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Ring Out 2013 (Just a Bit Early)

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NOTE FROM THE EDITOR

Ringling Out 2013 (Just a Bit Early)

WELCOME TO THE FIRST ISSUE of our new quarterly publication schedule and, our last issue for 2013. In the coming year, we will publish in February (Winter), May (Spring), August (Summer), and November (Fall). This schedule allows our authors (and editors) to experience the holidays without the intrusion of writing, editing, and other responsibilities for meeting our publication calendar.

This year has been a challenging one for *The Jury Expert* as an apparent increase in work (which is a good thing) has left our publication calendar in almost constant flux (this is not so much a good thing). We are grateful for the increase in work for both trial consultants and trial attorneys and grateful to our authors for alerting us as soon as possible to conflicts in work and writing that make meeting our deadlines impossible. Our Editors are learning to breathe deeply when these messages come in and tap a few other writers on the shoulder. Our connections with ASTC-member trial consultants and the strong connection we enjoy with the academic community have each helped us continue to bring you fresh and original contributions.

This issue contains articles on wide-ranging topics with immediate relevance to your day-to-day litigation practice. A Defense response to the Reptile Theory in wide use by the Plaintiff bar; two different articles on truthiness—one focused on visual evidence and the other on the myriad extra-evidentiary evidence that can distract juror focus from the actual facts in evidence; and an article on addressing negative pretrial publicity. We also have an article on how the speed with which you makes decisions leads to presumptions about your character and ethics; another on how what we think we know about our own politics may simply be inaccurate, and a book review on *Social Media as Evidence*. We also have a new Favorite Thing which is one with which you are likely all familiar.

As we close out 2013 (a bit early), we invite you to let us know what you'd like to read about in our pages. Just [send me an email](#). While we are always on the lookout for interesting ideas for content, we also like hearing from readers as to topical areas of interest. Enjoy this issue.

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



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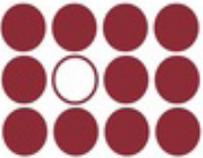
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Image by Pamela Miller of [Persuasion Strategies](#).

Taming the Reptile: A Defendant's Response to the Plaintiff's Revolution

by Ken Broda-Bahm, PH.D.

BEFORE A RECENT PRESENTATION, I was chatting with a Texas medical malpractice defense attorney when she shared the following:

Plaintiffs' lawyers have changed. They're all talking about "safety" now, and that word is finding its way into every deposition: "What is the safe procedure?" or "What would've kept Mrs. Johnson safe?" They're all talking about safety and security instead of standard of care.

I replied, "Oh, that is the Reptile." She hadn't yet heard about the popular [book](#) by David Ball and Don Keenan, so I explained, it's a theory for trying plaintiffs' cases by portraying the defendant's conduct as a threat to jurors' own safety and the safety of others. By framing arguments in terms of our most biologically basic need for security, the theory goes, plaintiffs are able to successfully tap into jurors' primitive or "reptile" mind. And when the Reptile decides, our conscious mind and reason-giving ability follows. Based on that unifying concept, the perspective has taken the plaintiffs' bar by storm, spinning off [more books](#) as well as frequent [trainings](#). The approach has significantly influenced plaintiffs' methods of trying cases, and

the philosophy currently claims [close to \\$5 billion](#) in associated verdicts.

"Cases are not won by logic," Ball and Keenan write, "you need to get the Reptile to tell the logical part of the juror's brain to act on your behalf. To get the Reptile to do that, you have to offer safety."

Defending Against the Reptile: A General Approach

Since its introduction in 2009, there has been only limited response from the defense bar, and some of these responses have taken on the theory on its own terms - terms that appear to rest on some questionable assumptions, particularly in light of a recent Scientific American piece. So this section offers a defense manifesto, so to speak, recommending three steps for a defense response to this trend.

But first, one quick disclaimer is in order. My intent isn't to add just another comment to the others ([here](#), [here](#), [here](#), or [here](#)) claiming that the Reptile perspective is legally inappropriate, unethical, or ineffective. Indeed, the enthusiasm of its adherents,

as well as its record of application in court, speaks volumes about its effectiveness. Despite what some critics might warn, the Reptile isn't some radical new toxin introduced into our court system. Instead, it is a new way of thinking about some very old ideas in communication. Accordingly, it calls for a thoughtful response.

For defendants looking at the prospect of the other side increasing their effectiveness by appealing to the survival instincts of the reptile brain, here is what I'd suggest.

Step One: Strip Away the Brain Baggage

A central support for the Reptile approach is the "[Triune Brain](#)" theory, as Ball and Keenan acknowledge in the foreword to their book. The notion is based on the work of neuroscientist Paul MacLean, who theorized in the 1960s that there are three discrete parts to the brain reflecting the stages of evolution: a reptilian complex at the core of the brain (primitive and survival-based), a paleomammalian complex located in the mid-brain (focused on emotion, reproduction, and parenting), and a neomammalian complex at the top (capable of language, logic, and planning). But it is that basic reptile level, the theory goes, that drives our behavior, and even when we think we are acting based on the language and the logic of our neomammalian brains (e.g., in deliberation), we are unknowingly responding to the commands of the reptilian brain. "The Reptile invented and built the rest of the brain," Ball and Keenan write, "and now she runs it."

This perspective on brain structure is an important part of what makes Ball and Keenan's perspective new. The message is that since the Reptile is in control of our thinking, our persuasion needs to tap into the only things that waken and motivate the Reptile: safety, security, and freedom from threats. That is what makes the approach unique and powerful at a level that goes beyond reason-giving and is essentially precognitive. So Ball and Keenan are offering plaintiffs' lawyers a kind of magic button to engage the most powerful persuader imaginable. Some defendants have taken note. Attorney Mark Bennett, for example, wrote in a blog post entitled "[Lizards Don't Laugh](#)," that civil defendants "can try to a) make a stronger appeal to the reptile brain, or b) disengage the reptile brain, and engage the dog brain or the ape brain." He goes on to suggest that laughter, by creating incongruity and relief, gets the jury out of their reptile minds, creating the possibility for at least a "Simian Trial."

The problem with all of this is that the idea of the "reptile brain" is more figurative than literal. "The theory," as science writer Ben Thomas [notes](#), "has proven outright insane in light of the latest scientific research." In a recent blog piece invited by [Scientific American](#), Thomas highlights the so-called reptile brain as an example of the popularization of dubious science. "The Triune Brain idea holds a certain allegorical appeal: The primal lizard – a sort of ancestral trickster god – lurking within each of us," Thomas writes, "But today, writers and speakers

are dredging up the corpse of this old theory, dressing it with some smart-sounding jargon, and parading it around as if it's scientific fact." Looking at MacLean's "reptilian complex" referring to the bundle of nerves at the base of the brain called the basal ganglia, for example, Thomas notes that this was only called "reptilian" because biologists in the 1960s believed that the forebrains of birds and reptiles were made of basal ganglia. But it turns out [they aren't](#). In addition, the idea that these sections of the brain could operate more or less independently like three brains, also hasn't held up in the face of modern neuroscience, because the brain tends to operate as a unified whole.

In light of Thomas' critique, Ball and Keenan's Reptile perspective stands out as illustrating [scientific beliefs](#) that persist more because they are useful than because they are valid. It persists and sticks not because there is strong evidence that it is true, but because it feels "complete" and has, as Stephen Colbert would put it, "[Truthiness](#)" independent of its truth. The idea that our persuasion is controlled by a reptile mind, as Thomas notes, "makes a weird kind of intuitive sense. We're bundles of instincts and inhibitions and desires that don't fit neatly together. It'd be comforting, in a way, if we could pin those conflicts on little lizard brains." But saying that persuasion isn't controlled by a reptilian underbelly is not the same as saying that our brains are logical, analytical, and predictable either. They're not. Instead of one neat and simple driver of decisions being found in the survivalist reptile, we need to continue to look at the more complicated picture of behavioral drivers that are nuanced, individual, and situational.

Step Two: Recognize that What is Left is Different, But Still Valuable

So what is the Reptile theory without the part about the reptile brain? It is a practical perspective that is as good as its results. Independent of the doubtful neuroscience, the ability to make one's case stronger by applying Ball and Keenan's advice is what matters. As the Los Angeles plaintiffs' attorney Sonia Perez Chaisson put it succinctly in [The Jury Expert](#), "We care not at all about brain anatomy and solely about whether the Reptile works." And by all indications, it works. But it most likely works not because its adherents have found a way to communicate directly the fact finders' primitive reptile brains, but simply because attorneys are recognizing that [motivation exists](#) and picking a very strong motivation to speak to. Instead of applying the rational-legal model of jurors reasoning their way to a conclusion by applying the law to the facts and deducing to a verdict, the Reptile practice forces attorneys to speak to what would make jurors *care* about the verdict. The principle of motivated reasoning is that once jurors, or any other decision makers, know what decision they *want* to reach, then they'll have no problem coming up with reasons to support that conclusion. The decision comes first and the reasons are filled in later. So, once you identify the motivation and tie that motivation to your case, you are more than halfway there. If you excise all of the brain-speak from Ball and Keenan's

book, I read them as saying, “Speak to the motivator. Make it an individual motivator, and make it an important motivator.” Whether that motive is attributed to the brainstem or to the neocortex matters not a bit.

Step Three: Find Your Own Motivation

A central part of Ball and Keenan’s argument is that the Reptile approach is a tool that helps one side, not the other. “The Reptile prefers us,” meaning plaintiffs, “for two reasons: First, the Reptile is about community (and thus her own) safety – which, in trial, is our exclusive domain. The defense almost never has a way to help community safety. The defense mantra is virtually always, ‘Give danger a pass.’ Second, the courtroom is a safety arena,” they write, “so when we pursue safety, we are doing what the courtroom was invented and maintained for.” Defendants might justifiably counter that the more limited purpose of the court is to resolve the claim before it, and not to broadly enhance society’s safety with each verdict. But at the level of personal injury, product, and medical malpractice suits, Ball and Keenan do have a point in emphasizing that it is often easier for the plaintiff to invoke safety than the defendant, except in those cases where the defendant’s own conduct is the more salient source of the danger.

But remember, the part of the theory that says, “safety is all that matters” is also the part that is based on the dubious “Triune Brain” theory. Security may be a very powerful human motivator, but once we’re freed from the reptile analogy, it is far from the only human motivator. Smart defendants will tie their own case to a powerful principle that is at stake: responsibility, innovation, or fairness. It can even be a strong appeal to empower jurors to resist the pull of an emotive safety-based verdict, and instead base their decision on evidence, science, and facts. Even within the assumptions of the Reptile perspective, there is one source of insecurity that can be hung on a plaintiff’s case: The idea of being manipulated can be very threatening. In one of Don Keenan’s Georgia trials in 2010, for example, the insurance defense counsel [called out](#) the Reptile strategy by name, and previewed what Keenan was likely to do in closing. Just like any other strategy, it becomes less effective when it is known and named.

Defending Against the Reptile: Protecting Your ‘Safety Rules’

In a number of different legal contexts – medical, personal injury, and products cases in particular – plaintiffs who adhere to a Reptile approach believe that by framing legal claims as basic appeals to community and personal safety, they are able to wake up jurors’ reptilian minds and motivate verdicts in their favor. As outlined above, there are reasons to believe the theory rests on a dubious foundation (the largely discredited belief in a reptilian brain governing the rest of our decision making), but that it works nonetheless (because it encourages persuaders to put motivation front and center). In this section, I want to focus on one element that is a particular vulnerability

to the theory: the safety rule. In looking at this particular part of the Reptile perspective, I will use medical malpractice as an example. While not exclusive to the field of medical malpractice, the Reptile and the earlier [Rules of the Road](#) work by Rick Friedman both focus strongly on coaching plaintiffs to win these and similar claims related to safety. While safety might apply most tangibly in a medical context, the notion of being secure applies as well, not only to other personal injury cases but, at a more abstract yet still meaningful level, to even contract or patent cases as well.

Safety Rules: The Soft Underbelly of the Reptilian Perspective

According to both the *Reptile* and the *Rules of the Road* views, the key to the plaintiff’s ability to persuade is to ground the case, not in a legal standard of care, but in a “safety rule,” or a commonsense principle jurors can immediately understand and apply to other contexts. In the formula Ball and Keenan advocate, “*Safety Rule + Danger = Reptile*” means that once the advocate is able to identify such a rule, and show fact finders the danger to themselves and the community when it’s violated, then they’ve awakened those jurors’ reptile brains, motivating them to equate justice in this case with their own security.

In other words, the med mal safety rule might be that doctors should do nothing without a patient’s or family’s agreement. The danger lies in doctors practicing in ways that take away our freedom and might miss hidden dangers. When jurors see both, then they’ll act, not in defense of a legal standard of care or abstract notion of “informed consent” but in order to prevent the doctor-defendant, and others like him, from threatening the safety of patients like the jurors and their loved ones. So the act of identifying a safety rule is key to the theory. Even setting aside the notion of a primitive reptilian brain, the articulation of a simple and widely applicable rule is what frames the conflict and motivates the jury, encouraging them to view the dispute in personal and community terms.

Not just any safety rule works. To really “awaken the reptile,” the rule needs to have the six qualities identified below. These rules about rules are not arbitrary, but help get plaintiffs over the barriers to jurors seeing themselves and their verdict as key to promoting safety and removing danger.

What the Plaintiff Wants (and What Medical Reality Often Refutes)

Underlying all six elements of a safety rule in a medical liability context is a black and white view of the medical world. But the advantage for medical defendants is that the real world of treatment and care typically isn’t black and white, but is instead situational and highly dependent on a particular patient’s circumstances. In resisting plaintiff’s attempt to distill it down to one pithy rule, medical defendants will generally have reality on their side. This sets up a conflict that has existed prior to and aside from this Reptile approach, but has been magnified by it:

As plaintiffs' attorneys push for a black and white worldview, defendants push back with a realistic appraisal of shades of gray.

The "umbrella rule," or the formulation with the widest possible application is that "doctors are never allowed to needlessly endanger their patients." That rule will contain a variant for each particular case, and there are six criteria that, according to Ball and Keenan, will determine whether that safety rule is effective or not. Blocking the overly simplistic rule thwarts the Reptile approach by minimizing the perception of personal and community danger, bringing the focus to what the case should be about: a particular plaintiff's treatment by a particular physician. The response on each of these six elements should inform the ways medical defendants prepare fact and expert witnesses, conduct voir dire, and create openings and closings. Each effort to deny a safety rule in your own case can be part of your message at trial.

1. The Safety Rule Must Prevent Danger

Of course, nothing is able to literally and fully "prevent" danger. Teach your jury that physicians are instead trying to lessen its impact or control its course. The reality is that medical care often involves swapping one danger for another in an imperfect effort to make the patient better off. For example, you prescribe a drug with known side effects in order to treat a condition that is, probably, worse than the side effects. This means that the line from the Hippocratic Oath to "first, do no harm" isn't literally true. Excising tissue in a surgery, for example, is doing harm, but a lesser harm than doing nothing. This, of course, is something that doctors, claims representatives, and defense attorneys understand intuitively. Jurors may resist the message, wanting to believe that physicians can guarantee safety. With a little explanation, however, they can realistically set that notion aside.

2. The Safety Rule Must Protect People in a Wide Variety of Situations, Not Just Someone in the Plaintiff's Position

Key to the Reptile's advice is to encourage jurors to abstract beyond the particular patient-plaintiff and to view the rule as broadly applicable and personally relevant. But chances are, patients' situations are not interchangeable, and there is no easy cut-and-paste set of rules that apply to all. Doctors have the job of treating the patient, and the more jurors understand that this is highly particular – patient and situation specific – the better they'll be able to resist the general safety rule.

3. The Safety Rule Must Be in Clear English

Of course, there is nothing wrong with clear English, but making something perfectly clear in a medical context should never require softening, generalizing, or leaving out key medical distinctions. A dumbed-down principle can be a less accurate principle. Complexity for its own sake is the defendant's enemy, and can be rightly seen as obfuscation. But

realistic complexity – factors and distinctions that are critical to patient care and can be patiently and accurately taught to the jury – is the defendant's friend.

4. The Safety Rule Must Explicitly State What a Person Must or Must Not Do.

The key language here is "must" and "must not." There is no room in a Reptile perspective for "typically," "probably," or "in most cases." It has to be an imperative: "If the doctor sees X, she must do Y." Certainly, there are some parallels to this absolute and linear decision-making in a medical context, but there are also plenty of situations where it isn't a "must" or a "must not," it is a realistic "it depends." Help jurors understand that by explaining and supporting all of the factors that go into that choice. Using a graphic showing a more complicated decision-tree, for example, can truthfully undermine any plaintiff's rule that assumes an "if A, then B" style of thinking.

