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Trial Consultants, TV Law, and a Load of Bull

What Television Can Teach Us about Trial Narrative

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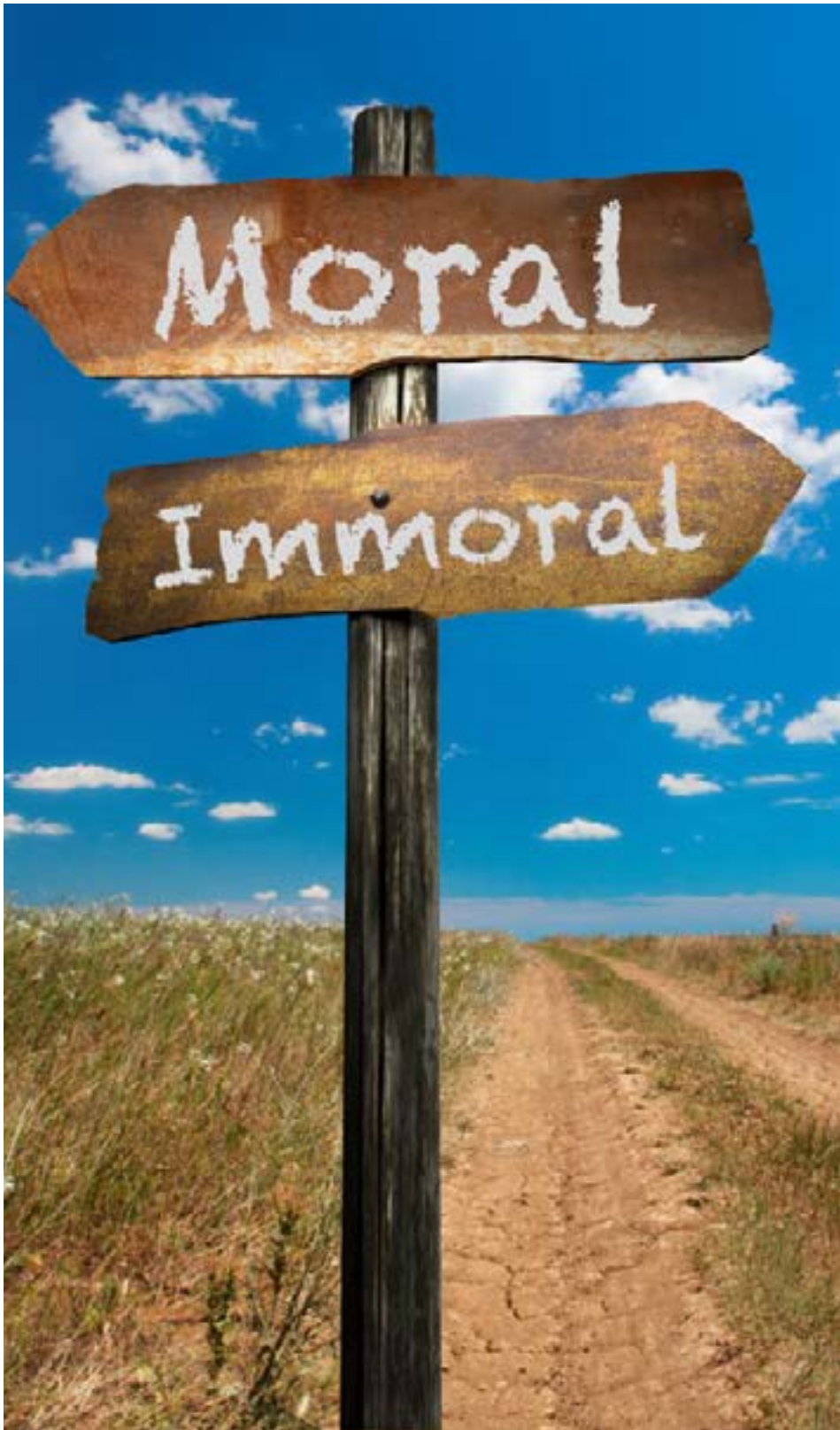
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NOTE FROM THE EDITOR

We've spent some trying a few new things here at The Jury Expert that have kept us from regular publishing but now, let's get back to some good extra-curricular reading on things you can actually use in your work. In the event you have not heard, trial consultants are now on prime-time television and so we asked Richard Gabriel to weigh in on what it means to have trial consultants on TV and how we can use the lessons learned from this somewhat amusing, but hardly accurate look at the profession. Richard began to write and realized he had two articles and not just one—so we published both of them. Thanks, Richard!

Then we have a look at what persuasion is (a summary of the literature from a group of academics) along with consultant responses and a reply from the authors. After that Jason Barnes, the “Graphics Guy” and our Associate Editor tells us how to deepen understanding of our listeners by adding graphics to our words. Speaking of our listeners—we have an intriguing article that just may contain a secret weapon to persuasion. Andy Luttrell writes on “making it moral” for us and we have a couple of trial consultant responses on how to use this strategy in litigation advocacy.

Court reporters are always a quiet presence in the courtroom but what do they really think of everything they hear and faithfully transcribe? Those words are important and this article gives us a peek into their secret lives. Speaking of words—we have an article from Mykol Hamilton and Kate Zephyrhawke on the importance of wording in change of venue questionnaires. It's a quick and surprising read and one that could make the difference between a successful and unsuccessful motion.

Brian Patterson has been doing a lot of work ‘under the hood’ on our website. You won't notice it but it makes it much, much easier and faster for us to bring you The Jury Expert regularly and attractively! Thanks Brian!

And finally, we welcome cooler weather just in time for our final issue of 2016. Sit back, relax, and enjoy this new issue of TJE! As always, if you'd like to share feedback with us, you can email me by clicking on my name below. We love hearing from our readers!

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

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AMERICAN SOCIETY OF TRIAL CONSULTANTS



Trial Consultants, TV Law, and a Load of Bull

BY RICHARD GABRIEL

WHEN PEOPLE ASK ME whether the new CBS show “Bull,” which features a prominent trial consultant, accurately portrays the work we do, I tell them “Absolutely. We have a stylist from Vogue on staff to dress our clients, we hack into jurors’ private computers, we steal and bug the watches of the attorneys we work with, and we always solve the crime.”

Seriously.

To criticize this now-popular show for its inaccurate portrayal of the law or trial consultants would be like criticizing “The Walking Dead” for not preparing us well enough for the zombie apocalypse. The purpose of traditional primetime shows is to entertain the masses and sell them cars, beer, and burgers.

However, as 12 to 15 million viewers watch the show every week, it is also unfair to simply dismiss it as entertainment with no consequence. The public has seen so many television shows about police, doctors, and lawyers for decades, so it is easier now for viewers to dismiss inaccuracies about these professions on modern television shows. But as the public has no reference

point for trial consultants, it is easier for them to accept what they see in these shows as, as Stephen Colbert put it, “truthiness” – the quality of seeming true, even if it is not necessarily true. Over the years, people have asked me in all seriousness whether the attorneys I work with wear ear pieces so that I can direct them on which jurors to pick or how to examine a witness, like Rankin Fitch, the Gene Hackman character in John Grisham’s *Runaway Jury* and, now, *Dr. Bull*.

With “Bull,” it is less important to worry about the impact on jury consulting as a profession, and more important to examine how popular culture portrays jury trials and how it affects the public’s view of our justice system, including trial consultants. It is also important for those of us who work in jury trials to see what lessons we can learn from television in constructing trial narratives to better communicate our cases to *our* audience – the jury.

Television Law

In the late 1950s and 1960s, popular legal shows included *Perry Mason* and *The Defenders*, which featured criminal defense at-

torneys. However, as the violent crime rate in the U.S. climbed in the 1970s and 1980s, the focus of our legal television shows shifted. After various states began enacting “three strikes” laws, established stiffer sentencing guidelines for crimes, and increasing the use of the death penalty in the 1990s, television generally stopped focusing on defense attorneys and shifted to reflect the zeitgeist of the time. “Law and Order” and its spinoff series, premiering in 1990, became entertainment juggernauts representing America’s desire to get tough on crime.

Public sensibility has again undergone a change. We have the highest incarceration rates and most expensive penal system of any country in the world, and on top of that have placed a disproportionate number of minorities in prison. There is now bipartisan support for criminal justice reform and support for the death penalty amongst the public is the lowest it has ever been since the 1960s. Television shows always reflect our changing cultural sensibilities. Thus, it is interesting to note that the latest slate of television shows, including “Bull” and another new show “Conviction,” tend to focus on exonerating wrongfully accused defendants.

There are a number of important trial and justice issues that Bull, in concept, brings to the viewing public. First and foremost, that trials are more than just evidence and law. Although portrayed in a slick, cynical, and even illegal way, Dr. Bull’s Trial Science team recognizes that trials are not just about evidence, but about the psychology of human decisions. In their own gimmicky television way, this TV team endeavors to better understand and communicate with the jurors in their cases.

In that respect, Bull does a good job of capturing an interesting aspect of our work. Often, in interviewing witnesses, reading documents, or conducting jury research, a trial consultant discovers behavioral or psychological aspects of one of the parties that sometimes get overlooked in factual discovery or the timeline of events but are enormously important to jurors. While prosecutors are not legally obligated to prove motive in a criminal case, the jury always wants to know why a criminal defendant behaved the way he or she did. Likewise, jurors in civil cases always are looking at the motivation for the accused conduct of a doctor, an employer, a plaintiff, or a product manufacturer--even though it is not required by law. If jurors are going to judge individuals in a trial, they want to know *why* they act the way they do.

Bull usually tackles a social science issue per episode. In the second episode, the team addresses implicit bias against a female pilot accused of crashing a plane and causing the death of all the passengers. According to the National Center for State Courts, which has extensively studied this phenomenon:

“Implicit bias is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional

control. The underlying implicit attitudes and stereotypes responsible for implicit bias are those beliefs or simple associations that a person makes between an object and its evaluation that “...are automatically activated by the mere presence (actual or symbolic) of the attitude object” (Dovidio, Gaertner, Kawakami, & Hudson, 2002, p. 94; also Banaji & Heiphetz, 2010). Although automatic, implicit biases are not completely inflexible: They are malleable to some degree and manifest in ways that are responsive to the perceiver’s motives and environment (Blair, 2002).”^[1]

U.S. District Court Judge Mark Bennett provides a detailed instruction to jurors on implicit bias^[2] and California has started using a more generic version of this instruction to make jurors aware of these potential biases. There is also a movement to instruct jurors on implicit bias to make them aware of how it can affect a witness’ cross-racial identification of a defendant. The ABA has launched an implicit bias website providing tools and resources for the Courts and litigants to help understand these pernicious biases that can affect the decision making of attorneys, witnesses, judges, and jurors. Indeed, implicit bias is at the core of most trial consultants’ work. While for decades the courts have only recognized explicit or conscious bias, trial consultants understand that a person’s life experiences, values, and belief systems profoundly affect how they interpret evidence and the law.

In another episode, The Bull team tackles the issue of pre-trial publicity in a case involving a woman accused of murdering her accused rapist, which has been publicized in a viral “Serial”-like podcast. The high profile trial, a part of the American justice system since Aaron Burr’s trial in 1807 for charges of treason and conspiracy, has been a challenging feature of our litigation landscape. Media trials threaten a defendant’s 6th Amendment right to an impartial jury as journalists tend to report a prosecutor’s allegations and facts of the investigation, some of which is either untrue and/or inadmissible in court. A defendant is only considered with the ineffectual disclaimers “alleged” or “presumed innocent until proven guilty”. Meanwhile, jurors struggle with separating what they have heard in the media and what they have seen on the news from the trial itself, and are told to merely “set it aside” by the judge. While Bull’s Trial Science team plants its own fake media stories to sway the jury (easily considered jury tampering) in one of the episodes, real trial consultants endeavor in these types of trials to identify how strongly jurors equate the media stories they have seen to actual evidence and whether they have actually already reached a verdict based on what they have heard.

One episode deals with the challenges of bringing or defending a case in the hometown of the opposing party. The last episode dealt with certain police techniques that sometimes result in a suspect’s false confession. In most of the episodes, Dr. Bull tries to identify personality, emotional, or learning characteristics (such as “locus of control”) that may predispose jurors to one side or the other. He then endeavors to shape the themes and

focus of the case to appeal to the jury he has. He also works with witnesses to uncover aspects of the case the attorneys may not have unearthed and to help them communicate in a clearer and more authentic manner. All of these are all important areas that trial consultants and attorneys deal with in their practices.

However, this show also badly mischaracterizes the work that trial consultants perform in a number of areas:

- Dr. Bull's team will do multiple mock trials (18 in the first episode), all ending in the same negative verdict. Most consultants would advise changing trial themes and strategies after the first adverse mock trial outcome, and if they were lucky enough to do multiple research projects, they would keep refining their presentations until they obtained a better result.
- Marissa Morgan, Dr. Bull's research savant says that Dr. Bull's Trial Science firm has developed a juror research methodology that looks "into what we already know about each juror's behavioral patterns -- in life and especially on the Internet -- where they go, what they click, how long they stay, preferences, 'likes', keywords, avoidances -- it all gets plugged into a 400-factor matrix that is scary in its predictive efficiency." In the era of big data, this all sounds plausible but is ridiculous and unethical, if not downright illegal. This both presumes that the Bull team has access to jurors' private data and also presumes that data actually means something. Trial consultants also don't *predict* trial results. We look at the interaction between psychological, behavioral, and learning patterns and help our clients to navigate their factual and legal cases in that changeable weather.
- The Trial Science team uses galvanic skin response iPads, biometric watches, advanced Homeland Security computer technology, and Big Data algorithms to analyze juror responses. Because, you know, they have gadgets so they must be smart. In fact, trial consultants traffic in extremely low-tech tools: the simple psychology of what sounds right and what makes sense to a jury.
- The Bull team touts that they "know jurors down to their neurons" and that they "know what they are thinking before they do." Dr. Bull further states in one episode that he "changes minds for a living". And this is where the series is deeply disrespectful and flawed. Because it presumes that


pretty much everyone else in the justice system – jurors, judges, attorneys, police are pawns in the brilliantly manipulated game of psychological chess that Dr. Bull is playing. As a result, he treats the lawyers, the court system, and even jurors with disdain.

- The most frustrating thing about Bull is the consistently mixed messages it sends. In the first episode, Dr. Bull comments on a jurors' bumper sticker proclaiming that the "System is Rigged" by stating, "Wow, that's cynical." He then cynically but not ironically demonstrates how *he* can rig the system by hacking into jurors' personal data and stealing and bugging his own attorney-client's watch. On a recent episode, the writers meaningfully address how police can coerce false confessions while at the same time Bull and his team engage in jury tampering.

Now I told you I wasn't going to critique *Bull* for its accuracy, but television and popular culture can mythologize a profession that can have lasting effects. Prosecutors deal with some juror expectation about crime scene investigation as result of the CSI and Forensic Files series, doctors deal with expectations raised by Grey's Anatomy and Chicago Med.

Bull also perpetuates the manipulation myth – that jurors are passive observers to be pushed and prodded to a verdict by the whim of lawyers and gurus. However, trial consultants see the jury as partners in the trial story. In a trial I recently worked on, a man was suing his ex-in-laws for negligence because his two-year-old daughter drowned in their pool. In jury selection, a number of jurors spoke about how the case sounded like a tragedy for the whole family. That became our theme for the trial, with the defense attorneys treating the whole family, including the plaintiff father with respect for the grief they must be feeling. After the verdict, the jurors told us they appreciated our sensitivity. It allowed them to feel sympathy for the father, even if they did not ultimately find for him.

