking as was expected. From its beginnings, game theory has focused on calculating the optimal strategies for dealing within scenarios in which there is incomplete information available to the game players (such as poker in which the other players' cards are hidden) and those in which there is complete information available to all opponents (such as chess where all pieces are in full view throughout). Jury selection, in which the attorneys make strikes based on incomplete information about the lives of the jurors, appears to be a fruitful area for game theorists to explore.

Although this is a laudable first step in that endeavor, Caditz has provided a model for jury selection that is not yet fully developed. The issue is that Caditz compares the ability of his game theory computer simulation against what he considers to be the norm of jury selectors– which is someone who does not take into account the other side's counter-moves and available strikes, but rather, just considers whether the current potential juror is better or worse than the average potential juror in the venire, the so-called "pool average". This unfortunately creates a straw man/woman of a strikingly blithe and inept practitioner. His other comparisons are to even more inept decision-makers, the "coin toss" and the "always accept" decision-makers.

Caditz argues that, for the most part, jury selectors pay a great deal of attention to the rating of potential jurors and little to no attention to the strategic use of strikes. Although it is certainly true that some practitioners pay too much attention to the gathering of juror information and too little to the strategy of using strikes, it is a bit of a reach to say that strategy is barely utilized. In my experience, New York State court voir dire in New York City, for instance, comes closer to a long battle of stealth, counter-punches, misdirection, and hand-to-hand combat than a lofty academic experience.

Caditz gives an example of trying to make a decision about a slightly unfavorable potential juror when the opposing side has one peremptory strike left. He argues that a game theorist would only strike if the juror's rating were particularly low, not just marginally below average, because the other side would have the advantage due to its ability to strike or accept the potential juror's replacement. Although the logic appears sound up to a point, it fails in its depth. Even a merely adequate jury selector would have to consider two potential jurors ahead to take into account the opposing side's ability to strike the potential first replacing juror and the probability that the second replacing juror would be more likely to be favorable than not.

In addition, the merely adequate jury selector would consider other variables that might have made up the original juror rating score, such as how this person would fit in with the other jurors. This may be a consideration of the male/female split of the jury, the potential juror's likelihood of influencing the other jurors (for instance, whether the person appears to be a leader, social facilitator or follower, and how the juror would interact with specific other potential

jurors in the potential jury), and the likelihood that this potential juror would respond to the other side's specific case themes or main parties.

In conclusion, in the same way that an optimal strategy for jury selection cannot ignore the opposing side's remaining strikes and counter-strategies, nor can the optimal strategy be based solely on the opposing side's ability to strike. There is no question that game theory has a lot to offer as a way to consider jury selection strategy, and Caditz has made a good first step. We should all look forward to the following steps as the optimal strategy continues to develop.

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FUN AND GAMES WITH JURY SELECTION: A COMMENT ON "ON THE APPLICATION OF GAME THEORY IN JURY SELECTION," BY DAVID CADITZ.

First, a biographical note is in order. I am probably the only professionally trained game theorist operating as a jury consultant today. My Ph.D. is from the Political Economics Program of the Stanford University Graduate School of Business, a doctoral program known for the application of game theory and social choice theory to decision-making within political institutions. I have written several articles exploring game theoretic models of judicial decision-making and applying strategic voting theory to the American Jury System.[1] As such, I begin from a place very sympathetic to Dr. Caditz's point of view.

The first critical lesson is that rules matter. My game theory background makes me very sensitive to the ways in which institutional structure (the rules of the game) affect the optimality of strategic choices. As such, it is critical for any jury consultant to identify the rules of procedure governing any given jury selection *in advance of formulating a voir dire and de-selection strategy.* Caditz correctly points to the distinction between sequential and struck systems as the most stark procedural element, but there are important differences in the ways in which judges operate even within those two broad camps. In my experience, most litigators do not think about these procedures nearly early enough (if at all). I usually have to prompt my clients to ask about these rules at a pretrial conference or try to get the judge's clerk on the phone to clarify the rules that will be employed.

The second critical lesson from Caditz's essay is that jury selection is a *game theoretic* problem, not a *decision theoretic* one. That is, an optimal strategy at any decision node (strike or don't strike) depends, at least in part, on what options will be available to one's opponent (opposing counsel) and how you anticipate that person will exercise his choice over those options. The simple example in the essay of a sequential strike choice (with a population of jurors uniformly distributed over a 10-point desirability scale), when the other side still has one strike left, illustrates this point nicely.

