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Are Lab Studies on PTP Generalizable?:

An Examination of PTP effects Using a Shadow Jury Paradigm

by Tarika Daftary-Kapur and Steven Penrod

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Don't miss our consultant responses from Charlotte A. Morris, Ken Broda-Bahm, and Alan B. Shniderman at the end of this article!

The Internet, 24-hour news shows, constant television and online commentary, blogs, and social media have progressively made news coverage more easily available to the public. As such, the influence of pretrial publicity (PTP) on potential jurors has become an increasing concern. This concern is all the more heightened in high profile cases. If that information presents biased, inflammatory, false or incomplete facts about a party in the case, then it has the potential to undermine the constitutional guarantees to trial by an impartial jury (as guaranteed under the sixth amendment) and to due process in both civil and criminal trials. Courts have devised and implemented a number of remedies to help eliminate the potentially biasing effect of PTP and the American Bar Association has developed guidelines to protect against the dissemination of prejudicial information before trial (see ABA standards, Rule 3.6 for specific standards for lawyers dealing with PTP issues).

What Do We Know About PTP Effects?

A significant body of psychological research shows that PTP can affect juror/jury decision making (see Steblay, Besirevic, Fulero, & Jimenez-Lorente, 1999 meta-analysis for a review). Overall the research shows that jurors exposed to negative PTP are more likely to find the defendant guilty as compared to those who are exposed to less negative PTP, or no PTP. Essentially, pretrial publicity may bias potential jurors and impair a defendant's right to be tried by an impartial jury, as guaranteed under the Sixth Amendment. Numerous aspects of PTP could influence potential jurors and their decision making. These include the amount of PTP, the type of PTP, the timing of the presentation of PTP in relation to trial evidence, the lack of appropriate screening measures of exposure for potential jurors and the nature of the PTP itself (Steblay, et al., 1999). In general, research has demonstrated that prejudicial PTP in criminal cases influences perceptions of defendant likeability, credibility, sympathy towards the defendant, perceptions of defendant criminality, judgments of pretrial guilt and final verdicts (Studebaker & Penrod, 1997).

Concerns About the Research on PTP and What We Did

Judges at times have been reluctant to accept these social science research findings concerning PTP effects. For example, in the change of venue hearing for the Oklahoma City bombing trial of Timothy McVeigh, Judge Matsch had greater faith in his personal experience as a trial lawyer and judge than in the psychological research "consisting of largely simulated trials" (*United States v. McVeigh*, 1996, p. 1473). In this study, we addressed a number of concerns raised by the courts about the applicability of psychological PTP research to the courtroom: the artificial stimulus materials used in prior research on PTP (by using a real case with real PTP and trial transcripts); the significantly truncated time in research studies between PTP exposure and the verdict (by conducting the study over a 10 week period as a real trial unfolded; the weak nature of PTP used in research (by including more PTP based on actual articles about the case); and, the over-reliance on undergraduate samples (by using community member mock jurors from the trial venue).

Through our research we blended both experimental and case study methods in an attempt to provide both more external and internal validity in testing PTP effects. In this study, we adopted two ways to examine PTP and its influence on juror decision making—non-experimental field studies and laboratory studies that are experimental in nature. Both approaches have their advantages and disadvantages, non-experimental studies in the field make use of actual cases, actual venires, and real PTP, whereas experimental studies allow for greater control.

In addition to examining PTP effects in real time, we tested a number of other important but under-studied effects such as slant of PTP (whether it was pro-prosecution or pro-defense), the amount of PTP exposure, whether PTP effects persisted in the face of evidence presentation and judicial instructions, and how attitudes played a role in juror decision making. In this article, we briefly discuss findings related to the persistence of PTP effects, and the impact of experimental and case study methods on juror decision making. (This paper summarizes a more complete presentation of this overall project contained in Daftary, Penrod, O'Connor, & Wallace (in press, *Law and Human Behavior*).

Do PTP Effects Fade Over Time?

In practice, courts seem to assume that with the passage of time the impact of the media coverage on potential jurors will be reduced. There is a belief that delay can decrease the effects of PTP as the majority of publicity is at the time of the incident and subsequent arrest, but tapers off subsequently (see *Sheppard v. Maxwell*, 1966). The research on the persistence of PTP effects however, is limited. Kramer, Kerr, and Carroll (1990) found that the influence of some types of information—specifically factual PTP—decreased over time whereas the effect of emotional PTP seemed to persist over time. Davis (1986) found no difference in the persistence of PTP effects when comparing immediate pretrial exposure to exposure that occurred one week before presenting the trial materials.

Does the Presentation of Evidence Counter the Biasing Effect of PTP?

Courts assume that presentation of evidence will counter any potentially biasing PTP effects. The assumption is that any biasing effect of PTP can be corrected through the presentation of evidence at trial. That is, jurors will disregard what they might have heard through the media, and use only the information presented at trial to make decisions about innocence or guilt. Research on the anchoring heuristic, however, suggests the opposite.

The anchoring effect occurs when exposure to initial information acts as an anchor and people evaluate all subsequent information in light of this starting point (Tversky & Kahneman, 1974). Although presentation of new information might examined on a numerical scale (Greene & Bornstein, 2003). This theory has been tested extensively in the legal context in relation to damage awards at civil trials (e.g. Chapman & Bornstein, 1996; Greene, Downey, & Goodman-Delhunty, 1999; Marti & Wissler, 2000). In the current context, individuals may use the initial information they learn about the case, usually via PTP, as the anchor and evaluate all subsequent evidence in light of this PTP. Research on the effect of presentation of trial evidence has been limited, and conducted in an experimental context. Studies that have included a more extensive presentation of evidence have revealed mixed results (Bruschke & Loges, 2004). Otto, Penrod, and Dexter (1994) had participants watch a 2-hour tape of an actual edited evidentiary phase of a trial. They found that trial evidence weakened the effects of character pretrial publicity only and did not influence other types of publicity such as statements made by a neighbor of the defendant, a prior record, or low social status of the defendant. A handful of other studies have used trial simulations lasting approximately 30 minutes (e.g., Ruva & McEvoy, 2008; Hope et al., 2004; Pritchard & Keenan, 1999, 2002; Ruva et al., 2007), with mixed results.

