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## *Subtle Contextual Influences on Racial Bias in the Courtroom*

BY KARENNA F. MALAVANTI, MEGAN K. JOHNSON,  
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Racial differences are immediately apparent to most people and are known to influence individuals' judgments about racial minorities. For instance, race impacts jury deliberations and thus cannot be ignored in the courtroom. Racial biases in the courtroom are neither new nor rare, and they play a special role in jury deliberations and court cases. For example, in 2009, the North Carolina General Assembly passed the Racial Justice Act, which allowed death row inmates to appeal their sentences if they believed race played a significant role in their sentencing. If the defendant can prove that race was a significant factor in his or her sentencing, the death penalty is commuted to a life sentence without parole.

Much research has focused on the direct effects of racial bias in juror decision-making (Sommers & Ellsworth, 2001), yet most research has overlooked the subtle influences of one's environment on juror decision-making. Subtle contextual cues, such as a Bible in court, may indirectly influence juror decision-making. The purpose of this article is to review possible effects of defendant race and subtle environmental factors, such as religious context cues, on juror evaluations and decisions. Given that exposure to religious concepts has been shown to increase racial prejudice toward African-Americans (Johnson, Rowatt, & Labouff, 2010), it is possible these religious environmental cues also increase racial bias in the courtroom.

### *Implicit Factors in Juror Decision-Making*

Historically, a "rational" view of jury decision-making was popularly accepted. That is, jurors were assumed to be logical, non-biased listeners, waiting until all available evidence was presented before attempting a rational process of deliberation. However, research indicates this process does not characterize human decision-making. Instead, jurors tend to be influenced by a variety of biases, not all of which are conscious. Roberts (2012) suggests that one recourse to address these implicit biases is through education, particularly early in the selection process. This is particularly important given that 90% of jurors favor a verdict prior to deliberation (Hastie, Penrod, & Pennington, 1983).

This early "inoculation" is necessary because of the top-down manner in which a juror reaches a verdict, a 3-stage explanation-based process called the Story Model (Pennington & Hastie, 1986). According to the Story Model, jurors initially take the evidence presented and create a narrative story to explain their initial impressions. Second, the juror uses possible verdict alternatives as end-result decision categories. Third, jurors try to find the best fit between their narrative story – which is internally coherent, but not necessarily accurate – and the verdict category. The verdict with the best fit to the story is the verdict chosen by the juror. Rather than allowing facts to dictate a decision, jurors tend to assimilate facts in light of the decision. Consistent facts are weighed heavily. Inconsistent facts are minimized or even ignored. In a trial scenario, racial biases, many of which are implicit, impact narrative stories from the outset. Hence, jurors may adopt their story or schema by using race.

Biases can also impact jury deliberations. In theory, juries are used by our court system because we believe polling individuals' on a topic will generate a more complete and less biased assessment of the evidence presented. Furthermore, we assume group consensus leads to less error. Jurors are not "blank slates," however. They come to trial with beliefs and knowledge that influences their decision-making implicitly (Devenport, Sted baker, & Penrod, 1999). For instance, individuals' knowledge of a cultural stereotype of black individuals as aggressive and dangerous is correlated with their likelihood of shooting an armed black individual quicker than an armed white individual in a shooter videogame (Correll, Park, Judd, & Wittenbrink, 2002). Thus, knowledge of negative cultural stereotypes about African-Americans might influence jurors' perceptions of African-Americans as more violent or aggressive and, as a result, the corresponding conviction. In addition, attitudes of one juror can often influence other jurors' attitudes (Vohs & Luce, 2010).

Although education can help address implicit biases (Roberts, 2012), some attempts to address racial bias are made through jury selection. For example, the Pretrial Juror Attitude Questionnaire (PJAQ; Lecci & Myers, 2008) can be used to measure racial attitudes of potential jurors. This instru-

ment contains subscales measuring racial bias, innate criminality, social justice, conviction proneness, system confidence, and cynicism toward the defense. Racial bias is measured by tallying responses to questions like “Minority suspects are likely to be guilty, more often than not.” People who have high scores on the racial bias scale are more likely to convict those of different race regardless of the evidence. Furthermore, those who score high on the PJAQ are also more conviction prone. Therefore, racial biases elevate the likelihood of a guilty verdict and elicit a more severe sentence. Thus, by measuring these pre-existing racial biases in potential jurors, the effects of racial bias in the courtroom can be reduced.

Jurors are especially affected when race is a non-salient factor of the case (Sommers & Ellsworth, 2000). This finding is surprising; when we think of racial biases, we often think of instances in which race is a salient factor at trial. However, these attempts are guided by later-stage, explicit processes. For example, white jurors are likely to resist (or at least, to give the appearance of resisting) explicitly racial factors when race is salient (Sommers & Ellsworth, 2000). When race is non-salient, however, racial biases are less likely to be attenuated.

The subtle influences of factors such as race result from automatic processes in attributions (Kahneman, 2011). Nobel Prize winning psychologist Daniel Kahneman (2011) has demonstrated that with respect to processes in decision making, we are guided by two systems: 1) System 1, characterized by rapid, effortless, and largely unconscious decision-making, and 2) System 2, characterized by effortful, slow, and deliberate decision-making. In addition, Kahneman found that many decisions that seemingly require the kind of deliberate processing of System 2 are instead a product of unconscious System 1 processing. Therefore, although decision-makers, jurors included, believe they rely on System 2 processes, in reality, System 1 processes drive most attributions.

As Kahneman demonstrates, System 1 decisions are not only rapid and effortless, they are also characterized by an uncritical acceptance of information. That is, System 1 displays none of the skepticism that might be expected in more deliberate decision-making. For example, we might believe that we can discount the effects of advertising by realizing that claims made for a product are stated by advertisers deliberately trying to influence buying decisions. System 1 processes, though, do not discount a message’s source. The content of the message exerts its impact even if we (consciously) believe the source to be non-credible. This is the primary factor behind the legal aphorism that “you can’t unring the bell.” Once an inadmissible statement is uttered, instructions to disregard are largely ineffective (Kane, 2007).

These automatic processes have been investigated in mock jury deliberations involving White and Middle Eastern witnesses, victims, and defendants (Adams, Bryden, & Griffith, 2011). During deliberations, where Kahneman’s System 2 processes might be expected, racial biases were mediated by juror discussions. When stereotypes of Middle Eastern terrorists were evoked (a System 1 process), however, jury biases were not mediated by deliberations.

Not only does race influence jurors’ decisions in trials, it also affects the likelihood that an individual will falsely confess to a crime. For instance, Najdowki (2011) suggests stereotype threats (an implicit priming of negative attitudes about a social group that impairs performance of a member of the that social group) may be responsible for the elevated false confession rates seen in blacks. Black suspects experience anxiety and cognitive load during interrogation, producing many of the characteristics that interrogators consider signs of guilt. This increases pressure on the suspects, increasing the chance that they will confess just to terminate the interrogation (see also Kassir, 2005).

## *Priming of Implicit Racial Biases through Religious Prejudice*

Much research on jury decision-making has focused on the direct influence of racial bias on jurors' decisions, but environmental cues likely heighten those biases. To date, these environmental influences in the courtroom have been largely ignored. However, our recent research (Johnson et al., 2010) demonstrates that environmental cues relevant to the courtroom, namely religious cues, increase racial biases toward African-Americans. These religious cues could be activating racial bias in the courtroom, which in turn affects jurors' decision-making.

In the social psychological literature, priming refers to "the temporary activation of an individual's mental representation by the environment and the effect of this activation on various psychological phenomena" (Bargh, 2007, p. 256). Thus, priming refers to the unconscious influence of individuals' environmental cues on their behaviors. Past research has demonstrated priming influences a multitude of behaviors and attitudes. For instance, individuals reported more conservative social attitudes and higher levels of prejudice toward non-Christian groups when asked about these attitudes in front of a cathedral than when in front of a governmental building (LaBouff, Rowatt, Johnson, & Finkle, 2012). A higher percentage of people voted in favor of a school bond when voting in a school rather than when voting in another location (Berger, Meredith, & Wheeler, 2008), and individuals voting in churches were more likely to support a conservative candidate and a ban on same-sex marriage than those voting in neutral locations (Rutchick, 2010). Even the weight of a document or hardness of a chair can influence individuals' social perceptions as heavier objects have been shown to increase the perceived importance of job candidates and hard objects have increased the rigidity with which individuals negotiate (Ackerman, Nocera, & Bargh, 2010). In short, subtle environmental cues have been shown to affect a variety of perceptions, attitudes, and behaviors. Thus, subtle context primes could also influence jurors' moods, perceptions of a defendant, or evaluative positions on a case. In the courtroom, one of these environmental cues could be religious objects such as the Bible.

In our research, we (Johnson et al., 2010) found priming individuals with religious words increased both subtle and overt racial prejudice toward African-Americans. In the first study, individuals were subliminally primed with either religious words (e.g., Jesus, Bible, prayer) or neutral words (e.g., shirt, butter, switch). This was done by having individuals complete a word game task in which they had to decide if a string of letters was a word or a non-word. Prior to seeing this string of letters, however, individuals were flashed a religious (or neutral) word for 35 ms, quick enough to be below their conscious level of awareness but still enough time to influence their attitudes. This exposure to the word was also preceded and followed by a visual mask (i.e., XXXX) to prevent the word from remaining in individuals' visual fields. After being primed, individuals were asked a series of questions that assessed the degree to which they had subtle prejudice toward African-Americans (e.g., agreeing that we should limit the amount of welfare given to African-Americans and that Whites are more intelligent than African-American

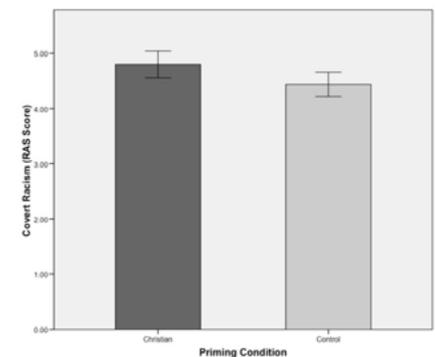


Figure 1. Priming with Christian-related words increases subtle racism (Johnson et al., 2010, Experiment 1).

icans). Individuals who were exposed to religious concepts reported more negative subtle attitudes toward African-Americans than those who were exposed to neutral concepts (see Figure 1). Thus, exposure to religious concepts increased subtle racial prejudice toward African-Americans.

Next, we wanted to see if these effects extended to a more overt measure of racial prejudice toward African Americans, namely general negative affect (Cottrell & Neuberg, 2005). General negative affect is the degree to which individuals agree with statements like “How negative do you feel towards African-Americans, as a group?” and “How much do you dislike African-Americans, as a group?” In the second study, we primed individuals with either religious or neutral words as we did in the first study, but we then measured their general negative affect toward African-Americans. We found that individuals who were exposed to religious concepts reported more general negative affect toward African-Americans than those who were exposed to neutral concepts (see Figure 2). Thus, exposure to religious concepts also increases overt measures of racial prejudice.

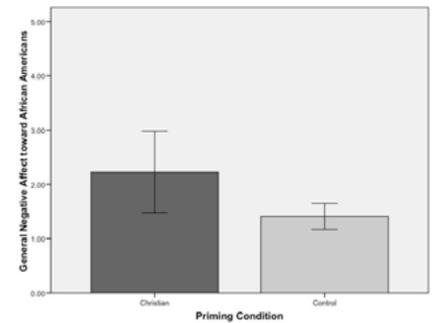


Figure 2. Priming with Christian-related words increases general negative affect toward African-Americans (Johnson et al., 2010, Experiment 2).

These findings are relevant to the jury-decision making literature because religious cues are often present in the courtroom. For instance, some courts still use a Bible on which to affirm to tell the truth. While no court makes you swear on a Bible, even the presence of a Bible in court can unconsciously influence jurors’ decisions. If a case exists in which the person on trial is obviously innocent or guilty, then these subtle cues may not influence jurors’ decisions. However, in cases which are less clear these subtle contextual religious primes might increase jurors’ racial bias and in turn, their resulting decisions on the case.

### Conclusion

American society has made considerable progress in terms of racial relations in the past half-century. At the same time, racial biases and stereotypes undoubtedly remain. More overt forms of racial biases – striking members of a jury simply because of their race, for example – are considerably less common than they once were. More subtle forms of racial biases, though, still exist. Religious cues in the courtroom, either seen or spoken, can subtly implicitly prime racial prejudice and influence juror verdicts. These subtle influences are likely to elicit their effects outside the realm of consciousness. Unfortunately, as Kahneman and others have shown, identifying biases is not the same as eliminating them.

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*We asked two experienced trial consultants to comment on this article as it relates to litigation advocacy. On the following pages, Karen Hurwitz and George Kich offer their perspectives.*

## *Race, Religion and the “B” Word*

RESPONSE BY KAREN HURWITZ

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This article was difficult for me to read and painful to consider. It sounded alarm bells inside of me that won't stop ringing. The “B” word is bias. I've wanted to believe things were better in terms of the “us-versus-them” mentality in this country and that inside the courtroom we were doing a decent job of uncovering bias and prejudice. This article, especially with the backdrop of the Trayvon Martin tragedy highlights how much work there is to be done.

We are biased. We view the world through the lens of our life experiences, our values and our beliefs. And our individual life experiences, values and beliefs are very different. To think that bias inside the courtroom is any less than bias outside the courtroom makes no sense. And to think that a question such as: “Is there anything about the fact that my client is African-American that might cause you to be biased in this case?” is going to uncover racial bias is naive.

The law says that jurors who have bias or prejudice about our case cannot serve. We cannot make a determination on juror biases if we dance around the subject or address it in a superficial manner. There is way too much at stake, especially in criminal cases where life and liberty are on the line.

The hard questions must always be dealt with in jury selection and the hard questions in jury selection are equally hard outside of the courtroom. We don't want to talk about subjects that make us uncomfortable, anywhere. Racial bias, whether increased by religious priming or not is generally one of those subjects. It brings to mind the lyrics of an old Pamala Stanley song: [“I, I don't, I don't want to talk about it.”](#)

We typically don't confront our biases until something or someone forces us to do so. As the research authors point out, awareness does not equate to change, but it is a prerequisite. With awareness, we have the ability to monitor our behavior and recognize when we revert to ways we do not like. At that point, we have the opportunity to act differently.

As a country, we need more conversations about bias and prejudice: conversations in which we explore our own attitudes and beliefs. Not with fear of repercussions, but to increase awareness and understanding of ourselves and others. In jury selection, we have both the opportunity and the obligation to have such a conversation.

Not only do we need to help jurors uncover their own biases, we also need to drive home a critical point through education: your client is not a statistic; your client is not a group. Your client is an individual. Your client represents no one but him or herself. When an African American is on trial, all African Americans are not on trial. When a Muslim is on trial, religion is not on trial. Statistics are not on trial. Statistics may be interesting in an academic article or helpful in setting policy, but statistics are irrelevant to what your client did or did not do.

Jurors hear the instruction that they are only to consider the evidence presented; that they are not to let bias or prejudice influence their decision. But if jurors are unconscious of their biases, then how

are they going to prevent them from influencing their decisions? Without a fuller discussion on bias and prejudice the instruction is likely to go in one ear and out the other.

In jury selection you want to create empathy for your client with regard to the bias he or she may face. The empathy may come when potential jurors can identify with your client because they or someone close to them have been judged by a stereotype. From there you want to discuss stereotypes generally, and ultimately the potential bias in your case. The expectation is that after such a discussion, not only will panel members recognize their shared experience in being judged by a stereotype, many will see that they apply a double standard when judging others based upon a stereotype.

As is true with most research, this research raises more questions. Can anyone really get a fair trial? How can we know to what extent any verdict has been affected by bias? Why would religious cues increase racial bias toward African Americans and how would they come into trial? Who made up the sample in the authors' research? Is the increased bias found in their study only toward African Americans? The answer to the latter question is "no." The same group of researchers has found in subsequent research that religious priming increases bias against gays, Muslims and atheists (Johnson, Rowatt, & LaBouff, in press).

The sample in the current research was undergraduate introductory psychology students at Baylor University in Waco, Texas. Megan Johnson, lead author and one of the researchers told me in a phone conversation that the students in the Baylor study were predominantly Christian and politically conservative and that the religious cues were Christian. Their sample was 50.7% White, 17.8% Asians, 17.8% Hispanic, and 13.7% African-American. The increase in racial bias was found within all groups in the study, including African Americans toward other African Americans.

So how might religion come into trial? Is it relevant? Religion often arises in criminal cases when talking about the defendant. It is important to many jurors that the defendant believes in God or attends church regularly. Could this cause the jurors to judge less harshly? Perhaps.

What types of religious arguments would cause a juror to feel increased bias against someone? Would an attorney intentionally introduce religion or religious cues to increase racial bias or religious bias? One recent patent case (*Commil USA, LLC v. Cisco Systems, Inc.*) speaks to this. In that case, upon the Plaintiffs request, the court granted a new trial for part of the case, including damages after finding that the defense attorney made irrelevant and prejudicial religious comments and arguments. The comments were made when one of Commil's owners, who is Jewish, took the stand and the arguments came in closing. The court concluded that the attorney created an "us v. them" mentality that had a tendency to appeal to the prejudices of the jurors and ultimately prejudiced the jury's findings. The jury awarded plaintiff \$3.7 million in the first trial, which was much lower than expected. On appeal, with the religious arguments gone, they awarded \$63.8 million, an award in line with the Plaintiff's damages.

As for religious cues in the courtroom, the one that comes to mind is the Bible. I am unaware to what extent the Bible is still used for swearing in witnesses. Certainly some courts no longer use them or the words "so help me God." The research would suggest that a lawyer should consider asking that any obvious religious cues be removed from the courtroom, citing this research. You may lose, but it seems worth the try.

The authors reference the Pretrial Juror Attitude Questionnaire by Lecci and Myers (2008) as one way to measure racial attitudes of potential jurors. I am not familiar with this scale and have not worked on a case in which this type of scale has been used. I communicated with Len Lecci regarding the scale and its use in court. While he is not aware of any lawyers who have used their scale in court, he said that

it is possible that has occurred. While I imagine this scale and others could be helpful, I wonder how the courts would use them. Would a juror who showed a high degree of racial bias on a scale automatically be excluded? Or, would it be the basis for a discussion before the judge? Or, simply additional information to consider with other information gathered in jury selection?

