



The Jury

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FAVORITE THING

SpamDrain

Rita R. Handrich

**Jury Expert Top Ten
Accessed Articles for 2013**

NOTE FROM THE EDITOR

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NOTE FROM THE EDITOR

February 2014

RELIGION, NEUROSCIENCE, CISGENDER, jailhouse informants, metaphors and are we asking jurors to do the impossible? Welcome to our first issue of 2014! The litigation cycle is back in full swing again so we are grateful to these authors for taking time to write for all of us! You will find everything from literature reviews to practical tips for voir dire to a review of what our readers liked most from *The Jury Expert* in 2013.

If you read our pages regularly, you know we are about helping you improve your litigation advocacy by bringing you the latest information on a variety of issues relevant to trial practice. This issue is bursting at the seams with the latest.

What questions will give you the information you need to know on juror religiosity when moral issues are at the core of your case?

The neuroscience field is changing fast—what do you need to know now about the latest on neuroscience, the insanity defense, and sentencing mitigation?

You know what the equal marriage rights debate is about but do you even know what cisgender is? Here's an overview of vocabulary and research so you are up to date on language and knowledge necessary to communicate and practice effectively in the LGBTQ arena.

Got a jailhouse informant? Here's an article to help you understand the dynamics and figure out a strategy.

Metaphors. We know jurors like them. Here's a nice practice article on using the metaphor to your advantage and stomping out the power of your opponent's metaphors.

We put a lot of pressure on our jurors. Do we ask them to do the impossible when we say they should set aside past experiences?

Spam got you down—especially on your tablet and smartphone? Our Favorite Thing will make all that angst go away. At \$15/year, it's a bargain.

And finally, we take a look back at the Top Reader Favorites in 2013. What did your friends, colleagues and opposing counsel find especially useful in the past year?

Enjoy. It's a terrific issue. Let me know what you'd like to see us take on in upcoming editions.

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

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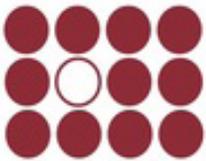
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The ABC's of Religiosity

Attitude, Belief, Commitment, and Faith

by Gayle W. Herde, Ph. D.

JURORS ARE TRADITIONALLY EXPECTED to leave their prejudices at the door of the deliberation room. However, there is no way to separate a person from his or her worldview: religion, or the absence of it, is a major contributing factor. According to the Pew Forum (2008), religion is “very important” or “somewhat important” to 82% of the people in the United States. Over 70% of the population believes in God or a universal spirit with “absolute certainty,” while another 17% is “fairly certain.” This is a constituency much too large to be overlooked.

A juror’s religion or spiritual practice, religious upbringing or background and general attitudes toward religion can and likely will inform their thoughts about your case, both overtly and covertly. Cases that will activate their religious orientation on a conscious level might involve First Amendment issues, clerical abuse or simply the concept of right vs. wrong as filtered through religious teachings. There are those with undertones of morality, such as immigration, abortion, or the death penalty, especially when a church or other religious body has taken a position or handed down an opinion. There are categories of personal responsibility that might be referenced in

tort litigation, or perhaps lifestyle issues. That is, does one party or the other live their lives or conduct himself or herself in a way that could be considered immoral? Perhaps you are using a religious proverb for your case theme, such as “let the one who is without sin cast the first stone.”

In an ideal world there would be a “one size fits all” scale of religious thought and practice that would inform the attorney’s judgment about potential jurors. The problem with trying to establish a single measure of religiosity is the extreme diversity of traditions and customs and their influence on mindsets. You can have a Buddhist, a Unitarian Universalist and an independent-fundamental-premillennial-King-James-version-only Baptist, all equally sincere and dedicated, all of whom could score equally high in religiosity, and yet have vastly different opinions of the same case, not only because of the differences in the religions but also in how those religions were taught and adopted by them.

What is to be done then when the time comes to de-select or exercise peremptory strikes with a jury panel? Examining various dimensions of religiosity is an important factor. A

supplemental juror questionnaire (SJQ) is extremely useful to determine the strength of each individual's commitment to his or her view. When the SJQ is supplemented with probing and specific voir dire, the attorney is able to make the most strategic use of the challenges available.

This article will give an overview of several dimensions of religiosity, including extrinsic versus intrinsic motivation, religious identity, beliefs, public and private behavior, and factors showing the level of commitment. There will be general information on the geographic distribution of various faith traditions around the country. I will give special attention to atheists and "nones" – persons, especially the current generation of Millennials, who describe themselves as unaffiliated with any organized religion. This article will touch on the association (or lack of it) between religion and political persuasion, as well as how religion can impact decision-making and end with specific strategies for juror questionnaires and voir dire.

There are people who attend church, synagogue, or mosque services once or twice a year; there are others who attend services once or twice a week, not including meetings of various committees on which they serve. They may all categorize themselves as Christians, Jews, Muslims, or something else, but their level of commitment differs greatly. It is not enough to know what religious labels people attach to themselves; this only encourages the use of stereotypes. Instead, you should attempt to learn more about the depth of their religiosity. According to Barna (2013),

“It is increasingly necessary to have aggregate indicators – that is, multi-dimensional research – that describe the rich and variegated experience of spirituality and faith.”

Religiosity is a difficult construct to define, as it means different things to different people. Tien Ren-Lin (2008) defined it as “the way people and communities are influenced by religious ideas and shape social reality accordingly,” while Singhapakdi, et al. called it “the faith that a person has in God and the extent to which they are pursuing a path considered set by God” (2013, p. 184). For discussion purposes, it is broken down more specifically, using extrinsic and intrinsic motivation, identity, belief, behavior, and commitment.

Extrinsic and Intrinsic Motivation

Singhapakdi, et al. (2012) studied the impact of “love of money” and religiosity, as measured by extrinsic and intrinsic dimensions, on ethical intentions governing decision-making by business managers. Extrinsic religiosity refers to religious practices for essentially utilitarian or selfish reasons, such as social approval, to get married or to further one's business or career interests. Intrinsic religiosity, on the other hand, is practiced with interior or selfless motivation, perhaps serving the common good or serving the religion itself (p. 184-185). The study found that managers high in intrinsic religiosity were more ethically intentional than those high in extrinsic

religiosity. Additionally, the impact of intrinsic religiosity on ethical intentions was greater by orders of magnitude than extrinsic. This could be because intrinsically-motivated managers “internalize ethical principles as a part of their moral identity,” as well as internalizing their commitment to religious principles as part of their daily life (p. 185, 188).

For purposes of jury selection, these concepts might apply to those who integrate their religion into their lives in ways intended to raise their social or business standing in contrast to those who have little interest in elevating their social or business standing, but are more likely to consider their religion as a “way of life” rather than a “part of life.”

Religious Identity

Religious identity is formed in different ways. Persons who come from countries where the laws stem from the national religion, such as certain Islamic countries, identify much more closely with their religion, as it has a strong cultural and societal component. Some traditions initiate infants or young people into their congregations by ceremonies such as baptism, or *bar-* or *bat mitzvah*, leading to the potential for a lifelong identity as a follower of that tradition. On the other hand, many persons born in the U.S. have been inculcated with the doctrine of the separation of church and state; therefore, their religion may inform their worldview, but may be less dominant as a guiding force for their overall outlook.

Belief

Belief in God or other universal spirit is a central tenet of most faiths and traditions in the U.S. Groups highest in absolute certainty in that belief include Jehovah's Witnesses (93%), evangelicals, Mormons and historically black churches (all at 90%), Muslims and “other Christians” (both at 82%) (Pew Forum, 2008). As a matter of interest, 73% of “mainline”[1] Christians, 72% of Catholics and 41% of Jews believe with absolute certainty.

Another revealing aspect of faith is belief in the Bible or other holy book. Of those asked, 62% of the members of historically black churches believe that the Bible is inspired by God and is literally true word for word, followed by evangelicals at 59% and Muslims (50%) regarding the Qur'an (PewForum, 2008). The majority of Buddhists (67%), Jews (53%) and Hindus (47%) believe that men wrote their holy books and they are not the word of God.

Perhaps one of the most telling indicators of religiosity is the belief that one's own faith is the only path to “salvation” or “eternal life,” as opposed to multiple paths (the most frequently selected response by most groups). Holding to this belief can be very divisive in an increasingly diverse and pluralistic society. Eighty percent of Jehovah's Witnesses feel this way, as do Mormons at 57%, followed by evangelicals (36%), historically black churches (34%), and Muslims (33%) (PewForum, 2008).

Behavior

Two types of behavior can demonstrate religiosity: public and private. Attendance at religious services is one such public marker. Jehovah's Witnesses attend services far more often than any other faith group, with 82% reporting that they attend once a week or more (PewForum, 2008). Mormons follow closely behind at 75%, while evangelical and black church members report a rate of attendance of 58% and 59% respectively. While attendance is not a measure of an intrinsic commitment, it demonstrates a willingness to give up a valuable resource in this society, one's time.

Private behavior includes activities such as prayer, meditation, or reading. The majority of nearly all religious groups, Christian and non-Christian alike, reported praying once or several times every day, ranging from 89% of Jehovah's Witnesses to 42% of "other faiths" (PewForum, 2008). Jews were the exception, with the majority (27%) stating that they seldom prayed. (It should be noted, however, that only one percentage point separated that group from those Jews who prayed daily or more, 26%.)

Commitment

Commitment to one's religion can be evidenced by public and private behavior, but also by the dedication of resources, such as time or money; some will even risk their social standing through active communication of their beliefs. Many Christians believe they should give 10% of their income to their local congregation. Muslims are required to contribute to the poor. People high in religiosity probably spend time at their place of worship in activities apart from worship, such as teaching or work on committees, or in service areas such as homeless shelters or soup kitchens. They may contribute significant portions of their income supporting their local congregation or national denomination, or supporting others who are doing work in foreign countries; they might even spend days, weeks or months, doing work away from home themselves. Muslims are expected to go on Hajj (i.e., visit to Mecca) at least once in their lives. They might make a regular practice of speaking to friends, strangers, and even family members about their faith at the risk of alienating them. Young Mormon men that are "worthy and who are physically able and mentally capable to respond to the call to serve" are strongly encouraged to participate in missionary work, both in the United States and abroad (Monson, 2012).

Geographic Dispersion

When a trial will have a spiritual aspect of one form or another, it may be easier for the attorney to question the panel knowing what to expect with regard to their likely religious persuasion. Nationally, evangelical churches represent the highest percentage of followers (26.3%) in the United States, followed closely by Catholics (23.9%) and mainline churches (18.1%) (PewForum, 2008). But not all faiths are spread evenly throughout the country. Here are some broad categories of regional distribution:

- Evangelical and mainline churches and Jehovah's Witnesses are found primarily in the South and least often in the Northeast.
- Historically black churches and Muslims reside chiefly in the South but least often in the West.
- Catholics are somewhat evenly dispersed throughout the country, but appear slightly more often in the Northeast.
- The vast majority of Mormons are in the West, as are Buddhists.
- Persons of the Orthodox faiths (Greek, Russian, Serbian, and so on) and Jews are mostly in the Northeast, seldom in the Midwest.
- Many Hindus can be found in the South and West, less often in the Northeast.
- Those unaffiliated with any church (atheists, agnostics, and others) appear most often in the South and West and (perhaps surprisingly) less often in the Northeast.

Atheists and "Nones"

Considering the rate at which the group of self-reported atheists and persons unaffiliated with a tradition is growing, it deserves separate consideration. For purposes of this discussion, "atheists" describes persons with no belief in any deity. "Nones" (also "unaffiliateds") is a term describing persons who do not deny the existence or knowability of a deity but who subscribe to no particular faith tradition and might, in fact, consider themselves spiritual. It is unclear how many atheists there are in America: extrapolating from the Pew data (2008), 5% of respondents reported that they do not believe in God. On the other hand, Keene and Handrich (2010) reported a Gallup finding from 2009 saying that atheism is the "third largest belief group in the United States (behind Catholics and Baptists)." The disparity between the two surveys might be explained by the perceived discrimination faced by atheists and their subsequent reluctance to admit their lack of belief publicly. The Mosaic Project conducted a survey and found that nearly half (47%) of Americans would disapprove of their son or daughter marrying an atheist or non-believer, a much greater percentage than those disapproving of a marriage to various other ethnicities or religions (Keene & Handrich, 2010).

Although being unaffiliated with a faith tradition is nothing new, the numbers currently being reported are new. As of 2012, Pew found that 20% of Americans have no religious affiliation, the highest number since Pew began polling on this issue. One third of those are adults under 30, the so-called "Millennial Generation" or "Generation Y." Twenty-five percent of the Millennials raised Catholic have left the faith, while 41% of persons raised in mainline churches have left (Jones, 2012). Overall, while only 11% were raised in unaffiliated homes,

25% report themselves unaffiliated, an increase of 14% (Jones). The Millennial generation is highly multi-cultural and inclusive. While they believe that Christianity contains positive attributes, they also find in it closed-mindedness, judgmentalism, hypocrisy and alienation (Putnam & Campbell, 2010, in PewForum, 2012; Jones, 2012).

However, it would be a mistake to assume that the “nones” are not spiritually-minded. One-third of them report praying at least daily and 25% attend church services weekly, although Millennials living at home with their parents are no more likely to attend than Millennials overall (Jones, 2012). Fully two-thirds of them believe in God, a third call themselves “spiritual” (but not religious) and many of them believe that religious organizations are good for aiding the poor and creating community bonds, though too focused on politics, money and rules (PewForum, 2012).