How Applicable Is the Research on PTP Effects to Real Cases?

Courts have been skeptical about the applicability of existing research in the laboratory to real

world settings. At the same time research has shown the validity and applicability of laboratory research (see Bornstein, 1999, comparing student and community jurors, and mode of trial presentation). The applicability of experimental research to what happens in the real world is something that psycholegal researchers struggle with (e.g., Bornstein, 1999; Bray & Kerr, 1995). The courts have been skeptical at times of accepting psychological research findings that are not "realistic (Diamond, 1997). PTP research in the laboratory has revealed a clear link between exposure of biasing PTP and juror/jury decisions. To show this link, and maintain experimental control, researchers have been forced to give up a certain amount of external validity (the extent to which research can be generalized to other situations/people). Courts have used the artificial nature of the exposure to PTP to reject laboratory findings because they do not mimic what happens in the real world. Thus, in this study we made an effort to close the gap between purely experimental manipulations of PTP variables in the laboratory and loosely controlled field studies to help demonstrate the external validity of laboratory research; in an attempt to convince the courts of the psychological reality of PTP effects on real-world decision making.

The Current Study

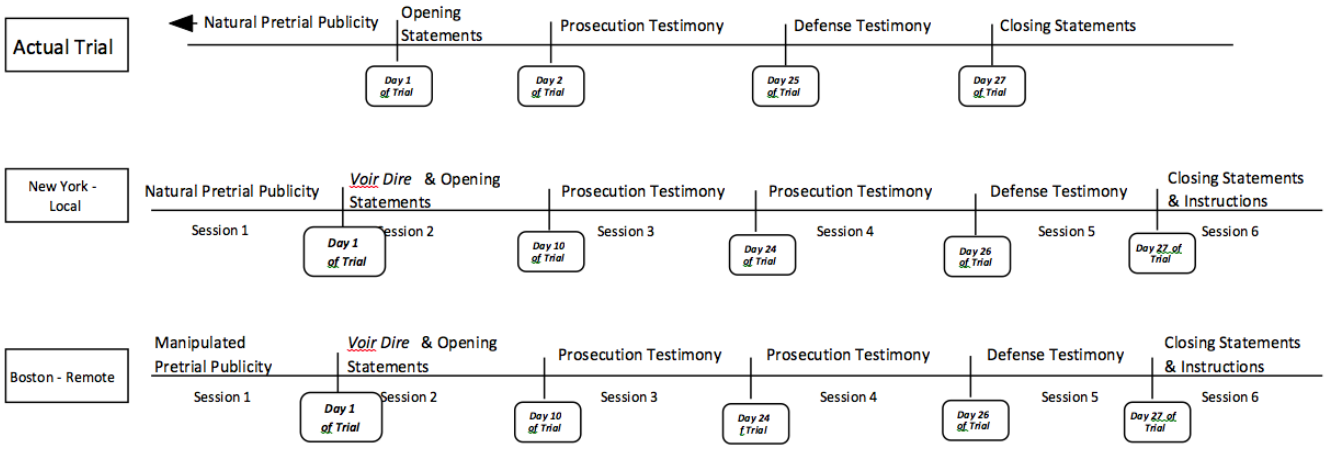
Our goal was to (1) examine the durability (persistence) of PTP effects from exposure to verdict and, (2) to focus on the comparability of the effects of PTP presented experimentally versus the effects which occurred naturally over the course of pretrial PTP exposure and consideration of actual criminal trial evidence. To do this we used a shadow jury methodology that tracked an actual criminal trial as it proceeded in New York City, and used that case in two parallel conditions – a "Natural Exposure" condition (for participants in New York city) and an "Experimental Exposure" condition (for participants in Boston).

In the current work, the entire study was conducted online. We selected a high profile case (described below) in which there was substantial pretrial publicity. Before the start of the actual trial, we recruited mock jurors from the **natural venue** where the case took place and jurors were being exposed to PTP naturally (New York City) and another sample of mock jurors from the **experimental venue** (a venue where jurors were not naturally exposed to PTP: Boston). Mock jurors in the NYC area were exposed to this information starting at 14 months prior to the trial when the incident took place. Their exposure consisted of anything they might have voluntarily read/seen/heard about the case. The sample from the experimental venue was exposed to the same type of PTP information that the natural venue was exposed to but with a few exceptions. We manipulated what the experimental sample was exposed to, to test the influence of bias (pro-prosecution and pro-defense) and amount of exposure (5 vs 10 newspaper articles). Also, they were exposed to the PTP 2 weeks before the start of the trial.

Participants were recruited online via an advertisement placed on craigslist.com and jury eligibility was determined. Those who met jury eligibility criteria were invited to participate in the study via email. The entire study was conducted in six sessions, online. We assessed participant familiarity with the case and took this into consideration during our data analyses. There were six "trial" sessions conducted over a period of 10 weeks. In each session, participants were exposed to new trial testimony (see Figure 1 for how sessions parallel the actual trial) and asked to fill out a questionnaire. After each session participants were instructed

with pattern New York State judicial admonitions, to avoid the media and any coverage regarding the trial during the duration of the study. At the end of session 6—after rendering verdicts—participants were queried on media exposure during the course of the study.