Below is a list of voir dire questions on racial bias to consider in a criminal case in which your client is an African American. I chose to address racial bias towards African Americans because that was the bias studied in the authors' original research. My goal is to show how you could develop a thoughtful conversation on racial bias, not to suggest that these questions must be used. Some questions could be included in a jury questionnaire with a shorter discussion during voir dire, but I believe the discussion is most important.

By thoughtfully considering these types of questions, many jurors will think about things they have never thought about before. They may begin to look at themselves and consider their own biases for the first time in their lives. You may, too. This is a huge step. HUGE. Honor it. Respect it. Recognize how difficult it is to look at your own stuff. And think about how it might affect the feelings and attitudes of someone on a jury panel staring at your client. My hope is that it will help achieve a greater degree of justice in our courts.

### **Possible questions on racial bias:**

How many of you or someone close to you have felt negatively judged, stigmatized, seen as inferior or treated poorly based on a stereotype, a label or a prejudiced attitude regarding some aspect of your life? Maybe you are a woman with blond hair and have been stereotyped as "a dumb blond" based on no information about you but your hair color; maybe you've struggled with weight and feel you've been treated poorly because of your weight; maybe you are Jewish and have been subjected to religious slurs when nothing else was known about you; maybe you are Muslim and since 9/11/2001 feel people are afraid of you and see you as threatening and dangerous; maybe you are Hispanic and find people assuming you dropped out of high school when in fact you were at the top of your graduating class; maybe you are African American and have been stopped by the police for no apparent reason other than you are dark-skinned; maybe your spouse or partner has been stigmatized because he or she suffers from depression; maybe your child has been bullied because he is smaller than the other children his age or because she is smarter or has a learning disability; maybe you are gay and you've been physically attacked simply because you are gay. It could be one of an endless list of negative stereotypes or judgments that people have created over the years. Please share with me, if you can your experiences of being negatively judged in this way.

What does it feel like to be negatively judged by someone who knows nothing about who you are inside?

How have these negative judgments affected your life or your family's life?

How have you learned to cope with the stereotypes and judgments made about you?

How do you think people come to feel negatively toward an entire group?

Do you think people are aware of the pain and damage they can cause when they label someone who they do not even know?

If someone has a negative opinion of an entire group, do you think it is possible for them to change that negative opinion?

What are some of the ways you can imagine that a person might come to see that they are unfairly judging an entire group and the serious consequences of their judgments?

As you can see, my client, Mr. Jones (fictitious name) is African American. We've been talking about stereotypes generally. I want to continue our discussion and shift now to stereotypes about African Americans. I know some of you may feel uncomfortable having this discussion with Mr. Jones and other African Americans sitting among us. Let me reassure you that Mr. Jones welcomes the discussion; you will not say anything he has not heard before and I feel quite certain the same is true for the other African Americans in the room.

As hard a discussion as it may be it is necessary. You know why. If you are selected to be a juror in this case you will be making a judgment about Mr. Jones' innocence or guilt. His freedom is at stake. The judge will tell you before you start deliberations that you must base your decision on the evidence in the case and that you may not let bias or prejudice affect your judgment. You see where I am going here. If any of you have negative opinions of African Americans as a race; if you are afraid of African Americans; or if you've had negative experiences with African Americans, then those negative feelings or fears are going to go with you into the trial. If you are afraid of African Americans, then you would in all likelihood be afraid of Mr. Jones or see him as someone who is dangerous. You would feel that way already and you are not a juror yet.

If you are one of the many people who had the courage to share with me how you have been wrongfully judged and you were on trial, I feel certain you would want to know who on the jury panel had negative feelings about you simply because you were a member of that group. You would want jurors who look at you and have either a neutral or a positive opinion about you for whatever reason, but you would not want someone who started off thinking poorly of people who are like you.

So let me start with this, how many can recall growing up hearing a parent, grandparent or other relative use a word for African Americans that you thought was ugly? Do you think your relatives had a negative attitude toward African Americans or do you think it was simply something they heard their own parents say? Do you feel that you have come to think about African Americans the same way your relatives did or would you say that you have a different attitude?

Do you think that racial discrimination against African Americans still exists in our country? If yes, do you think there is less discrimination than there used to be or do you think it just shows up in different ways? Those that think racial discrimination against African Americans is largely a thing of the past, can you think of a turning point in our country when things changed?

Does it surprise you that the country is so split about the Zimmerman case in Florida? What do you think explains the intensity?

If bias and prejudice exist towards African Americans outside the courtroom then it seems it must exist in the courtroom, too. Would you agree?

To the extent you feel that discrimination towards African Americans is still a big problem, how do we reduce it? Is it possible?

How many of you are currently or have in the past been married to or in a relationship with an African American? If you are in a mixed relationship, what is that like for you in terms of public reactions? How many of you approve of whites marrying African Americans? How many do not? For those that do not, can you share with me how you have come to feel this way?

I'm sure some of you have heard people say that they are more afraid of African Americans. For whatever reason, if an African American man walks toward them on the street, they are more afraid than if a white man walks toward them. Can anyone share where you think the increased fear comes from? Do you think it is based upon statistics or do you think it has to do with something else?

How many of you have hired African Americans, either at your home or at your office? Were those experiences generally positive or negative for you?

How many of you have had or currently have close relationships with African Americans?

If someone does not like African Americans do you think they could fairly judge an African American accused of a crime?

If someone believes that African Americans are more dangerous than others do you think they could fairly judge an African American accused of a crime?

If you feel that it is important for people to say if they have negative opinions or feelings toward African Americans before they are allowed to serve on a jury in a case in which an African American is on trial, how do we get people to admit those feelings?

My concern ladies and gentlemen is simple. I believe that if you have a negative feeling toward African Americans as a group for any reason, if you think they are of less value than others, if you think they are more dangerous, if you think they are less intelligent or any other feeling or fear that you have, then you may very well judge Mr. Jones more negatively or harshly than you would if you did not have those feelings. I fear that if you have those negative thoughts toward African Americans that you will not be able to see Mr. Jones as a person but will see him simply as a part of a group that you do not like, value or feel comfortable with.

Mr. Jones is not a group. He is one person. Statistics may show that African Americans are charged and convicted of crimes more than whites. They are also more frequently wrongfully convicted than whites. What do those statistics tell us about Mr. Jones in terms of his innocence or guilt? Nothing, correct? Why is that? Right, because Mr. Jones is one person. He's himself. Just as you and I are one person. Neither he nor any of us can represent an entire race or religion or ethnic group. It's impossible. Mr. Jones is not a statistic in this case. He is a human being who was arrested and charged with committing a crime that he claims he did not commit. He is not

an entire race. He does not represent an entire race. No stereotype applies to everyone in a group. We've already discussed that. And the jury selected will be judging him solely upon the evidence that you hear at trial. Not based upon articles you have read in the newspaper or shows you have watched on TV. None of that has anything to do with this case or with Mr. Jones.

So this is my last question for you and the last time I will get to speak with you as a group. You must be honest with me because the law requires it and Mr. Jones deserves it. And you can rest assured I'm not going to ask you in front of all these people why you are raising your hand. So, please raise your hand if there is any reason whatsoever, any reason that you feel you should not be a juror in this case; it may have something to do with this discussion or it may be about something we haven't even discussed. Whatever it is, in your heart of hearts, you feel this is not the case for you.

Thank you for participating in this discussion and for your honesty.

The attorney's ability to engage jurors in this type of discussion depends on many factors. Most importantly, the judge must believe in its importance and give you the time. Regardless of the number of peremptory strikes that result, I believe there is much to be gained from this conversation. Once jurors see their own biases and double standards there is a greater chance they will, at least for the duration of trial, monitor themselves along those lines.

The hope is that this type of conversation in voir dire will lead to a more thoughtful and respectful conversation in deliberations. And that's the most we can ask for from jurors -- a thoughtful rational conversation about reality; not about what they want to think or what they assume occurs, but based on reality; the reality that they have biases and prejudices and the reality that if they are not careful in their deliberations, and if they do not police their biases and prejudices they can completely misjudge someone, worse, wrongfully convict someone and worst of all cause someone to lose their life.

I don't believe it's possible to eliminate all bias, but I do believe a more direct and thorough discussion will eliminate more. We need to do better in eliminating bias in the courtroom. And we need to start now.

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## *How Does Religion Play a Role in Biasing Juror Deliberations?*

RESPONSE BY GEORGE KITAHARA KICH

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Prejudices, biases and stereotypes are cognitive psychosocial processes that operate within each of us and affect our relationships in both obvious and subtle ways. Many people work hard at making unconscious processes into conscious, interpersonally adaptive and mutually-enhancing behaviors and decisions. At the same time, racial, gender, class and privilege biases, subtle and overt, are very much a part of our everyday lives and our work in the courts. We do jury research, run questionnaires and prompt direct voir dire questioning as ways to get at jurors' biases. However, the recent research on "priming" and implicit biases that operate automatically and out of our awareness has added a complicating spin to our efforts at identifying, exposing or challenging jurors who hold unwavering biases.

The very interesting paper by Malavanti, Johnson, Rowatt and Weaver highlight in their research that subtle use of words, images or objects that have *religious* meaning appears to heighten jurors' negative reactions to African Americans. This is an amazing result, and brings up many questions for me: Is this religious information more exclusively United States Christian? What, if any, effects result from using non-Christian religious information? Is there any difference in response if more inclusive or accepting religious concepts or words are used? Does it matter if the person is an atheist, or how religious or religiously-identified the person is? What is the effect of a juror bringing a Bible to deliberation, and asking the other jurors to join him in a prayer meeting to help them come to the right and just decision?

Their research also made me curious about why priming about religion might induce these responses about race. Does religious priming introduce an authoritarian and exclusionary frame as Lakoff discusses in his writings about traditional moral values and Strict Father Morals? Are threats and safety rules neurologically activated against stereotypes of threatening aggressors as Ball and others have described? I recently read Rapaille's fascinating descriptions of the subtle, underlying "culture codes" that manufacturers highlight as a way to induce us to want various products. What cultural mindsets are being activated by religious priming? Further research may uncover these processes and I look forward to hearing more about their ongoing work in this area.

In the meantime, the NCSC (National Center for State Courts) has done interesting and extensive work on acknowledging and combatting implicit bias not only in jury selection and deliberations, but also among judges and in the organization and structure of the courts, with a campaign called "[Racial and Ethnic Fairness](#)". Many of their reports and articles provide ways of making the implicit more conscious, slowing down the cognitive and emotional load of the information being presented, and making space for the "high effort processing" that race-salient information requires. We also know that

the narrative structure of the story of the case, presented during voir dire, as well as throughout the trial, can expose implicit biases to the more conscious and deliberative minds of jurors. This is in line with Sommers' research that says that making race (and possibly by extension the influence of religious beliefs?) into an explicit, salient and important component of the trial can mitigate the subconscious effects of actual bias. When jurors are put on notice and primed toward conscious deliberation of race instead of allowed to have an unconscious colorblind mindset, they can focus more overtly on the facts and the law.

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## *The “Hoodie Effect”: George, Trayvon and How it Might Have Happened*

BY DOUGLAS L. KEENE & RITA R. HANDRICH



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*Note: The authors of this article are not engaged for either side of this dispute, or any current dispute that closely bears on a fact pattern similar to the Zimmerman case. The purpose of this article is to explore the social psychology of events such as the death of Trayvon Martin, in light of our experience applying such information to juror values and decision-making.*

*The role of litigation consultants varies from case to case, but central questions are common:*

*How do citizens from various walks of life make sense of this story?*

*What parts of the story are likely to resonate with different people?*

*What questions will jurors have, and what information will be required for them to feel confident they have reached the correct verdict?*

*What we offer in this article is a form of analysis that those working on this case might undertake.*

There has been no shortage of opinions regarding why George Zimmerman shot the unarmed teenager Trayvon Martin.<sup>1</sup> Some say it is reflective of *institutional racism*. Others say it *was justifiable*. Others think it an example of *vigilantism*. Still others say it was an example of racial profiling, stalking and straight-forward *murder*. In an unusual move, George Zimmerman's defense team has established a website and social media presence to *keep the public aware* of their case.

Both those prosecuting and defending Mr. Zimmerman have the responsibility to present a view of the killing—but to be effective with jurors (or the public at large) they will have to offer not only facts about *what* happened, but a reasonable explanation of *why* it occurred. Reasonable people want an explanation that offers understanding and logic, in part to reduce their apprehension about violent encounters. As trial consultants, our task is to sort out the 'why' of such an event. Our own strategy is to look to the social sciences research for insight into what is known of human behavior as it applies to the case, and then to discuss with mock jurors these evidence-based hypotheses. While it is crucial that any narrative is consistent with the facts, there are numerous ways those facts might be understood or interpreted; and therein lies the persuasive power of the case narrative.

The emotional power of this story is enormous. There are few who are not moved. You can expect to see pro-Zimmerman or pro-Martin slants to what is written in blawgs, editorials, and public comments, but few remain neutral. This is a horrible story—whether you see it as a miscarriage of justice that Zimmerman has been charged with a crime at all, or a miscarriage of justice that an arrest was so long in coming.

Why did the shooting occur? Are there explanations that “make sense”? The social sciences research has a great deal to say to us about ‘how’ it might have happened. In this paper, we would like to review what the research tells us and offer some ideas (much as we would in a case we were working on) for our understanding how (and helping jurors understand ‘how’) this could have happened.

First, some background on the two people in this story: *George Zimmerman and Trayvon Martin*.

**George Zimmerman** has reported he is a “*neighborhood watch captain*” but there is no record of him being part of a registered neighborhood watch program. Other media depictions conflict. Some say George Zimmerman is *not a racist vigilante*.



*“The 28-year-old insurance-fraud investigator comes from a deeply Catholic background and was taught in his early years to do right by those less fortunate. He was raised in a racially integrated household and himself has black roots through an Afro-Peruvian great-grandfather - the father of the maternal grandmother who helped raise him.*

*A criminal justice student who aspired to become a judge, Zimmerman also concerned himself with the safety of his neighbors after a series of break-ins committed by young African-American men.”*

<sup>1</sup>Despite the media frenzy over this case, the initial story run in the Orlando Sentinel was only three paragraphs long. The story was *not covered outside Florida*. In addition, this case has also generated intense debate over “*stand your ground*” laws (dubbed by pro-gun-control groups as “shoot first” laws. *Neighborhood watch programs* and the idea of neighborhood watch volunteers carrying weapons are also under heated debate.

Other sources say he *is a racist vigilante*.

*“George Zimmerman had previously been charged with resisting arrest with violence and battery on an officer but the charges were dropped. He had also been accused of domestic violence in a case where he counter-accused his partner.”*

Obviously, these images of George Zimmerman are diametrically opposed and will be highly influential with jurors—each encouraging them to see Zimmerman through either a sympathetic or a punitive lens.<sup>2</sup>

**Trayvon Martin** was a 17 year old black male staying at the home of his father’s fiancée in the gated neighborhood who went out that night to purchase a *bottle of Arizona Iced Tea and a bag of Skittles candy* for his brother and himself. His shooting has been described as *“walking while black”*. His parents described Trayvon as a *courageous son*.

*“Trayvon was our hero. At the age [of] 9, Trayvon pulled his father from a burning kitchen, saving his life. He loved sports and horseback riding. At only 17 he had a bright future ahead of him with dreams of attending college and becoming an aviation mechanic. Now that’s all gone. When Zimmerman reported Trayvon to the police, they told him not to confront him. But he did anyway. All we know about what happened next is that our 17 year-old son, who was completely unarmed, was shot and killed.”*

Alternately, Trayvon Martin is *depicted as a troubled youth* in difficulty with both the school and legal systems.

*“Trayvon Martin was suspended from school three times in the months before he was shot dead by a neighborhood watchman, it emerged today. It was also revealed that he might have attacked a bus driver, according to a Twitter account that it is claimed belonged to the teen. The Miami Herald claims that in October, he was caught with a ‘burglary tool’ - a flathead screwdriver - and 12 pieces of women’s jewelry. Martin insisted that they did not belong to him. Earlier, he had been suspended for skipping school and showing up late to class. And most recently, in February, he was suspended again when officials found a ‘marijuana pipe’ and an empty baggie with traces of the drug.”*

Like George Zimmerman, Trayvon’s depiction in the media is both sympathetic and unsympathetic. Jurors will be faced with the urgent wish to understand the true identities of George Zimmerman and Trayvon Martin.

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<sup>2</sup>Another area of research highlighted by this case is on the *impact of apology in litigation*. George Zimmerman *unexpectedly apologized to Trayvon Martin’s parents* during his bail hearing. “I wanted to say I am sorry for the loss of your son. I did not know how old he was, I thought he was a little bit younger than I am and I did not know if he was armed or not.”

## *Imparting Understanding of What Happened: What the Research Tells Us*

There is a *fine line between self-defense and murder* and both sides need to know how to explain possible reasons for such a shooting to jurors. What we've seen in the media reactions to this story are largely three groups of responses: one group that cries racism; another that supports self-defense/justifiable homicide; and a third group who wants more information—including those who are worried that the Zimmerman arrest is reflective of pressures from *"mob thinking"* rather than a due process.

The social science research points to five possible hypotheses for George Zimmerman's decision to shoot: a heightened tendency to see Trayvon holding a gun; feeling powerful/"larger than life" because George, himself, was holding a gun; George perceiving himself as being in a position of power; a domestic variation on the *turban effect*; and increased racial bias due to exposure to alcohol (not necessarily drinking it).



### *Wielding a Gun Increases Bias to See Guns Held by Others*

New research shows that if you carry a gun yourself, you are much more likely to believe *others are holding guns as well*. It's more than a sense of suspicion--you actually see innocent objects (for example, a shoe, a cell phone or a soda can in this study) as guns.<sup>3</sup> For this research, participants either held a toy gun or a neutral object like a foam ball.