Trial consultants listen carefully to the jury and also watch for patterns in the case that will more clearly and accurately present the client's story to a jury. And that is the trial consultant's real art of trial persuasion, to listen for what evidence carries the ring of truth for the jury, the judge, the witnesses, and even opposing counsel.

In part two of this article, I will discuss how television can teach us how to tell better stories in trial. 

Richard Gabriel is a former President of the American Society of Trial Consultants and author of the book *Acquittal: An Insider Reveals the Stories and Strategies Behind Today's Most Infamous Verdicts* (Berkley Press) as well as the co-author of *Jury Selection: Strategy and Science* (Thomson West). Mr. Gabriel is a frequent commentator on high profile trials for CNN.

[1] Casey, P. et al. (2012) *Helping Courts Address implicit Bias: Resources for Education*. [Link](#)

[2] Bennett, M. (2010) *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*. *Harvard Law & Policy Review*, 4, 1207-1230.



What Television Can Teach Us about Trial Narrative

BY RICHARD GABRIEL

HOLLYWOOD HAS HAD a passing fascination with our profession over the years and we have been portrayed in movies and numerous television episodes. After I wrote my book *Acquittal* in 2014 on my trial consulting experiences in high profile cases, Warner Brothers optioned the book and gave it to Jerry Bruckheimer's team to develop. The producers and writers wanted to come to my offices and see all of the advanced technology gizmos I used and to learn how I employed Mephistophelian manipulation to win cases. When I explained to them that we simply study the psychology of litigation judgment and employ communication strategies to tell better case stories, they had a hard time figuring out how to make a primetime show out of that concept. "Bull", a new CBS show based on the early trial consulting career of Dr. Phil McGraw, suffers from some of the same problems.

Part of this is the fault of the format and the formula of a procedural drama and not the show itself. These shows start predictably because familiarity is important in traditional prime time procedurals. A body is discovered on a beach. A woman is accused of murdering her alleged rapist. The daughter of a billionaire is murdered and her fiancée, with whom she was seen

arguing with, is accused. Every case must be wrapped up in 42 minutes of viewing time in a prime-time hour, with roughly 18 minutes to sell Viagra and Doritos. That 42 minutes must include the story arc of the case *du jour*, character development of the new case participants such as a defendant or opposing counsel, ongoing story development of the main characters in the series, and hopefully a twist or two in the investigation and the trial. The characters have to be relatable and understandable to a viewer who has not seen the show: the arrogant, charming, and brilliant Dr. Bull, his pretty and wonky second in command, the tough ex-cop, The Gen-Y hacker. The writers of Bull also have to introduce this new unfamiliar genre, trial consulting, in a familiar way to the audience within the confines of that 42 minutes as well. With these restrictions, it is easy to resort to clichés, stereotypes, and hackneyed dialogue.

These challenges may be some of the reasons why critics have not been kind to the show, rating it a 24 out of 100 on Rotten Tomatoes. Another reason is that the viewing public has been exposed to the complexities and nuance of serial true crime drama in the form of the Emmy award winning *The People v. O.J. Simpson: American Crime Story*, *Making a Murderer*, *The*

Jinx: The Life and Deaths of Robert Durst, and the HBO series, *The Night Of*. All of these popular and critically acclaimed shows build slowly and reveal multi-faceted aspects of the case facts and characters over a long period of time. The truth is often not what it first appears, people are not always who they seem to be. The good guys are flawed and the bad guys have redeeming qualities. Viewers have shown that they have an appreciation and appetite for the mystery and unpredictability of human behavior. Part of the fascination of the viral podcast *Serial* is the listeners are left wondering whether Adnan Syed, a young man serving time in Baltimore for the murder of his ex-girlfriend in high school, is really guilty or not. (He was granted a new trial in August of 2016.) While journalist and podcast host Sarah Koenig raises serious questions about his guilt, she does not (and cannot) resolve those questions one way or another. All of these shows are instructive to those of us who work in developing case narratives.

Because the cases we work on are often complex, defy conventions and familiarity, and have subtle and nuanced aspects of human behavior, they are not easy to explain, categorize, and fit into a one-hour slot. The work that trial consultants do on cases often uncovers much richer and more deeply dramatic stories than you often see in network primetime series.

It is here where we can learn valuable lessons from *Bull* and other television trial dramas and documentaries about constructing trial stories.

In 1981, Lance Bennett & Martha Feldman wrote about how trial attorneys tended to organize their cases in a storytelling model and how this model facilitated juror judgment.^[1] In 1991, Nancy Pennington and Reid Hastie came to the same conclusion: storytelling aided the cognitive processes of jurors in how they arrived at their verdicts.^[2] Stories are neurologically wired explanatory systems that serve to stabilize our world by labeling and orienting new, threatening, or uncertain information in our environment.

While a story model in Hollywood is different than a legal case, some of the same rules apply. As Robert McKee, who wrote one of the quintessential textbooks for television and movie writers said, "Story is about archetypes, not stereotypes. The archetypal story unearths a universally human experience, then wraps itself inside a unique, culture-specific expression. A stereotypical story reverses this pattern: It suffers a poverty of both content and form. It confines itself to a narrow, culture-specific experience and dresses in stale, nonspecific generalities."^[3]

In trials, we are generally poor storytellers. We take too long, repeat too much, flatten out any dramatic or interesting parts of our cases, and generally bore and confuse our audience. Even though condensing an entire case into a one-hour episode is completely unrealistic, the lessons learned from television writing can help us better organize our trial themes and overall case story. While there are numerous components to a trial story model, for purposes of this article, I will focus on

five main components: Theme, Character, Action/Structure, Environment, and Tone.

Theme

Evidence, by itself, is not a story. It must be organized into a story. As we know that judges and jurors use stories to assemble and explain the events in question, you need a central organizing principle for your evidence that helps them to understand your case. Robert McKee calls a theme a controlling idea. He says, "A controlling idea may be expressed in a single sentence describing how and why life undergoes change from one condition of existence at the beginning to another at the end." Thus, "greed", "negligence", and "broken promises" are not themes. "We have no duty" is not a theme and "They have not met their burden" is a weak theme. If you think of the O.J. Simpson trial, the bookend themes from defense's opening statement, "Rush to judgment." and, "If it doesn't fit, you must acquit." from closing argument creates a strong controlling idea for that case.

One of the ways to think about a central theme is what you want to hear as the first sentence out of your jurors' mouths in deliberation when they summarize the trial and say, "This case is about...". One of the better lines in *Bull* is when the Dr. says, "Real closing arguments take place behind the deliberation room doors." The important part of a theme is that it expresses a change in state as well as a value or action. In a case involving allegations of wrongful termination of a dedicated 20-year employee, consider two themes.

An employee's poor performance resulted in her termination.

Some employees had a hard time adjusting to the company's needed reorganization and despite being given multiple chances, had to be let go.

Which is the better defense theme?

Character

As a result of the thousands of channel choices and programming we have these days on cable, HBO, Netflix, Amazon, and Hulu, we can also record and binge-watch any number of shows. As a result, most shows on television now follow more episodic story lines rather than the self-contained stories of procedural dramas or certain sitcoms where the characters discover, work through, and handle one or two situations per episode. This shift has allowed writers to spend more time developing character arcs over the course of a season rather than defining all the characters upfront and relying on those same characterizations in each episode.

Because trials tend to focus on conduct, we often place our focus on the actions of the parties involved. But jurors always judge conduct through the lens of character. They want to know who these people (i.e., the parties) really are in order to judge

whether and why they acted the way did. In trial, we tend to present case stories in absolutes and stereotypes that are more fitting for a primetime procedural than a serial documentary or miniseries. Attorneys say that a defendant is “greedy”, a plaintiff is a “victim”, and that companies are “good” by virtue of their charitable contributions. But these broad-brush characterizations ring false for juries as much as they do to audiences watching shows at home. Audiences, including jurors, expect fully drawn characters, not two-dimensional stereotypes.

Robert McKee says, “True character is revealed in the choices a human being makes under pressure. The greater the pressure, the deeper the revelation, the truer the choice to the character's essential nature.” Thus, jurors in a medical malpractice case don't accept that a doctor was a top surgeon, was Board Certified, or “went into medicine because she wanted to help people” as a defense explanation for why she met the standard of care. Jurors want to know that the doctor had a demanding and unforgiving father whom she could never please, which drove her to a maddening perfectionism because nothing she did ever seemed good enough.

We can help attorneys create these more fully realized characters by having more meaningful conversations with the witnesses to better understand their motivations. Audiences, including jurors, need a back story – why the parties in the case are the way they are and why they acted the way they did. This means talking to a witness about more than their education and past jobs. We need to ask them about their parents, where they grew up, the values they learned, and the struggles they have had. A witness' or party's character is never revealed more to a jury than in examples of how he or she has dealt with adversity. All stories and all lives involve conflict and we need to bring this alive for jurors in order to fully appreciate how a plaintiff or defendant acted in the situation in dispute. A fully realized character has both conscious and unconscious drives. We want jurors to identify and empathize with those drives.

In the Phil Spector case where he was accused of murdering Lana Clarkson in the foyer of his house, a limo driver testified he saw Mr. Spector come out of his house holding a gun saying, “I think I killed someone.” Four women testified that he threatened them with a gun. Yet most of the forensic evidence pointed to the fact that Lana Clarkson was holding the gun when it went off. The attorneys wanted to show the jury what a musical genius Phil Spector was and how he could never have committed this act. I strongly discouraged this because I believed that a jury could understand that Mr. Spector could be a troubled man with great accomplishments and still not have killed Ms. Clarkson. In a sympathetic way, I wanted jurors to also understand that Ms. Clarkson also was troubled, plagued by doubts about her health, her career, and financial problems. To better understand what happened in that house that night, jurors needed to have a full picture of these two people's lives, their struggles, and their desires.

Jurors can be empathetic without necessarily being sympathet-

ic. Jurors can feel empathy toward someone they don't even like as long as they understand their background, who they are, and what has brought them to this place in their lives. By bringing out the struggles of our own clients, we embrace their flaws, creating both a sense of authenticity and credibility for jurors. In Hollywood parlance, this is referred to as character “dimension.”

Character is also revealed through action. Robert McKee again says, “True character can only be expressed through choice in dilemma. How the person chooses to act under pressure is who he is. The greater the pressure, the truer and deeper the choice to character.”

In 2008, Casey Anthony didn't report her child missing for 31 days and then lied to police about her job and a fictitious nanny. She was vilified in the media for more than two years before the trial as a matricidal evil incarnate. When I did a focus group in Orlando, our mock jurors had all heard about the case from the news and all thought she was guilty. When I walked them through the publicly available prosecution's evidence, stopping only to question some of the key facts, a curious thing happened. When I asked the group who would convict Casey of first degree murder, only three jurors raised their hands. When asked why most wouldn't convict, jurors said they didn't see why she would murder her only child. Most of the witness accounts said she was good mother who loved her child. They opined, without any evidence, that Caylee had drowned in the family pool, and that Casey, overwrought with guilt and shame, buried the child nearby to cover it up. They went on further to say that there was something wrong with the family because the grandfather was the one who attempted suicide over the death of his grandchild and her brother professed tearful resentment about not being able to attend the birth of Caylee. When I asked why Casey would not tell authorities what really happened, one juror calmly looked at me and said, “She's a narcissist. They never admit they are wrong.”

All actions reveal character. Inevitably, the story that a jury constructs is much more interesting than what we usually present in trial. Our question is how well we understand the story the jury creates.

Action/Structure

We sometimes make the mistake of thinking the case chronology is the best organization of a case and that case events constitute a trial story. However, sometimes the disputed actions of the case do not provide context or emphasize the best story for a particular side. Think of it this way: where do we want jurors to spend most of their time in a case? If you are a plaintiff in a product liability case, you might want jurors spend as much time as possible at the company headquarters, focusing on a company's struggles to balance the demands of shareholders, a changing industry, slipping profitability, lost market share, changes in management, and a reduced budget for R&D. This provides context for jurors to understand allegations of prod-

uct defect or a failure to warn. When you understand where you want to spend most of your time in the case, this allows you to do what they call in Hollywood terms “plotting and composition.”

Plotting is the selection of the right series of events to feature and reveal the story. In screenplays, composition is the sequence and linking of events or evidence that leads to the crisis, the climax, and the inevitable conclusion. While we tend to structure trials around witness availability, it is better to tell the story of our case where we are building evidence and testimony to tell the story of the case. You can then decide the pacing of the case or how long you want to spend on each piece. This is important because we can often let the amount of discovery dictate the amount of time we spend at trial. However, discovery volume does not always tell the best story. Again, Robert McKee says, “Storytelling is the conversion of idea to action.”

In order to better understand action sequencing, screenwriters write brief descriptions of all of scenes they want in their show on 4x6 cards. They then shuffle the cards, adding or subtracting scenes until they feel they have the best narrative line. This can be a painful process as writers often have to kill the scene they most love because it may not serve the story. By itself, it may be a beautiful piece of writing but ultimately it does not move the story forward. And this is the way we should look at the evidence. Despite what we think is important, strong, or even relevant, what moves the story of the case forward?

In a traditional story structure, you have exposition which helps the audience understand the four “Ws:” who, what, when, and where. You then typically have an “inciting incident” which upends the established context and the balance of the protagonist’s life. Remember, there is no story movement without conflict. The inciting incident sets a series of actions or choices in motion that then escalate into a single crisis that culminates in the climax of the action. There is then the denouement, which is where the final elements of the plot are explained and resolved.

In a traditional civil or criminal case, plaintiffs and prosecutors use this usual structure to create conflict, whereas defendants seek to defuse the plaintiff’s story of “conflict.” However, there are times where we advise defense clients to develop their own narrative, with its own story structure and its own internally generated exposition, inciting incident, escalating conflict, crisis, conflict, and denouement.

Trey Parker and Matt Stone who created the comedy series *South Park* and the Tony award winning play, *Book of Mormon* use a writing technique^[4] in their writer’s room where they state an individual action of a character, called a “beat”. The next sentence has to start with the words “therefore...” or “but...” which ensures that the next action or part of the story is connected to the previous action. In their opinion, when a movie has a series of actions that aren’t causally connected to each other, these may be movies but not necessarily stories.

Many times, we have evidence without stories. The “but...” and “therefore...” technique should apply to us as well as we construct our trial narratives. This allows a logical sequence of events for the jury to follow and helps us to organize the order of witnesses in trial.

Environment

With every case story you create, it is important to place that story in a particular location. The setting for your case actually becomes another character in the story, whether it’s a road, a hospital, a store, or a workplace. While filmmakers in television and movies have lighting, set designers, and cinematographers to help them create a visual world, the attorney has language. Thus, in an employment case involving allegations of a hostile work environment, jurors want a feel for the office environment even if it might seem irrelevant to the case: is it open plan with cubicles or separate offices? Where are the managers or supervisors in relation to the office workers? In a medical malpractice case, how busy is the hospital? Creating a verbal and visual template for the location of the litigation dispute allows jurors to more clearly step into that world and judge the actions of the litigants.