Political Persuasion

It is notoriously difficult to predict political persuasion from religion (and vice versa). However, at least one association can be made: the unaffiliateds, especially from the Millennial generation, are more likely than not to be Democrats and to describe themselves as liberals rather than conservatives (PewForum, 2012). Sixty percent of unaffiliated persons said they are registered Democrats. Furthermore, in an examination of the religious composition of the Democratic party, unaffiliateds were the largest group at 24% of the total. They have views considered to be liberal: 72% of all unaffiliateds (not just Millennials) believe abortion should be legal in most or all cases, while 73% support same-sex marriage, compared with 48% of the population overall. Seventy-five percent voted for Barack Obama in the 2008 election (PewForum).

Apart from the religiously unaffiliated, religious intensity seems to be a somewhat better predictor of political persuasion than the faith or denomination of a person. In a study performed by Gallup (Newport, 2009), there was evidence of a correlation between religiosity and politics: non-Hispanic whites who were highly religious (based on church attendance and the self-reported importance of religion in their lives) were more likely to be Republicans, 62% among the highly religious compared to 28% Republican affiliation of those not religious. Conversely, highly religious whites were Democrats only 28% of the time, while non-religious whites were Democrats 56% of the time. African-Americans and Hispanics skewed strongly Democratic, regardless of their level of religiosity.

Religiosity and Decision-Making

A person's worldview has an impact on their judgment that has been demonstrated by multiple studies and mock juries, as reported extensively by Lindsey, et al. (2008) and Millares (2009). Attitudes on social issues stem from deeply held beliefs (Unnever, et al., 2006). For example, regarding religious labels (more superficial than cultural-religious identity, but still

useful) and similarity, Christian and Jewish mock jurors were more lenient to defendants with whom they identified on a religious basis (Kerr, Hymes, Anderson & Weathers, 1995, in Lindsey, 2008).

Literalism, as a subset of the Belief dimension, may be a good indicator of punitive attitudes. Those who believe “the Bible is the literal word of God and should be interpreted literally” are more likely to support the death penalty specifically (Leiber & Woodruff, 1997; Miller & Hayward, 2008) and harsher penal sentences generally (Evans & Adams, 2003; Greer, et al., 2005; Unnever & Cullen, 2006). Literalists are considered to be fundamentalists because of their evangelistic zeal and behavior (Grasmick, et al., 1993; Unnever, et al., 2005), which may in turn stem from their commitment to the belief that there is single path to eternal life.

This belief in a “single path” is also strongly related to authoritarianism (Altemeyer, 1996; Altemeyer & Hunsberger, 1992; Kirkpatrick, 1993; Laythe, Finkel & Kirkpatrick, 2001). Many religions, including a number of Christian denominations, are highly authoritarian in structure and belief and can be attractive to people with a deep-seated respect for persons in authority. As a result, those jurors are more likely to demonstrate that respect by siding with the prosecution in criminal cases as the representative of the state, as well as of law and order.

In 1904, Max Weber coined the term “Protestant work ethic,” and used it to describe a spirituality that is accompanied by hard work and frugality, eschewing worldly luxuries. Some persons called for jury duty may believe that American society is still a reflection of this philosophy. Persons from conservative Protestant denominations are likely to side with the defense in civil trials for at least two reasons: first, the presumption of innocence carries the authority of law (Authoritarianism, above); secondly, because the work ethic carries with it a potential bias in favor of the defendants who “worked to earn their money,” as well as a possible corresponding lack of sympathy toward plaintiffs perceived to have a “victim mentality” or who might be “gaming the system” or lack “deservingness” and might squander their financial recovery in “high living.” Furthermore, they could possess beliefs opposed to litigation generally, feeling that it is “up to God to right wrongs or take vengeance,” or relying on karma “to even things out.”

Finally, there is a strong sense among religious Protestants of taking personal responsibility for one's actions that often plays against plaintiffs. According to Engel (2009), there is an assumption that “religiosity in American society...leads inevitably to a view of causation based on the ethic of individual responsibility....[and] is opposed to the use of tort law to obtain compensation for injuries that are, in the most basic sense, the fault of the injured person” (p. 266). For example, in the recent claim brought by the family of the late celebrity Michael Jackson against his tour promoter, no liability was

found on the part of the promoter for hiring an incompetent doctor to care for Jackson. According to USC law professor Jody Armour, “The jury decided the case on the notions of personal responsibility, and concluded that Michael Jackson had some responsibility in picking [Dr. Conrad] Murray and creating the circumstances surrounding his own death” (Kelsey & Feldman, 2013).

Religiosity and Jury (De-) Selection

As mentioned above, simply applying a denominational or religious label, perhaps even found on the juror form provided by the court, is a poor method of determining religiosity. Multiple dimensions should be examined. For example, extrinsic and intrinsic religiosity can be a measure of ethical intentionality, as well as a measure of commitment to one’s religious principles. Other dimensions of religiosity include belief, especially regarding belief in a universal deity, the literal interpretation of a holy book, and the belief in a single path to eternal life; public and private behavior; and commitment. Below I will address how to deal with these in the contexts of juror questionnaires and voir dire.

Supplemental Juror Questionnaire

Questions about today’s hot-button social issues, such as abortion, gay marriage and gay ordination, might seem to be revealing about a person’s religious orientation, but that can be deceptive. Gay marriage is especially polarizing (consider, for example, [the Duck Dynasty controversy](#)). Jurors will often be reluctant, in open court, to truthfully answer questions that go against what they perceive to be the current stream of popular opinion. Inquiries into that issue and others are best incorporated into the privacy of a Supplemental Juror Questionnaire (SJQ).

This list of potential questions goes to each of the dimensions. They should include response choices ranging from Strongly Agree to Strongly Disagree, as well as a Not Applicable option for the unaffiliateds or atheists:

- *I try to hard to live my life according to my religious beliefs.* [Intrinsic motivation] (Singhapakdi, 2012)
- *It doesn’t matter much what I believe, as long as I am good.* [Intrinsic motivation, reverse scored](#)
- *I believe in God / universal spirit with absolute certainty.* [Belief: God]
- *I believe that the Bible / holy scriptures is the inspired word of God and should be taken literally word for word.* [Belief: literalism]
- *I believe that my faith is the one true path to eternal life.* [Belief: single path]

- *I always state my opinion unequivocally on social issues, even if it might make me unpopular.* [Behavior: public]
- *I would rather engage in reading or meditating on my faith than many other types of activities.* [Behavior: private]
- *I have traveled for a reason related to my religious beliefs or activities.* [Time or financial commitment]
- *I make a regular practice of telling others about my religion.* [Emotional commitment]

A social scientist familiar with religiosity would be able to draw conclusions based on the responses and help make recommendations for follow-up questions during *voir dire*, as well as establish a preliminary list of challenges. This will also be useful in case a question arises about discrimination based on religion.

Voir Dire

You will have read this before in *The Jury Expert*, but it is important enough to bear repeating: The primary focus of voir dire should be to elicit and gather information from the panel, and less about persuading the panel. It is a time to ask them open-ended questions and follow up on their responses to the SJQ. Your ultimate goal is to find out how, if at all, their beliefs will impact their deliberations and judgment.

Open up voir dire with an acknowledgement of the very personal turn that your questioning is about to take: *I’d like to move for a moment to the subject of religion. I know that some of you may be very open about your religious beliefs and practices and some of you may feel this is private. I’d like all of you to please be as candid with me as possible. We’re not here to judge anyone’s opinions or beliefs; we just simply want to know what they are.* When questioning an individual directly, especially a person who is potentially of a non-Christian or less predominant religious persuasion, it must be done with sensitivity and respect, avoiding any references or language that might single them out as “different” or in any way hold them up to ridicule.

If there is someone from another country, such as India, in the pool, the initial religious question series could flow something like this: *I understand you’re from (country), which is very diverse, correct? Does it have a number of ethnic groups, languages, faiths and traditions? What are the languages? Do you speak (one of those languages)? What are the religious traditions? Do you follow one of those? How do you think your belief might impact your participation on this jury / influence your thinking in this case?* Then to the group generally: *Who else believes their faith might have an impact on their work on this case?*

If a person has responded that they have traveled in behalf of their religion (e.g., Hajj to Mecca, missionary trips to developing countries, or tours of the Holy Land), ask for a few details, such as where they went, when and why. If they are

open, ask them how they were impacted by the experience. Listen for extrinsic (*I loved seeing another country*) versus intrinsic (*It brought me much closer to God*) responses. Gently inquiring into these activities can provide a gauge of religiosity without asking directly about time and monetary investment.

Another area, very revealing though perhaps far more sensitive, is a person's reason for joining their religion. This line of questioning could begin very generally: *There are many reasons that people follow a particular religion – they might have been raised with it, they might have converted for a variety of reasons. Who here is willing to share with me why they are a part of their religion?* Again, listen for extrinsic (*To marry my husband*) and intrinsic (*I looked into it and found it led me closer to God / universal deity*) reasons. Don't forget the atheists and unaffiliated persons: ask if they would be willing to share their reasons. Above all, the conversation must be non-judgmental and non-confrontational.

Many unaffiliated persons have a spiritual side, despite not adhering to an established religion. Explore that by asking: *Is there anyone here who does not attend a place of worship but still has a spiritual side or engages in spiritual practices like meditation or prayer? What do you do, if anything, to nurture your spiritual life?*

Religiosity and Legal Challenges

While challenges based on religion are proscribed in multiple jurisdictions (e.g., Colorado in *Fields v. People*, 1987, 732 P.2d 1145; New Jersey in *State v. Fuller*, 2002, 812 A.2d 389; California in *People v. Wheeler*, 1978, 583 P.2d 748, all in Bornstein & Miller, 2005), it is less clear whether challenges are prohibited on basis of *degree* of religiosity. An SJQ using measures of religiosity, similar to the questions above, can be very useful in justifying a challenge; it can be used to demonstrate that the challenges were exercised based on degree and dimension of religiosity, rather than on a single denomination or tradition.

Religiosity is a vital and inherent foundation that has far-reaching influence upon an individual's rationale for decision-making. Whether reliance upon religious convictions is conscious or unconscious, in their brain or in the "heart," there is no denying the influence the spiritual core of a person has upon the filters through which they sift information and arrive at a conclusion. Not to consider this factor when screening jurors would miss tapping into critical attitudes and experiences that a person brings into the jury room, no matter how unbiased they may claim to be. To quote an old proverb, "Keep thy heart with all diligence; for out of it are the issues of life." ©

Gayle W. Herde, Ph.D. is a litigation consultant based in Denver, Colorado. She has an extensive background consulting in civil trials, including personal injury, intellectual property, medical malpractice, toxic torts, and communication law, among other areas, and is skilled at garnering and interpreting insights secured through the use of various research tools and methodologies. Her professional research interests include authoritarianism, religiosity, and the Millennial Generation. She can be reached at gherde@integrityservicesglobal.com or 303.482.6526.

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- My many thanks go to Robert Ray, J.D., Ph.D. with Veritas Research, LP for his invaluable input in this article.
- [1]"Mainline" is defined by Pew Forum for this purpose as Protestants who did *not* affirmatively answer the question, "Would you describe yourself as a born-again or evangelical Christian or not?" ("Nones" on the rise, footnote 5.)

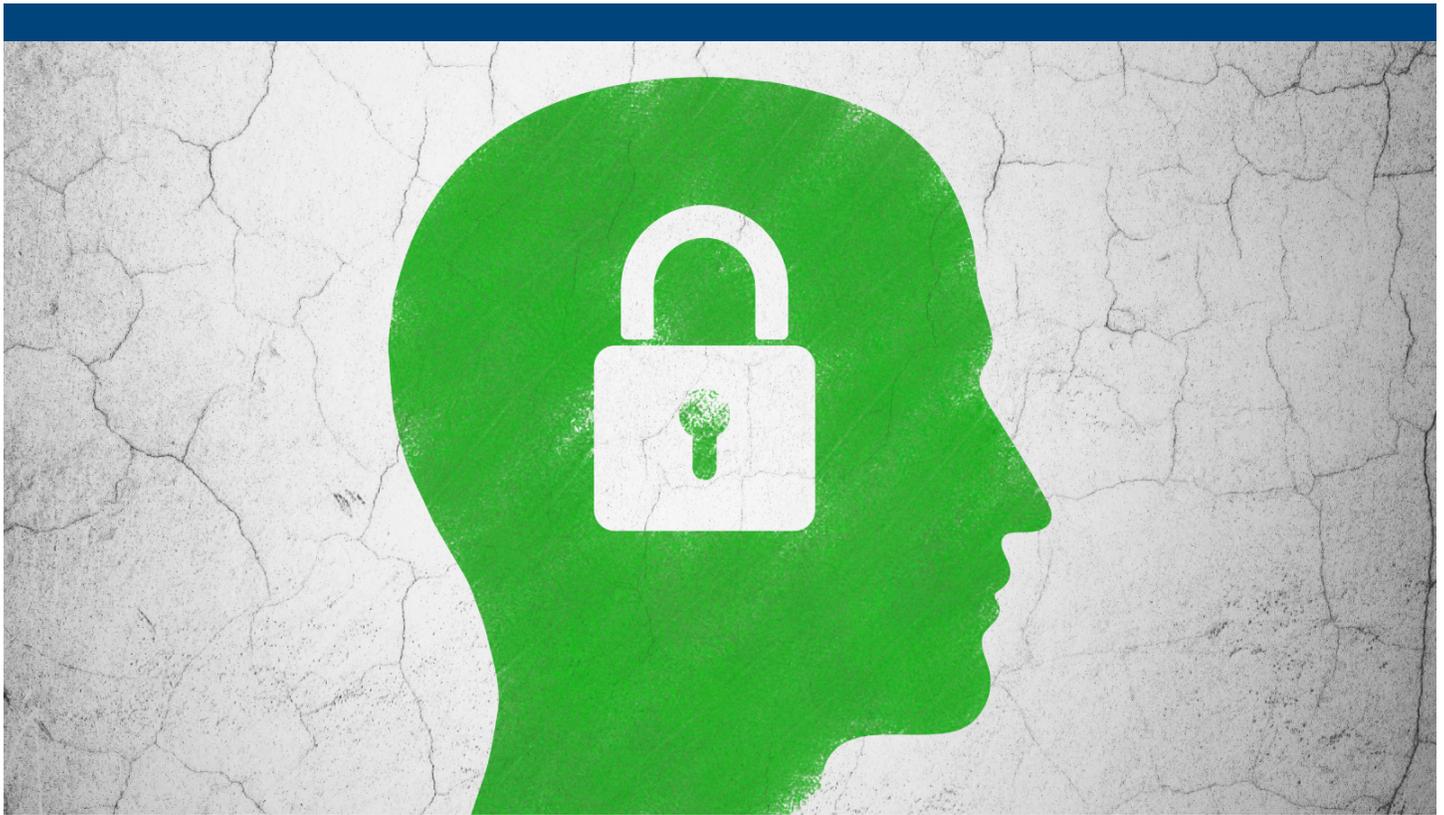


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No Such Thing As A Sure Thing: Neuroscience, The Insanity Defense, and Sentencing Mitigation

by Adam B. Shniderman, M.A.