5. The Safety Rule Must Be Practical and Easy for Someone in the Defendant's Position to Have Followed.

It is often practical and easy in hindsight: If only Dr. Smith had ordered that biopsy, or if only Dr. Jones had transferred the patient earlier. But the question is never what would have provided better care in retrospect, it is always whether appropriate care was delivered based on what was known and believed at the time. *Could* the physician have ordered a different test at an earlier time? Of course, that is going to be both practical and easy. But *did* the physician have solid reasons *at the time* to have ordered that test? That is a different question. Of course, getting jurors past this psychological preference for hindsight can be a challenging task, but not an insurmountable one. You can encourage jurors to adapt a hindsight-resistant mindset by using a timeline to walk through the story based on what was known at the time, and by focusing on the multiplicity of treatment options, not just the one obvious choice that could have been made in hindsight.

6. The Safety Rule Must Be One That the Defendant Will Either Agree With or Reveal Him or Herself as Stupid, Careless, or Dishonest in Disagreement

This final rule really sums up the mindset: You either agree with a simplistic rule, or you are stupid, careless or dishonest. To fight back, you need to mount an educational offensive that frames the choice as something other than that. For example, craft your own safety rule that is simple, yet honest: a principle that jurors can understand and that the doctor followed in this case. If the true rule is a little more complicated than the plaintiff's proffered rule, then make jurors proud of the extra effort it takes for them to get it: They aren't taking the easy route, they're taking the accurate route.

Closing Thought: No One's a Reptile...But Plaintiffs Are Pandas and Defendants Are Seals

Noting the responses I outline above to the six criteria for a successful safety rule, it is clear that at every point, the Reptile practitioners are aiming for the simplicity and comfort of an absolute and cut-and-dried formula for medical care. It is so wedded to the black and white that it could have been called "Panda" rather than "Reptile." Defendants, on the other hand, are often realistically wrapped in all shades of gray – like seals.

In practical terms, plaintiffs are often the ones saying, "It's simple, it's clear, it's obvious" while defendants are responding, "Not so fast. There's more to it than that."

Popular psychology can have a preference for the black and white and many people prefer [low effort thinking](#). That is why the Reptile approach works. But reality is often gray. That can be a big advantage, and defendants shouldn't hesitate to use it.

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Note: Content for this article is adopted from two posts in the author's blog, *Persuasive Litigator*.



The Truthiness of Visual Evidence

by Eryn Newman Ph.D. and
Neal Feigenson, J.D.

Don't miss our trial consultant response at the end of this article from Jason Barnes.

VISUAL EVIDENCE can help us. Photographs and other pictures scaffold new information and connect it to prior knowledge, improving comprehension. Photos can also reduce the cognitive effort people exert to understand new information. In all of these ways, they make incoming information feel more fluent (Marcus, Cooper, & Sweller, 1996; Mayer, 2008 see also, Carney & Levin, 2002). And, by capturing people's attention, photos increase the chances that people will encode new information into memory (e.g. Sargent, 2007).

But visual evidence can be unhelpful to the viewer too. Photographs can systematically bias us to believe that things are true, whether they are true or not. For instance, in one study, seeing a doctored photo of Obama shaking hands with the former Iranian President, Mahmoud Ahmadinejad—a completely fabricated event—led people to remember having

witnessed that false event on the news (Frenda, Knowles, Saletan, & Loftus, 2013). In another study, seeing a doctored childhood photograph led people to remember taking a hot air balloon ride they had never taken (Wade, Garry, Read & Lindsay, 2002). That these altered photographs can sway people's judgments makes sense. We often take photographs as the best evidence that something actually happened. So if a photo depicts an event, we're inclined to believe that the event actually occurred. Moreover, once a photo helps people to picture an event in their minds, they may confuse information from the photo—colors, people, places—as being information from their own memories (for a review of these kinds of 'source monitoring errors' see Lindsay, 2008), reinforcing their belief that the event really happened.

But photos do not need to depict or otherwise offer evidence of an event or fact to affect our judgments (see Lindsay et al., 2004). Recent work shows that photos that relate to, but do not provide any evidence for, a claim can produce *truthiness*—that is, they can nudge people towards believing that the related claims are true, whether they are true or not. In one

study, when subjects saw trivia claims (such as “Macadamia nuts are in the same evolutionary family as peaches”) presented with a photo that related to the claim (a bowl of macadamia nuts), they were more likely to believe that the claim was true (Newman, Garry, Bernstein, Kantner & Lindsay, 2012). This truthiness effect, moreover, did not fade rapidly, within minutes or hours after seeing the photos; it persisted for up to two days (Fenn, Newman, Pezdek & Garry, 2013).

These sorts of photos shouldn’t affect people’s judgments about the truth or falsity of the related claims because they do not actually provide any evidence about whether the claims are true. They are *non-probative* images. So why does seeing these photos incline people to believe the claims that the photos are paired with? One possibility is that they help people to generate *pseudoevidence* that the claim is true. We know that people tend to evaluate new information by assuming that it’s true (see Gilbert, 1991) and then to interpret subsequent related information through the lens of a confirmation bias (Nickerson, 1998). Thus, people might be inclined to interpret even non-probative information in the photos as bolstering their initial position that the claim is indeed true.

Macadamia nuts are in the same evolutionary family as peaches



For instance, someone might look at the photo of macadamia nuts and think, “Well, they are fuzzy like peaches (even though the ‘fuzz’ is probably salt) and they are a similar shape to a peach stone; therefore, the claim that the nuts are related to peaches evolutionarily is probably true,” even though these features of the nuts’ appearance in the photo have no bearing on the truth of the claim. The photos may also simply make it easier for people to form mental images of the claim and help people to rapidly retrieve ideas and information relating to the claim. And decades of psychological research tell us that the easier it is for people to bring ideas or claims to mind, the likelier people are to conclude that those claims are credible and true (*processing fluency*; see Schwarz, 2010 and Alter & Oppenheimer, 2009 for a review).

So How Might the Truthiness of Visual Evidence Play Out in the Courtroom?

We already know that some kinds of visual evidence can be persuasive in legal settings. Emotion-provoking images can lead jurors to award more damages to accident victims (e.g., Edelman, 2009; Oliver & Griffitt, 1976) or incline them to find a defendant guilty (e.g. Douglas, Lyon, & Ogloff, 1997; Bright & Goodman- Delahunty, 2006). And visual evidence such as animations that depict how an event happened can influence other legal judgments, such as liability (e.g. Dunn, Salovey, & Feigenson, 2006). The research on “truthiness” discussed above suggests that even images that are not emotional and do not depict or explain the event in question can systematically bias people’s judgments. Although the effects of these sorts of non-probative photos on legal judgments have not yet been tested, possible effects can be readily imagined. For instance, experts or eyewitnesses describing complex or unfamiliar material may illustrate their testimony with images that do not themselves prove that the testimony is true but that help convey the material to jurors. Doing so makes sense—photos and images can facilitate comprehension and memory, especially when an idea is difficult to understand (Carney & Levin, 2002). But these are also the conditions under which people are most susceptible to truthiness: When people are evaluating an unfamiliar claim, seeing a non-probative photo is most likely to make them believe that the claim is true (Newman et al., 2012). This finding fits with other research in cognitive psychology—under conditions of uncertainty, when people do not know an answer, they are most likely to fall victim to cognitive biases and draw on tangentially related information to answer a question (Schwarz, 2010).

Non-probative photos used during a closing argument may also influence jurors’ judgments. For example, in one case, a plaintiff’s lawyer used a stock photo of an ATM machine to illustrate his theme that the new management of the defendant’s company had treated the company like an ATM (Feigenson & Spiesel, 2009). The photo (like almost all of the other images with which the lawyer accompanied his closing) was purely illustrative; it did not provide any probative evidence that his claim was true. But it may have helped jurors to form and retain the desired sort of mental image (and/or to retrieve associated thoughts consistent with his theme), and thus made them likelier to believe his claim.

So How Can We Protect Jurors from the Truthiness of Visual Evidence?

One way judges attempt to protect jurors from being influenced by images is to give them instructions on how they should treat those images. For instance, judges might tell jurors that a picture or photo is only illustrative – that it is intended to help the jurors understand testimony but is not to be taken as evidence that the testimony is true. The problem with this approach, and with limiting instructions more generally (see Sklansky, 2013 and Lieberman & Arndt, 2000 for a review), is that instructional interventions often do not protect people from cognitive biases. People often have little insight into their cognitive biases and are unaware of how information influences

their judgments (see Nisbett & Wilson, 1977; Tversky & Kahneman, 1974; see Pronin, 2006 for a review). For example, in our own studies we sometimes ask people how the photos influenced their decisions. Many people report that the photos help them to understand the claims, while others tell us that the photos do not influence their judgments of the claim's truth at all. Yet many of these same subjects who say that the photo just helped them understand, or that they are not swayed at all, nonetheless succumb to truthiness. That is, people have very little insight into how the photos are biasing their decisions. Another approach might be to warn people about the power of photos—even non-probative ones, only tangentially related to the claims they are paired with—to influence judgments about the truth of those claims. Warnings can work in other domains of judgment and protect people from external influences or suggestion (e.g. Oeberst & Blank, 2012). Whether warnings would reduce truthiness is an empirical question worthy of future research.

Summary

Jurors are faced with conflicting claims to the truth. Pictures often help them decide where the truth lies. Photos and videos, for instance, can help persuade jurors that the events occurred as the images depict them. The legal system aims to protect jurors from images that are improperly persuasive, such as images with a veneer of science that might unjustifiably make an expert seem more credible, or overly emotional images that might arouse jurors' anger or disgust and lead them to judge the defendant using those emotions. The research we have reviewed here, however, suggests that even more innocent images, ones intended merely to illustrate or even decorate an idea, may also have powerful effects on legal decisions. People take photos as a cue to the truth of the statements they accompany, regardless of whether the photos actually make those statements more likely to be true. This research underscores the need for the legal system to remain vigilant about the use of visual images in court, and for further research to clarify the influences of these kinds of images and to suggest ways of limiting any improper effects. 

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We asked trial consultant Jason Barnes to respond to this paper.

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

Jason Barnes responds:

In my own experience, the authors’ conclusion, that non-probative images effect jurors’ assessment of claims, is true. The authors suggest that the judge might offer an instruction but admit that such instructions are of limited value in dealing with unconscious cognitive biases. On this point, we agree. Another approach, they suggest, would be “to warn people about the power of photos.” This idea has, in my opinion, merit.

The adversarial nature of trials is fundamentally different than the “truthiness” study. Unlike the Newman study cited by the authors (which claimed macadamia nuts were related to peaches) in which the researchers were free to make unchallenged claims supported by non-probative images, a trial is conducted against an opponent whose job is to identify and exploit weaknesses in

your argument. In the face of this danger, a party will use non-probative images at their own risk.

Suppose that we are in a dispute that alleges an oral contract made over the telephone. Let's take the assertion, "The defendant agreed to the proposed terms," as the basis for creating some graphics each of which uses a non-probative image as support of the statement. First, assume that we are defending against the claim and that we have been presented with these demonstratives in the plaintiff's opening statement. How can these seemingly innocuous demonstratives be turned against the plaintiff?

The Defendant Agreed to the Proposed Terms



1

Since credibility is perhaps one's most important asset in a trial, we should attack our opponent's credibility for using a graphic that is, measuring against the assertion, useless at best and misleading at worst. You might object, but sometimes a little jujitsu is better. For example, in our own opening statement, we could call out the plaintiff's attorney:

"Ladies and gentlemen, the plaintiff's attorney just showed you this slide of two men shaking hands, presumably because they've agreed on something. Now, I don't know what two men are attached to those hands, maybe one of them is Mr. Jones, the plaintiff. But I know who the other one isn't. My client, Mr. Smith. There will be no evidence in this trial that there was any handshake. There was no meeting, no handshake and no agreement. This picture, like the plaintiff's claim, is not real."

Or, we could cross examine the plaintiff, who, like his attorney, must establish and maintain credibility:

Q. Mr. Able, did you see the slide your attorney used in opening statements, the one with the photograph of the hands shaking?

A. Yes.

Q. Is that a picture of you and of my client shaking hands?

A. No, it's just a picture.

Q. Were you trying to mislead this jury into believing that you and Mr. Charles actually shook hands on some deal?

A. No, of course not.

Q. Do you have any idea why your attorney would use a picture of two unknown men shaking hands for some unknown reason when that has nothing at all to do with this case?

A. I don't know why he did that.

If we had seen this in the plaintiff's closing argument, we could launch an attack similar to the one described above in our opening remarks - only with more argument about why the plaintiff's attorney wanted to use images of things that never happened and why that is a good reason to question his, and his client's, credibility.

Here are a couple more images that would face the same kind of attack:

The Defendant Agreed to the Proposed Terms



2

The Defendant Agreed to the Proposed Terms

- 1,000 Widgets
- \$25,000.00 Deposit
- Delivered May 15th
- \$75,000.00 Upon Receipt



3

But what about a slightly different graphic that uses a non-probative but "truthiness" inducing image?

The Defendant Agreed to the Proposed Terms



- 1,000 Widgets
- \$25,000.00 Deposit
- Delivered May 15th
- \$75,000.00 Upon Receipt

4

Here we see an image of the defendant, Mr. Charles, alongside a checklist of the terms to which he allegedly agreed. Nothing about the list is probative of whether or not there was an agreement. However, having the picture and the terms checked off is subtly convincing. It suggests the defendant himself

actually checked off the terms - presumably in agreement. It is not as emotionally provocative as the handshake, but it provides few avenues of attack.

Leaving a graphic like this on screen for an extended period of time, for example, during the plaintiff's direct examination, might provide a subtle but consistent reinforcement of the plaintiff's claims, a truthiness. But is it objectionable? Can we attack the plaintiff or his attorney for using it? I suggest that the answer is that we cannot effectively turn it against the plaintiff, which tells me that this is exactly the kind of truthiness I'd like to have in my own demonstratives. If I were a plaintiff, I would use this graphic, not the ones that depict imaginary events, to support my claims where necessary.

"Truthiness" can work for you or against you. Remain vigilant. Identify when the technique is being employed against you and try to turn the weapon against your opponent in the battle for credibility. In your own demonstratives, employ the phenomenon with caution or be the victim of your opponent's jujitsu and wind up on the mat. 🎯



Neutralizing Negative Pretrial Publicity: A Multi-Part Strategy

by Adam B. Shniderman, M.A.

Pretrial Publicity, Voir Dire, and Challenges for Cause

CABLE NEWS, the internet, twenty-four hour news cycles, social media websites including Facebook and Twitter, newspapers, expert and not-so-expert television commentators, interviews of and media releases by participants and observers—some of whom may have agendas which extend beyond the case at hand—have significantly increased the amount of information, speculation, and theories made available to the public, and thus potential jurors, about pending cases. This is all the more true with high profile cases. Consultants and lawyers have long known what psychological research shows – pretrial publicity can have significant impact on jury verdicts. As many in the business of trial consulting know, the law makes an incorrect assumption that potential jurors can compartmentalize the influence of outside information and set it aside. On this assumption, the law has, through statute and/or judicial opinions, constructed a standard for acceptance/dismissal for cause of a juror based on a juror’s self-assessment of whether he/she can set aside facts, views, and opinions and decide the case solely on the basis of the evidenced admitted at trial. This article explores the issue of pretrial publicity (PTP) and juror bias, briefly discusses the psychological literature on

the realities of bias and decision-making, and offers a multi-part suggestion for addressing PTP prior to trial, during *voir dire* and during the trial.

As we have seen during *voir dire* in the Casey Anthony, George Zimmerman and Andrea Sneiderman cases, significant time and energy is spent trying to ascertain what a prospective juror has seen or heard about the case and whether he/she has formed any opinions about the incident and the guilt or innocence of the defendant. Once these “objective” questions have been asked, prospective jurors are repeatedly reminded that if they are selected to serve, their verdict must be based solely on the testimony and other forms of evidence admitted at trial. Lawyers from both sides follow this admonition with a question about whether the prospective juror can and will “promise” to set aside any information he or she has heard in the media and the opinions he or she has formed, and decide the case solely on the evidence. In part, explicitly questioning whether a prospective juror can and will make an unbiased decision, particularly in Florida, where both the Anthony and Zimmerman case were held, stems from repeated precedent and statute that it is insufficient to dismiss a prospective juror

for cause because he or she has heard about the case or has an opinion, if he or she states that he or she can make an objective decision based on the evidence admitted in court. [Florida Statute §913.03\(10\)](#) states that the “formation of an opinion or impression...shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial [unbiased] verdict according to the evidence.” Georgia Statute §15-12-164 provides a series of questions prospective jurors are to be asked during *voir dire* to determine competence to serve. While the statute is less clear than Florida’s on the issue of opinions and impressions, it too suggests that a juror’s self-evaluation of his/her ability to be fair and impartial should be taken into consideration. The U.S. Supreme Court set forth a similar standard in [Mu’min v. Virginia](#). Significant deference is given to these self-reports, and as research shows, even if lawyers and judges inquire into these biases to make an independent assessment of a prospective juror’s ability to act impartially, it is insufficient to eliminate the impact of pretrial publicity.