Whether you are a plaintiff or defendant, there also needs to be the *perceived* consistency in the world you are creating. Even small inconsistencies can cost you credibility points in front of a jury. This applies to television shows as well. In one of the Bull episodes, he defends a female pilot that survived a commercial plane crash that killed everyone on board, but they never explain how she survived. In another episode, the father of a murdered girl shoots the *father* of the accused defendant on the courthouse steps, again, without an explanation. Even though Bull’s team mainly works with high profile attorneys on criminal cases, none of them seem to have investigators. In our cases, we also must look for small inconsistencies that don’t seem to make sense to jurors. If we do not take care to clearly draw the world we are asking jurors to step into, we can either lose credibility or invite them to fill in the gaps we have left.

Tone

A trial is always a reenactment of the events in question. But there are two different versions of those events. Jurors expect both parties to put on their best “show” to persuade them of their respective positions, scoffing at the notion that we only want to get at THE TRUTH. This creates a challenging tension in trial. Jurors know that each side is selectively presenting evidence to create a desired result. They become resistant and skeptical of being “sold” on a particular position. They then engage in their own construction of what they think “really happened.” For this, they fill in gaps in the case story with their own experiences and beliefs. They do this because there are often cognitive holes in evidence and testimony they need to fill because of judicial rulings. And sometimes they create their own stories because their interpretation is just more interesting or makes more sense than what they are enduring in days and

weeks of tedious testimony. These stories become their own little episodic television show, played out every day on their cerebral screens.

And they cast this series with the witnesses and attorneys. Both become the embodiment of the outlook and attitude of the litigants. In all interesting television and movies, there is both text and subtext. The actors recite lines but sometimes their behavior belies intent that runs contrary to the words coming out of their mouths. On television, we see this in the Southern gentility and murderous manipulations of Frank Underwood in *House of Cards*. In life, many have commented on the charm of both Ted Bundy and Bernie Madoff. Jurors consider themselves both amateur detectives and amateur psychologists in trials because they want to know what made the people in their case act the way they did.

I have worked with executives, experts and lay witnesses whom attorneys have told me came off as arrogant and insensitive in deposition. Many had concerns or outright fears about testifying that translated into a guarded and defensive demeanor, a problematic subtext in any trial. Addressing these concerns and having a frank and open discussion with them about their values and intentions has often allowed them to communicate in a more open and genuine way.

It behooves us to pay attention to not only *what* we say in court but *how* we say it and how we look to the observing jurors. We may have great evidence to defend a company in a harassment lawsuit, but if we aggressively cross-examine the plaintiff and accuse her of fabricating accusations, we can embody the very harassment against which we are defending. An injured plaintiff can minimize their damages by joking around or speaking in an animated way on the phone in the courthouse hallway.

It is as important to understand and manage the tone of the case as it is to control the presentation of evidence. Do we want to communicate caring, outrage, skepticism, surprise or curiosity? At the core of every case there is an emotional tone that tells jurors how they should feel about the facts. Attorneys need to understand and communicate the appropriate tone to communicate the emotional message in the case.

Whether considering a television show or a courtroom trial, both are telling a story to an audience. Stories are wrought through conscious craft by focusing on Theme, Character, Action/Structure, Environment, and Tone. By discovering a more meaningful story through the evidence, we can give the jury and judge a more accurate and persuasive picture of our client's case and allow them to arrive at a more informed verdict. ¹⁶

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Juries, Witnesses, and Persuasion: A Brief Overview of the Science of Persuasion and Its Applications for Expert Witness Testimony

BY REBECCA E. VALEZ, TESS M.S. NEAL, AND MARGARET BULL KOVERA

Don't miss the responses at the end of the article:

- [Jennifer Cox and Stanley L. Brodsky](#)
- [John Gilleland](#)
- [Elaine Lewis](#)
- [A reply from the authors](#)

EXPERT TESTIMONY IS IMPORTANT for helping jurors make legal decisions when information needed for making those decisions is not common knowledge. Expert witnesses are invited by the courts to testify and share with the jury their specialized knowledge and they may be permitted to offer an expert opinion. Through their testimony, expert witnesses communicate information to the jury with the potential to influence the jury's decision and persuade them one way or another. Thus, expert testimony often functions as a persuasive message from the expert (the source) to the jury (the audience). We begin this article with two major theories of persuasion that have emerged in the scientific literature. We then briefly discuss jury methodology to help the reader understand the science of jurors' evaluations of expert testimony. Finally, we

end with some practical applications that attorneys can utilize during witness selection and preparation.

History of the Science of Persuasion

The study of persuasion can be traced to the Periclean Age of ancient Athens in the fifth century B.C. (McGuire, 1985). By the late 1970s, a substantial number of different theories and studies on persuasion had emerged, including studies about how such factors as characteristics of the source of the message, the content of persuasive messages, intended audiences of the message, and how the message was delivered influenced the adoption of the position in the message. Although the amount of research was extensive, there was little to no consensus on how these variables influenced the effectiveness of a persuasive message (Petty & Cacioppo, 1986). The results were inconsistent – showing that the same variables could have a significant impact, no impact, or a negative impact on persuasion in various situations – which led to confusion in the field about how and when messages were persuasive. By the early 1980s, two models emerged from different teams of researchers that provided a similar framework for understanding the effective-

ness of persuasive arguments. These models accounted for the prior inconsistencies in the literature as well by showing how the situation was important for understanding when and how messages would be persuasive. Both models contend that there are two main paths for persuasion, although they use different terminology. The first path is known as “central” (Petty & Cacioppo, 1981, 1986) or “systematic” (Chaiken, 1980) processing, and the other is known as “peripheral” (Petty & Cacioppo, 1981, 1986) or “heuristic” (Chaiken, 1980) processing.

Central Route to Persuasion. Central processing involves being persuaded by the content of someone’s argument (Chaiken, 1980; Petty & Cacioppo, 1986). For persuasion to happen via central processing, the person evaluating the quality of the argument must both be able to comprehend the content of the argument and motivated to pay attention to the whole argument. However, jurors may be presented with evidence from experts that exceeds their ability to understand, thus failing to meet the necessary conditions for central processing.

Peripheral Route to Persuasion. Peripheral processing occurs when a person’s evaluation of a persuasive statement is based on superficial aspects of the argument rather than a careful consideration of the strength of the information itself. Thus, people are using peripheral processing when they take cues from characteristics of a message other than its quality. These cues may make certain heuristics—shortcuts in the decision-making process—accessible. There are many superficial factors that can cause these heuristic judgments, such as the length of a message, the number of arguments made during the message, and the reactions of other people (Chaiken, 1987). Superficial characteristics of the presenter can also function as a cue for persuasion. People are more likely to be persuaded by an attractive, likable, and powerful person than they are by a less attractive, likable, or powerful person despite the content of the argument or statement (see Chaiken, 1987; Neal, 2009).

How Scientists Study Jury Decision Making

Before describing the studies that have been conducted on expert witness’s persuasion and juror decision-making, a basic primer on jury research methods is useful. Researchers primarily use one of three types of studies to examine jury decision-making. The first is archival. These studies utilize public records of jury trials, such as appellate records, to look for relationships between features of the case and the outcome of the trial. Researchers conducting archival studies are unable to control the types of data in public records, so their research questions are limited by the content of the records. There have been archival studies that examine if case law developments have an impact on judicial decisions to admit expert testimony (Groscup, Penrod, Studebaker, Huss & O’Neil, 2002) and what case features can predict the use of expert evidence in child abuse cases (Connolly, Price, & Read 2006). However, we are not aware of any archival studies that have investigated the role of expert testimony in jury decision-making.

Archival studies would be difficult to use for studying expert testimony and jury decision making, as there is not any variability in jury verdicts in appellate cases (all defendants would have been “guilty”). It isn’t the best method to use in civil contexts either, because there could be a lot of covarying factors influencing the trial outcome. It would be difficult to determine if changes in the verdict occurred because of the expert evidence or due to other related variables.

Researchers can also study jury decision-making using jury interview studies. In this method, researchers interview jurors in real trials after the trial is concluded. Jurors answer questions about how they made their decisions and what factors influenced them. Berger (1997) reported that jurors in a medical malpractice case were influenced by the demeanor of the doctor on the stand, and not by the content of the expert testimony. However, asking jurors directly about factors that influenced their decisions is not necessarily the best way to find that answer. People are generally unaware of the factors that influence their choices (Nisbett & Wilson, 1977). Jury interview studies are able inform researchers of what jurors *think* influences their decision making, but not necessarily what *actually* influences their decisions.

Experimental studies are the third method of studying jury decision-making. Researchers use random assignment to assign jurors or juries into different trial conditions to investigate what causes jury verdicts to change. These types of studies can be done in the field, using actual trials assigned to different conditions, or in the laboratory using mock trials. An example of an experimental field study is the Arizona Jury Reform Study in which juries were randomly assigned to one of two conditions. In the first condition, juries were not permitted to discuss the case until they heard all of the trial evidence and received instructions by a judge. In the other condition, juries could discuss the case at any point during the trial so long as they were in the jury room and all jurors were present (Hanford, Hans, & Munsterman, 2000).

Experimental studies can also be conducted in a laboratory setting using trial simulation methodology. In simulation or laboratory studies, participants experience a trial stimulus that reflects the topic the research is interested in studying. Participants make decisions about the trial, such as rendering a mock verdict. Trial simulation studies can differ in many ways, including whether the sample uses college students or jury-eligible community members, the trial simulation is in the form of a written summary or a videotaped simulation, and juries reaching verdicts after deliberation or individual jurors making decisions without participating in deliberation (Penrod, Kovera, & Groscup, 2011).

There are two principal features of experimental studies that enable researchers to determine if the purposeful changes across conditions had a causal influence in the changes in verdict. The first is that researchers select specific variables to manipulate between different conditions and keep all other factors con-

stant. Second, the use of random assignment of participants to different conditions ensures that any individual differences among participants are distributed randomly across conditions. These two methodological features allow researchers to attribute differences in verdicts from the different conditions to their manipulated differences among conditions (Penrod et al., 2011). Jury researchers tend to prefer conducting their experiments in laboratory settings rather than in the field because there is more control in the laboratory setting and a greater chance of random assignment failing in the field, as was the case in the Arizona study. Laboratory simulation methods ensure that researchers have control of random assignment and manipulation of variables (Penrod et al., 2011).

Persuasion and Expert Witnesses: How Jurors Perceive Experts and their Messages

We have covered the two models of persuasion, explaining how jurors can be persuaded by both the substance of a message and by peripheral cues that are unrelated to the strength of the message. We have also considered the science of studying juror decision-making, describing how scientists use experimental methods to examine how specific messages and situations influence juror perceptions and decisions. We will now look at some specific studies that have examined how jurors are persuaded by expert testimony. We will begin with studies that examined peripheral cues before turning to studies that cover jury persuasion through central processing.

Peripheral Processing of Expert Testimony. Peripheral cues related to the expert witness – the source of the message – affect the extent to which jurors are persuaded to reach decisions consistent with the expert’s testimony. One example is witness credibility. The Witness Credibility Model is an empirically-developed model that examines witness credibility as a function of four factors: witness likability, knowledge, confidence, and trustworthiness (Brodsky, Griffin, Cramer, 2010; Brodsky, Neal, Cramer, & Ziemke, 2009; Cramer, Brodsky, & DeCoster, 2009; Neal, Guadagno, Eno, & Brodsky, 2012; Parrott, Neal, Wilson, & Brodsky, 2015). Jurors assess the content of expert testimony while also evaluating experts using these factors and others as peripheral cues. Prior studies have investigated the effects of each of the four factors independently to examine how jurors perceive expert witnesses, respond to testimony, and make trial decisions. One of the most critical aspects of this series of studies is that all of them used the same case materials, including the content of the expert witness testimony. The only difference between the studies was the factor that was manipulated. Because the persuasive message given by the expert was unchanged in each study, this group of studies gives valuable information about how these four peripheral cues affect the persuasiveness of expert witness testimony.

Two studies examined the likability of expert witnesses by using high and low expert likability conditions and keeping the content of the testimony the same in each condition. Jurors were more persuaded by likable experts than unlikable experts,

and particularly so if the expert witness was a woman (Brodsky et al., 2009; Neal et al., 2012). Other studies have investigated expert knowledge (e.g., displays of the expert’s competence, expertise, impressive educational credentials, relevant experience) and show that knowledge cues are a critical factor for witness credibility and persuasiveness (Neal et al., 2012; Parrot et al., 2015). Jurors find highly knowledgeable experts more credible and persuasive than less knowledgeable ones. However, cues to knowledge were less critical for male experts than female experts. Male experts that were perceived as less knowledgeable could still be persuasive to jurors, but for female experts, exhibiting knowledge was essential to be persuasive (Neal et al., 2012).^[1]

Another study manipulated the confidence displayed by the expert witness using three conditions: low, medium, and high confidence. The content of the testimony was the same in each condition. Jurors were the least persuaded by the unconfident expert (Cramer et al., 2009). Interestingly, jurors were more persuaded by the medium-confidence expert than they were by the high-confidence expert. The researchers surmised that the high-confidence expert may have appeared arrogant or overly assertive, whereas the medium-confidence expert had enough confidence to appear credible without being unlikable.

Jurors are more likely to be influenced by peripheral cues when other factors impede their motivation and/or ability to systematically process evidence. For example, one study manipulated the complexity of expert witness testimony to investigate if jurors would be more likely to rely on peripheral cues if they had difficulty understanding evidence. The expert’s pay was also manipulated as a peripheral cue. The expert was either paid an extremely high or low amount of pay. The researchers expected that jurors would only use the pay cue if they could not understand the evidence and needed to rely on other details to make their decisions. In this study, participants heard a civil case in which the matter to be decided was whether chemical polychlorinated biphenyls (PCBs) were the primary cause of the plaintiff’s cancer (Cooper & Neuhaus, 2000). When asked if research studies had investigated the effect of PCBs on animals, the low-complexity expert answered (p.164):

Definitely. In 1980, a scientist named McConnell, published a summary of the diseases that PCBs cause. He found that PCBs caused several different forms of liver disease in rats, mice, monkeys, and humans. In the rats and mice, PCBs caused not only liver disease, but also cancer of the liver. In addition to the liver damage, McConnell found diseases of the immune system as well.

In the high-complexity condition, the expert responded (p. 164):

Definitely. In 1980, McConnell, publishing in the Elsevier Biomedical Press, reported a summary of the patho-

logical findings due to the toxicity of PCBs. He reported tumor induction in rats and mice. He also reported that not only rats and mice, but in monkeys as well, there was hepatomegaly, hepatomegalocytosis, and lymphoid atrophy in both spleen and thymus.

As the researchers hypothesized, participants in the low-complexity language condition were not affected by expert pay. In the high-complexity language condition that was designed to impede understanding, participants instead relied on the expert's pay rate when making trial judgments. In the high-complexity condition, the low-paid expert was more persuasive than the high-paid expert.