Researchers then compared their interpretation of various computer screen images showing another person holding either a gun, a cell phone or a soda can. Participants were asked what the person in the photo was holding. When the research participant was holding a gun, they were more likely to believe the person on the computer screen was also holding a gun.

One phase of the experiment finding this bias involved varying the race of the person holding the object (either a gun or an innocent object). In other words, researchers had both African American and Caucasian confederates holding objects and asked research participants to react to this array of individuals. What they found was no significance in varying race of the person holding the object but a tendency among the research participants to react more quickly (one way or the other) when the pictured potential threat was black rather than white.

Lead author Jessica Witt comments on this finding by saying that race of the person holding the object may result in activating other stereotypes that result in conclusions being drawn based on the observer's sense of threat. Essentially, *we over-react*.

*"However, there are other factors related to race, and that is where stereotypes come in," she says. "If you have stereotypes, and your perception is changed when holding a gun, those factors could interact to increase the likelihood of an over-reaction. In our study, there was a gun in 50 percent of the trials. In the real world that is not typically the case, but I would expect in the real world, this gun effect and race stereotype could amplify each other."*

<sup>3</sup>This research is in press currently: Witt, JK & Brockmole, JR (2012). Action alters object identification: Wielding a gun increases the bias to see guns. *Journal of Experimental Psychology: Human Perception and Performance*.

In other words, racial biases can result in intensifying pre-existing stereotypes when we identify the person holding the object as more of a threat. The researchers quote the familiar saying “*when you hold a hammer, everything looks like a nail*”. They point out that when you have a gun you are more likely to see situations as justifying shooting.

Obviously, in this situation George Zimmerman had a weapon in hand. By his own report, he did not know if Trayvon Martin was armed. He told the 9-1-1 operator he believed Trayvon Martin was “*black*” and “*really suspicious, looks like he’s on drugs*”. Zimmerman’s actions would not have been possible without that weapon and having the weapon made him more likely to see a hoodie-wearing teen wielding a cell phone, soda and Skittles as a threat to his own safety. He reacted by pulling the trigger

### *Do I Look Bigger with My Finger on a Trigger? (Yes.)*

According to [Science Daily](#), “*new research confirms what scrawny thugs have always known*”. Holding a gun makes you look bigger to others.<sup>4</sup> George Zimmerman is reportedly 5’8” (shorter than the US average at 5’9.5”) and weighs about 185 (again *lower than the US average* at 191). While he would likely not describe himself as “*scrawny*”, he is under-tall and under-weight compared to US averages. This research says that when observers know someone has “*a gun or a large kitchen knife*”, we perceive them to be “*taller, larger and more muscular*” than those with more “*mundane objects*”.

George Zimmerman’s report is that Trayvon Martin (*6’0” and 160 pounds*) “*threw the first punch*”. While there is no way to corroborate this statement, what this research would indicate is that if, as Zimmerman says, Martin saw Zimmerman’s gun and “*a struggle began*” –it would make sense that an unarmed observer seeing a weapon would sense a significant threat and attempt to avoid that threat.

The attorney for Trayvon Martin’s family says [who initiated the first punch](#) is not important:

*Crump said it was not clear that Martin threw the first punch but, argued that even if he did, Zimmerman’s actions launched the entire sequence of events. “Trayvon Martin had every right to stand his ground,” Crump said. “We believe that Trayvon went to his grave not knowing who this strange man was that was approaching and confronting him.”*

What this research says is that Trayvon Martin would have seen George Zimmerman as more physically imposing than he is in reality, since Martin knew Zimmerman had a gun. Even if Martin didn’t believe Zimmerman would pull the trigger, he would have perceived Zimmerman as being larger and more menacing. Conversely, if Zimmerman believed (see below for reasons why) that Martin was carrying a weapon, he, too, would have perceived Martin as being bigger and more a more menacing threat, even apart from the weapon.

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<sup>4</sup>Fessler, DMT, Holbrook, C. & Snyder, JK (2012). Weapons make the man (larger): Formidability is represented as size and strength in humans. [PLOS ONE, 7\(4\)](#), April. Open access.

## *Perceiving Oneself as Powerful*

Other research that may have relevance to this case has to do with how powerful people act on their sense of powerfulness in relation to others.<sup>5</sup> We cannot know George Zimmerman's personal sense of being powerful but in this situation, he was acting as a *self-appointed "neighborhood watch captain"*, carrying a gun, and confronting a "really suspicious guy" wearing a hoodie. He had imbued himself with self-appointed authority, even after being told otherwise by the legitimate authorities, which suggests a sense of considerable personal power. We also know he had *long-standing aspirations* to be in law enforcement. What this research says is that if you feel powerful, and there are no brakes on your sense of powerfulness, you are more likely to act in a fashion consistent with "priming impulses".

A review of the *9-1-1 tape of Zimmerman reporting Martin* indicates Zimmerman was suspicious, knew Martin had "something" in his hand and that Martin "had his hand on his waistband". Despite being told by the 9-1-1 dispatcher to "not follow" Martin, Zimmerman both followed and apparently confronted Martin.

In terms of priming, these researchers would likely see Zimmerman *as primed* to anticipate danger and threat based on his description of Martin in the 9-1-1 call. We cannot know for certain how these events unfolded; we only know the outcome. This study is, among those we are considering, perhaps the mostly loosely supported in terms of relevance to the Trayvon Martin shooting. We simply do not know about George Zimmerman's sense of his own power and firm conclusions are therefore premature. But it does point out a potential area of story development for both prosecution and defense: The prosecution notion that he was wielding arrogant power (or from the defense perspective, that he was modestly but courageously trying to protect his neighbors) could be a worthwhile component of the narrative.

## *The "Hoodie Effect": A Domestic Variant of "The Turban Effect"*

Recent research on the *"turban effect"*<sup>6</sup> shows what you probably guess it would show. We exhibit automatic biases (heightened since 9/11) against those wearing turbans, are more prone to see innocent objects held by the turban-wearer as weapons, and in video games at least, we shoot at them more frequently just because they wear turbans. And therefore they are dangerous. Because they wear turbans.

Much has been made about Trayvon Martin *wearing a hoodie*. The hoodie has become a sociopolitical statement *seen in Congress*, at *rallies protesting* Trayvon Martin's death, among *professional athletes*, and *in churches*. Geraldo Rivera, no stranger to controversy, made an *oft-quoted comment* blaming the hoodie (equally with George Zimmerman) for Trayvon Martin's death.

<sup>5</sup>Guinote, A., Weick, M. & Cai, A. (2012). Does power magnify the expression of dispositions? *Psychological Science*.

<sup>6</sup>Unkelbach, C., Forgas, J., & Denson, T. (2008). The turban effect: The influence of Muslim headgear and induced affect on aggressive responses in the shooter bias paradigm *Journal of Experimental Social Psychology*, 44 (5), 1409-1413 DOI: 10.1016/j.jesp.2008.04.003

*“I believe that George Zimmerman, the overzealous neighborhood watch captain, should be investigated to the fullest extent of the law and if he is criminally liable, he should be prosecuted,” Rivera said Friday morning on Fox & Friends. “But I am urging the parents of black and Latino youngsters, particularly, to not let their children go out wearing hoodies. I think the hoodie is as much responsible for Trayvon Martin’s death as George Zimmerman was.”*

Is it fair to blame an item of clothing for a teen’s death? Obviously not. No more fair than it is to shoot those wearing turbans faster than we shoot other opponents in video games. No more fair than it is to sexually assault a woman who is wearing provocative clothing. No more fair than it is to make assumptions about others based on religion, sexual orientation, age, disability status, or other differences. What the research suggests is that while all agree it’s awful that a young person died, the apprehension experienced by Mr. Zimmerman might be understood by jurors who have these biases.

Assumptions about “the hoodie” reflect stereotypes and biases. The hoodie wearer is seen as a delinquent, as dangerous, as probably black, as untrustworthy, and as “suspicious”. We can hear stereotypes in George Zimmerman’s 9-1-1 call reporting Trayvon Martin’s presence in the gated neighborhood. The “hoodie effect” may have exacerbated George Zimmerman’s response to Trayvon Martin’s presence in the gated neighborhood, increased his suspicion and sense of threat, and contributed to his use of deadly force.

### ***You Don’t Have to Drink Alcohol to Act Intoxicated When it Comes to Racial Bias***



Finally, we have research looking at alcohol and racial biases. But not just any old research. This is scary research because you don’t have to drink a drop to have your racial biases raised by alcohol.<sup>7</sup> We’ll never know *if George Zimmerman was drinking* that night because while Trayvon was given drug screen tests including blood alcohol levels, George Zimmerman was not.

Fortunately, or perhaps unfortunately, it doesn’t matter. All you have to do is see a billboard, a television ad, or some other image of alcohol and you act in a more racially biased manner! We [blogged on this research](#) recently:

*“What this research (along with other studies we have reported to you) demonstrates is that in 2012, we still assume black men are aggressive, violent and dangerous. We still assume white men are higher status occupationally than black men regardless of how they are dressed.*

*And, according to this research, when we are primed by alcohol (whether via direct ingestion or merely viewing advertisements for alcohol), we are more likely to see black men as wielding weapons (as opposed to say, wallets, cell phones or car keys).”*

<sup>7</sup>Stepanova, E., Bartholow, B., Saults, J., & Friedman, R. (2012). Alcohol-related cues promote automatic racial bias *Journal of Experimental Social Psychology* DOI: [10.1016/j.jesp.2012.02.006](https://doi.org/10.1016/j.jesp.2012.02.006)

When we consider this research in light of the Trayvon Martin case, it's very disturbing. It obviously has scary ramifications for all of us since the media is saturated with images of alcohol and just having lunch or dinner at a restaurant can result in looking at both images. You could close your eyes but ultimately there appears no other way to avoid this sort of bias-exposure. The research raises questions about whether this effect is triggered by listening to music about drinking or drugs, or news reports or advertising on the radio.

We can only guess about whether George Zimmerman had been drinking or had been exposed to alcohol imagery that evening (either directly or through the viewing of magazines, online, or on television). What we can surmise, based on the research and a review of his 9-1-1 call, is that his stereotypes were working over-time, his senses were on high alert, and his ultimate reactions were likely exaggerated by his sense of threat and danger. Whether his sense of threat and danger were realistic is a difficult question that a jury will have to decide.

### *Summary and Recommendations*

Research offers various insights for factors that might have played a part in seeing Trayvon Martin as a threat, even though he was unarmed and, even though if he wanted to hurt George Zimmerman, he was not likely to succeed. It's a very sad story and a commentary on our oh-so-not-post-racial-society. This is likely a story about more than racial bias, but racial bias appears to have played a significant role in tragedy for Trayvon Martin, George Zimmerman, and civil society.

It is axiomatic that in a diverse jury, different people will key in on different features of the evidence. If the parties involved in this case were to conduct pre-trial research with mock jurors, it would be worth exploring whether any or all of these story components are viewed as credible, informative, or useful by differing members of the jury. If one of the research conclusions is viewed as irrelevant by 60% of the jurors but is useful or instructive to 40%, it might be worth including. But if it is viewed as helpful by 60% while being harshly alienating to 40%, that approach would likely be too risky. Taking a look at reactions to story elements and identifying which jurors are most prone to reacting positively or negatively to facts and explanations is central to effective jury selection strategies.

A pro-Prosecution compilation of these research studies would create an identity for George Zimmerman as a wannabe police officer with racist and overly suspicious tendencies. He is a small man and covered his insecurities about his size with dreams of being in law enforcement (being "important and in authority"), by elevating his status to "neighborhood watch captain" and by carrying a concealed weapon as he made his nightly rounds of the gated neighborhood. What he really was, was the neighborhood busybody wielding a gun. When he saw Trayvon Martin wearing a hoodie in the dark and rainy night, and carrying "something", he made assumptions based in bias and racism. He profiled, stalked, confronted and ultimately killed Trayvon Martin for "walking while black". A self-appointed vigilante cannot be allowed to wander neighborhood streets killing innocent and unarmed teenagers.

A pro-Defense explanation of this same research would identify George Zimmerman as a biracial man with a love of neighborhood and a sense of community responsibility. He was enrolled in community college and, as a responsible citizen, kept 9-1-1 operators apprised of suspicious activities and people in his neighborhood. He was out patrolling as part of his neighborhood watch when confronted and assaulted by Trayvon Martin. The research would potentially paint Martin as being attracted to the intimidating image that his attire created in Zimmerman, and not as an innocent teen. In the ensuing struggle, Zimmerman remembered he had a gun and shot Martin in self-defense. Not realizing Martin was so seriously wounded, Zimmerman tackled and restrained Martin while awaiting 9-1-1 responders. George Zimmerman was trying to be a responsible and proud community member who took the only action he saw as possible to protect his own life while also protecting his community. Should he be punished for taking on that commitment and civic responsibility?

Litigation research usually begins with a careful examination of pre-existing attitudes about various issues, particularly those relevant to the facts of the case. Once evidence presentations are concluded at a mock trial, it is important to listen carefully as mock jurors deliberate and then thoroughly debrief around issues related to race, bias, gun control/safety, stand-your-ground laws, and other additional areas that emerge.

*Are the post-presentation attitudes the same or different than those expressed prior to the evidence?*

*Has the story somehow been transformative in some way?*

Social science researchers attempt to understand behavior, but real life (and true crime), is a laboratory of a different type.

Image 1 [hoodie](#)

Image 2 [George and Trayvon](#)

Image 3 [gun](#)

Image 4 [fully stocked bar](#)

## *Leveraging Social Media for Litigation*

BY AMY SINGER

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Social media: To some people, it means Facebook and its nearly one billion members. To others, it means Twitter and its nearly 300 million tweets per day. And to others, it means YouTube streaming 28 billion videos every week. To civil litigators, most of whom don't know it yet, it should mean a prime opportunity to achieve the best possible trial or ADR outcome.

By quantitatively and qualitatively testing your courtroom presentation, trial theme, opening statement, direct examination, cross-examination, witness testimony, and closing argument with hundreds, thousands, even tens of thousands of people online, all of whom function, in effect, as virtual, surrogate jurors, you can analyze and dissect what your actual jurors will think and feel about the important aspects of the case. This finely tuned, interactive intelligence ultimately will lead you to optimal strategic planning that the other side cannot match. And guess what? You can conduct such invaluable online testing inexpensively and easily and at the very last minute! How does this work? Read on.

Social media (Web 2.0) is a development that is just as revolutionary as the Internet (Web 1.0). It enables engagement and conversations of all types among all of the peoples of the world that have access to Internet connections. Social media concerns communities of people who gather online in one form or another to socialize, communicate with one another, and share information and opinions.

It takes multitudinous forms: microblogs such as Twitter, social networks such as Facebook, video-sharing services such as YouTube, photo-sharing services such as Flickr, plus, online gaming, live-casting, aggregators, podcasts, virtual worlds and much more. Confusing? Not at all – just think of social media as the world's water cooler, where everyone gathers online to converse.

As such, social media is the ideal online milieu for trial consultants. These professionals use focus groups and other litigation research testing methods to hypothetically replicate, usually in advance, how jurors will deliberate – that is, converse – about court cases. Ultimately, trial consulting and litigation research are all about tapping into the probable conversations in which jurors will engage when they deliberate to reach their verdict decisions, and then recommending trial or ADR strategy based on this invaluable information.

Before social media, trial consultants were restricted, on a practical basis, to a finite number of focus groups (termed “jury simulations”) comprised of a finite number of participants (termed “surrogate jurors”). Such jury simulations, repeated over and over, could provide excellent qualitative information about the predilections of jurors concerning how they would think about and decide the case.

But now, thanks to the availability of online social communities made up sometimes of hundreds of millions of people, along with online social media research that can tap into these vast communities, the number of people trial consultants can test to gauge their attitudes and opinions concerning litigation disputes is virtually limitless. Therefore, trial consultants can now provide legitimate quantitative (as well as qualitative) information about jurors’ potential attitudes and opinions. This is a remarkable breakthrough for trial consultants – and for the lawyers they counsel and assist. It provides extraordinary advantages to the attorneys wise enough to take advantage of this remarkable litigation intelligence.

### *Casey Anthony*

The 2011 Casey Anthony trial concerned the Orlando woman who was found not guilty of first-degree murder of her two-year-old child, Caylee Anthony. It was dubbed the social media trial of the century. This was because all the social media networks were abuzz with comments and opinions about the case and its various aspects. The trial was fully covered by the media, and interactive websites about the trial were posted before, during, and after the proceeding. Our firm has mined the social media data from this trial and our analysis has provided the following insights.

### *The Four Steps for Social Media Courtroom Strategizing*

Harnessing the amazing power of social media to win in the courtroom or ADR involves four key steps: 1) audience gathering, 2) engaging, 3) listening and analyzing, and 4) responding. Each of these individual steps is crucial. You must handle them all not only correctly but also adroitly, indeed, expertly. If you don’t, your attempts to secure and employ insights gained by monitoring the tweets, blog postings, and other comments by people online will almost surely blow up in your face. To borrow a term from computer scientists, it is the old GIGO problem: garbage in-garbage out.

Securing appropriate and meaningful data from the proper online sources, systematically analyzing this information and then, on the basis of the insights you have developed, crafting the optimum courtroom or ADR strategy and tactics, requires a sophisticated understanding of exactly what it is that you are doing at every step along the way. To paraphrase popular humorist and writer Finley Peter Dunne, online persuasion research for litigation applications “ain’t beanbag.” Message to attorneys and other legal professionals who are not expert at persuasion research and unfamiliar with online social media sampling, testing and analysis: Don’t try this yourself.

## *Audience Gathering*

The premise here is simple. Gather an audience of online participants who are not just willing but eager to comment about your case and its key particulars. I have achieved excellent results by congregating online audiences for my litigation research. How? After much trial and error, I will share with you some key points to focus on.

Much research has been done on how to use the science of influence in regards to social media. This discipline has been evolving and now new ideas are emerging in 2012. Today it is not just about how many people follow you on Twitter or how many friends you have on Facebook. It is about how many people you are engaging with. With any interaction of people, some will influence a group more than others. There is a measurement for this phenomenon, it is called their “Klout” score.