Based upon my jury selection experience with numerous other consultants and litigators, as well conversations with colleagues in the field, it is clear that most people do recognize both of these critical points. They understand that rules matter and that any decision about exercising a strike must take into account what the other side is likely to do in response. As such, the $64,000 question is to what extent using a computer program to make such strategic choices improves upon the performance of a mere human attempting to approximate an optimal strategy through instinct, experience and a "feel for the moment." This is the sort of question addressed in Malcolm Gladwell's popular book on instinct and split-second decisions, "Blink."[2] Gladwell's admittedly unscientific conclusion is that instinct is no substitute for well-informed deliberation, but combining expertise and experience can create a sort of hard-wiring that allows people to make very sound judgments in very short order. I imagine that most of us jury consultants believe we can blink pretty effectively.

Caditz actually identifies several reasons in the introduction to his essay why human judgment in real-world jury selection might be superior to a computer model. He mentions several forms of incomplete, imperfect or asymmetric information. What does the distribution of juror attitudes in the general population really look like? How representative is the draw in any given case? What are the preferences of your opponent? How precisely can you identify a given juror's desirability based upon available information? (Judge-conducted voir dire in state court anyone?) Finding closed-form analytical solutions for optimal strategies with these kinds of uncertainty requires some pretty heavy duty calculus of variations, along with many, many simplifying assumptions. Game theory is an exercise of abstraction and it remains an open question for any model as to how closely the abstraction tracks the "real world." Good game theory models provide general lessons but rarely precise instructions as to how to make any given real life decision.

I would add to Caditz's list of complications a few others of particular note for us practitioners. We pay close attention to how influential a juror is likely to be in deliberations. If we have difficulty predicting how a given juror is likely to react to a case, we are more likely to strike that juror if we believe she will be vocal and influential. That is, the uncertainty surrounding this juror carries greater weight than that surrounding a relatively passive juror who we would expect to be a follower. In addition, we understand the potential for "cascading" in the jury room, where a failure of understanding or a normative judgment can gain momentum as it passes from one juror to the next. In game theory terms, we can think of the Condorcet Jury Theorem, extended by scholars like Krish Lada to accommodate the possibility of correlated evaluations by jurors and disproportionate influence for some jury members.[3]

Again, I want to emphasize that I am not raising these concerns to dismiss the value of game theory for exploring rational strategies for jury selection. Quite the opposite is true. I would encourage scholars and practitioners alike to devote more attention to studying this critical strategic scenario. The better is understood the factors that determine optimal strategies for exercising peremptory strikes, the better we will all be able to do our jobs. In addition, such scholarship is critical to informing a sensible debate about reforms to the jury system.[4] Rather, I am highlighting the difficulty faced by Caditz's company – and anyone attempting to put game theoretic solutions into practice – in helping consultants use his software effectively on a case-by-case basis. I believe that a seasoned consultant, armed with an understanding of what the software does and does not take into account in producing recommended strategies, could make very good use of this sophisticated new tool.

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Footnotes

[1] The reader is invited to explore any of the following articles if interested in the application of game theory and social choice theory to the American Jury System: E.P. Schwartz and W.F. Schwartz, "And So Say Some of Us: What to do When Jurors Disagree," 9(2) University of Southern California Interdisciplinary Law Journal 429-463 (2000); E.P. Schwartz, "Double Jeopardy and Lesser Included Offenses: Complements, Substitutes, or Neither?" presented at the Annual Meetings of the Public Choice Society, Charleston, SC (2000); E.P. Schwartz and W.F. Schwartz, "The Challenge of Peremptory Challenges," 12(2) Journal of Law, Economics, and Organizations 375-394 (1996); E.P. Schwartz and W.F. Schwartz, "Deciding Who Decides Who Dies: Capital Punishment as a Social Choice Problem," 1(2) Legal Theory 113-147 (1995); E.P. Schwartz and W.F. Schwartz, "Decisionmaking by Juries Under Unanimity and Super-majority Voting Rules," 80 Georgetown Law Journal 775-807 (1992)

[2] Gladwell, Malcolm. Blink: The Power Of Thinking Without Thinking. New York : Little, Brown And Co., 2005.

[3] Krishna K. Ladha. "The Condorcet Jury Theorem, Free Speech, and Correlated Votes," American Journal of Political Science, Vol. 36, No. 3 (Aug., 1992), pp. 617-634.

[4] From my own research on the topic, I have reached what is seen as a very revolutionary conclusion that the shared democratic ideals underlying the criminal jury system would be best served by eliminating all peremptory challenges

and moving to a simple majority rule for all jury verdicts. See E.P. Schwartz and W.F. Schwartz, "And So Say Some of Us: What to do When Jurors Disagree," 9(2) University of Southern California Interdisciplinary Law Journal 429-463 (2000);