The Illusion of Picking an Impartial Jury

This standard, set by legislatures and courts, is outmoded in light of a growing body of literature in cognitive psychology on human judgment and decision-making, and has been for quite some time. The logic underlying current standards for dismissing jurors for cause assumes that information influences an individual’s judgments and decisions at a conscious level. As such, a prospective juror is expected to know what factors, experiences, and information may impact his or her decision-making, put them in a box, and set them aside during the trial and deliberation. Dating as far back as Nisbett and Wilson’s influential piece in the 1970’s, cognitive psychologists have empirically shown that factors influencing decision-making often operate at an unconscious level and that individuals are therefore unable to know all of the “inputs” in their decisions or consciously control their biases. Specifically, Nisbett and Wilson found that people often cannot report accurately on the effects of particular stimuli on higher-order inference-based judgments, even after they are told about potential biases in their decisions. As Emily Pronin writes, research shows that individuals recognize the existence and impact of the biases that are known by psychologists to affect human judgment and inference. However, individuals lack recognition of the role these same biases have in shaping their own judgments and inferences. As a result of this “[bias blind spot](#),” individuals frequently overstate their objectivity when making decisions. These findings in cognitive psychology have been replicated with direct application to the legal decision-making.

Research assessing the impact of pre-trial publicity on jurors has long found strong evidence for its impact on verdict choice. A 1999 meta-analysis of the 44 empirical studies on the impact of negative pretrial publicity, completed by that time, found an overall damaging effect of negative PTP. The size of the effect varied based on several factors, including the studies’ subject pool (students vs. recruited adults) and length of time between

exposure and assessment. Unsurprisingly, studies dating back to the mid-1970’s have found that the cognitive phenomena described above, in other areas of judgment/decision-making, appear in juror decision-making and self-assessment. Just as individuals making other decisions suffer from the “[introspection illusion](#)” and the “[bias blind spot](#),” prospective jurors are unable to self-assess bias based on PTP and set them aside to deliberate. In 1975, Sue, Smith, and Pedrozza found that individuals who had been exposed to negative pre-trial publicity, but who said they could render a fair and impartial verdict, were more likely to convict than those who had not been exposed to PTP. Robertson *et al.* found similar results in the civil area. In a paper presented at the Conference on Empirical Legal Studies and the ASTC Annual Conference the researchers found that jurors were biased by PTP, they were unable to accurately self-diagnose, or set aside bias. The mounting scientific evidence that is contrary to the legal system’s assumptions and approach cannot be ignored or swept aside. The ultimate question becomes what to do about PTP as you attempt to empanel an unbiased and impartial jury.

Clarifying The Problem

Voir dire has been demonstrated to be an ineffective means of addressing the impact of PTP. Kerr *et al.* found that even with an approach for detecting bias that went beyond simply accepting the jurors’ self-diagnoses, judges and lawyers were unable to pick a jury that was more impartial. Dexter *et al.* subsequently replicated this finding, discovering that “extended” *voir dire* did not reduce the impact of PTP. Judicial limiting instructions and admonitions have also been shown to be ineffective. Fein *et al.* found that judicial admonitions were ineffective at reducing the effects of PTP. Robertson *et al.* have suggested a change in the standard. They propose “lowering the bar” by allowing for the disqualification of any prospective juror whose “impartiality might reasonably be questioned.” This standard would allow for the dismissal for cause of anyone who has been exposed to “mental contamination” at all. Certainly, long term, a change in the standard to better reflect the state of scientific knowledge seems ideal. And at first blush, Robertson’s proposed rule seems like a positive step forward. However, there are several issues with this proposed solution, beyond the risk the authors of the study note in their paper - dismissing individuals who may have ended up being impartial.

First, in many cases, as demonstrated in the high-profile and emotionally-charged Anthony, Zimmerman, and Sneiderman cases, it can be difficult to find anyone who has not been “contaminated” by some sort of PTP. Only those who “live under a rock” and have no interest in any form of news would remain in the jury pool. As such, this approach could empanel a jury that is apathetic about the events of the world around them. Many would likely agree these are less than ideal jurors. Second, the science that undermines the law’s approach to assessing juror bias is not new. Cognitive psychologists have demonstrated the inability of people to understand their own decision-making and self-diagnose their own biases for

40 years. Yet, courts and legislatures continue to employ and even reaffirm the dated standard for dismissing individuals for cause. Thus, it would seem the system is in no hurry to change the standard. Certainly, this does not mean lawyers and trial consultants should give up.

Combating PTP

The principal concern associated with negative PTP for attorneys and trial consultants is confirmation bias – the tendency to seek out evidence consistent with one’s beliefs and to ignore, dismiss, selectively interpret or undervalue evidence to the contrary. Confirmation bias can also lead to belief perseverance – continuing to hold a belief/view even in the face of unambiguous evidence to the contrary. Like most biases and judgment/decision-making processes, confirmation bias occurs unwittingly. To combat the problems of PTP and confirmation bias, jury consultants and trial lawyers should consider employing “[debiasing](#)” strategies. Wilson and Brekke identify four conditions that must be satisfied to avoid “mental contamination” and to “debias” decision-making. While it is impossible to satisfy the four conditions necessary for an individual to *actively* or *consciously* debias his or her decision-making, all hope is not lost.

Research on debiasing is still ongoing and much is still unclear about what biases can be mitigated through debiasing. Generally, debiasing, as the name implies, involves the implementation of techniques to eliminate bias, or at a minimum, significantly diminish the intensity of bias. Scholars studying debiasing techniques have explored a range of biases, their cognitive origins, and in doing so have begun to develop steps to eliminate the influence of these biases. Debiasing techniques, nearly universally but particularly those developed/explored for addressing confirmation bias, seek to move decision-making from automatic, heuristic-based processes into the realm of conscious, carefully reasoned analysis.

A multi-stage approach to debiasing prospective jurors is recommended, beginning before the juror pool is assembled and continuing through *voir dire*. As the case develops in the media, consultants and attorneys should focus on casting suspicion on negative PTP. Casting suspicion has been shown effective in reducing (or even negating) the impact of pretrial publicity. While, many defense attorneys attempt to offer a general counter-narrative and portray their client in a positive light prior to the beginning of trial, the assault on negative publicity should more directly address negative pretrial publicity. Consultants can work with attorneys to gather negative PTP and develop a means of communicating with the public, either directly through the media or through the internet independently, to cast suspicion on the motives of those disseminating the information, particularly highlighting the press’ ratings driven behavior, as well as to cast suspicion on the information itself, highlighting and correcting any skewed “facts” being reported (without giving away trial strategy).

Steven Fein and his colleagues tested the impact of pretrial publicity when jurors are also exposed to a news article casting suspicion on the motivation behind the negative pretrial publicity found in the biasing information. Fein defined suspicion as “actively entertaining multiple, plausibly rival, hypotheses about the motives underlying a person’s behavior”. Their research was concerned with counter-information that caused jurors not only to question the veracity of the pretrial publicity but also “why the information was presented in the first place and to consider the possibility that it was done for ulterior motives.” Their study found that jurors who had been exposed to the “suspicion article” were not significantly different in their decision-making from jurors who had not been exposed to any pretrial publicity. Given this empirical research, defense lawyers and consultants in media-heavy cases should formulate and implement a pretrial strategy to directly address and cast suspicion on any media reports that may be damaging. This approach was, to some extent, employed by the defense lawyers in the Zimmerman case, with their website and social media campaign. [ABA Rule of Ethics 3.6](#) on “Trial Publicity” permits such practices and commentary. Rule 3.6 allows for lawyers to “[m]ake a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or his client.”

Voir dire should be aimed at gauging to what pretrial publicity potential jurors have been exposed and continuing debiasing strategies. Knowing that the bar for dismissing a juror for cause is high, and that even those who seem unbiased may indeed suffer unconscious bias from even limited PTP, lawyers can take the opportunity to not only deselect jurors, but also debias jurors. Request partially sequestered *voir dire*, as it allows a significant opportunity to debias jurors without potentially “contaminating” others – particularly as these debiasing strategies require addressing very specific information. Partially sequestered *voir dire* is becoming routine in high-profile cases. In both the Zimmerman and Sniderman cases, prospective jurors were individually questioned on PTP issues. The judge in the Holmes’ case in Aurora has issued an order that will allow counsel to question prospective jurors individually, outside of the presence of other jurors, on death qualification and PTP issues.

This stage of the *voir dire* process allows lawyers to gather specifics about what information a potential juror knows and has been exposed to, and to tailor debiasing to each prospective juror. In addition to continuing to cast suspicion, the opportunity to interact with the prospective juror allows lawyers to employ the “[consider the alternative](#)” strategy. Using this method, lawyers propose and ask the juror to consider an alternative (explanation, possibility, etc.) to the biasing information - to generate a rival point of view or imagine other explanations for a set of events or information. Research has shown that getting an individual to consider an alternative or consider the opposite (a counterfactual), as an explanation for potentially biasing information is effective in eliminating the

effects of confirmation bias. The strategy is significantly more effective than simply admonishing individuals to be as fair and unbiased as possible. Jurors who go through this debiasing *voir dire* process should make decisions that are similar, if not identical, to jurors with no PTP exposure.

Should sequestered *voir dire* not be available, these debiasing strategies can still be used. However, lawyers must be cautious to avoid “contamination” of other listening/observing potential jurors. In non-sequestered *voir dire*, attorneys can capitalize on the interactive nature of the process and use jurors to debias each other through their responses. This approach will allow lawyers to get prospective jurors thinking about the bias in media reporting, to continue to cast suspicion on negative pretrial publicity in a more general sense, and to further gauge prospective jurors’ attitudes.

Contrary to instinct, lawyers should consider jurors who have

been exposed to both positive and negative pretrial publicity. Particularly in very high profile cases, individuals who have *no* PTP exposure are likely not ideal. Those who watch, read or listen to the news, and who have been exposed to both *biasing* and *debiasing*, particularly debiasing *voir dire*, may be the best jurors, particularly in complicated cases requiring careful deliberation. These individuals’ decisions will closely reflect those of an individual who had been exposed to no pretrial publicity and their decision-making will likely be, because of debiasing efforts, based more in careful, reasoned judgment than automatic processing. Finally, given the limited empirical exploration of debiasing to neutralize the effects of pretrial publicity, any prospective juror exposed to *significantly* damaging evidence, such as knowledge of a defendant’s prior crime that would not come into evidence under the [Rule of Evidence 404](#), can be noted for possible peremptory challenge if he or she satisfies the minimal standard to preclude a challenge for cause. ©

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When Does a Defendant's Impulsivity Exculpate vs. Incriminate?

by Clayton R. Critcher, Ph. D. and
Yoel Inbar, Ph. D.

Don't miss our trial consultant responses at the end of this article: Susan Macpherson, Holly G. VanLeuven, and read the author's response here.

WHEN DETERMINING HOW MUCH BLAME someone deserves, jurors will care not only about what someone did, but how he or she went about it. The same action can lead to very different conclusions about blame and responsibility depending on what jurors infer about (among other things) the actor's beliefs, intentions, and state of mind (see Young & Tosi, 2013, for a review). The importance of these factors is formally encoded into legal and penal systems as well—for example, involuntary manslaughter is a less egregious offense than first-degree murder (Hart & Honore, 1959). More generally, the law's requirement of *mens rea* reflects a sense that the key to a wrongdoer's culpability lies not merely in the outcomes he or she is responsible for, but in the wrongdoer's corrupt mind.

In thinking about how jurors are likely to use information about defendants' states of mind in assessing their culpability, one may consider the case of *impulsivity*. For example, upon

learning that John killed a man in a bar fight, we would likely see him as violent and dangerous. But we might temper that assessment if we learned that he acted impulsively in response to a provocation. Here, jurors are likely to blame John less, because they believe that in his true heart of hearts, he likely did not *really* want to kill anyone (Pizarro, Uhlmann, & Salovey, 2003). John's impulses "got the better of him," leading him to do something that did not reflect the true John. And because jurors are swayed by their impressions of a defendant's underlying character ("Is John actually a good or a bad guy?"), John's impulsivity may persuade jurors that they should not rely on his bad actions in deciding whether (or to what degree) John is a bad person.

However, impulsivity does not always have this effect. Together with psychologist David Pizarro, we studied cases in which we expected that a wrongdoer's impulsivity would actually intensify, not lessen, moral condemnation. In particular, we considered circumstances in which transgressors behaved impulsively not because they were emotional, but instead because they were rash, deciding on a course of action extremely quickly. Consider Kara, who happened upon a cash-stuffed wallet in the parking

lot of her local grocery store. Kara ultimately keeps the wallet instead of turning it in. Would you judge Kara more harshly if you knew that it took her hours to decide what to do with the wallet, or if you knew that she made her decision immediately? Even though in the latter case Kara's is seen as more impulsive, research participants to whom we put this scenario were more likely to condemn impulsive Kara. It seems that even though emotional impulsivity may be seen to interfere with someone acting out his or her "true" intentions, speed-based impulsivity instead signals the unequivocal corruptness of one's moral character. That is, slow Kara may have ultimately done the wrong thing, but her decision speed indicates that she has good inside of her as well; there was no sign that quick, impulsive Kara even had moral qualms about her dishonesty.

In what follows, we summarize empirical evidence that supports our conception of impulsivity as both a mitigator and exacerbator of blame. We then describe four implications of our findings for legal contexts.

The Empirical Evidence

In brief, we are proposing that people treat emotionally impulsive decisions very differently from merely quick decisions—emotional impulsivity obscures one's true desires; rash actions reveal them. If this is true, then people should see emotionally impulsive actions as partly reflective of the situation one is in (for example, punching someone in anger might be due to provocation in addition to a surly disposition), whereas quick or rash acts should be seen as purer signals of a person's true character. Our first study tested this idea.

Study 1: What do impulsive acts reflect? We gave 246 participants 17 short descriptions that indicated a behavior was either emotionally impulsive (e.g., "had trouble controlling impulses") or quick (e.g., "made mind up without using careful reasoning"). We wanted to know whether different types of impulsive acts (emotion- or speed-based) were seen to provide relatively more information about a person's moral character versus the situation that person was in. Toward this end, participants indicated for each description whether the impulsivity described would imply that the behavior "is very strongly revealing of the kind of person s/he is" or is "definitely the result of the situation and does not reveal anything about the type of person s/he is." Participants made these ratings from 1 (situation) to 7 (person). As we predicted, when a behavior was described as quick, it was seen as statistically significantly more reflective of the person's character (*Mean* = 4.97) than when the behavior was described as emotionally impulsive (*Mean* = 4.58). In other words, even without specific information about the context, people assume that quick actions are more revealing of a person's moral character than are emotionally impulsive ones.

Study 2: Does emotionality exculpate, and quickness incriminate? Although Study 1's participants stated in the abstract that quick actions provide a stronger signal of character

than emotionally impulsive ones, a second study directly tested how impulsivity of each type influenced moral evaluations of a specific transgression. We asked 410 participants to consider Kathy, who learned from her husband that a friend of his had had an affair, which was over and which he now regretted. Kathy promised her husband not to tell anyone, since revealing the affair now would accomplish nothing other than hurting Anna, the adulterer's wife. Some participants learned that Kathy immediately called Anna and told her of her husband's affair (*quick decision*). Other participants learned that Kathy deliberated for a day about what to do; only much later did she call Anna to tell her of her husband's affair (*slow decision*). In two other conditions, participants were told that Anna made a snide remark to Kathy, which was said to either anger Kathy (*emotional*) or not anger Kathy (*non-emotional*). In both cases, Kathy then told Anna about her husband's affair.

Participants evaluated Kathy by indicating whether they would end a friendship with someone like Kathy, whether she was a good person, whether she should be morally blamed, and whether she did not deserve forgiveness. In general, participants thought Kathy was in the wrong, but they varied in how strongly they condemned her. The nature of Kathy's impulsivity determined whether it was a blame mitigator or exacerbator. Quick Kathy was seen as much morally worse than slow Kathy, but emotional Kathy was seen as somewhat morally better than non-emotional Kathy. That is, Kathy's quick actions were seen as especially revealing of her flawed character, but her emotionality signaled that her actions were a distorted sign of her underlying character.

Study 3: Do impulsivity's divergent effects extend to the real world? Of course, the story of Kathy is one (fictional) vignette, so skepticism is appropriate in considering whether quickness and emotionality tend to relate to blame exacerbation and blame reduction more generally. In a third study, we asked 215 participants to think of a time that a transgressor's impulsivity affected how much the person was blamed. Some participants were asked to think of a time the impulsivity led to less blame, whereas others were to recall a time the impulsivity led to more blame. We then had participants answer questions about their memories that would indicate that the impulsivity was speed-based (e.g., "The person was rash in considering how to proceed") or emotional ("The person was highly emotional"). Recalled episodes characterized by quickness were more likely to be associated with blame exacerbation, whereas recollections characterized by emotionality were more likely to be characterized by blame mitigation. Thus, the opposing influences of each type of impulsivity on blame seem to be a general phenomenon.

Study 4: Why does decision quickness amplify moral evaluations? Although previous research has explored why emotional impulsivity is blame-mitigating (Pizarro et al., 2003), we conducted a final study to more precisely understand why quickness influences moral evaluations. By our account, quick decisions reflect a certainty in one's moral (or perhaps,

immoral) conscience. Slow decisions reflect greater ambivalence, signaling a moral character that is filled with elements that push one both toward good and toward bad. Note that by this reasoning, it is not that all quick morally-relevant decisions are bad. Instead, quick moral (i.e., praiseworthy) decisions should receive especially glowing moral evaluations. After all, the quickness of the good decision should indicate the person did not even feel tempted to sin.

