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NOVEL DEFENSES IN THE COURTROOM

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



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

AMNESIA

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

USE IN COURT

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

LEGAL RULINGS

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

PSYCHOLOGICAL RESEARCH

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

POST-TRAUMATIC STRESS DISORDER

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

USE IN COURT

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

LEGAL RULINGS

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

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

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

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

PSYCHOLOGICAL RESEARCH

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

BATTERED WOMAN SYNDROME

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

USE IN COURT

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

LEGAL RULINGS

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

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

PSYCHOLOGICAL RESEARCH

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

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

MULTIPLE PERSONALITY DISORDER

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

USE IN COURT

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

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

LEGAL RULINGS

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

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

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

PSYCHOLOGICAL RESEARCH

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

POSTPARTUM DEPRESSION

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

USE IN COURT

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

LEGAL RULINGS

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

PSYCHOLOGICAL RESEARCH

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

GAY PANIC DEFENSE

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

USE IN COURT

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

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

LEGAL RULINGS

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

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

PSYCHOLOGICAL RESEARCH

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

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

FIGURE 1

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

OVERVIEW AND METHOD OF STUDY

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

PARTICIPANTS

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

MEASURES

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

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

FIGURE 2

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

RESULTS

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

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

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

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

DISCUSSION AND RECOMMENDATIONS

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

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

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

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

FIGURE 3

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

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RESPONSE TO NOVEL DEFENSES IN THE COURTROOM

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

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

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

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

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

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

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

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

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

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

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

REPLY FROM THE AUTHORS TO RICHARD GABRIEL:

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

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

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