Systematic Processing of Expert Testimony. Recall that for jurors to process expert witness testimony systematically, they must be both motivated and able to examine the quality of the arguments being presented. Researchers can infer if jurors are processing evidence through the central route because their decisions will be more consistent with the strength of the evidence that is presented. Experts may be able to increase jurors' ability to systematically process trial evidence by connecting relevant research to specific case facts in their testimony. These connections help jurors understand the link between scientific research and the specific case about which they are making decisions. In a study aimed at testing this hypothesis, jurors viewed a videotaped trial simulation of a child sexual abuse case. The child victim testified in a calm, composed, and confident manner, or in an emotional, confused, and uncertain manner (Kovera, Gresham, Borgida, Gray, & Regan, 1997). There were four different conditions for expert testimony. In the control condition, there was no expert testimony. In the second condition, standard expert testimony gave a summary of research findings about children's reactions to child sexual abuse (which are consistent with the emotional/uncertain demeanor of the victim). The third condition was similar to the second condition in that it provided a summary of the research, but it also repeated the summary so that jurors would hear it more than one time. In the last condition, the expert gave a research summary like in the second condition, and then linked the research to the specific facts of the case. In the standard and repetitive conditions, the decisions that jurors made about the child and the verdict were less consistent with the expert testimony compared to the control group. Jurors that saw the child testify in a composed manner thought that she was more credible and were more likely to reach a guilty verdict for the defendant, even though the expert testified that actual child victims tend to be emotional and uncertain. The fourth condition was the most effective in helping jurors process evidence systematically. Linking the research with specific case facts made this the only condition that equipped jurors to evaluate the victim's demeanor. Jurors in this condition saw the emotional and uncertain child as more credible and were more likely to find the defendant guilty when the child's demeanor was emotional and uncertain.

Researchers have also looked at how procedural safeguards can

aid jurors in processing evidence systematically and recognizing differences in the methodological quality of research presented in expert testimony. Jurors are influenced by expert testimony and also by peripheral cues, such as the general acceptance of the underlying method in the relevant scientific community (Kovera, McAuliff, & Hebert, 1999). But jurors are not very sensitive to methodological flaws in research presented by experts (Kovera et al., 1999; McAuliff, Kovera, & Nunez, 2009). And although cross-examination has been considered to be the "greatest legal engine invented for the discovery of truth" (Wigmore, 1974), research suggests that even strong cross-examinations are unlikely to help jurors systematically process evidence and recognize the scientific validity of information (e.g., Kovera et al., 1999). Recent studies have investigated this matter and suggest that scientifically-informed cross-examinations that are intended to educate jurors about flaws in an expert's research can help jurors process evidence and recognize flawed and valid evidence (Austin & Kovera, 2015).

Opposing expert witnesses theoretically serve as another safeguard to increase jurors' ability to process evidence systematically. Previous research in this area has suggested that opposing experts bring little help to jurors in systematic processing of evidence. Instead of comparing and contrasting content from each expert's testimony, jurors experiencing opposing experts use the disagreement between the experts as a peripheral cue that both experts were biased and were not persuaded by either one of them. This effect has been termed the "skepticism effect" (Levett & Kovera, 2009, p. 128). However, a recent study suggests that opposing experts can help jurors weigh evidence *if* the expert demonstrates to jurors how the other expert's arguments are flawed by using a visual aid to walk them through a methodological evaluation of the research used by that expert (Jones & Kovera, 2015). This approach can show jurors how to effectively evaluate the validity of evidence and has a "sensitizing effect" on jurors (Levett & Kovera, 2009, p. 128), enabling them to evaluate and compare evidence given by opposing experts, instead of relying on the peripheral "skepticism effect" cue.

Applications of the Science of Persuasion for Witness Selection and Preparation

The theory of persuasion, the science of juror decision-making, and specific findings from jury studies can be relied upon to generate practical strategies for preparing expert witnesses to be effective and persuasive communicators. However, using these techniques to prepare experts to deliver false or misleading testimony to increase persuasion is both unethical and illegal (American Bar Association, 2001, §1.2d & §3.4b). The objective is to deliver testimony in a responsible way that enables the trier to understand and use the content of the message in reaching their judgment.

The most ideal scenario is when jurors are able to process the expert testimony systematically (i.e. through central processing). Strategies that attorneys and judges can employ to help

ensure this are:

- Have the expert go beyond simply providing research information by linking it to the case facts. The attorney can ask the expert to find relevant research with specific links to the case facts, and help prepare the expert to present these links to jurors in a clear and concrete manner.
- Attorneys can develop an effective cross-examination of expert witnesses that not only exposes the flaws in experts' research, but also educates jurors about why those flaws matter. This scientifically informed cross-examination better enables jurors to process evidence systematically by teaching them to recognize valid versus flawed evidence.
- When there are opposing experts hired by each adversarial side, attorneys can equip jurors to evaluate the strength of the experts' testimony by educating them about valid versus flawed evidence. When opposing expert testimony on how to evaluate the other expert's research validity is paired with a visual aid representing the research evaluation process, jurors are better able to process expert evidence systematically.

Peripheral cues also function as an important part of the persuasive process. Attorneys and experts should prepare and practice strategies to manage these cues as well (see e.g., Brodsky, 1999, 2004, 2013). The expert witness should:

- Be likable. This includes being well-mannered, respectful, and pleasant. Using plain language is preferable to technical jargon. As stated previously, this cue appears to be more important for female experts.
- Be confident without being arrogant. Maintain good eye-contact with the attorneys, judge, and jury. Be poised and maintain a good posture and stable tone of voice with a

moderate pace of speech and a moderate degree of certainty.

- Try to appear competent and knowledgeable. Both men and women should demonstrate expertise (see e.g., Cialdini, 2001; Titcomb et al., 2015), but this demonstration may be particularly important for women. Attorneys should ask questions that allow the expert to provide details about strong educational credentials (e.g., specific areas of training, board certification), relevant professional experiences, history of academic publication in case-relevant areas, and other background information that may aid in establishing expertise.

In conclusion, attorneys who wish to use the science of persuasion should be aware of the two main processes by which persuasion takes place. They should ensure their expert is delivering testimony in a way that enables jurors to process the information systematically. And they should also be aware of how peripheral cues impact a juror's ability to process information systematically, taking steps to minimize their negative impact by teaching experts how to generate positive cues.

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[1] Neal (2014) published a comprehensive review of men and women's persuasiveness as expert witnesses in different court contexts.

Expert Witness Persuasion: What We Know and Where We Go

Jennifer Cox and Stanley L. Brodsky respond:

What We Know

In their 2016 essay, "Juries, witnesses, and persuasion: A brief overview of the science of persuasion and its applications for expert witness testimony" Valez, Neal, and Kovera describe the dual cognitive processing model as well as how this model has been examined within the context of juror decision making. Their essay concludes with some common sense suggestions for attorneys and expert witnesses to present their message to lay jurors. This review of the literature and the proffered suggestions are helpful in forensic practice, and may encourage jurists and experts alike to consider how juror cognitive processing may inform their own practice.

Valez, Neal, and Kovera highlight the importance of addressing factors central to juror cognitive processing such as the strength of the expert's argument as well as peripheral factors such as the expert's likability or perceived attractiveness. One cannot overstate the power of peripheral factors. In fact, during the first author's clinical internship training, an entire seminar was devoted to focusing on those secondary factors. As one supervisor pointed out, the expert does not want to focus on peripheral factors at the expense of the central factors (e.g., trying to come across as likable and sacrificing authenticity). At the same time, experts certainly do not want to allow peripheral factors to distract the juror from relying on reason and logic.

Although not always intuitive, linking research to the case at hand is part of effective testimony. However, in our experience scientifically oriented experts may feel overly inclined to insert caveats into their reports and testimony when the elements of the case stray from documented research. For example, we recently evaluated a defendant and included in the report an opinion of future violence risk. The demographics of this defendant (African American, female, emerging adult) were such that the usual actuarial foundations and structured measures lacked applicable standardized norms, requiring the evaluator to rely more heavily on clinical judgment. When explaining this to the retaining attorney, the attorney initially was left with the opinion that a violence risk opinion could not be supported by empirical evidence. After some conversation, the matter was clarified. However, we can be safe in assuming that, in the desire to present accurately, our message was muddled. If this

communication had transpired in the presence of a jury, the jurors may have been equally confused and the expert might have been less persuasive due to this confusing testimony.

The Valez et al. suggestion concerning communicating a message in plain language free of technical jargon is important. However, this begs the question – how do experts know when their message is too technical? Undoubtedly, to be expert one has to have knowledge of the area. As a consequence, there may be a lack of understanding about how laypersons may not grasp such knowledge. For this reason, expert witnesses, and the attorneys prepping them for testimony need to practice, and then practice more, communicating their messages to laypersons.

Where We Go

To this point we have discussed central and peripheral processing in the context of expert behaviors. The salient issue for trial consultants in jury selection is to attend to the interaction of the nature of the case with characteristics of potential jurors. When the evidence is strongly on the side opposing that of retaining counsel, the trial consultant may well seek to help select jurors who process information poorly and superficially. Is it right that attorneys and their teams should deselect jurors who will do an especially good job of understanding the evidence? Attorneys may answer affirmatively without reservation. When the weight of the evidence is against an attorney, they may actively seek jurors who are emotionally reactive and non-cerebral.

The first new direction, then, is to understand how different testimony styles fit with varying jurors' or judges' methods of processing knowledge. It is reasonable to hypothesize that testimony styles may correspond with processing – an expert who communicates in a strong manner or about weak evidence may be more effective with the "feelers", while an expert testifying to strong evidence in any manner might be more appealing to the "thinkers." However, future social science research should examine this hypothesis about the relationship between testimony styles and cognitive processing styles. It could be informative to the practice of trial consultation.

The subtext from the Valez et al. discussion is that experts are generally capable of communicating substantive content that lends itself to central processing. Yet, Ireland (2012) studied the reports and transcripts of 126 experts who testified in family

court in Great Britain. She concluded most of the experts were either unqualified, off-task, unscientific, or did not address the referral issue. Once the Ireland results came out, she was subjected to an unceasing barrage of attacks and efforts to stifle publication. However, when most experienced and knowledgeable mental health experts are asked, they will present a torrent of critiques of certain unprepared, biased, and naïve experts. This leads us to conclude that part of where we need to go from here is to clean our own houses. Experts who misrepresent the science, tout bad science, or in other ways misinform the jury should be called out during cross-examination or by an opposing expert. Not doing so allows the message of any expert witness to be called into question. The operational issue of how to clean our own houses goes well beyond the space and scope of the present commentary. But it should not be neglected.

Finally, we need more informative and effective communicators like Valez, Neal, and Kovera to talk to lawyers and teach in law schools. The research foundations of expert knowledge and communication need to be given away. But, even then, we are aware that the stammering, nervous, and socially awkward expert may have a tough time effectively testifying about good and scientifically sound opinions. Increasing the quality of research about how to improve effectiveness, given the variable cognitive processing styles of jurors, may result in better communication and understanding.

An Aside

We have joined the authors in using the term persuasion. We would like to think, in expert testimony, that *res ipsa loquitur* - the facts speak for themselves. Jurors and judges should not have to be persuaded. Persuasion belongs in domain of attorneys. Nevertheless, experts are called and examined by attorneys who are committed to persuasion, and it is the rare expert who does not think of court testimony as having an element of persuasion.

Jennifer Cox, Ph.D., is an Assistant Professor in the Clinical Psychology program at The University of Alabama, specializing in Psychology-Law. Her research interests include juror perceptions and decision making, psychopathy, and the impact of sex and gender on legal decision making. Correspondence regarding this response may be directed to jennifer.m.cox@ua.edu.

Stanley L. Brodsky Ph.D. is a forensic psychologist and trial consultant, who is also Emeritus Professor and Scholar-in-Residence at The University of Alabama. Author of 15 books, mostly about psychology applied to the law, he may be contacted at biminip@gmail.com.

Dr. John Gilleland responds:

Evidence of both central and peripheral processing is

alive and well in small group research done by jury consultants

This article not only provided a detailed overview of the classic science of persuasion, but it also worked to transport me back to graduate school when Petty & Cacioppo were first reporting studies in support of their Elaboration Likelihood Model (ELM). This seminal work in turn became the cornerstone of decades of research efforts that examined the impact of persuasion efforts on audiences in an attempt to lend understanding to how that process works within the field of social influence.

Applying these studied principles to the jury trial and/or how jurors may come to view expert witnesses testifying during the course of litigation are natural extensions of the ELM. As the field of jury consulting matured we have been regularly treated to articles – and creative mock jury research reports – that are replete with attempts to educate lawyers as to the factors that may make them and their expert witnesses more credible and therefore more persuasive.

In short, the notions of *central* versus *peripheral* processing have become mainstays when talking in general about jurors attending to and remembering evidence at trial, and when talking specifically about jurors' reactions to witnesses who may become very technical in their explanations. Applying these academic principles of persuasion to more applied mock jury research and witness preparation efforts are both major goals of almost all jury research professionals, as they try to take these tenets of persuasion into real world applications.

In my experience most consultants tend to use the central and peripheral distinction as an either/or method of processing information, since the ELM is based on a continuum that varies in the amount of elaboration that may take place for a receiver of the given persuasion attempt. That is, if elaboration is thought to be lower, peripheral processing occurs, or if higher, then central processing takes place. But of course there is also nothing that prevents *both* types of processing from occurring for an individual juror within a single lengthy opening presentation or within the full day of testimony from an expert witness. Specifically, they may be more motivated to put in the cognitive (elaborative) effort during one portion of the influence attempt, but less so during another portion of the presentation. In fact, we have seen instances where jurors appear to have centrally processed information early on in the expert's testimony, but then seem to "tune out" and process more peripherally as additional arguments are being made (evidenced by the fact they cannot really recall the arguments that occurred later on in the testimony). Perhaps once they are convinced the expert is correct, they are no longer as motivated to fully consider additional information that is presented on its own merits.

Methodology

The authors point out that *academic jury research* works best when studies are done experimentally, that is, 1) random assignment into different conditions, and 2) researchers manipu-

late specific variables between conditions (endeavoring to keep all other factors constant). And of course, the use of jury-eligible community members (versus college students) adds validity to the research design.

In *applied jury research*, there are almost always many more moving parts, and although experimental designs are occasionally implemented – two deliberation panels hear one specific additional fact or argument, two others do not – it is far more common to have all of the mock jurors react to the entirety of the presentations. Other differences between the two research approaches include:

- The use of jury-eligible respondents is the norm, not the exception
- “Quotas” are established to generate a respondent pool that is representative of the venue of interest (i.e., matching the ethnic breakdown, a set percentage of full time workers including both blue and white collar, a range of ages, etc.)
- Reactions to expert witnesses are gathered in a variety of ways
- The stimulus material is typically much more detailed.

These “mock jurors” then typically respond to the stimulus through periodic written feedback (after each presentation or after the testimony of a specific witness), the completion of verdict forms (individually and then later as a group), and through their eventual mock deliberations (which may be facilitated, unfacilitated, or both).

Thus, the presentations of the expert witnesses are not experimentally manipulated to weigh impact, but qualitative feedback is still obtained as to whom they would rate higher on key positive and negative descriptors (e.g., likable or arrogant). These witness ratings are coupled with the content analysis of open-ended comments that are collected (typically listing perceived strengths and weaknesses), and then researchers also review comments jurors make about the witnesses during their deliberations or when prompted about the witnesses during follow-on focused discussions with a facilitator.

Several observations as to how mock juror respondents exposed to this type of applied mock jury research seem relevant to The Witness Credibility Model discussed by the authors.