We told 553 participants about Pamela, a maid who struggled to earn enough money to provide for her two young children. Mr. Muir, the man for whom Pamela worked, took a suspiciously strong interest in one of Pamela's children. He approached Pamela with an unusual proposition: He would triple her salary if she permitted him to adopt her child, meaning the child would no longer be Pamela's legally and would instead live with Muir. We varied whether Pamela was said to have accepted or rejected Muir's offer, as well as whether it took her 3 seconds (*quick decision*) or 3 days (*slow decision*) to do so. Participants completed several measures, the last of which was a *moral evaluation* that asked whether Pamela was a person of good moral principles and standards.

Consistent with our earlier findings, Pamela was evaluated more harshly when she immediately accepted Muir's offer than when she accepted it after much thought. But also, Pamela was evaluated more positively when she immediately rejected the suggestion that she, in effect, sell her child, than when she turned down the request only after much thought. Additional analyses showed that Pamela's quickness was taken to reflect that she was highly certain and not-at-all conflicted about her choice. A Pamela that took 3 days to make her decision was seen as a mix of good and bad—a woman motivated to protect her child and to make money any way possible—whereas a Pamela who decided in 3 seconds was seen as possessing only pure or only corrupt motives. And when participants assessed her character, it was these inferred motives they were responding to: Crucially, her decision process revealed something about her that her behavior alone did not (Cricher, Inbar, & Pizarro, 2013).

Implications for Legal Contexts

Our research highlights that a wrongdoer's impulsivity is likely to have different, but predictable, effects on juries' willingness to ascribe blame. Although it has long been appreciated that emotion-based impulsivity can serve as a blame-mitigator, our findings show that speed-based impulsivity can amplify moral judgments. In our final section, we consider four implications of our findings and framework that should be considered when speaking about impulsivity in the courtroom.

Disambiguate ambiguous impulsivity. In the research presented here, we took pains to make sure that our experimental materials clearly identified impulsivity as being emotion-based or speed-based. But in actual situations, especially those that are reconstructed in the courtroom, there is likely to be ambiguity

about whether impulsive actions were characterized by reason-corrupting emotionality or by dispassionate quickness. Did the defendant decide to throw a brick through the plaintiff's car window "without hesitation" (speed-based) or "while in a fit of rage" (emotion-based)? Keeping in mind that not all impulsivity is created equal, one would do well—through one's questioning of witnesses and one's own presentation of the facts—to push for a characterization of impulsive actions in one way or the other.

Recognize that planfulness need not be a cue to responsibility. Our findings qualify Roberts et al.'s (1987) conclusion that the degree of planfulness in committing a crime leads to harsher criminal judgments, because planfulness is a cue to responsibility (Roberts & Golding, 1991). We instead find that wrongdoers who spend considerable time deliberating about their infractions, and thus could be characterized as more planful, are judged *less* harshly than those who pursue wrong more quickly. We think one resolution of this apparent contradiction is it matters whether there is uncertainty about whether a wrongdoer's actions reflect his own moral compass as opposed to the pressures of the situation. That is, if it is unclear whether Vivian's decision to maim her cheating husband stemmed from jealous rage or calculated malice, knowing that she injured her husband only after much planning and deliberation signals that her actions were reflective of her guilty disposition and not the corrupting situation. Given emotionality is seen as only a temporary corruptor (i.e., our tempers cool with time), added planning makes emotional impulsivity an implausible defense. If instead it is unambiguous that Vivian's decision to attack her husband was based on a dispassionate consideration of her options, then Vivian's quick settling on her plan is especially revealing of her blameworthy character.

Consider disentangling decision speed from action speed. Oftentimes there is a disconnect between when someone *decides* to carry out an action and when they actually *act*. When someone acts immediately, the ambiguity is resolved—both decision speed and action speed are quick. But when a person acts slowly, it is possible that the decision itself was arrived at quickly, but that it then took considerable time to act. Herein lies a second resolution to why a wrongdoer's planfulness sometimes enhances and sometimes diminishes culpability. The longer it takes one to reach a decision, the clearer it is that the person was ambivalent in their motives, which reflects a less blameworthy character. But once the decision has been made, the longer one takes to then carry out that action, it is clearer that the person is even more confident in her choice. If Barry decides quickly to participate in an embezzlement scheme, we learn that Barry's moral soul is no good and all bad. But if Barry must spend a year planning his crime, we learn even more about the firmness of his immoral resolve, which may explain why planfulness can prompt blame. In short, the lesson is that juries are likely to be more sympathetic with defendants who took considerable time before *deciding* to misbehave, but may be less sympathetic with defendants who spent considerable

time *plotting* how to carry out the action.

Appreciate that from the clarity of the courtroom, “quick” may seem “long.” When jurors consider someone else’s decision making process, they do so from a privileged position. In thinking about a defendant’s choice to behave badly, jurors will spend hours, days, or even weeks carefully considering the defendant’s decision—the options, the relative risks, the stakes. In contrast, when the defendant was actually confronted with this decision, there was likely greater ambiguity and uncertainty about the choice before him or her. Consider a defendant who is being prosecuted under a Good Samaritan Law because she failed to act in time to save a drowning woman. The jury may see the defendant’s choice as having been simple: to throw or not to throw the victim a life preserver. As a result, any delay in the defendant’s action is seen to reflect her moral callousness, thereby justifying a harsh punishment. But in the actual situation, there may have been ambiguity about whether the situation was an emergency, uncertainty about whether

the defendant or someone else would be the one to help, or a paralyzing confusion given the unusualness of the context. If jurors do not fully appreciate these factors, they may see a defendant’s action as delayed. In reality, once the defendant understood the decision with the cool clarity that the jurors take for granted, she may have acted quite quickly.

Conclusion

Juries are likely to be influenced by knowledge that a defendant behaved impulsively, but it matters whether that impulsivity reflects emotionality or mere decision speed. Although it has long been recognized that emotionally impulsive acts receive less blame than the same acts committed dispassionately, speed-based impulsivity (i.e., rashness) exacerbates blame. By considering our four implications for legal contexts, attorneys should be well-equipped to predict how juries are likely to respond to information about a defendant’s impulsivity. 

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[Yoel Inbar, Ph.D.](#), is an Assistant Professor in the Department of Social Psychology at Tilburg University, Netherlands. He studies how intuition affects our choices; how our moral beliefs determine our own actions and our judgments of others; and how the emotion of disgust can predict our moral and political attitudes. Read more [here](#).

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We asked two trial consultants to respond to this article.

Susan Macpherson is a senior trial consultant with NJP Litigation Consulting’s Midwest office (smacpherson@njp.com) She has been conducting jury research, assisting with jury selection and consulting on presentation strategies for IP, complex commercial, employment, personal injury and criminal defense cases for over 30 years (see www.njp.com.)

Susan responds:

IT IS EASY TO OVERLOOK subtle but significant factors that can influence how jurors reconstruct and judge critical events in the courtroom. The work that Critcher and

Inbar have done in drilling down on factors that can drive opposing interpretations of impulsive behavior is a good example. Whether a defendant’s impulsive act is perceived as an aberration or as revealing his/her true character can change the outcome in many cases.

One could quarrel with their labeling of impulses as “emotion based” vs. “speed based,” in that all impulsive behavior by definition shares the element of speed. The dichotomy of impulses set up in their research seems to be more aptly described as “emotional vs. dispassionate.” Labeling aside, most attorneys trying criminal cases would already recognize the need to “disambiguate ambiguous impulsivity” when intent is an element of the charge. In my experience, the effect of

ambiguity is more likely to be underestimated when impulsive conduct plays a role in a civil case. For example, in a case where the dispute centers on what was said in the documents, jurors' perceptions of the impulse to write something down, to send an email, or to delete an email can result in very different judgments about that evidence and the person connected to it. Was the document written, sent or deleted due to an angry outburst, a snap judgment or a carefully calculated decision? We often hear jurors debate whether they should give any weight to "smoking gun" documents when the attorneys focus only on the content and allow the author's or sender's state of mind to remain ambiguous.

The discussion of whether evidence of planfulness does or does not cue responsibility and harsher judgments raises another labeling question. Is "deliberating about infractions" the same thing planning wrongful conduct? If the former is intended to mean struggling with the temptation to engage in wrongdoing, that seems quite different than planning.

Their explanation of the need to distinguish decision speed from acting speed is easier to follow. We've seen that detangling decisions and actions can make the difference between a guilty and not guilty verdict in cases involving women who have acted in self-defense to escape the threat of fatal harm from a violent spouse. If jurors perceive the woman's use of force as an impulsive act fueled by fear that can easily lead to a verdict of manslaughter rather than murder, as would be predicted by Critcher's and Inbar's research. But if the goal is a verdict of not guilty by reason of self-defense, jurors need to believe her fear was based on a reasonable or (in some states) an "objective" assessment of the potential threat. Focusing jurors only on the emotion driving her impulse to use force often results in her perception of the threat of harm being viewed as distorted by fear and unreliable. Her response is then seen as an unjustified overreaction rather than a necessary use of force. Separating the description of decision speed – how she developed the ability to discern the subtle cues and signs of escalating imminent danger – from the description of her acting speed is usually an essential step on the path to an acquittal.

Addressing why she stayed in the relationship is another issue that requires separating decision speed from acting speed. The defendant may have struggled over a long period of time with the decision to leave but that needs to be clearly separated from acting to defend herself in the face of an imminent threat. The failure to make that distinction invites a perception of her intent that is more consistent with the argument usually made by the prosecution: she finally had enough and just decided to kill him to put an end to the abuse.

Interviews with jurors who have decided self-defense cases illustrate the fourth point made by the authors: her "quick" move can appear to have taken a "long" time when recounted in the courtroom. They typically report that reaching a verdict required reconciling opposing views about whether the defendant had time to escape without using force. The defense

attorney has to anticipate this problem in helping his client prepare to testify, and take it head-on in the closing to prepare jurors for deliberations.

Again, the same principle can be applied to thinking about how jurors will evaluate conduct in civil cases. For example, when jurors are asked to judge whether the defendant(s) acted with deliberate or reckless disregard, the plaintiffs often frame the action that caused harm as quick and dispassionate to show that the defendants gave no thought at all to the obvious danger and foreseeable harm. Civil defendants in such cases can often escape punitive damages by painting the opposite picture. Isolating the harmful act and encouraging jurors to focus on the long period of uncertainty or mixed signals about whether there was any potential for harm can reduce the motivation to punish.

The evidence presented by Critcher and Inbar demonstrates how quickly jurors can form conclusions about a defendant's "true character" based on a very small amount of information. This has significant implications for crafting the story told in opening and describing decisions and actions in testimony. The specific words chosen to create the visual image and the context for a single act can set up the defendant to be excused or to be blamed for the outcome. ¹⁹

Sociologist Holly VanLeuven, President of Genesis Group, has been a practicing Trial Consultant since 1972, having left an established career in conflict management and civil disorder mediation when Trial Consulting was in its infancy. Currently located in Concord NH, VanLeuven's Genesis Group offers a full range of trial consulting services; her special interest is the relative power and influence of individuals in the group decision-making process.

Holly responds:

Critcher and Inbar examine the factors determining how much blame someone is likely to get from jurors, depending upon both *what* someone did and *how* they went about it. Missing in this paper is consideration of motive, the *why* of the act, although there is attention given to timing, the *when* of the act, whether it was immediate or the result of deliberation over time. The authors posit that jurors assess the underlying character of a person by means of interpreting that person's behavior...whether the behavior was impulsive or decisive and whether the speed of the action revealed a cold heart or a deliberative mind.

For centuries our culture has weighed in on these, and related issues:

"Fools rush in where Angels fear to tread" -Alexander Pope

"Quick decisions are unsafe decisions" -Sophocles

“A prince should be slow to punish and quick to reward”
-Ovid

etc..

Our sacred documents, our myths, our nursery rhymes, books and movies deal with these issues, coming down on one side or the other and everywhere in between.

Every functional human being, regardless of age and life experiences, regardless of religious beliefs, ethnicity, gender, national origin and other demographic factors, has a value system and has devised some method of sorting out the clues they have collected about the world around them. Jurors are no exception to this process. Critcher and Inbar are attempting to make some sense of this and in some ways they succeed.

As a Trial Consultant, my concern is to be able to discern who in a jury pool is likely to interpret the story of our case, the facts in our case, in a manner most favorable to our client. Does this research help me to do that? Not exactly. The research probes some kinds of responses people might have to different behaviors but doesn't suggest what responses are likely to come from people, jurors, with various characteristics. The research does a good job of raising the issues. It flunks at providing a route to a more effective jury selection.

But what about the usefulness of this study to our Attorney clients? Again, it does a good job of raising issues but I don't think that in its present form it would be particularly useful to attorneys. I am a Sociologist and should find it fascinating. However, sadly, I didn't. At the risk of being presumptuous, my guess is that it would be less so for an Attorney

A valuable book for anyone interested in reading more on this general subject is *Thinking, Fast and Slow*, written by psychologist Daniel Kahneman, in 2011. Kahneman won the 2002 Nobel Prize in Economic Science. His signature theme is human irrationality. 📖

Critcher and Inbar reply:

Our research emphasizes that, in the minds of jurors, all impulsivity is not created equal. As Ms. Macpherson's thought-provoking commentary implies, there are many nuances to address before achieving a more complete understanding of how impulsivity influences juror decision making.

First, Macpherson raises good points on nomenclature. She is correct to highlight that speed is common to both types of impulsivity, which is why she encourages us to relabel “speed-based” impulsivity *dispassionate* impulsivity. We chose “speed-based” given that the key feature that signals the unequivocal nature of the decision is its quick, not its dispassionate, nature.

But she is right that we should stress that when impulsivity is emotional, speed does not communicate certainty (because it is the emotion, not certainty, that is responsible for the rushed action). We also agree that terminological vagueness surrounding the term *planfulness* is a reason it seems to have varying effects on blame. It matters *what* one is planning or deliberating about—which course of action to take or *how* to go about the chosen course.

Second, Macpherson offers an example that illustrates the importance of certain temporal dynamics in impulsive episodes. In considering the domestic violence victim who attacked her partner while afraid, we imagine a core question for jurors is the temporal sequence of the woman's perception that she is in danger and her experience of fear. If the perception *precedes* the fear, then the fear is more likely seen to be legitimate, and thus a mitigating factor. But if the fear is seen to precede and thus *bias* her perception of her situation, then jurors are likely to be less sympathetic to her. More broadly, this highlights that emotional impulsivity is likely not an unconditional blame-mitigator; perhaps only “reasonable” emotionality is. We suspect that a defendant who committed a crime of passion would receive less juror sympathy if it were exposed that he was dispositionally quick-tempered. That is, his chronically short fuse calls into question the reasonableness of his emotionality in any particular episode. We think more research is needed to understand whether a belief that “most people would be upset by this situation” is actually a necessary condition for emotional impulsivity to attenuate blame.

Third, we think that Macpherson's point that plaintiffs “often frame the action that caused harm as quick and dispassionate to show that the defendants gave no thought at all to the obvious danger and foreseeable harm” raises an interesting issue. Our studies examined cases in which the foreseeable harm was clear, so decision quickness reflected a lack of concern about it. In other words, decision quickness signaled an actor with an inappropriately clean conscience. But when the harm is less obviously foreseeable, the influence of decision quickness is less clear. That is, if the person acted without even realizing he would perpetuate harm, his actions might seem less bad. On the other hand, this person might be blamed for negligence—acting without even understanding the situation at hand. Understanding when one or the other conclusion would be drawn is another fruitful avenue for future research.

The second commentator, Ms. VanLeuven, offers quotations on the wisdom or folly of making decisions quickly or slowly. Although our article did not address this intriguing question, we too recommend Daniel Kahneman's book, which identifies the relative strengths and shortcomings of relying on intuition (quick, effortless thought that is error-prone) versus reason (slow, effortful thought that is often a better guide to accuracy). For what it's worth, we find it both useful and fascinating. 📖

The DELETE Key

Ah, the DELETE key. Sitting politely in the upper right of your keyboard, it patiently awaits a caress from your pinky. It quickly corrects errant keystrokes and poor word choices. Click. Goodbye. It evicts spam in the blink of an eye. Banishing Testostoril, Walk-in tubs, and Nigerian Finance Ministers with hardly a thought. No other key, not the Control key, not the Alt or the Function keys, not even the Command key have the kind of raw power assigned to this one magical button. Music, photographs, spreadsheets and even whole applications don't stand a chance! Tired of that song? DELETE it. Stalker boyfriend party pics? DELETE 'em. That email rant written in anger and frustration? DELETE it.

So, thank you, delete key, for always being there, ready to help with whatever problem we have. 🍌

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Innaccuracy in Political Self Perception: Young Adults Are Not as Conservative as They Believe

by Michael J. Bernstein, Ph. D. and
Ethan Zell, Ph. D.