Figure 1. *Timeline of Trial and Study Progression*



Target Case

The target case for this study was a case tried in the Supreme Court of Queens County, New York, *The People of the State of New York v. Michael Oliver, Gescard Isnora, and Marc Cooper.* The defendants, undercover police officers with the New York Police Department were charged with manslaughter in the death of Sean Bell on the night before his wedding. On the night of the incident the police officers were staking out a nightclub in Queens with the intent to uncover a prostitution ring. At the end of the night, when the club was closing, one officer witnessed an argument between a friend of Sean Bell and another patron of the club in which he thought he overheard Sean Bell's friend say that he was going to his car to get a gun. The police officer radioed his colleagues for back-up. Instead of waiting for his back-up to arrive, the undercover officer approached Sean Bell's car with his gun drawn. According to the defense, when Bell and his companions saw a man approaching them with a gun drawn they revved the engine and tried to escape. In the process, the car scraped the officer's leg. Around the same time, the back-up van arrived and witnessed this event. The two officers in the van and the officer on the street opened fire on the car with Bell and his friends, firing a total of 50 shots. Bell's two friends survived – one with 19 shots to his body, but Bell's injuries were fatal.

A number of aspects of this case made it particularly suitable for the current study– 1) there was extensive media coverage surrounding this case that revealed support both for the prosecution and for the defense; 2) the defense filed a change of venue motion with the court claiming that the jury pool had been contaminated due to the extensive media coverage; and 3) the prosecution filed a motion in response, citing PTP that was supportive of the defense case.

Participants

Natural exposure (NYC). We recruited 130 participants in the local venue, and our final sample consisted of 115 participants (12% attrition). Of the 115 participants, we had 84 (73%) females and 31 (27%) males. The average age of the participants was 36.92 (*SD* = 12.53) years, with a range of 18 to 72. The sample was ethnically diverse with 66 Caucasians (57.4%), 22 African–Americans (19.1%), 9 Hispanics (7.8%), 7 Asian-Americans (6.1%), and 11(9.6%) who identified as other. Additionally, 43.5% (*n* = 50) of the participants were college graduates, 24.3% (*n* = 28) were high school graduates only, 19.1% (*n* = 22) had a post graduate degree, 10.4% (*n* = 12) had some graduate school training, and 2.6% (*n* = 3) had some high school education. Finally, 85% of the participants were familiar with the Bell case.

Experimental exposure (Boston). We recruited 177 participants in the remote venue and our final sample consisted of 156 participants (13% attrition). Of the 156 participants, we had 104 (67.7%) females and 70 (32.3%) males. The average age of the participants was 33.25 (*SD* = 120.32) years, with a range of 18 to 67. The sample was primarily Caucasian (*n* = 187, 86.2%), 11 African –Americans (5.1%), 11 Asian-Americans (5.1%), 4 Hispanics (1.8%), and 4 (1.8%) who identified as other. Additionally, 38.7% (*n* = 84) of the participants were college graduates, 23.5% (*n* = 51) were high school graduates only, 21.2% (*n* = 45) had a post graduate degree, 15.7% (*n* = 34) had some graduate school education, and 0.9% (*n* = 2) had some high school. Finally, 5% of the remote participants were familiar with the Bell Case.

Finding 1: Slant of the Pretrial Publicity Influenced Mock Jurors' Decision Making.

Regardless of exposure modality (natural in NYC or controlled in Boston) exposure slant had a significant effect on verdict. That is, those who were exposed to high pro-prosecution PTP were more likely to find the defendants guilty than those exposed to pro-defense slanted PTP. These findings support previous findings in the literature (see Stablay et al., 1999).

In the natural (NYC) sample 72.4% of those who were classified as being prosecution biased found the defendants guilty on at least one count, and only 40.6% of those classified as being defense biased found the defendants guilty on any counts.

In the controlled sample (Boston) 62.8% of those who were exposed to pro-prosecution PTP found the defendants guilty on at least one count, and compared to this, only 40% of those exposed to pro-defense PTP found the defendants guilty on any counts.

Finding 2: PTP Had the Same Influence on Mock Jurors' Decision Making Regardless of Exposure Modality (Natural or Controlled)

We hypothesized that the PTP would have the same influence on mock jurors' decision making regardless of exposure modality (natural or controlled), which speaks to the external validity of laboratory studies. To test this we examined the differences in verdict for the natural exposure sample and the controlled exposure sample. Overall, there were no differences in outcomes based on exposure modality.

