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Does Video Image Size Affect Jurors' Decisions? A Look at How Image Size Interacts with Evidence Strength, Defendant Emotion and the Defendant/Victim Relationship

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Promoting Communications between Social Scientists and Lawyers

Ronald K. Bullis

NOTE FROM THE EDITOR

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NOTE FROM THE EDITOR

It's cold outside and other musings for November of 2014

WE HAVE HAD A COLD SNAP here in the heart of Texas Hill Country and it has given us a taste (kind of) of what colder parts of the country experience as fall gives way to winter. That crispy weather is just all the more reason to put off spending time on holiday decorating, shoveling snow, or shopping. Just find a comfortable chair and a laptop or tablet and sit back with the final 2014 issue of The Jury Expert. You will find research and thoughts from practitioners on video image size and gay bias in the courtroom as well as an article focused on stress and depression in attorneys. We have an article on neuroscience evidence potentially backfiring on you and a book review on Law and Neuroscience (which is hot off the presses). We also have a primer on how to communicate with your social science expert witness.

Finally, we have a special piece penned by Lynne Williams from the (very cold) state of Maine. It is rare to get a glimpse into the mind of someone skilled in selecting juries for political trials – and that is what we have in this issue. Lynne shares her experiences in selecting juries for both civil disobedience trials and antiwar protest trials. She doesn't just share what she does, but also why and how she does what she does. As I read this article for the first time, I was excited and touched that Lynne would share her internal process with readers of The Jury Expert – but I was also thrilled that we get to publish a piece on important work being done in this area of litigation advocacy. As trial consultants, we have a rich history in the civil disobedience and antiwar movements as well as in civil rights. Sometimes we can forget the quiet work continuing on in those important arenas. Thanks to Lynne for reminding us!

We also want to give a shout out to [Richard Gabriel](#) (TJE author, trial consultant, and a very nice guy) who has made the big time but...we knew him when. Richard's book [Acquittal](#) will be the basis of a [new TV series produced by Jerry Bruckheimer and airing on CBS](#). As we go to press, I have no idea who is playing Richard but I have a [favorite candidate for the role](#). My DVR will certainly be recording this one when it hits the airwaves. Congratulations, Richard!

This issue will publish just before Thanksgiving here in the United States and we want to again thank all our readers who keep coming back and those who stumble across us and stay to read more. We won't be back with a new issue until February of 2015 so our wish is that you have a happy and restful holiday season and that January begins slowly but quickly builds to usher in a profitable beginning to 2015. In the meantime, keep reading and as always, let us know if there is anything in particular you would like to read in our virtual pages.

Rita R. Handrich, Ph.D.
Editor, [The Jury Expert](#)

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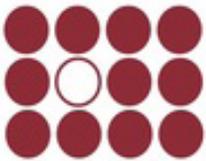


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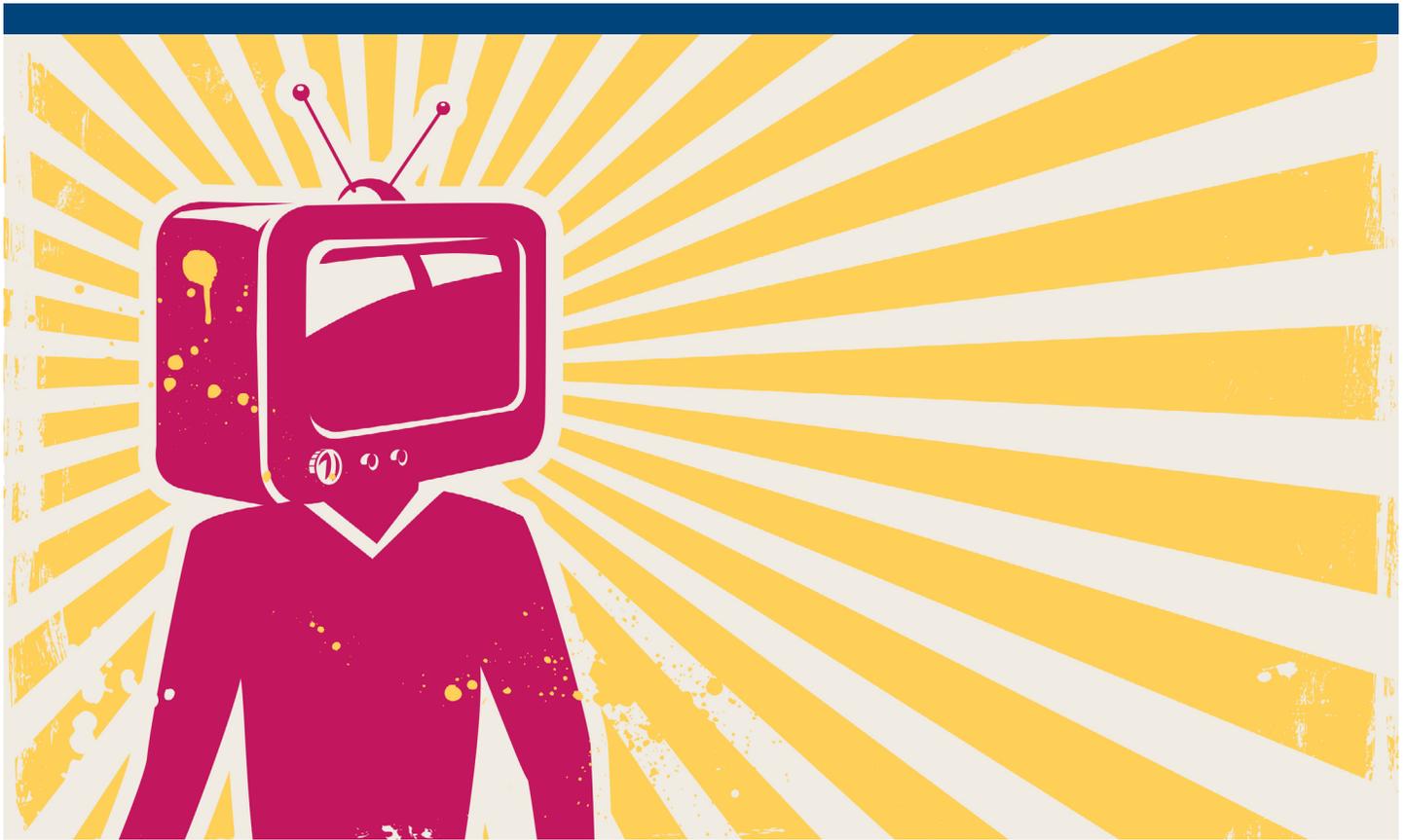
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Does Video Image Size Affect Jurors' Decisions?

A Look at How Image Size Interacts with Evidence Strength, Defendant Emotion and the Defendant/Victim Relationship

by Wendy P. Heath, Ph. D., and Bruce Grannemann, M.A.

Don't miss our consultant responses at the end of this article: Jason Barnes and Brian Patterson; Ian A. McWilliams. Then read the authors' response:

THE USE OF VIDEO TECHNOLOGY is becoming increasingly common in litigation (see [The Jury Expert: Visual Evidence](#)). For example, consider how video was used in the second trial of Jason Young, a man charged with the murder of his wife. After watching a video tour of the murder scene, complete with the bloody footprints from the defendant's 2 year old daughter as well as the body of the victim lying amid blood splatter, jurors were presented with Young's videotaped testimony from his first murder trial so that the prosecution could point out inconsistencies in his story. These "riveting" images were projected on a large screen for all in the courtroom to see (Huffman, 2012, para 34). Ultimately, Young was found guilty of murder (Klaiss, & Curry, 2012)—although [subsequent appeal resulted in the scheduling of a third trial](#).

In the case detailed above, attorneys used large video images to make their point. However, courtroom presentations can range from video images on small screens in the jury box to images

on big screen television monitors, to large format projection screens (Siemer, Rothschild, Bocchino, & Beskind, 2002). Does video image size affect how other trial components are evaluated? Researchers have considered perceptions of witnesses in live versus video presentations (Landström, Anders Grannhag, & Hartwig, 2005), however, the impact of video image size within the context of a trial has not yet been considered.

Impact of Image Size on Decisions: General Research Findings

There is a limited amount of research regarding how video image size generally affects judgments. For example, Detenber and Reeves (1996) as well as Reeves, Lang, Kim and Tatar (1999) found that larger video images were rated as more arousing than smaller images. Reeves et al. (1999) also found that those viewing larger screens pay more attention than those viewing smaller screens. It was results such as these that led Detenber and Reeves (1996) to conclude that larger image sizes can "intensify viewers' evaluations of content" (p. 70). We extend the investigation on this topic by testing for effects of video image size within a legal context.

A Legal Context: Views of Defendant Emotion

At 16, Jeff Deskovic was convicted of the rape and murder of a high school classmate. After 15 years in prison, Deskovic was released when the court acknowledged that he was not guilty. Why had Deskovic been convicted? Why was he even a suspect despite the fact that DNA testing conducted before his trial revealed that he was not the source of the semen from the rape kit? According to information presented at www.theinnocenceproject.com, Deskovic became a suspect in part because he seemed “overly distraught” after an acquaintance was found dead. Recent evidence does suggest that the level of emotion displayed by one accused of a crime can affect how that person is viewed (e.g., Hasel, Dinsdale, & Montgomery, 2010). Here we investigate how perceptions of a defendant, varying in emotion level, are affected by the size of the presented video image.

Reports of Deskovic’s case suggest that his emotional display was seen as suspicious because it was considered to be an incongruous amount of emotion given the superficial relationship between Deskovic and the victim (e.g., Santos, 2006). Interestingly, there are also instances of those accused of a crime against a family member who are described as showing an “inappropriate” level of emotion when they lack emotion (e.g., see Heath, 2009 for a review); together these examples suggest that those judging the accused consider, not only the emotional display of the accused, but the relationship between the victim and the accused. We will also consider that here. Expectations regarding defendant emotion have been shown to vary with the defendant/victim relationship (see e.g., Heath & Grannemann, 2011).

Evidence strength is also investigated in the following study; Heath et al. (2004) found that defendant emotion levels had little impact when evidence is strong, however, when evidence is weak, there was a tendency for a more emotional defendant to be viewed more favorably. We anticipate finding a similar pattern of results, and are interested in determining whether evidence strength will interact with video image size to affect perceptions.

Thus, in the following study, participants read a scenario about a murder, watched defendant testimony and then answered a questionnaire. The level of defendant emotion presented during testimony (low or moderate), the defendant/victim relationship (spouses or strangers), the strength of the evidence (weak or strong), and the size of the presented image (small or large) were varied.

The Study

Two hundred and sixty-three jury-eligible undergraduates (178 females and 84 males) were tested. Participants were from a small, northeastern university; their ages ranged from 18-50 years with a median age of 20½. Seventy-nine percent of the participants were white, 10% were African American, 5% were Asian, 3% were Hispanic, less than 1% were Native American, and 3% described themselves as “other.” Participants were ran-

domly assigned to conditions.

The participants were presented with a case and trial summary of approximately 450 words about a female defendant charged with the murder of either a spouse or a stranger. Participants were also presented with information about either weak or strong evidence against the defendant. Participants were then presented with a video of an actress providing a 3-minute “portion of the defendant’s testimony.” The words in each video were the same but the emotion level was either low or moderate. The defendant in the low emotion condition showed flat affect, while in the moderate emotion condition, the defendant’s voice and face displayed verbal and nonverbal behavior identified in research as indicating sadness/distress (e.g., Izard, 1977). The video was presented on either a 27” television monitor or on a 9’ projection screen.

After watching the defendant testify, participants answered a questionnaire. The case and trial summary was available to participants as they answered all questions. Upon completion of the questionnaire, participants were debriefed.

Results

Manipulation Checks

The first set of analyses were conducted to determine that the manipulations were perceived as intended. These analyses revealed that the manipulations were successful. In addition, one of these analyses revealed that evidence strength ratings were affected by an interaction between evidence strength and screen size. Stronger evidence seemed stronger and weaker evidence weaker when participants viewed a large screen as opposed to a small screen.

Trial Outcome Variables

Verdict. An analysis was conducted to test for the effects of emotion level, defendant/victim relationship, evidence strength, video image size, and the interaction on the participants’ verdicts. Evidence strength affected decisions. When evidence was weak only 23% thought the defendant was guilty; when evidence was strong, 58% thought the defendant was guilty. The defendant/victim relationship affected verdict decisions too. People were more apt to say the defendant was guilty when she had been accused of killing her spouse (46% guilty) versus a stranger (35% guilty). In addition, evidence strength and video image size interacted when verdicts were rendered. To better understand this interaction we examined verdict when video size is large versus small. When the participants had observed the defendant on a large screen and had read about the strong evidence against her, 65% saw her as guilty while only 52% saw this defendant as guilty when the video screen was small. Analogously, when the strength of the evidence was weak, and the defendant was viewed on a large screen, only 13% saw the defendant as guilty as opposed to 32% who saw this defendant as guilty after viewing her on a small screen.

Verdict Certainty. There was an interaction between emotion

level and image size. When the image was large, verdict certainty stayed uniformly high. However, when the image was small and the defendant showed less emotion, viewers were less certain of their verdicts.

Level of Defendant Guilt. The defendant/victim relationship affected the defendant's rated level of guilt (guilt was rated on an 11-point scale with higher numbers indicating more guilt). The defendant was given a higher guilt rating when her spouse was the victim (Mean = 5.73) as opposed to a stranger (Mean = 4.87). In addition, the defendant was given a higher guilt rating when the evidence was strong (Mean = 6.39) rather than weak (Mean = 4.20). There was also an interaction between evidence strength and image size. When evidence was strong, the size of the video image had little impact (guilt ratings were high in both cases), but when the evidence was weak, the defendant was seen as more guilty when the video image was small as opposed to large (large image and strong evidence: Mean = 6.48; large image and weak evidence: Mean = 3.62; small image and strong evidence: Mean = 6.30; small image and weak evidence: Mean = 4.74).

Sentence. Participants gave shorter sentences to the defendant on a large screen (Mean = 28.78 years) versus a small screen (Mean = 32.72 years).

Impressions of the Defendant

Defendant Credibility. The defendant was rated as having less credibility when the evidence was strong (Mean = 5.10) rather than weak (Mean = 6.45). There was also an interaction between relationship type, emotion level and image size. Specifically, the defendant on the small screen who showed little emotion after being charged with killing her husband was seen as having the least amount of credibility. Her credibility increased substantially when she was viewed on a large screen (see Figure 1).

Discussion

Overall, video image size had a large impact on perceptions. First, an increase in video size resulted in strong evidence appearing stronger and weak evidence appearing weaker. This result is seen prominently when participants rendered their verdicts. When the video was large rather than small, the defendant was less likely to be found guilty when evidence was weak, and more likely to be found guilty when evidence was strong. An increase in the video image size heightened the effects of evidence strength.