MUCH HAS BEEN MADE of recent neuroscientific discoveries and their relevance for the criminal justice system. Some have touted neuroscience as the system's savior – a means for finally handling criminals effectively and appropriately. Neuroscientific expert evidence *may* provide a more effective means of representing clients by framing mental illness in terms of organic illness and providing jurors with objective indicia of a defendant's claims. Neuroscience may also provide a means for mitigating the perceived culpability of an otherwise "evil" defendant. However, there is no "silver bullet." Attempts to use neuroscientific evidence in court should be carefully considered before a neuroscientist is consulted and testimony is offered. Lawyers should be careful to avoid irrational exuberance and mining the brain for a defense. While anecdotal evidence abounds, there is limited research on the impact of neuroscientific evidence on jurors and results are mixed. The evidence may even backfire. A number of factors can impact the success of using neuroscientific expert evidence in court. This article provides an overview highlighting the complicated state of the relevant fields, and provides insight and guidance for trial lawyers and consultants defending clients

with possible neurological impairment.

Representing a client with mental illness or a psychological/personality disorder can present a significant challenge. The insanity defense is fraught with emotion and preconceived notions. The public is highly skeptical of insanity pleaders, in part due to skepticism about the legitimacy of defendants' claims of mental illness and misunderstanding the implications of an *NGRI* verdict. [Research](#) shows that the public believes that many insanity pleaders are simply faking mental illness to avoid the consequences of their actions. This myth impacts even the most educated of jurists. In [Atkins v. Virginia](#), Justice Scalia embraced the myth that the "[determination a person's incapacity] is a matter of great difficulty, partly from the uneasiness of counterfeiting this disability..." (p. 351, 2002). The fear of faking may be strongly associated with the longstanding perception that psychology is [unscientific](#), and that psychologists simply ask people why they do what they do, instead of conducting scientific investigation into human behavior. Additionally, [research](#) finds that jurors misunderstand the consequences of an *NGRI* verdict, often believing that a

person spends only a short time in custody or is released as they would be if found not guilty. It is logical that these perceptions would interact to influence jury verdicts. Jurors who fear they are being duped by a cunning defendant who “beat” psychological testing, and who believe that the defendant will be released quickly if found *NGRI* are going to be less inclined to find a defendant legally insane.

Biocriminology: Do Bad Brains Cause Bad Behavior?

In the past two decades, advances in neuroimaging have allowed physicians and researchers to analyze the structure and function of the brain in greater detail. These technological advances, as well as the sequencing of the human genome, have led to a resurgent interest in understanding biological correlates and predispositions of criminal conduct. Neurocriminologists, those who study the neurological correlates of criminal behavior, are investigating and finding the purported neurological roots of a variety of behaviors and traits associated with criminality. Importantly, the deterministic attitude of early biocriminology has been replaced with the understanding that genes and brains interact with environment to shape behavior. Research finds that neurological dysfunction reaches far beyond the prototypical mental illness (*e.g.* psychosis) in criminals. For example, a particular recessive genotype of the tryptophan hydroxylase-1 (“TPH1”) gene, involved in the synthesis of serotonin, has been found to be a genetic risk factor for criminal behavior, particularly homicidal behavior in patients with schizophrenia. The MAO-A gene, the so-called “[warrior gene](#),” which codes an enzyme responsible for degrading the neurotransmitters noradrenaline, adrenaline, serotonin, and dopamine, has also been the subject of significant research. Studies have revealed that a particular low activity form of the gene, in conjunction with environmental factors, could lead to aggressive impulsiveness.

Imaging studies have paid attention to a variety of regions of the brain. Scholars have explored the role of the prefrontal cortex—the region of the brain just behind the forehead that is implicated in decision-making and regulating behavior—in antisocial and violent behavior. Empirical studies have shown that patients with antisocial personality disorder (“APD”) have a significant reduction in prefrontal cortex gray matter, with similar findings in studies of aggressive individuals and pathological liars. Functional imaging studies have also revealed decreased activation in this region of the brain in impulsive violent individuals, suggesting impulsive violence stems from diminished use of the prefrontal cortex’s inhibition systems. In addition to the prefrontal cortex, a variety of areas of the limbic system, particularly the amygdala – involved in reward processing and fear – show structural and functional differences in individuals with antisocial behavior. With these discoveries has come significant interest from the academic and legal community in understanding its potential impact on the criminal justice system. Some lawyers and academics hoped neuroscience would provide the impetus for radical change in the legal system, while others believe this new information is

of little use. As [Hank Greely](#) writes, “[t]oday we are regularly making new discoveries about the functioning of the human brain, discoveries that have led many lawyers, philosophers, and neuroscientists to speculate about the consequences of our new understanding for the criminal justice system.”

The Unclear Impact of Neuroscientific Evidence

In 2008, [McCabe and Castel](#) found that neuroimages had a significant impact on individuals’ perceptions of articles summarizing cognitive neuroscience data. These images impacted perceptions of both accurate summaries and those that included incorrect science. These early findings spurred a widespread fear among academics and lawyers that jurors would be bamboozled by colorful 3-D images of the defendant’s brain. In the aftermath of these early studies, scholars have conducted mock jury experiments to understand the impact of neuroimages on jurors. The field is rapidly growing, however, neurolaw is still in its early stages. To date, only five published, and several forthcoming empirical studies, including several of my own, have explored the impact of neuroscientific expert testimony on jurors. A recent [blog post](#) notes that the tides have turned since 2008. However, the impact of neuroscientific evidence and neuroimages in particular is complex and remains unclear. Dr. Handrich is correct. Scholars *have* generally found that providing jurors with neuroimages has no additional impact above and beyond verbal expert testimony (see *e.g.* [Schweitzer & Saks](#) and [Schweitzer et al.](#)). In a forthcoming [article](#) in the *Journal of Empirical Legal Studies* (JELS), Saks *et al.* found that neuroimages are important to obtaining a desirable outcome.

When the defense offered expert evidence in support of mitigation for a defendant diagnosed as psychopathic, the evidence only had the desired effect when accompanied with neuroimages. Without neuroimages, neuroscientific and genetic expert testimony backfired and led to harsher sentences. The opposite was true for defendants diagnosed as schizophrenic. Non-image based testimony produced the desired effect of mitigating assessments of responsibility and sentencing. Neuroimages increased judgments of responsibility and sentences of death in the capital phase of a criminal trial for these defendants. The authors suggest the difference in findings from other recent studies, finding no impact of neuroimaging, may be attributable to the fact that most studies examine the guilt phase, whereas this study focused on the sentencing phase. As such, jurors in the JELS study were assured that the defendant would receive some form of punishment. However, Greene and Cahill also examined the sentencing phase of a capital case and found that neuroimages provided no additional benefit beyond neuropsychological testing without imaging. Variation in the results may be attributable to the fact Saks *et al.* employed a more representative sample of the United States population, while Greene and Cahill used a sample of college students. As for the backfire effect, the authors acknowledge that the reason for these puzzling findings is unclear.

Studies have *generally* found significant impact of *verbal* expert testimony, particularly in the guilt phase. Neuroscientific evidence is significantly more persuasive than psychological testimony. Studies by Schweitzer and Saks in [2011](#) and Schweitzer *et al.* in [2012](#) and Greene and Cahill in [2012](#) show that neuroscientific expert evidence was significantly more likely to produce desirable outcomes (*NGRI* or *GBMI* verdicts) and decreased sentences for defendants. Much has been made of the fact that neuroscience is more persuasive than clinical psychology, but little attention has been paid to the mechanism for its persuasiveness. The results of published and forthcoming studies do provide some insight into possible explanations, which may provide potential guidance for lawyers. As discussed at the outset, the public is highly skeptical of clinical psychology and of the insanity defense. The inexactness of the tools used to diagnose mental illness leaves jurors no choice but to take a large leap of faith. Neuroscience, even without imaging presented in court, provides the jury with more specifics about the cause for the defendant's behavior than clinical psychology can provide. Neuroscientific expert testimony, in these mock jury studies and in actual criminal cases, localizes the dysfunction in the defendant's brain and provides greater detail about the cause of the dysfunction and aberrant behavior.

Finally, a recent [study](#) of 181 state trial judges by researchers at the University of Utah provides some insight into how judges view neuroscientific evidence and how this evidence can impact sentencing. While the decisions in [Graham v. Florida](#) and [Miller v. Alabama](#) provided some insight into the possible influence of neuroscientific evidence on how the Court viewed a class of offenders (the extent of the role of neuroscience in influencing these decisions is highly contested among academics), the University of Utah study looks at the impact of neuroscience on trial judges handling the trials and everyday sentencing of the criminal justice system. The study asked judges to sentence an individual in a mock case who had been convicted by a jury of aggravated assault. The researchers found that while a diagnosis of psychopathy resulted in an enhanced sentence (almost 14 years compared to an average of 9 years for this crime), neuroscientific and genetic evidence reduced the impact of the diagnosis by approximately a year. The study has, however, recently been criticized by legal scholar [Deborah Denno](#) for methodological problems and its failure to reflect the reality of the legal system.

Effectively Advocating Using Neuroscience

There are several ways current neuroscience knowledge can be useful to trial lawyers representing clients with mental illness. First, it's time to think beyond traditional mental illness,

particularly at sentencing, where the rules of evidence are relaxed. A new or less common technique/form of evidence is more likely to be admitted. Neuroscientific evidence has been used in sentencing hearings across the United States to assist in the defense of clients who do not fit the traditional image of mentally ill (see *e.g.*, [Grady Nelson](#), [Brian Dugan](#), [Virginia Schoolteacher](#), among *others*). Research has discovered that neurological dysfunction can contribute to delinquent/criminal behavior far beyond the bounds of traditional mental illness. A defendant with a long criminal history may have genetic or neurological factors that predispose or contribute to his/her delinquent behavior. Presenting evidence of such a condition at sentencing may help reframe that potentially detrimental history and mitigate its potentially aggravating effect. The evidence may also be offered as mitigation even where no aggravating evidence is offered.

Second, neuroscientific evidence may offer greater likelihood of success for an insanity defense. The majority of neuroscientific research that exists in neurocriminology considers conditions that involve [volitional impairment](#). In total, [28 states](#) adopt an insanity standard that gives no consideration to volitional incapacity. As such, the opportunity to enter an insanity plea based on volitional impairment and, at the same time, offer neuroscientific evidence is limited – likely to states that have adopted an [irresistible impulse test](#) (IIT "25") (*e.g.*, Colorado where the Aurora theater shooter James Holmes has entered an insanity plea). In "IIT" states, neuroscience may assist trial lawyers in overcoming some of the skepticism and prejudices that are associated with the insanity defense. Neuroscientific testimony would provide the jury with "hard" science evidence and provide a more precise description and location of the dysfunction, which may alleviate a number of concerns that the juries have in these cases. Psychology experiments thus far suggest you stand a better chance of success if neuroscientific evidence is used in support of an insanity claim.

One might read this article and assume the use of neuroscientific evidence constitutes a "rich person's defense" – available only to those that can afford neuroimaging, or to defense lawyers who can get the court to pay for the expense. However, several studies, including Schweitzer and Greene's studies, as well as forthcoming studies, find that neuroscientific evidence (based on imaging) is no more persuasive than *neuropsychological* evidence (that employs only an external examination to find and characterize the neurological root of the illness). While fMRI and QEEG and structural MRI might be seen as the pinnacle of evidence (even if the images cannot be presented in the courtroom), framing the defense in terms of the brain may be effective regardless

Use neuroscientific evidence in sentencing hearings to assist in the defense of clients who do not fit the traditional image of mentally ill. Remember that neuroscientific evidence may offer greater likelihood of success for an insanity defense. When cost is a concern, remember that framing the defense in terms of the brain may be effective regardless of whether it was an internal (*e.g.*, neuroscientific) or external (*e.g.*, neuropsychological) examination.

When considering neuroscience knowledge, proceed with caution – and caution beyond that of the ordinary caution any good trial lawyer uses in defending a client.

of whether it was an internal (e.g., neuroscientific) or external (e.g., neuropsychological) examination.