Witness Credibility – The Peripheral Factors Of: Likability, Knowledge, Confidence, and Trustworthiness

Jurors know that the expert witness has an agenda – they are called by one side, and therefore foster an expectation from jurors that their testimony will be supportive of that side in the litigation. However, our experience comports with the research cited by the authors, that is, those experts perceived as more likable/knowledgeable/confident/trustworthy will also be rated

as more credible. Generally, our experience for each of these characteristics dictates:

Likability can be generated in any number of ways, and for most experienced expert witnesses that translates into being more relaxed, smiling, professional, and conversational in tone (when appropriate) – more at ease in their own skin. More time on the stand helps to remove the jitters, and usually works to make the experienced expert witness more likable.

Knowledge is broken down further by the authors into the components of competence, expertise, credentials, and experience. Although being credentialed from a noted school is an instant peripheral cue, our mock jurors routinely tell us that experience is weighted more heavily than a long list of degrees – to jurors, if you’ve been in the field and actively doing the work, that is far more important than where you received your training.

Confidence eliminates most of the negative peripheral cues that jurors typically rely on for their perception of truthfulness – hesitancy, face touching, throat clearing, eye blinking, and a lack of eye contact – all of which have been shown to actually be poor indicators of lying, but that are routinely relied on by lay people anyway – are typically at a minimum in the confident witness. It is a fine line between presenting confidently and presenting arrogantly – although you may want your expert witness to be the smartest person in the room, you certainly don’t want them portraying themselves as such to the jury.

Trustworthiness is very difficult for most to characterize, but mock jurors typically say it includes an openness/honesty component as well as a tendency to be unbiased. This would seem to dictate that the best expert witnesses should be respectful of opposing opinions (even when tearing them down), and would also approach the cross-examination with the same openness and candor that they have exhibited on their direct-examination. Although most lawyers say they don’t want their expert *killing them with kindness* it appears that this approach makes them appear to be much more trustworthy to jurors.

Although some very competent expert witnesses fail in projecting one or more of the above characteristics, we have found that often just teaching them about jurors’ expectations in each of these areas can enhance their performance at trial.

Witness Credibility – The Central Factors of the expert’s testimony itself

As the authors detail, the gist of the central route to persuasion is the need to *connect* the expert opinion to the specific facts of the case, allowing jurors to “see” how the opinion mirrors the facts at issue. In addition, when attacking the opposing expert’s methodology, jurors need to see an effective cross-examination on the science in order to recognize flawed evidence.

From the applied side of things, the lawyers we work with seem to believe that if they can just get the jurors to attend to the

evidence they are presenting, jurors will rule in their favor, and the hope is the same with the testimony of expert witnesses – there is a decided expectation that jurors should be able to follow the central route to being persuaded.

Of course, when the jury comes back in favor of the opposition, the lament is often that “they just didn’t get it, they didn’t understand what the evidence showed!” Of course we find that we often have to offer an alternative explanation to the lawyer by pointing out that the failure may have been in the presentation of the evidence, that is, a failure to connect the dots for jurors.

Although the number one complaint we hear from actual jurors when conducting post-trial interviews is the amount of repetition that occurs during trial, we find time and again that it is exactly that repetition that is necessary in order for jurors to piece together the arguments you are making at trial – you not only have to lay out the expert’s analysis of the case facts, but then it is helpful to explain how that analysis maps one-for-one on the arguments that are being made and the themes that are being presented by trial counsel.

The burden here does not rest solely with the expert. We have found that lawyers can *simplify* the experts time on the stand by providing outlines, by directly asking for the nexus in the middle of the examination (“...now how does that relate to this case, to the facts this jury has heard...?”), and by summarizing the main takeaways from the experts’ testimony as it concludes.

We frequently counsel that the expert who can “make the light bulb go off” for the juror is the one who is going to have the most impact on the decisions they make. For complicated expert testimony such as in financial matters or patent matters, jurors need to be taught what is going on as much as they need to be persuaded as to who is in the right, and the expert who can provide the jury with a roadmap will be both appreciated and remembered.

As the authors point out, it is common for both mock and real jurors to say that opposing experts giving diametrically opposed opinions cancel each other out – leading them to have to make up their own mind (the skepticism effect). But when you dig a little deeper into which side the juror is backing and why, you still often hear portions of the expert’s testimony being cited in support of the juror’s position (e.g., “But we heard that in the past, the defendant had never negotiated or agreed to such a high royalty rate”). Saying they “threw out” the experts is one thing, but it is not unusual for people to fail to understand what impact the testimony may have had on them, and what is actually driving their decision-making processes.

Of course, the applied mock jury research format *still* does not come close to the full stimulus presentation that will be experienced by the actual jurors who sit through an entire trial. But to me, the research surrounding central and peripheral processing arguments appear to be validated by the applied field research that is conducted by the jury consulting industry.

Although the experimental rigor is not the same, the proof is there in the decisions jurors make about experts in mock jury situations, and in the reactions we hear about from actual jurors as they explain their opinions of the real experts they heard from at trial.

Dr. John Gilleland is a Vice President with DecisionQuest, working out of the Chicago office, and has been a full-time jury consultant for the past 29 years (jgilleland@decisionquest.com). He has worked with hundreds of witnesses in preparation for both deposition and trial testimony in addition to gathering data on jurors' perceptions of key witnesses during over 900 mock jury research studies.

Elaine Lewis responds:

Is This New? Or Is It Very, Very Old?

Through an investigation of various scientific studies of persuasion, the authors have identified a group of elements shown to influence jury decision making which they believe would be helpful to attorneys and others responsible for preparing expert witnesses to testify at trial.

Although well researched, well written and clearly organized, I believe the results of the research fail to offer something new. An analysis of persuasion that has stood the test of time has been available since about 300 BC when Aristotle, in his book on rhetoric, taught that the three paths through which an audience or jury could be persuaded to accept a speaker’s position were *ethos*, *logos*, and *pathos*. It is generally agreed that *ethos* means credibility. *Logos* is the presentation of a logical argument. *Pathos* is emotional impression.

The authors noted that while much of the persuasion research over the years has been inconsistent, they found two studies that were in agreement in their identification of two paths to persuasion. Those paths were identified as a Central Route, termed “systemic” by some researchers, and a Peripheral Route, called “heuristic” by some. Though the authors seem not to have realized it, the two path models were actually Aristotle’s ideas organized differently.

The Central Route, described as the “substance of a message,” is the same as *logos*. The Peripheral Route, explained as the “peripheral cues that are unrelated to the strength of the message,” combines *ethos* and *pathos*.

When Aristotle described three distinct paths to persuasion, he argued that *ethos*, *logos*, and *pathos* working together would be the far more powerful way of convincing an audience, than the use of any one of the paths without the others. The models relied on by the authors, tested the Central and Peripheral paths as separate routes to persuasion.

The research described in this paper was careful and thorough,

using many different variables to test the effects of the two paths on jury decision-making.

One model examined the Peripheral Route using the variables of *likability*, *knowledge*, *confidence* and *trustworthiness*. The results showed that all were important factors to a jury considering credibility (*ethos*). Another model examining *likability* and *expert knowledge* concluded that “Jurors were more persuaded by likable experts” (*pathos*), and that “Jurors find highly knowledgeable experts more persuasive and less knowledgeable” (*ethos*).

In the study using *confidence* as a variable, the finding was that “Jurors were least persuaded by the unconfident expert” (*ethos*). Medium confidence turned out to be best because high confidence came off as arrogance which is a characteristic off-putting to juries.

The studies of the Central Route (*logos*) found that structuring a clear and compelling message was at the core of successfully using this method of persuasion. Jurors were able to process an argument only if they understood it. If facts and opinions of an expert were difficult to comprehend, jurors found it easier to fall back on peripheral cues in decision-making.

The recommendations by the authors of ways to facilitate juror understanding are already known tools of good oral communication found in most books on public speaking and communication. Simplifying the argument, giving specific examples, using clear language, making use of repetition, and including visual aids in a presentation, are among the many recognized ways of helping an audience or jury better grasp the information being presented.

Based on the outcome of the Peripheral model testing, the insights offered by the authors, in my experience, are known instinctively by litigators. Litigators don't need to be told about the importance of likable, credible experts who appear confident and explain material clearly. When I get a call to help prepare a witness, it's often because the attorney is worried about an expert who is too arrogant, unlikable, not confident, acts like he or she is not telling the truth, doesn't appear knowledgeable, or is exhibiting one of the other behaviors considered negative in the Peripheral model results.

Even though it is likely many litigators are not aware of these studies, and possibly have little familiarity with Aristotle's theories, I believe most recognize the power of the peripheral cues and the need for their expert to be an effective teacher.

The two-path model research was accurate in identifying some of the elements of effective persuasion, but the results confirmed things that have long been recognized.

To me the most important revelation in this paper is something that appears not to have been the focus of the authors. While their emphasis was on identifying the elements of persuasion

that most appealed to juries, the results of the studies also demonstrated that it is nearly impossible to separate the peripheral cues from the basic central argument. Almost as an aside at the end of their paper, the authors comment that though the ideal would be for jurors to process expert testimony through central processing alone, peripheral cues are “an important part of the persuasive process”. They state that attorneys should be “aware of how peripheral cues impact a juror's ability to process information systemically”.

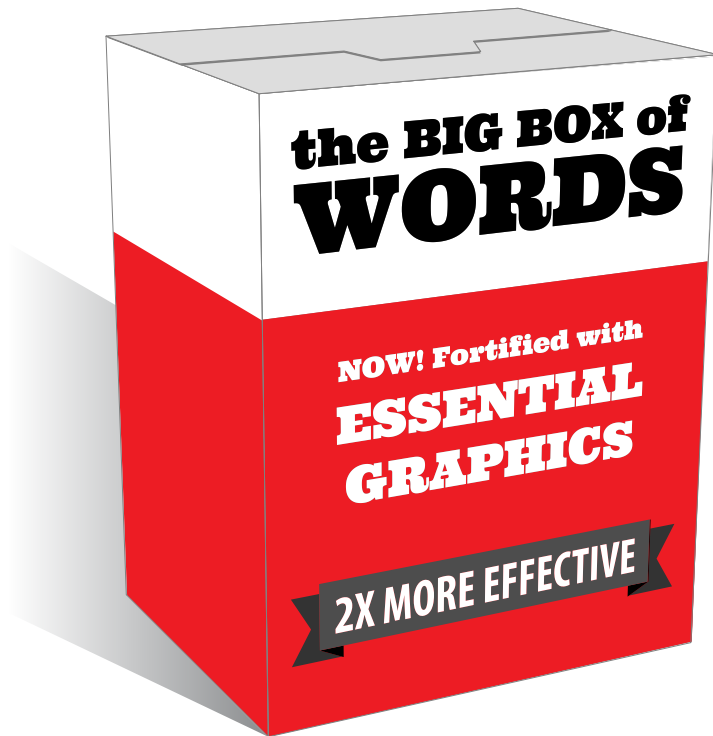
Until our juries are composed of artificial intelligence robots, the central and peripheral paths to persuasion are intertwined. Aristotle got it right.

Elaine Lewis is President of Courtroom Communications LLC and specializes in witness preparation. Prior to her work in the legal field, she taught Public Speaking skills to upper level business executives.

The authors reply:

We appreciate these three responses and the opportunity to reflect on their content. Drs. Cox and Brodsky's thoughtful response brings up issues of the quality of experts' work and the rightful role of persuasion by experts (should experts be thinking about persuasion at all? We targeted this write-up for attorneys and trial consultants, but it is a good question for us to wrestle with). Dr. Gilleland's detailed descriptions of how he uses these research findings in his trial consulting work is interesting and informative. His expansion about these issues in applied research echoes some of the substance of Ms. Lewis's response, particularly that trial consultants likely know the foundation of this research and build on it in their work.

Regarding Ms. Lewis's response, we feel it is important to clarify a couple of points. First, these ideas do indeed stem from Aristotle's ancient writings, but they are not entirely the same and they expand on Aristotle's ideas by specifying empirically the conditions under which people are likely to be persuaded by one route or the other. It wasn't until just a couple of decades ago that science really clarified how and when these routes to persuasion worked - there had been confusion for millennia prior to these empirical findings. It is incorrect to say that the two routes of persuasion are inextricably linked. We now know from the science that they are clearly separable: when there is no motivation and/or ability, persuasion via the central route will not occur. The purpose of science is to advance us beyond intuition - to test relations empirically rather than relying on common sense, as we know from several empirical studies that common sense is often wrong.



DOUBLE COMPREHENSION

by adding graphics
to your words

GRAPHICS DOUBLE COMPREHENSION

BY JASON BARNES

Incorporate graphics to strengthen the power of your presentation. It's a maxim supported by our personal learning experiences, our observations of others, and by numerous scientific examinations. But, why does it work, and how strong is the effect in the courtroom? The answer to these questions can be found within the very structure of your brain.

You Remember What You See Far More Than You Remember What You Hear

As humans, we experience our world through our eyes. Your retinas contain 70% of all sensory receptors in your body and are actually outgrowths of your brain! Your brain's visual system occupies up to 40% of your cerebral cortex. For comparison, touch takes up about 8% of the cerebral cortex and hearing accounts for only 3%.^{[1][2]}

We are visual creatures – but our ability to use language is a defining, though not quite exclusive, human characteristic. Even so, our linguistic abilities arise from much smaller areas of the brain found almost entirely within one hemisphere – Broca's area and Wernicke's area.^{[3][4]}

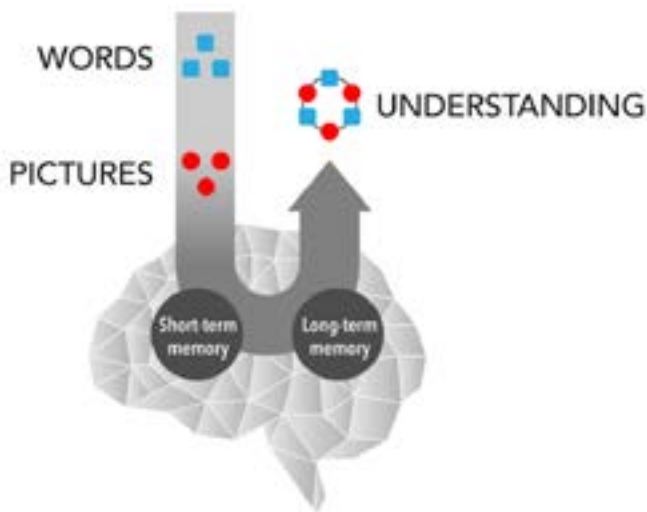
This visual dominance explains why our ability to remember visuals is far greater than our ability to remember words. Studies consistently demonstrate that people shown over 2,000 images for a few seconds each can remember having seen them or not with an accuracy exceeding 90%, even after 3 days.^[5] People's ability to accurately recall what was said to them is about 50% immediately following a presentation and falls to about 25% after only 1 day.^[6] Worse, research suggests that about half of what you remember is actually incorrect.^[7]

Words and Pictures Can Interact in Working Memory to Form More Meaningful Connections

So, now we know that jurors can remember less than half of what they hear and almost all of what they see. But simply remembering the evidence is not enough. We need jurors who understand the evidence, who can fit that understanding into their larger world-view. And we need jurors who can work as our advocates during deliberations, using their understanding of the evidence to craft new arguments as they work with other jurors to reach a verdict.