The effect of video image size was also evident in the trial-outcome variables of guilt level and sentence. Quite simply, participants assigned shorter sentences to the defendant presented on a large versus a small screen. With regard to guilt, the defendant was seen as highly guilty when evidence was strong with the highest guilt ratings resulting from a large image presentation, but when evidence was weak and the presentation was on a large as opposed to a small screen, the defendant was

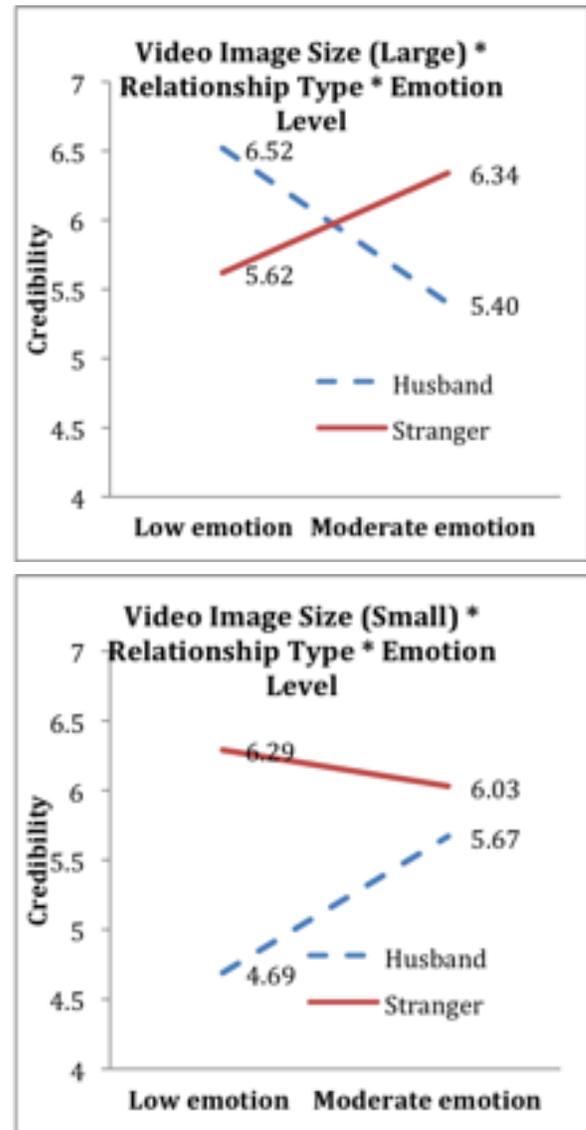


Figure 1. Ratings of Defendant Credibility as a Function of Video Image Size, Relationship Type and Emotion Level

seen as less guilty. This result is congruent with the results for verdict and both are in line with the conclusion of Detenber and Reeves (1996) that larger image sizes can “intensify viewers’ evaluations of content” (p. 70).

There were also complex interactions that reveal additional information regarding how video image size can affect decisions. For example, verdict certainty was affected by the defendant's emotion level as well as video image size; participants were most certain of their verdict when the defendant displayed low emotion and this display was projected on a large screen (they were least certain when this defendant was shown on a smaller screen). The defendant's level of credibility was also affected by the size of the video image; in this case, the size of the image interacted with the defendant/victim relationship and the defendant emotion level. The defendant on the small screen who showed little emotion after being charged with killing her husband was seen as having the least amount of credibility. Her

credibility increased substantially when she was viewed on a large screen. It is as if the larger screen enabled participants to be better able to see what little emotion there was.

Overall, larger screens seemed to accentuate what was presented. Detenber and Reeves (1996) as well as Reeves et al. (1999) suggested that larger screen make messages more arousing, thus messages from larger screens may be remembered better, and this increased arousal may potentially affect later behavior (see Reeves et al., 1999) such as the decisions that jurors are likely to make. This interpretation is consistent with what we have found; the increased arousal is a possible mechanism by which the larger screens have their impact, although additional research is needed to test this directly.

Defendant emotion level had an impact on decisions beyond that noted above. In fact, as others have found (e.g., Wessel et al., 2012), much of the impact of defendant emotion was on impressions of the defendant and not on trial-outcome variables. However, there were indications that defendant emotion could impact juror decision-making as it did affect defendant credibility and verdict certainty (in interactions with other variables), and both defendant credibility and verdict certainty may reasonably be important influences on juror decisions.

Limitations

There are potential limitations of this research. For example, we've only considered how people view a female defendant. Females are generally expected to be more emotional than males (e.g., Fabes & Martin, 1991), although some have noted that views of crying men have changed in recent years (e.g., Timmers, Fischer, & Manstead, 2003). With regard to defendants, Salekin, Ogloff, McFarland, and Rogers (1995) found that defendant emotion levels impact views of male and female defendants differentially. Researchers may wish to determine how the variables considered here such as image size might affect views of a male defendant.

Another limitation of the current research is that we do not know whether presenting a large video image is somehow distorting the presented information or merely making the presented information comparable to live testimony. In order to determine how different image size presentations compare to live presentation, future researchers may wish to replicate the present study with an added live presentation control group.

The present work is also limited in its level of external validity. We used video-taped stimuli presented to jury-eligible undergraduates in an effort to increase the external validity of this work relative to much of what has been completed in the field

of psychology and law (see Bornstein, 1999). Even so, it is appropriate to raise questions concerning the generalizability of these findings to the legal system because our mock jurors had an experience that lacks similarity to the real juror experience. The simplicity of our presentation materials was purposeful, as we wanted to know, on a basic level, how the presented variables might impact decisions. Future researchers may wish to increase the external validity of this work.

Conclusion

The results with regard to video image size are a new and important contribution to the literature with implications for both research and for the practical realm of the courtroom. Researchers presenting video images need to recognize that respondents may evaluate stimuli differently as a function of the image size presented. As for the courtroom, attorneys often have to determine how to present visual material to jurors, and this decision can include whether to present jurors with smaller or larger images (Siemer et al., 2002). Although our research shows that video image size can affect both trial outcome variables (e.g., guilt determination, sentence), and non-trial outcome variables that may ultimately affect jurors' decisions (e.g., defendant credibility), we are not yet suggesting that courts make decisions regarding the admissibility or regulation of video presentations of evidence (we do not know how the size of the image will impact all types of video evidence—e.g., gruesome crime scenes). We are, however, suggesting that attorneys need to make informed decisions regarding how they present the types of video evidence profiled here. If you have a strong case, the recommendation would be to use large-screen video as the strength of the evidence will likely be accentuated by the size of the screen. For a weaker case, the recommendation would be to use a small screen. Thus, consider the strength of your case when making such decisions.

We have also provided evidence that a consideration of the specific content of the video presentation is important. For example, as we have illustrated here, if you have a case in which the defendant shows little emotion after her husband is killed, her credibility is likely to suffer more if she is viewed on a small rather than a large screen. The large screen accentuates the presented emotion.

Thus, overall we have demonstrated that video image size matters; it can have an impact on mock jurors' perceptions of a defendant and decisions regarding that defendant. Future research is needed to determine more about the parameters of the relationship between video image size, the type of information to be delivered and the decisions to be made. ©

Wendy P. Heath is a Professor of Psychology and a Law and Justice faculty member at Rider University in Lawrenceville, NJ. Her research interests are in the areas of defendant emotion, excuse defenses and other factors that can affect jurors' decisions. Correspondence should be addressed to Wendy P. Heath, Ph.D., Rider University, Psychology Department, 2083 Lawrenceville Road, Lawrenceville, NJ 08648, USA. E-mail: heath@rider.edu

Bruce D. Grannemann is a Biostatistician for the Mood Disorders Research Program and Clinic and a faculty member in the Department of Psychiatry at the University of Texas Southwestern Medical Center in Dallas, Texas. His research interests include measurement of the effects of depression on noncore symptoms, decision-making, and factors that influence judgments.

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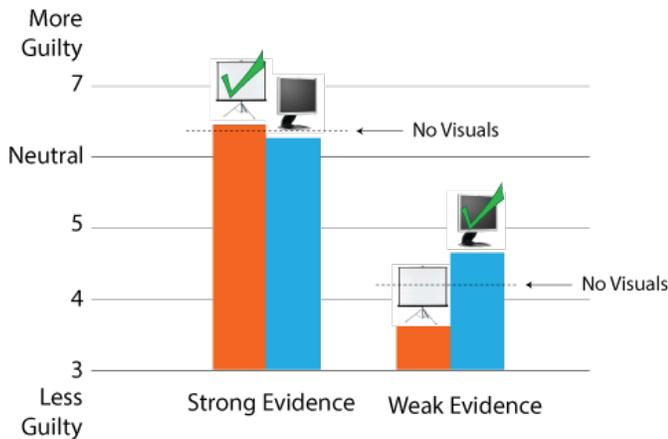
Response from Jason Barnes and Brian Patterson

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

Brian Patterson has been a graphic designer since 1990. In 1998, he began working in litigation graphics as a designer and art director, creating and overseeing production of multimedia presentations for more than a hundred courtroom proceedings. He joined [Barnes & Roberts](#) in 2007 as a graphic designer and trial consultant.

Does the size of the screen used during video playback and presentations have an effect on juror decisions? This is the question Wendy Heath and Bruce Grannemann explore in the above article. To help summarize a few of their findings, we’ve created some graphs using their data.

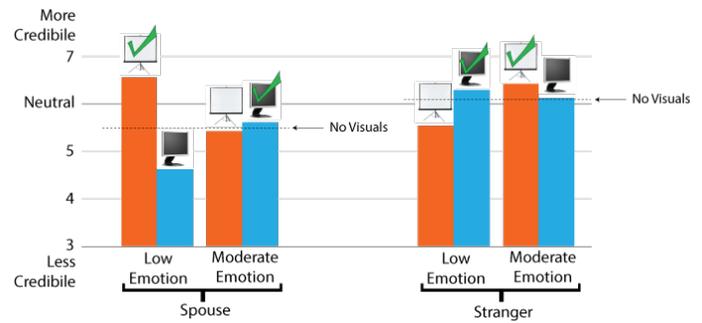
The first deals with their findings of how strong vs. weak evidence interact with screen size.



As seen in the above graph, strong evidence of someone’s guilt seems slightly stronger when shown on a large screen. Just as the big screen amplifies the strength of the relatively stronger evidence, it also amplifies the weakness of the relatively weaker evidence. This weakness makes the defendant seem less guilty.

The second set of data we were interested in is how the emotion level of the witness and the relationship of the witness to the victim affect the credibility of the witness at different image sizes.

For a defendant accused of killing their spouse, low emotion gave them the most credibility on the large screen and the least



credibility on the small screen. The screen size made little difference for a moderately emotional defendant accused of killing their spouse, though they appeared slightly more credible on a small screen.

For a defendant accused of killing a stranger, low emotion was found to be more credible on the small screen, while moderate emotion seemed more credible on the large screen.

Though the study in this article deals only with a criminal case, we want to discuss how this data might transfer to a civil case.

Applying these findings to a civil case, a litigant would want to maximize the visual appearance of strong evidence in their favor. Although it may seem counterintuitive, the research suggests a litigant would also want to maximize the appearance of weak evidence against them so that its weakness would be easier to see. A litigant would also want to minimize the appearance of strong evidence against them. Since weak supporting evidence was found to be less effective when shown on screen than when not shown, it may be best not to visually present weak evidence at all.

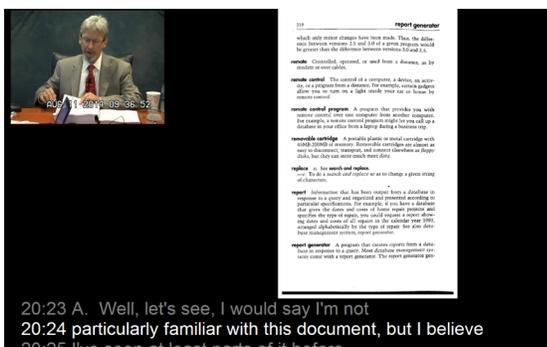
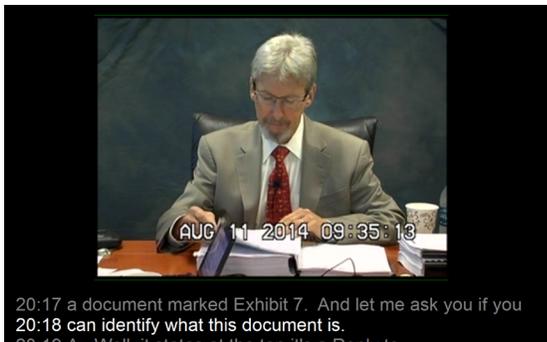
In most cases, we are limited by the system already in the courtroom, whether a projection screen, small monitors in the jury box, or larger monitors at some distance from the jury. Consequently, our ability to alter the visual size of evidence is really a function of how we choose to display that evidence on the screens that are available.



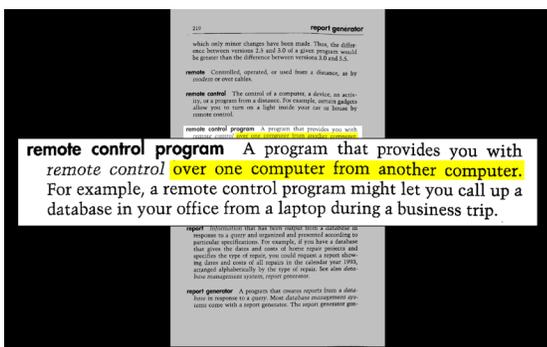
For example, trial presentation software usually has several options on how to display a witness presented by video deposition. You may show the witness full screen with no documents and no scrolling transcript if you feel the witness’s testimony is strongly in your favor – amplifying the strength of the testimo-

ny. Similarly, you may want to amplify the weakness of an adverse witness by presenting the testimony as full-screen video.

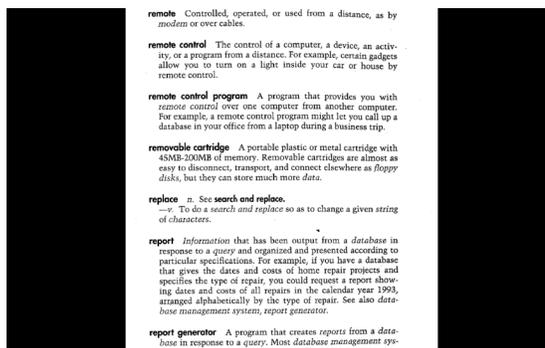
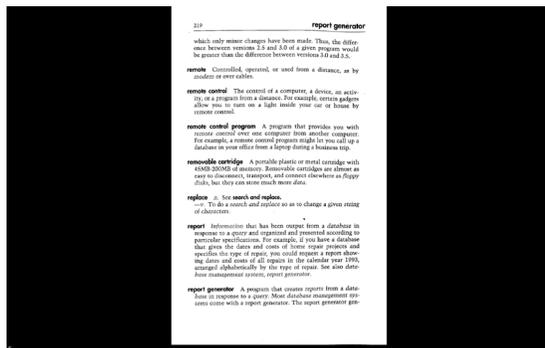
To minimize the strength or weakness of a witness, you can present the witness's image along with scrolling text or documents, which has the added benefit of splitting audience attention.



To amplify the strength or weakness of documentary evidence, you may make large callouts and selective highlighting to draw attention to the document.



When you want to minimize evidence strength or weakness, don't enlarge the document or, if you do, don't draw extra attention to the area you want to minimize. Instead, enlarge the surrounding area so that the text is legible but no specific area is emphasized. Don't use highlighting. Alternatively, don't put the document on screen at all. Go back to the basics and hand the witness a hard copy of the document and simply ask about the contents.



While this study did not test these concepts in the context of civil litigation, their findings comport with general presentation guidelines we recommend. We would urge the research community to build on this intriguing information to test a variety of fact patterns including civil questions. ¹⁶

Response from Ian McWilliams

Ian McWilliams of New England Trial Services has had a front row seat, editing and showing videos at many of New England's biggest civil trials. And in some of those picturesque old courthouses has often had to bring his own chair.

I know firsthand the power of a visual image, whether moving or static. I work with images every day. And right now if I could provide a visual image for this response it would be a picture of me, with a mildly sarcastic sneer on my face, thanking the authors for giving me just ONE MORE THING to think about when I walk into a courtroom with a cartload of equipment and try to figure out how I am going to show my client's images to a jury, judge, witness and counsel. Thanks a whole bunch.

Yet, without knowing it, I believe I have witnessed their conclusions played out in real life. And, through my experience over nearly 20 years of courtroom presentations, I may have unknowingly assisted my clients, trial attorneys, in their efforts on behalf of their clients, civil litigants, to use techniques shown in this article to "... make messages more arousing,..."; "... be remembered better,..."; and, "potentially affect later behavior ...".

And all because I am really, really lazy. Really. Allow me to explain.