As noted at the outset, however, proceed with caution – and caution beyond that any good trial lawyer uses in defending a client. Don't mine the brain for an excuse – it could backfire. Research on the impact of neuroscientific evidence remains ongoing. Relatively little research exists in this area and as this article highlights, the research that does exist provides unclear and mixed information about the potential impact of presenting neuroscience in court. A dysfunctional brain may be a double-edged sword. Attempting to mitigate responsibility by showing a biological contributor may have the opposite effect.

Judges and juries may see a client as permanently damaged and unfixable, leading to a guilty verdict or a harsher sentence in the hopes that this permanently aggressive or dangerous defendant will not return to the streets any time soon. The success of using this type of evidence and defense may depend on the type of crime, the type of dysfunction and conclusions of the expert, as well as the beliefs of the jury in science, determinism/free will, mental illness and other yet unknown factors. Given the nature of this area and the complexities of presenting a defense using neuroscientific evidence, consulting an academic (someone who studies and understands juror decision making) may be useful. This area likely requires a team effort between lawyers and various experts to craft a successful defense ©

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A (Short) Primer on Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Culture in America

by Alexis Forbes, PhD

THE LEGAL CLIMATE for LGBTQ rights is now the most fervent and dynamic in recent years. The latest case to garner media attention involves the unfair exclusion of a gay juror in an anti-trust case regarding the pricing of an HIV medication. During *voir dire*, a gay male juror was eliminated through a peremptory strike exercised by the defendant, Abbott Laboratories. Attorneys use peremptory strikes to eliminate jurors that the attorney feels will not be favorable for their client. The strikes are limited so attorneys must use them wisely. Typically, the strikes go unchallenged and attorneys do not have to provide a rationale for striking a particular juror. However, the plaintiff, GlaxoSmithKline (GSK), objected to the strike of this gay male juror and asked for Abbott's rationale. Abbott told the court that it was striking the juror because the juror was a gay male. The judge, however, allowed the juror to be stricken from the panel and the case proceeded. Ultimately, GSK won the case in 2011 but received an award that hundreds of millions of dollars less than what it originally sought. For this reason, GSK appealed the verdict and requested a new trial.

In March 2012, Lambda Legal and 12 other social justice

agencies filed an [amicus brief with the Ninth Court of Appeals](#) asking the court to consider the 1986 U.S. Supreme Court ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986)^[1] when evaluating the constitutionality of striking a juror because of their sexual orientation. The *Batson* ruling stated that attorneys could not use peremptory challenges to strike jurors according to race. *Batson* also delineated how eliminating jurors through racial group membership violated the Equal Protection Clause of the 14th Amendment of the Constitution. Striking jurors because of certain characteristics was unfair to both the parties involved in the case, as well as to the jurors. GSK and the amicus brief focused on that crucial point from *Batson* to argue that striking the juror because of his sexual orientation was in violation of the Equal Protection Clause proscribed by the 14th Amendment. On January 21st, 2014, the 9th U.S. Circuit Court of Appeals ruled that the peremptory strike used to remove the gay male juror was prohibited by the constitution and the case was remanded to the lower court for a new trial.

The heightened interest and media attention to this case was motivated by a more simplified concern: whether people can be excluded from jury service because of their sexual orientation.

The salaciousness of this case, and the resulting decision, is set in a societal climate in which LGBTQ rights and concerns are in flux. In recent years, citizens in the United States have discussed, promoted, argued against, and implemented laws or policies that affect the daily lives of LGBTQ individuals and American culture as a whole. Despite this increased attention to LGBTQ culture, many Americans still have only superficial knowledge of what “LGBTQ” is. The following article provides an introduction to LGBTQ-related terms and some important constructs. Though informative, this article is not an exhaustive compilation of the issues that are important to LGBTQ people. However, I hope that you find it accessible to your interests and helpful in learning more about where you, LGBTQ or not, fit in the lives of LGBTQ American youth and adults. Ultimately, having non-LGBTQ people becoming more comfortable with and normalizing the LGBTQ culture is another way to help reduce a large source of inequality in our country.

The Importance of Labels & Terminology

Some of the more prevalent research topics in LGBTQ discrimination include, gender, biological sex, gender identity, sexual orientation^[2], and gender nonconformity^[3]. While these constructs are interrelated, some or all of those constructs can be conflated in academic and social conversations about LGBTQ experiences^[4]. Thus, it is necessary to describe the important details of the variables that influence discrimination to foster an understanding for the unique experiences of LGBTQ and other gender nonconforming people.

Language and labels are very important in LGBTQ culture. The bottom line is that people want to be able to describe themselves using terms that represent their identity. The challenging aspect of that desire is that LGBTQ-related terms and labels are dynamic and can change for different people and for different reasons. For instance, the term “queer” was once considered a derogatory term but now, in appropriate contexts, that term can be used to describe a romantic or sexual orientation that fluctuates or is difficult to characterize. Additionally, queer is also used as a label for gender identity and has been incorporated to produce the word “genderqueer”. Genderqueer describes a gender identity that shifts along the spectrum of male and female and/or may be hard to typify using conventional language. It is not uncommon to hear people in the LGBTQ community to say that they “self-identify” with regard to their gender identity or sexual orientation. That language and practice of self-identification indicates that the person has chosen a label that they believe provides a more accurate representation.

Gender as a Construct

Gender is the concept of behaviors, interests, and socially constructed expectations that society has established for men and women. Gender identity refers to an individual’s conceptualization of their gender as male, female, queer, or

another self-identifying term. Male gender identity is typically associated with having masculine interests and behaviors^[5]. Individuals stereotypically associate masculinity with ambition, dominance, athleticism, and self-reliance. Female gender identity usually represents an individual whose behaviors and interests are traditionally feminine. Some examples of traditionally female-typed characteristics are compassion, sympathy, loyalty, and sensitivity^[6]. Regardless of their sex*, female-identified individuals feel that they are female or a woman, and that “female” is the term that most closely defines how they perceive their gender. Likewise, a male-identified individual feels that they are a man irrespective of their sex.

In contrast, cisgender individuals are people whose self-concept of gender matches their sex. Currently, the word, “cisgender”, is typically used in the context of an LGBTQ-related topic; consequently, many cisgender individuals are unaware of this term. This lack of knowledge and ignorance to the benefits of majority status can typically be described as “cisgender privilege” or “cisprivilege”^[7]. Similar to the concept of White privilege^[8], cisprivilege is defined as societal-level rights, opportunities, and preferential treatment that is exclusive to individuals whose sex, gender identity, and gender presentation match. Additionally, cisprivilege is discernable only through evaluating the treatment disparities between cisgender and non-cisgender individuals (i.e., transgender or genderqueer). Therefore, individuals that are not aware of the discriminatory treatment that transgender and genderqueer people face will also be unaware of their own cisprivilege.

The Intricacies of Physical Appearance & Identity

In the United States, sex is culturally constructed to be binary (i.e., either male or female but not both)^[9]. However, for some intersex infants, physicians cannot immediately assign a binary sex at birth because that child has “genetic, hormonal, or anatomical sex characteristics” of both genders^[10]. In the past, physicians resolved the ambiguity of that child’s sex by performing surgeries that enhance one sex and minimize the other. Medical doctors, researchers, and advocacy groups advise the parents of intersex children that the binary sex of their child cannot be resolved through cosmetic surgery alone. In addition to undergoing what some argue are unnecessary surgeries to eliminate or enhance biological sex organs, some intersex individuals must take hormones in order to suppress any unwanted sex characteristics (i.e., breast development or facial hair).

Intersex individuals, regardless of surgical procedures, may have an intersex identity whereas, instead of being both male and female, that individual identifies with a “third gender” that does not conform to society’s understanding of gender. The intersex identity is unique in that it does not represent a “sum” of its parts. One intersex person with male and female sex characteristics may have a male gender identity while another intersex individual with the same type of sex characteristics may have an identity that is neither male nor female. In a

society where binary gender identification is the norm, intersex individuals often have difficulty with navigating their sense of gender identity because their biological sex does not correspond to a single gender^[11].

Similar to those with an intersex gender identity, people with a queer gender identity (genderqueer) feel that neither, “male” nor “female” describe their gendered outlook or self-concept. Someone with a queer-identified gender may engage in behaviors that are stereotypical for males and have interests and feelings that are stereotypically associated with females. These genderqueer individuals believe that the binary conceptualization of gender, male or female, does not accurately describe their identity^[12]. Having a genderqueer identity is sometimes difficult to explain. Others may have misconceptions that genderqueer is the same as intersex (e.g. being born with both male and female sex characteristics) which it is not. Typically, genderqueer people were born with the reproductive anatomy of only one sex but have a gender identity and gender presentation that varies along the spectrum of traditional concepts of male and female, or masculinity, androgyny, and femininity^[13].

Transgender studies and advocacy is incorporated into LGBQ (lesbian, gay, bisexual, and queer) issues because transgender people experience similar stigmas and discriminatory experiences to what lesbians, gay men, bisexual men and women, and queer individuals encounter^[14]. However, the term, “transgender”, does not denote any form of sexual orientation identity. Therefore, transgender people may identify as lesbian, gay, bisexual, asexual, pansexual, and/or heterosexual. It is not their sexual orientation, but the discrepancy between their gender identity and their sex that defines their transgender identity. For example, a transgender woman, also labeled MtF (male to female), is a woman who was born with male sex characteristics, but still identifies her gender as female. Conjointly, a transgender man (female to male (FtM)) is a man who was born with female sex characteristics but his gender self-conceptualization is that of a man. As support and advocacy for transgender people has increased in the United States, the language used to describe a transgender identity has diversified. Some transgender individuals label their identity as gender fluid, gender nonconforming, or gender variant.

Transgender individuals often experience emotional distress if their outward gendered appearance (i.e., clothing, physical form, or facial features) is not in accord with their gender identity. Some transgender individuals will consult a physician to decide what medical (i.e., hormones) or surgical treatments (i.e., facial feminization or a double mastectomy), if any, they should pursue to align their physical appearance with their gender identity. In addition to medical and surgical treatments, there are also behavioral treatments such as cadence, posture, or speech lessons that help transgender people enhance their gendered behaviors appropriately.^[15]

Sexual Orientation

The LGBTQ community has illuminated a broad diversity of sexual orientation identities. Sexual orientation is defined as an “enduring physical, romantic, and/or emotional attraction to another person” (pp. 8)^[16]. Heterosexual men and women prefer opposite-sex relationships and have no desire to engage in same-sex sexual or romantic relationships. For example, a heterosexual, transgender woman is one that is intimately attracted to men. Lesbians and gay men have a stable and singular attraction to people of the same sex. Specifically, lesbians are self-identified women (i.e., cisgender female or MtF) who are only attracted to other women. Likewise, gay males are attracted to and seek out romantic, emotional, or physical relationships with men only.

Bisexuality refers to individuals who experience attraction to both males and females. Bisexual people may choose to be in a long-term relationship with an opposite-sex partner but their sexual orientation and bisexual attraction to same-sex partners is not eliminated. It is sometimes difficult for bisexual people to explain that their sexual orientation is not dependent upon who they are in a relationship with at any given time. Therefore, throughout a bisexual person’s life, they may be attracted to men for two years and then women for 3 months. Their relationship status may change but their sexual orientation does not^[17].

Someone with a self-identified queer sexual orientation typically has a pattern of sexual, romantic, or emotional attraction that they believe is not consistent with traditional labels. For example, an individual with a bisexual-like pattern of romantic attraction may refuse that bisexual label and choose instead to label their sexual orientation as queer. As “queer” is an umbrella term, any individual can label their pattern of romantic, relationship-oriented behaviors queer^[18].

Gender Nonconformity (GNC)

Within the transgender community, individuals and their allies understand that gender nonconformity (GNC) is the common and defining characteristic of transgender individuals. However, because GNC can be present in so many realms of behaviors and emotions, almost all people, to some degree, are GNC. Gender nonconformity is defined as, expression of a schema of behaviors, which is typically associated with the opposite sex (i.e., male ballet dancer or female construction worker)^[19]. GNC can be exhibited through an individual’s physical appearance; but, someone’s personality characteristics, communication style, and social interests or hobbies can also demonstrate GNC.

Gender conforming members of the LGBTQ population are less likely to experience LGBTQ-related discrimination when other individuals are not aware that they are LGBTQ. Therefore, when behaving according to traditional gender norms, the individual’s LGBTQ identity alone may not result in discrimination that LGBTQ-identified individuals typically

experience. Evaluating discrimination and its impact on physical and mental health within LGBTQ populations does not thoroughly ascertain risk factors if research samples include LGBTQ participants who are “passing” as cisgender and/or heterosexual for some or all of their daily interactions, familial relationships, and in professional settings^[20]. Adolescents cope with sexual orientation based discrimination by passing as heterosexual. They monitor and conform the way that they walk, dress, and speak to traditional gender norms as a precaution to avoid being “outed” as LGB^[21].

Gender nonconformity is a prominent correlate to victimization for lesbian^[22], gay, bisexual men and women^[23]. There is evidence that GNC has a compounding effect on sexual orientation-based discrimination such that gay, effeminate males are more likely to encounter discrimination than are gay, masculine males^[24]. Victimization occurs more frequently with gender nonconformists than with other LGBTQ persons^[25]. Sandfort and colleagues (2007) reported that GNC is a significant risk factor for verbal, physical, and sexual assault from childhood through adulthood^[26]. For instance, GNC LGB individuals are more likely than gender conforming LGB individuals are to report suffering physical, verbal, and sexual abuse at the hands of family members or intimate partner. In some ways, GNC is an indication of membership in the stigmatized and marginalized LGBTQ group. This physical or nonverbal indication of minority status is similar to that inherent to people of color. Visual indications of membership to a stigmatized group can promote the salience of differential social statuses and result in discriminatory behaviors enacted by the group that occupies a higher social status. If minority group membership is as salient as an individual’s gender nonconformity, it will be difficult for researchers to conclude, with high degrees of certainty, if the perpetrators of discrimination are responding solely to an individual’s GNC, their sexual orientation, or if there is another motive that is a combination of both factors.