Neuroscientists describe the visual and verbal systems of our brain using a “dual coding model” in which each channel operates independently to process information. Both channels have limited bandwidth and can be overwhelmed by too much stimulation – too many words or images coming too quickly – but they do not interfere with one another.^[8] Instead, raw data from both the visual and verbal channels are buffered in working memory where information and meaning are extracted, tested against information we already know, and if deemed important enough, stored in long-term memory for later recall.

Importantly, while information is in working memory, the visual and verbal channels can interact with one another. When the information from each channel “fits together,” it forms something stronger and more meaningful. Like cement mixing with sand and gravel to form concrete, the interacting information is changed into a self-reinforcing amalgam, an idea not only remembered but understood. This interlocked understanding linking the words and the picture together can then be stored in long term memory. When we think of the words, we see the images. When we think of the image, we also hear the words. The interlinking is what gives meaning to each.

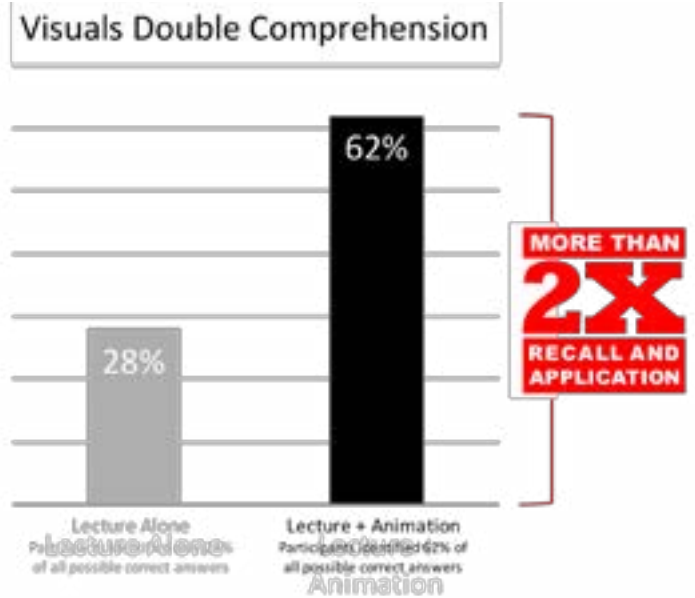


Combining Visuals with Words More than Doubles Comprehension

Some remarkable research from Dr. Richard Mayer^[9] at the University of California shines a light on putting pictures to our words, what he calls the “multimedia principle.” Not only does his work validate what we know about dual coding with the visual and verbal channels, he has measured the improvement in learning – not just memory, but understanding of the subject matter.

Briefly, he gave one group of subjects a lecture on how a tire pump works while another group heard the same lecture synchronized with an animation of the tire pump in action. Dr. Mayer wanted to know which group understood the material better. To get at this information, he posed questions de-

signed to test recall and application of the facts. For example, one question asked participants how to improve the pump’s efficiency and another question asked them to troubleshoot a malfunctioning pump. These ideas were not covered in the presentation. To answer, subjects would have to demonstrate an understanding of how and why the pump works. The results were dramatic.



Subjects were scored based on whether their answers to the problem solving scenarios were considered plausible or acceptable by researchers conducting the study. They were given four questions, with 2.5 minutes to come up with as many solutions for each question, subsequently. Each correct (acceptable) answer was worth one point; questions 1,2 and 3 had a maximum of four attainable points, question 4 with a maximum of two.

The lesson for trial advocates is clear. If we want jurors to not only remember our evidence and our arguments, but to also understand them, we must use visuals to strengthen our words. If you are explaining a business deal, draw a flow-chart. If you are explaining technology, narrate an animation. If you are telling a story, use a timeline, photos of the characters, maps, etc. to illustrate each scene.

We must be careful to remember that the jury is always looking; their visual system is a 24-hour news channel that can’t be turned off. We should, as much as possible, control what they see. There is a time for demonstratives and visual evidence, certainly. But, there is also a time for having them look at the squirm of a witness, the grim expression of the defendant, the eyes of the attorney delivering a passionate closing argument. We may even want to visually distract when things are not going so well. Everything they see is visual evidence – make certain it works to your benefit. ©

Jason Barnes has been a **Trial Consultant**, designing demonstrative evidence and presentations, since 1990. With over 25 years of experience, he has prepared presentations and provided on-site support for hundreds of cases. He writes regularly for **The Jury Expert** where he is also the **Associate Editor**.

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Making It Moral: How Morality Can Harden Attitudes and Make Them More Influential

BY ANDREW LUTTRELL

Don't miss the responses at the end of the article:

- [Sonia Chopra](#)
- [Charlotta A. Morris](#)

People can have an opinion about nearly anything. In social psychology, these are “attitudes”. An attitude is a person’s positive or negative evaluation of something, and that “something” can be anything from a person to an object to an abstract idea. For example, someone who says that she dislikes lawyers has a *negative attitude* toward lawyers. Someone who supports law enforcement has a *positive attitude* toward law enforcement.

These attitudes can be important in a variety of circumstances because they can be used to communicate something about the person who holds the attitude (Katz, 1960), and they can be used to predict a person’s behavior (see Glasman & Alabracin, 2006). As an example of the latter point, the person with a positive attitude toward law enforcement would be more likely to vote in favor law enforcement systems than a person with a negative attitude.

Although attitudes can be informative in a variety of ways, sometimes just knowing a person’s attitude is not enough. There are many other qualities of people’s attitudes that shed new light on how likely they are to act on their opinions and change them when faced with new information. These qualities are known as indicators of “attitude strength”, and they include things like how certain a person is of the attitude, how important a person thinks the attitude is, how conflicted a person feels about the topic, et cetera. (Petty & Krosnick, 1995; Visser, Bizer, & Krosnick, 2006).

The Consequences of a “Moral” Opinion

One quality of people’s attitudes that has important consequences is whether the attitude has a *moral basis*. This can depend on the topic, and it can depend on the person. One person might think his attitude toward fast food does *not* have a moral basis, but he might think that his attitude toward the death penalty *does* have a moral basis. Another person, though, might think her attitude toward the death penalty is *not* based in morality.

Plenty of research has now converged on a key insight: the more a person thinks that his or her attitude has a moral basis, the more that person's behavior aligns with that attitude, and the less likely it is to change in the face of pressure (Skitka, 2010).

First, moral attitude bases are associated with more attitude-consistent behavior. In one study, for example, Skitka and Bauman (2008) found that the more people thought their choice for president reflected their moral beliefs, the more likely they were to vote in the 2000 U.S. presidential election. Another study found that the more people think that their position on a specific issue is a matter of morality, the more they say they will vote in upcoming elections (Morgan, Skitka, & Wisneski, 2010).

Second, consider the finding that people are less likely to revise their opinion if they see it as a matter of morality. People are constantly faced with pressures to change their opinions. They read new information, have surprisingly good and bad experiences, and learn the opinions of friends and family. All of these things could lead them to update their opinions. In one study, Aramovich, Lytle, and Skitka (2012) created social pressures to get people to rethink their opinion of torture. Their results showed that the more participants thought that their initial opinions were a matter of morality, the less likely they were to change in the face of group pressure.

The Mere Perception of Morality

The previous research clearly shows that the more people say they have a moral basis for their attitude, the more their behavior aligns with that attitude, and the less likely they are to change it. This research relies on people simply indicating how much their opinion has a moral basis, which means it is not yet clear whether these effects happen because people *truly* have moral reasons for their attitude or because people simply *think* they have moral reasons.

There has been plenty of research recently suggesting that the *perceived* qualities of one's attitude matter just as much as—if not more than—the actual qualities. For example, studies have long established that people's behavior aligns with their attitudes more if they have taken considerable time to think about and form that attitude (e.g., Petty, Haugtvedt, & Smith, 1995). New evidence, however, shows that when people merely *believe* that they have thought carefully about a topic—whether that is true or not—that is all it can take to increase the correspondence between the attitude and subsequent behavior (Barden & Petty, 2008).

Because perception plays such a strong role for other qualities of people's opinions, it seems that the same may be true for morality. That is, regardless of whether a person's attitude is actually grounded in their core moral beliefs and convictions, perhaps merely perceiving a link between an attitude and morality can be enough to make the attitude stronger.

My colleagues and I recently tested this possibility in a series of experiments (Luttrell, Petty, Briñol, & Wagner, 2016). In each experiment, we employed a procedure that would lead some people to perceive a moral basis to a particular opinion of theirs. Half of the participants in a study would be assigned to a condition in which they were led to perceive a moral attitude basis, and the other half would be assigned to a condition in which they were led to perceive a non-moral (but equally important) attitude basis. Importantly, participants were assigned to these conditions at random, which means that people had an equal chance of being in either condition, regardless of whether they *truly* had a moral basis for their attitude. In other words, these procedures ensured that any differences between conditions can be attributed only to differences in *perceived* moral bases and not actual moral bases.

Experiment 1: Acting on Attitudes

Recall that one of the key findings in past work on moral attitude bases is that people are more likely to behave in line with an opinion if that opinion is founded upon moral beliefs and convictions. In this study, we aimed to replicate that effect by leading some people to perceive a moral basis to their attitude, whether or not there was already such a basis in place.

We chose to assess people's attitudes toward a fabricated university policy. The participants included 138 undergraduate students who were told the study was about a proposed policy at their school that would require seniors to pass a set of comprehensive exams in order to graduate. Everyone began the study by reading a written description of this proposed policy and writing down the thoughts they had pertaining to it.

In this study, we used two slightly different procedures to get people thinking about how their attitudes toward this policy had a moral (vs. a non-moral) basis. Each method was based on the thoughts that people wrote down in response to the policy description. First, we asked some of the participants to reflect on their thoughts. Half of these people were asked to think about how their thoughts related to their core moral beliefs, and the other half of these people were asked to think about how their thoughts related to the important value of equality (an important basis that is not necessarily "moral"). Second, however, we presented other participants with feedback about their thoughts. We told them that a computer program was able to analyze patterns of text and that they could see the results of the analysis. For half of these people, the results of the program said that their thoughts clearly reflected moral concerns, and for the other half of these people, the program said that their thoughts clearly reflected the important value of tradition. In reality, the feedback people received was decided before they began the study. At this point, then, half of the participants had come to see their attitudes as morally based and half had come to see their attitudes as based on values other than morality (even though the *way* in which they came to these perceptions differed).

Following this procedure, everyone indicated their attitudes toward the policy. Importantly, the attitudes themselves did not depend on the experimental condition. The participants also indicated how willing they would be to engage in pro-policy behaviors. These questions asked people how willing they would be to sign a petition in favor of the policy, to put their name on a list of students who favor the policy, and to vote favorably on the exam policy.

The critical question in this study was how well-aligned people's behavioral intentions were with their attitudes toward the policy. Not surprisingly, these two variables were correlated overall. The more people said they were in favor of the policy, the more they said they would engage in pro-policy behaviors. Most importantly, though, this correlation was stronger among the people who were led to see their attitudes as moral. In other words, the participants in the moral condition showed more correspondence between their opinion of the issue and their willingness to take actions in line with that opinion, compared to participants in the non-moral condition. It also did not matter whether people came to see their attitude as moral because they directly reflected on its moral basis versus simply being told that their thoughts reflected moral concerns more than other concerns.

In sum, this study provided an important insight—that simply *perceiving* that one's attitude has a moral basis makes people more likely to behave in line with that attitude. It is worth reiterating that people's attitudes did not differ by experimental condition. That is, perceiving a moral basis does not automatically change the opinion itself; people who came to see their thoughts as moral supported the policy to the same degree as people who came to see their thoughts as founded upon non-moral bases, on average. Rather, seeing one's attitude as moral makes that attitude a stronger predictor of subsequent behavior.

Experiment 2: Resisting Persuasion

The previous study established that mere perception of a moral basis can make attitudes stronger in that they correspond more with behavioral intentions. In the second experiment, we tested whether the power of perceived moral bases could apply to another outcome: resistance to persuasion. We also changed the topic in this experiment to see whether these effects extend beyond a fabricated university issue. Instead, we examined people's attitudes toward recycling.

The participants included 73 undergraduate students, and as in the previous experiment, everyone began by reading a brief description of recycling programs, and they listed the thoughts that they had about recycling. In this experiment, we chose to stick with just one way of leading people to view their attitudes as being founded upon moral beliefs. Everyone received the "computer program's analysis" of their thoughts that either suggested that the person's thoughts reflected moral beliefs or reflected practical concerns.

Then they indicated their attitudes toward recycling, which again was not affected by the type of feedback they received. Following this, everyone read a persuasive essay containing arguments *against* recycling. Because all of the participants initially had positive attitudes toward recycling, this essay was a clear counterpoint to their initial opinions.

After reading the essay, everyone indicated their attitudes toward recycling one final time, and the question was: how much did people change their attitudes after reading the new information? The results show that the people who were told that their attitudes had a moral basis ended up changing those attitudes *less* following the message, compared to the people who were told that their attitudes had a practical basis.

Once again, this study showed that simply perceiving one's attitude as being grounded in morality made it less susceptible to change. As in the previous study, perceiving a moral basis did not affect the attitude itself; instead, it made that opinion—whatever it was—better able to withstand the forces of persuasion.

Experiment 3: Clarifying the Persuasion Effect

There was one issue in Experiment 3 that needed to be addressed. It was possible that our anti-recycling message accidentally appealed specifically to practical concerns. Previous research in persuasion has shown that people can be more susceptible to persuasion when the message contains elements that are consistent with qualities of their attitude (e.g., Maio et al., 2014; See, Petty, & Fabrigar, 2008). That is, in the previous experiment, people who were told that their attitudes were based on practical concerns might have been more persuaded by the message just because the message spoke directly to those practical concerns.

Therefore, this experiment used a revised persuasive message that spoke to both practical and moral concerns. In this way, we were able to more strongly test the hypothesis that perceiving a moral basis makes people resist persuasion, even if the message speaks to those moral concerns.

We also used this experiment as an opportunity to address the fact that the prior two studies relied on college students as participants. In this experiment, we recruited 100 participants using Amazon.com's *Mechanical Turk* program (54% male, mean age of 39). The experiment was nearly identical to Experiment 2 except that it used a persuasive message that spoke to moral concerns as well as practical ones.

The results mirrored those of Experiment 2. The people who were told that their attitudes were based on morality changed their attitudes less following the message, compared to the people who were told that their attitudes were based on practical concerns. Thus, even when there is some consistency between one's perceived attitude basis and the persuasive strategy used in a message, perceiving a moral basis still prompts greater re-

sistance to persuasion.

Conclusions and Implications


Three studies established that opinions do not need an actual moral basis in order to guide behavior and resist change. When someone merely *thinks* that he or she has a moral reason for holding a particular opinion, that opinion becomes a stronger predictor of behavior and more difficult to change.

One might be tempted to view these results as evidence for a compelling persuasion strategy, but this would not be warranted given the data. Throughout these studies, when we led people to view their attitudes as having a moral basis, it did not change their attitudes *per se*. For instance, in Experiment 2, one person could come to view his attitude as morally based, and another person could come to view her attitude as non-morally based, but they could nonetheless be equally pro-recycling. Thus, rather than being a method to *change* people's opinions, getting people to see something as moral is a way to get them to commit more strongly to a position they *already* hold.