The first trial I ever worked using a laptop computer and presentation software to assist my client with showing evidence was a high profile medical malpractice case in Boston. Up until then I had shown videotaped depositions I had shot to jurors using, ironically, a 27" TV (the biggest size available) with a VCR, wheeled in on a tall metal cart, which I often had to carry up a few flights of stairs when the elevators were out of order in some of Massachusetts old courthouses. But for this case the out of town lawyer representing the plaintiff wanted to put on a show. So we used two 10' screens with high wattage projectors to provide a view to all in the courtroom in addition to six 12" computer monitors in front of the jury box. In the present time that is not such a difficult setup to accomplish using flat screen monitors and small, bright and quiet projectors. But back in the last century it was a challenge. The projectors were big, hot and noisy and the 12" monitors were the old beige office CRTs which had to be set high enough for the second row of jurors to see, but, when set that high blocked the view of the witness for the jurors in the first row. So, by order of the judge who didn't want this "circus" in the first place, for every document shown, every video clip played and every transcript page quoted I had to get up from counsel table, turn on the projectors which were shut off so the court reporter could hear the testimony, then pick each thirty pound monitor up off the floor where it was ordered to be placed when not in use, put the monitors on the table set in front of the box, return to counsel table and display the document, clip or page to the judge, jury and courtroom, then get up and put the six, thirty pound monitors back on the floor and shut off the projectors until the next time we were to show a document, clip or page. Every time. Every day. For 6 weeks.

So I came away from that experience with; a keen desire to continue to use a computer in trial and, a permanent vow that I would never work that hard in a courtroom again. So I became a proponent, an apostle if you will, of the one big screen setup and a less is more philosophy. And through that may have helped to prove the author's conclusions in real life. So, you are welcome.

Real Life Applications

Here in Massachusetts we have a great history and a unique diversity when it comes to our Halls of Justice from the sleek, modern Moakley Federal Courthouse, which has anchored a long needed revival of the Boston waterfront, to the Colonial

Era, Charles Bullfinch designed Newburyport Superior Courthouse which opened the year Daniel Webster began practicing law. It is impossible to design a one-size-fits-all system that can be used everywhere. In the federal courtrooms presentation equipment is installed, limiting the options of counsel. While touch-screen annotation monitors for judge, counsel and witness are a nice touch, the idea that jurors will be able to share 7" arm rest monitors and comprehend complex information or judge the credibility of a videotaped witness, as this study suggests, seems wrong.

The state Superior and District courts are another story entirely. Strapped for funds, facing deteriorating buildings and trying more cases than ever, the courthouses are barely maintained as the historic places most of them have been designated. In good times new courthouses are proposed and eventually built but lately not too many have gotten off the drawing board. The attorneys who practice in these venues must bring their own technology to the dusty halls where a chalkboard is considered a modern teaching tool. Anyone who wants to try a case in the state court is free to bring in their own experts and equipment and put on as big a production as they want. But they must be aware of the issues they face just walking in the front door.

When I walk into a courtroom to setup presentation equipment I have to consider such factors as; ceiling height, room dimensions and lay-out; number and placement of electrical outlets, lights and windows;

When I videotape a deposition I try to set up the room in a way which makes the difficult job of the freelance court stenographer who will transcribe the proceedings easier. In my time as a legal videographer I have had the privilege of working with some of the finest court reporters in the nation. In fact the best advice came from a 6-Time National Speedwriting Champion (yes, they have races), one of the pioneers of Real-time Reporting and a renowned instructor and speed coach. He told me the best layout for a reporter is to have the witness on his right hand side and the questioner on his left hand side. Using their strange machines and phonetic language, the keystrokes required to begin a new line in a transcript and designate a Question with a capital Q is stroked with the left hand and capital A for Answer is made with the right hand. So having the questions and answers come from the appropriate side is just a small way to make things easier and help produce an accurate record. After all, the reporter has the hardest job in the room while I have the easiest. I just have to stay awake watching boring TV.

what the Judge will allow, what the court officer will allow, what opposing counsel will allow, what my client wants and, finally, is there a place for me to sit and work or was I once again smart enough to bring my own table and chair. In my cartload of equipment I have power cables, computer cables and nearly every cable adaptor made; an audio system, notebook and touch screen computers, LCD 3-chip projector and their backups. Office supplies along with a printer, copier scanner machine. And if I am in a courtroom for the first time I have an assortment of screens from 4' diagonal to 10' and will use the largest screen for the available space. If allowed I explain to the judge, court officer or my client why I want to set the room

in a particular way and use a Rule of Three to demonstrate my ideal setup. If possible I will set the screen directly across the room from the jury box, between the attorney's podium on one side and the witness stand on the other. When the jury gives their attention to the question, then to the answer, I explain, I believe it is effective to have the screen in the middle of their view, during the back and forth of examination. And by using the largest possible screen for the room I eliminate the need for multiple small monitors or big screen plasma TVs or easels and whiteboards or any of the things that can clutter the room and distract the jury's attention from the message.

A Useful Study

With the conclusions stated in this study I feel that I am armed with excellent information to use in my practice. My clients depend upon me for just this type of insight and practical advice. I welcome additional studies of this subject. In addition, I have long posed the question, "Do production values used in recording audio visual depositions have an effect on a viewers opinion of witness credibility". In particular the screen layout of a witness; a medium close-up shot with top of the head at the top of the frame, the eyes in the top third of the frame and the bottom of the frame at mid-chest level. Or a long shot with the camera at table level and showing the witness from the table up. Using these particular shots, are there differences in perception from a frame with the witness centered in the frame and looking directly at the camera, and a frame where the witness is set to one side of the frame and looking at an invisible interviewer off frame. See examples. Is there a difference? Is one shot "more effective" than the other? Would someone like to study this? Thanks.

Heath and Grannemann respond to the consultants:

We welcome this opportunity to discuss our results with those in the trenches, and we appreciate hearing ideas of how our results might play out in the real world. Interestingly, while the responses of McWilliams, Barnes and Patterson take different approaches to responding to our data, there is a common theme across both responses, and that is a call for more research.

Specifically, Barnes and Patterson discuss how trial presentations might be modified in light of our recommendations and in light of potential technology limitations in the courtroom. While Barnes and Patterson apply these ideas to civil cases, it seems to us that their suggestions could work for criminal cases as well. Their ideas regarding amplifying the strengths and weaknesses of visual evidence seem comparable to what was shown to be advantageous in our work, however, as they suggest, future research is needed to test both their presentation ideas and the application of these ideas to both civil and criminal cases. We too welcome these investigations.

Ian McWilliams posed an additional question about production values for trial presentations. Specifically, he asked whether the "screen layout of a witness" affects perceptions of that witness. This is a reasonable question, and we too are interested in the answer. Changing the screen layout could potentially make some information more visually prominent, perhaps affecting perceptions. There is, in fact, research by Lassiter (e.g., 2010) that suggests that videos that direct observers' attention to a suspect during interrogations as opposed to directing attention to the interrogator or directing attention equally to the suspect and interrogator in a scene tend to produce more prejudicial perceptions of the suspect (e.g., suspects are more likely to be seen as guilty). Lassiter has referred to this perception as "camera perspective bias." With regard to McWilliams' question, it is possible that researchers could find that there are advantages and disadvantages to certain screen layout presentations (e.g., if there is a table in the shot, will observers be distracted by items on the table?). Future research is needed to address this issue and the many others that still exist in this field. We encourage researchers to continue to search for answers regarding potential advantages and disadvantages of various forms of trial presentation. ©

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Moral Outrage Drives Biases Against Gay and Lesbian Individuals in Legal Judgments

by Sarah E. Malik, and Jessica Salerno, Ph.D.

Don't miss our consultant responses at the end of this article: Stanley L. Brodsky and Christopher A. Coffey; Alexis Forbes.

THE GROWING ACCEPTANCE of homosexuality in American society has been reflected in some areas of the legal domain, from the invalidation of sodomy laws (Lawrence v. Texas, 2003) to the growing legalization of gay marriage (e.g., Connolly v. Jeanes, 2014). Yet, bias against LGBT individuals persists in other areas of the legal domain. Although there have been some demonstrations of discrimination against gay individuals in legal settings (e.g., Quas, Bottoms, Haegerich, & Nysse-Carris, 2002; Stawiski, Dykema-Engblade, & Tindale, 2012; Wiley & Bottoms, 2009, 2013), we know little about sexual orientation discrimination in the legal system compared to the decades of research investigating racial discrimination in our legal system (e.g., Meissner & Brigham, 2001; Mitchell, Haw, Pfeifer, & Meissner, 2005; Sommers & Ellsworth, 2001; Sweeney & Haney, 1992). We will describe recent research that identifies two legal contexts in which LGBT individuals are discriminated against as both perpetrators and victims of crime:

support for juvenile sex offender registration and acceptance of the “gay panic” defense. Within each context, we will review a case study, our experimental findings, and legal implications.

Juvenile Sex Offender Registration

Case Study

Kaitlyn Hunt, a high school senior, was prosecuted for engaging in a sexual relationship with her 14-year-old girlfriend. Her girlfriend's parents reported their relationship as soon as Kaitlyn turned 18, making her a legal adult. Because her girlfriend was underage she was charged with lewd or lascivious battery (Harrison, 2013) and was sentenced to two years of house arrest followed by three years of probation (Corcoran & Lane, 2013). Kaitlyn's case gained international attention because people suspected her prosecution was a direct result of her sexual orientation. Kaitlyn's case is one of many that have resulted in concern that gay youth are being selectively prosecuted and punished for voluntary sexual activity among peers (Brydum, 2013; James, 2009; Sutherland, 2003).

Experimental Findings

We tested whether people are more supportive of sex offender registration for gay youth than for straight youth. Sex offender registries were created to protect society from dangerous sexual predators preying on children (Office of the Attorney General, 1999) and have recently been extended to include juvenile offenders (Adam Walsh Act, 2009). The appropriateness of sex offender registration for juvenile offenders becomes more ambiguous, however, when considering juvenile offenders who are prosecuted for voluntary sexual acts with their underage peers. The application of sex offender registration laws to these kinds of cases has been very controversial given the life-long hardship that comes with public sex offender registration (e.g., loss of personal relationships, harassment and shame, etc., Levenson, D'Amora, & Hern, 2007) and because juveniles are less likely to recidivate and are more amenable to treatment than adult sex offenders (Trivits & Repucci, 2002).

This ambiguity surrounding whether sex offender registration is an appropriate punishment for juvenile in these cases might also make discrimination against stigmatized groups, such as gay youth, more likely. Why? In contemporary society it is relatively less acceptable to express explicit prejudice against gay individuals than it once was. Although people still hold implicit (and often unconscious) biases against gay individuals, they are motivated to avoid looking prejudiced. As a result, people are more likely to discriminate against gay individuals in ambiguous situations because it is easier to justify that discrimination, making the prejudice less obvious (Crandall & Eschleman, 2003). The goal of the present research experimentally tests this question: Does the ambiguity surrounding juvenile sex offender registration put gay youth at a greater risk of being registered as a sex offender for consensual sexuality activity with their peers?

The current research included two experimental studies (for full details about this research, see Salerno, Murphy & Bottoms, in press). The goal of the first study was to determine whether a gay offender would be treated differently than a heterosexual offender in an ambiguously serious (vs. less ambiguous) crime. A national sample of adults read a description of a crime. In the scenario, the male defendant videotaped himself receiving oral sex from a 14-year-old victim. Participants were randomly assigned to read about either a male or female 14-year-old victim, and about either a 16-year-old or 35-year-old defendant. In other words, they read about a straight-forward application of statutory rape laws (a 35-year-old who had sex with a 14-year-old minor) or a more ambiguous application of the law (a 16-year-old who had sex with a similarly aged 14-year-old peer). The study was aimed to test the hypothesis that the ambiguous situation would bring out participants' bias: We predicted that they would be more supportive of registering the gay juvenile as a sex offender than the heterosexual juvenile. Yet, in the more straight-forward scenario, we expected the participants to be equally harsh on the gay and straight adult defendants. The results of our study demonstrated that, indeed, participants

were significantly more supportive of sex offender registration for the gay juvenile compared to a straight juvenile, whereas they were equally punitive toward the adult defendants — regardless of their sexual orientation. Analyzing our data another way revealed the power of anti-gay bias. We found that people were much more supportive of registering a 35-year-old defendant who had sex with a minor than a 16-year-old defendant who had sex with a minor. This makes sense: the 35-year-old is the more prototypical offender for which the registry was created: an adult who preys on much younger minors, whereas the 16-year-old is a teenager engaged in sexual activity with a peer. Yet, this was only true in our study when the defendant was straight. When the defendant was gay, the research participants were just as harsh with the 16-year-old having sex with a peer as they were with a 35-year-old defendant. In other words, participants were willing to give the heterosexual juvenile a break, but did not afford the same leniency to the gay juvenile. Further, we determined that this bias toward gay youth was driven by retributive motives, rather than utilitarian motives — the latter being the stated purpose of the registry: to protect society from dangerous offenders. More specifically, reading about a gay (versus straight) juvenile made people more morally outraged, which in turn made them more supportive of registration. In other words, people believed the gay adolescent deserved punishment because they were morally outraged by his actions, not because they wanted to protect society.

We conducted the second study to test whether this anti-gay discrimination would extend to (a) another type of ambiguous situation (i.e., “sexting” or sending nude pictures of oneself between two juveniles) and to (b) lesbian defendants. Although gay males and lesbians both fall under the category of “homosexuals,” we hypothesized that our previous discrimination finding would not extend to lesbians because people do not feel as negatively toward lesbians as they do gay males (Herek, 2000) and because men who “act like women” are perceived more negatively than women who “act like men” (Vandello & Bosson, 2013). To test this hypothesis, we again presented participants with a crime scenario — this time describing an underage teenager sending a naked self photograph to another teenager. This time we compared participants' support for registering the juvenile when the sender was male versus female, and when the receiver was male versus female. This enabled us to compare participants' reactions senders who were straight girls, straight boys, lesbian girls, or gay boys.

As expected, when the perpetrator was male, participants were harsher on him when he sexted another male than when he sexted a female. Surprisingly, though, not only did this effect go away for females, but it actually reversed. When a female sexted another female, participants were marginally less punitive than when she sexted a male. In other words, participants were actually somewhat more lenient toward a lesbian offender than a straight female offender. Similar to our first study, the effects

of sender gender and sexual orientation on support for punishment was driven by retributive motives — but in this case, utilitarian motives also factored into the participants' punishment decision. More specifically, reading about the gender and sexual orientation of the sender of the sext determined how morally outraged they were (i.e., retributive motivation) and the extent to which they perceived the sender of the sext as a threat from which to protect society (i.e., utilitarian motivation), which both in turn predicted their support for sex offender registration.

Legal Implications

Although the Supreme Court has recognized that adolescents should be spared from serious punishments because they are less culpable due to their lack of maturity (Steinberg, Cauffman, Wooland, Graham, & Banich, 2009), life-long and public stigmatization as a sex offender has been extended to juvenile offenders. Sex offender registration can lead to lifelong negative outcomes (Levenson et al., 2007). Yet, sex offender registration is mandatory in 26 states (Salerno, Stevenson, et al., 2010) — even for teenagers engaged in arguably normative sexual activity. This is particularly dangerous because many teenagers do not consider the legal consequences of their actions (Strassberg et al., 2013), and are unaware they could get into legal trouble for engaging in consensual sexual activities with a peer (Stevenson, Najdowski, & Wiley, 2013). The ambiguity surrounding the appropriateness of these laws for juvenile cases of non-coerced sexual activity may inadvertently allow for discrimination against offenders who have acted in a way that leads people to feel morally outraged, such as gay youth. To the extent that judges and attorneys hold similar biases, gay youth might be particularly vulnerable to public stigmatization on sex offender registries, thereby potentially contributing to institutionalized prejudice against gay youth.