Don't miss our trial consultant responses at the end of this article: Tara Trask, Charlotte A. Morris, and read the author's response here.

Background

Most people assume they have insight into their goals and motivations, believing they know who they are, what they do, and why they do it. This fundamental assumption – that we are aware of our skills, talents, and even our knowledge – is the basis upon which we navigate our lives. We make decisions every day that rest on a belief that we know our abilities. Students choose one major over another because they believe they might be unable to handle certain prerequisites; teachers believe they can predict their student evaluations at the end of the year based on their experience in doing so; jurors believe they can be impartial during a case; and lawyers believe they can sway a jury or judge with their persuasive abilities.

While it is indeed the case that people can be accurate in their self-perceptions, much research suggests this is not always the case; we often do not have accurate self-perceptions. While people often believe they can predict how they performed on

an exam or how they will be evaluated by their superiors, or even their students, research often shows that these beliefs are only modestly related to actual performance in those domains (Mabe & West, 1982; Zell & Krizan, 2013). In some instances, this error in self-perception is only an annoyance for the perceiver, such as a student who believes they are so naturally gifted in an area that they fail to spend enough time studying and thus perform poorly on an exam. It can also, however, be devastating, as in a case in which a medical doctor performs a risky procedure they believed they could do and yet were not skilled enough to complete.

In this paper, we explore a domain of self-knowledge as of yet relatively unexamined and one for which we believe most people would be certain that they have accurate self-knowledge – political orientation. Political orientation is a particularly important self-aspect for many people, particularly in today's partisan culture. Our relationships, where we live and work, the news we watch, and how we see the world more generally are influenced in part by our self-perceived political orientation. Given that such orientations have been shown to influence a host of behaviors, including even how we process information,

it should be particularly important that we be accurate in our self-perceptions. Yet we believe that such a standard of accuracy is not necessarily being met. We begin by outlining prior research on self-knowledge generally and then focus on our predictions for political self-knowledge.

So, are we really that bad?

As stated previously, there are many studies showing that people's perceptions of their performance is often only weakly related to their actual performance outcomes. For example, people's views of their own intelligence are only slightly correlated with their performance on academic tests and intelligence assessments (Hansford & Hattie, 1982) and student's self-assessments of performance in the classroom are often only moderately related to the grades they receive from instructors (Chemers, Hu, & Garcia, 2001). Research showed that surgical residents performance on a standardized test assessing surgical knowledge was completely unrelated to their belief in their knowledge (Risucci, Torolani, & Ward, 1989). In another vein, people often believe they are very good at detecting lies, and yet there is virtually no correlation with such a belief and their actual ability to detect lies (DePaulo, Charlton, Cooper, Lindsay, & Muhlenbruck, 1997). Peers are often better able to predict how long our romantic relationships will last than we are (MacDonald & Ross, 1999). CIA analysts believe their predictions about world events are better than they are (Cambridge & Shrekengost, 1980), and students who performed in the bottom 25% of a class on an exam left the exam believing they outperformed their peers (Dunning, Johnson, Ehrlinger, & Kruger, 2003).

Why are we so bad at this?

One may wonder why it is that we are so bad at accurately knowing ourselves, especially given how seemingly important it is to do so. Part of our poor insight may be due to a lack of enough information against which to judge ourselves – people simply do not know that which they do not know (Dunning, Heath, & Suls, 2004). Imagine a teacher entering the class for the first time and then trying to evaluate how he or she performed at the end of the class; they may not have accurate insight into the cues that would help them assess their performance, and what is worse, they may instead rely on other, less valuable cues. As a result, this lack of knowledge prevents their accurate self-assessment (Caputo & Dunning, 2005). In another example, when asking someone to generate as many words as he or she could using the word “television,” (e.g., vision, not, tons), a person may list 20 and believe this to be a reasonable number, even though there are more than 350 potential words that could be created. Knowing the total number of possible words would certainly help a person more accurately assess their performance, but not knowing the correct amount makes the task difficult at best.

People are also often motivated to see themselves in a positive light and overestimate their abilities, which can lead to these

self-perception inaccuracies (e.g., Guenther & Alicke, 2010). Individuals who believe, for example, that they are more likely than their peers to live past 80 and less likely to have a heart attack (Weinstein, 1980), show an optimistic bias, as do the 60% of students in one study who rated themselves as being in the top 10% of students in their ability to get along with others (College Board, 1976-1977). People also expect they will finish tasks more quickly than they actually do, and often fail to make their deadlines even when they predict a completion time they are “certain” they will meet (Buehler, Griffin, & Ross, 2002). These are all examples of how motivation to see oneself positively can also play a role in shaping our self-perceptions.

Political self-knowledge

Given the spate of research in recent years documenting people's inaccuracy at self-perception, we wanted to know whether this extended to people's perceptions of how liberal or conservative they are. Are people who identify as conservative really as conservative as they believe and, in turn, are liberals as liberal as they attest to be? We believe there is quite a bit of evidence supporting our assertion that people may not have insight into such identifications. To begin, rather than desiring less distribution of wealth, Americans favor greater distribution than is currently observed in our society (Norton & Ariely, 2011); greater wealth distribution is a far more liberal perspective than a conservative one, even though the majority of the country identifies along the conservative spectrum (Gallup, 2012). This is particularly interesting in light of the fact that the majority of Americans support more liberal policy issues concerning topics such as poverty, environmental regulation, and education practices (Free & Cantrill, 1967; Stimson, 2004). On such issues as immigration, gay marriage, and marijuana legalization, Americans seem to be taking more liberal stances (Plaue, 2012) all the while identifying more as conservatives (Florida, 2011). So why might people identify as being more conservative while supporting more liberal issues? Well, conservatives tend to have a greater focus on loyalty to their groups (e.g., family, country, religion) than do liberals (Graham, Haidt, & Nosek, 2009). This is consistent with evidence suggesting people who identify as conservatives value obedience to authority and group loyalty more so than do liberals (who show greater concern for harm and fairness; see Haidt & Graham, 2007 for review). It is possible that this sense of loyalty leads individuals to identify more strongly with conservatism than their support of issues may actually reveal. Along a similar vein, conservatism is associated with self-enhancement insofar as research has shown individuals rating themselves as conservative (as compared to liberals) had more distorted, overly favorable self-perceptions (Jost, Liviatan, van der Toorn, Ledgerwood, Mandisodza, & Nosek, 2010). This tendency toward self-enhancement, along with their desire for group loyalty, may lead conservatives to perceive themselves as typical or “true” members of the Republican Party when their attitudes on specific issues may not reflect that. Thus, it is possible that individuals may identify as strongly conservative when they may indeed only be moderately or even weakly

conservative.

The current work

We hypothesized that individuals would underestimate how liberal they in fact are. In each of three studies (using different populations and including slightly different measures), participants were asked to rate the strength of their own liberal or conservative orientations. They were then given a more objective measure of their political attitudes via a set of 12 items concerning various political issues, which could then be compared to norms for the population at large. Based on the previous literature described above, we predicted that, generally, people's political attitudes would be more liberal than their self-assessment of their political orientation, but that this would be particularly true among those who self-identified as politically conservative.

Study 1

We had one-hundred and ninety-nine college students (138 Female; 55% Caucasian, 25% African American; *Average Age* of 20.34 years) complete a survey for partial course credit. Participants first indicated their political views on a scale including the following categories (1=Liberal Democrat, 2=Average Democrat, 3=Moderate Democrat, 4=Independent, 5=Moderate Republican, 6=Average Republican, 7=Conservative Republican; see Table 1 for frequencies of each category across all three studies).

Participants next completed a political attitudes quiz developed by the [Pew Research Center](#) (PBS NewsHour, 2012). Participants responded to 12 attitude statements about issues in American politics that are strongly tied to the political spectrum including topics such as gay rights, abortion, welfare, government regulation of business and the environment, and others. Respondents had to rate their agreement with each statement on a "1 Strongly Disagree" to "4 Strongly Agree" scale. Example items include, "Poor people have become too dependent on government assistance programs," "Business corporations make too much profit," and "There need to be stricter laws and regulations to protect the environment." Researchers at the Pew Research Center (2012) gave this questionnaire to a representative sample of Americans and developed a coding scheme whereby respondents could be placed into one of the same seven political categories mentioned above. The coding scheme estimates the degree to which participant's responses match those who are typical of each political group and places them into a category of best fit (for additional details, see Zell & Bernstein, in press). Following the 12 items, participants answered some demographic questions, were thanked, and debriefed.

Study 1 Results

Having made ratings of their political attitudes, we could use the coding scheme developed by the Pew Research Center and

then make a more objective assignment to one of the seven categories of political orientation. We could then compare the objective measure with the self-assessment each participant made on the political orientation scale. Thus, each participant had a category to which they assigned themselves as well as a category to which they were assigned via the Pew Research Center scale. While self-assessment scores and the objective measures did correlate with each other ($p < .001$), our hypothesis was supported; the objective political orientation scores were significantly less conservative than were the self-assessment scores ($p < .001$). As we predicted, as individuals self-identified more with conservatism, the bias to underestimate liberalism increased, $p < .001$ (see Figure 1). When looking at the political orientations individually, Liberal Democrats significantly overestimated their liberalism ($p = .02$) and Average Democrats had relatively unbiased self-perceptions ($p = .64$). However, Moderate Democrats ($p = .001$), Independents ($p < .001$), and Republicans ($p < .001$) significantly underestimated their liberalism.

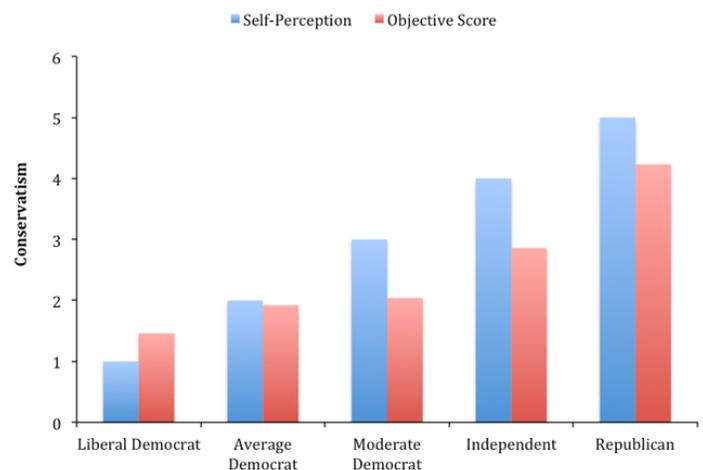


Figure 1: Self-perception and objective scores as a function of between self-perceptions and objective scores as a function of political identity

Study 2

We wished to replicate our findings from Study 1 using a different population. In this study, we collected data using Mechanical Turk (e.g., Bernstein & Benfield, 2013; see for review Buhrmester, Kwang, & Gosling, 2011). We collected 360 respondents (233 Female, 74% Caucasian, *Average Age* = 28.46 years). Participants were all US residents and 44 states were represented in the survey. The procedure for Study 2 was identical to Study 1 except we counterbalanced the order of the self-assessment survey and the attitude quiz to ensure that the order of the surveys did not affect the results. We also measured education and income to determine if these influenced our results.

Study 2 Results

Neither the order of the surveys nor people's sex, race, age, income, education level, or region of residence influenced the

results. We again replicated our finding from Study 1, such that self-assessed political orientation was more conservative than were the objective assessments ($p < .001$), though the two measures were correlated ($p < .001$). Also as in Study 1, the regression analysis (coding remained the same as in Study 1) revealed that the more conservative respondents showed a greater underestimation of their liberalism (i.e., they rated themselves as more conservative than their attitudes suggest) than did those who identified as more liberal, $p < .001$ (see Figure 2).

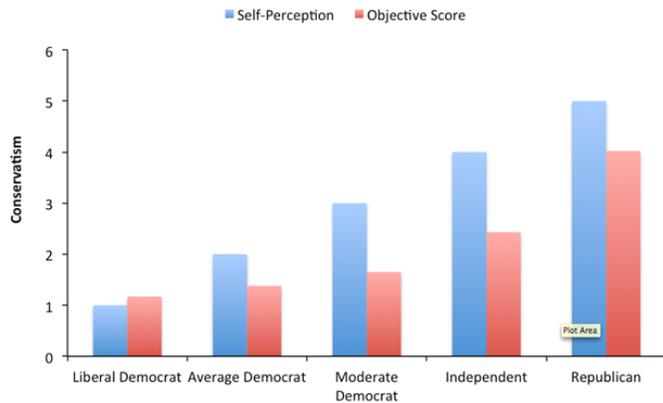


Figure 2: Self-perception and objective scores as a function of between self-perceptions and objective scores as a function of political identity

Study 3

While Studies 1 and 2 were supportive of our hypothesis, they are not without their limitations. First, our sample was largely skewed towards more Democratic respondents. While this is not uncommon for young people to be more affiliated with the Democratic party, we need to show whether our effect occurs among each Moderate, Average, and Conservative Republican groups and thus Study 3 aimed to sample more equally among the political spectrum. Study 3 also examined whether this bias among self-perceived political orientation affected voting behavior in the 2012 Presidential Election.

College student samples from two universities (one in the Southeast and one in the Mid-Atlantic) were collected in January of 2013. We used a screening procedure to ensure we got equal sample sizes with respect to political categories. One hundred and fifty-four participants (110 Female, 66% Caucasian, 22% African American, *Average Age* = 20.31 years) were collected in total with 22 participants in each of the seven political categories. The procedure was identical to Study 1 with the exception that respondents were also asked to report on whom they voted for in the 2012 Presidential Election (Barack Obama, Mitt Romney, another candidate, or did not vote).

Study 3 Results

We again examined whether self-rated political orientation differed from the more objective measure, and as in the two previous studies, we found the same significant effect, $p < .001$.

As shown previously, self-assessed political ratings were more conservative than the objective measure, although the two were again correlated ($p < .001$). Further, a regression showed the same pattern as in the prior two studies, namely that this effect was strongest among more conservative individuals, $p < .001$ (see Figure 3).

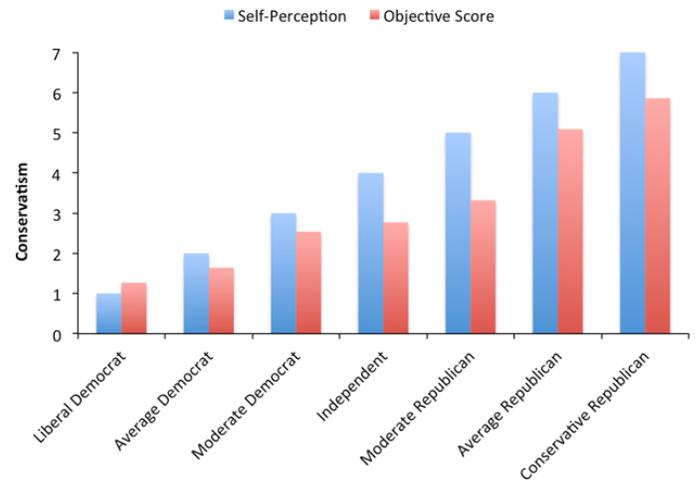


Figure 3: Self-perception and objective scores as a function of between self-perceptions and objective scores as a function of political identity

We also wanted to see if our self-assessed measure of political orientation and our more objective measure could predict voting behavior. We performed a logistic regression for each President Obama and for Governor Romney and found that, in each case, the self-reported scale as well as the objective measure both acted as significant predictors of voting behavior. Interestingly, self-assessed reports of political orientation still predicted who a person voted for even after controlling for the more objective measure, and this was true whether people voted for Obama or for Romney.

Discussion

In three studies, we showed that young adults tend to think they are more conservative than they really are in terms of their support for important political issues and that this was particularly true for young adults who self-identify along the conservative side of the political spectrum. We think it is important to note that there was a reasonably strong correlation between self-assessed political orientation and our more objective measure, indicating some degree of accuracy. While it may be convenient to say that, because of this correlation (especially compared to some of the examples provided in the introduction), this bias is not important, we believe that would be premature.

In the political domain, these results have important implications. Much work shows that self-assessed political orientation predicts voting behavior and support for Presidential candidates who share the same political orientation (Jost, 2006). Nonetheless, if individuals are more liberal than they believe they are in terms of self-identification, it is possible that

they could end up voting for candidates who do not actually represent their political views in regards to particular issues. Further, in states in which primaries are closed (i.e., individuals may only vote in the primary for which they are registered as being a party member), individuals may be relegated to voting for primary candidates who also do not represent their personal stance on issues.

In terms of voting, the relevance of this attitude was clear. When examining the results of Study 3, we found that no one who identified themselves as a Democrat was actually more closely aligned with Republicans based on their objective scores. However, 19 individuals who identified themselves as a Republican were actually Democrats based on the objective measure. Of these, six voted for Obama, five for Romney, one for another candidate, while seven did not vote at all. Thus, some people who voted for Romney had a liberal identification according to the objective measure. This was unlike those who voted for Obama, of whom none would be identified as conservative based on their attitudes on issues (the objective measure). This suggests that Republicans who misclassify themselves may vote for a Republican candidate even if their attitudes better align with the Democratic Party, yet the reverse is not necessarily the case.