“Klout” is a formal measure of a person’s influence across the social networks they are engaged with. This score looks at the size of a person’s network, the online content created from it and also how other people interact with that content. People who have a high “Klout” rating are able to gather a larger, more diversified audience. The question arises, “Do you want influencers on your jury?” What do the influencers think about the issues key to your case?” The answers to these questions affect the entire process of voir dire. I have found the key for gathering an effective audience is to identify the right influencers, then activate an association with them by reaching out and nurturing a relationship, such as offering incentives.

One promising social media service for congregating audiences is Twitter. I particularly like this popular social media service because you can learn valuable personal information about your audience of followers through their Twitter profiles, for example, “MaggsBear - Retired executive. Father, grandfather and Maggie’s husband. I rant against hypocrisy and stupidity in a world with too much of both. I have a new bike...”

Take a look at these actual profiles. Whose opinion would you like to analyze?

“I’m a writer that enjoys blogging, politics, hard news, technology, and writing for other folks. I like to blog and consider myself a liberal Democrat.”

OR “*Conservatarian and Constitutionalist. God/Guns/Country.*”

OR “*Pro-Israel Proud Jew. Anti-Islam. Anti-antisemitism. Against Christian missionaries with an agenda to convert Jews. Proud friend and supporter of XYZ.*”

OR “*I’m a slave of Allah & Trying to Follow our beloved Prophet Muhammad (PBUH) If you want One way To Jannah Follow Prophet Muhammad (PBUH) FreePalestine*”

OR lastly, “*Citizen, Conservative, Daughter, Mother, Grandmother, Mad as Hell, Limited Government, Fiscal Restraint, Country Pride, No apologies.*”

Decades of jury research findings clearly demonstrate that nothing correlates more closely with jury verdict decisions than jurors’ values and beliefs.

Audience gathering involves three key aspects: “mining,” which is finding out who is out there online, and what they think and feel about the litigation issues you wish to evaluate; “seeding,” which is planting specific ideas about your case with your audience (“Although the evidence proves that the trucking company forced their delivery drivers to travel at breakneck speeds all day long to make all of their stops on time, the company claims that the drivers are never pressured in any way”); and “farming,” which is collecting the comments and opinions of your audience members and using this information for your research.

Note the word “audience” for this initial step, not “panelists,” or “respondents,” or “participants.” This is not a casual definition. Indeed, when it comes to social media research, the word “audience” is perfectly apt. Why? The people you will gather for your online research will share one salient characteristic: They all want to be entertained. Or as they might tweet about this concept in the Twitterverse: They all want to *follow* you. Thus, the second step in the leveraging social media process: *engagement*.

## Engaging

According to Mark Smiciklas’s Social Media Advocacy Model, “audience engagement objectives, strategies and tactics should evolve past acquisition towards advocacy.” Advocates are people who have opinions and ideas about the issues in your case.

If you can’t engage people online, you will never gather an adequate following to do meaningful online persuasion research. However, when it comes to the four separate steps for social media leveraging for litigation applications, engagement is, by far, the most challenging aspect. It also is the one step out of the four that requires the most artistry. Instructing people on how to engage others in a successful manner (particularly online) is a little like trying to teach people how to be funny. You either are funny, or you are not. Similarly, you are engaging, or not, depending on who you are.

The best way to engage people online is to provide information on topics that engage them. Thus, if you are interested, for example, in environmental and sustainability issues, and tweet and/or blog about these issues on a regular basis, you can readily engage others who share this sustainability concern. Because these individuals follow you when you communicate on environmental issues, you have entrée to approach them when you have a case and want them to comment online about various aspects of the legal dispute.

Of course, it is far easier to interest people online if they live and promote green lifestyles, or love James Dean movies, or are inveterate sports fans, than it will be to hook them with litigation proceedings concerning, for example, a nursing home malpractice suit. But as I wrote above, this is where the artistry comes into play. One way to engage people is via online forums. Discussion groups, for example, Google Groups, are also excellent for this purpose. Many of the online groups involve causes, for example, “Save the Whales” and “Stop Animal Cruelty.” By offering to make small donations on behalf of group members, you can often engage these individuals to participate in your online research.

To spot the ideal individuals that you want for your online social media research, look for people who comment online about the specific issue that you target. Thus, if you plan to donate to an environmental group in order to engage people for your research who worry about sustainability, look for tweets and/or online comments like this actual tweet from one individual on Twitter: “Building roads is usually hot work, but there’s a cooler approach that helps cut fumes.”

Facebook permits interested parties, including trial attorneys and jury consultants, to form so-called “secret focus groups” where they can conduct online litigation research. Some examples of organizations with “secret focus groups” now online at Facebook: International Association of Certified Home Inspectors, Snowmobile.com, and Skullcandy. Even Victoria’s Secret has its own secret focus group! What is interesting about secret focus groups on Facebook is that the trial consultant and attorney can cherry pick certain individuals from the groups to engage in more comprehensive conversations via private IM chats, and thus secure additional insights concerning how jurors will view the case.

### *Listening and Analyzing*

In this step, listening and analyzing largely represent the same thing. The concepts for step three are eminently direct: You pay close attention to what your online commenters, that is, your audience, have to say about key legal issues in dispute. You then carefully analyze these comments to draw reliable – and actionable – meaning from them. Those attorneys who get social will be very successful, while those who fight or ignore the feedback available within social media will find themselves overpowered. The key is to join them, as you will not be able to beat them.

This process takes two forms: content analysis (what online users have to state about the legal issues) and sentiment analysis (how online users feel about the legal issues). Both content and sentiment are important. However, how people feel about the legal issues often is closely predictive on how jurors will actually decide the case.

I would like to share with you some notes to reinforce some of the key things you will want to pay attention to in this tremendously important listening and analysis step. They are defined as follows: 1. emotions, 2. questions, 3. relating, 4. observations, 5. game-changers, and 6. judgments.

1. Of course, emotions concern how people feel about things. For example, are online users angry concerning particular legal issues? If so, you may be able to use this information to craft direct examination questions that strongly resonate with jurors. By the way, our experience with anger statements from online audience members is that if they project to the jurors, you never will be able to change the jurors’ minds (that is, if they are angry – emotionally invested – against your client) regardless of the evidence and testimony.
2. Questions are the actual queries that online audience members raise concerning legal issues. The attorney must be sure to answer all of these questions during the trial, that is, during his or her opening statement and closing argument, or through direct examination and/or cross-examination. Otherwise, these questions will almost surely linger in the minds of the jurors. If they do, the jurors will focus on these unsettling questions and will tune out what the attorney and witnesses have to say during the trial.
3. “Relating” comments have to do with statements such as this by online audience members: “I can relate to \_\_\_\_\_.” The more positive relating comments you are able to secure online, the better. Among other benefits, savvy attorneys can leverage relating comments to craft the most effective voir dire questions.

4. Observations concern what online users notice – and remember – about the witnesses, the evidence, and the attorneys. If these observations are negative, for example, people online hate how your primary witness styles her hair, it will be helpful to advise the witness to change her hair style. Otherwise, jurors may end up negatively thinking about the witness's appearance, and not pay attention to what she has to say on the stand.
5. Game-changers are just that: Information that changes the minds of online users who initially were skeptical about your client and his or her case, but now fully back that individual. Thus, game-changers are the most important variable of your analysis. Obviously, game-changers are potentially invaluable for your side. Therefore, it is incumbent that you and your trial colleagues isolate these specific game-changers and then find ways to exploit them during the case presentation.
6. Judgments consist of how people perceive the issues and problems of your case. This category is broken down into the following variables: compelling, believable, impressive, agreement, etc.

### *Responding*

In the responding stage, the trial consultant/ social media researcher comments (responds) to initial comments from online users. These new comments spark an entire repeat cycle of commentary from the online audience. At the same time, the trial consultant empowers online users to spread their message, which allows for additional audience gathering. This is necessary because people online routinely drop out of virtual conversations (which is what your online social media research truly is). You then follow this by additional engaging, then more listening and analyzing, and then even more responding.

You keep going through this loop, over and over, getting an increasingly precise and reliable fix on how people think and feel about the case. If you have handled things correctly, this is most likely how jurors will also think and feel about the case as well (and how they will decide it). As you refine things, learning more and more through your virtual conversations – which will directly parallel the jurors' deliberations – and adapting your case presentation or trial planning accordingly, you eventually will reach the final goal of this elaborate social media research exercise: *to discover the argument for which there is no counter-argument.*

Once you do, you have accomplished your online research mission: to provide the attorney with the most reliable and validated information he or she can use to win the case. Armed with such data, the jury has only one option to exercise: to surrender (that is, accept your side's version of events). Ultimately, this is what online persuasion research is all about.

## *Sifting Through 40,000 Separate Online Comments*

When our firm mined the social media networks concerning the Casey Anthony trial, I utilized colleagues, interns, and volunteers to amass, sift through, classify, and segregate some 40,000 separate tweets, blog postings and other online comments about the case. They did so primarily through sophisticated keyword search algorithms that my firm developed.

Once my assistants performed this tedious mining operation, and after an elaborate data analysis, we were able to derive reliable meaning (and accompanying insights) from this immense amount of data. We created a dashboard for effective content and sentiment analysis of this data. Our dashboard reported on the analysis of this voluminous data by the following key criteria: questions, observations, judgments, emotions, relating, and change.

After conducting social media research for numerous trials, including some low-profile cases now in various planning stages, it is clear to me, that the findings from such research provide an ideal blueprint for voir dire and case presentation strategizing and tactics, as well as ADR planning and strategizing.

### SNOW

In addition to the online social media research activities outlined above, another attractive research option is SNOW, an acronym that stands for “social network opinion website.” Utilizing the advanced SNOW methodology, the trial consultant creates multiple websites solely for social media online research purposes. Using sophisticated audience-gathering techniques, the trial consultant secures numerous (often, tens of thousands) visitors to the various websites, where they have the opportunity to learn about a particular litigation dispute, and then to render opinions on its individual aspects.

From these opinions, the trial consultant can develop valuable insights on the tactics and the strategies the attorney can use to persuade jurors. To illustrate to CNN (and the rest of the media) how social media research works, my firm set up a SNOW website in conjunction with the trial of Dr. Conrad Murray, Michael Jackson’s personal physician, who was accused and found guilty of involuntary manslaughter of the pop singer and cultural icon. There, visitors offered their instructive opinions on the guilt or innocence of Dr. Murray.

Multiple SNOW websites are utilized for this online social media research. The reasons for this are twofold: 1) you can conduct different forms of social media research at multiple websites; and 2) some SNOW websites are set up solely to (quite cleverly) provide misinformation to the other side’s counsel should he or she attempt to access the websites (extremely difficult without the correct passwords).

The SNOW acronym is an apt one for this type of research (and misdirection). For example, you can characterize each SNOW website as a research “snowflake.” Using them together, the trial consultant can fashion a research “snowball.” Only the client (along with the trial consultant) has full access to all of the SNOW websites. Thus, it is only he or she who can build a full-fledged research “snowman.” All of the carefully controlled misinformation and misdirection means that if opposing counsel actually gains partial access to any of the “snowflakes,” his or her “snowman” will end up as nothing but a big puddle!

### *Recent Developments*

As a result of our firm's experience with the benchmark Casey Anthony trial, we can see the value of automating all of the tedious work we previously assigned to our assistants, interns, etc. We believe that the human-intensive data mining, seeding and farming that needs to be part of a quality online social media research program should give way to automated software systems.

We also recognize the value of incorporating secret channels for online focus groups to secure maximum confidentiality for attorney work product. An advanced program that includes these elements as well as predictive modeling is something we believe will break new ground in 2012.

Our research is looking at a SNOW capability that has complete anonymity for all online commenters, thus enhancing unbiased data input for our research. We want to look at software applications to expand many research functions, including the introduction of online shadow juries using conventional jury simulations. In short, trial consultants will be seeing expanded applications of software and Information Technology to make their work exponentially more effective in 2012.

Litigators on either side of the aisle will like what online social media research has to offer them this year and beyond. More reliable quantitative and qualitative information enhances jury selection and trial outcomes. It will be fast, cost effective and offer a menu of resources for the law firm. Right now trial counsel can access tens of thousands of surrogate jurors to use as an electronic shadow jury in real time during trial proceedings. Online social media research is recognized as providing a resource advantage over opposing counsel in both trial and ADR applications. My experience is that the litigator who utilizes online social media research puts him or herself at an advantage that makes the other side seem like it is playing slow motion checkers. Bottom line of course, online social media research works. My experience confirms that.

## *10 Tips For Preparing The Crazy Witness For a Media Frenzied Trial*

BY KATHERINE JAMES

*Katherine James, MFA is a trial consultant based in Culver City, CA. Her specialization is live communication skills. She specializes in making witnesses “not do that anymore and do this instead” in cases and attorneys to be the best they can be in live and virtual workshops. Read more about her company ACT of Communication at the [website](#).*

*“Everyone, in some small sacred sanctuary of the self, is nuts.”  
Leo Rosten, author (1908-1997)*

### *Introduction*

When TJE Editor Rita Handrich asked if I would write about preparing witnesses, especially clients, for “celebrity” trials at first I hesitated. For some reason, I never get asked to help prepare run-of-the-mill celebrities in Hollywood Trials. Nor do I get asked to prepare regular CEO’s of big corporations whose lawsuits garner national headlines. Nor do I get asked to prepare plain, ordinary, well-known people whose cases seem to have as many reporters as there are big law firm associates in the courtroom gallery for a large “public” trial.

Don’t misunderstand me. I’ve been involved in cases in all those “big time” legal arenas. It’s just that I’ve only worked with witnesses in “spotlight” cases who, in the words of the beloved Jewish literary icon Leo Rosten, are “nuts”.

In this article, my goal is to give some advice on how to handle the delicate situation of *The Insane* meeting *The Worldwide Public* in the courtroom. I imagine some of this advice will also apply to *The Non-Insane* meeting *The Worldwide Public* in the courtroom. I am looking forward to the day when I get to find this out ... through my own personal experience.

First a word of warning – I am not a psychologist or psychiatrist. I do not have a PhD in psychology or an MSW. I did not go to medical school (I was the one who flunked lab in biology in the 9th grade because I refused to pith a frog). I know that many of my colleagues who are members of ASTC hold such degrees. I also know that there are much nicer and more professional words to call the famous lunatics I somehow get called on to deal with. But I shall be referring to them by several colloquial terms that I have picked up over the years.

I know that I have a reputation in the marketplace for being able to “fix any witness.” I always warn the lawyer with whom I am working, “Darling, you know I can’t fix organic problems.” That means “I can’t make crazy people un-crazy.” But attorneys generally feel that whatever I manage to figure out is better than the past solutions they have tried from whomever they have hired to help with a client who is bonkers. I regard this as much a result of familial ties as it is of my thirty-five years of experience as a trial consultant. If you grew up with as many “not quite right” Great Aunts and Great Uncles as I did you, too, might have learned at an early age how to deal with crazies.

### *Ten Top Tips*

#### *1. When the media and public relations teams are meeting with the legal team to make the big “plan,” do not include the witness who is bonkers.*

The following is as good as it has ever gotten in my career with a crazy person and making a media and PR plan for a big public trial.

- By the time a trial consultant arrives on the scene, in my experience, the media people and public relations people have a fantastic plan in place to handle the media that **does not** involve the client. Why? Because all the clients I have dealt with are too crazy and unpredictable to participate in such a level headed meeting with any kind of positive mental health.
- No planned news and media conferences involving the client as an actual physical presence. The crazy client can’t say nutty things nor can they give off whacky nonverbal communication if they are behind closed doors and out of the “official messages.”
- The takeover of all social media (Facebook, Twitter, etc.), normally handled by the client, by the media and PR teams. So much better than letting this loose cannon blab freely on the World Wide Web.
- The legal team is completely cooperative with the media and PR teams and has memorized the perfectly crafted messages that have been worked out for them. NO lawyer on the legal team will ever say the nightmare invoking, “No comment.”
- •The crazy witness is getting a massage, working with a trainer, on the beach soaking up rays while the coordination of the media and PR is taking place.
- •The witness is taught how to give neutral and relaxed nonverbal communication and a neutral one- to three-word verbal comment which has been created by the media, PR and legal team. This will be used while the witness is calmly, like a sane person, going to and from the courthouse in full view of the media. How will you know your crazy person knows how to do this? Practice, practice, practice. This is not a time for lectures – you must practice this!

## ***2. Diagnosing what kind of “crazy” this “crazy” is.***

Is this person a narcissist? A big druggie? Bi-polar but anti-medication? Ra, The Sun God forced to deal with the rest of us on this earthly plane for reasons that are still not yet clear to him? Etc., etc., etc. Yep, been there done that, bought the tee-shirt with all these categories several times (actually I only met someone claiming to be Ra once, many have just acted that way). There are as many kinds of crazy in my experience as there are crazies. The important thing is you have to figure out what exactly is this particular brand of lunacy. *Why?*

Because then you can make direct deals with the witness around the mental health issue for preparation time and testimony time.

For example, for narcissists, I force “*The Eleanor Roosevelt*” rule for all testimony, so we have to practice that in all preparation sessions. It comes from a famous Eleanor Roosevelt story from a reporter for the Saturday Evening Post. It seems that he had an interview with Mrs. Roosevelt for three and a half hours. During that time period, she never used any words that referred to herself (no me, I, mine, my, etc.). He said she was the most selfless human being he had ever met. That’s the goal with the narcissistic witness. As much as is humanly possible – get them to stop talking about themselves.

In the media frenzied trial every word this person says will be scrutinized with far more depth with much more innuendo read into it than with most juries.

## ***3. Planning on conducting a direct examination? It can’t be any longer than your witness can act like a normal person.***

Do you have to put this person on the stand? Okay, let’s say that the answer is “yes.” How much water do they have to carry? The goal in the ideal world is “none.” Clearly, since the person is testifying, we aren’t able to achieve the ideal goal. Fine. We have to achieve the next-to-the-ideal goal.