The “Gay Panic” Defense

Case Study

The previous example demonstrated bias against gay defendants. Yet, biases against LGBT individuals also extend to victims of crime. We demonstrated such bias in the context of the gay panic murder defense. The gay panic defense is a form of a provocation defense, in which murder defendants may use a provocation defense to claim that they committed the act because they were under extreme mental or emotional disturbance and thus could not control their actions (Dubber, 2002). Specifically, the gay-panic provocation defense is used to claim that the victim had made an uncomfortable sexual advance on the perpetrator, leading to the defendant's loss of control (Chen, 2000). A recent example involved Vincent McGee, who beat and stabbed Richard Barrett and subsequently set his house on fire because Barrett allegedly made a sexual advance toward McGee that he was not comfortable with. In his “gay-panic” defense (Chen, 2000), McGee claimed that, though he did commit the crime, he was less culpable because he was overtaken by his emotions in the heat of the moment.

Most courts still allow the gay panic defense (Lee, 2008), with only a few courts having ruled that the gay-panic defense cannot be used (see Davis v. State, 2005; Janofsky, 1999). In fact, gay-panic defenses have been utilized in at least 45 trials since 2002 (Nichols, 2013; e.g., Van Hook v. Bobby, 2011). Recently, the American Bar Association (2013) has encouraged state legislatures to ban the gay-panic defense because of its inherent bias against gay victims. Since then, California became the first and only state to ban the gay panic defense (Kutner, 2014).

Experimental Findings

Although concern that this defense might bias jurors against gay victims has been voiced, there was no experimental evidence that it would, indeed, make jurors more lenient. Given, however, that jurors must make a very subjective decision in these cases regarding whether they believe the defendant's actions were reasonable, we hypothesized that this subjectivity could give rise to antigay discrimination by individuals who react negatively to homosexuality, such as political conservatives. Thus, the goal of this research was to test the hypothesis that conservative (but not liberal) jurors would be more lenient (i.e., downgrade a murder defendant's charge to manslaughter) when a perpetrator's provocation defense was a gay-panic defense rather than a nongay-panic defense (for full details about this research, see Salerno, Najdowski, et al., in press).

Participants were asked to read a description of a murder case that included a provocation defense. The defense argued that the victim provoked the defendant into a fight by insulting his wife and yelling, which resulted in the defendant beating the victim to death. Participants were randomly assigned to read a scenario that either did or did not also include the victim making a gay advance toward the defendant (i.e., a gay-panic provocation defense). After reading jury instructions, the participants completed several relevant measures, including their verdict choice (either murder or manslaughter), how confident they were in their verdict, feelings of moral outrage toward the defendant and victim, and their political orientation. Our results demonstrated that political conservatives were, in fact, significantly more likely to downgrade the charge from murder to manslaughter when the perpetrator used a gay-panic defense compared to when they used a similar provocation defense that did not include a gay advance. The gay panic defense did not, however, make liberal jurors more lenient. Similar to the juvenile sex offender studies, this bias against gay victims was again driven by retributive motives: specifically, moral outrage among political conservatives. Conservative jurors felt less moral outrage toward the murder defendant when he offered a gay-panic defense, which in turn made them more likely to downgrade the charge from murder to manslaughter.

Legal Implications

Similar to the ambiguous context of applying sex offender registration to juveniles, the gay-panic defense might provide

a vehicle for jurors to express their anti-gay bias. Our results confirm the [American Bar Association's](#) concern that this defense will lead to same-sex behavior justifying murder (Nichols, 2013) — at least among political conservatives. California passed a law in 2006 requiring jury instructions to tell jurors not to use sexual orientation as a basis for decision-making in a provocation defense (Egelko, 2013) and very recently has banned the gay-panic defense. On the other hand, some have argued that it is important to allow the gay-panic defense in court because being able to talk about the issue out in the open may make it easier to reduce its effects. This would allow the opportunity to (a) eliminate jurors with antigay biases during voir dire, (b) make antigay bias salient, and © allow the opportunity to present evidence that gay panic does not necessarily cause violent behavior (Lee, 2008; Perkiss, 2013). This study also has implications for juror selection. Because political conservatives were more likely to have their moral values violated by a gay advance, it might be beneficial for prosecutors to keep conservatives off the jury when a gay-panic defense is offered. Finally, these results raise questions regarding whether provocation defenses are essentially inviting jurors to rely on their biases. When jurors are asked to determine whether a certain provocation might cause a reasonable person to lose control and commit a crime, they will likely turn inward and think about how they personally would have reacted. This introspective process might invite reliance on jurors' personal biases, such as anti-gay sentiment.

Conclusion

Blatant and explicit discrimination against gay individuals in the legal system is becoming less socially acceptable. It is important to understand, however, that discrimination against gay individuals in the legal system has not disappeared, but changed into a more subtle form. Anti-gay bias might still drive discrimination against gay defendants and victims in ambiguous punishment situations. We identified two very different legal contexts in which we demonstrated discrimination against gay defendants and victims. We also identified the psychological motivation behind anti-gay bias in legal judgments. Although the stated purpose of these laws are often utilitarian, such as protecting society from dangerous offenders, people's biases against gay individuals are motivated by more emotional, retributive goals to punish the offender, rather than by utilitarian goals to protect society. In the case of both the gay panic defense and juvenile sex offender registration, people experienced more moral outrage toward gay (versus) straight defendants and victims, which in turn determined their level of punitiveness. Because more contemporary, subtle bias is more difficult to detect than more traditional, blatant bias of the past, it is important to continue to identify ambiguous punishment contexts that breed discrimination against gay individuals in the legal system. ©

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Stanley L. Brodsky and Christopher A. Coffey respond:

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Anti-Gay Bias in the Courtroom

To begin with, Malik and Salerno have done nice job of pulling out the essential findings from the longer article by Salerno, Mary Murphy and Bette Bottoms in *Psychology, Public Policy, and Law*. Their studies are methodologically sound and yield findings that are likely generalizable to the greater public. Nevertheless, readers who would like to know, for example, how many people they studied and who these people were, are advised to go right to the source.

These are compelling findings. The anti-gay bias is cogent in both the Juvenile Sex Offender Registration study and the Gay Panic Defense study. Consider the image of Lady Justice wearing a blindfold; it goes back at least 500 years, with the blindfold representing a commitment to objectivity. Justice is supposed to be administered by the triers of law and triers of fact blinded to power, appearance, social status, and identity. Lady Justice surely has not been blindfolded when it comes to gay defendants in criminal trials.

Issues related to homosexuality in the legal system provide fertile ground for discussion and research, particularly as these issues continue to elicit media attention. Identifying and understanding these biases will help ensure that individuals receive fair treatment in the criminal justice system, regardless of sexual orientation. The authors' discussion of Kaitlyn Hunt's case provides a useful illustration of the anti-gay bias they discovered through their studies. Kaitlyn's parents issued several public statements advocating for equal treatment and avoidance of registration as a sex offender. With her parents' help and the support of her attorney, Kaitlyn eventually was not re-

quired to register as a sex offender. However, not all gay youth are fortunate enough to have the support Kaitlyn had. Many gay youth are rejected by their families when they come out. As a result, a few turn to criminal activity, including drug trafficking and sex work, to support themselves, increasing the likelihood that they will become involved with the criminal justice system. Malik and Salerno's findings are especially concerning for these LGBTQ individuals who are forced to face the biases of the legal system. Identifying and illuminating these biases are important steps.

The two Malik & Salerno studies yield results in which a gay identity was found to have special relevance for the simulated decision-makers. We would like to raise the issue of whether there is a wider reach of homophobia in our justice system. At the very least four questions call for investigations and meaningful data.

1. Is there a systemic discrimination against gay defendants in garden-variety criminal cases, in which there is no sexual identity issue explicitly raised?
2. In civil cases in which there is a gay plaintiff or defendant, do jurors devalue the arguments or probative value of a case because of LGBTQ bias?
3. Are fact witnesses who are strongly or marginally identifiable as LGBTQ believed less than comparable straight witnesses?
4. Are there forms of bias against attorneys who are visibly or ambiguously identifiable as LGBTQ?

Although anti-gay bias continues in the court system, there are reasons to be hopeful. Malik and Salerno's findings nicely illuminate unfair treatment toward LGBTQ defendants and victims. Along with the uncovering of discrimination against this population, laboratory findings from recent years suggest that progress is being made for LGBTQ individuals in other cases of overt and egregious discrimination. For example, research using actual jurors by Cramer and colleagues, published in *Psychology, Public Policy, and Law* in 2013, reported that mock jurors favored imposing harsher punishments for offenders in cases in a hate crime perpetrated against a gay individual,

compared to African American and transsexual victims. Other research provides reasons for LGBTQ professionals practicing within the legal system to be optimistic. In research completed but not yet published in our Witness Research Lab, we studied the effects of CV items indicating gay or lesbian sexual orientations in expert witness credibility. This was a modest manipulation. We found no effects, adverse or otherwise. A growing body of empirical evidence suggests a decrease in overt discrimination against LGBTQ individuals. Subtle forms of discrimination are being identified and brought to light.

Not only are promising findings being observed in laboratory settings, real world changes are being made that will likely continue the trend of improving conditions for LGBTQ individuals who become involved in the legal system. Recently, the 9th U.S. Circuit Court of Appeals held that men and women could not be struck from a jury pool on the basis of sexual orientation, extending the Supreme Court's ruling in *Batson v. Kentucky* (1986) that barred juror strikes on the basis of race. This decision had a dissenting minority, but nevertheless appears to yield an important impetus to offer equal protection on the basis of sexual orientation. This ruling could have legal implications in a number of cases, including cases in which the "gay-panic" defense described by Salerno and Malik is employed. Nevertheless, we still don't know how much one's sexual orientation can impede objective decision-making in real gay panic cases, or other related cases. Meaningful empirical and case study data are necessary to evaluate this question.

Let us applaud this thoughtful beginning by Malik and Salerno. It serves us all well when the covert and unacceptable in the justice system make their way to being viewed in the bright light of scholarly findings. And let us hope that subsequent research builds on this solid foundation. ©

Alexis Forbes responds:

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Victimizing and Criminalizing Sexual Minority Youth

Malik and Salerno smartly used uncomplicated mock juror research methods to investigate discrimination against sexual minority youth and adults. Lesbian, gay, and bisexual teens are vulnerable to victimization and maltreatment because of their sexual orientation (Almeida, Johnson, Corliss, Molnar, & Azrael, 2009). Often, the discrimination and abuse that they endure in their school-aged years translates into negative financial and mental health outcomes in adulthood (Almeida et al., 2009; Birkett, Espelage, & Koenig, 2009). The type of bias that Malik and Salerno observe in their first study, is a great test

of how jurors might apply the "Romeo and Juliet" provision in some states' statutory rape laws. The "Romeo and Juliet" provision prevents mandatory sex offender registration for some defendants who are guilty of statutory rape (Higdon, 2008). The exception was intended to allow teens over the age of 14 to avoid the lifelong stigma of being labeled a sex offender. The provision generally states that if both participants in the sexual behavior are 14-years-old or older, have no more than a three-year age difference between them, and the sexual behavior is consensual, the eldest teen in the relationship does not have to register as a sex offender. However, in some parts of the country, the Romeo and Juliet provision does not apply if the teens are engaging in same-sex sexual behavior. For instance, California has a Romeo and Juliet provision in its statutory rape laws but that provision does not apply if the teens have engaged in sodomy. Currently, there are also same-sex exceptions to the Romeo and Juliet provision in Texas and Alabama. Legal provisions that disparately criminalize same-sex sexual behavior by teens is just one way that certain institutions, like the educational and criminal justice systems, discriminate against gay and lesbian teens (Higdon, 2008).

In the most recent biennial report from the Gay, Lesbian, and Straight Education Network, entitled *National School Climate Survey (NSCS)* (Kosciw, Greytak, Palmer, & Bosen, 2014), teens who identified as lesbian, gay, or bisexual reported that they were harassed, assaulted, or discriminated against in school because of their sexual orientation. Hostile learning environments negatively affect students' achievement and mental health. For example, in a sample of 7,898 students between the ages of 13 and 21, nearly three-quarters of the LGBT-identified (Lesbian, Gay, Bisexual, and Transgender) respondents reported being verbally harassed in school. Some of the LGBT teens (16.5%) were physically assaulted because of their sexual orientation. Over half (56.7%) of the LGBT students who had been assaulted or harassed had not reported these incidents to school administrators because they believed that reporting would have produced null results or it would have worsened their situation (Kosciw et al., 2013).

Research on lesbians and gays people frequently demonstrates connections between being mistreated in school and poor mental health outcomes (Albelda, Badgett, Schneebaum, & Gates, 2009; Almeida et al., 2009; Birkett et al., 2009). Additionally, these negative physical and mental health effects of in-school discrimination occur in childhood through adulthood. For instance, gay men and lesbian adults who were harassed or assaulted in school because of their sexual orientation, were more likely to attempt suicide in their lifetime than gays and lesbians who had not experienced sexual orientation discrimination in school (Albelda et al., 2009; Almeida et al., 2009; Birkett et al., 2009).

Given these poor trajectories associated with anti-gay discrimination, school systems have attempted to incorporate remedies that improve outcomes for lesbian and gay children. Some school systems provide a simple framework for LGBT acceptance and support that may improve social and interpersonal outcomes for students. Kosciw and colleagues (2014) report that institutional-level adjustments, such as LGBT-inclusive educational curriculums, are associated with positive peer relations among LGBT and non-LGBT teens. For example, ap-

proximately 75% of the LGBT teens who attended schools that use LGBT-inclusive curriculum said that they felt accepted by their peers. In contrast, only 39.6% of the LGBT teens that attended schools that did not use an LGBT-inclusive curriculum felt that the other students were accepting of LGBT-identified people (Kosciw et al., 2014).

Discouraging bias by incorporating the diverse perspectives of lesbians and gay men may help to reduce the institutionalized discrimination that many sexual minority teens face. As the targets of institutionalized discrimination, lesbian- or gay-identified children may not understand the extent to which their behaviors are perceived as morally wrong, compared to the same behaviors by their heterosexual counterparts. It would be interesting to know if, after being reminded of the conse-

quences of a sex offense conviction (registering as a sex offender and being stigmatized as a predator), jurors would still recommend such stigmatizing sentences for children and teens engaging in same-sex sexual behaviors.

Malik and Salerno examined how jurors can apply and enforce systemic and institutionalized sexual orientation discrimination in a mock juror paradigm. It serves as a great bridge between the typical juror decision-making research and current issues in LGBT studies. The simplicity of the research provides a very clear basis for extended voir dire or a supplemental juror questionnaire. It suggests that there are implicit biases that individuals may or may not be aware of that impact their legal judgments for, or against, sexual minorities. ©

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Anti-war Protestors and Civil Disobedience: A Tale of Two Juries

by Lynne Williams, Ph.D, J.D.

OVER THE LAST THIRTY YEARS, I have done pro bono jury selection work on numerous political trials. I started with the [1973 trial of the Camden 28](#), members of the non-violent anti-war left, charged with breaking into Selective Service offices across the country to remove and destroy government draft records that identified young men available for military service.

That was my first introduction to the vagaries of political trials and how they differ significantly from traditional criminal trials. A criminal defense strategy typically includes a primary goal of acquittal or at least mitigation of a sentence following a guilty verdict or plea. However, the strategy in most political cases where the defendant(s) are charged with civil disobedience, “public order” related charges, such as disorderly conduct or criminal trespass, is to tell the story that the defendants want told. This story typically includes the injustice that was protested against, the goals of the protestors, and an explanation of why the protestors felt compelled to engage in civil disobedience.

Over the last ten years, I have done significant online profiling

of members of jury pools, while creating a profile of the type of juror I want on my jury and rating potential jurors against the criteria in that profile. My team conducts extensive online research of potential jurors and I almost always attempt to utilize a written juror questionnaire. In my state, Maine, there are always serious negotiations with the presiding judge about the questionnaire, since questionnaires are typically used only in cases involving sex crimes, so as to allow the jury pool members to answer what may be sensitive questions in writing.