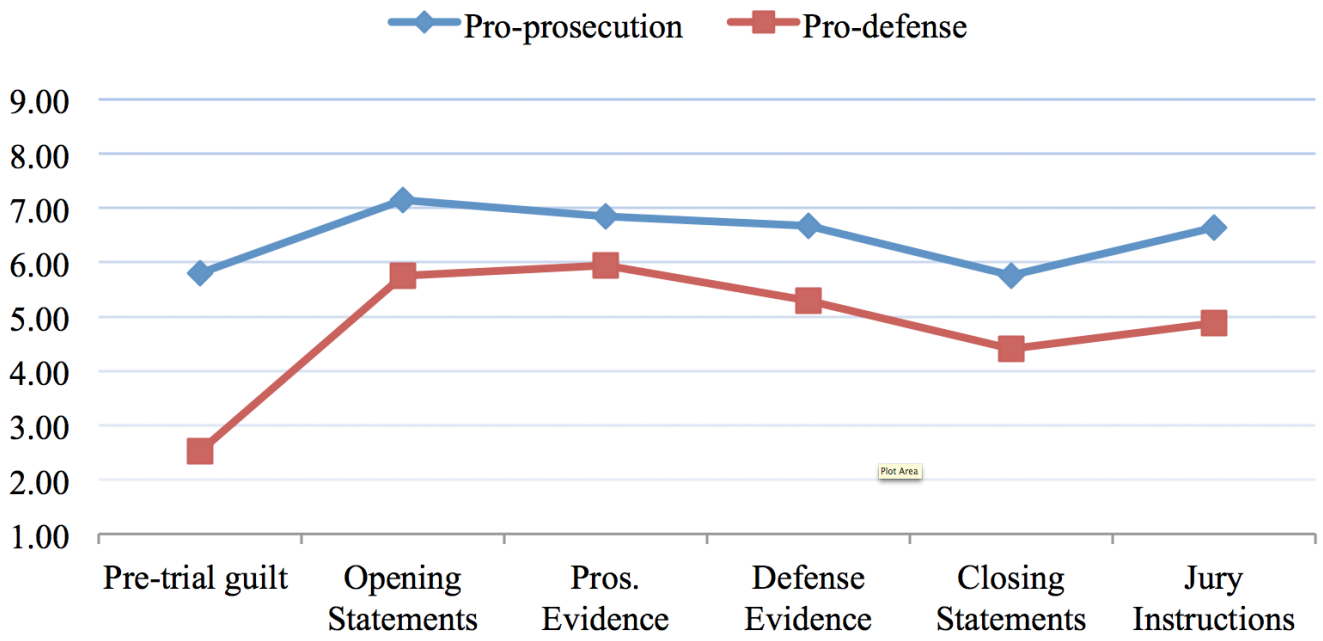
That is, those who were exposed to pro-prosecution PTP naturally (NYC) had similar verdicts to those who were exposed to pro-prosecution PTP in the controlled exposure condition (Boston).

Similarly, those who were exposed to pro-defense PTP naturally (NYC) had similar verdicts to those who were exposed to pro-defense PTP in the controlled exposure condition (Boston).

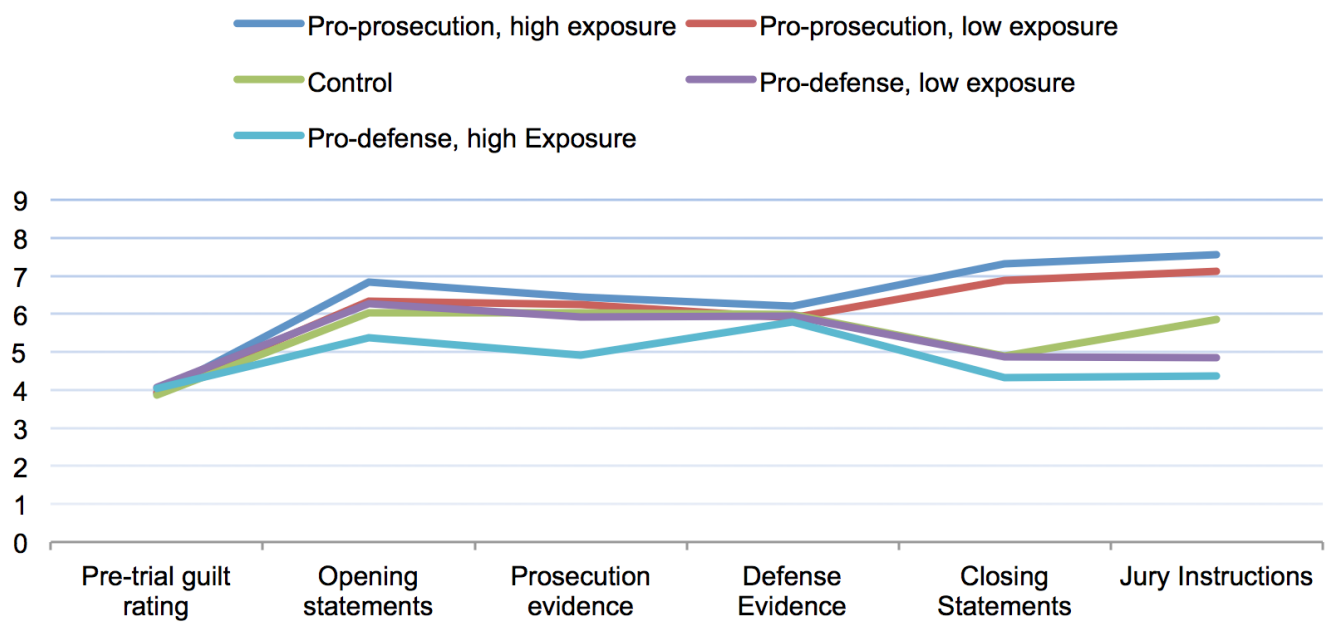
This provides support for the hypothesis that bias functioned in the same manner across modalities. Therefore we can say with some assurance that PTP exerted its influence similarly regardless of whether it was experimentally or naturally presented.

Finding 3: Biasing Effects of Pretrial Publicity Persisted Throughout the Duration of the Trial and Influenced Final Verdicts.

Exposure to pretrial publicity biased mock jurors in the direction they were exposed (pro-defense or pro-prosecution) and this effect persisted throughout the trial. Figure 2 shows guilt leanings at various stages of the trial for those in the natural exposure condition, and Figure 3 shows guilt leanings for those in the controlled exposure conditions. As expected, there were no significant differences in pretrial leanings of guilt (these leanings were taken prior to any PTP exposure), across different levels of exposure.



The next set of leanings was obtained after opening statements (this was post-PTP exposure); and as expected, there was a significant difference in guilt leanings based on exposure level—those who were exposed to pro-prosecution PTP were more likely to rate the defendants as being guilty (on a scale of 1-9 ranging from not guilty to definitely guilty), whereas those who were exposed to pro-defense PTP were more likely to rate the defendants as not guilty.