In terms of the law, this has equally important implications. Beyond adding to the abundance of evidence showing that individuals often do not have accurate perceptions of themselves, this research suggests the importance of asking questions concerning particular issues rather than simply asking ones' political identification when questioning witnesses and potential jurors. Along these lines, the results of Study 3 showed that objective political orientation scores predicted voting after accounting for self-ratings of political identity, and

were as important as self-ratings in predicting voting. Therefore, researchers and legal professionals who only utilize self-ratings of political orientation may be neglecting a key source of data that predicts behavior and potentially jury decision-making.

Another important aspect of this is that asking people (e.g., jurors) to identify which political party they support may not reveal their views on specific political issues. It is commonly assumed that people within the Democratic and Republican parties hold views on issues like immigration, gay rights, and abortion, and that these views are highly polarized. When someone explicitly identifies themselves as a member of a political party, we may stereotype them according to their party and assume they hold views that are consistent with our stereotypes of the party. The present findings suggest that these political stereotypes may be somewhat inaccurate, and that using them to infer other people's attitudes may be counterproductive in some instances.

More generally, because political conservatism predicts many important behaviors and is correlated with a number of other important personality factors (e.g., prejudice, see Terrizzi, Shook, & Ventis, 2010; social dominance orientation, see Pratto, Felicia, Sidanius, Stallworth, & Malle, 1994; disgust sensitivity, see Inbar, Pizarro, & Bloom, 2008), it may be worthwhile to assess political orientation in terms of issues in addition to self-reported identification. Self-knowledge is something we all assume we have and yet, its accuracy is often called into question. Findings ways to assess our knowledge while avoiding the biases in our thinking is of the utmost importance when trying to understand peoples' motivations and behaviors. This quest for greater accuracy is of value for both basic psychological research as well as in the realm of more applied domains. ©

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Ethan Zell, PhD is an Assistant Professor of psychology at the University of North Carolina at Greensboro. His research examines self-evaluation of ability; accuracy of self and social perception; and the effects of age, culture, and gender on the self. More information can be obtained from [his website](#).

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Table 1

Distribution of Self-Perceived and Actual Political Orientation

<i>Study 1</i>	<i>Self-Perception</i>	<i>Objective Score</i>	<i>Difference</i>
Liberal Democrat	13.1	39.2	-26.1
Average Democrat	25.6	12.6	13.0
Moderate Democrat	11.6	17.6	-6.0
Independent	28.1	14.6	13.5
Moderate Republican	12.6	10.1	2.5
Average Republican	6.0	4.0	2.0
Conservative Republican	3.0	2.0	1.0
<i>Study 2</i>			
Liberal Democrat	27.8	63.3	-35.5
Average Democrat	15.6	10.8	4.8
Moderate Democrat	15.8	7.8	8.0
Independent	28.3	8.1	20.2
Moderate Republican	7.8	3.9	3.9
Average Republican	3.6	3.6	0.0
Conservative Republican	1.1	2.5	-1.4
<i>Study 3</i>			
Liberal Democrat	14.3	30.5	-16.2
Average Democrat	14.3	13.0	1.3
Moderate Democrat	14.3	14.9	-0.6
Independent	14.3	13.6	0.7
Moderate Republican	14.3	11.7	2.6
Average Republican	14.3	6.5	7.8
Conservative Republican	14.3	9.7	4.6

We asked two trial consultants to respond to this article.

Tara Trask is President and Founder of Tara Trask and Associates, a full service Trial Consulting, Jury Research and Litigation Strategy firm with offices in San Francisco and Dallas. She focuses her work on intellectual property litigation, antitrust, securities, products liability and other complex commercial litigation.

Tara responds:

Authors Bernstein and Zell seek to address the accuracy of self-reporting with regard to political attitudes and party affiliation. The authors hypothesize that people are generally poor at self-reporting their levels of conservatism or liberalism. The authors further hypothesize that self-described conservatives, in particular tend to define themselves as more conservative than they are when compared to objective assessment.

This research is particularly applicable for those of us who focus on juries. When making determinations about peremptory strikes in the cases I work on, I am often looking for any clues I can gather as to the values and beliefs of the prospective juror I am observing. With regard to whether a juror is more likely to identify with a patent holder, a company making a product, or one side or another of a contract dispute, that juror's values are of the utmost importance to me.

What this research sheds light on is the fact that knowing political party alone, and making decisions based on that metric alone will likely result in mistakes in jury selection. I never make decisions about a juror based on one characteristic. But this research lends depth and texture to something I was already considering and aware of. I often tell attorneys that I make decisions based on the "constellation of characteristics" I am able to glean about a person. This research informs that perspective.

For example, to assume that someone who self-identifies as a Republican will be unwilling to award damages in a products case would be a faulty assumption based on stereotypes according to this research. I would suggest that other metrics are equally important to consider in the "constellation" of the juror. What do they do for a living? How do they describe their parenting style? What groups or organizations do they belong to? And of course, how are they dressed? Are they carrying a particular book or periodical? All these questions and others combine to assist me in determining whether the story my client will be putting forward will resonate with that particular juror.

On a broad note, I would say that this research underscores something those of us in this field have long known; reliance on over generalization and stereotypes is a recipe for disaster. And, more importantly, while some of the decisions that are made by trial consultants every day may *look* like they are simple and stereotype-driven, most are not. This research underscores that point. ☺

Charli Morris has 20 years of trial consulting experience and holds a Master's degree in Litigation Science from The University of Kansas. She is co-author of [The Persuasive Edge](#) and can be reached directly at charli@trial-prep.com.

Charli responds:

Bernstein and Zell reach two related conclusions that are consistent with my own experience:

- 1) "...asking people to identify which political party they support may not reveal their views on specific political issues."
- 2) "...this research suggests the importance of asking questions concerning particular issues rather than just asking ones' political identification."

Stereotypes have always been rooted in generalities and jury research has always been interested in moving beyond the superficial to find specific attitudes and beliefs that will be meaningful given the facts and law that apply to a case (or case type).

Labels are Loaded

The problem with labels of any kind is that we don't control their meaning. Words like Latino, Black and Asian are technically nothing more than demographic indicators of race, but consider the wide variety of impressions (indeed prejudices) that are generated by the words alone. Even gender comes with baggage. "Man up." "You throw like a girl." Indeed, the ultimate name-calling for males starts with the letter P and is a word used to describe female anatomy.

We add "right-wing" to "Republican" to make it an insult, and curse the "left-wing Liberal" media for being sympathetic to the President when he's a Democrat. Members of both parties are characterized as "extremist" or "radical" when their political beliefs are strongly held. Our political system has consistently denied third-party candidates even when "Libertarian" and "Independent" sound about as non-threatening as they can get. I dare say many of us are still not entirely sure what it means when people tell us they are members of the Tea Party.

No wonder we are so bad at knowing (or accepting) what the labels mean, even as we apply them to ourselves.

It's been a long while since I asked focus group participants or potential jurors to tell me their political party affiliation. I've gotten the feeling that the question is regarded as intrusive by judges and jurors alike, despite the fact that voter registration is a matter of public record. If I did so, given today's political climate my list would certainly include more than the two major political parties and an ill-defined third (Republican, Democrat or Independent). But to the extent that we may still see value in asking it, I recommend asking follow-up questions to ***find out how politically active they are as a measure of***

The federal government has too much influence on the way **machine guards and protective devices** are designed and manufactured to protect against known hazards and foreseeable risks of harm and danger in the workplace.

or

Our government has a legitimate role in establishing **safety standards in the workplace** to protect against known hazards and foreseeable risks of harm.

In the first, potential jurors would likely need specific experience with “machine guards and protective devices” in order to have a firmly held belief that could make a difference in the case. In the second (better) question, a potential juror needs only work experience of any kind to have developed a belief about the role government plays in establishing safety standards. *Our questions designed to uncover liberal or conservative bias must likewise be just right not too general and not too specific.*

Final Thoughts about the Studies

The most serious limitation of the research in its application to litigation is the age of participants in two of the three studies. When clients and I are reviewing data from pre-trial research and SJQs, *I regularly caution against putting too much stock in the political preferences of people under the age of 25 (e.g., college students), particularly those who are still closely tied to their parents (e.g., financially dependent, living at home, etc.).* Just as medical research has demonstrated that the human brain is not yet fully developed in young adults, I would argue our political beliefs are more fully developed and stabilize over time as we age and live more independently.

The business of measuring attitudes and beliefs that are relevant to jury decision-making is both art and social science. Experienced trial consultants can help attorneys apply the principles of research provided in studies like these conducted by Bernstein and Zell to the specific facts and law of a case. ©

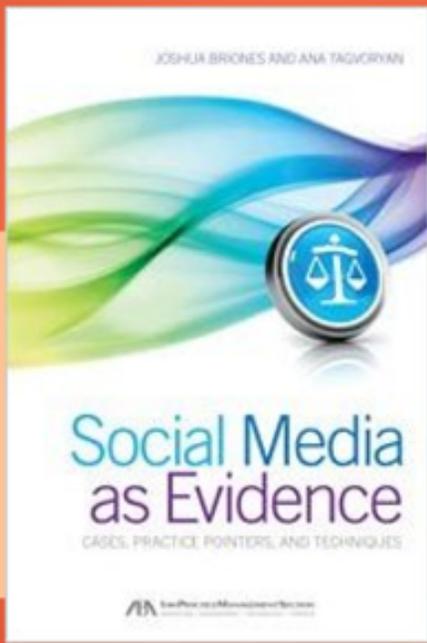
Bernstein and Zell Reply

There are of course limitations to this work that are important avenues for future study. First, an astute reader may wonder whether asking people their political affiliation and then having them report on their ideologies could in fact change people's initial attitude about their political orientation; in other words, would a participant who states they identify as conservative have a change in their own identification after realizing that they seem to support relatively liberal views? While we believe

that revealing a person's inconsistent views with their self can indeed change attitudes about the self, our data from the second study suggests this is not occurring here; in Study 2, we varied the order of the orientation question and the ideology questions and found no effect. If the order was important, than we should have expected participant's self-described political orientation to be more liberal following their responses to their ideology questions. We did not find that, however.

There are also valid concerns about using a single item measure to assess political orientation. The scale, for example, does not differentiate between social conservatism and fiscal conservatism and it is not clear whether independent is truly in the “middle” of liberal and conservatism or if it is in fact an orthogonal category. These concerns are not only valid but, in part, support one of our primary claims about the value of our research findings. The single item scale we used is so common in part because *it does* predict behavior (e.g., voting behavior, policy support). Thus, even a single item scale that does not differentiate between more nuanced understandings of political orientations still predicts well. Our argument, however, is that not only is it not perfect, but it also underestimates liberalism. We wholeheartedly believe that if those in the legal profession only had access to the single item “self-description” measure, that it would be better to add additional questions that assessed other aspects of orientation (e.g., social vs. fiscal conservatism; how important is one's political orientation to their sense of self; how often they are involved/donate money to their political groups). Future research would do well to examine how these and other additional questions relate to the political ideology scale we incorporated in this research.

Finally, while Study 2 used a non-college sample and revealed the same results as Studies 1 and 3, those latter studies did use only college sample students. There is reason to be cautious about the political beliefs of younger adults simply because they may be strongly based on their level of dependence with their parents. However, that seems more of an issue of consistency over time rather than accuracy or predictive value; for example, age of participant did not differentially predict the effect we found, indicating that young adults and older adults in our sample showed the same bias. Further, while the political orientations of young adults may be more greatly influenced by parents and guardians than the political orientations of older adults, that does not mean they are less important in predicting behavior. For example, a 20-year-old man or woman sitting in a jury pool may strongly identify as conservative now, precisely because his or her parents identify as conservative. While that orientation may change over time, that does not negate the impact that such identification has now. Nonetheless, future research should continue to examine this effect among older and more diverse populations. ©



THE JURY EXPERT BOOK REVIEW

SOCIAL MEDIA AS EVIDENCE: CASES PRACTICE POINTERS AND TECHNIQUES

BY JOSHUA BRIONES AND
ANNA TAGVORYAN

Review by Rita Handrich, Ph. D.

Social Media as Evidence: Cases, Practice Pointers, and Techniques by Joshua Briones and Ana Tagvoryan Publisher: [American Bar Association](#), \$79.95, 100 pages.

The social media landscape shifts quickly and keeping up with changes in platforms, privacy settings, and case law is more than a full-time job. Websites used for juror research may be purchased by other websites and, suddenly, their results are identical. You can spend hours doing painstaking research and inadvertently “make contact” with a juror because you don’t understand how different social media websites notify users of who has looked at their social media profiles. You may think you are being very, very careful, and yet leave a trail behind you—sometimes called “cyber crumbs” or “electronic footprints” that can unintentionally identify you as having peered into the social media life of someone you (likely) do not know.

Now, two attorneys at DLA Piper have written a book they plan to update routinely so it remains relevant and useful. “The proverbial ‘smoking gun’ document of the pre-Internet era, which had given way to smoking gun email, has now given way to the smoking gun social media post”, say the authors.

The book (*Social Media as Evidence*) introduces the various social media platforms (something which, if you are reading this book, you likely do not need) and then covers case law in various civil areas. Even if you are fairly well-informed on social media discovery, I think you will learn a number of new pieces of information from this book.

You’ve probably read about the evidentiary gold mine awaiting you by searching social media sites for evidence in insurance fraud cases, for impeaching witnesses or undermining the litigation position of a company. Stories are published routinely of attorneys searching Facebook and LinkedIn for information relevant to pending litigation, and of the searching of Twitter for tweets with relevance to attitudes, beliefs and values that could prove useful for either side in a dispute headed for the courtroom. Some of these searches are actually conducted in violation of the fast-evolving case law, much to the distress of both the attorneys and the courts.

While we are likely all familiar with the idea of social media discovery, many of us are not well-versed in the myriad ways it can go horribly wrong. The authors address this knowledge gap

and educate the reader on the pitfalls of social media discovery by summarizing recent case law (which is, at times, inconsistent and even contradictory), discussing ethical considerations, providing tips and tricks for various types of litigation discovery, and even describing challenges surrounding data authentication and retention in litigation.

For trial lawyers and consultants who work in trial courts, this book is a handy reference tool. The Appendices are a treasure trove of samples for jury instructions, preservation notices, litigation holds, and even sample questions you may wish to ask during discovery. There is however, one major drawback to the information presented in this brief but informative book.

The main dilemma for books like *Social Media as Evidence* is the nature of book publication timelines and the lightning speed at which the technology changes and shifts. One example of how quickly things change is the lack of information in this book on avoiding “inadvertent contact” when searching LinkedIn for information on potential jurors. This tip has been widely circulated in the past year but is not mentioned in the book itself—probably because they went to press before this was widely appreciated.

In the event you do not know about this issue, LinkedIn has a feature where they tell the user who has looked at their profile in the recent past. Unless you change the privacy settings on your own account, the LinkedIn user will be given notice that you looked at their account. This has been ruled “[inadvertent contact with a juror](#)” by the NY Bar Association, and is barred. Obviously something you want to avoid.

FYI: To avoid this sort of “cyber footprint”, go to your Privacy Settings in LinkedIn and select the option about what someone sees when you have looked at their account. Set your privacy setting to “you will be completely anonymous”. And then you will not be revealed to the LinkedIn user when you peruse their profile.)