It is my goal to convince the judge that a privately completed questionnaire will not only elicit more honest answers from the jury pool members, but also make voir dire more efficient – meaning “completed more quickly.” Some judges have grown to like the questionnaires and automatically allow them; others are more resistant. There are, however, objections to certain questions, even on the part of judges who have used the questionnaires in prior cases. One question is particularly troublesome to them: “Do you believe your Government lies to you?” A judge in a civil disobedience case more than a decade ago turned to me after reading that question and said, “Of course they do. You don’t need a question on that, everyone knows

the answer.”

When creating a juror profile for environmental and anti-war protestors, we are looking for the traditional liberal – contributor to/or supporter of NPR, PBS, Audubon, the Sierra Club, Peace Action, Veterans for Peace or other peace/environmental groups. Much of this information is available online from the organizations’ annual reports, which often list contributors and volunteers. We also go to the potential jury member’s Facebook page, if she has one, to look at her friends, literary bent, political affiliations, music choices – folk, great; country, not so great; heavy metal, can show anti-authoritarianism. The jury pool list that we receive from the court includes age and profession, as well as the highest academic degree received and the town where the individual lives. As a whole, though with exceptions, those with higher degrees tend to be more supportive of our clients. However, I once kept a high school graduate on a jury of anti-war protestors because he looked like a young Bob Dylan. Going with my gut paid off, since we got an acquittal of all six defendants in that matter.

The above-mentioned trial was of six protestors who sat in at Maine Senator Susan Collins’ office for an entire day, to protest the war in Iraq. At five o’clock, the building manager went to the office, told the protestors that they had to leave because the building was closing, and they declined to do so. All were peaceably arrested for criminal trespass, booked and soon released on no cash bail, own recognizance. A colleague and I (we have seven political arrests of our own between us, but that was in our younger days) took on the case of the six who were arrested and soon named the “Bangor Six.”

The issues for trial were not whether the defendants had engaged in the criminal conduct, since they freely admitted that they had committed criminal trespass. Rather, the argument was that such conduct was civil disobedience and justified. Maine, however, does not allow a necessity defense in matters of civil disobedience. Therefore our tasks included creating and telling the story, identifying and seating jurors who would be open to that story and also have a generally liberal bent. In order to make the research doable in the two weeks we had between receipt of the jury pool list and trial, we initially prioritized the list, tentatively giving a negative rating to those with occupations that I have generally found to correlate with authoritarianism, close-mindedness and lack of creativity, including supervisory personnel, school principals, security guards, and the like. Of the 82 remaining members of the jury pool, we were able to view Facebook pages for about half, and discovered some relevant information, such as those who volunteered at non-profits such as food banks, community radio stations and environmental education centers. Following leads on the Facebook pages, we researched whether the individual contributed money to any charities and/or political groups. And simply Googling someone’s name led us down various trails, some of which were fruitful.

As with most of my cases, about 25% of the folks on the jury

pool list had no online presence whatsoever. We therefore sorted those names by age, highest level of education and occupation. Given the lack of an internet presence, it was not surprising that the average age of this group was late sixties, with a few folks in their late eighties. Likewise, given their ages, most had only graduated from high school, and most of them listed their occupation as “retired.” Unless there is at least one positive indicator, I tend to avoid seating elderly jurors. One such positive indicator in this matter was the fact that one 80-year-old gentlemen was a retired labor organizer and I would have liked him on this jury. However, the prosecutor used one of his challenges to strike the man.

Since attorneys cannot argue in favor of jury nullification, we always try to present a valid legal argument for the jury to hold its hat on, if it so chooses. Our clients were six attractive middle-aged men – including a nationally known artist, an organic farmer, a retired professor of poetry, a political science professor, a long-time activist and contractor and, lastly, a graduate of the Air Force Academy and a founder of Veterans for Peace. We felt that their own testimony, combined with our arguments and, we hoped, the jury instructions that we had written, would win the day.

The state of Maine criminal code includes a section noting the following: “Evidence of ignorance or mistake as to a matter of fact or law may raise a reasonable doubt as to the existence of a required culpable state of mind.” [M.R.S.A. Title 17-A Ch.1 §36](#). Since we were also precluded from using international law as a defense, per the judge’s pretrial ruling, we chose to argue that while they may have been mistaken, the defendants sincerely believed that international law authorized them to sit in at the Senator’s office. Consequently we needed to seat jurors that would be able to understand, and feel comfortable with, the nuances of that argument. We had a short written questionnaire in addition to the questions that the judge agreed to ask verbally, and one of the written questions was the following: “Do you think it is more important to be right or to be fair?” The goal of this question was to identify those with legalistic tendencies and those with a broader perspective on what “right” was, given that “fair” is not always in line with the law.

After the judge eliminated all veterans and current military, all law enforcement officers, and all of those with law enforcement officers in their immediate families, we were left with about 50 people in the pool. By utilizing our rating system based on internet research, we incorporated the responses to the questionnaire and produced a new ranking of most of the members of the jury pool. We had negotiated 10 peremptory challenges, given that we were representing 6 defendants. A few jury pool members remained unclassified. As the initial venire was chosen I had occasion to look up at their faces and saw one of the men smiling the broadest smile I have seen in a courtroom. We put him on the list to keep if at all possible.

After peremptory challenges, we sat a jury of 12 members and two alternates, and I was fairly comfortable that they would

at least give our argument a fair shake. I was particular heartened by the 8 middle-aged women that we had seated, the Bob Dylan lookalike and the smiling man. The other two jurors were unknown quantities but, of course, all it takes is one hold-out.

In addition to the standard jury instructions, the judge adopted the jury instructions that we had drafted about the elements of criminal trespass and, most importantly, about mistake of fact or law. The trial took a day and a half and all of the defendants testified. After two hours deliberation, the jury returned non-guilty verdicts for all six defendants on the charge of criminal trespass. Many of the jurors seemed inclined to wait outside for our clients to exit and tell them how much they admired them. One woman told me that the reason that they took two hours instead of 45 minutes was that they wanted to get the free lunch. The Bob Dylan lookalike did not stick around to talk.

Four years later we had occasion to represent six defendants who were members of [Occupy Augusta](#). The defendants had walked from their campsite in Augusta's Capitol Park to the lawn of the Blaine House, the governor's residence. For a while they stood on the lawn with signs and were then given an order to leave by the Maine State Police. They refused and were ultimately arrested and charged with criminal trespass.

Five of the defendants requested that my colleague and I represent them, and the sixth retained a private attorney. As always, we met with our clients to try to outline a strategy for the defense. Unfortunately, a number of the clients had admitted to law enforcement that they knew they were not licensed or privileged (elements of criminal trespass) to be on the Blaine House lawn and knew the order to disperse was legal and they would be arrested. The others told us that they did not feel comfortable arguing that there was a mistake of fact or law. That precluded utilizing a defense of mistake of fact or law.

I should note here, for those who have not represented defendants in political trials, that while the goal may be acquittal, the defendants are typically taking a moral position and do not want their attorneys to get them off at all costs. Once I represented six defendants on criminal trespass charges, again in an elected official's office, who pled guilty and each received a \$250 fine. They refused to pay the fine since it was supporting the government that was supporting the war they were protesting. Consequently, they informed me that I needed to argue to the judge that he should incarcerate them for one night, which he agreed to do if they each paid for their "room and board," \$88.00. One general prisoner waiting for arraignment was heard to say, "I hope I never have her representing me!"

The jury selection for this trial was very different from the trial described above. The defendants included five women and one man, much more working class than the previous defendants, not quite as smooth, although no less sincere. However, the Occupy movement had developed a certain persona, not a particularly positive one, except with those who were supportive

of their encampments and issues. This was not an anti-war or environmental case, so I needed a new approach.

I did the usual online research on the jury pool, but struggled with a juror profile. Who did we want on this jury and why? Even on the morning of jury selection I knew we probably wanted a different profile from the anti-war protestor profile, but could not articulate what that should be. As I sat in the attorney section next to a very experienced criminal defense attorney who knew my work, he pointed to a name on the jury pool list and said "You don't want this guy on your jury". I asked him why and he said that the man was his handyman and every time he worked on projects at the attorney's house he listened to Rush Limbaugh and Glenn Beck. Bingo! Just what I wanted, people who hate America. I knew the judge would refuse to ask the jury pool whether they hated their government, nor did I want her to since that would tip my hand. So I needed to utilize the background information, the online research and my gut feeling about potential jurors to know who to use my peremptory challenges on. And I needed to keep that handyman on the jury.

The judge's questioning proceeded and, as usual, all law enforcement and those with law enforcement in their immediate family were eliminated, as were those who knew of the Occupy movement and, unfortunately, stated that they totally agreed with the movement. Likewise, the prosecutor used most of his challenges on young people, obviously assuming that Occupy was mainly a youth movement. I was able to keep my handyman, as well as a middle-aged man on SSDI, whose demeanor reeked "angry". I figured that was the best I could do and the rest was a toss-up, if not a slam-dunk for the prosecution. The jury was dismissed, to return the following morning.

Upon arrival at the courthouse the next day, I saw two protestors holding a sign calling for jury nullification and another man handing out literature, but not to the folks walking towards the juror entrance. The judge had been made aware of what was going on and called in each juror separately, questioning them about whether they were approached, whether they knew about the concept of jury nullification and whether they could be impartial. All passed her test. So, the trial began.

Unlike the trial described above, a few of our clients chose not to testify, and those who did admitted that they knew they were breaking the law and could articulate no legal excuse. The trial ended and the jury began deliberations. Four hours later they were still deliberating and were dismissed by the judge to resume deliberations the next day. The next day, after two hours, a note was sent out to the judge. The note was signed by the foreperson and stated, "There are four people in this room who hate their government. We will never come to consensus." The judge called it a hung jury and declared a mistrial.^[1] Obviously the handyman and the angry man had convinced two others to go along with them. The seventh defendant had his trial immediately following the verdict in our trial. His jury deliberated for ten minutes before finding him guilty of criminal

trespass.

The lessons to take from these two trials are that even in the realm of political trials, there are always unique circumstances. Occupy Augusta included a few Tea Party folks, and that changed the entire dynamic of the jury selection. I needed to look beyond left and right, to the emotions that jurors would bring to the deliberations. The emotions that an anti-war activist trial brings out are very different than those that an Occupy trial brings out. With the anti-war defendants we needed

to elicit empathy. It was about the defendants. In the Occupy trial, it was about the jurors. We needed to gauge their anger. It is incumbent on the individual conducting the jury selection to recognize those differences and address them. We often tend to categorize and equate words, such as “protest” and “activist” while such categories need further situational definition. We owe it to our clients to do a deep analysis of what jury configuration might serve them best, while rejecting standardized profiles. ©

Lynne Williams is an attorney and social psychologist. She frequently represents environmental and political activists who commit civil disobedience and is a skilled jury selection expert. Lynne also takes up the cause of tribal members in Maine who are frequently challenged on their sovereign rights, as well as folks with disabilities who are challenged on their human rights.

¹ The Occupy Augusta defendants were retried later and ultimately convicted.



A Qualitative Examination of Self-Care in Lawyers

by Mary E. Wood, Jacklyn E. Nagle, M.A., and Pamela Bucy Pierson, J.D.

Don't miss the consultant responses at the end of this article: Andrew M. Sheldon and Alison K. Bennett.

"I honestly don't have a strategy. My goal is simply to make it to bed every night. And typing this makes me think this is something I should probably address!"

—Anonymous Alabama Lawyer

IT MAY SEEM OBVIOUS that self-care is important for well-being and success in life. However, self-care is not always practiced when work, bills, and other issues come into play. All individuals experience stress in their lives, but not all have identified specific strategies to adaptively cope with stress. Recent research has established the negative implications of work-related stress on well-being. Workplace stress includes workload, long hours, and demanding conditions (Cooper, Dewe, & O'Driscoll, 2001). Although many different occupations experience workplace stress, one of the most challenging and

strenuous workplace environments is the practice of law.

Lawyers may be particularly prone to stress and burnout in their careers (Kobasa, 1982). Research has noted that lawyers are particularly prone to psychological distress and maladaptive coping mechanisms (Beck, Sales, & Benjamin, 1996). Data have suggested lawyers have higher rates of depression and substance abuse than the general population (Rothstein, 2008). Impairment in lawyers due to poor well-being can lead to counterproductive actions and pose concern based on their important societal roles. This is especially problematic as their professional services often influence important matters in others' lives (Rothstein, 2008). In addition, part of practicing law includes the element of helping others and there is a paradoxical relationship with stress since helping, when either ineffective or even successful, leads to increased levels of stress. Based on the potential risks involved when lawyer well-being deteriorates, the need for self-care with these professionals is crucial.

Recent research findings by Joudrey and Wallace (2009) have suggested that leisure is an effective coping resource for law firm lawyers. However, leisure that was passive in nature was

not significantly effective in reducing psychological symptoms like depression. These passive and ineffective activities included watching television, reading, going to the movies, or working on hobbies at home. On the other hand, active leisure and social leisure were positively related to mental health in lawyers. Active leisure included working out at the gym, running/jogging, walking, playing sports, and cycling. Social leisure included frequency of visiting others, talking with others, eating out with others, or going to community or church meetings. The study also found that taking a vacation was also influential in reducing symptoms of depression in lawyers as well.

Additional investigations are needed to better understand the adaptive coping strategies and leisure activities involved in the self-care of practicing lawyers. Previous studies have been limited in utilizing self-report item ratings in order to measure self-care tactics. Qualitative research allows for a richer and deeper analysis by gathering data via open-ended questions. Rather than using quantitative collection methods with limited items, qualitative data collection offers participants with an opportunity to provide individualized, unique responses.

Given the importance of self-care behavior and effective coping (particularly in high stress jobs), we thought it important to investigate the prevalence of stress in practicing lawyers along with data on the primary methods of coping on which they relied and meaning derived from work. Participants, practicing lawyers, were recruited from the Alabama State Bar Association. Of the 93 lawyers who responded to the online survey, the majority were Caucasian and married. The age of participants ranged from 26 and 65 with an average age of about 42. Most participants had children and had been practicing law anywhere from one to 41 years.

Each participant completed the Perceived Stress Scale (PSS), a 10-item measure of levels of stress in one's life. Scores ranged from 4 to 35 (out of a possible 0 to 40 points) with an average score of 18.98 (SD = 7.42); higher scores indicative of more chronic levels of stress. Items on the Perceived Stress Scale (PSS) reference the level of uncontrollability and unpredictability of one's life. Results suggested average levels of stress overall.

Participants were asked an open-ended question about the methods with which they coped. Of the 81 participants who responded to this question, 140 responses were generated and categorized into 20 unique groupings. A total of 25 participants indicated exercise is a strategy they use to cope with stress. Nineteen participants reported they engage in a fun activity (e.g., golf, go to a concert, read) while 12 individuals identified faith and/or prayer as a method of coping. Of interest, and of potential concern, nine individuals identified alcohol use as a method of coping while another nine identified eating as a coping mechanism.

These coping strategies were categorized according to the active, passive, and social groupings investigated by Joudrey and

Wallace (2009). For participants who identified multiple coping strategies, the first listed strategy was used to categorize the response. For example, the participant who responded "exercise and talking with people" was categorized as Active. This new created variable was used as a grouping variable to investigate differences in perceived stress among groups. The model was not significant ($p = .82$), suggesting that perceived stress did not depend on method of coping, as measured in this study.

In addition to coping, we were interested in the meaning one derives from the job. This was investigated as meaning derived from work may lessen levels of perceived stress, or result in more adaptive methods of coping. Of the 83 participants who responded to a qualitative item regarding the meaning they receive from the job, over half (60%) responded "helping people," or some variation of that response. Various other responses included reference to problem-solving or using one's wits, winning, the positive impact/influence of the job, justice and fairness, and money. Four participants indicated that nothing about the job was meaningful. Levels of perceived stress were not different among individuals who indicated that "helping people" was the most meaningful aspect of the job, nor were there differences in coping strategies utilized according to responses on this item.