Why LGBTQ Need Legal Protections

Minority groups vary in the type of privilege and the degree to which privilege is available to them^[27]. In the United States, social movements such as the Civil Rights Movement and the Women’s Rights Movements consisted of events that led to changes in law and public policy that made it illegal to discriminate against those groups. Historically, the movements have occurred independent of one another but the resulting legislation or policies will broaden to include the minority groups for which the movement was started and for those who, subsequently, have been identified as being in need of similar protections. Cultural movements toward equality typically persist so that more types of equality and previously invisible aspects of inequality are brought to light (i.e., adding gender identity to hate crime laws). The fight for equality for lesbian, gay, bisexual, transgender, and other GNC individuals progresses but some of the cultural movements that involve policy change have not extended to include LGBTQ individuals^[28],^[29]. For example, federal and state discrimination laws that govern how

citizens interact in employment, health care, retail, and housing contexts extend to gender, race, country of origin, ethnicity, and age but many states do not include language that prohibits discrimination against gender identity, gender presentation, or sexual orientation in those same contexts.

Throughout their lifetimes, LGBTQ people encounter systematic discrimination and prejudice, physical and sexual victimization, mental and physical health complications, poverty, academic punishments at rates higher than the averages observed for cisgender, heterosexual people. Counselors and psychologists who work with LGBTQ individuals are aware of these explicit stressors that contribute to an LGBTQ client’s mental health but many are beginning to examine the subtle forms of discrimination that can have a cumulative impact on an individual’s emotional well-being^[30]. Microaggressions are subtle forms of discrimination that are perpetrated, sometimes unknowingly, by an individual or by a society. Microaggressions against LGBTQ individuals include heterosexist comments about romantic relationships or the use of antigay terms in casual conversations with or without an LGBTQ individual present. Microaggressions and blatant forms of discrimination jeopardize the mental health of youth^[31] and adults^[32] who identify as lesbian, gay, transgender, or bisexual. One example of a systematic microaggression is in the courts with the lack of the extension of certain legal rights (i.e., marriage) and the courts’ failure to enforce laws to protect LGBTQ individuals (i.e., employment discrimination).

An increase of media attention on bullying-related suicides in the media has brought emotional support and other resources to aid in the reduction of suicides in the LGBTQ community. Negative mental health outcomes for transgender adults can vary according to the transphobic bullying and victimization that they experienced when they were youth in school^[33]. In a sample of 6,450 trans-identified and GNC adults, an alarming 41 percent reported having suicidal ideation at least once in their lifetime. This is approximately 25 times higher than the prevalence of suicidal ideation observed in the general population (1.6%)^[34]. Many factors contribute to an individual’s risk for suicidal ideation but authors found that there were specific antagonizing factors among their transgender sample. In addition to its effect on suicidality, school victimization is also related to higher rates of other negative mental health outcomes for transgender adults. Transgender individuals who experienced school victimization were more likely to stay in jobs that they did not want, use drugs or alcohol to cope with transphobic victimization, and to contract HIV than were transgender individuals who did not report experiencing some form of school victimization.^[35]

In 2010, as a reaction to LGBTQ youth suicides, Dan Savage and Terry Miller founded the “[It Gets Better Project](#).” Savage and Miller recorded a video to LGBTQ youth to send a message of support to bullying victims^[36]. The project’s popularity is evidenced by the 50,000 personally recorded messages from individuals all over the world. Since its inception, the It Gets

Better Project expanded to include messages of support to LGBTQ youth as well as messages to the public about the importance of speaking out against LGBTQ-related bullying^[37].

Unfortunately, LGBTQ-related bullying continues to affect schoolchildren^[38]. The most recent statistics from a national sample of LGBTQ youth indicates that almost 85 percent of LGBTQ youth hear antigay remarks “frequently or often” (p. xiv), and that antigay bullying and discrimination is even enacted by teachers and staff members in school systems. In addition to the antigay comments, negative comments about gender nonconformity or gender presentation were reported by approximately 60 percent of the survey participants. The survey revealed that between 12 – 56 percent of the verbal and physical bullying targets the LGBTQ youths’ nonconforming gender expression. Over 81 percent of the LGBTQ youth were verbally harassed, 63 percent felt unsafe in school, 38 percent were physically harassed, and 18 percent were physically assaulted in school because of their sexual orientation. The high rates of sexual orientation based discrimination for LGBTQ youth corresponded with higher rates of self-harm (25% vs. 6.3%) and suicidal ideation (23.9% vs. 7.4%) than for non-LGBTQ youth.

Legal and Legislative Momentum toward Equality

In the United States, the justice system is comprised of entities that are intended to keep citizens safe and to enforce the rights that are afforded to citizens through the Constitution. The courts provide a forum through which civil, family, and criminal legal matters may be resolved. Unfortunately, the laws that govern these legal matters are sometimes flawed in that they do not benefit each demographic equally. Biased judges may implement biased interpretations and order biased enforcements of the law for individuals in stigmatized groups (i.e., ethnic minority). These interpretations and enforcements have lasting impacts on the individual, and sometimes, on the entire demographic^[39]. The importance of the courts in the United States lies within its power to affect social statuses and change the context of cultural acceptance for marginalized groups.

Fortunately, state and nationwide legal developments related to LGBTQ rights have provided hope that the momentum toward equality is building. The past five years have hosted dramatic shifts in the rights and protections available to LGBTQ people. In 2009, Barack Obama signed an act that added sexual

orientation and gender identity to the hate/bias crime laws. As of January 2014, 17 states had passed some type of marriage equality legislation; recognizing same-sex marriages. Only three states had legislation in place prior to 2009. The remaining 14 states passed their legislation within the five years between 2009 and 2014. President Barack Obama has publicly announced his support of marriage equality and the U.S. Supreme Court ruled that a key part of the Defense of Marriage Act (prohibiting legal same-sex marriage) was unconstitutional. In 2012, the EEOC ruled that discrimination according to transgender identity equated to sex discrimination and provided that transgender claimants could now file Title VII employment discrimination lawsuits. Additionally, the EEOC released a document which outlined the steps that employers should take to make sure that the work environment, policies, and benefits are transgender-inclusive. Also in 2012, the [Juror Non-Discrimination Act](#) and the [Jury Access for Capable Citizens and Equality in Service Selection \(ACCESS\) Act](#) were introduced in Congress and in the Senate. These two bills seek to prohibit sexual orientation and gender identity discrimination in jury selection and during jury service. Unfortunately, to date, those bills have not been passed. However, the January 2014 ruling from the 9th Circuit Court of the United States communicates that legal precedent as another way to curb discrimination against lesbian, gay, bisexual, transgender, and queer citizens in the years to come.

The 9th U.S. Circuit Court’s ruling about discrimination against the gay juror signals that tolerance for discrimination against LGBTQ people is decreasing. This ruling also communicates something even more important: the discrimination against LGBTQ people is rampant and severe enough that legal protections must be proscribed. These landmark cases can help to inform the American people that discrimination against LGBTQ people is similar enough to that experienced by people of color and women that judges must include them in the category of protected groups when it comes to equal protection and the law.

For more information on the challenges that LGBTQ people face in America and why legal protections are necessary, take a look at an informative pamphlet on the Human Rights Campaign’s (HRC) site

For more information on how to be a “straight” ally or supporter of LGBTQ people, check out this brief brochure from PLFAG and HRC. 

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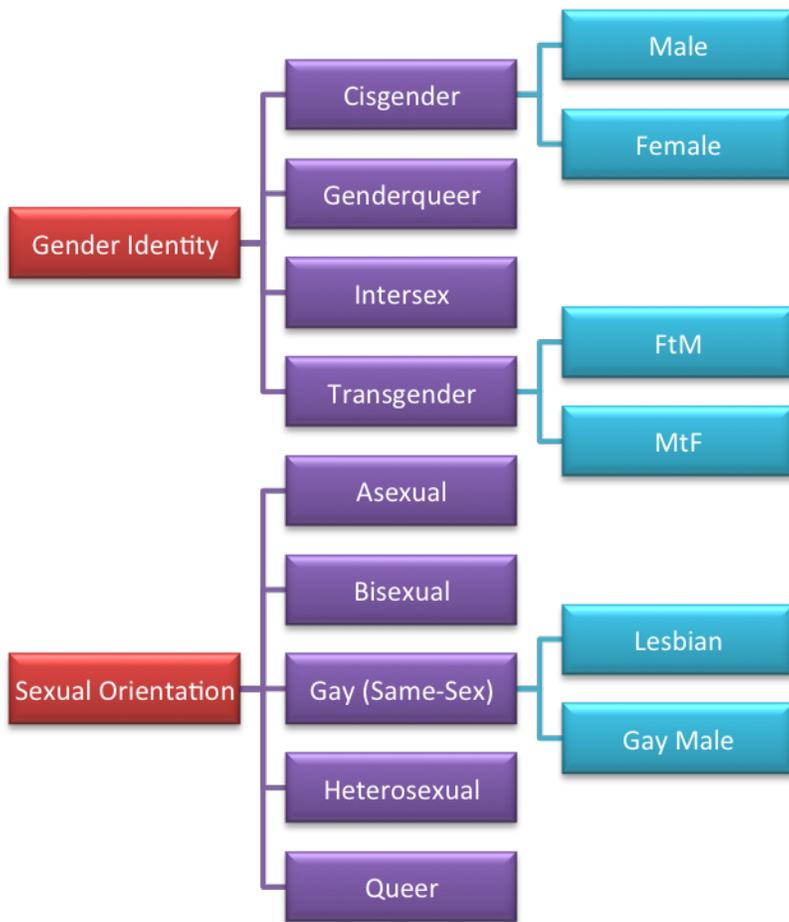
New Time, New Terms

The terminology or the method of labeling identities is extremely important to LGBTQ people. Describing people in terms that they prefer, however non-traditional these terms are perceived, helps to prevent committing microaggressions or other forms of unintentional disrespect. Below is a list of a few popular terms with the out-dated verbage as well as the currently accepted words. Visit to download GLAAD's media reference guide, which contains a full glossary of appropriate terms as well as some terms to avoid.

Do Not Use These	Use These Instead
Homosexual	Lesbian/Gay
Transvestite	Transgender
Homophobic	Antigay
Hermaphrodite	Intersex
Sexual Preference	Sexual Orientation

The Basics

LGBTQ is the most common acronym used to describe the sexual orientation, gender identity, and culture of people who identify as lesbian, gay, bisexual, transgender, and queer or questioning. Below is a list of some of the terms that people use to describe their sexual orientation and their gender identity.



Gender Identity

Cisgender – a male or female that identifies with the sex that they were assigned at birth. Cisgender people also identify, to some degree, with the gender norms (excluding sexual orientation) that are associated with their sex.

Genderqueer – is used to describe a gender identity when the binary conceptualization of gender, male or female, does not accurately describe an individual’s gendered outlook or self-concept.

Intersex – describes a variety medical conditions wherein an individual’s reproductive anatomy or genitals do not fit the binary definition of male or female.

Transgender –an individual whose self-concept and gender identity do not correspond with their natal sex.

Transgender man/Female to Male (FtM) – is a man whose sex is female but he lives and identifies as male.

Transgender woman/Male to Female (MtF) –is a woman whose sex is male but she lives and identifies as female.

Sexual Orientation

Asexual – refers to the absence of physical or sexual attraction to another human being. An asexual man or woman can have romantic, intellectual, or emotional attractions to other people but they do not engage in physical sexual acts.

Bisexual – the sexual orientation that describes either a male or a female who is attracted to both males and females.

Gay – Depending on the context, gay can refer to either gay males and/or lesbians. Gay males are self-identified men who are emotionally, physically, romantically, and/or sexually attracted to people who identify as male.

Lesbian – a self-identified female who is emotionally, physically, romantically, and/or sexually attracted to other people who identify as female.

Heterosexual –an individual who identifies as either male or female (can be cisgender, FtM, or MtF) and is attracted to individuals of the opposite sex.

Queer - is an umbrella term that is used to describe an individual’s self-concept of their sexual orientation identity.

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Defense Responses to Jailhouse Informant Testimony

by Britney P. Bate, Ph. D., Robert Cramer, Ph.D., and Robert E. Ray, J.D., Ph.D.

ONLY EIGHT YEARS AFTER his birth in 1958, Leslie Vernon White had his first of many run-ins with the criminal justice system. A career criminal, some of White's crimes included drug offenses, robbery, and kidnapping (Bloom, 2002). As a means of navigating the criminal justice system, White was also one of the most clever jailhouse informants to date, likely responsible for a very high number of wrongful convictions throughout his criminal and informant career. Unfortunately, White is just one of many jailhouse informants influencing trials, and attorneys as well as trial consultants may need to deal with these witnesses in their work.

A jailhouse informant ("JI") is most often a "cooperating witness" who provides testimony of a crime based on information obtained while incarcerated (Neuschatz, Lawson, Swanner, Meissner, & Neuschatz, 2008). Information gathered through supposed conversations with the accused are relayed to an agent of the legal system, as the courts oftentimes rely upon JIs for prosecutorial information (Mazur, 2002). Most frequently, this includes a purported confession, referred to in the literature as a secondary confession (Neuschatz et al, 2008). The JI is often

looking for promise of early release, a reduction in charges, or early parole. JIs may also seek in-custody benefits, such as more food, greater telephone or television privileges, or cash (Bloom, 2002). Regardless of the JI's specific desire, options of such deals make it incredibly motivating for informants to gather and provide information, even if that means fabricating or lying in order to further their personal agenda.