Similarly, note that we did not necessarily use "moral arguments" or frame an entire issue as moral. Instead, we focused on getting people to view their own attitudes as being based

upon moral beliefs and convictions. Although the former approaches may achieve similar outcomes, it is simply worth reiterating that our experiments speak more directly to what happens when people come to perceive a moral basis for an attitude that they already hold.

These results have several implications for legal contexts, particularly in situations when it is desirable to have someone commit to a position, not waver, and even act in line with that position. On the one hand, it can be useful to distinguish people who are naturally inclined to see the issues of a particular trial as moral or not. As in the previous research, one can simply ask people whether their attitudes toward a particular person, group, or issue are based on their core moral beliefs and convictions. This information can help predict whether they are likely to be swayed by new evidence and act according to those attitudes.

On the other hand, it might be possible to use the findings of these three experiments as strategy. By telling a jury, for example, that their reactions are a reflection of their core moral principles, it could harden their existing beliefs, attitudes, and predispositions, protecting them against subsequent information that comes to light and prompting them to advocate for their position. 

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Sonia Chopra responds:

Understanding jurors' attitudes and attempting to determine when those attitudes are most likely to influence behavior is the bread and butter of what we do as litigation consultants. It makes sense that people who think their beliefs are based on core moral values would be more steadfast in those beliefs. The interesting aspect of this research is that the authors have demonstrated that one need only be told that their opinions are based on moral reasoning to engage in attitude consistent behavior and have those beliefs be resistant to change.

What troubles me in thinking about how to apply this research to our work, is the question of what does it mean to have a "moral" basis for one's opinions? The term "morals" is inherently subjective and arguably some of the variables used in the research could be perceived as having a basis in morality. For example, in Experiment 1 the authors had half the respondents think about how their responses reflected core moral beliefs, and the other half was told to think about how their answers reflected the value of equality. There is an argument to be made that believing in the importance of equality could come from a moral framework. The same could be true when comparing "traditional values" to "moral values," which are the variables used in the second phase of Experiment 1. The current presidential election comes to mind. For many people, support of "traditional values" are based in religious beliefs about things like abortion, or same sex marriage, which are arguably morality based opinions.

In the litigation arena I see the strongest application of the research to death penalty work. Beliefs for and against capital punishment are frequently based on core moral frameworks such as "an eye for an eye," "a life for a life" or "thou shall not kill," "only God can take a life." Those who have worked on capital cases know that jurors who espouse morality based sentiments to explain their death penalty views are the most steadfast in their beliefs and unlikely to be swayed. Litigators' arguments about why the death penalty should or should not be given often contain pleas to jurors' moral judgements about right and wrong, good and evil, retribution and justice. This research suggests that perhaps telling jurors that a life sentence is a moral decision, or that a death sentence is the moral choice, might influence voting behavior of those who already support the sentence the attorney is advocating for.

I like the author's suggestion about asking jurors whether or not the opinions they express in jury selection are based on core moral beliefs. I find that judges are more open to granting challenges for cause when the attorney is able to establish that the juror's opinions are strong, long-held beliefs that are resistant to change. Some examples of morality based attitudes that are relevant to civil litigation are the belief that "accidents are the result of fate or God's will," or that it is morally wrong to sue for money damages over the loss of love, companionship, and affection of a family member. Morality based thinking could also factor into jurors' thinking about punitive damages.

In California, the punitive damages jury instruction references "despicable conduct," which is "conduct that is so vile, base or contemptible that it would be looked down on and despised by reasonable people." The content of the instruction itself calls for a judgement on the morality of the defendant's actions. Moral appeals to award damages to jurors who already favor punitive damages might cement their willingness to do so.

An important takeaway from this series of studies is that being told that one's position was based on morality or on something else did not change peoples' opinions. Perceptions that one's beliefs have a moral component only makes those beliefs more resistant to change.

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Charlotte A. Morris responds:

IF YOU ONLY SKIMMED THE RESEARCH ARTICLE, YOU MUST READ THIS NOW

Boy oh boy! I've said before my favorite empirical research is the kind that affirms the litigation strategies and practices I've been recommending for decades now. And this one nails it!

Not only does the author deserve a lot of credit for conducting solid social science research on the issues of attitude formation, intention, behavior and persuasion, but he also writes it just as plainly as it can be written and now all I have to do is say how I plan to incorporate the ideas in the work I do for attorneys and their clients.

First, let's revisit the important findings and conclusions of the research:

- A) Attitudes that have a moral basis are stronger and more resistant to change than attitudes that do not.
- B) Even if people don't know their attitudes have a moral basis, we can tell them that they do and it still works (i.e., the attitudes are stronger and more resistant to change).

And here's my favorite because it reminds us that there is no EASY BUTTON for litigation:

- C) It is not a matter of simply labeling your OWN arguments as moral so that people will believe them strongly, and be resistant to opposing counsels' efforts to change those beliefs. This only works on attitudes that people brought with them when they walked in the door^[1].

So how does this work in our cases?

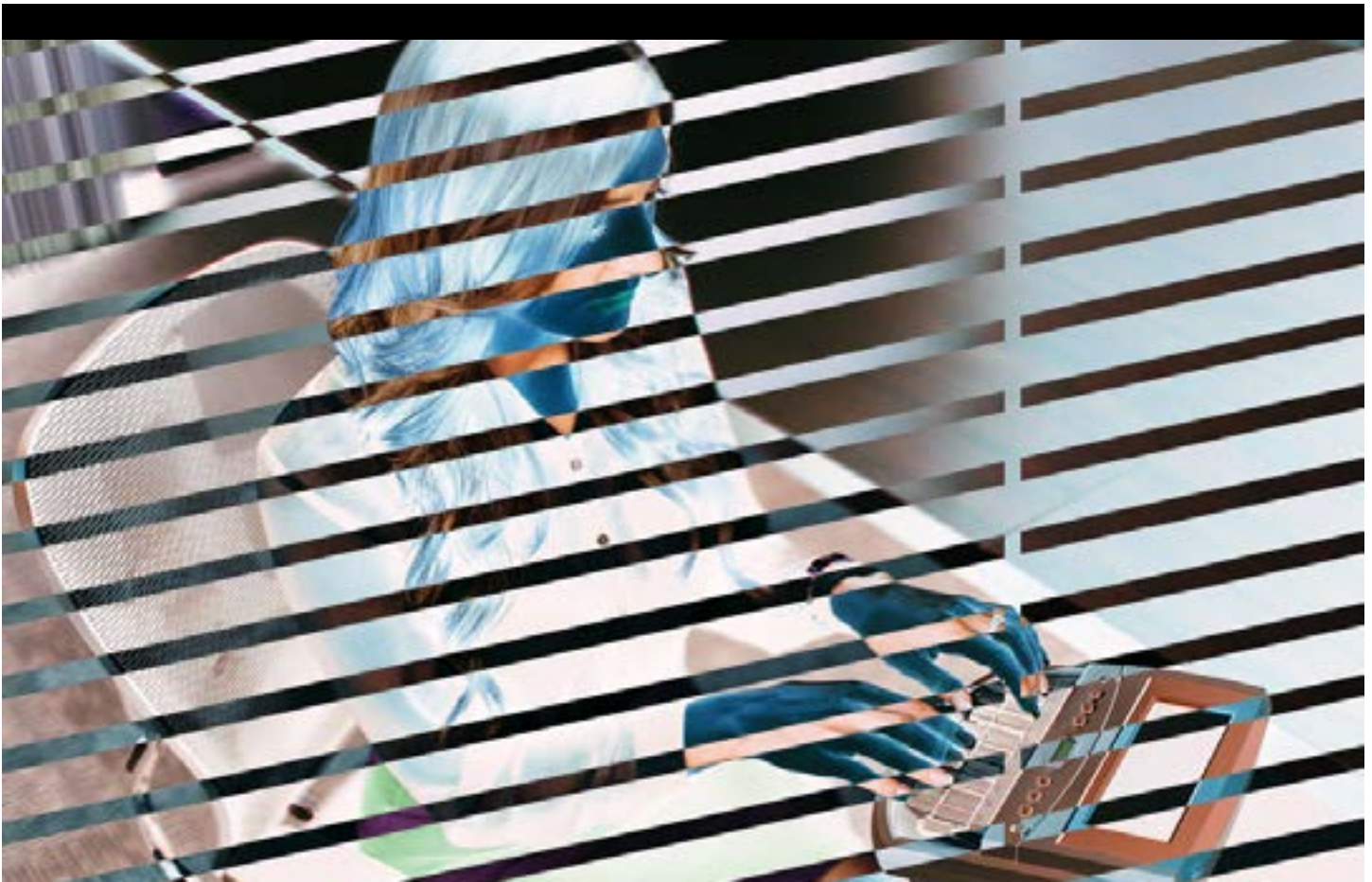
1. Use pre-trial research (or hire consultants who have already done a ton of them on cases like yours) to figure out which case facts or themes are closely linked to attitudes and beliefs which have a moral basis.
2. Develop the themes, arguments, evidence and testimony that will be linked to those experiences, attitudes and beliefs that will be pre-existing in your jury pool. Do this during discovery by running pre-trial research early in the case.
3. In voir dire, ask prospective jurors about those experiences, attitudes and beliefs and in follow-up questions find a way to suggest their pre-existing beliefs have a moral component (e.g., It sounds like you've thought a lot about your idea on this topic and feel pretty strongly; am I hearing you right that it may even be an issue of moral importance to you?).
4. Deploy your case themes, opening statement, direct and cross-examinations, demonstrative exhibits and closing

arguments which are consistent with these moral beliefs so that jurors may more readily accept your theory of the case and resist attempts by the opposition to persuade them of anything else.

Now, go back and read the whole article (if you didn't) because the experiments he conducted are well-crafted, and the results are fascinating. He ran three different trials to make sure they were getting it right (including one with folks who weren't college sophomores) and the bibliography references the work of many other accomplished and credible social scientists who have studied attitude formation and persuasion for decades.

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[1] See Also Morris articles on [voir dire](#).



The Hidden Lives of Court Reporters

BY CLAIRE E. MOORE AND STANLEY L. BRODSKY, PH.D. AND DAVID SAMS

Popular television series have portrayed the courtroom as a theatrical setting in which attorneys feud, witnesses make compelling confessions on stand, and judges bang their gavel to restore order. While these actions are part of some trials, there remains a silent, but important character in the courtroom: the court reporter. Court reporters rarely have a major impact in television dramas, and the camera will pan past this person from the judge to the witness, then possibly to the jury, treating this character with the indifference of furniture.

Court reporters diligently record all that is spoken, preserving every word uttered, yelled, or whispered. Court reporters are depicted in the media as silent actors who remain emotionless and distant from the tense environment. Many individuals involved with the legal system see a somewhat different picture of the roles of court reporters.

We reviewed the scant literature and in a preliminary inquiry interviewed two court reporters about their personal experiences, as well as talked with attorneys who have worked alongside court reporters. The court reporters were asked open-ended questions about personal experiences regarding their work

and attitudes towards their role. Similarly, the attorneys were asked about their experiences with working with court reporters, to allow a wide breadth of responses.

Court reporters undergo two years of training before they are licensed and able to practice. They also have their own professional society (National Court Reporter Association^[1]), and a journal that publishes articles on impartiality, technical issues related to court reporting, and employment advice. Court reporters work in settings inside and outside the courtroom. Thus, there is the potential for court reporters to form different kinds of working relationships with attorneys and judges. For example, some court reporters are independently contracted to transcribe depositions, motion hearings, and witness interviews. In these situations, the reporter may be hired for a series of events in the same case or may be retained for a single occurrence. Other court reporters are employed exclusively by the court, work for a specific judge, and only transcribe for criminal trials or only for civil cases. Still other court reporters may work in a specific courthouse, for a number of judges, transcribing for both criminal and civil trials.

In the federal system, each federal court has general responsibility to administer court reporting duties^[2]. More specifically, the Court Reporters Act provides the statutory authority outlining the duties of federal official court reporters (28 U.S.C. § 753). The Court Reporters Act requires that every session of a federal court be recorded verbatim by a court reporter if an electronic sound recording or mechanical recording is not utilized (28 U.S.C. § 753(b)). Many states have similar court reporter acts. For example, the States of Illinois and Washington have both enacted legislation that outlines the duties of court reporters in state level proceedings^[3]. These acts provide a similar statutory framework to the Court Reporters Act guiding the court reporting practice at the state level.

Little is known about court reporters and their emotional involvement with cases. Because court reporters sometimes work closely with one judge, they also may encounter the same attorneys on a regular basis. This is especially true in jurisdictions with a small number of criminal prosecutors, civil trial attorneys, and defense attorneys. As a result of these ongoing engagements, court reporters tend to create allegiances with certain legal decision makers. These allegiances can lead to special treatment of the transcriptions of various courtroom participants. Reciprocity in ongoing relationships between court reporters and lawyers was described by interviewed attorneys. One attorney observed that attorneys frequently ask court reporters for their opinions on juror perceptions as well as their opinions on the likely outcome of the trials.

In one study, twenty reporting firms were contacted via telephone in the Washington Metropolitan Area and approximately 100 court reporters participated. The second survey was nationwide and participants were contacted through the mail. The court reporters admitted to polishing judges' and lawyers' grammatical usage approximately 82% of the time. In contrast, expert witnesses' grammar was usually corrected 36% of the time and lay witnesses' grammar was corrected 18% of the time (Walker, 1990). Court reporters have a tendency to refrain from doctoring the testimony of sworn speakers because it is considered primary evidence (Walker, 1990). The difference between prevalence of the editing of expert witness versus lay witness transcriptions supports this position. Lay witness are usually called to provide first hand knowledge related to some aspect of the case. Expert witnesses are predominantly called for opinion testimony. The National Shorthand Reporters Association (NSRA) suggests that because judges are associated with education and culture, it is unfair to include crude speech. Therefore, court reporters are advised to protect this positive appearance by polishing the language of judges (Budlong, 1983; Walker, 1990).

In addition to polishing transcripts, in the Walker study court reporters admitted to being emotionally affected by certain cases. We were interested in understanding how court reporters perceived their profession, their level of emotional attachment, and their ability to remain impartial when transcribing cases. In this pilot work, we asked 2 court reporters four questions:

1. Are you emotionally affected by some cases?
2. Do you believe this emotional response affects your ability to transcribe cases?
3. What parts of your job are stressful?
4. What do you think is important for researchers to ask court reporters?

The court reporters interviewed by one of the authors (CEM) varied in the settings they worked and the types and number of clients they assisted. One respondent was an official court reporter working for a single judge specializing in criminal cases. She was also an officer in the Court Reporter's state organization. The interview was informal, and the questions were open-ended. The interview took place for approximately two hours.

To assess whether or not the court reporter was affected emotionally by certain cases, she was asked if it was a problem to listen to trials involving victimization. The court reporter replied that it was difficult to listen to cases involving childhood sexual abuse. She stated that it was particularly stressful to watch children testify in front of their abusers. She felt a desire to help the child but recognized her profession did not provide her with a proper outlet to do so.