The purpose of the current study was to investigate perceived stress and coping strategies in practicing lawyers. In response to an open-ended question about coping, participants provided responses ranging from drinking alcohol and exercise to faith/prayer and relaxing with friends. Of interest, coping method (i.e., active, passive, social) did not differentiate among levels of perceived stress, inconsistent with prior research (Joudrey & Wallace, 2009). This finding (or lack thereof) may be an artifact of the way the variable was recoded rather than a true absence of an effect. Future research should seek to investigate this possibility.

Regardless of the inconsistency with prior research, we wanted to highlight the importance of coping in high-stress jobs, such as the practice of law. Self-care and coping are imperative to managing job-related stress, but also to the relative stability and happiness outside of work. Active methods of coping (e.g., exercise) tend to be more effective than passive methods, though this general conclusion was not supported with the current data. In addition, the rate of burnout in helping professions is higher, likely given the rate with which that helping is ineffective. The authors developed the following recommendations to address and protect self-care and coping, especially for high-stress positions, like that of law:

In short, we encourage individuals to engage in self-care and coping in an effort to sustain work productivity and general efficacy. Understanding and awareness of one's limits and finding support and downtime are essential components of the self-care equation. ©

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Andrew M Sheldon responds:

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Maybe It Starts in Law School

Back in the day (late sixties), when I was in law school, I felt the stress these authors talk about. It was not fun. For one of my classmates, it was deadly; for others, it was just depressing and anxiety provoking. Of course, my best friend thought all my concern was silly because he was having a helluva good time in law school. Law school was a joy for him and he was not alone. But then I wasn't alone either.

Benjamin, Kaszniak, Sales and Shanfield did the study that opened my eyes to possible explanations for my varieties of unhappiness.^[1] Listen to the abstract for their 1986 paper:

“Data were collected, using four standardized self-report instruments (Brief Symptom Inventory, Beck Depression Inventory, Multiple Affect Adjective Checklist, and Hassle Scale) on subjects before and during law school and after graduation. Before law school, subjects ex-

pressed psychopathological symptom responses that were similar to the normal population. Yet during law school and after graduation symptom levels were significantly elevated.”

What does “significantly elevated” symptom levels exactly mean? Here's what they said:

“During law school . . . symptom levels are elevated significantly when compared with the normal population. These symptoms include obsessive-compulsive behavior, interpersonal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, and psychoticism (social alienation and isolation).” At page 225. And, they noted, 20 to 40% of a law school class had these symptoms of illness and distress (depending on the symptom).

These symptoms of illness and dysfunction did not disappear on graduation. “Finally, further longitudinal analysis showed that the symptom elevations do not significantly decrease between spring of the third year and the next two years of law practice as alumni.” P 246

If that's not indictment enough, the study also discovered that the deleterious effect of law school affected everyone, not just people with “unique and rare vulnerabilities.” Moreover, when

compared to that other very stressful education, medical school,

“law students developed significantly more distress than medical students for all symptoms except somatization and phobic anxiety.”

Dr. Benjamin and I talked a bit back then (mid-seventies) mostly because we were both law and psychology dual degree holders seeking some affiliation with like-minded others, and discussed the possibility that “learning to think like a lawyer”, the oft-stated goal of legal education, really meant something like “getting sick.” A stretch, maybe, but maybe not much of a stretch for at least 20 to 40% of a law school class.

Like the authors of this article being reviewed, I decided something should be done to help lawyers. I sent letters to all recent law school graduates in the area offering a support group. “Let’s talk about it.” No takers. Not one.

Then I received a call from a high powered lawyer with a high powered law firm asking me to come meet with him to discuss a presentation on stress at the senior partner’s retreat in the spring. At the meeting, I inquired: Why do you want this presentation on stress? What are the issues you all are dealing with?

His quick reply: I can’t think of anything.

But I presented anyway in the naïve belief that maybe one person would take away something helpful. The meeting immediately prior to my little talk about Type A and Type B personalities was a personnel committee meeting in which it was decided to terminate the insurance coverage of a long-term secretary with the firm. She had cancer and “was probably going to die anyway.” Undeterred, and after a very nice introduction, I delivered my information about stress. In the question/answer session that followed, a statement came from the floor: “This typology is good for us because we are looking only for Type A personalities. They’re the ones that work the hardest.”

And there were more similar experiences over the years. In short, my experience with lawyers is that those in the trenches, embedded in daily conflict and attempting its resolution, may begin to feel bad. When that occurs, they should pay attention to those feelings and get some help, as these authors suggest. It may be possible to make the professional adjustments and life changes necessary to bring life back into a constructive balance. Or, in many cases, it may be time to move on to something you love more. If that’s the case, don’t dally. ¹⁹

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¹ “The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers,” American Bar Foundation Research Journal, Vol. 11, No. 2, Spring 1986.

Alison K. Bennett responds:

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A Response to A Qualitative Examination of Self-Care in Lawyers

According to a Johns Hopkins study (Eaton 1990), lawyers are 3.6 times more likely to be depressed than the general population, and are fifth in the incidence of suicide as compared to 104 occupational groups. This article posits a lack of self-care in lawyers may lead to depression that makes it difficult or impossible to properly serve clients. Given this, it is important for lawyers to embrace and pursue good mental health with the same vigor that many place on their physical well being, or to simply value their mental health at least as much as their careers.

From an economic standpoint, depression could be related to the mass exodus of attorneys from the field of law each year, which can cost large firms millions in recruiting and training costs. According to a recent American Bar Association Law Practice Management article, (Weiss 2014), about half of lawyer departures at law firms are unwanted. According to the National Association for Law Placement and the Massachusetts Institute of Technology, 57 percent of lawyers leave law firms altogether before their fifth year of practice, and 31 percent of female associates leave private practice altogether after leaving their law firm. In addition to the financial burden this places on law firms, this exodus comes at a time when an increasing number of Americans are having trouble finding affordable legal help. So this could be another cost of depression in lawyers.

There are many contributing factors to depression in lawyers, from unrealistic expectations for the field that begin in law school and a legal culture that rewards perfectionism, pessimism, and excessive work habits. Many state bars have started Lawyer’s Assistance programs, but the more depressed a person is, the less likely he or she is to seek help. Thus, self-care – as outlined in the study – is key, but it is also important for big firms to follow the lead of state bar associations and take proactive measures to prevent, detect, and encourage treatment for its employees. Given recent advances in technology, incorporating a mentally healthy lifestyle into the legal environment is easier than ever with the increased development of smart watches that monitor various health statistics, as well as technology-driven sleep monitors and aids that encourage good sleep habits. It would also be wise to lay the groundwork for self-care and normalizing the seeking of mental health care in law school. One study (Andrew and Benjamin, et al. 1986), found that about 40 percent of law students are clinically depressed by the spring of their third year.

This study of self-care in lawyers is a qualitative study, so sample size and demographic diversity was not emphasized as much as it may have been in the Joudrey & Wallace, 2009 study cited

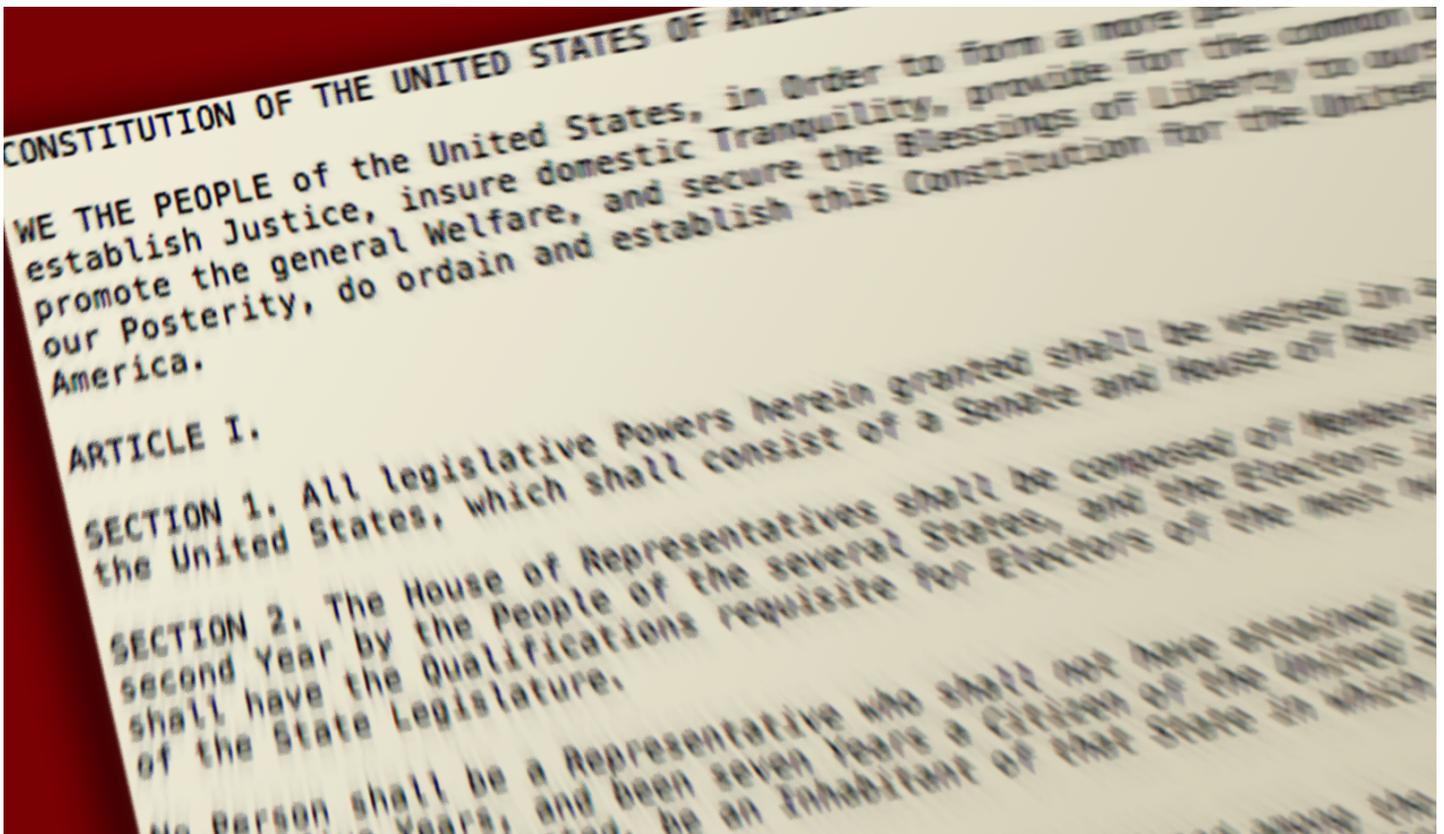
by the authors. This could account for why this study found different effects on depression among passive leisure activities – such as watching T.V. – as opposed to active leisure activities such as exercise and sports, and social activities. Nonetheless,

it is a good step toward a worthy cause of encouraging a proactive approach to good mental health of lawyers, which in turn benefits the public who relies on their talents and energy. 

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FAVORITE THING



Plain Text

by Brian Patterson

PLAIN TEXT IS THE COCKROACH of file types: it will outlive us all. If you've ever tried opening a document from an old or obsolete word processor or page layout program, you know how difficult, if not impossible, it is to do. If you can find software that will actually open it, you might be lucky enough to see something you recognize hidden among the computer gibberish that surrounds it. Digging through the rubble to salvage what you can may eventually get you something useful, but it's no one's idea of a good time.

On the other hand, if you have any old .txt files you want to browse, they'll open easily and look exactly the same as they did before. There will be no unrecognizable characters added, no weird computer noise, just simple, plain text. Plain text will always survive because it is free from computer formatting, more or less, and is instead human-readable.

Best of all, plain text editors are everywhere, and many of them are free. TextEdit comes preinstalled on Macs, as does WordPad on the PC. [TextWrangler](#) is free and, in addition to text editing, offers very powerful tools for manipulating text.

You can write in plain text without worrying about what it will eventually look like. It is sort of like writing in long hand, except with a keyboard and screen instead of a pen and paper. The content is the center of attention, not which font to use, how big the font should be, how far apart the lines should be, or the millions of other choices a program like Microsoft Word puts in front of us.

Many things you write never have to go beyond plain, unformatted text. Notes (maybe organized with a program such as [Simplenote](#) or [Drafts](#)) or todo lists may never leave their humble beginnings. Some, however, will require stylized text, tables, footnotes, or images, which plain text can't deliver on its own. And if you intend on publishing on the web, in an ebook, in print, or maybe all three, you will need to provide direction on how you intend for your document to be formatted. The instructions on how your document is structured are called markup.

The slashes and letters in the above text are instructions on how the text should be styled, though the styles are not defined within the document. This could be considered human-readable

markup, because although there are characters that wouldn't normally be where they are, the text is generally recognizable.

While it has the advantage of a front end editor keeping the code hidden away underneath, RTF has very minimal formatting options available. There are other, better options available if you are willing to spend a few minutes getting your hands dirty.

Markdown is a very minimal **markup language** designed for writing for the web. It is designed to be compatible with HTML, yet as readable as possible to non-coders. To quote its creator John Gruber:

“The idea for Markdown is to make it easy to read, write, and edit prose. HTML is a publishing format; Markdown is a writing format. Thus, Markdown's formatting syntax only addresses issues that can be conveyed in plain text.”

It is easy to **learn** and because it is written using plain text, it is much simpler yet more precise than a **WYSIWYG** editor. **MultiMarkdown** is another version which encompasses and extends Markdown with more options. And the options for text editors geared specifically toward Markdown and other mark-

up languages is **ridiculous**. Here are just two of the many other markup languages worth exploring. **Textile** was introduced in 2003 and offers more formatting options than Markdown, but still with simple syntax. This article is being written in Textile. **LaTeX** is a markup language with a somewhat steeper learning curve, but it has powerful controls, many geared toward the scientific and academic communities. It produces beautifully typeset PDFs for anyone willing and able to implement it.

What makes plain text my favorite, though, is the ability to translate it between these markup languages automatically using a converter like **pandoc**. For this issue of **The Jury Expert**, I used pandoc to batch convert all of the authors' articles and replies from Microsoft Word into Textile. Then I used **TextMate** as my editor to format the documents. TextMate has its own Textile to HTML converter that I used to create the HTML which went onto The Jury Expert, though I could have used pandoc for that as well. Finally, I exported the HTML to a variation of XML that is readable by Adobe InDesign called ICML.

That's a long way around to say that plain text is a great tool, more powerful than many realize, and it's worth considering how it might be better suited to some of the things you do than what you are currently using. ©

Brian Patterson is a graphic designer and trial consultant at Barnes & Roberts. He has created and overseen production of multimedia presentations for well over a hundred courtroom proceedings since 1998.

The Selective Allure of Neuroscience and Its Implications for The Courtroom

by Adam B. Shniderman, Ph.D.

*Don't miss the consultant responses at the end of this article:
Robert M. Galatzer-Levy and Ekaterina Pivovarova.*

Background

ADVANCES IN NEUROIMAGING and growing knowledge about the operation of the human brain have led to the rapid discovery of the purported neurological roots of a variety of behaviors and traits. With these advances has come forecasting about the role and influence of neuroscience on the criminal justice system. In 2004, Joshua Cohen and Jonathan Greene argued that the hard science of neuroscience would provide scientific “proof” of “facts” that various scholars have long been inclined to believe – that free will is an illusion and that some people cannot control their behavior as a result of their neurobiology. In light of this proof, Greene and Cohen claimed that society, beyond the realm of already doubting academics, would radically change its views about criminal culpability, leading people to find the current legal system unjust.