Start by going down the list of all the testimony that is needed from this witness. With each and every item, ask the question, “Who else besides our dear fruitcake could give this information to the jurors and the free world?” Each segment of testimony that is determined must be given by the client, must be gone through a second time and asking the question, “Okay – but does our beloved wing nut need to be responsible for every nuance of this information?”

Now, when you role-play direct examination you are down to the maximum amount of information that you are going to use with this witness. It will be answered with no more than the minimum answers imparting that information.

### ***How does this work practically?***

The attorney is going to ask pointed questions – not leading, but not global questions that invite narrative answers. Not ever, ever, ever. Yes, this will cause you and the attorney to work harder than you ever have in your lives to develop these questions. Fine. That is your job. Do not put a lawyer in a position of asking a crazy person a regular lazy direct question such as “Could you please explain that to the jurors?”

Practice getting the witness to act calm, serene and relaxed during these role-playing sessions of direct examination. Experiment with whether or not you want them to direct their answers to the jurors. With normal people, you want all answers directed to the jurors. But if you get very nervous when the crazy witness looks in your eyes, like you start thinking about whether or not your life insurance policy is paid up and if your spouse knows that you love him or her, then it is time to consider NOT letting the crazy person look into the eyes of the jurors.

Serene, serene, serene – relaxed, relaxed, relaxed. The jurors should always get this message from any witness. But in the frenzied media trial the whole world needs to get this message. If it is appropriate for the witness to get a bit teary-eyed in a spot, then that's fine. However, truly it does no one any good to have a reporter overhear your witness saying under her breath in the direction of opposing counsel, *"Die, you obnoxious beyotch!"* with the accompanying nonverbal communication.

In the middle of direct but sensing that the witness is going to lose it and blow? Have a safe word/question for the lawyer that he or she can use as soon as someone on the trial team picks up on those signals from the witness. I suggest something like, *"I am now going to ask you a question that my Aunt Elvie would be asking right about now."* I would of course use my Aunt Elvie because she was the crazy older sister of my Grandma Louise. Aunt Elvie would be my safe word for, *"You are acting like a nut job just like my Aunt Elvie. I'm warning you to chill out!"*

#### ***4. Cross Examination – teaching the insane how NOT to try to advance the ball.***

Practice, practice, practice. Role-play, role-play, role-play. Forever and a day until this particular crazy person answers every cross exam question you can think of with an economy of words and a horn of plenty full of serenity. Great answers are things like "yes" and "no" and "Half right and half wrong."

Any time a crazy person answers with an explanation in cross is a very dangerous moment for the case. Practice getting them not to do it. Practice what it will be like when you come back and "clear it all up" in redirect.

Teach them the trick of not looking opposing counsel in the eyeballs when opposing counsel is asking him or her a question. Have them practice, practice, practice concentrating on your mouth or the knot of the tie or the hollow of the throat as you pretend to be opposing counsel.

Neither the jurors nor the reporters will know that your crazy witness is not being sucked into the vortex of doom of the eyes of opposing counsel.

Can you imagine how great it will be to read, *"She answered the questions of the lawyer in cross examination calmly and clearly. When she talked about the stalker her voice waivered a little, but she stayed strong and clear eyed."*

#### ***5. For God's sake, don't let the witness wear that crazy outfit.***

Costuming in a regular trial is always important. Costuming in a media-rich trial is crucial, causing me to ask many rhetorical questions. Like: Why do crazy people ignore the lingerie section of the department store? Don't these people know that when you are wearing a translucent skirt without a slip in front of people with flash bulbs in their cameras that the whole world is going to see your blue thong underwear?

What a celebrity or important person wears has been reported by the media for as long as there have been public trials. For example, did you know that to her execution Marie Antoinette wore a white cotton dress with a black petticoat, and a white cap with a black ribbon? Did you know that she wasn't trying to make a fashion statement, as was reported by the press of the day? Since she wasn't allowed to wear black to her execution she wore the only other outfit she had with her in prison. So what? You think the literally blood thirsty media of her time did their due diligence and looked into that fact?

Have things changed that much? Oh, no. They've gotten worse.

Remember – you are dressing a person whose every thread is going to be scrutinized by the media with extraordinary care.

Then make sure that what you have chosen is “all” that is worn that day. Double check. Then triple check. Crazy people tend to act like rebellious young girls with dress codes in the 8th grade. The ones who wear one thing when they head out the door to the school bus and arrive at school wearing something quite different they had hidden in their best friend's backpack.

***6. If they don't get why they shouldn't drive that car,  
find someone who will take the keys away.***

This person is not allowed to arrive at the courthouse in the \$350,000 car. This person must be driven by someone else. Someone else who is not in a chauffeur's cap and suit. Someone who is driving a “normal” car.

You know this is true in all cases – but in a case which is being tweeted about it is vital.

***7. Choosing a “wrangler” or two for the trial.***

Are you the one who is going to be sitting at the right hand of this witness keeping this lunatic appearing sane throughout the trial? Someone, at least one someone needs to be assigned to the care and feeding of this witness and to have no other assignment. If you are female and the person is male, you need at least one more someone to take the guy to the bathroom. These people can never be left alone.

***Why not?***

Because they can't be trusted to keep their nonverbal communication perfect and their verbal communication non-existent without supervision.

I almost always choose to have a paralegal or an associate help wrangle “just in case.” I am one small woman who is now sixty years old. I was never much of an athlete in any decade of my life, let alone this one. And my sport of choice has always been dance rather than wrestling.

Sometimes you need more than one.

Recently, when a crazy witness in a widely watched case sprang free and ran from the courtroom screaming into a cell phone, “*That #\$\$\*@ lawyer just ruined my #\$\$%^@ business!*” and all the reporters ran after him I needed stronger arms than mine to help me corner him in the stairwell. I also needed one young able-bodied person to block the reporters from crashing through the stairwell door while I tried to talk the guy down.

I almost never choose to have someone from the person's entourage on this detail. That person might give us a head's up that the lunatic is getting ready to blow. But I don't trust the inner sanctum of the great and the near great. Too many of them are suppliers of drugs, etc. to their “bosses.”

Think of the last 24 hours of Elvis' life. Do you really want to be with your Elvis and his Grace-land Groupies and no one else in court?

***8. It isn't enough to have a Plan "A".  
Always have a Plan "B" and a Plan "C".***

Think ahead on physical movement as though you are the head of the Army instead of part of a trial team.

Here's an example:

Planning on avoiding the reporters by coming in the back instead of the front? That's Plan "A".

When the back is blocked by the smart reporters know how to get through the side entrance. That's Plan "B".

When the side entrance is magically under construction come through the secret tunnel. That's Plan "C".

Now, here's the most important part of this example.

Don't explain any of this to the crazy person. Just say, "Follow me, sweetheart – it's all good! I swear on the lives of my children! Did I tell you how great you look right now?"

***9. Debriefing at the end of today before it all starts up again tomorrow.***

See "1" on this list. You are back to square one in general and point "1" on this list.

No, no, no – do not think that just because today went well that you can let your guard down tomorrow with a nut job witness. You cannot count on life being a cumulative learning experience for the insane.

Worst and most dangerous days to look out for – the whole time after the witness has testified.

Normal people want to get back on the stand and set the record straight on a daily basis after they are off the stand. This gets majorly exaggerated for those of questionable mental health.

In normal trials, you can try to figure out how not to have the client witness in court every single day. You will need to figure out if this is even possible or desirable with your particular media-rich trial.

If this is a daily white knuckle ride, you and the whole team are going to have to concentrate and practice at the end of every day and at the beginning of every day what kind of behavior is desirable courtroom behavior. A daily analysis of what kind of feedback you are getting from the nonverbal communication of the jurors as well as what the media is saying about this witness is vital. Again, the nutty witness needs to be on a "media fast" – that is, a total absence of media coverage of this case in any form.

You and the team will analyze without the crazy witness in the room, and then plan a strategy to report what is "being said" in and out of the courtroom to the crazy witness.

## 10. What's a "win"?

In a regular case, a win is "we won the case and got all the money we asked for" or "we didn't have to pay that much in damages" or "she was acquitted" or "he got a really light sentence."

The media frenzied case with the whack job witness has a whole other layer of "win" to it that often goes far past these normal "wins."

I always ask the team at the beginning of one of these cases, "What does a win look like?"

Sometimes the "best case" scenario is, "The reporters get our message and the witness acts like a person pretty much all the time and no one ever sees the tattoo or the fangs."

Hey. Whatever the criteria is, we all need to be on the same page.

### *Conclusion:*

When dealing with a crazy witness in a case under intense media scrutiny you need to bring along a few "P's":

- patience
- practice
- persistence

Hey, if I ever get to work on a media frenzied case with a "normal" witness, I'll let you know whether or not my hunch that a lot of these principles apply is borne out.

*Good luck to us both!*

## *Turning an Expert Witness into a Great Witness*

BY DOUG CARNER

*[Doug Carner, CPP/CHS-III](#) is President of Forensic Protection in Van Nuys, California. His professional experience spans twenty years of audio-video enhancement and authentication. Mr. Carner also donates his time to law enforcement, innocence projects, and educational seminars. You can review Mr. Carner's work and contact information on his [lab's webpage](#).*

Over the years, I have seen seasoned experts become directionless as opposing counsel and retaining counsel fight to shape the facts. This usually results from experts clueless to their attorney's narrative, and attorneys unaware of what the witness knows.

Witness testimony involves more than the timely recitation of facts. Long before the trial, your expert needs a clear understanding of where they fit into your story and what to expect at trial. Their skills were employed as a trier of fact and opposing counsel will attempt to discredit their findings or diminish its weight with the jury.

Meet with your expert well before the trial to ensure that they understand the trial process and have a clear strategy for answering questions. Familiarize them with the questions to expect during both direct and cross examination – including potential attacks on their professional and personal credibility. Record your trial preparation and have the expert review the video to strengthen their responses and body language. This is also a good time to suggest clothing changes. For example, a suit and bow tie can add a nerdy nod of credibility.

Ask your witness if there are any case facts, background vulnerabilities, or credibility issues that have not been covered. Discuss the use of charts or diagrams to help present the case facts. Tell the expert of any relevant opposing counsel strategies or tactics they should expect. For example, your opponent may have a tendency to challenge witness qualifications more than their conclusions.

Even seasoned experts need help to avoid stating potentially damaging or unnecessary information. Remind the expert to listen carefully to each question and only answer what is being asked – nothing more. They must trust you to ask follow-up questions when you need the jury to hear more details. Tell them to pause briefly to provide you with ample time to object. If an objection is raised, they should await the judge's ruling or the Attorney's rephrasing before providing their answer.

While it is okay for your expert to work additional facts into their response, they must not focus on key buzz words or phrases. If they sound scripted, it will harm their perceived credibility. They should just stick with what they know to be true and not be concerned with any thematic concepts or

legal theories. If the opposing counsel's question steer the facts to an incorrect conclusion, the expert can state the correct facts in their response.

Expert should avoid complicated or excessively technical answers, unless that is the only way to convey their facts. Likewise, they must avoid talking down or over-simplifying their answer. The goal is to engage and educate the jury, not bore or frustrate them. This can be especially challenging for experts with large egos and a love of their own voice. Large egos and a desire to please the attorney can also encourage experts to speak beyond their qualifications, thus jeopardizing their overall credibility.

Unless it is 100% accurate, experts that use absolutes like "always" and "never" may regret saying those words during cross. They should avoid long answer that begin with the words "Yes but" or "No but" or they may be interrupted before providing their full answer. A better option is to begin their response with something like "That question cannot be answered with a simple yes or no, but..."

Regardless of their personal feelings for your case, remind the expert that they are not the hero, nor the client's advocate. They must remain professionally impartial, regardless of any personal feelings, and advocate for the facts. They should simply stick to the facts and leave the advocating to you. If opposing counsel doesn't ask the "right" question, you will ensure that the jury gets the facts during your redirect.

Remind the expert to avoid becoming emotional or defensive with the person asking the question, and to never guess on things they don't know. They should just state what they know as fact and, if asked a question where they don't recall the specific details, respond with "I don't recall" instead of the more damaging "I don't know". The goal is for the witness to tell the truth in as few words as possible and be okay with any awkward silence. A long-winded answer gives the opposing counsel a chance to embarrass your expert by asking, "Was that a yes?"

Teach your expert to retain eye contact with whoever is asking the question and then look at the jury during answers that require a longer response. They should remain confident with an open body language (e.g. no crossed arms, clenched fists or angry facial expressions). The opposing counsel may present the expert with a document during cross in order to invade their personal space. If timed correctly this can make the expert anxious, which the jury could perceive as a lack of confidence. To counter this, the expert should remain relaxed and, when their opinion is soundly based, own it with conviction.

The goal is to help the jury's perception of the expert's credibility as they weigh their testimony. With proper trial preparation, you and your expert will be ready to deliver a strong and compelling case.

*We asked two experienced trial consultants to comment on this article as it relates to litigation advocacy. On the following pages, Stanley Brodsky, Elaine Lewis and Ellen Finlay offer their perspectives.*

## *Psychological Cautions in Expert Witness Preparation*

RESPONSE BY STANLEY L. BRODSKY

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The article by Doug Carner (2012) in this issue offers many constructive suggestions on how attorneys and trial consultants should go about preparing the experts with whom they work. He describes several logical steps in meeting with experts and promoting their credibility. At the same time, he prescribes many activities without presenting the psychological cautions that should accompany such actions. I see five important cautions that should accompany the Carner advice.

1. **Clothing.** To begin with, it is demeaning for attorneys to suggest how experts should dress. Experienced and novice experts alike know that they should wear their nicer professional clothing to court. Take the Carner example of the bow tie to promote nerdy credibility: there are few men and virtually no women who are comfortable wearing bow ties. Uncomfortable witnesses are often bad witnesses. Forget the bow tie.
2. **The I Don't Know Response.** Carner advises that experts who don't recall details should say, "I don't recall" instead of the more damaging "I don't know." Of course, people who do not recall details may say they do not recall. However, I disagree with his characterization of "I don't know" replies as damaging. Quite to the contrary, a straightforward and non-defensive statement of "I don't know" can enhance credibility. It shows that the expert knows what he or she does not know and is willing to admit it. It can reflect a comfortable humility about the limits of expert knowledge.
3. **How Much to Say.** One Carner observation is that, "Even seasoned experts need help to avoid stating potentially damaging or unnecessary information." I disagree on two bases. First, this may be somewhat true for novice experts who do not appreciate the need to listen to questions and then answer what has been asked. It is not applicable to wise and seasoned experts. Second, the advice portrays experts as committed to the advocacy role of the attorney. Good experts answer responsively and give information even if it is damaging. It is their commitment because they are under oath and because they serve the court objectively.
4. **Narcissistic Experts.** I like the advice that experts should not try to be heroes. In my forthcoming book (Brodsky, in press) and in the excellent commentary by Gutheil and Simon (2005), narcissistic experts are described as expert witnesses who think the proceedings are all about them. They take every challenging inquiry as a personal af-

front. I would go further than Carner. Instead of instructing experts not to be heroes, I would avoid retaining experts who approach their tasks with such narcissistic self-preoccupation.

- 5. Opinion Testimony.** My final comment is in response to the statement that experts should simply stick to the facts and leave the advocating to the attorneys. I disagree. Expert witnesses differ from lay witnesses in the sense they are allowed to offer opinions. It is the job of the experts to advocate for their own findings and their own opinions, whatever they are. That means experts should explain, interpret, and actively defend their conclusions and opinions.

In conclusion, I propose that the Carner article should not be called, *Turning an expert witness into a great witness*. That is a grandiose and rarely attainable aim. It is more reasonable to think of preparing experts to be informed and adequate witnesses. That goal is well within the reach of most attorneys and trial consultants.

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## *Turning an Expert Witness into a Great Witness*

RESPONSE BY ELAINE LEWIS

*Elaine Lewis is President of [Courtroom Communications LLC](#). She is a member of the American Society of Trial Consultants, American Federation of TV and Radio Artists, Screen Actors Guild, and Actors Equity Association.*

From the title of this article, it would seem Mr. Carner's objective is to offer some tips on how to turn expert witnesses into not just good witnesses, but great witnesses. If that was his intent then I believe he has not succeeded. His article is simply a listing of the traps and pitfalls inexperienced experts stumble into when they have not been well prepared. There are no tips or witness preparation insights. Rather, this article appears to be observations of a trial tech support person who has spent long hours in trials watching experts falter. For example, we are told an expert "should remain relaxed" but there is no suggestion on how to accomplish this.

Mr. Carner notes that so many expert witnesses:

**Don't appear to know how their testimony fits into the case.**

**Haven't been trained in how to listen carefully and answer only the questions asked.**

**Talk too much.**

**Get defensive.**

**Guess.**

**Don't know where to look.**

**Don't understand their role is to educate the triers of fact and not to try to demonstrate how smart they are.**

**Haven't been warned about the traps of "always and never".**

**Don't wait for objections.**

**Don't understand that they can explain in a re-direct examination.**

**Haven't practiced how to use graphics and visual aids.**

**Etc. etc. etc.**

The problems listed are nothing new. They are typical of any unprepared witnesses – expert or fact. In truth, by detailing the many failings of the expert witnesses he has observed, this article by implication is a critique of how attorneys prepare, (or rather neglect to properly prepare) their witnesses. Essentially the author is giving a shout out to attorneys that if they don't prepare their experts well the case will suffer for it at trial.

Assuming this article is directed to an audience of trial attorneys, I find it too basic. I don't believe it is necessary to tell any litigator that the skills of their expert were employed because "a trier of fact and opposing counsel will attempt to discredit their finding or diminish its weight with the jury." Further, I am sure all litigators recognize a bad witness when they see one. It is not necessary to list the things that make an expert a bad witness.