She said that these types of cases are difficult for many court reporters, especially reporters who have been personally victimized. She stated that cases involving robberies might trigger an emotional response for court reporters who had been involved in similar events. This court reporter also shared with us published research related to vicarious trauma in legal professionals. Her notes in the margins of the article indicated that the portrayal of court reporters as detached conduits of words is inaccurate.

We found indications that the personal relationships of the court reporters outside their professional lives shaped their experience. For example, when probed about what future questions would be helpful to our inquiries, the first court reporter mentioned asking other court reporters about their spouses' occupations. She also provided us with a list of questions that she believed we should ask future court reporters. They were inquiries into whether the person was an official versus freelance court reporter, commute time, amount of time spent in courtroom, estimate of the number of cases reported/transcribed, civil vs. criminal cases, and how many hours of additional work were required outside the office. When we further questioned this reporter on why she believed it was important to ask about the spouse's occupation, she said her husband was a police officer and that it was beneficial that he appreciated the nature of her work, as well as good for their relationship, that both of them understood legal jargon and had an interest in criminal cases.

We interviewed a second court reporter who independently

contracts and transcribes for depositions in civil and criminal cases. She reported that being interested in the details of a case could affect her work. In order to avoid being distracted by the subject matter of the case, she explained that she does not listen for content. If she did, she said she would lose her place while transcribing. When not distracted by the details, she said she could not repeat back what occurred in many of the cases because she was focusing on recording the case. However, she described a divorce proceeding that she transcribed in a small town where everyone knew one another. At one point in this trial, a witness admitted that she had an affair with the defendant and began to cry. During this heightened emotional display in the courtroom, the court reporter paid more attention to the details of the testimony, and lost track of her task while transcribing the statement.

Both of the interviewed court reporters stressed the importance of familial support in coping with the stress in their profession. Each of their spouses supported their work in various ways, which enabled them to better handle the stress. For example, one court reporter's husband often drove her to trials some hours away. She said he drove her so she could complete work from other cases while on route.

When asked about the stresses associated with her profession, this court reporter described a case in which the attorneys requested expedited transcripts. She had asked the attorneys

several times if they were certain that they wanted expedited transcripts because they would cost more. The attorneys assured her that they did. In order to accommodate them, the court reporter missed spending time with her family over the Thanksgiving holiday to prepare these transcripts expeditiously. However, the attorneys later decided that they no longer needed expedited transcripts. Adding to the frustration of the wasted effort, the court reporter did not receive the expected compensation for her efforts when the attorneys no longer needed the product. She explained that this was frustrating but part of the job.

Throughout these two interviews, the interviewed court reporters said that they were at times emotionally affected by cases. However, they were enthusiastic about their work and confident in their ability to produce verbatim transcripts. In these interviews, although court reporters are emotionally affected by cases and their relationships with other legal decision makers, they retain a strong commitment to their field and maintaining impartiality. Future research might benefit court reporters by allowing them to implement practices in their training that would help them cope with emotional cases. Furthermore, additional research would also allow attorneys and the judiciary to understand better the stresses of many legal proceedings experienced by these important parties. Court reporters may be often overlooked but substantial research may shed new light on the inner thoughts and emotions of the court reporter. ●

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BIAS

MORE TECHNIQUES FOR UNCOVERING JUROR BIAS BEFORE IT'S TOO LATE

BY MYKOL C. HAMILTON AND KATE ZEPHYRHAWKE

The Sixth Amendment guarantees all Americans the right to an impartial jury. Yet typical methods for selecting jurors fall short of ensuring that constitutional right: the impartial jury remains an ideal rather than a reality.

While strikes for cause eliminate prospective jurors who express overt bias, the biggest problem—the real problem—is hidden bias. By design, human beings make rapid judgments about other people upon first sight; among them are trustworthiness and likeability. These judgments quickly transform into “gut feelings”, which lead people to unconsciously filter new information in a way that confirms their original, and often erroneous, impression. These processes come into play regardless of good intentions to be fair and open-minded. In voir dire, asking prospective jurors if they can be impartial, if they can ignore pretrial publicity and put aside their opinions about a case and their feelings about a defendant, is at best futile. At worst, it drives bias underground. Our goal is to find better ways to identify hidden bias *before* someone takes a seat in the jury box.

To this end, we have performed several studies to reveal underlying attitudes in prospective jurors by examining the effect of

question wording in change of venue surveys and voir dire. (If you are not familiar with our previous research and would like to learn about other questioning techniques we have examined, short summaries of a few of our studies appear in Appendix 1. In addition, you can read our *TJE* articles on [prehabilitation](#) and [question wording](#).

Our most recent experiment involves data from nine change of venue surveys performed by the first author over the last decade. Although these were all high publicity criminal cases, due to the nature of the wording and question variables, the lessons learned will surely apply equally well to civil cases.

The Study

In criminal cases, the single most important bias issue, the one around which all others orbit, is whether a prospective juror or survey respondent believes a defendant is guilty. In a civil case, the central bias question is whether a person favors one side over the other. Many voir dire and survey questions *indirectly* test the focal point of bias: “Do you think big corporations are out of control in this country?” “Are there too many trivial

lawsuits these days?” “What evidence have you heard about this case?”

But of course there are direct ways to ask fundamental bias questions as well. In a change of venue survey for a criminal case, for example, the wording of the direct question has traditionally resembled the wording suggested in our ASTC Practice guidelines: “Based on what you have read or heard, do you think [name] is definitely not guilty, probably not guilty, probably guilty, or definitely guilty?”

After performing several change of venue surveys in criminal cases, the first author suspected that the traditionally worded guilt/innocence question led many people to automatically give the culturally expected answer—that a person is innocent until proven guilty beyond a reasonable doubt—rather than taking some time to reflect on their true feelings about the defendant’s guilt or innocence.

What led to this suspicion? First, of those who did not say they thought the defendant was probably or definitely guilty, virtually no one chose innocent as their answer. Instead, many volunteered a third option, the legally appropriate but perhaps disingenuous, “innocent until proven guilty.” Indeed, a large number of those respondents disclosed guilty bias in their responses to later survey items. For example, they affirmed statements such as *he confessed*, *the community thinks he’s guilty*, *he will be convicted*, *the police found the murder weapon in his apartment*, and so on.

Those observations led to my supplementing the traditional guilt/innocence question with a “water cooler” version, one that though it’s more casual, the less official tone might reduce the likelihood of knee-jerk answers. My variation of the water cooler question was: “If you had to say you lean one way or the other right now about the [ROTATE] guilt or innocence of _____, which way would you lean?”

In subsequent surveys I saw that whatever percentage had answered Guilty in response to the Traditional guilt/innocence question, another ten or fifteen percent answered guilty when the Lean question came up a little later.

The current experiment was a formal test of the question, “Across nine change of venue surveys, individually and collectively, does the water cooler/lean question tap into additional Guilty bias above and beyond that uncovered by the traditional guilty bias question?”

We tested an additional possibility with the most recent survey of the nine (performed in April and May of 2016). Callers asked roughly half the respondents the Lean question only, while the other half were asked both versions as usual—that is, they answered the Traditional question, then those who did not commit to either Innocent or Guilty were asked the Lean question. We wondered whether skipping the Traditional question and going straight to the more casual Lean question would

result in just as many admissions of guilty bias as would asking the two questions sequentially. If that turned out to be true, simply asking the Lean question in surveys and voir dire could uncover a great deal of guilty bias rather efficiently. (Although it might still be necessary to retain both questions in COV surveys to adhere to traditional guidelines).

Method

From 2006 through 2016, in cooperation with polling companies, the first author conducted nine landline and cell phone change of venue surveys concerning high pretrial publicity murder cases. Each survey had a target of 400 respondents, for margins of error under 5%. In two counties with small populations we had to settle for substantially smaller numbers.

After a series of screening and familiarity-with-the-crime questions came the traditional Guilty Bias question. For those who answered either Guilty or Innocent, an open-ended “why” question followed. The Lean question was asked of respondents who had not committed to innocent or guilty (except, as mentioned above, for a subset of respondents in the most recent survey).

Results

For each case separately as well as for the nine cases together, the Lean question resulted in a statistically significant increase in Guilty opinions. The increases ranged from about 9% to 19%, for an average increase of about 14%. Case by case and overall results appear in Figure 1. (See Table 1 in Appendix for data and statistical tests.)

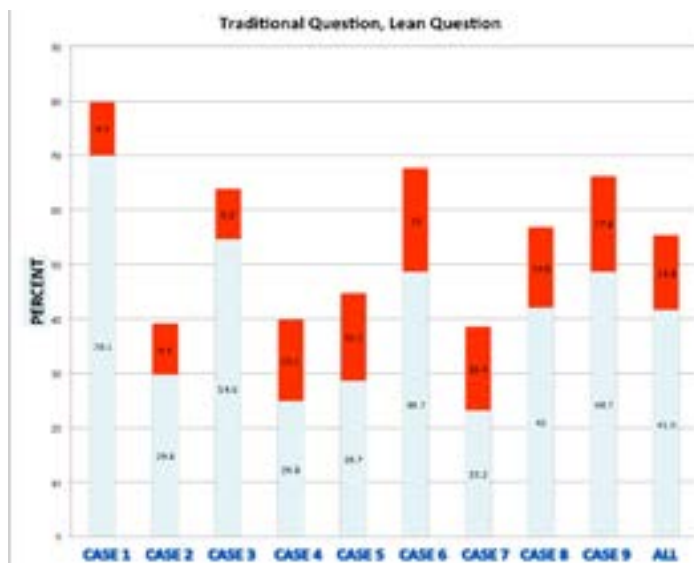


Figure 1. Percent increase in admissions of Guilty opinion from traditional Guilty question to Lean Guilty question.

Note: All increases are statistically significant.

The additional variable we tested in Case 9—to determine

whether the Lean question alone would yield a similarly high rate of Guilty Bias compared with the Traditional question along with the Lean question—resulted in an affirmative finding. Of the 139 respondents who answered only the Lean question, 67.6% (94) said they believed the defendant was guilty. As can be seen in Figure 1, for those answering both questions, the cumulative rate was nearly identical to the rate for the Lean question alone (66.4%; 79/119).

Discussion

What does an increase in the percentage of people admitting guilty bias mean in practical terms? Translating numbers into words for a few of the cases makes the significance clear:

- 29% to 45% – from *over a quarter* to *almost half* (Case 5)
- 49% to 68% – from *about half* to *over two thirds* (Case 6)
- 42% to 57% – from *less than half* to *more than half* (Case 7)

Increases of these magnitudes in COV surveys could make the difference between a change of venue for your client being denied or granted. Furthermore, using the Lean question in jury questionnaires and voir dire — though not directly tested here — is also likely to reveal prospective jurors with a guilty bias, leading to dismissals for cause.

Asking biased jurors whether they can be impartial despite their opinions and gut feelings is not merely pointless, it puts your client in jeopardy. Revealing hidden bias in prospective jurors *before* seating them on a jury will help ensure your client's right to a fair trial and strengthen the integrity of our justice system.

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Appendix 1

Background concerning our previous research:

The theme that unites findings from many of our studies is a voir dire technique we call "prehabilitation," or the attempt to rehabilitate prospective jurors because they may *potentially* be biased. Research shows that plain old rehabilitation does not work well (e.g., Dexter, Cutler, & Moran, 1992; Moran & Cutler, 1991), and prehabilitation is worse. Not only does prehabilitation fail to remedy bias, but it drives bias underground. Judges prehabilitate when they introduce voir dire by drilling into prospective jurors their duty to be fair and objective, as well as challenging their abilities: "You *must* listen only to evidence presented in court." "We want to know whether you're *capable of* presuming innocence." "It will be your *job as a juror* to set aside any preconceived notions." "We're here to see if you *can follow the law*." The attorneys and/or judge then continue with a series of leading, prehabilitative questions in the same vein—*can you, are you capable of, will you be able to ... fulfill your duties, do what the law requires, meet your responsibilities?*

In response, prospective jurors minimize or deny their bias. It's no surprise that they avoid responses like *no I can't be fair, I refuse to follow the law, I'm not open-minded...* Prehabilitation thus defeats the central purpose of voir dire, which is to seat a fair jury by striking biased prospective jurors.

Descriptions of four previous studies:

1. Students read about the death of Trayvon Martin, which had happened just the previous month (Hamilton & Henize, 2013). Half imagined talking to a group of friends about the case (a variation of the "water-cooler approach"); half imagined they were prospective jurors and read a judge's prehabilitative voir dire introduction.

Those in the friends/water cooler condition, as compared with those in the prehabilitative judge introduction condition, leaned more strongly toward George Zimmerman's having committed murder, were more certain that the defendant would not receive a fair trial, and were more certain that it would be difficult to presume Zimmerman's innocence.

2. We found that prehabilitation in voir dire introductions by

judges is ubiquitous. In ten cases across the U.S. and one in Canada, every judge used prehabilitative techniques for every one of the 604 prospective jurors (Hamilton et al., 2014 *TJE paper on ubiquity of a prehabilitation*)

3. Hamilton & Zephyrhawke (2015 TJE paper, question wording) found that willingness to admit difficulty with the presumption of innocence or with putting aside pretrial information is strongly affected by question wording in COV surveys.

For example, more bias was uncovered with “If you ... had to decide whether _____ is guilty, you *might have some trouble* putting aside opinions...” than with “If you ... had to decide whether _____ is guilty,... you *could* put aside opinions...” Also, asking people how difficult it might be to “assume he is *not guilty*” rather than using the legalistic phrase “assume he is *innocent until proven guilty*” increased admissions bias.

4. People are less likely to admit guilty bias in voir dire than in COV surveys, when heavy prehabilitation occurs in a judge’s introduction and in questioning (Hamilton, Augustus, and Melloan, 2011). In one of the murder cases reported in the body of the current paper, the judge declined to change the venue. Therefore, a comparison could be made of bias admissions by survey respondents versus prospective jurors. An equally high 91% of both groups were familiar with the case, yet six times more survey respondents (42%) than prospective jurors (7%) admitted guilty bias.

Appendix 2

Table 1. Increases in admissions of Guilty opinion from traditional Guilty question to Lean Guilty question, with significance information.

Case #	Traditional Guilty question % Guilty Answers to (# of Guilty answers/N*)	Lean Guilty question % increase in Guilty answers (# of Lean Guilty answers/N)	Total Total % Guilty answers (total # Guilty answers/N)	Significance Chi square statistic (1df); probability X2 p	
1	70.1% (281/401)	9.7% (39/401)	79.8% 320/401	9.52	= .002
2	29.8% (90/302)	9.3% 28	39.1% (118/302)	5.35	= .02
3	54.6% (216/396)	9.3% 37	63.9% (253/396)	6.78	= .009
4	24.8% (67/270)	15.1% 41	40.0% (108/270)	13.53	= .0002
5	28.7% (114/397)	16.1% 64	44.8% (178/397)	21.5	< .00001
6	48.7% (194/398)	19.0% 76	67.8% (270/398)	29.07	< .00001
7	23.2% (92/395)	15.4% 61	38.7% (153/395)	21.3	< .00001
8	42.0% (168/400)	14.8% 59	56.8% (227/400)	16.82	< .00001
9	48.7% (58/119)	17.6% 21	66.4% (79/119)	6.88	= .009
All	41.6% (1280/3078)	13.8% 426	55.4% (1706/3078)	117.47	< .00001

*N = total number of respondents minus number who declined to answer the Guilty question.