A growing number of studies have assessed the impact of neuroscience and neuroimages on the lay public (see e.g., Weisberg, Keil, Goodstein, Rawson, & Gray, 2008; McCabe & Castel,

2008; Gruber & Dickerson, 2012), including within the mock jury paradigm (see e.g., Gurley & Marcus, 2008; Schweitzer & Saks, 2011; Schweitzer et al., 2011; Greene and Cahill, 2012; Saks, Schweitzer, Aharoni, & Kiehl, 2014). Weisberg et al.'s 2008 article inspired fear that neuroscience would bamboozle and overwhelm laypersons. Their study found that naïve adults were duped by unsound and irrelevant neuroscience explanations. The article gained significant traction in the academic community and has been cited more than four hundred times. Yet, subsequent experiments examining the influence of neuroscience (and extending to neuroimaging) have yielded less fear-inducing and less clear results. Studies have set out to explore these contradictory results and understand what conditions the impact of neuroscience and neuroimages (see e.g., Baker, Schweitzer, Risko, & Ware, 2013; Schweitzer, Baker, & Risko, 2013). However, [Nick Scurich](#) and I observe that much of the research in this area has been atheoretical, overlooking a large body of literature on how prior beliefs affect perceptions, particularly in the evaluation of scientific and social scientific research (see e.g., Lord, Ross, & Lepper, 1979; Kunda, 1990; Ditto & Lopez, 1992; Koehler, 1993; Nickerson, 1998; etc.).

The Current Research

In [The Selective Allure of Neuroscientific Explanations](#) (Scurich & Shniderman, 2014), we sought to understand the role of motivated reasoning, the tendency to selectively credit or discredit information in a manner that reinforces preexisting beliefs, in lay evaluations of neuroscience. We conducted two studies on highly politically and emotionally charged issues – the death penalty and abortion.

In the death penalty study, subjects began the experiment with a single-item measure of attitudes toward death penalty, abortion, and the HPV vaccine. Subsequently, participants read a fictional news article that described the results of fictional studies that used neuroscience. Participants in the fictional study viewed footage of an execution or a documentary about life without parole and living in prison. The result of the reported study was experimentally varied. In one condition, the results indicated that those who viewed the execution footage were significantly less impulsive than those who viewed the footage of life behind bars. Accordingly, the lead researcher concluded that the death penalty was a deterrent. In the other condition, the results indicated no significant difference in the neurological activity. The lead researcher stated that this meant the death penalty was not a deterrent.

Our subjects responded to 10 items evaluating the “neuroscience quality” of the reported study. The 10 items (Cronbach’s alpha = .891) were combined to create a composite score. A two-way ANOVA, excluding participants who stated they had no opinion about the death penalty (n= 25), evaluated the impact of prior attitudes (split into those opposed and those in favor of the death penalty) and study outcome (is deterrent, is not a deterrent). We found a significant interaction effect between prior attitudes and condition (INSERT HERE). We found no significant main effects. Thus, prior attitudes interacted with outcome of the study to determine how scientific the study was perceived. Consistent with our hypothesis neuroscience, like other scientific information, was subject to motivated reasoning.

To confirm our hypothesis and assess whether the results replicated, we conducted a subsequent study on abortion. To ensure a new sample, individuals who participated in the first study were prevented from participating in the second study by a software feature. The procedure was identical to the death penalty scenario. Subjects provided their opinion about abortion, death penalty, and the HPV vaccine. The participants then read a fictional news article that described a study in which fetuses were exposed to a noxious sound, known to cause discomfort and pain in babies less than one year old, while being scanned

by an fMRI. The fictional researcher detailed how activation in the parietal lobes of the fetus would indicate whether the fetus was experiencing pain. As in Study 1, the result of the fictional study was experimentally manipulated. In one condition, the results of the fMRI indicated that second and third trimester fetuses were able to feel pain. Based on these results, a fictional pro-life individual stated that the study results indicate that second trimester abortions should be illegal because the fetus can feel pain. In the other condition, fMRI results indicated the fetus could not feel pain. A fictional pro-choice individual concluded that the study indicates that second trimester abortions should be legal because the fetus doesn’t feel any pain. Participants were asked to respond to the same 10 questions as in Study 1. The responses to these questions were collapsed into a neuroscience quality scale (Cronbach’s alpha = .874). Consistent with our hypothesis and with Study 1, a two-way ANOVA yielded a significant interaction effect between prior attitude and outcome of the fictional study (INSERT HERE). No main effects were found.

Contrary to the fear inspired by Weisberg et al. and McCabe and Castel’s findings, the results of these two studies indicate that neuroscientific explanations/evidence are subject to motivated reasoning, like other scientific and social scientific information. The biggest determinant of the impact of neuroscientific information on an individual appears to be the individual’s prior attitude about the topic. Thus, neuroscience appears to have a selective, rather than a universally seductive, allure.

As with all experimental research, this study has its limitations. First, it is unclear whether this research is relevant for issues that are less polarizing. The effect is likely to exist for issues that are non-moral or less ideologically driven, however it may be smaller than observed. Second, relatively little is known about the representativeness of MTurk samples, which may limit the generalizability of findings using the service.

Implications for The Courtroom

As I have recommended in several prior issues of [TJE](#), this research reinforces the need for caution when attempting to use neuroscientific evidence in court. That motivated reasoning plays a significant role in the evaluation of neuroscience suggests the effect of neuroscience in the courtroom will be highly dependent on jurors’ case relevant attitudes, and potentially their feelings about the disease/disorder for which neuroscience is being offered. This raises the importance of thorough voir dire to [de]select appropriately and to understand those who compose your jury. 

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Robert M. Galatzer-Levy responds:

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This laboratory study suggests that jurors are likely to use neuroscience evidence in support of preexisting belief rather than being convinced by neuroscience evidence itself. As always with such studies it is interesting to explore their ecological validity, i.e., whether they apply in the real world. The following example provides such a confirmation.

An “experiment of nature” occurred in the form of the arguments and decisions of SCOTUS in a series of cases on the issues of juvenile death penalty – life without parole. In chronological order these are *Roper v. Simmons* (543 U. S. 551, 560) which barred the death penalty for children, *Graham v. Florida*

(560 US 48, 176 L. Ed. 2d 825), which barred juvenile life without parole for crimes other than murder, and *Miller v. Alabama* (548, 181 L. Ed. 2d 395) which extended the ban on life without parole to include murder. The decisions in all three cases rested solidly on arguments that adolescents are immature such that they have a relative incapacity to control their behavior, i.e., they are impulsive. Furthermore, their personalities are likely to change with time since their development is incomplete so that sentences that gave them no opportunity to benefit for these changes are inappropriate. The role of neuroscience in these cases is consistent with Shniderman’s research.

Across the three cases the court relied increasingly, but always to a very limited extent on neuroscience. Justice Kennedy commented in *Graham* that the neuroscience was consistent with “what every parent knows” about the psychological immaturity of adolescents. As Charles Ogletree, a Harvard Law School

professor, put it, “Roper established what every parent knows and what science confirms: adolescents are fundamentally different from adults in maturity and judgment.” In other words, like Shniderman’s subjects, the court used neuroscience at most to bolster its own preexisting opinions.

The court’s modest use of neuroscience contrasts with the very extensive briefs filed in these cases, both by the parties and the amici. These briefs progressively rested more heavily on neuroscience studies that suggests that the connection between the parts of the brain that regulate behavior and those parts of the brain in which impulses arise are not fully formed until the mid-twenties and are certainly different in adults and adolescents. This trend toward reliance on neuroscience data was doubtless partly due to the massively increased amount of neuroimaging research available in the last 20 years. However, the primary neuroscience findings had been well established by the time Roper came before the court. The more recent studies simply confirmed the earlier high quality studies. There was no new information pertinent to the court’s decisions that emerged from neuroscience research during this period.

What appears to have happened is that the briefs’ authors, especially the authors of the amicus briefs, had themselves become convinced on the persuasive value of neuroscience and assumed the court would be convinced by the neuroscience evidence. Their belief in the persuasive value of neuroscience was far greater than the court’s. This conviction persisted despite the clear indication that the majority of the court was perfectly willing to rely on common sense psychology rather than neuroscience as the foundation of its opinion.

Social scientists and mental health professionals seem to be impressed by neuroscience. They are remarkably ready to believe neuroscience evidence on psychological issues. And this attitude is present even when the neuroscience data is of questionable quality or relevance. They commonly believe neuroscience findings should be given more weight than more direct observations of psychological phenomena. For example, the demonstration of neuroimaging changes accompanying PTSD is given enormous weight by many psychiatric researchers even though those data are merely consistent with well-known and long standing clinical findings and tell nothing of practical importance beyond the psychological findings.

It is not surprising that these same mental health professionals, who are so persuaded by neuroscience findings, anticipate that judges and juries would be similarly impressed. However, for better or worse it seems not to be the case that courts find neuroscience findings much more persuasive than comparable psychological findings.

The idea that psychological theories are most persuasive if presented as neuroscience research parallels the so called “CSI effect,” the claim that the popular television show had set new (and unrealistic) expectations among jurors concerning forensic evidence. Shelton (2007) demonstrated that recent decades

have indeed seen a shift in juries toward greater expectation of forensic work but this shift did not result from jurors mistaking the essentially magical activities portrayed on the CSI shows for real forensic science. Instead, jurors appear to be increasingly well educated about the actual science involved. For examples, most jurors now know what DNA is. They are neither greatly impressed by exaggerated or greatly diminished claims about what forensic science can do. Attorneys and expert witnesses who assume there is a strong CSI effect are probably confusing their own opinions with those of a jury.

Similarly, just as the CSI effect concept mistakenly asserts that the exaggerated portrayal of forensic science on television has great influence on triers of fact, so too, lawyers and neuroscientists enthused about neuroscience studies are likely to believe that neuroscience evidence will particularly influence courts. However, studies like the one under review and the observation of courts dealing with similar issues strongly suggests that judges and juries are not as impressed with neuroscience as these lawyers and psychological professionals hope or fear. ©

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- Shelton, D.; Kim, Y.; Barak, G. (2007). A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the CSI Effect Exist? *Vanderbilt Journal of Entertainment and Technology Law* 9 (2): 367.

Ekaterina Pivovarova responds:

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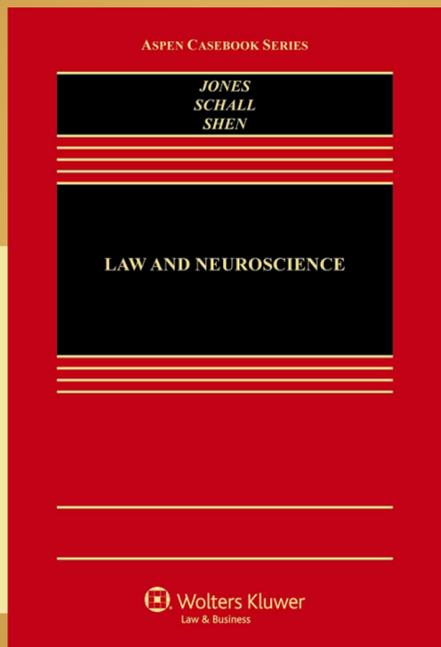
In *Selective Allure of Neuroscience and Its Implications for the Courtroom*, Shniderman adds to an already long list of reasons for why attorneys and trial consultants should be cautious in using neuroscientific evidence in legal proceedings. Scurich and Shniderman (2014) found that individuals evaluated the scientific validity of neuroscientific evidence based on preexisting beliefs. At first glance, this study might seem like another example of scientists proving a well-known concept that juries and judges bring their individual experiences into the courtroom. In fact, voir dire is premised on identifying individuals with particular types of beliefs that may produce a particular type of verdict. However, on closer examination, the findings from this study highlight a different point – introduction of neuroscientific research may backfire, or in the very least not produce the intended results. And, not knowing how the jury or a judge will interpret a particular type of evidence should be disconcerting to attorneys, legal consultants and experts.

Scurich and Shniderman (2014) acknowledge a significant limitation of the study. The authors asked respondents questions about highly polarizing issues – death penalty and abor-

tion. It is unclear whether similar effects, of interpreting the validity of evidence through a prism of motivated reasoning, will hold for less emotionally charged issues. A related point that was not addressed by the study is whether the same pattern would emerge if the fact finders were offered with opposing expert opinions. In real life settings, juries and judges are unlikely to hear scientific evidence that is unopposed or offered without cross-examination. It is possible that motivated reasoning would be diminished somewhat through legal techniques specifically designed to offset potential bias by the fact finder. Researchers will need to address this issue before conclusions about the impact of neuroscientific evidence in the courtroom can be made.

Shniderman notes that concerns about the deleterious effects of neuroscience on juror decision-making have not borne out. Further, he notes that the insights promised by neuroscientists

in changing how judges and juries think about free will, and thereby decide about criminal culpability, have not occurred. I disagree that either of these conclusions can be made at this time. First, as noted above, the research we have on juror decision-making is limited and as described in a previous post (see [Pivovarova and Brodsky comment here](#)) focuses on specific neuroscientific features. Second, the impact of neuroscience is difficult to assess, in part because there are legal barriers to introducing such evidence and because the field is relatively new compared to other scientific and social fields. Whether such changes will ever occur is unclear, but there is little doubt that neuroscience has allowed us to understand behavior in unique ways. Dismissing the impact of neuroscience on the fact finder too early is just as problematic as giving it too much credence. As this study highlights we have much to learn about how juries and judges interpret neuroscientific evidence. ☹



THE JURY EXPERT BOOK REVIEW

LAW AND NEUROSCIENCE

OWEN D. JONES, JEFFREY D. SCHALL
AND FRANCIS X. SHEN

Review by Rita Handrich, Ph. D.

Law and Neuroscience

Aspen Casebook Series

by Owen D. Jones, Jeffrey D. Schall, Francis X. Shen

Publisher: Wolters Kluwer, 816 pages, \$189.

I EXPECTED TO LIKE THIS BOOK since I am intensely interested in neurolaw advances. What I did not expect was to find a reference manual that succinctly (if 800+ pages can ever be described as “succinct”) overviews the burgeoning literature (for both civil and criminal practices) and actually teaches the critical thinking skills necessary to avoid the immediate and uncritical “gee whiz” reactions many have to the “sciencey” nature of neurolaw testimony.

As a voracious reader and a veteran scourer of electronic databases, I often prepare myself to be disappointed when opening newly published professional books since they are almost always out of date by the time they are published. This one is different. When I read the quote below, I grinned and realized this text would not simply summarize, but also inform readers and encourage the development of critical thinking through the relaying of case narratives and interpretation of research

and law that is naturally engaging to those of us with an interest in the area.

“Even if fMRI could reliably diagnose psychopathy, it wouldn’t necessarily reduce a defendant’s culpability in the eyes of a judge or a jury. Ultimately, the law is based on an individual’s rational, intentional action, not brain anatomy or blood flow”, says Stephen Morse, professor of law and psychiatry at the University of Pennsylvania. “Brains don’t kill people. People kill people,” says Morse.

The first 250+ pages of this newly published book (meant to serve as both an interdisciplinary textbook and a reference guide for practitioners) supply background on the issues addressed in the intersection of law and neuroscience (aka neurolaw). They educate on brain structure and function (what part of the brain does what) and they cover early trials and issues as well as the relationships between law, science, behavior and responsibility. But they also discuss the rules of evidence and how to critically assess the validity of various neurolaw findings. This is a thread throughout the entire text and, to me, one of the most valuable

inclusions. It is one thing to read the content of various publications or listen to expert testimony. It is entirely another thing to understand how to critically evaluate the findings, how to prepare experts to teach those findings, and how to help jurors understand them.

The next part of the book covers core themes that the authors define as: the injured brain (brain death, brain injury, pain and distress), the thinking and feeling brain (memory, emotions, lie detection, judging), the developing and addicted brain (adolescent brains and addicted brains). For each of these areas, we get a bit of historical context, voluminous and yet clearly described case law, information for civil and criminal practitioners on how to present the information in court, special cases with neuroscience relevance (like the special case of fetal pain) and much more. The final section of the text looks down the road to the future of neuroscience and the law and the issues we will likely soon face in the courtroom.