This pattern continued throughout the presentation of evidence, closing statements, and judicial instructions. Overall, initial exposure to PTP affected perceptions and led participants to evaluate all subsequent evidence through this biased lens.

Conclusions and Legal Implications

In this study we found a significant effect of pretrial publicity on decision making in both the natural and controlled exposure conditions, and these effects persisted throughout the course of the trial—in the face of trial evidence and admonitions to disregard.

In practice courts rely on admonitions to disregard information with the aim that it will lead jurors to set aside prejudicial PTP when making decisions; this approach was not supported here. Despite the fact that participants were instructed to base their decision making on trial evidence alone, the PTP they were exposed to influenced their final verdicts. Thus, presentation of trial evidence may not eliminate a PTP effect which will continue to persist in the face of evidence. Moreover, jury instructions, which have long been assumed by the court to act as a safeguard against PTP failed to protect against (indeed, did not reduce) PTP's influence in this study.

A primary goal of this study was to enhance the generalizability of PTP research by examining the influence of natural, non-manipulated exposure to PTP all the way through to post-trial verdicts. We tested whether findings in our field-based design shadowing an actual, ongoing trial, would match those in the laboratory. Indeed, we found no significant differences in the biasing effects of PTP that occurred naturally, and that which was manipulated. This should lead to an increased confidence by the courts in relying on the findings of PTP research conducted in controlled, experimental scenarios

We also found that a common safeguard used by the courts—continuances – might not be

effective in reducing PTP effects. Participants in our natural condition were exposed to PTP approximately 14 months prior to the trial (when the incident took place), and despite this time delay, the influence of PTP persisted. This provides evidence for the strong influence that PTP can have on decision making in the trial context, and that continuances might not protect against the harmful effects of PTP.

The judiciary does recognize the harmful effects of PTP and safeguards have been put in place to protect against these, but our findings show that many might not work. Additionally, judges at times disregard social science research due to what they believe is its lack of external validity (see, e.g., *Lockhart v. McCree*, 1986). The current study was one attempt to address some of these concerns by having community member participants, using an actual case with real PTP, and using natural as well as controlled exposure to PTP. Thus, given the overall body of research on PTP publicity, and our current findings, we can safely conclude that PTP does in fact influence judgments in the courtroom. The next step then is to develop strategies to combat this effect, and encourage courts to acknowledge the deleterious effects of pretrial publicity on potential and actual jurors.

Tarika Daftary-Kapur (**tdkapur@fdu.edu**) is an Assistant Professor at Fairleigh Dickinson University in Teaneck, NJ. Her research interests are in the area of decision making in the legal context, jury decision making, impacts of pretrial publicity and bias on decision making. You can review Dr. Daftary-Kapur's research and contact information on her** webpage**.

Steven Penrod (**spenrod@jjay.cuny.edu**) is a Distinguished Professor at John Jay College of Criminal Justice, New York. His research interests are in the area of decision-making in legal contexts, death penalty decision-making, juror's use of probabilistic and hearsay evidence, comprehension of legal instructions, and the impact of extra-legal influences such as pretrial publicity, joinder of charges, the effects of cameras in the courtroom, and the effects of juror questioning of witnesses on jury performance. You can review Dr. Penrod's research and contact information on his** webpage**.

Maureen O'Connor (moconnor@jjay.cuny.edu) is the Executive Officer of the Doctoral Program in Psychology at the Graduate Center of the City University of New York, and Professor and former Chair of the Psychology Department at John Jay College of Criminal Justice. Her research interests are in the intersection of psychology, gender, and law. She is a member of the bar in Arizona and Washington, D.C. She has held numerous governance positions in the Society for the Psychological Study of Social Issues (SPSSI), including President, and also an elected member of the American Psychological Association's Policy and Planning Board, an APA and SPSSI Fellow, and long-time member of the American Psychology-Law Society.

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[1] See Daftary-Kapur, T., Penrod, S. D., O'Connor, M., & Wallace, D. B. (in press). Examining pretrial publicity in a shadow jury paradigm: Issues of slant, quantity, persistence, and generalizability. *Law and Human Behavior,* for a complete presentation.

Response from Charlotte A. Morris:

Charlotte A. (Charli) Morris, M.A. has been consulting on cases nationwide for more than 20 years and she can be reached through www.trial-prep.com or charli@trial-prep.com.

Does This Elephant Make My Room Look Fat?

My response to the article and the study is less like an essay and more like a collection of related questions and thoughts. To wit:

- As a general proposition and in cases of all types, my attorney-clients and I have to assume that bias always exists. Whether it comes in the form of a response to pre-trial publicity or lives in the pre-existing attitudes, personal experiences and beliefs of potential jurors, we approach every trial knowing there is an elephant (at least one) in the room and we will have to address it. We know that evidence and instructions are not sufficient to overcome bias so we must come equipped with our most persuasive arguments, well-prepared witnesses, and excellent demonstratives too.

- I really like that the study was done to convince the courts that what we learn in controlled social science research is applicable to real-world settings, because I see results in real trials that match what I learn in small group research every year. In fact, this article makes the best case possible for running small group research to find out what the bias is and to test our best efforts to overcome it.

- I had the following questions about the research that are not fully answered in this article (some of which may be found in the full Law and Human Behavior article).