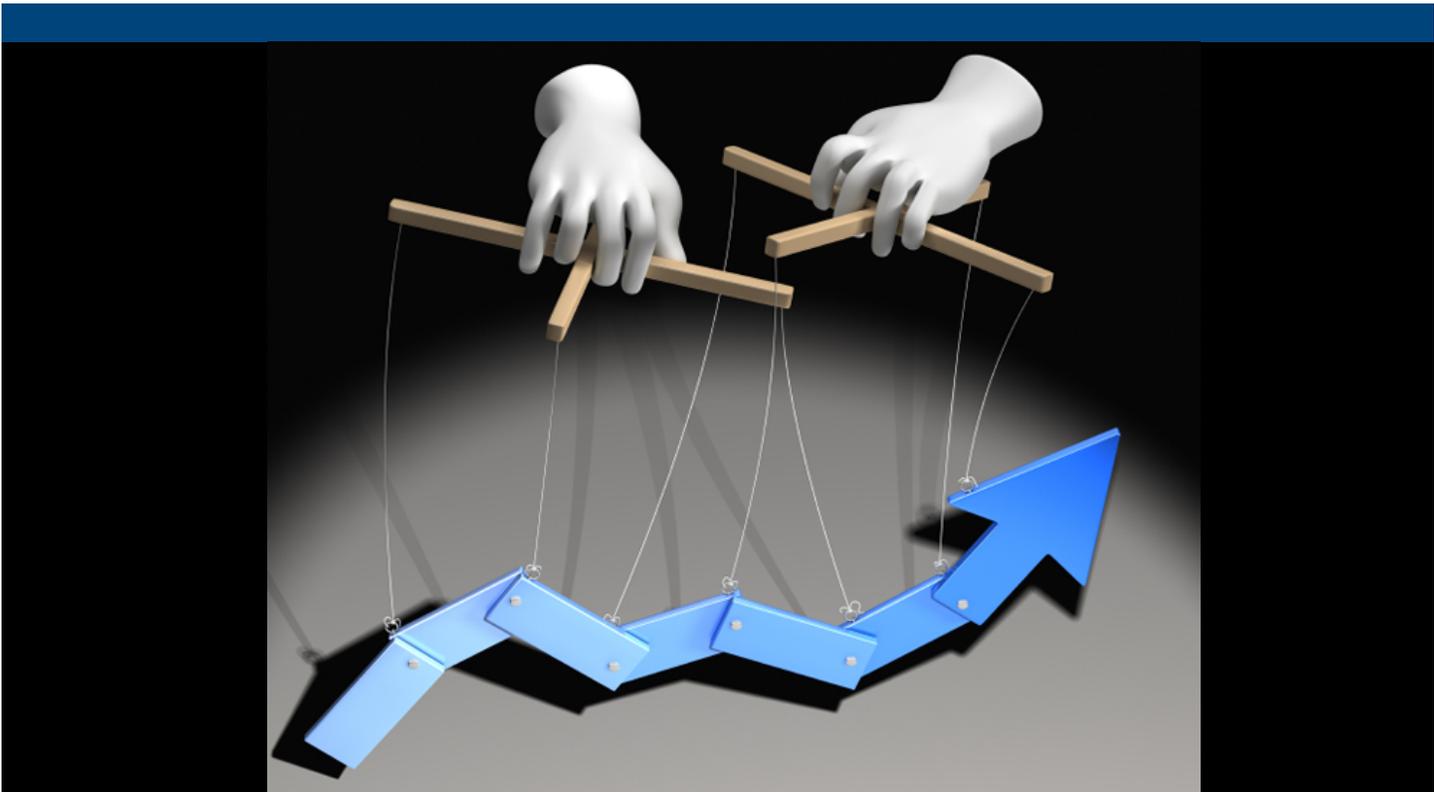
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Another shortcoming for me in this book was the focus on education and case law without a real set of information “tools” one can use for social media discovery. There is no list of tools, strategies, or resources for actual juror research that would make this a truly stellar resource for the practicing attorney who needs to know the latest in social media discovery. They tell the reader ‘why’ but give very little information on ‘how’. This book tells you about potential strategies and questions for social media discovery but leaves you longing for guidance on how to make use of the resources out there.

One thing I especially liked was the author’s mention of blog posts and blog comments as a useful source of information. They point to the Supreme Court citing online posts in their opinions and comments that inform regarding debate in the legal arena. They also add that comments from potential jurors in online forums can be truly instructive. While the authors are presumably referring to the content of the comment for potential indications of attitudes, beliefs and values, there is also new information available on the *kind of people* who actually post comments on internet news websites. We [blogged about this recently](#) at our firm blog (*The Jury Room*) and concluded this:

“As an aside, it can be worthwhile in voir dire to inquire about whether anyone has ever posted a comment on an internet news site. If you find someone who has done it more than a couple of times, you probably have a fairly kooky person of one type or another.”

In sum, this book is a useful reference tool and a fast overview of the social media discovery arena. I hope the authors will consider incorporating a list of social media discovery tools they find useful in upcoming editions of the book and updating those with each new issue as well. That addition of the ‘how’ in social media discovery would transform this book from a ‘good resource’ into a ‘must have reference’ for your library. ©



Trial Advocacy: Truthiness, Falsiness, and Nothingness

by Kathy Kellermann, Ph. D.

TRUTHINESS, FALSINESS AND NOTHINGNESS occur in litigation and legal advocacy. Advocates and litigation consultants routinely try to use truthiness and falsiness to influence decisions and verdicts in their clients' favor, and seek to avoid nothingness. However, jurors tend to follow the evidence, and so despite everyone's best attempts, nothingness also happens.

What are truthiness and falsiness in legal advocacy? Truthiness in legal advocacy occurs when information that is non-probative (i.e., non-diagnostic) of a claim nonetheless increases the perceived truth of the claim in the mind of a legal decisionmaker (e.g., jurors, judge, arbitrator, mediator, opposing attorney, witness, etc.). Falsiness is just the opposite, occurring whenever information that is non-probative (i.e., non-diagnostic) of a claim nonetheless decreases the perceived truth of the claim or fact in issue in the mind of a legal decisionmaker.

Newman and Feigenson (2013) provide important insight into how non-probative visual images affect people's judgments of the truth of a claim, and outline important implications for trial advocacy. Though not mentioned in their article,

other articles by them and associated authors offer additional and intriguing information about truthiness and falsiness. For example, truthiness of visual images is not a temporary response to a visual image; truthiness "sticks" over time (Finn et al., 2013). While truthiness can occur by using related though non-probative visual images, falsiness can occur by using visual images unrelated to a claim (Newman, 2013). Not everyone is subject to truthiness: 30% to 40% of people were not affected by truthiness in their research (which leaves a substantial majority, 60% to 70% who were affected by truthiness) (Newman, 2013). More than visual images can cause truthiness: non-probative verbal information also can increase belief in the truth of a claim (Newman et al., 2012).

In this article, I make three points about truthiness and falsiness: (1) Truthiness and falsiness from non-probative visual images can occur, but so can nothingness; (2) Truthiness and falsiness are much broader phenomena in trial advocacy and are not limited only to non-probative visual images, and so is nothingness; and (3) Truthiness and falsiness are tactics that can be used to counter nothingness, but other tactics exist to turn truthiness and falsiness back into nothingness.

Visual Images and “Nesses”

In trial advocacy, I accept, based on both experience and research such as Newman and Feigenson’s (2013), that purely decorative and metaphorical visual images can influence the perceived truth of a fact in issue. Trial graphics are often designed by litigation graphics consultants with this exact intent in mind.

Litigation graphics consultants rely on the same principles as advertising experts who employ non-probative visual images to encourage people to believe claims about products (e.g., a car is a better car because a sexy girl is selling it). Though written over a decade before Steven Colbert coined the term “truthiness,” Paul Messaris’s (1997) book entitled *Visual Persuasion: The Role of Images in Advertising* provides an insightful analysis of how non-probative visual images used in advertisements get people to believe product claims through “visual truths” and “visual lies.”

One technique used in advertisements is to alter the size of what a viewer sees in order to alter the belief in a claim. Litigation graphics consultants also use this technique. I will never forget seeing the defense in the first O.J. Simpson criminal trial in 1995 use a *huge* poster board showing a *huge* vial of blood, with the contested 1.5 mL of “missing blood” visually appearing to be a *huge* amount of white space on the poster board, even though it was only a very small proportion of all the blood initially drawn and, in reality, a very small amount. Given the large white space in the vial on the poster attributed to the “missing blood,” it became much easier for jurors to believe that this blood was *lost* or *taken* rather than *unaccounted for* because of simple measurement error or drops that stuck to the side of vials when blood samples were taken for testing. The picture of a large white space labeled as missing blood in a vial on a poster board bigger than most people are tall created belief that the blood was missing based on non-probative evidence (an illustration). Had jurors been shown an actual vial with 1.5 mL of blood in it, I believe that the claim of “lost blood” would have been much less persuasive.

Non-probative aspects of trial graphics, animations and videos can influence verdicts. Newman and colleagues (Finn et al, 2013; Newman, 2013; Newman & Feigenson, 2013; Newman et al., 2012) provide strong evidence that accompanying a statement with an image that is non-probative can cause truthiness and falsiness. Studies of videotaped confessions and computer animations demonstrate how the *perspective* taken in the video, a non-probative matter, causes truthiness. Evaluations of videotaped confessions can be altered by small changes in the camera perspective taken when the confessions are recorded. Videotaped confessions recorded with the camera focused on the suspect (as compared to videotapes from other camera points of view, such as on both the interrogator and suspect or only on the interrogator) lead mock jurors to judge that the confessions are more voluntary and the suspects more likely to be guilty (Lassiter, 2002; Lassiter et al, 2002). Computer animations of traffic accidents prepared for an actual court case

more than doubled the hindsight bias of mock jurors, that is, the computer animations made it twice as hard for mock jurors to reconstruct the accident from the perspective of the driver in “real time”. Those mock jurors disregarded knowledge of the outcome of the accident because the animation took an overhead perspective rather than the perspective of the driver (Fessel & Roese, 2011; Roese et al., 2006). Truthiness can occur with the full range of litigation graphics.

Design choices in creating displays of numerical information can create both truthiness and falsiness. For example, changing a graph’s height relative to its width can greatly change the *visual* perception of the slope of lines in the graph, which alters people’s characterization of the relationship. For the exact same data, a graph’s aspect ratio can be change from a steep to a shallow trend line, and the steeper the line, the more people characterize the relationship depicted as sharply increasing, and the more horizontal the line becomes, the more people characterize the relationship depicted as slightly increasing. The data have not changed, only the non-probative way it is presented. Similarly, people can be encouraged to overestimate and underestimate differences by choosing to represent data with areas of circles and volumes of boxes rather than with pie charts or bar charts (see, Kellermann, 1998). Trial charts of numerical information are often designed with nonprobative features to create truthiness and falsiness.

Despite the regular design of trial graphics to encourage the truthiness and falsiness, these effects do not occur whenever non-probative information is used. Some animations produce truthiness, while others produce nothingness. For example, Bennett and colleagues (1999) found that animations had no effect on damage awards or on the percentage of fault assigned to the plaintiff and defendants in a car accident trial, and Dunn (2002) reported that a plaintiff’s plane crash simulation reversed verdicts from the defendant to the plaintiff, but that a car accident animation had no effect on verdicts rendered. Similarly, some visual images produce truthiness, while others produce nothingness. For example, McCabe and Castel (2008) found that an academic article was perceived as more scientifically reasonable when it was accompanied by a realistic image of a brain, but not when accompanied by a bar chart. The use of a non-probative photo did not guarantee truthiness. Similarly, presentations of numerical information may as easily produce nothingness as truthiness or falsiness. Many numerical displays are sufficiently difficult for jurors to comprehend that they are unable to extract useful information from the graphic (Kellermann, 1998). The attempt to encourage truthiness or falsiness may result in nothingness.

Use of nonprobative visual images also can backfire, producing falsiness when truthiness is desired. Falsiness can occur when *unrelated* photos are paired with claims (Newman, 2013), an outcome all too easy to elicit if jurors do not understand the relationship between a visual image and a claim. A backfire effect can happen even when related nonprobative photos are used if they are paired with warnings or to discredit myths

(Newman, 2013). In one study, repeated warnings about myths led older adults to remember the myths as facts, and not the information regarding their inaccuracy (Skurnik et al., 2005). In my opinion, disrespectful photos that violate jurors' standards for decorum in the courtroom also could backfire, such as in the Jim Fayad case when a prosecutor disdainfully asked "If this defendant didn't do it, who did? Batman?" and showed a Batman slide, and said "The defense is offering you a buffet of explanations" and showed a buffet slide. This behavior caused a juror in the case to rant angrily against the prosecutor's PowerPoint slides [in a blog post](#). Backfire effects might also occur when people take different messages from the same photo. Recently, I was asked to look at a picture of a criminal defendant who pled insanity due to delusions of being a Nazi guard at a prison camp where he believed he was acting under proper (Nazi) authority when two people were marched into an abandoned bunker and shot. The criminal defendant looked very pleasant, nice and "soft" in the picture, and the attorney wanted to use the picture to show the defendant's vulnerability. I looked at the picture and thought *how sane* the defendant looked in the picture, and recommended against its use in opening. The message a photo sends to one person, can be exactly opposite of the message it sends to another. The attempt to create truthiness might create truthiness, but also might result in nothingness or may even backfire.

Trial graphics may also fail to produce truthiness or falsiness because they are "individual graphics", rather than an immersive graphic experience of continuous images. Persuasion Strategies' Visual Persuasion Study reported by Broda-Bahm (2011) found that the occasional use of graphics was not enough to influence jurors, and jurors instead must be immersed in graphics throughout a trial to see an effect of trial graphics on jurors' decision-making. To date, the research on truthiness and falsiness in trial graphics is not contextualized in long and ongoing trials in which graphic immersion occurs. Rather, the research looks at individual graphics that might be easily countered or overwhelmed by ongoing and repeated trial arguments and evidence in actual trials. Truthiness and falsiness are small effects in the research (Newman, 2012), most often found when the evidence is uncertain and ambiguous, and it is my belief that even if a number of non-immersive graphics were used, they would be unlikely to be able to overcome the more certain and unambiguous verbal arguments and evidence *unless* one or more graphics personifies vividly the case theme, such as the non-probative ATM graphic used to illustrate a plaintiff lawyer's theme that the defendant company's new management had treated the company like an ATM (Feigenson & Spiesel, 2009). In my experience, most trial graphics are neither this vivid, nor do they address directly such a central matter, nor do they occur in the context of ambiguity and uncertainty, nor are they immersed in a graphics environment. The graphics are thus less likely, as individual graphics, to be able to sustain the small difference produced in truthiness or falsiness in the context of all trial arguments and evidence.

Trial graphics, even if immersive, may still fail to produce

truthiness or falsiness due to their quality. Not all trial graphics are created equal, and some graphics do not communicate well their intended message. I believe that tests of graphics (e.g., at mock trials or through online focus groups) can determine if they produce truthiness or falsiness as individual graphics, and these pretrial tests of graphics are an important part of trial preparation. If the test is conducted during a mock trial, jurors can be immersed in a continuous graphic display with individual graphics tested for their truthiness, falsiness, nothingness, and any backfire effects. Truthiness and falsiness from non-probative visual images *can* occur in trial graphics, but so can nothingness. Even though the effect is small, and nothingness may occur, still I believe that truthiness and falsiness are important to consider whenever designing trial graphics, both to prevent backfire effects and to capitalize on every possible tactic that can be used to persuade jurors to accept the arguments and evidence being forwarded. One juror can change a verdict, and a slight change in belief can change a juror.

Trial Advocacy and "Nesses"

Truthiness and falsiness extend far beyond non-probative visual images, and can arise from almost anything related to trial advocacy. Examples of truthiness and falsiness in trial advocacy abound.

Truthiness or falsiness can occur when a promise in opening statement goes unfulfilled – which "ness" occurs depends on whether the opposing attorney points out in closing the unfulfilled promise. In one research study, when a prosecutor failed to point out that a promise by a defense attorney in opening was not fulfilled, the defendant was acquitted more often. The unfulfilled (and non-pointed out) promise had increasing impact over the course of the trial on mock jurors' belief in the defendant's innocence: the judgments of mock jurors who did and did not hear the promise in opening grew further apart as the trial progressed. However, if the prosecutor alerted the mock jurors in closing that the defense attorney made an unfulfilled promise about the evidence in the opening statement, falsiness occurred and the mock jurors became less sympathetic to the defendant in their verdicts (Pyszczynski et al., 1981). A promise in opening never alters the actual evidence of a trial, and so is non-probative, yet it nonetheless can influence jurors' beliefs.

Falsiness also can occur when attorneys ask expert witnesses leading questions. The questions are not evidence, and so not probative of an expert's credibility; the answers are evidence. Kassin and colleagues (1990) tested whether mock jurors' perceptions of an expert witness can be influenced by leading cross-examination questions. Mock jurors heard a cross-examiner ask two questions of an expert witness that implied something negative about the reputation of that expert (*Isn't it true that your work is poorly regarded by your colleagues? Hasn't your work been sharply criticized in the past?*). One third of these mock jurors also heard a denial from the expert (*No, it isn't; No, it*

hasn't), one third heard an admission from the expert (*Yes, it has; Yes*), and one-third heard objections to the questions from an attorney that were sustained by the judge and then withdrawn before the witness had a chance to respond. There was also a group of mock jurors who did not hear the leading cross-examination questions. The expert's honesty, believability, competence and persuasiveness were significantly diminished by the leading questions. The expert was less credible to jurors even when the expert flatly denied the charge or the attorney won a favorable ruling on an objection. The technique of cross-examination by innuendo can be highly effective in creating falsiness.

Truthiness and falsiness also can occur when witnesses testify to trivial and peripheral details. In one research study, a man stood accused of murdering a store clerk during a robbery and eyewitnesses described store items that the defendant had bought as either *a few store items or Kleenex, Tylenol, and a 6-pack of Diet Pepsi*. The specific store items were peripheral details and non-probative as to the defendant's guilt or innocence. When the prosecution eyewitness offered the detailed list of items, truthiness occurred and jurors were more likely to find the defendant guilty (Bell & Loftus, 1988). Even when the eyewitness said that the detailed list of items was purchased by another person in the store other than the defendant, judgments of guilt were still influenced (Bell & Loftus, 1989). Falsiness can occur, however, when trivial details in testimony are refuted. In one study, mock jurors were presented contradictory testimony from two eyewitnesses to a car accident, one of whom included unnecessary and trivial details which were then discredited. After the trivial details were refuted, the credibility of the witness presenting the trivial details decreased *and* the credibility of the other witness who had no offered trivial details increased *despite* no change in that witness's testimony (Borckardt et al., 2003). Similarly, exposing inconsistencies in testimony through cross-examination of a prosecution witness reduced conviction rates regardless if the inconsistencies were central facts or peripheral details (Berman et al., 1995). The offering of peripheral details in testimony can cause truthiness, and rebutting those details can cause falsiness.