Turning our attention back to Leslie Vernon White, he is particularly well known for gathering or fabricating information about an individual who was facing charges, and then offering this information to the authorities in exchange for rewards or sentence reductions. In fact, he was so creative in his role as a snitch he would use the jail telephone to call offices such as the morgue or police precincts to obtain information about crimes not yet released to the media, thereby gleaning information to make for seemingly reliable testimony comprised of details that he theoretically would only have been able to receive from the defendant (Neuschatz, Wilkinson, Goodsell, Wetmore, Quinlivan, & Jones, 2012). Of note, he testified against the leader of an Aryan brotherhood prison gang in a prison murder case, against a burglary suspect when the rest of the

evidence was circumstantial at best, and provided testimony of a later admittedly false confession against a defendant who could not effectively speak English (Bloom, 2002). White was able to maintain his informant business for close to 11 years before going public in a 1989 segment of *60 Minutes*, in which he confessed to consistently fabricating confessions of fellow inmates in the form of perjured testimony to the courts (Bloom, 2002). While clearly an exceptional case of JI influence, White illustrates a potential problem for attorneys and consultants. Interestingly, we may be able to turn to a small body of social science research to gain insight into how to deal with JIs at trial.

Experimental Literature on Perceptions of JIs

There have been very few studies that have addressed JI influence in an experimental way. One of the first investigations into this area included two experiments examining the relationship between juror knowledge of incentive for testifying and verdict rendered, utilizing both community and college samples. Across the two experiments, Neuschatz et al. (2008) had participants read a trial transcript that included either a secondary confession from an accomplice witness (AW), a JI, a member of the community (CD), or a no confession control (NCC). In half of the experimental conditions, it was made clear to participants that the cooperating witnesses were provided with incentive to testify. Results of both experiments showed that information pertaining to incentive to testify (either leniency or reward) had no influence on the verdict rendered. In the second experiment, results confirmed the presence of a fundamental attribution error in participant jurors' decision making, in that participants attributed the motivation of the AW and JI as being a reflection of personal factors as opposed to situational factors, discounting incentive entirely. Finally, and consistent with the literature on confessions (e.g., Kassin, Bogart, & Kerner, 2012; Kassin & Gudjonsson, 2004; Kassin & Neumann, 1997), both experiments confirmed that mock jurors were significantly more likely to render a guilty verdict when there was a confession, albeit secondary, in comparison to a no confession control.

As this study was one of the first of its kind, it is important to more specifically discuss the results and implications of each experiment. In experiment one, the researchers arrived at several important findings: First, no significant difference in conviction rates was found between the "incentive" and "no incentive" conditions. When participants were made explicitly aware that the cooperating witness was receiving some type of incentive as a result of providing the secondary confession, they were no more likely to render a guilty verdict than when not made explicitly aware of the provided incentive. Second, across all conditions and sample types, mock jurors convicted significantly more often when there was a secondary confession present. Regarding the college and community samples, the college sample convicted significantly more often than the community sample. Finally, the CD witness (i.e., the community member) received higher ratings in trustworthiness,

truthfulness, interest in serving justice, and was perceived as being less interested in serving his own needs in comparison with the other cooperating witnesses.

It was hypothesized that such results were consistent with the presence of the fundamental attribution error (Kassin & Gudjonsson, 2004). This psychological concept posits that individuals tend to attribute the behavior of others to dispositional factors, while ignoring the power of situational factors. It seemed as though jurors committed the fundamental attribution error in attributing the cooperating witnesses' secondary confessions as being indicative of dispositional factors (such as truthfulness, guilt, civic duty), while ignoring the situational incentive for testifying (such as leniency or reward). As a result, participants likely ignored the impact that an incentive may have on willingness to provide accurate or truthful information (Neuschatz et al., 2008). Further supporting this idea, there were no significant differences found regarding ratings of trustworthiness or truthfulness across the "incentive" or "no incentive" conditions.

Neuschatz et al. (2008) considered that participants might have simply failed to notice the incentive manipulation, leading to the results found in experiment one. In order to assess whether the results were actually due to the fundamental attribution error or simply a result of cognitively disregarding the incentive manipulation, experiment two implemented a few changes to test these possibilities. In order to assess if participants noticed the incentive manipulation, all participants in the experimental conditions were asked if the cooperating witness was provided an incentive for their testimony. Further, participants were asked to indicate what that incentive was. Participants were then asked to explain why the cooperating witness would provide the secondary confession evidence. In line with theory pertaining to the fundamental attribution error, if results were indeed a result of this error, participants in all conditions should attribute the secondary confession testimony to dispositional aspects of the cooperating witnesses (i.e. honesty, trustworthiness, guilt) as opposed to situational factors (i.e. receiving an incentive for their testimony). Finally, a "no incentive explicit" condition was added in which the witness explicitly indicated that no incentive was given in exchange for their testimony, so as to be sure no assumptions were made on the part of the participant regarding the notion of a potential incentive. With the exception of these noted changes, all other aspects of the experiment remained the same as described within experiment one.

Results of experiment two largely duplicated that of experiment one. Regarding appropriate recognition of the presence of an incentive, results indicated clear awareness of the presence of the incentive, as participants correctly identified this condition over 90% of the time (Neuschatz et al., 2008). Eighty-five percent of participants attributed the testimony of the cooperating witnesses to internal factors (i.e. guilt, feeling sorry for the family, etc.) or both internal and situational factors (i.e. reward, leniency, etc.) compared to only 15% of participants attributing

the testimony to solely situational factors. Cumulatively, it seems clear that participants were aware of the presence of an incentive, yet were able to disregard the situational incentive to testify, instead focusing on dispositional attributions as a reason for the testimony. Again no significant differences in verdict decision were found between the “incentive” and “no incentive” conditions, suggesting that jurors ignored the motivation cooperating witnesses may have had to fabricate their testimony in exchange for a reward, and instead relied on dispositional attributions of trustworthiness and honesty to accept the testimony at face value.

In further support of how impactful secondary confession evidence can be, it is important to note that within this study the secondary confession evidence was presented in an otherwise extremely weak case, as evidenced by the fact that in the control condition, participants as a whole voted guilty only 26 percent of the time (Neuschatz et al., 2008). However, when secondary confession evidence was presented, participants as a whole rendered guilty verdicts 71 percent of the time.

As a result of the implications of the prior study, Neuschatz et al., (2012) conducted a follow-up study to examine other facets of JI testimony that may impact juror verdict decisions. In this two-experiment study, participants read trial transcripts that presented secondary confession evidence from either a JI or an accomplice witness (AW). However, in the first experiment JI testimony was manipulated so participants were made aware that the JI had previously testified as an informant in either zero, five, or 20 cases. In the second experiment, participants were educated by an expert witness testifying on the unreliability of testimony of cooperating witnesses. Results of both experiments again yielded interesting results. The percentage of jurors who rendered guilty verdicts did not vary as a result of incentive, JI testimony history, or jury education through expert testimony. Further, this study replicated previous findings that participants exposed to secondary confession evidence rendered a guilty verdict significantly more often than when no confession evidence was presented.

Implications for Trial Preparation

The testimony of JIs can result in wrongful convictions given the influence of confession testimony on jurors. The following paragraphs describe strategies now in practice in different parts of the country, or recommended in the literature. Finally, we include our own recommendation to further explore the issues of jury selection and jailhouse informant testimony.

One solution suggested included using expert witnesses to help the jury better understand the unreliability and motivations associated with testimony given as a result of suggestive interaction with handlers (Gershman, 2002). However, as presented in Neuschatz et al. (2012), a study utilizing mock jurors to test this exact premise found no difference in the number of guilty verdicts rendered when comparing the experimental (expert witness) and control (no expert witness)

conditions.

Another solution that has been implemented in some states, such as [California and Illinois](#), include instructions delivered by the judge to more directly encourage jurors to carefully scrutinize the testimony and consider the degree to which the informant may have been influenced by promises of reward or leniency (Neuschatz et. al., 2008). However, it has been shown throughout the literature that cautionary instructions likely have little effect on verdicts rendered (Neuschatz, Jones, Wetmore, & McClung, 2012). As an example, a meta-analysis of 48 studies examining judicial instructions to ignore inadmissible evidence in juror verdict decisions found that juror verdicts did not vary with the presence of cautionary instructions, deeming such instructions ineffective (Stebly, Hosch, Culhane, & McWethy, 2006).

A final solution was for lawyers to more effectively cross-examine these cooperating witnesses in an effort to make their motivations to gain leniency or some other reward more salient to jury members (Cassidy, 2004; Mazur, 2002). At that time, it was thought that if the jury were made explicitly aware of a cooperating witness' incentive to testify (leniency or reward) or testimony history, then the jury would be more likely to discount testimony (most oftentimes secondary confessions) provided by that witness. However, Neuschatz et al. (2008) as well as Neuschatz et al. (2012) provided evidence suggesting that neither incentive nor testimony history have a significant impact on juror verdict decisions.

Given that research has shown current strategies are not particularly useful, attorneys may need to rethink strategies to deal with JI testimony. Since there appears little that a judge, expert witness, or sound cross-examination can do to assist in changing juror perceptions of JIs and, particularly, secondary confession testimony, a next logical step may be to address the very root of the problem: re-conceptualizing jury selection.

Through the use of juror questionnaires and peremptory challenges, one can apply social science knowledge in assisting with de-selecting individuals who may be most likely to believe a JI or fall victim to the fundamental attribution error. We highlight two potentially useful juror characteristics to consider measuring in the jury panel members: dogmatism and need for cognition.

Dogmatism is a personality trait characterized by close-minded, “black-and-white” type thinking in which individuals rigidly view things on absolute ends of a spectrum (Devine, Clayton, Dunford, Seying, & Price, 2001). Simply put, dogmatic jurors passionately cling to their belief systems or rules (Cramer, Adams, & Brodsky, 2009). Empirical evidence suggests that high dogmatism is associated with more guilty verdicts (Shaffer & Case, 1982). In application to cases involving JIs, a defense attorney would likely want to de-select individuals high in dogmatism. In criminal trials, the defense typically prefers individuals who are cognitively flexible, and who tend to avoid

views of the world as black and white. Regarding testimony of a JI, an individual who exhibits high degrees of dogmatism is likely to hear the provided secondary confession and fail to consider other factors relating to the testimony. Accordingly, these individuals may be candidates for de-selection. A full version of the Rokeach Dogmatism Scale (Rokeach, 1960) can be viewed within *Measures of Personality and Social Psychological Attitudes* (Robinson, Schaver, & Wrightsman, 1991, p 560-564). However, Troidahl and Powell (1965) provide a shortened 20-item dogmatism scale, likely more useful for purposes of jury selection. ([See page 10 of this file for the 20-item scale.](#))

Notwithstanding its age, the Dogmatism Scale provides a foundation for meaningful use in both SJQs and voir dire. As a practical matter, however, it is unlikely that a trial court would permit all 20 items to be included in a SJQ, or allow all items to be the subject of voir dire inquiry. With the understanding that research-level reliability as a predictor is compromised, a reduced number of four or five of Troidahl and Powell's scale items could be added to the SJQ as scaled response questions to get a sense of a panel member's level of dogmatism. The following five of Troidahl and Powell's items might be considered:

1. In this complicated world of ours the only way we can know what's going on is to rely on leaders or experts who can be trusted.
2. My blood boils whenever a person stubbornly refuses to admit he's wrong.
3. There are two kinds of people in this world: those who are for the truth and those who are against the truth.
4. Most people just don't know what's good for them.
5. Of all the different philosophies that exist in this world there is probably only one that is correct.

With a six or seven point response scale using end points "Strongly Agree" and "Strongly Disagree," the attorney can get a glimpse of the respondent's views that could be followed up during voir dire. Even without a follow-up opportunity, the attorney has more information than would ordinarily be available to evaluate whether the prospective juror should be struck for cause or by peremptory challenge. If the SJQ is not permitted, the attorney may still utilize dogmatism scale items by asking the venire for a show of hands of those who agree or disagree with the scale item, and then making decisions about which jurors' responses or response patterns warrant additional inquiry.

Need for cognition addresses the extent to which people actually enjoy and put forth effortful thinking (Cacioppo, Petty, Feinstein, & Jarvis, 1996). You will often hear need for cognition assessed in voir dire by the attorney asking potential jurors if they enjoy Sudoku or completing crossword puzzles.

As applied to the courtroom, a juror high in need for cognition is likely to thoroughly enjoy the challenge of discerning the "truth" and will not be satisfied until they have wholly examined all evidence presented from various viewpoints (Brodsky, 2009). Here is the short form of the [Need for Cognition Scale](#).

In our situation, the defense would likely want to de-select those individuals who have a low need for cognition, as they may be especially susceptible to accepting the JI's testimony at face value, and thus falling prey to the fundamental attribution error. Similar to the dogmatism scale, a limited number of items or related concepts from the NCS could be incorporated into the jury selection process by way of an SJQ or in the voir dire to give counsel some sense of the venire's general willingness to engage in "effortful cognitive endeavors" (Cacioppo, Petty & Kao, 1984). For example, an attorney for a criminal defendant might integrate the concepts behind NCS items into an SJQ question such as,

"Which statement best describes your view:

1. I prefer daily routines that do not require much mental effort; or
2. I prefer daily situations that require problem solving and abstract thinking."

Though not directly drawn from the NCS itself, attorneys can employ scale items to formulate SJQ or voir dire questions that may provide answers which enhance their ability to identify jurors with a low need for cognition, followed by additional voir dire questions intended to confirm whether a prospective juror is willing and able to scrutinize and evaluate the evidence in a way that considers generally recognized concerns raised by JI testimony. Most importantly, however, these responses can form the overall basis on which attorneys can make more informed decisions about how to treat those members of the panel when exercising peremptory strikes or proposing strikes for cause. If time and money allows, testing all individual scale items in mock jury/mock trial research could potentially identify the most useful items for the case at hand.