I found myself skipping around the text rather than reading straight through; the extensive Table of Contents summary lends itself to that purpose. I was especially fond of the section on the Thinking and Feeling Brain since that is where much of my own interest lies. This section includes almost 200 pages on how memory works, eyewitness memory, false memories, cross-racial identification, emotional defendants, jurors and judges, lie detection using the polygraph and more recent neuroscience based lie detection strategies, neuroscience and legal reasoning, and finally, neuroscience and racist judgments. While most of it was familiar to me, the way in which the information is presented is fresh, fair, and comprehensive.

Despite the length and denseness of the text, I did not really feel as though I was reading a law textbook. My academic background is in psychology and this could have easily been an advanced psychology text on neuroscience and the law. It is written in language that is highly accessible across disciplines. While *Law and Neuroscience* is obviously a graduate school textbook, I do not recall having ever experienced reading an entire (lengthy) textbook tome and marveling at the clarity and completeness with which the information is presented throughout.

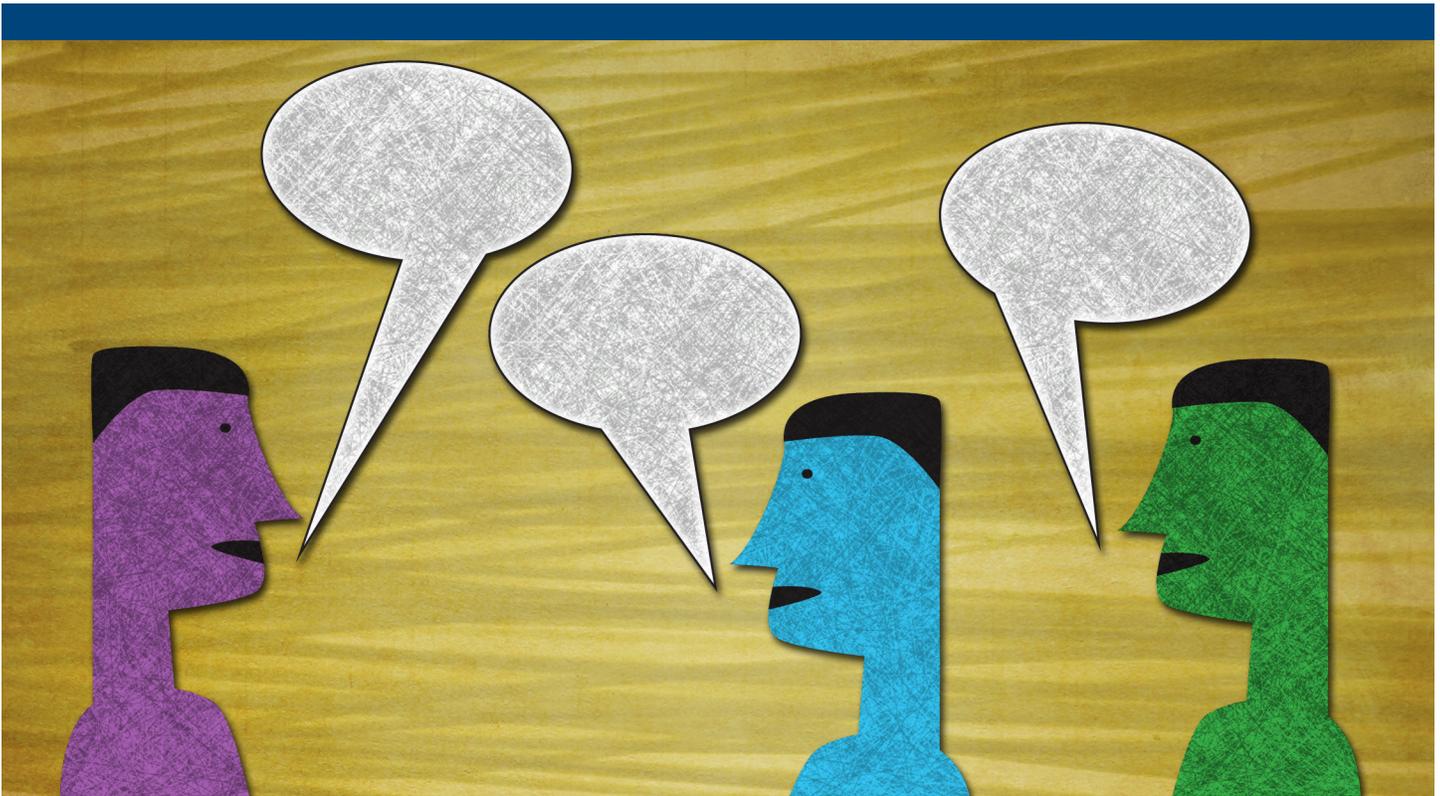
Critical or analytical thinking is tough to teach in the abstract, yet this text does just that by offering both sides of the arguments (as well as the middle perspective) on neuroscience use in the courtroom. These authors use case law to tell memorable stories of how neuroscience found its way into the courtroom. Then, rather than quickly moving on, they present criticisms, limits, and cautions. While the neurolaw arena is often written

up in the mass media as a “gee whiz” revelation or at times, characterized as a ridiculous venture into the courtroom—in this book, I never had a sense of the “gee whiz”. I also never had a sense the authors were disgusted by the inappropriate use of neuroscience in the courtroom. Instead, the text was measured, fair, logical in progression, and yet both fascinating and engaging. This was neither a witch-hunt nor a cheerleading squad and by reading it, I learned more than I ever expected to learn when I first opened the text. This is paradoxically both an introductory text and an advanced reference guide for both criminal and civil practitioners.

What Professors Jones, Schall and Shen have achieved is the unprecedented assembly and useful organization of the huge and complex neuroscience literature. Not every article is included. Not every bit of case law is included. But I felt, when I finished reading, as though I had a new respect for the breadth and depth of neurolaw. Even better, the authors plan to update the book regularly and they have a website with current case law and articles of interest to supplement the book in between editions. (The website is password protected but when you buy the book, you get the log-in information for the website.)

A few years ago, people were very excited about a new book on typeface for legal writing (we published the author’s Q&A on his book, [Typography for Lawyers](#), in 2011). *Typography for Lawyers* was hailed by many in 2011 as the ultimate writing reference guide for many trial lawyers and litigators. Similarly, *Law and Neuroscience* is perhaps the ultimate reference guide for any of us (and that would be all of us) who find ourselves faced with questions on the human brain and behavior, new technologies that give us glimpses into and dazzling pictures of the brain, questions about the role of personal responsibility in behavior, and whether neuroscience findings will ultimately inform or mislead the triers of fact. These are questions that resonate with the mock jurors with whom we do pretrial research and, I think, they are questions that will resonate with all of us in the years to come as neuroscience continues to advance into the courtroom. *Law and Neuroscience* is a book that will reside on the bookshelf closest to my keyboard—while the companion website will occupy a prominent position on my Favorites bar. ☺

Rita Handrich, PhD is a trial consultant with Keene Trial Consulting and Editor of The Jury Expert. She has been following neurolaw findings since the mid-2000s. She blogs regularly, on neurolaw and other litigation advocacy topics, at Keene Trial Consulting’s 2010, 2011, 2012, 2013, and recently 2014 ABA Top 100 blawg, The Jury Room.



Promoting Communications Between Social Scientists and Lawyers

by Ronald K. Bullis, Ph.D., J.D.

THIS ARTICLE SERVES as a reminder. It is intended to remind lawyers about fundamental communication skills. It does not pretend to plow any new ground. Rather, it offers fundamental solutions to a fundamental issue. That is, the cultural and communication dissonance between professions—in this case between lawyers and scientists, especially social scientists. Sometimes, especially in the crush of litigation, the best remedies return to foundational skills.

Different Professions, Different Planets?

I spoke with a colleague as we planned forensics training for social scientists. We both had legal and social science backgrounds and were preparing to speak on how social scientists can be better expert witnesses. The gist of the conversation went something like this:

Yikes! We're going to have to translate a lot of legal terms and legal procedure.

Yeah, I know. Especially, if they don't testify regularly.

Nor do most attorneys know social science culture. How would they know?

Lawyers have their language. Social science has theirs.

"And ne're the twain shall meet."

"You know, it's not just a matter of language, either. It's a difference in professional goals, definitions and methods for uncovering truth, definition of outcomes, training, even professional ethics. Like they're living in different cultures."

"Even worse, like we're living on different planets."

We knew we were not the only professionals having to straddle the two worlds of science and law. It is no secret that the space between the "lapperson" and the "expert" in any field can amount to the differences between worlds. Ever since the landmark decision of [Brown v. Board of Education](#), where social science evidence was used to render its landmark decision, courts and lawyers have used social research in earnest. Cases

utilizing social science research have dramatically increased over the years, not the least with the forest of forensic experts and cases cited in [Daubert v. Merrell Dow Pharmaceuticals](#) and its progeny. The importance of interdisciplinary communication has increased accordingly. As social science methods become more complex and sophisticated, the language and concepts also become increasingly specific and less understood across disciplines.

This problem may show up in three areas:

1. Lawyers who are new to the field or new to using social scientists as scientific consultants.
2. Lawyers who engage trial consultants, many of whom are social or behavioral scientists (especially if the relationship between the attorney and the trial consultant is new or is addressing new or complex research or concepts).
3. Experts testifying, many of whom are scientists.

Miscommunications yield miscues, misunderstandings and missed opportunities. Expectations can be unmet when either attorneys or social scientists do not “hear” what the other party is saying. The different assumptions and frames of reference between a lawyer’s world and the social science world are largely the culprit. Legal research and social science research have different methods and ends in mind. The communication problem becomes acute when the two professions need to collaborate.

Why Is It So Hard for Two Educated and Accomplished Professions to Understand Each Other?

Simply put, the answer is: precisely because these professionals are so educated and accomplished!

Both the legal and scientific professions require both a high degree of training and experience. Years of specialized training, specialized skill-building, specialized technology, specialized discourse and specialized experience yield a highly specialized language and a highly specialized culture. The more specialized the culture, the easier it is to communicate to colleagues. Likewise, the more the specialized the culture the harder it is to communicate with “outsiders”—meaning those in other professions and just about everyone else.

The problem is more than mere semantics. The issue sizzles down to zeitgeist—the worldview, the frame of reference, the perspective from which the lawyer and social scientist understand truth, ultimate value, themselves and others. I have described this difference by saying that a courtroom is neither a classroom nor a therapist’s couch.

Different authors use different terms to define these differences. Some suggest that there is a hierarchical difference between how legal decisions are made (judge or jury) and argued and the more consensual way that science arrives at conclusions. That is, a critical mass of consensus is usually required to repeat

the same results before the scientific community concurs.

Other authors use the term dichotomous thinking to describe the law and believe that science has a more integrated approach. After all, at the end of a trial, the jury declares the defendant to be guilty or not guilty or liable or not liable. End of story—at least until appeal. In science, the truth is never really set in stone; something is rarely “settled law”. This is particularly so for the social and behavioral sciences. People, culture and environments change. While these distinctions are admittedly overdrawn, they make a point. Different disciplines define “truth” differently.

So, How Can Lawyers Improve Communication?

The following ideas may seem obvious, even simplistic. They are not. Communication, persuasion and learning are not as simple as once thought—with the teacher figuratively opening up the brain of the student and pouring in information and the students then repeating it.

First, this article suggests what lawyers do not do—like, don’t be a social scientist. Be a lawyer. In fact, be a cutting-edge lawyer—be a client-centered lawyer and be a lawyer who remembers to use cognitive skills that refine the human software. These are the cognitive skills that law schools are beginning to teach lawyers for the 21st century.

The first skill is to know how we learn and communicate. [Demirdögen’s 2010 article in the International Journal of Social Inquiry](#) notes how the Yale Study of persuasion cited well-published elements of persuasive communication: the speaker, the message, the audience and the context. For social scientists to really “hear” the lawyer, the lawyer must attend to each of these elements. These communication elements are well-known by many, but are easy to forget in the crush of litigation. Adjusting your message to adopt all these elements is necessary for effective communications.

We have already noted all these elements earlier. That is, we have noted how the lawyer (speaker) uses professional language (message) to an audience (scientist) who comes from a different world (context). It could be a perfect storm of miscommunication. But client-centered communications act as the perfect calm in situations with a high potential for miscommunication.

Here are some specific cognitive skills and client-centered communications recommendations and strategies:

1. Use your imagination. Try being a novice and imagine knowing nothing. Your goal is to let the scientist teach the innocent (i.e., the jurors) about their scientific expertise. Are they effective? If you knew nothing about their expertise, do they clarify or confuse you? You should not have to excavate undergraduate study or your experience from previous cases to understand what the scientist is explaining.

2. Then, take it one step further and make the scientist use their imaginations. Ask “how” questions, not “yes or no” questions. For example:

“How do you think cross-examination will go?”

“How will you explain contrary data from other researchers?”

These questions make the scientist give voice to unspoken assumptions. It is better for the lawyer to find out unspoken assumptions or predispositions before trial—not during cross-examination.

For example, one unspoken assumption might be for the scientist to consider themselves to be so much the objective researcher that they do not consider their testimonial demeanor. They may think, “Let the research speak for itself.” So they might appear disinterested or aloof. When, in fact, as [Ivkovic & Hans, in their 2003 article in Law and Society Inquiry](#), said, “The messenger is the message.”

3. A hallmark of client-centered legal practice is listening well and asking well. It sounds simple, but it is not. It takes time, energy and skills and the same skills can be applied to scientist witnesses as to your clients. It will seem awkward in the beginning. Asking open ended questions is much different than close-ended, yes or no questions. Asking, “Did you conduct DNA research in undergraduate school?” is different than asking, “Tell me how you got interested in DNA research? The open-ended question offers much more information not only about when they started such research, but what personal involvement they have with the research. The jury wants to know more about the expert than their list of degrees and publications. They want to know them as human beings with values and interests and passions. Jurors want to know more than what the scientist knows. They want to know who they are. Jurors must judge credibility. That’s their job. Those values, interests and passions form the connective tissue for cultivating rapport with the jury. Without rapport, the scientist is just another talking head.

If the researcher cannot answer how and why they got interested in their research, suggest they think about it—hard. It’s that important.

4. Be an educator to another professional. Speak the obvious. Be clear, even blunt. You are a professional. So is the scientist.

But, the scientist is not in their classroom. They will be on your territory. They need to know how cross examination works and how their credibility will be challenged—and how they will respond. They will not test their “students” (i.e., jurors). Instead, the “students” will test the “teacher”. The lawyer can describe how they expect the trial may proceed, how the scientist’s testimony fits into the trial theory and other matters.

Then (and here is good client-centered practice at work with other professionals) ask the scientist to tell you what you just said. Another hallmark of client-centered legal practice is rephrasing responses. Rephrasing just means the lawyer says back in their own words what the scientist just said. The old formula is “I heard you say that...” Rephrasing makes the scientist think through what you have said and to organize it.

It also is a memory aid. Research tells us that restating information helps the brain organize information in a useful and meaningful way. Besides, factual errors in the communication are revealed and can be corrected. Similarly, research indicates that illustrations, examples, charts and graphs are all effective educational and communication aids. You use them in trials. Try using them to help the scientist to know their role in the proceedings, the significance of their testimony, what issues should be addressed, likely challenges to credibility and research, and other matters.

We think we communicate because we talk or write. We talk on cell phones, write emails, and use social media. Some even write articles. Just because we talk or write doesn’t mean we communicate. It’s a much more complex process. While the ideas in this article are simple, they are not simplistic. The concepts may sound like child’s play, but applying them is not. It certainly is not intended to be patronizing to the scientist or to shoe-horn their testimony to fit certain results. It is how professionals communicate across their professional languages and cultures. The goal of this article is to reduce this culture gap so that the communication may not seem like it stretches between worlds, maybe just across the chasm between continents. ¹⁶

Ronald K. Bullis, is a free-lance writer and communications consultant. His latest book is *The Narrative Edge in Expert Testimony: A guide for social workers* You can review additional information on his practice at Ron’s website: lawis-thecoach.com.