1. The sample in both the natural and experimental conditions varies quite a bit from census data for Queens County, NY on two reported demographics: gender and education. Beyond census data, though, I'd also want to know from practicing lawyers in the venue what the venire "looks like" and whether these samples reflect real-world conditions. Knowing that demographics alone are not often predictive of jury behavior, I wonder how much – if any – this could matter?
2. The article mentions exposure to pre-trial publicity in the form of newspaper articles and I have to wonder if that's an accurate reflection of the way most people get their news today? In fact the authors note this in the first sentence with a comment about the "Internet, 24-hour news shows, constant television and online commentary, blogs and social media."
3. How was pre-trial exposure in the natural condition measured both in terms of type and

quantity? The authors report assessing “participant familiarity” with the case but don’t specify the measurements they used and participants in this condition are not grouped according to categories such as “low” or “high” exposure (Figure 2).

4. Similarly, was there any attempt to control for the amount of exposure to PTP in the natural condition? A judge who wants to dismiss the importance of the findings in this study would likely say that there are already remedies for excluding people who report having the greatest amount of exposure. Or were the results analyzed in such a way that might account for the varying amounts of PTP exposure among participants (particularly those in the natural/local condition)?
5. The dissertation also mentions the potentially biasing effects of post-venire publicity (PVP) – meaning continued exposure to information about the case even after the jury has been sworn – and I had the same thought about participants in this study: if we assume that research participants (like real jurors) sometimes ignore the instructions of the Court, were participants also assessed throughout the study for potential PVP exposure (apart from what was given to them in session 4 of 6) and, if so, what difference (if any) did it make? PVP is perhaps the more pressing issue of our day and the authors note the paucity of research on the subject. We all want and need to know more; I currently tell my clients to assume the worst, that at least some jurors will do at least some homework outside of trial and we have to plan discovery and trial strategy accordingly.

- I agree with the conclusions and legal implications as briefly stated in the article, especially that continuances may not be a suitable remedy in cases where there has been significant PTP. I would take this a step-further. Pre-trial publicity and its potential to interfere with the goal of seating an impartial jury is – and has long been – the basis for seeking improved voir dire conditions (supplemental juror questionnaires, attorney-conducted voir dire, additional peremptory strikes, more latitude on motions to challenge for cause, etc.). I find that most lawyers still need our support and encouragement to file the appropriate motions for these (see Jurywork: Systematic Techniques). Many courts are still reluctant to give attorneys enough latitude during voir dire to fully explore potential bias. And many lawyers still don’t have the skills or comfort to conduct *voir dire* with ease, particularly on the thorniest issues in a case. (I am also curious to know more about what the dissertation refers to as “voir dire packets” that were given to research participants and how those compare to jury selection in the real trial.)

- When we start with the assumption that pre-existing bias can and will matter to jury decision-making, litigators must have both the permission of the court and the appropriate tools for conducting thorough and effective *voir dire*. Beyond simply finding out if and how much exposure to PTP potential jurors have, *voir dire* is the first opportunity we have to address it head-on. Lawyers need good questions for generating candid conversation on the issues that are both helpful and harmful to their client and to their case. Talking directly about PTP as a source of bias could be useful too. Consider a series of questions that might follow a discussion of what/how much jurors already know about the case:

    - Raise your hand if you’ve ever made a terrible first impression on someone

before? I know a lawyer who still tells the story of his first law firm interview during which the tail of his dress shirt was poking through the open zipper of his suit pants. I don't even know if he got that job because all he ever tells is the story about how terrible he felt making that first impression. Anyone else have a similar story about you or someone close to you?
    - Do you think you overcame that bad first impression? Why or why not? How do you know?
    - How did things turn out?
    - What did you learn from that experience?
    - What about the opposite: Raise your hand if there has ever been a time when someone else made a bad first impression on you? What happened and how did things turn out? What did that experience teach you?
    - What can someone do to overcome something as powerful as a bad first impression?
    - Do we have to be open to more information in order to give someone the opportunity to recover from making a bad first impression?
    - How many of you would say you think you have a strong gut feeling about people and your first impression is almost always right? Tell us about that. Have you ever been wrong? How hard is it for someone to change your mind about that first impression you have?
- Finally, I would love to see a movement in our courts for judges to explain (in plain English) *why* it is important for jurors to give lesser weight to what they heard about a case outside of the trial (no weight may be an unrealistic expectation given what we know about heuristics). I'm not a lawyer and I didn't go to law school, so while I mostly understand how they work I'm not the best person to explain the rules of evidence. I know for sure that jurors themselves don't know them at all (even if they think they do); they routinely stumble when explaining preponderance of the evidence to each other during deliberations. Why can't judges tell jurors in a very candid way about the protection that the rules provide all parties: that some things a person might know or hear about a case before a trial just don't pass the legal test for admissible evidence in the trial itself. The rules aren't arbitrary, they've been established over time and legal experts (lawyers and judges) work very hard to apply them to the case facts before and during a trial so that the legal decision jurors make will be just according to the law. We have a rather elaborate system for taking justice out of the court of public opinion because that's what our Founding Fathers believed was best and we still agree. Using information we learned outside of court is not unlike playing that old game of "Telephone" where distortions and distractions always interfere with the message.

I do believe that jurors take their oath and their job seriously in the vast majority of cases and I think they would be better served by talking about their bias (and its many potential sources) and getting common sense explanations for the instructions they must follow in order to overcome it. Assuming they cannot overcome it, attorneys and their trial consultants must also put together a case that embraces the elephant in the room.