Falsiness also can occur when witness testimony is shown via videotape instead of testimony occurring live. In one study, mock jurors viewed the same witness testimony either live or on videotape. Observers of the live witness testimony rated the testimony in a more positive way than did observers of the same testimony viewed via videotape. (Landstrom et al., 2005) The medium of the testimony is non-probative as to witness credibility, yet observers distrust witness testimony more when presented via videotape.

Falsiness also can occur when non-native speakers of English testify in court. Accents often make it hard for jurors to understand what witnesses are saying. Lev-Ari and Keysar (2010) studied the impact of accent on speaker credibility. Native-English speaking Americans were asked to judge the truthfulness of statements recited by others such as "Ants

don't sleep" and "A giraffe can go without water longer than a camel can." The statements were recited by speakers having no accent in English, a mild accent (Turkish, Polish or Austrian-German) or a heavy accent (Turkish, Korean or Italian). Despite knowing that all speakers were reciting from a script, the listeners judged as less truthful the statements coming from the non-native speakers of English. The more severe a non-native speaker's accent, the greater the decline in the speaker's perceived truthfulness. The credibility of non-native speakers was impaired regardless of whether the content of the statements was familiar or unfamiliar to listeners, or factually true or false. Listeners misattributed their own difficulty in understanding the speech of non-native speakers to a reduced truthfulness of the speakers' statements.

Both truthiness and falsiness can occur in response to a defendant's physical characteristics. Zukier and Jennings (1983-1984) gave mock jurors information that was diagnostic of guilt in a murder case, with some mock jurors given additional information that the defendant was of average height and average vision and some others told the defendant was extremely tall and had extremely good vision. These physical characteristics, whether average or extreme, were non-probative: they were nondiagnostic of guilt in the case. Mock jurors told the defendant had extreme height and vision were as likely to find the defendant guilty as mock jurors who had no information about the defendant's height and vision. However, jurors told the defendant had average height and vision were more likely to acquit the defendant. The researchers concluded that "extremeness" in one category (height and vision) is related to "extremeness" in another category (likely guilt), and that "typicality" in one category (height and vision) is related to typicality in another category (innocence). In my experience, physical characteristics also can cause falsiness. Many jurors think that plaintiffs and defendants physically look liable or guilty, and jury consultants often dress and present litigants physically to counteract these concerns. Gender and race are physical characteristics that can influence truthiness and falsiness. For example, women and minorities are substantially disadvantaged in bringing age, race and sex discrimination claims, winning from one-half to one-third as often as men and whites (Oppenheimer, 2003). Black defendants are disproportionately convicted and given the death penalty than white defendants (see, Death Penalty Information Center), though acquitted more often when pleading not guilty by reason of insanity (Poulson, 1990) and when charged with crimes jurors typically associate with white defendants such as embezzlement or white collar crime (Gordon, 1990; Gordon et al., 1988; Rickman, 1989). Height, vision, gender, race, age, weight and other physical characteristics are only rarely probative, and can cause truthiness and falsiness.

Falsiness and truthiness also can occur based on a litigant's demeanor during trial. For example, the amount of emotion a criminal defendant displays while sitting at counsel table during trial can influence conviction rates. In one research study, a defendant displaying a low, as opposed to a moderate or high,

level of emotion was judged more guilty and less credible when the evidence against the defendant was weak; when the evidence was strong, the defendant's emotional display had no effect on the conviction rate (Heath, Grannemann & Peacock, 2004). In another research study, a criminal defendant's impassive demeanor resulted in a harsher recommended sentence in a simulated capital case (Antonio, 2006). In yet another study based on a real manslaughter case, 60% of mock jurors voted for manslaughter when seeing a remorseful facial expression on the defendant, whereas 100% voted for manslaughter when the defendant's expression was neutral or angry – and all jurors were given identical case evidence (MacLin et al., 2009). A litigant's demeanor is not probative, but nonetheless influences beliefs.

Truthiness also can occur by an attorney's use of persuasion tactics such as repetition of an claim or stealing thunder. Assertions that have been repeated just once are perceived as more true than assertions heard for the first time, even when the person making the assertion has been lying repeatedly (Begg, Anas & Farinacci, 1992). Repeating an argument does not prove an argument, and so repetition is non-probative, yet mock jurors agree more with an attorney's recommendation when arguments were repeated three times, rather than once (Wilson & Miller, 1968). Repetition does have limits in its ability to cause truthiness: The truthiness arising from repetition disappears if the argument is weak or people are paying close attention (Moons et al., 2008), and repeating an argument *three times* and using *repetition on a theme* (rather than word-for-word repetition) are common guidelines for effective use of repetition. Stealing thunder occurs when an attorney reveals potentially incriminating evidence first (before the other side can) for the purpose of reducing its negative impact on jurors or other decision-makers. Stealing thunder does not change the information, and so is not probative, yet can reduce the negative impact of the incriminating evidence even when the importance of the negative information is not downplayed or the opposing attorney also mentions the evidence (Dolnik et al., 2003).

These are just a few examples of how truthiness and falsiness can arise from diverse extralegal factors advocates confront in the courtroom. I have seen these and other extralegal factors influence verdicts. Nonetheless, in my experience, truthiness and falsiness influence verdicts much less than many might suppose. First, truthiness and falsiness are most evident when evidence is ambiguous or weak, rather than strong and clear, and the evidence in most cases that go to trial tends not to be ambiguous or weak. Second, jurors tend to follow the evidence, rather than the truthiness and falsiness arising from extralegal factors. One of the most enduring takeaways for me from mock trial research and post-verdict interviews of jurors is that jurors tend to follow the evidence.

Social science research differs from what is experienced in actual trials in ways that I believe lead to extralegal factors such as non-probative photos, unfulfilled promises, leading questions,

peripheral details, videotaped testimony, accents, physical characteristics, demeanor, repetition and stealing thunder to be highlighted in research results, and overshadowed by evidence in trials. In many studies, jurors read case materials, rather than see presentations of the case. The case materials are summaries of evidence that often minimize evidentiary issues. Written case materials often are presented without visual material and respondents have only a sense of "paper people" for the defendants, attorneys and witnesses. If visual presentations are used, they usually are videotaped for reasons of experimental control that, unfortunately, sometimes sacrifice the generalizability of the results to the complexity of actual courtroom situations. I believe that the non-probative extra-legal factors that produce truthiness and falsiness increase in importance against the impoverished information environments of experiments wherein evidence is not accentuated.

Studies of actual trials, where evidence is almost always accentuated, find that jurors' decisions are dominated by evidentiary issues rather than these extra-legal factors (Visher, 1987). The results of these studies consistently show that the most powerful determinant of jurors' verdicts is the strength of the evidence, and the side that presents the strongest case generally prevails (Feigenson, 2000; Overland, 2008). Data from actual trials show that jurors are considerably less responsive to extra-legal characteristics of victims and defendants than they are to the evidence (Visher, 1987). I wonder about the extent to which truthiness and falsiness influence verdicts in actual trials as compared to the less rich information environments of the research studies, and the strength of the evidence in those cases.

That said, in my experience, sometimes truthiness and falsiness occur in actual trials, and when they do, attorneys must deal with their occurrence.

Turning Truthiness and Falsiness into Nothingness

What is an attorney to do when opposing attorneys use extra-legal factors and create truthiness for themselves or falsiness for one's own claims?

Judicial Instructions. As Newman and Feigenson (2013) noted, judicial instructions have difficulty overcoming cognitive biases and so are unlikely to be able to overcome truthiness and falsiness. I concur. Lassiter and colleagues (2002) directly tested the usefulness of judicial instructions in their study of the camera angle of videotaped confessions, and found that a corrective judicial instruction was insufficient to mitigate the prejudicial effect that the typical camera perspective of the suspect had on mock jurors' assessments of the voluntariness of the confession or their verdicts. However, some judicial instructions work to some degree sometimes, and usually do not produce backfire effects, so that asking for a judicial instruction has little risk and sometimes a reward. For example, Levi-Ari and Keysar (2010) found that asking listeners to consciously attend to the difficulty in understanding non-native speech

partially corrected the biased judgments of the truthfulness of non-native English speakers with mild, but not heavy, accents. A judge could instruct jurors and ask them to attend to their difficulty in understanding the speaker's accent, and separate that from their judgments of a witness's truthfulness. While I would ask for an instruction in the hopes it might have some effect, I agree with Newman and Feigenson (2013) that other solutions are needed to respond effectively to attorneys from the opposing side using truthiness and falsiness.

Exposure. Based on my experience and research on persuasion, I believe that one of the most effective responses an attorney can make to an opponent using truthiness and falsiness is to expose the persuasive tactic the attorney is using. For example, I am frequently asked how to handle an opposing attorney who repeatedly asserts a claim that in fact was unproven but *seems* to be a truthful fact because of the repetition. I advise the attorney who called me to:

- (a) *label the tactic* the opposing attorney is using (“repeating”)
- (b) *explain the tactic’s truthiness or falsiness* (“we tend to believe statements that are repeated are true, which is why commercials and propaganda works so well”)
- (c) *identify when the attorney used the tactic* (“repeated here, repeated there, ...”)
- (e) *explain what the tactic can’t do* (“repetition isn’t proof, it is just repetition and so you still haven’t heard evidence that supports the opposing attorney’s claim, or evidence that refutes our claim that”)
- (d) *explain the tactic is used to distract jurors from the evidence* (“the opposing attorney is hoping you won’t notice he/she has no evidence to support his/her claim and to refute ours”)
- (e) *warn jurors to put their guard up against the tactic* (“every time the opposing attorney repeats the claim, ask yourself ‘where is the proof?’”)
- (f) *provide your evidence* (“here is why he/she can’t provide that evidence, because we’ve proven that....”)

This exposure method could be used with virtually any extra-legal factor giving rise to truthiness or falsiness. This exposure method provides a warning (helping jurors guard against further use of the tactic), exposes the opposing attorney as using “tactics” (being tricky, having a persuasive goal) rather than “informing” (having an informational goal), and refocuses the argument on the evidence (which jurors prefer to follow). People do not like to be manipulated, and this exposure method lets people know what an opposing attorney is trying to do. When people are forewarned about another’s persuasive intent, they put their guard up, even against subliminal messages (Verwijmeren et al., 2013).

This exposure method can counter truthiness and falsiness, and turn them into nothingness. For example, stealing thunder (where an attorney reveals potentially incriminating evidence before the other side can for the purpose of reducing its negative impact) is no longer effective when it is revealed that the stealing thunder tactic has been used on people (Dolnik et al., 2003). The persuasive effect of making a promise in opening is nullified when an opposing attorney points out to

jurors in closing that the promise went unfulfilled (Pyszczynski et al., 1981). Raising the issue of racial biases in voir dire can reduce guilty verdicts with fewer mock jurors finding a black defendant guilty when the issue of racial bias was raised on a juror questionnaire than when it was left unstated: Only 24% of mock jurors who were asked questions about race on the juror questionnaire voted guilty compared to 47% who were not asked questions about race on the questionnaire (Sommers, 2006). I recently worked on a public corruption case where the defendant was beyond morbidly obese and physically looked like he literally had “fed at the public trough.” We addressed this matter directly, asking on the juror questionnaire if the defendant physically looked guilty. The point here is to raise the issue of persuasive techniques, a defendant’s characteristics (race, religion, gender, weight, age, etc.), or any extra-legal factor to expose and obviate the truthiness and falsiness they create, as well as challenge jurors for cause and use peremptories on jurors who cannot set truthiness and falsiness aside.

Countering. Truthiness and falsiness created by an opposing attorney can be countered as well as exposed. For example, the use of non-probative information in litigation graphics can be countered effectively with your own animation or video, changing perspective in an animation or video, and/or replacing a video with transcripts and text. Recall the study where the plaintiff’s plane crash video reversed verdicts from the defendant to the plaintiff. When the defense countered the plaintiff’s animation with an animation of its own, verdicts shifted back in favor of the defendant (Dunn, 2002). For videotaped confessions, changing to a camera perspective that focused mock jurors’ attention on the interrogator helped jurors better detect coercive influences occurring in the interrogation and improve their assessments of the confession’s reliability. Transcripts and audiotapes also circumvented the prejudicial effects of the camera focusing on the suspect during an interrogation (Lassiter et al., 2002). Creating an animation of a car accident from the point of view of the driver, rather than from an overhead perspective, can reduce the belief that the situation could have been avoided. When mock jurors were placed in automobile driving simulators (so they had the perspective of drivers, rather than an overhead perspective of the entire set of events), the hindsight bias induced by the overhead perspective mostly disappeared (Fessel & Roese, 2011). Finally, immersing jurors in continuous graphics of your own can create the conditions for your graphics to influence jurors more than individual images of the opposing side. Countering the truthiness and falsiness created by the opposing side’s trial graphics can make turn truthiness and falsiness into nothingness.

Truthiness and falsiness in witness testimony can also be countered by discrediting testimony, undermining a witness’s confidence, and hiring professional actors to read deposition testimony live to jurors. The credibility of an eyewitness testifying to trivial and peripheral details (“*Kleenex, Tylenol, and a 6-pack of Diet Pepsi*”) decreased when the trivial details were refuted. This eyewitness’s loss was a gain for the other

eyewitness who hadn't testified to those details ("a few store items"), despite no change in the "few store items" witness's testimony (Borckardt et al., 2003). A witness gaining credibility because of the truthiness of peripheral details can also have their confidence as a witness undermined. The confidence of a witness (another extra-legal factor that influences truthiness and falsiness) is a more important influence on jurors' verdicts than the consistency of a witness or inconsistencies involving peripheral details. Jurors seldom give guilty verdicts when faced with a non-confident prosecution witness, regardless of whether the testimony was consistent or inconsistent or contained peripheral or central details (Brewer & Burke, 2002). Finally, professional actors can be hired to read deposition testimony, rather than showing a videotape of the testimony of the actual witness. Of course, the person doing the reading is not introduced as an actor. A number of years ago I conducted a mock trial where we compared the credibility of a live actor reading deposition testimony with a videotape of that testimony. Mock jurors saw *both* clips of the actual witness's testimony on videotape (in the plaintiff's case) as well as an actor who looked somewhat like the actual witness (for the defense's case). Even with mock jurors knowing the live reader was not the real witness, and jurors having seen the actual witness on videotape, jurors treated the live reader *as if* she was a real witness, and the live reader's credibility was significantly higher than the credibility of the actual witness on videotape. Discrediting, undermining, and replacing videotaped testimony with a live reader (a professional actor) can counter truthiness and falsiness of an opposing attorney and turn them into nothingness (or sometimes even into truthiness for one's own side).

Truthiness and falsiness related to characteristics of litigants can also be countered. For example, attorneys and jury consultants frequently discuss with litigants (and their friends and family) desired demeanor, dress and self-presentation in the courtroom. I have found that using clothing one size larger than normal often makes a litigant look less threatening, more vulnerable, and more sympathetic. Research has suggested that wearing eyeglasses can help make a person look more intellectual and

less threatening, and criminal defendants who wore eyeglasses received fewer guilty verdicts (44%) than defendants who did not (56%) (Brown et al., 2008). Countering litigant characteristics can help turn falsiness into nothingness or even truthiness.

I believe that the vast majority of truthiness and falsiness can be exposed and/or countered in some way, though not always for all jurors. Voir dire can be used to identify jurors for whom exposure and countering will not work. That said, I cannot stress strongly enough that effective use of exposure and countering requires not only the exposure and countering to occur but also explicit effort be spent turning jurors' attention back to the evidence, as once the persuasive "gimmicks" are exposed or countered, what is left is the evidence.

I routinely advise clients to expose, counter and use extra-legal factors in their favor, turning the other side's truthiness into nothingness or falsiness, and one's own claims into truthiness. Even though truthiness and falsiness are small effects that can help only some of the time (e.g., ambiguous or weak evidence, for only 60% to 70% of jurors), my attitude is that "You never know. They might work this time." You may have noticed that I put my picture at the top of this article. This picture is nonprobative as to the truth of anything I have written. My hope is that by seeing my picture that I created truthiness and you more strongly believe what I wrote, even if only a little bit. This picture tactic is common with newspaper columnists and bloggers, and for the reason I just described. Did the use of my non-probative photo on this article create truthiness? I don't know. Maybe not. I am hoping my arguments and evidence are not weak or ambiguous. However, I don't believe the use of my picture created falsiness, so no reason exists for me not to try to create truthiness – except one. By exposing to you my use of this truthiness tactic, I most likely obviated any effect it might have had and potentially allowed a backfire to occur. If so, I beg your forgiveness. I thought using my picture on this article was the best way to illustrate truthiness and falsiness, and how, through exposure, you can turn "nesses" into nothingness. ☺



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