Further research within trial consulting is needed to address the issue of juror perceptions of jailhouse informants. If more time was spent on juror perceptions of JI testimony within focus groups, mock trials, and shadow juries, it is possible that patterns could be drawn as to what characteristics are most relevant in juror perceptions of informant testimony. Practical limitations to this approach are that it is costly, time-consuming, and each individual study would be largely a game of trial-and-error, in that trial consultants would be testing different strategies, case conceptualizations, and juror questionnaires to see which one, or which combination, may work to reveal the optimum or "best" type of juror for the defendant. We believe such a research-informed approach to jury selection in JI-involved cases offers a promising start in dealing with this unique type of evidence. ©

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Metaphors and the Minds of Jurors: Practical Applications for Trial Attorneys and Consultants

by Ronald K. Bullis, Ph.D., J.D., L.P.C.

GLOVES AND DNA weren't the only arguments at the O.J. Simpson trial. The attorneys also argued over metaphors—and for good reason. Metaphors have passed from literature into litigation. Now PR professionals use them. So do politicians and generals. Lawyers use them as well, not because they sound pretty, but because they work. They use them because metaphors are the stealth bombers of persuasion.

O.J. Simpson Prosecutor Christopher Darden, during closing argument, said:

“This relationship between this man and Nicole, you know, it is like the *time bomb ticking away* [author's emphasis]. Just a matter of time, just a matter of time before something really bad happened.”

Johnny Cochran, of Mr. Simpson's defense team, challenged that metaphor, saying:

“We are going to tell you and convince you about the motive in this case, and then he [Darden, author's emphasis] spent a long time trying to do that. As I say,

he did a fine job and addressed the facts and conjured up a lot of emotion. You notice how at the end he kind of petered out of steam there, and I'm sure he got tired and he petered out because this *fuse* [author's emphasis] he kept talking about kept going out. It never blew up, never exploded. There was no triggering mechanism.”

Metaphors associate one thing or idea with another thing or idea. The “ticking” time bomb is a metaphor because it relates one concrete thing (the time bomb) with a seeming dissimilar thing (the relationship between Mr. Simpson and Nicole Simpson). But the impact of metaphors extends well beyond poetry and into fundamental cognitive processes.

How Metaphors Work Forensic Magic

Neuroscience, jury research and social science recognize their power to shape our attitudes and decisions—and our brains. First, metaphors frame our thoughts because they form cognitive structures. Mr. Darden's “ticking time bomb” metaphor was no literary flourish. It was specifically designed to frame how the jurors interpreted the evidence presented at trial. The metaphor

was designed to form facts into a cogent and coherent picture in juror's minds. This might seem like a tall order—but not when we understand how metaphors work in the brain.

A neuroscience adage is that “neurons that fire together, wire together.” D.O. Hebb's 1949 quote in [Organization of Behavior: A neuropsychological theory](#) means that neurons bundle and form cognitive coalitions surrounding associations. For example, when metaphors link two ideas or images (“fire together”), neurons bind to one another (“wire together”) and form deeper, more powerful thoughts. To the extent that Mr. Darden presented evidence to reinforce that connection, those neurons will bind to form stronger associations between the metaphor and Mr. Simpson.

Second, metaphors chart past and future decisions. Metaphors organize our history and memories into coherent narratives. Similarly, metaphors organize new information. Jurors, in our example, were presented with the prosecution's new information and new metaphor of a “time bomb.” So O.J.'s counsel, Mr. Cochran worked to disassemble that connection. He had to disassemble Darden's metaphor or let those cognitive connections strengthen. The defense could not let that happen. The cognitive map made by Darden's metaphor had to be dismantled by another metaphor. Just denying that the metaphor is inaccurate is insufficient. The remedy for one metaphor is another metaphor.

Third, metaphors transform perception. They shape both what and how we think. By using a familiar object to stand for something complex, unclear or unknown, metaphors shape the *process* of thought as well as the *product* of thought. The right metaphor shapes the way jurors assess motive, responsibility, or personality. Metaphors inform forensic decisions. For example, an early forensic metaphor was first used in a murder trial in 1907. The defense, using the relatively new kind of expert testimony from a profession then known as “alienists” (later, psychiatrists), said that the defendant suffered from a “brain storm.” This now well-known metaphor, besides causing a public uproar, caused the first trial to end in a hung jury. Although later convicted, the metaphor provided a powerful image by which jurors addressed the then-existing legal excuse for murder.

A “brain storm” didn't just introduce an excuse into the equation of criminal guilt. The “brain storm” metaphor connected brain activity to the sometimes sudden, violent, eruption of forces unknown to us—a tsunami of the mind, so to speak. While the 1907 jury knew little of psychiatry and even less of neuroscience, they certainly knew that the brain

Create a forensic metaphor.

Be alert for witnesses' use of metaphors. How do they liken one thing or idea to another? Might the metaphor be useful to characterize trial issues? Freely associate or “brainstorm” key trial issues or testimony—especially complex or abstract trial issues. What are these concepts or ideas “like”? Of what do they remind you? What images come to mind? Is there a movie or TV scene or character or literary reference applicable?

Then take cues from the culture. How understandable and how closely applicable to the key trial issues is the proposed metaphor? Is it likely to be misunderstood by a diverse jury?

controlled human thought and behavior. They also knew about “storms.” Storms could come up suddenly and behave violently. The metaphor made a clear and cogent cognitive association between how storms work and how the brain works. The defendant could not control himself any more than we can control a thunderstorm. The defense wasn't just making a new cognitive connection about the mind and storms. The defense was making connections about how thinking can be violent, unexpected and inevitable. After all, there will always be storms; they will arise suddenly and they can often be violent.

So, the defense was not only making a scientific point. The defense was making a legal point. If the defendant had no control over his “brainstorm,” how could he have the requisite *mens rea* for a murder conviction?

Fourth, metaphors work implicitly as well as explicitly. Research shows that metaphors work both consciously and unconsciously.

Jurors or judges don't need to be literary critics for metaphors to work. Metaphors are influential without jurors even knowing they just heard one!

We use metaphors in our communication so often that we hardly notice them. The Simpson jurors may not have consciously noted that attorneys Darden and Cochran were using metaphors. It didn't matter. Their brains had already heard the metaphor. The neurons were already associating or “wiring together”. The chain of influence had already commenced and “once the bell is rung...”

The only way to undermine one metaphor is to replace it with another. Mr. Cochran had to instill the image of an unfused time bomb or a time bomb with no explosive—a dud. Only metaphors overcome metaphors.

Fifth, both Darden and Cochran used their metaphors to their best advantage. The “time bomb” and the “dud” metaphors were on point and understandable to the jury. These are exactly the characteristics that researchers find are the most persuasive. This makes sense because the metaphor must be familiar if it is to be effective. The metaphor also must be on point for the jurors to pertinently apply it.

How Trial Consultants Can Help Trial Lawyers Use Metaphors Successfully

Trial consultants can help their client attorneys spot, develop or counter metaphors in several, unique ways. First, and most importantly, is to simply remind lawyers how valuable metaphors are to winning cases. More and more law schools

train their students about the importance of narratives in their legal writing and trial practice classes. Yet, the specific, cognitive impacts of metaphors and their persuasive qualities often go undervalued. Valuing metaphors heightens our awareness of their influence. Consultants can provide reminders about how metaphors capture and keep the judge's or jury's attention.

The consultant can specifically help their clients listen for the "stealthiest" of metaphors. Sometimes the briefest metaphor yields the best results. In testimony at one Virginia criminal case, the prosecution's forensic scientist likened DNA to a "blueprint" for the body in one sentence. The metaphor was quick, clear and accessible. It is both a credible metaphor and a threat to the defense. The defense consultant would want to suggest even more pertinent metaphors to immunize the jury.

To undermine the "blueprint" metaphor, the defense attorney would insert another metaphor. For example, the attorney could use the image of an imperfect blueprint. This new metaphor might be inserted in opening and closing statements and throughout the trial. Suggested words can go something like this:

DNA is not destiny. DNA doesn't determine everything. It is like the first page of a blueprint. The first page of a blueprint only shows the outside of a building, the façade. Even genetic scientists say that while genes "load the gun," culture "pulls the trigger." So DNA evidence doesn't determine a person's motive. It doesn't determine a person's opportunity to commit a crime. DNA doesn't determine a person's will. You, the trier of fact, determine what the inside of the house looks like. When you buy a house, you want to see the inside of the house. Does the plumbing work? Do the lights turn off and on? Is the building soundly constructed?

You, the triers of fact, are building inspectors, not just people looking at how good the paint job is.

DNA is only the first page of a blueprint. It's what on the inside of the house that is important. You need to go inside the building and see for yourselves what's on the inside. That's what I want to help you to do.

In forming forensic metaphors, trial consultants can listen and respond to the language used during discovery and depositions by both opposing lawyers and witnesses that reveal trial strategy, the characterization of the parties or other witnesses, or other information useful. Sometimes the consultant will suggest a strategic metaphor to characterize the lawyer's position or, conversely, consultants will need to suggest undermining metaphors.

The infamous "broccoli" metaphor became a central way for opponents to characterize provisions in the Affordable Health Care Act. During the March 27, 2012 Supreme Court oral argument in [Department of Health and Human Services v.](#)

[Florida](#)(2012), Justice Scalia raised the broccoli metaphor to challenge the Act's individual mandate to purchase health care insurance.

Justice Scalia asked Solicitor General Verrilli:

"Could you define the market — everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli."

General Verrilli: "No, that's quite different. That's quite different. The food market, while it shares that trait that everybody's in it, it is not a market in which your participation is often unpredictable and often involuntary. It is not a market in which you often don't know before you go in what you need, and it is not a market in which, if you go in and — and seek to obtain a product or service, you will get it even if you can't pay for it. It doesn't —"

Justice Scalia: "Is that a principal basis for distinguishing this from other situations?"

The metaphor stuck and the press debated it for weeks. More importantly, Justices on both sides of the 5-4 decision, upholding the Act's constitutionality, again evoked the broccoli metaphor. This metaphor was impressive because the metaphor was both apt and accessible. It is at least plausible to connect the mandated purchase of health care in the marketplace to the purchase of broccoli in the food marketplace. Additionally, everyone knows what broccoli is and everyone has an opinion on whether or not they will buy it. The proof of a forensic metaphor's power is always how much attention it commands. In this case, the attention was considerable.

What might be a contrary metaphor which the government might have used? If broccoli was meant to evoke a food that is avoided by some consumers, then what is a desirable, even necessary food? Water might be such a metaphor. So the antidote for Justice Scalia's "broccoli" metaphor is buying water. While one might choose not to buy broccoli, we all need water and will buy it.

Second, consultants can help create metaphors from scratch. Making forensic metaphors does not require either a law degree or a degree in fine arts. It does, however, require attention to specific trial issues, the social, cultural and linguistic dispositions of the jurors, witnesses and lawyers, and it takes expertise at free association. Trial consultants can help trial attorneys generate metaphors by identifying potential metaphors from discovery, deposition and pretrial research, by freely associating metaphors that frame precise trial issues or by creating metaphors that frame the case essence.

During the trial of Zacarias Moussaoui, an accused conspirator in the 9/11 terrorist attacks, defense attorney Edward

MacMahon wanted to undermine a “hero” metaphor. MacMahon had read a note by accused hijacker Mohamed Atta, who was killed in the attacks, which called the suicide attackers “heroes.” MacMahon, arguing that while Moussaoui was an al-Qaeda member, he took no part in the conspiracy. MacMahon wanted to distance his client from the “hero” metaphor and from other 9/11 defendants. He concluded his opening statement:

“Please don’t make him a hero, ladies and gentlemen. He just doesn’t deserve it.”

MacMahon, in deflating the hero metaphor, needed to position his client between two common metaphors—the “hero” and the “anti-hero.” MacMahon astutely defines a third metaphor, that of a “non-hero.” The “non-hero” metaphor is an ordinary, harmless fellow who fancies himself as much more.

An imaginative scan through such literary or cultural figures reveals at least one non-hero candidate: Walter Mitty. He was the “everyman” character in James Thurber’s 1939 short story *The Secret Life of Walter Mitty*. Walter is a “non-hero” living an extraordinary life, but who fantasizes about extraordinary and heroic adventures. The cultural metaphor has been often repeated in literature and Mitty has been played on screen both in 1947 by Danny Kaye and in 2013 by Ben Stiller. Such a metaphor applied to Moussaoui would work to change his image from an evil schemer to a hapless dreamer.

Third, consultants can alert trial lawyers to opportunities for metaphors at each major juncture of litigation. At trial opening and closings, lawyers can cogently and succinctly frame both the weaknesses of the opposition position and the strengths of their own position. Using metaphors at openings is a way to frame both the opposition’s case and to establish the conceptual framework for your own case. Employing metaphors during openings is an excellent way, literally, to create new neural pathways for considering the case. Then, reinforcing the same metaphors at closing and throughout testimony reinforces

those cognitive associations.

Metaphors are also powerful appellate tools. Appellate argument can be a staccato fire of questions from the bench and truncated answers from lawyers. Metaphors don’t need many words and can be subtly communicated. One subtle metaphor has a bite far worse than its bark. That is, lawyers who insert and repeat metaphors can insinuate metaphors without fanfare with effective results. Metaphors succinctly and cogently frame the argument in the lawyer’s favor, are memorable, and influence judges even on the implicit level.