Response from Ken Broda-Bahm:

Dr. Ken Broda-Bahm provides research and strategic advice on cases across the country, applying a doctorate in communication and 17 years of experience. He is lead author for Persuasive Litigator***, an ABA Journal Blawg 100 publication with more than 400 articles on practical judge, jury, and arbitrator persuasion, has trained and consulted in 19 countries around the world and is a Past President of the American Society of Trial Consultants.***

Strengthening the Argument on Pretrial Publicity

It is often helpful to think of research, not simply as descriptive knowledge, but as an argument. The current article by Daftary-Kapur, Penrod, O'Connor and Wallace is one such example. Placed in context, the scholarship speaks to an ongoing debate. On one side are those who are attuned to the social science and see that the amount, type, and timing of pretrial publicity has a direct and measurable effect on jury decision making. On the other side are those who place unwarranted faith in jury instructions or in small separations in time or geography to address that influence.

Entering that debate, this article can be appreciated for making a novel bottom-line argument:

Problem: Courts are not sufficiently heeding the social science on pretrial publicity, believing it to be too far removed from real conditions.

Solution: The present study compares the strength and persistence of pretrial publicity in both natural and experimental conditions, contemporaneously following an actual trial.

Implication: The fact that the study finds comparable results in both natural and experimental settings suggests that courts should be giving greater weight to the already substantial body of literature on the biasing effects of pretrial publicity.

It is exactly the right move, in my opinion, to take aim at the reasons being offered by courts in order to discount the research. By offering a direct comparison between natural exposure and experimental exposure in a setting that more directly parallels the time frame of an actual trial, the authors will at least make it easier for litigants to offer credible change of venue motions and harder for judges to disregard the research that undergirds those motions.

But one cannot expect this or any study to be a final answer either. To the extent that judges can be expected to challenge this study, as they have challenged other studies, it makes sense for the authors to address these objections up-front in a very direct way. In more complete presentations in the academic press (I believe the authors have another article based on this research in press with *Law and Human Behavior*), the authors should provide the data and the descriptions of methods that more forcefully address the foreseeable responses.

What Would the Doubters Say in Response to This

Research?

Viewing the research in that context as an argument, it is helpful to think about how the argument would be answered by those who want to keep downplaying the effects of pretrial publicity or to maintain solutions that are often largely symbolic.

Here is what I think the doubters can say:

They'll Say the Pretrial Exposure is Not Like Natural Exposure

"Courts have used the artificial nature of the exposure to PTP," the authors note, "to reject laboratory findings because they do not mimic what happens in the real world." So a central selling point is that the study is fixing that by including the "natural exposure condition" of New York City where the trial was taking place. But to me, at least, there is a question of how the researchers measured natural exposure. In the method section they write, "We assessed participant familiarity with the case and took this into consideration during our data analyses," but that doesn't fully clarify what natural exposure means in this case. Instead, the analysis (e.g., comparing figures 2 and 3) seems to be classifying the naturally-exposed New Yorkers as either prosecution-biased or defense-biased from the start, presumably as a result of pretrial publicity. But the amount, form, timing, and salience of that publicity all seems to be undescribed, at least in this shortened description of the research.

To really help address courts' rejection of prior research, the current article should be giving this point central emphasis. There should be some way, for example, to operationalize whether –- in participants' recollection at least –- the pretrial publicity has been high, moderate, low, or nonexistent. It should be possible to record a perception of whether that publicity has tended to favor the prosecution, the defense, neither, or both. Without that emphasis, the local/natural exposure component of the research could be dismissed as simply showing that those who were biased at the start of the trial continued to be biased throughout the trial.

They'll Say The Study's Trial Is Not Like the Actual Trial

A second essential way in which the research seeks to improve on prior research is by following or 'shadowing' an actual trial. In that context, doubters may point to the fact that the method relies on online 30-minute summaries at six points over the ten weeks of trial. When compared to the trial itself, of course, that is just a small slice of information. But when compared to prior research, that is a huge step forward. The authors and others who are applying this research can point to the ecological validity of this study in paralleling the trial in some essential respects.

- Careful summaries were created by researchers attending every day of the trial.
- Exposure was not a one-shot deal, but lasted as long as the actual trial.
- The nature of the information added followed the trajectory of the real trial.

No, it isn't perfect – research never is – and the ideal would be to have an actual "shadow jury" physically attending every day of trial. But the authors' method still offers a dramatic improvement over the method of giving an article and a one-page trial summary. The researchers' 30-minute summaries can never cover the full trial, but it can do much better than researchers have done using more artificial experimental measures.

Importantly, the article shows that *adding similarity* to the method does not cause the effects of pretrial publicity to diminish. Instead, the researchers appear to show that a study incorporating a number of changes in the direction of greater realism will reveal the same basic pattern that the simpler experimental studies have been showing all along. That reinforces the main point: Pretrial publicity is a powerful and persistent source of bias.

They'll Say Ability to Follow Instructions Will Win Out

Of course, no article of faith appears to be stronger among judges than the belief that jurors will understand, apply, and adhere to the instructions. If a mountain of studies show that pretrial publicity biases jurors (and we are getting there), then some judges will still respond, "Well, then I'll ask them to set aside that bias and keep the ones who promise they can." As much as that promise can be a fairy tale (since it assumes that potential jurors both know and can control their biases), that promise still works to satisfy many trial and appellate judges.

So one critical function of research studies like the present one is to underscore that the bias persists, even in the face of the instructions. In that light, the article could substantially clarify how the research participants were told to disregard pretrial publicity in advance and screened on the basis of their professed willingness to do so. The researcher mentioned the repeated instruction "to avoid the media and any coverage regarding the trial *during* the duration of the study," (emphasis added) but were they told and did they promise, in advance, to set aside any influence of the publicity that they had been, either naturally or experimentally, exposed to? That is an important point that should be answered in the text of the article.