I think the only take-away from this article is that too many experts are not well prepared. Missing advice from the author as to how to fix the problem, I offer the following coda:

*In my experience preparing expert witnesses, I find that attorneys are often so focused on content of the case that they neglect working on how the expert is to deliver that content. No matter how good the substance, if it is not presented effectively its impact will be lost. Clearly attorneys who use experts should spend enough time training their experts in effective trial techniques in addition to reviewing case materials. If there is not enough time for both, I suggest hiring a witness preparation professional to help out with the job.*

***Ellen Finlay responds:***

***Before forming Jury Focus in 1998, Ellen Finlay, J.D., a 1986 graduate of the University of Texas School of Law, practiced law in Houston and was a shareholder in Thompson & Knight. Jury Focus provides trial consulting services throughout the U.S.***

In reviewing Mr. Carner's brief article, I am struck that his comments do not reflect an appreciation of the truly daunting task that is witness preparation, especially the preparation of testifying experts. For purposes of this response, I have chosen to refrain from commenting on the majority of his suggestions, even if I disagree with the wisdom behind his assertions (e.g., whether a bow tie adds a "nerdy nod of credibility"). Instead, I've chosen to focus on the common thread throughout his article - the recognition that it is not wise to simply throw experts in to the witness chair and expect them to shine without making sure they are fully prepared for their time under the spotlight.

Because I tried cases for twelve years before entering the trial consulting profession in 1998, I cannot help but be empathetic when it comes to the plight of trial attorneys because I experienced the obstacles they face when gearing up for trial. For example, I know that most attorneys are taught to prepare witnesses in a very cookie-cutter fashion. Attorneys are taught to instruct witnesses to testify, "I don't recall" if they are not absolutely sure about the answer to questions seeking important as well as trivial information. Very few attorneys have had the opportunity to observe more than one or two juries dissect the performance of their witnesses. As a result, they do not appreciate how much most jurors loathe the phrase "I don't recall" if it is used more than once or twice. This response is not the appropriate time to discuss attorney misconceptions about witness testimony, but certainly an attorneys' approach to witness prep can be counterproductive.

I also know from my time in the trenches as well as my time helping my clients that most attorneys do not set aside adequate time to prepare direct examinations of their witnesses, including their experts. Throughout law school and our years as practicing lawyers, most trial attorneys obtain virtually no meaningful training in the preparation of direct examinations. Most attorneys graduate law school prepared to conduct cross-examinations. We've watched crosses on television and at the movies since we were children. And let's face it, cross-examination is much more fun than direct. I've had the opportunity to judge a number of law school mock trial exercises and it can be painful watching young, inexperienced attorneys attempt to navigate their witnesses through a direct. But these young Clarence Darrow's in training are magically transformed once they get to cross opposing witnesses.

This is important because preparation of a good direct is the most effective way to communicate your story to both the jury and your own witnesses. A well crafted, methodical direct is critical to providing a road map to the jurors. And working through the draft direct with your witnesses helps them understand what you are trying to tell the jury. The draft direct also helps witnesses understand when they should speak openly and directly to the jury about a given topic versus when they should recognize the constraints of cross and answer “no” or “yes” or “that is correct.” If they know a topic will be covered in direct or redirect, they are less likely to try to force it into an answer during cross where it may not be appropriate or where it may serve to undermine their credibility or likeability.

I sometimes hear attorneys worry that a witness may seem “too coached” if they are put through an actual direct during witness prep. In my opinion, this perception does not result from the use of an actual direct examination during witness prep but instead results from the tendency to hyper-focus on a few key questions or phrases. Yes, jurors do notice when you use the same phrase over and over or when the expert parrots the same phrase the attorney used during opening. I tried one case in the mid-90s where both opposing counsel and his expert used the phrase “footprints in the sand.” I thoroughly enjoyed hearing the jurors repeat the phrase in a mocking tone after the verdict came in.

Of course, handling experts is typically more difficult than handling other witnesses. First, most experts have limited availability so that their prep is often crammed into a night session during the middle of trial. Second, testifying witness hourly fees can be extraordinarily high which may lead attorneys and their clients to severely limit prep time. Third, testifying experts often mistakenly believe they don’t need much prep and can become openly hostile when anyone, including an outside consultant, tries to work with them prior to trial. I suspect every jury consultant can tell war stories about working with these types of egotistical witnesses and there is simply not enough space for me to do justice to this topic. Fourth, many experts have a difficult time accepting that cross is not the appropriate time to do battle with opposing counsel. They forget, at their peril, that most trial attorneys excel at cross. Lastly, attorneys often lack the imagination, creativity or experience to identify what tools or props the experts might need to bring out their inner teacher.

“Turning an expert witness into a great witness” is a daunting task. The logistical challenges associated with expert witness testimony are just a fact of life for most trial attorneys, and those challenges are only compounded by the personality characteristics that sometimes lead a person to rise to the top of their field to become an expert. While it is impossible to fully cover witness prep in this article (or any article for that matter), advance preparation of a well thought-out direct is a good starting point for the process of prepping an expert. Once the story line has been fleshed out and detailed, it is much easier to help the expert hone his or her testifying skills and handle the types of issues identified in Mr. Carner’s article.

### *Reply from Doug Carner to the trial consultant responses:*

I agree with Ellen Finlay regarding the time commitment required for proper witness preparation and, due to the brevity of the article, I chose to focus on only the most damaging witness pitfalls versus the equally important suggestions and scenarios desired by Elaine Lewis or the psychological concerns raised by Stanley Brodsky. Addressing all of those points would make for an excellent, and much longer, follow-up article.

*-Doug Carner*

## *“A Parade of Horribles” – Broccoli, Burial Markets, and Justice Scalia’s Wife: The Role of Analogies in Human Decision-Making from Justices to Jurors*

BY RYAN A. MALPHURS & L. HAILEY DRESCHER

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Although Supreme Court advocates and trial attorneys argue before very different audiences, both Supreme Court justices and juries rely on analogies to make sense of ambiguous and complicated situations. For trial consultants, the use of analogies and their suggested integration into cases is not a new concept. In fact you would probably be hard pressed to find a trial consultant who would recommend avoiding the use of analogies at trial. Why do the majority of trial consultants suggest the adoption of analogies? Because an “analogy is a powerful cognitive mechanism that people use to make new inferences and learn abstractions,”<sup>1</sup> analogies assist in making a poorly understood situation more approachable. However, while trial consultants generally advocate the use of analogies, trial attorneys often fearfully shudder at the thought of using them.

Perhaps analogies and hypotheticals remind attorneys of their nightmares in law school—the grouchy curmudgeon professor posing a devastating analogy or the saccharine professor kindly asking a crushing hypothetical. All of us have similar night terrors related to the impossible challenge be it graduate school, law school, or grade school. But assuming most attorneys have shaken off the mental scars of law school, for trial attorneys, analogies often contain hidden weaknesses. When opposing counsel or adverse jurors identify an analogy’s weakness, a seemingly solid case may suddenly disintegrate from its own flawed logic.

Without proper consideration and testing, adequate analogies may play into the hands of a skilled opposing counsel. After all, law schools do train burgeoning lawyers to think abstractly about

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<sup>1</sup>Gentner, Dedre, and Arthur B. Markman. “Mapping in Analogy and Similarity.” *American Psychologist* 52, no. 1 (1997): 32.

situations, turning seemingly stable arguments into tenuous and slippery scenarios. Thus, attorneys do have much to fear about poorly considered analogies – much is at stake. But, if reversed analogies have the ability to powerfully undermine a case, then successfully advanced analogies have the ability to control how justices and jurors understand a case. Whether an attorney offers his or her audience an analogy, this much is certain – justices or jurors will adopt their own analogy to deconstruct a case. Which analogy would you prefer: yours or theirs? All humans rely on analogies in their reasoning and decision-making; this paper reviews compelling research on the ubiquitous nature of analogies, distinguishes between intuitive and deliberative analogies occurring in the recent SCOTUS health care oral arguments, and makes suggestions for attorneys and trial consultants in the use of deliberative analogies at trial.

### *The Ubiquitous Analogy: Intuitive or Deliberative*

“The ability to think analogically is central to human cognition”<sup>2</sup> and for good reason, because the versatile power of the analogy makes it “a tool for a wide range of purposes, including solving problems, constructing explanations, and building arguments.”<sup>3</sup> The “mapping of relations” assists humans in understanding “two very disparate domains” by using our prior understandings of the world to make sense of new and novel situations.<sup>4</sup> Analogous reasoning “promotes comprehension and abstraction,”<sup>5</sup> making it “one of the most common forms of reasoning in law” as “legal inference is drawn from one case that has already been classified and is assessed to another case on the basis of similarity and dissimilarity.”<sup>6</sup> Through analogical reasoning, known as hypotheticals in the legal community, legal scholars and practitioners attempt to anticipate the ramifications of various legal and policy decisions. Because the Supreme Court justices often face challenging policy decisions, they rely heavily on hypothetical analogies to achieve a clear understanding of the impact the Court’s decision may have on its citizenry. Since humans adopt analogies to make sense of the ambiguity or uncertainty before them, evaluating, advancing, and controlling an analogy offers attorneys a powerful opportunity to influence how a judge or juror cognitively processes a case.

Jurors and justices often find themselves in a similar situation – “a deliberately adversarial problem area, in which there is no side with the right answer, but rather where everything is a matter of degree.”<sup>7</sup> Separate from jurors, but similar in task, the justices have been presented with written briefs, lower court opinions, and various supplemental materials. Oral arguments present them with the opportunity to probe a case’s “weakness, oversights, and implications....Hypotheticals/[Analogies] can

<sup>2</sup>Kurtz, Kenneth J, Chun-Hui Mao, and Dedre Gentner. “Learning by Analogical Bootstrapping.” *Journal of the Learning Sciences* 10, no. 4 (2001): 417..

<sup>3</sup>Gentner, Dedre, and Keith J. Holyoak. “Reasoning and Learning by Analogy: Introduction.” *American Psychologist* 52, no. 1 (1997): 32.

<sup>4</sup>Gick, Mary L., and Keith J. Holyoak. “Analogical Problem Solving.” *Cognitive Psychology* 12, no. 3 (1980): 307.

<sup>5</sup>Kurtz, Kenneth J, Chun-Hui Mao, and Dedre Gentner. “Learning by Analogical Bootstrapping.” *Journal of the Learning Sciences* 10, no. 4 (2001): 417

<sup>6</sup>Macagno, Fabrizio, and Douglas Walton. “Argument from Analogy in Law, the Classical Tradition, and Recent Theories.” *Philosophy and Rhetoric* 42, no. 2 (2009): 154-155.

<sup>7</sup>Rissland, Edwina L. “Dimension-Based Analysis of Hypotheticals from Supreme Court Oral Argument,” *Proceedings of the 2<sup>nd</sup> International Conference on AI and Law* Vancouver, BC, 1989, p. 15.

be particularly potent in novel situations for which the body of relevant case law is sparse: they can provide gedanken [thought] experiments in which conditions can be tested in the way mathematicians test new conjectures.”<sup>8</sup> Although the Supreme Court may have the advantage of education, experience, and background information, more information does not always mean superior decision-making. Much of the quality of an analogy or reasoning process depends upon whether a thinker intuitively or deliberatively approaches problem-solving.<sup>9</sup>

As humans we know that some analogies work better than others and that it may take careful consideration of characteristics to determine an analogy’s suitability. We have all experienced this in trial strategies meetings: an attorney blurts out an analogy to describe a particular situation, and two minutes later a devastating flaw is found. Considering all facets of an analogy’s utility forces humans into deliberative decision-making from what may have been an intuitive or impulsive analogy. Lately researchers have been focusing intensely on intuitive deliberative decision-making in public policy circles,<sup>10</sup> and scholars have adopted similar considerations in juror decision-making.<sup>11</sup> These scholars similarly describe two kinds of thinking: “Intuitive and automatic, and another that is reflective and rational – the Automatic/[Intuitive] system is rapid and is or feels instinctive. . . . The Reflective/[rational] system is more deliberate and self-conscious,”<sup>12</sup> or “sometimes the term rational (or logical) is applied to decision-making that is consciously analytic, the term non-rational to decision-making that is intuitive and judgmental.”<sup>13</sup>

As social science scholars have turned greater attention to the dual process of human decision-making, they note dangers and drawbacks associated with intuitive reasoning.<sup>14</sup> However, we would

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<sup>8</sup>Rissland, Edwina L. “Dimension-Based Analysis of Hypotheticals from Supreme Court Oral Argument,” *Proceedings of the 2<sup>nd</sup> International Conference on AI and Law* Vancouver, BC, 1989, p. 1.

<sup>9</sup>I believe it is useful to understand intuitive and deliberative thinking on a spectrum of idealization. On one end sits pure emotion and instinct, and on the other pure logic and analytic reasoning, neither contain the other, but the decision-making process contains a bit of each. We make our decisions using both emotion and logic, but the process by which we reach a decision can have varying levels of intuition and deliberation.

<sup>10</sup>See Brafman, Ori, and Rom Brafman. *Sway: The Irresistible Pull of Irrational Behavior*. New York: Random House, 2008.; Kahneman, Daniel. *Thinking, Fast and Slow*. New York: Farrar, Straus, and Giroux, 2011.; Thaler, Richard H., and Cass R. Sunstein. *Nudge: Improving Decisions about Health, Wealth, and Happiness*. New York: Penguin Group, 2009.

<sup>11</sup>See De Vries, Marieke, Rob W. Holland, and Cilia L.M. Witteman. “Fitting Decisions: Mood and Intuitive Versus Deliberative Decision Strategies.” *Cognition & Emotion* 22, no. 5 (2008): 931-43. ; Richetin, Juliette, Marco Perugini, Iqbal Adjali, and Robert Hurling. “The Moderator Role of Intuitive Versus Deliberative Decision Making for the Predictive Validity of Implicit and Explicit Measures.” *European Journal of Personality* 21, no. 4 (2007): 529-46.; Simon, Herbert A. “Making Management Decisions: The Role of Intuition and Emotion.” *The Academy of Management Executive* 1, no. 1 (1987): 57-64.; Sunwolf, and David Seibold. “Jurors’ Intuitive Rules for Deliberation: A Structural Approach to Communication Injury Decision Making.” *Communication Monographs* 65, no. 4 (1998): 282-307.; Tormala, Zakary L., Joshua J. Clarkson, and Marlone D. Henderson. “Does Fast or Slow Evaluation Foster Greater Certainty?” *Personality and Social Psychology Bulletin* 37, no. 3 (2011): 422-34.

<sup>12</sup>Thaler, Richard H., and Cass R. Sunstein. *Nudge: Improving Decisions about Health, Wealth, and Happiness*. New York: Penguin Group, 2009. p.19-20.

<sup>13</sup>Simon, Herbert A. “Making Management Decisions: The Role of Intuition and Emotion.” *The Academy of Management Executive* 1, no. 1 (1987): 57.

<sup>14</sup>These scholars often point out the dangers and drawbacks associated with intuitive reasoning, but neither reasoning process is superior in itself, but rather both ends of the spectrum offer benefits depending upon the situation. When decision-makers face situations and environments requiring quick decisions and actions, a deliberative process may be a poor approach. Similarly, when decision-makers face complex variables and an unclear path with much at stake, then an intuitive approach should probably be avoided.

all hope that in the courtroom both jurors and justices adopt a deliberative process “analyzing the pros and cons of different options before making a decision. Deliberative decision-making is cognition based, rule governed, analytical, precise and slow. Deliberating decision-makers take their time to thoroughly analyze the positive and negative aspects of different options.”<sup>15</sup> While we hope for a deliberative process, we also know that humans prefer the comfort and ease of intuitive reasoning. A skilled trial attorney will guide jurors toward a deliberative process by offering a deliberative analogy that quickly makes sense of the complex environment for jurors.

### *Supreme Analogies*

Deliberative analogies occupy a liminal space between intuitive and deliberative decision-making. While analogies speak to prior personal experience and emotional familiarity, they also present a complex situation by making abstract concepts concrete. Intuitive analogies may fail to withstand legal scrutiny and questioning. At the Supreme Court, we would expect skillful implementation of deliberative analogies, but like jurors, even the justices occasionally lapse into intuitive analogies without any cognitive rigor.

In the Affordable Care Act cases, the justices were placed in the unenviable position of interpreting Congress’ intention, limits to the Commerce Clause, the Anti-Injunction Act, and the expansion of Medicaid. The Affordable Care Act is 2,700 pages alone, and as Justice Scalia dryly noted “You really want us to go through these 2,700 pages?”<sup>16</sup> The media chastised Scalia for his comments, and to some degree rightly so, but his remark calls attention to the larger bulk of materials and arguments through which the justices must wade. In ordinary cases, justices have thousands of potential pages to examine; in the Affordable Care Act cases, the justices probably had well over 20,000 pages to review<sup>17</sup> and listened to 4 oral arguments comprising 6 hours. Much like jurors in complex cases, the justices also struggle to make sense of the information before them and reach an agreed upon decision.

The justices adopted a variety of analogies to test legal theories that advocates advanced, offering some humorous analogies at times. Justice Sotomayor inadvertently opened Pandora’s box early in oral arguments when she asked “What is the parade of Horribles that you see occurring .... What kinds of cases do you imagine the courts will reach?”<sup>18</sup> Following Justice Sotomayor’s statement, the justices poured forth their hypothetical analogies, some deliberative and insightful and some intuitive and distracting.

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<sup>15</sup>De Vries, Marieke, Rob W. Holland, and Cilia L.M. Witteman. “Fitting Decisions: Mood and Intuitive Versus Deliberative Decision Strategies.” *Cognition & Emotion* 22, no. 5 (2008): 932.

<sup>16</sup>Ironically, even Justice Scalia, the standard bearer of textual scrutiny within historical context, notes the impossibility of scrutinizing the Healthcare Act’s text.

<sup>17</sup>Some readers may dismiss the workload of the justices by indicating that a justice’s clerks complete most of the work. While this is partially true, clerks typically identify and summarize the most relevant material for the justices’ consideration, removing any redundant arguments. After the clerks have offered their suggested readings, then the justices will turn to the relevant material, often calling for further materials related to preceding cases noted throughout opposing briefs. Justices often joke that the first few years are spent just learning how to manage the sheer amount of paper presented to them.

<sup>18</sup>U.S. 11-398 Department of Health and Human Services et al. v. Florida et al. p.14 (3-26-2012).