The Bottom Line

Metaphors are powerfully persuasive tools. Metaphors make intuitive sense once brought to our attention and are proven by the social and behavioral science research. Metaphors also offer opportunities for us to incorporate neuroscience knowledge into trial practices. First, simple reminders about the power of metaphors increase awareness. Most lawyers aren’t poets, but they do want to win cases. They may be well aware of narrative or storytelling’s power with jurors, but may not apply this same value to narrative’s best friend—the metaphor.

Second, metaphors are best deployed throughout all phases of trial and appeal. Listen for the opposition’s metaphors even during depositions to gain insights into how they seek to characterize the parties and their case theory. Third, create case-specific and understandable metaphors (see sidebar). Fourth, be attentive for metaphors during trials and use metaphors to undermine opponents’ metaphors. Metaphors are not sleeping dogs that lie. They create immediate cognitive associations. The “antidote metaphor” should be administered as soon as possible. Fifth, consider using a central, master metaphor that serves as a case theme. A master metaphor is effective at capturing the essence of the case and mapping the juror’s decision making process and outcomes. Finally, as the “stealth bombers” of forensic narratives, metaphors covertly influence legal decisions by acting beneath the conscious radar of the jury. 

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Why Do We Ask Jurors To Promise That They Will Do the Impossible?

by Susan Macpherson

WHETHER YOU HAVE DONE a handful of jury selections or a hundred, you have most likely heard many jurors asked this question as a follow up to revealing some experience or opinion related to the issues in dispute: “Would you be able to set aside that experience/attitude/belief and decide this case only on the evidence you hear in this courtroom?” Some attorneys use this question to fend off a potential cause challenge. Judges often use it to determine whether the challenge should be granted. Since the answer is used to make critical decisions, we should be sure this is the right question to ask. The short answer is that it is not. Why? The “set aside” concept is based on fundamentally flawed and outdated assumptions about how the brain processes information and how jurors make decisions.

Jurors often promise to try their best to set aside prior experiences, attitudes or beliefs. But the desire to do what jurors believe is expected of them does not create the ability to do it. These factors can be reliably “set aside” only when the juror has no need to do so because the juror doesn’t view them as relevant to the case. If the juror perceives a prior experience, attitude, or belief as relevant, research demonstrates it will have

some influence on the juror’s decision making by being part of the schema used to evaluate the evidence. Note that the *juror’s perception* of relevance is the only test that matters here. While attorneys and judges can help jurors make that assessment by clarifying what is or is not involved in the case, their own definitions of relevance are usually not shared by the jurors.

Decades of social science research debunk the assumptions underlying the “set aside” question.^[i] More recent neuroscience research dramatically illustrates how outside stimuli trigger immediate reactions in the brain and offer further proof that a request to “set aside” a relevant experience, attitude or belief is asking jurors to do the impossible.^[ii] Jurors simply cannot flip a switch and shut off the influence of their own life experiences or well-established attitudes and beliefs.

A recent Florida Supreme Court decision on this issue (*Matarranz v. Florida*)^[iii] illustrates how we often make it hard for jurors to express any doubts about whether they can do the impossible. Many cause challenges end with a question like this: “You said you would try. What we need to know is whether you are really comfortable with that – are you sure you

can set that aside?” The Florida Supreme Court made it clear that getting an affirmative answer to that type of question to protect the record does not protect the rights of the litigants, and ordered a new trial:

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

When I first discussed this issue at an Inns of Court meeting many years ago, a federal judge approached me after the meeting. He was troubled by the idea that he had been asking jurors to do the impossible, and equally troubled by the implications of accepting a deeper understanding of juror bias. How would they ever get a jury seated if he couldn't just ask whether they could promise to be impartial? I proposed he consider thinking about jury selection as an “informed consent” process in which the task of the judge and counsel is to help jurors with three basic tasks:

1. identify prior experiences, attitudes, and beliefs that may touch on the issues to be decided;
2. examine the ways in which the identified factors could have an influence; and
3. address the consequences of uncertainty.

Most attorneys do provide some help with the first task by using jury selection to highlight specific issues or factors that may make it difficult for jurors to start out with an open mind. Some judges expedite this task by permitting the use of a supplemental jury questionnaire. The process more often falls short on the second task when jurors are not encouraged to consider how an experience, attitude or belief related to the issues in the case could influence their view of the evidence. All too often, they are actively discouraged from doing so by asking the “set aside” question, or it's cousin: “Is that going to cause you any problem in being fair and impartial?”

Jurors with no experience evaluating testimony and applying the law to the facts have no frame of reference for the tasks that lie ahead. They often need to “think out loud” about how specific factors in their backgrounds could influence their views. This is particularly true in civil cases where generic labels that are used to describe the case in jury selection (“this is an employment case” or “this is an antitrust case” or “this is a patent case”) don't help jurors anticipate what the case is about.

Giving them some specifics about the types of evidence they will have to consider and defining some of the issues they will have to decide helps jurors to think through whether their own experiences, attitudes or beliefs may be relevant to their task.

For example, saying “This is a case about property rights, “ doesn't tell a juror who previously worked on projecting retail sales for a “big box” retailer whether that experience would have any potential influence on her opinion in an eminent domain case. On the other hand, if that juror is given the additional information that one of the key disputes will be whether the potential use of the property as a retail site has changed as a result of changing the access from the main road, that juror will be in a much better position to make an informed assessment of how her prior work experience could influence her decisions

Another example comes from a patent case where jurors were given the following description: “this is a case involving allegations of patent infringement and invalidity in the medical device industry.” Adding the information that “the patent claims a process that reduces the number of nonconforming components” allowed a juror who documents quality assurance at a food processing plant to consider the ways in which his own experience and opinions about the manufacturing process could influence the way he viewed the issues in that case)

When a case specific jury questionnaire has not been used, jurors may also need a little time to accurately and fully recall their prior experiences. This is why it is always a good idea to end jury selection by asking, “Have any of you thought of something you'd like to add to an earlier answer or change an earlier answer because more information has come to mind?” When jurors have revealed an upsetting or painful experience, they often initially downplay or underestimate its potential influence. This is especially true if the juror has not previously or recently discussed the experience with anyone or had managed to suppress it until the subject came up in voir dire. . It may take a little while to recall important details or to recognize the strength of emotions that are triggered by activating the memory. The best strategy in this situation may be to tell the juror to take a few minutes to think about the potential influence of a prior experience, or to consider the opinions shaped by that experience, while the other jurors are being questioned.

The third task recognizes that, even after thinking it through, many jurors will remain uncertain about whether an identified experience, attitude, or belief will influence their perceptions and decisions. The consequences of remaining on the panel in the face of that uncertainty are often not addressed because, for the most part, jury selection is an “opt in” system: say you can be fair and you generally stay on the panel; say you are not sure and you generally get excused.

That the traditional approach to further questioning of a juror who has expressed potential bias or prejudgment is called “rehabilitation” speaks volumes about what is wrong with it.

The goal should not be helping uncertain jurors figure out how to give the “right” answer, but rather helping those jurors understand that the consequence of uncertainty, in most instances, should be serving on a different type of case. Jurors may also need some help in understanding that they need to be fully prepared to “opt in” because they often assume that they will be struck by one side or the other after revealing a potential bias or prejudgment. Only the judges, attorneys, and jury consultants know that it doesn’t necessarily work out that way.

An attorney or a judge who doesn’t want to risk losing an otherwise qualified juror often skips third step of addressing the consequences when the jurors has expressed some uncertainty. But consider what happens when the uncertain juror has been encouraged to recognize – rather than ignore – the potential difficulty he or she faces in struggling to keep an open mind

and ultimately “opts in.” That juror is more likely to start the case with a heightened awareness of the challenge he or she faces in making impartial judgments. Research indicates that being made aware of the negative effects of a bias can reduce its influence when the decision maker is highly motivated to achieve that goal.^[iv] Equally important is the fact that his or her fellow jurors who have been listening to the voir dire are now well prepared to be on the lookout for any indications that the uncertain juror’s prior experiences, attitudes, or beliefs are inappropriately influencing his or her decisions.

We ask a great deal of the jurors in every case. We should stop adding to that burden by asking them to take on an impossible task. Let’s take the concepts of “set aside” and “rehabilitation” off the shelf of tools approved for jury selection and use instead the types of questions that will help jurors, as well as attorneys and judges, make these critically important assessments. ●

Susan Macpherson is a founding member and Vice President of National Jury Project’s Midwest regional office located in Minneapolis. She has been conducting jury research and assisting attorneys with jury selection since 1976. She advises attorneys across the country on complex commercial, antitrust, intellectual property, class action, professional negligence, personal injury and criminal cases. She is a contributor to National Jury Project’s practice manual, JURYWORK: Systematic Techniques (Thomson West, updated annually). You can learn more about National Jury Project at www.njp.com or contact Susan Macpherson at smacpherson@njp.com.

References

[i] For an excellent review of the literature, see “Models of Juror and Jury Decision Making,” in *Jury Decision Making: The State of the Science*, by Dennis J. Devine, New York University Press, 2012.

[ii] For an example, see *Thinking Fast and Slow*, Daniel Kahneman, 2011.

[iii] No. SC11-1617, –So.3d.–, 2013 WL 5355117 (Fla. Sept. 26, 2013). This decision incorporates the relevant voir dire transcript and is available on the Florida Supreme Court website at www.floridasupremecourt.org/decisions/2013/sc11-1617.pdf.

[iv] “First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making,” *Court Review*, Volume 49, Pg. 190, by Jennifer K. Elek and Paula Hannaford-Agor. This article reviews the research and remedies for reducing bias, noting that certain authoritarian approaches can have a harmful backlash effect.



SpamDrain

by Rita Handrich, PhD.

HAVE YOU EVER WISHED you could stop all that spam from coming to your tablet and smart phone like it's stopped with the email spam filter on your computer? There's an app for that! This one stops spam, viruses, and phishing attacks at the server level BEFORE it disseminates to your tablet and phone so you won't ever again be bothered by those emails from fake PayPal, Ashley Madison, "pharmaceutical" sales, someone wishing to give their money to you because you are a moral person with good character, the purveyors of size enhancers and international brides, and even emails from known quantities that you just don't want to see any longer.

[SpamDrain!](#) Here's what they say about themselves:

"We are really sick of having our time wasted by stupid spam and that's why we've invented this service. Join us and experience how hassle-free life can be without spam."

It's \$15 a year per email address. 95% of my spam mail goes to a single address and so that is the one I pay to filter via SpamDrain. Shortly after I began to use it, I realized I could just let newsletters and announcements from professional associations that I did not care about be identified as spam. I don't have to unsubscribe but I only see them now when I review the spam folder.

There are configurable settings so you can have a spam summary email once a day or less if you really want to forget about it. Watch it closely for the first week so it knows what really is spam. I check it every day so if client email somehow is seen as spam, I catch it quickly. This is perhaps the most accurate, efficient, and irritation-reducing spam solution I have tried over the years. The bonus is that every day when I review what's in the spam folder, I smile to see who has been trapped and then, with a single mouse click, I consign them to be spam forever. It's a good thing. 

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Top Ten of 2013

HERE'S A LOOK BACK at what your colleagues were especially interested in at The Jury Expert in 2013. One of the things we worked really hard on is our internet search keywords and it shows in the range of articles sought out by readers in the past year. Some of these articles have had very brief lives thus far while others are long-time favorites. (Note to authors: When you write for us, your article has a pretty long life thanks to multiple academic databases indexing us and the internet searches that find us time and time again.)

This list is a traditional count-down from #10 to #1 and is based on Google Analytics visits to all Jury Expert articles from January 1, 2013 to December 31, 2013. Have you read all these? There's no time like the present!

10. In our #10 position is Ken Broda-Bahm's November 2013 rejoinder to the Reptile Theory from a Defense Perspective: [Taming the Reptile: A Defendant's Response to the Plaintiff's Revolution](#).

9. In the #9 position is Mark Bennett's January 2010 article on jury selection: [16 Simple Rules for Better Jury Selection](#).

8. In the #8 position is another Reptile rejoinder by Stephanie West Allen, Jeffrey M. Schwartz, and Diane Wyzga. Originally published in May 2010— [Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea](#). This article was also a favorite in 2012.

7. In the #7 position is the November 2011 article on Gen X members now from Doug Keene and Rita Handrich.

[Generation X members are "active, balanced and happy". Seriously?.](#) This article was also a favorite in 2012.

6. The #6 position is another article from Doug Keene and Rita Handrich, this one from November 2012. ["Only the Guilty Would Confess to Crimes" : Understanding the Mystery of False Confessions](#).

5. In the #5 position is the January 2009 article by British ethicist Annabelle Lever: [Ethical Issues in Racial Profiling](#). This article was also a favorite in 2012.

4. In the #4 position is a January 2013 article from David Sams, Tess M.S. Neal, and Stanley L. Brodsky: [Avoiding Jury Duty: Psychological and Legal Perspectives](#).

3. In the #3 position is a July 2012 article from Merrie Jo Pitera: [Courtroom Attire: Ensuring Witness Attire Makes the Right Statement](#).

2. In our #2 position is this November 2010 article from Krista Forrest and William Douglas Woody: [Police Deception during Interrogation and Its Surprising Influence on Jurors' Perceptions of Confession Evidence](#). This article was also a favorite in 2012.

1. And, the #1 most accessed article during the 2013 calendar year (ta-da) was this November, 2009 article from two (then) graduate students, Jennifer Kutys and Jennifer Esterman: [Guilty but Mentally Ill \(GBMI\) vs. Not Guilty by Reason of Insanity \(NGRI\): An Annotated Bibliography](#). This article was also a favorite in 2012. 📌