Admittedly, I am making my own argument in this comment: Research should argue. So to anticipate possible counterarguments, let me say that, no, that doesn't mean the researcher should be invested or biased. A good researcher follows the facts. But when the facts give you an answer – say, telling you that the earth is not "young" or that anthropogenic climate change is a present reality -- then the researcher as a communicator has an interest in fashioning an argument that at least makes life as hard as possible for those who would deny its conclusions. Minimizing the effect of pretrial publicity is not in the same category as creationism or climate change denial, but the underlying dynamic can be seen as similar.

This article can be a weapon in the battle against those who would favor ease over fairness when it comes to pretrial publicity. At the same time, the research description should be reoriented to more forcefully address the likely reactions to the study and more fully defends the realism that is central to its advantage. Because the study at the heart of the article is likely to have a continuing life in future publications, I believe it can be made into an even stronger argument by more clearly addressing the three points above.

Adam B. Shniderman responds:

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The authors' findings reinforce what many of us have long sensed – the implicit psychology that the legal system adopts with respect to PTP, among other evidentiary issues, is outdated and inadequate. The system demands and believes that jurors can identify biasing information, put that information into a box, and consciously choose to set aside that information and those biases to make an unbiased decision about the case. These assumptions are problematic. As decades of psychological research have have shown, bias operates unconsciously and, as a result, people are poor at identifying the reasons for their decisions and at identifying their own biases.

The legal system's lack of recognition of psychological advances in understanding judgment and decision making leads to difficulties for lawyers attempting to address the effect of PTP. Because of the system's flawed assumptions, the standard for challenging a juror for cause during *voir dire* because of PTP exposure can be difficult to meet, leaving lawyers to use their precious few peremptory challenges or empanel a juror who may be biased by damaging press. Furthermore, the system's efforts to minimize the effect of PTP on empaneled jurors do not eliminate the effect of exposure.

The authors' findings are consistent with what a large and growing psychological literature on PTP have long found – the variety of techniques the legal system employs to address the potential bias stemming from PTP – *voir dire*, the presentation of evidence, judicial admonishments, and continuances (increasing time from exposure) are inadequate to eliminate the effects of PTP. In fact, these efforts may even exacerbate the issue, as some research has found with respect to judicial instructions and admonishments. These types of instructions can draw attention to the inadmissible information, including PTP, and increase its salience in jurors' decision making. (Think about when someone tells you – "Don't look down." or "Don't think about the pink elephant in the room.")

The legal system hesitates to adapt and respond to growing psychological knowledge about PTP arguing that mock jury experiments lack the ecological validity (the extent to which a laboratory experiment approximates the "real world" being studied) to be believed. The authors' findings mark an initial effort to demonstrate that this concern is unfounded - "laboratory" experiments assessing the effects of PTP and measures designed to counter its effect *do* reflect the real world.

So, what does this mean for the system, lawyers, and consultants? What do we do to empanel a jury and minimize the effect of PTP?

Systemically, the standard for challenging jurors could change to better reflect the current state of psychological research on bias in judgment and decision making – i.e., by lowering the bar for excusing for cause anyone with *any* potential bias from PTP exposure. However, as I mentioned in a previous issue, in an age of the 24-hour news cycle fascinated with trials, the proliferation of (often inaccurate) information through social media, and ready access to information through smartphones and tablets, empanelling a venire with no exposure to PTP may be impossible, even in cases that don't rise to the level of O.J., Casey Anthony, Jodi Arias, or George Zimmerman. Furthermore, civically disengaged individuals with no exposure or social awareness are likely not the jurors we want serving.

It's unlikely that this solution is in our near future. Aside from the practical considerations, demonstrating that experiments approximate the real world is likely insufficient to change the system's implicit "politics," psychology, and policies with respect to jury selection and PTP. The legal system and social science have a tenuous relationship and a complex history, even in the face of overwhelming evidence that the system assumptions are wrong. The judicial system's use of social scientific information, and particularly psychological research findings is mixed, even when real cases support the findings. For example, the system has been slow to respond to changes suggested by decades of eyewitness identification and memory research -- even though three-quarters of wrongful convictions involve some sort of mistaken eye-witness identification (supporting the social science research), few jurisdictions have made substantial changes to their lineup procedures to better reflect the state of psychological knowledge.

But trial lawyers are not without options.

First, lawyers can employ the debiasing strategies I have discussed in a previous issue.

Second, lawyers can use bias to their advantage.

Decades of research on confirmation bias and motivated reasoning demonstrate that the processing of information and the weighing of evidence is significantly influenced by prior beliefs and feelings. People tend to unconsciously undervalue (when an objective measure of evidentiary value can be determined), devalue, or cast aside information that is inconsistent with their beliefs or does not support a desired conclusion. Though no research has been done on the implications of these psychological phenomena for PTP, their truth and impact is so widespread it is difficult to hypothesize they would not hold true for PTP (and the authors' findings leave me with the feeling that controlling for general criminal justice attitudes would explain a fair amount of the influence of PTP on jury verdicts).

Thus, the impact of PTP should be, at least to some extent, dependent on general attitudes towards the criminal justice system. Those who are pro-defense should value negative PTP significantly less than those who are pro-prosecution, decreasing its influence on the evaluation of subsequent pieces of evidence, and eventually on verdict choice.

A number of validated scales have been developed that could be converted for use in *voir dire* to assess jurors' general criminal justice attitudes to seek out those that are pro-defense:

The Juror Bias Scale (Kassing & Wrightsman, 1983)

The Revised Legal Attitude Questionnaire (Kravitz, Cutler, & Brock, 1993)

The Pretrial Juror Attitude Questionnaire (Lecci & Myers, 2008)

Keep in mind that these are not a panacea, eliminating all potentially unfavorable jurors who have been negatively influenced by PTP. The predictive power of these scales is good, but not as strong a predictor of outcome as general death penalty or insanity defense attitudes are in those cases.