Unfortunately, intuitive analogies tend to be hastily offered, contain fatal weaknesses, and may reflect a poor level of consideration. In the Affordable Care Act oral arguments, Justice Scalia advanced two poor analogies that he later quickly abandoned. The most active participant in oral arguments, Justice Scalia’s weak analogies reflect his intuitive “off-the-cuff” style.

In this example, Justice Scalia presses Solicitor General Verrilli’s definition of a “market” related to the distinct nature of the “health care market,” and the need for an individual mandate as argued by the Solicitor General:

*Justice Scalia: 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....*

Justice Scalia then attempts to shift the analogy to “blue eyes”:

*Justice Scalia: Is that a principled basis for distinguishing this from other situations? I mean you know, you can also say, well, the person subject to this has blue eyes. That would indeed distinguish it from other situations.”*

It is not until Justice Ginsburg points out the obvious flaw that Justice Scalia relents:

*Justice Ginsburg: Mr. Verrilli, I thought that your main point is that, unlike food or any other market, when you made the choice not to buy insurance, even though you have every intent in the world to self-insure, to save for it, when disaster strikes you may not have the money.<sup>19</sup>*

In the next example, Justice Scalia attempts to persuade Paul Clement, former Solicitor General for President George W. Bush, to adopt his understanding of “coercion.” In this instance, Justice Scalia attempts to aid Mr. Clement, but Mr. Clement resists his characterization. Justice Scalia’s impromptu analogy draws laughter and comments from other justices – both from his performance and lack of clarity – eventually abandoning his failing analogy:

*Justice Scalia: ...I mean, I think you know the old Jack Benny thing, Your Money or Your Life, and you know he says ‘I’m thinking, I’m thinking.’ [laughter]*

*It’s funny because it’s no choice. You know? Your life? Again it’s just money. It’s an easy choice....*

*Now, whereas, if the choice were your life or your wife’s, that’s a lot harder. [laughter].... It’s a tough choice.... Okay? You can’t refuse your money or your life. But your life or your wife’s, I could refuse that one. [laughter]*

*[excerpted text.....]*

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<sup>19</sup>U.S. 11-398 Department of Health and Human Services et al. v. Florida et al. p.13-14 (3-27-2012).

*Justice Sotomayor: Mr. Clement, he's not going home tonight. [laughter]*

*Justice Scalia: I'm talking about my life. I think – take mine, you know? [laughter]....I won't use that as an example. Forget about it.<sup>20</sup>*

Justice Scalia's analogies neither appear well thought out nor do they present a situation that could lead to further insight. While the reference to Justice Scalia's wife provides a humorous moment its introduction serves as a distracting hindrance to Mr. Clement's case, forcing Chief Justice Roberts to restore order by declaring "That's enough frivolity for a while." Instead his analogies waste the advocate's precious time and detract from the argument. Although reasoning through intuitive analogies is common in human decision-making, one would hope a Supreme Court justice could offer a more rigorous analogy to test legal principles, particularly in such an important case.

In contrast to Justice Scalia's active questioning and impromptu intuitive analogies, Chief Justice Roberts and Justice Alito offer more thoughtful comparisons, striking at the heart of the individual mandate by comparing the unexpected need for health care to cell phones and the burdensome cost of health care to the burial market. Chief Justice Roberts advances a deliberative analogy when referring to people's inability to control when they enter the health care market:

*General Verrilli: ...People cannot generally control when they enter that [healthcare] market or what they need when they enter that market.*

*Chief Justice Roberts: Well, the same, it seems to me, would be true for the market in emergency services: police, fire, ambulance, roadside assistance, whatever.*

*You don't know when you're going to need it; you're not sure that you will. But the same is true for health care. You don't know if you're going to need a heart transplant or if you ever will. So there's a market there. In some extent we all participate in it.*

*So can the government require you to buy a cell phone because that would facilitate responding when you need emergency services? You can just dial 911 no matter where you are?<sup>21</sup>*

As General Verrilli attempts to explain the differences between health care and emergency services, Justice Alito offers burial services as an even closer analogy:

*General Verrilli: ....This is an issue of market regulation and that's how Congress looked at this problem....*

*Justice Alito: Do you think there is a market for burial services?*

*General Verrilli: For burial services?...Yes I think there is.*

*Justice Alito: All right. Suppose that you and I walked around downtown Washington at lunch hour and we found a couple of healthy young people and we stopped them and we said: You know what you're doing? You are financing your burial services right now because eventually you're*

<sup>20</sup>U.S. 11-400 Florida et al. v. Department of Health and Human Services, et al. p. 31-33 (3-28-2012).

<sup>21</sup>U.S. 11-398 Department of Health and Human Services et al. v. Florida et al. p. 5-6 (3-27-2012).

*going to die, and somebody is going to have to pay for it, and if you don't have burial insurance and you haven't saved money for it, you're going to shift the cost to somebody else. Isn't that a very artificial way of talking about what somebody is doing?.....*

*[excerpted text.....]*

*General Verrilli: ....[There's] a difference, and it's a significant difference. That in this situation one of the economic effects Congress is addressing is that the many billions of dollars of uncompensated costs are transferred directly to other market participants. It's transferred directly to other market participants because health care providers charge higher rates in order to cover the cost of uncompensated care, and insurance companies reflect those higher rates in higher premiums, which Congress found translates to a thousand dollars per family in additional health insurance costs.<sup>22</sup>*

Clearly Chief Justice Roberts' and Justice Alito's analogies tested case issues more thoroughly than Justice Scalia's broccoli or wife examples; however, one cannot tell whether the justices planned to pose these analogies or whether they materialized through discourse. But the justices' defenses and discussions of the analogies suggest a deeper consideration than impromptu or intuitive usage. Planned or unplanned, intuitive or deliberative, in either instance the larger issue for readers to recognize is that analogies have varying degrees of quality, and they play a fundamental role in human reasoning even at the highest level of decision-making. The advantage is awarded to the attorney who offers either juror or justice a deliberative analogy that makes the abstract concrete and withstands the battering of oppositional winds.

## *Principles for Analogies*

### **1. Employ Deliberative Analogies**

Test analogies before introducing them at trial. Each case is unique and the current political winds change so frequently it can be difficult to predict how analogies may be received. Analogies must resonate with the target audience in order to prove even moderately effective. References that emanate from outside the audience's breadth of knowledge or are culturally situated may prove confusing or simply be dismissed. But without testing analogies within the larger scope of a mock trial, attorneys may find their intuitive judgments lead them astray.

Recently, we conducted research in New York and some of the Gulf States. Attorneys in New York wanted to liken their opposition to the banking sector that caused, in part, the economic downturn. Similarly, attorneys in cases along the Gulf Coast wanted to liken their opposition to the oil industry. When testing these analogies during mock trials, we learned the proximity to these industries created a dependence which caused jurors to support their regional businesses. Family and friends were employed by the very industries the attorneys critiqued through their analogies. Conversely, New Yorkers viewed the oil industry in a more negative light than the banking sectors, and Gulf Coast

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<sup>22</sup>U.S. 11-398 Department of Health and Human Services et al. v. Florida et al. p. 7-9 (3-27-2012).

jurors viewed Wall Street more negatively than the oil industry. Without previously testing jurors' reactions to these industries, we would not have expected to find these responses.

Testing analogies may also reveal analogies that jurors themselves may construct. We often find jurors creating their own analogies, which provide attorneys with a powerful weapon at trial. But without testing analogies, an attorney risks having his or her analogy replaced by another juror's, a risky and dangerous proposition. Vetting analogies prior to trial reduces the probability that they may be substituted with the imaginings of a juror.

The deliberative process of screening analogies during mock trials is crucial for success by scrutinizing hypotheticals in a controlled environment. Testing analogies at mock trials allows hidden weaknesses to be discovered by jurors or an "opposing counsel" without the damaging consequences at trial. And testing analogies also reveals their strengths, providing attorneys with a powerful framing device that may control jurors' perception of the case during deliberations. Of course it is not always feasible to test analogies through mock trials, but attorneys may still deliberate over analogies, considering strengths and weaknesses with team members. At the very least, deliberative analogies will more often prove effective than intuitive analogies by withstanding the opposition's scrutiny and may be adopted by jurors during deliberations.

## 2. Control Analogies

Trial attorneys must consider the timing of analogies. The earlier that attorneys use analogies in cases, the more vulnerable analogies become to the opposing counsel's criticisms. Thus, knowing when to advance the most important analogies is critical for attorneys and trial consultants to determine. Because analogies provide a potent frame through which jurors may understand and decide a case, the most effective analogies may often be used in closing argument. During closings, the opposition may have little time to counter or reverse an analogy for his or her own purposes. Smaller helpful analogies may be used throughout the case, but attorneys should time the most influential analogies for suitable contexts during court (witness testimony, closings, cross-examine, etc...).

Thematic resonance should also be considered and controlled by attorneys and trial consultants; analogies should not clash with case themes or social and political undercurrents. The prior example of banks and the oil industry involved attorneys that wanted to research breach of contract and product liability disputes. Thematically, using banks to frame a contract dispute or comparing the oil industry to the opposition in a product liability case meshes well with the case themes (i.e. banks ignored regulations and broke trust; oil industry's product hurt environment). If these analogies were offered to jurors on the West Coast or North-West, proximity would not have been an issue, and thematically the analogies would have resonated with larger case themes. Attorneys and consultants ought to consider the manner in which analogies align with larger case themes, because the analogies must intuitively make sense to the jurors. Any emotional reaction to the analogy or poor thematic alignment may cause jurors to reject the analogy and adopt their own.

Finally, turning or reversing an opposition's analogy can be devastating to the opposition's case. For jurors, exposing the weaknesses of the other side's analogy causes them to gravitate toward the most stable and secure analogy, which is, hopefully, yours. Trial consultants and attorneys should pay close attention to analogies used during pre-trial conferences and settlement discussions in antici-

pation of these analogies being brought out at trial. Turning these analogies and testing any reversed analogies may provide insight into the effectiveness of a failed analogy. The vast majority of attorneys neither test nor deliberate carefully over the analogies they incorporate in trial, many use them intuitively, leaving their case vulnerable should the analogy prove deficient. If a trial consultant or attorney can twist the opposition's analogy for his or her own purposes, then substantial influence may be gained during deliberations.

### 3. Avoiding Analogies

"That is not this case..." loathsome words to a Supreme Court Justice, but a wise approach depending upon the circumstances. Like Supreme Court advocates, trial attorneys and consultants may encounter situations where analogies should be avoided. Occasionally, analogies cannot sufficiently capture a case, or certain cases may prompt jurors to adopt adverse analogies. Without testing analogies in mock trials, it may be difficult for attorneys to know when analogies fail to encapsulate a situation and when cases prompt adverse analogies. In a recent breach of contract case with a complex interplay of variables and parties, we learned that adopting an analogy to contextualize the complex relationship actually prompted jurors to simplify the relationship through an analogy that cut against our client's interests. We knew opposing counsel would use a similar analogy and thus strategized to illustrate to jurors why the analogy fell short, or why "that is not this case." Sufficient research will assist attorneys and trial consultants in discerning when to advance an analogy and when to avoid one. It is not common that we recommend avoiding analogies, certainly humans may gravitate towards their own, but if an attorney can counter intuitive analogies then he or she may have broken down a troubling barrier that could cripple a case.

### *Conclusion*

Perhaps the potent nature of an analogy results from its ability to lead a disparate group of people from confusion to clarity. Philosophers, anthropologists, linguistic scholars, and rhetoricians have all sought to explain the persuasive influence of analogies – there is an ineffable power to them. However, analogies are not a panacea for a troubled case. On their own, analogies will not persuade jurors of your client's case, but they will assist in framing jurors' understanding of complex issues, and they will be used in a jury's deliberations to make sense of the case.

Instead of cringing or running from analogies, we urge attorneys to consider adopting them in their cases. We know that analogies play a fundamental role in human decision-making from Supreme Court justices to ordinary jurors. Analogies assist justices and jurors in making sense of complex problems before them. Varying qualities of analogies exist based upon intuitive or deliberative reasoning, and even deliberative analogies may not hold up to mock trial testing. The question attorneys should ask, is not "should I use an analogy?," but rather "will jurors use my analogy, my opposition's, or their own?," because it is certain jurors will adopt an analogy. Which analogy jurors adopt depends upon deliberate consideration, but surely attorneys can offer better analogies than broccoli or Justice Scalia's wife.

***Book Review: Ideology, Psychology, and Law***  
***Edited by Jon Hanson***  
***Oxford University Press, Inc. (2012, 800 pages)***

BY RITA HANDRICH

*Rita R. Handrich, PhD is a trial consultant with Keene Trial Consulting and the Editor of The Jury Expert. She has a long-standing curiosity about the myriad ways our experiences, values and beliefs are reflected in our decisions and in how we 'hear' various fact patterns. She is a frequent contributor to The Jury Room <http://www.keenetrial.com/blog>, recipient of ABA Blawg 100 Awards for 2010 and 2011, where bias, ideology and persuasion are discussed in their ever-changing (and often a little scary) forms.*

Trial consultants, and the very best trial lawyers, practice with an awareness of the law, the domain of the case facts, and the way jurors are likely to understand and misunderstand all of it. If these avenues of thought had a single intersection, you would find that Jon Hanson has been living on that corner for 25 years. As a Harvard Law School professor and prolific writer, he has done much to keep me and many others informed of the traffic coming from these diverse directions.

In March of 2012, the Harvard Law School [published an interview](#) with Dr. Hanson and asked him what big insights he has learned over his career that led him to study the intersection of law and the mind sciences. His reply follows:

*"To keep things simple, I'll boil them down to two big insights.*

*First, mind scientists had learned that most people in western cultures operate with a naïve and commonsensical model of human psychology that presumes that an individual's actions reflect a stable personality or disposition and little else. From that perspective, people are presumed to be in control of, and responsible for, their behavior and its consequences. By the way, that's the same model of human behavior that is employed in law and conventional legal theory. And it's the same model that the tobacco industry actively promoted.*

*The second big insight was that that model of human behavior is fundamentally wrong. People are moved less by a stable disposition and more by internal and external forces that generally go unnoticed in our causal stories. The errors go beyond our causal assessments of other people's behavior; we confuse and deceive even ourselves, believing our own reasons, when social science reveals those reasons often turn out to be mere confabulations."*

As trial consultants, these two paragraphs boil down what we repeatedly observe in mock jurors processing case facts and simultaneously supplementing the evidence with their own thoughts, values, beliefs, and assumptions at an often dizzying rate. Humans are not akin to logic- and reason-based data processors. We do not take in facts and spit out evidence-based conclusions. We hear your story and automatically supplement it with our own experiences and biases, forming conclusions that are strongly felt and defended—even when we cannot explain the ‘why’ of our conclusions. Ideology (what we believe and hold dear at our core) is inescapable. I cannot step outside my own biases and neither can you. Ironically, believing we can avoid our own intrinsic biases makes us more prone to step right in the middle of the proverbial ‘it’.

Bias is a fundamental element we consider in every legal case we test in pretrial research. But, as a word, ‘bias’ conjures up a negative reaction. Bias is bad. We don’t want to appear biased. Usually, I like the relative neutrality of the word ‘ideology’. It is more descriptive of how we each inhabit our beliefs, attitudes and values rather than a direct indictment of our character. We can invite jurors to consider their ‘ideology’ or we can shame them for having ‘biases’. In other words, we can curiously consider their reactions rather than punitively judging them.

I have long believed that the most insightful nuggets of information are found at the intersections of multiple disciplines. Although I was daunted at the prospect of 800 pages, this highly unusual tome illuminates the intersection of the “mind sciences” (e.g., social psychology, social cognition, psychiatry, cognitive neuroscience, neurolaw, decision theory, behavioral economics, and so on) and the law. In short, this book tells us that we are almost never impartial beings and our application of the law to specific fact patterns is also rarely impartial.

This book isn’t a fast read, but it is an exhaustive reference work, intended to be read topically. It is long, written by researchers as an encyclopedic resource for thinkers who want to learn more about how we make decisions and who are willing to take time to ponder how to apply that knowledge in the day-to-day challenges and questions of litigation advocacy. You might think of it like a series of densely written academic articles that one has to chew, digest, and ponder, one at a time. The articles requires study, and for those willing to do it, the knowledge will be worth the effort. If you do not enjoy reading (and, at times, deciphering) academic articles, you will not enjoy the majority of this book. If you want to take on the challenge, you may find it most useful initially to pick and choose chapters of immediate interest and then to expand your reading into areas not as familiar to you.

I began with Chapters 12 and 13 (both on bias and how we can buffer, aggravate or help make bias visible) and then chose Chapter 14 (the backlash against mind sciences among legal academics). The more I read, the more curious I became as to how many of my own assumptions are dated and inaccurate given the more recent research. That curiosity pushed me to read more.

The [summaries of literature](#) the chapters within this book provide are invaluable to those interested in learning more about how decision-making is done both psychologically and contextually, what we know now about how to influence that process, and (perhaps most importantly) how very much we still have to learn. Or, as [Jon Hanson himself summarizes](#):

*“How we think’ affects ‘what we think’ and ‘what we want to believe’ about the law”.*

This single sentence is lovely. It promotes curiosity rather than judgment. It opens our minds to consider ‘ideology’ rather than ‘bias’ and allows us to identify alternate ways of telling our story more inclusively and invitingly so that individuals with varying worldviews can come together on their conclusions about your legal narrative. And that, to me, is the essence of persuasion as seen through the particular lens of *Ideology, Psychology, and Law*.

## *Juror Questions: Why Attorneys Should Embrace Allowing Jurors To Ask Questions of Witnesses*

BY ANDREA KREBEL

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In 2005, the American Bar Association's American Jury Commission<sup>1</sup> published a set of 19 jury principles to improve jury practice. One of the principles was that the court and parties should promote juror understanding of the facts and the law. Among the recommendations the committee made to improve juror understanding of the facts was allowing jurors to ask questions of witnesses in civil trials.

Most states leave it up to the individual judges' discretion to allow jurors to ask questions of witnesses in civil trials, either through case law, statute, or with no specific rule mandating or prohibiting such a practice. As of July 1, Illinois becomes the most recent state to specifically allow juror questions<sup>2</sup>. According to the National Center for State Courts State of the State Courts survey<sup>3</sup>, several states, such as Arizona, Colorado, Indiana, and Wyoming, mandate that jurors be allowed to ask questions during civil trials. A number of states, including Georgia, Minnesota, Mississippi, and Nebraska, outright prohibit jurors from asking questions of witnesses at trial<sup>4</sup>.

### *Perceived Benefits and Drawbacks of Juror Questions*

Nancy S. Marder<sup>5</sup> and Diamond, Rose, Murphy, and Smith<sup>6</sup> provide thorough literature reviews and explanations as to the possible benefits of allowing jurors to ask questions, as well as concerns voiced by judges and attorneys on the topic. The following is a brief summary of some of these arguments.

<sup>1</sup>American Jury Project (2005). *Principles for juries and jury trials*. Chicago, IL: American Bar Association. Retrieved from [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/american\\_jury/principles.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/american_jury/principles.authcheckdam.pdf)

<sup>2</sup>Tybor, J. R. (2012). New rule will allow jurors to submit questions in civil trials. Press release: Supreme Court of Illinois. Retrieved from <http://www.state.il.us/court/media/PressRel/2012/040312.pdf>

<sup>3</sup>Mize, G. E., Hannaford-Agor, P., & Waters, N. L. (2007). *The state-of-the-states survey of jury improvement efforts: A compendium report*. Williamsburg, VA: National Center for State Courts. Retrieved from [http://www.ncsconline.org/D\\_Re-search/cjs/pdf/SOSCompendiumFinal.pdf](http://www.ncsconline.org/D_Re-search/cjs/pdf/SOSCompendiumFinal.pdf)

<sup>4</sup>Hannaford-Agor, P. (2008). Judicial nullification? Judicial compliance and non-compliance with jury improvement efforts. *Northern Illinois University Law Review*, 28 (3), 407-424.

<sup>5</sup>Marder, N. S. (2010). Answering jurors' questions: Next steps in Illinois. *Loyola University Chicago Law Journal*, 41 (4), 727-752.

<sup>6</sup>Diamond, S. S., Rose, M. R., Murphy, B., & Smith, S. (2006). Juror questions during trial: A window into juror thinking. *Vanderbilt Law Review*, 59 (6), 1927-1972.

Potential benefits include:

- Answers to juror questions can improve comprehension – Jurors have an opportunity to clear up any confusion they may have regarding the facts of the case or clear up any misunderstandings right away, while the witness is still on the stand, so that it doesn't impact the way they understand the rest of the trial.
- Being allowed to ask questions can encourage jurors to pay attention – Much to the chagrin of attorneys, jurors are not passive viewers of a trial who process information and think about the case only after all of the testimony is heard. Jurors actively process information from witnesses (both verbal and non-verbal), exhibits, and attorneys. After days of testimony, however, jurors may become fatigued or their minds may drift. Being allowed to ask questions may incentivize jurors to pay close attention to the entire proceeding.
- Questions posed by jurors can give attorneys insight into how jurors are processing the case – Questions can show attorneys which areas they need to address more thoroughly and clearly.
- Getting questions answered in court may prevent jurors from turning to outside sources – If jurors can get answers to the questions they have during trial they may be less likely to use outside sources, such as the Internet, newspapers, dictionaries, etc., to get answers to questions they think are important.

Fears and potential drawbacks to juror questions:

- Allowing jurors to ask questions takes up too much time – Judges and attorneys fear that allowing jurors to ask questions will add a significant length of time to a trial.
- Attorneys will lose control over their trial strategy – Attorneys carefully hone their case, and often have a decent idea of what the other side is going to present. Sometimes attorneys intentionally leave out or downplay certain information, and fear the loss of control of their case if jurors are allowed to ask for more information on these topics.
- Jurors may react negatively if their question is not answered – There is fear that jurors will become angry, embarrassed or offended if their question is not answered, and may draw incorrect inferences from it.
- Allowing jurors to ask questions may affect their ability to remain neutral until it is time to deliberate – Judges and attorneys fear that jurors may weigh the responses to their own questions as more important than other evidence they hear at trial.

## *The Process*

Generally, the process courts follow in allowing juror questions of witnesses follows the recommendation of the American Jury Commission. The judge instructs the jurors at the outset of trial that they will be allowed to ask questions of witnesses. In some instances the judge explains that some questions would not be admissible. After a witness testifies, the judge allows the jurors to submit any questions they may have in writing to the bailiff. The judge reviews the submitted questions with the attorneys, and the questions are put into the record. Attorneys have the opportunity to object to any questions they deem to be inappropriate. Once the judge rules on the admissibility of the questions, the judge asks the questions of the witness. If necessary, the judge may choose not to read a juror's question verbatim, but instead may re-word it to be neutral or in the proper form. Once the witness answers all of the admissible questions from jurors, the attorneys may have the opportunity to use follow up re-direct and re-cross examination, but only on issues brought up by the questions.

## *Selected Research*

Over the years, several research studies and pilot tests have addressed the issues surrounding allowing jurors to ask questions. Most of these studies involve feedback from jurors, judges, and attorneys about the process, perceived value, and perceived fairness of the process. Three such studies are described below.

Larry Heuer and Steven Penrod<sup>7</sup> examined the impact of allowing jurors to take notes and ask questions in both civil and criminal trials through two experiments, one conducted in Wisconsin state courts, and the other involving both state and federal courts in 33 states. Heuer and Penrod provided a pre-instruction to be read to jurors before trial. They found that, on average, jurors asked 2.3 to 5.1 questions per trial, which came to less than one question per hour of trial. They found that when jurors were allowed to ask questions, jurors felt more informed about the evidence, thought the questioning of witnesses had been thorough, and were more confident they had sufficient information to reach a verdict. According to judges and attorneys jurors did not ask inappropriate questions, and jurors did not report being embarrassed or angry when their questions were objected to. They also found that jurors did not draw inappropriate inferences from unanswered questions. Jurors remained neutral, rather than becoming advocates, when they were allowed to ask questions, and did not rely more heavily on the answers to their own questions than the rest of the trial evidence. However, jurors, attorneys, and judges did not report increased satisfaction with the trial or verdict when jurors were able to ask questions compared to when they were not.

Attorneys in the study reported that their greatest fears regarding juror questions were not realized: information they deliberately omitted was not brought up, questions did not interfere with their trial strategy or cause them to lose command of their case, nor did they prejudice their client. After the trial, both judges and attorneys in cases where jurors were allowed to ask questions said they were more in favor of allowing jurors to ask questions than did those judges and attorneys on trials where

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<sup>7</sup>Heuer, L, & Penrod, S. (1996). Increasing juror participation in trials through note taking and question asking. *Judicature*, 79 (5), 256-262

juror questions were not permitted. Although some of the other possible benefits of allowing jurors to ask questions were not realized (questions did not alert attorneys to issues that needed further development or increase participant satisfaction with the trial), they concluded that the fears judges and attorneys had about allowing jurors to ask questions did not come to fruition.

The Arizona Filming Project, conducted in Pima County, Arizona<sup>8</sup> provided a unique opportunity to examine the questions jurors ask of witnesses as well as jurors' reactions. In this study, the researchers were allowed to videotape fifty civil trials and everything that happened in the jury room during the trial and deliberations. Researchers were given copies of the questions the jurors asked, and thus were able to analyze the jurors' discussions that led to the questions, the questions themselves, and what, if anything, the jurors said about their questions after they were addressed by the court and/or witnesses. In each of these cases, the judge pre-instructed the jurors regarding questions to witnesses, which included language explaining why some questions could not be answered. Jurors asked questions of 44% of the live witnesses in the 50 trials that were part of the study, and the number of questions for a particular witness increased with the length of the witness' testimony. On average, allowing jurors to ask questions added just over 30 minutes per trial, which included the time the judge spent reviewing the questions with the attorneys, asking the questions of the witnesses, and attorney follow up questions. Given the total length of the trials, this was not a long period of time.

A unique aspect of this study was that juror deliberations and discussions during breaks in trial were videotaped. An analysis of those discussions showed that jurors made mention of 11% of the questions they submitted. Jurors asked questions of nearly half of the expert witnesses. Most of those questions involved attempts to understand their testimony, and only a small number of questions directed at expert witnesses were about their credentials. As far as the type of questions asked:

- 80% of questions were about legal issues,
- 28% asked for clarification or definitions,
- Approximately 17% went to witness character (with just a small number of those regarding being paid to testify),
- 42% of all questions were what the researchers referred to as cross-checking, which is an attempt at judging witness credibility,
- only 8% of the questions were characterized as argumentative, and
- just a small number of questions were about insurance or management of the litigation.

In a second publication as part of the same research project, Diamond, Rose, and Murphy<sup>9</sup> examined the questions jurors submitted that were not allowed to be asked. Judges allowed 76% of the questions submitted by jurors to be answered, indicating that, for the most part, jurors asked relevant and admissible questions. The types of questions that were excluded the most frequently were questions asking for standards with which to judge the case (22% of disallowed questions), questions asking for definitions or miscellaneous facts (14%), questions about damage awards including insurance (13%), questions seeking information to help determine the character or credibility of a witness (12%), and questions about causation (12%).

<sup>8</sup>Diamond, S. S., Rose, M. R., Murphy, B., & Smith, S. (2006). Juror questions during trial: A window into juror thinking. *Vanderbilt Law Review*, 59 (6), 1927-1972.

<sup>9</sup>Diamond, S. S., Rose, M. R., & Murphy, B. (2004). Jurors' unanswered questions. *Court Review*, Spring, 20-29.

Judges acknowledged disallowed questions just under one-third of the time. Juror discussions and deliberations were analyzed to examine jurors' reactions to disallowed questions. They found that most of the time jurors did not discuss disallowed questions. The discussions about disallowed questions that did occur tended to be short, though discussions about insurance were longer. Jurors either accepted the lack of response from the judge or did not complain about half of the unaddressed questions.. Only a very small number (4%) of responses from jurors were negative, which does not support the fear that jurors will be resentful or angry if their questions are not answered. Jurors tried to generate their own answers to unasked questions (usually based on other related testimony or their own experiences) in only a small number of instances.

The Seventh Circuit Jury Project Commission<sup>10</sup> conducted a study designed to test several of the ABA American Jury Commission Jury Principles, including allowing jurors to ask questions of witnesses. Juror questions were analyzed in both phases of the study. Jurors were pre-instructed about why and how to ask questions before trial, and in Phase Two an instruction included language regarding what types of questions would be appropriate and that jurors rarely have more than a few questions for any witness. Jurors asked questions in 83% of the trials, on average submitting six questions per day of trial. Just over half of the jurors in these trials reported having submitted questions. Jurors were more likely to ask questions if they were reminded after each witness that they had the opportunity to do so than when they were instructed that they could at the beginning of trial, but then were not reminded throughout the trial. The researchers did not have access to the questions jurors asked, so they relied on jurors' self-reports as to the purpose of the questions they asked. The most frequently cited purposes were to get additional information, to clarify information that was already presented, to check on a fact or explanation, and to cover something that the lawyers missed.

Judge and attorney ratings of the procedure were generally favorable. A strong majority of judges and attorneys (63% and 69% respectively) thought jurors submitted an appropriate number of questions, with a much smaller percentage reporting that too many juror questions were asked (27% of judges and 21% of attorneys). Overall, a majority of judges and attorneys thought allowing jurors to ask questions improved their satisfaction with the trial process, with only a small number of attorneys (and no judges) indicating that their satisfaction decreased. Judges and attorneys were asked to rate the impact of juror questions on fairness, efficiency, and juror understanding. Efficiency took the hardest hit, with 23% of judges and 28% of attorneys indicating that the juror questions decreased the trial's efficiency. All of the judges thought that allowing jurors to ask questions either increased or had no impact on fairness and juror understanding, while a small number of attorneys thought the questions decreased fairness and juror understanding (7% and 2% respectively). Based on these results, the Commission recommended the use of juror questions in future trials.

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<sup>10</sup>Seventh Circuit Bar Association American Jury Project Commission. (2008). *Seventh Circuit American Jury Project, final report*. Chicago, IL: Seventh Circuit Bar Association.

## *How Attorneys Can Use Juror Questions to Their Advantage*

Although many attorneys have a negative stance on the issue, most who have experienced the process favor it. Attorneys shouldn't fear juror questions and, in fact, there are ways attorneys can use juror questions to their advantage. First, juror questions provide invaluable insight as to how members of the jury comprehend the testimony they are hearing, or what they're having difficulty understanding. This could be particularly important in complicated cases, such as patent cases. For instance, it is beneficial to know if jurors are confused about the technology at issue in a patent case while attorneys still have the opportunity to address it through the witness on the stand or upcoming witnesses. Once jurors are in deliberations and realize they are confused they may send questions out to the judge, but at that point it is too late. This sort of confusion early on could impact the way jurors process information throughout the rest of the trial.

Secondly, jurors' questions may give attorneys insight into what jurors think important issues are in the case. Jurors may start asking questions about issues attorneys didn't think would be important. Attorneys can use this knowledge to emphasize, if necessary, this information through the testimony of upcoming witnesses instead of jurors going down the rabbit trail with little information from evidence or witnesses to go on. If the information truly is not a factor in the case, that is something attorneys can address and explain in closing arguments.

### *How to Ask the Judge to Allow Juror Questions*

If the judge does not indicate that he or she will permit jurors to ask questions during trial, attorneys should feel comfortable asking the judge to allow juror questions provided the case is not in a venue where juror questions are prohibited. Juror questions should be addressed in the pre-trial conference in which trial procedure is discussed. In case the judge is resistant to the idea, attorneys should become familiar with the case law in the trial venue, as well as with any court rules or statutes regarding juror questions. There are also numerous empirical studies (those cited above as well as many others) that attorneys can cite in an attempt to explain to judges why allowing jurors to ask questions is a beneficial practice. The Seventh Circuit Jury Project report suggests appropriate pre-instructions as well as final instructions on the issue.

The process of allowing jurors to ask questions of witnesses is becoming more widely accepted, and it will continue to become more commonplace as time goes on. There is no need for attorneys to be afraid of the process. Judges keep close control of the process, and both judges and attorneys who have participated in trials where jurors were allowed to ask questions have found it to be a positive experience. Juror questions are more likely to be helpful to attorneys than they are to be harmful to their strategy. Attorneys should embrace, rather than resist, this process.

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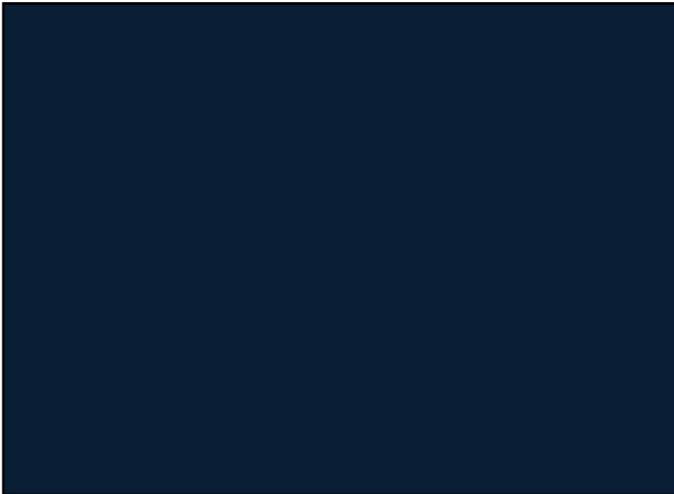
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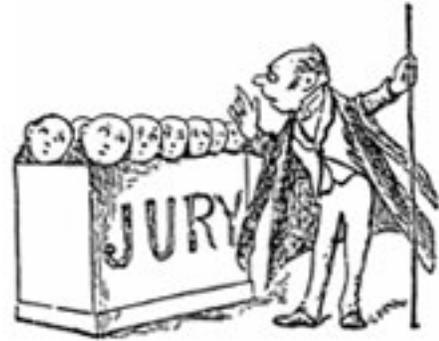
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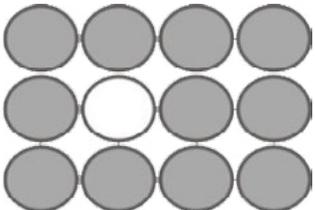
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*Editor's Note*

Much has happened since we last published and we have attempted to keep up with it by bringing you multiple articles on current topics. Racism and bias are our wheelhouse in the world of trial consulting and so we have two articles for you on that arena.

First, a research article on how even small visual or verbal indicators of religion can increase bias against African Americans. This is powerful and disturbing research that will make you question what you are currently doing to mitigate bias. It certainly made Karen Hurwitz and George Kich, our trial consultant respondents, reflect carefully on bias in the courtroom and deliberation room.

Second, the George Zimmerman and Trayvon Martin case has made headlines and incited debate across the nation. Doug Keene and Rita Handrich are looking at that case through the lens of social science research and showing how you can build case narratives based on the literature and then test those narratives in pretrial research. It's an unusual perspective and one we think will make you stop and think as well.

And we have a lot more. We know you're wondering about social media analysis in trials with lots of media coverage. Amy Singer tells you all about that process. Katherine James gives practical and "non-mental-health-professional" advice on how to deal with the "crazy" witness. Stan Brodsky, Elaine Lewis and Ellen Finlay react to a brief article on preparing the expert witness by Doug Carner. Then Ryan Malphurs and Hailey Drescher teach us about analogies (like broccoli and Justice Scalia's wife) and Andrea Krebel summarizes what is happening with jurors questioning witnesses. Finally, we have a book review on *Ideology, Psychology, and the Law* – the new encyclopedia of the intersection between law and the mind sciences.

It's a lot. So much, in fact, that we have a bunch of new Road Warrior Tips that can't be highlighted in this issue so you'll just have to go take a look by using the category link! As always, we value your feedback and hope you will take the time to leave a comment on the website or write in about article topics you would like to see us cover.

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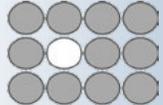
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