



The Jury

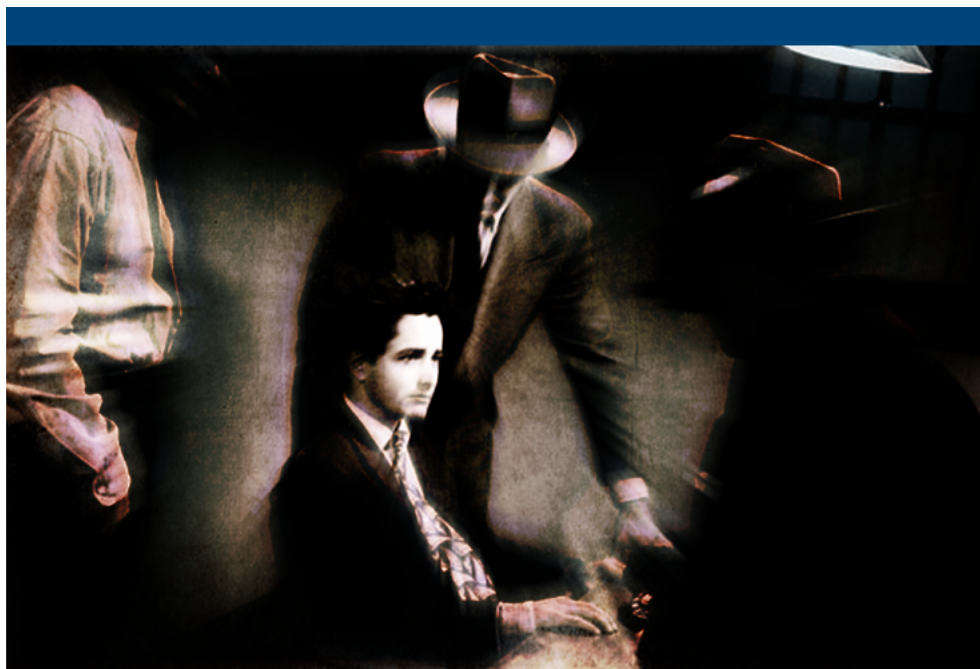
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EXPERT

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“Only the Guilty Would Confess to Crimes”

Understanding the Mystery of False Confessions

Douglas L. Keene and Rita Handrich

False Confessions: “I Can’t Believe I Said That”

Diane Wiley

BOOK REVIEW

Police Interrogations and False Confessions, Edited by Daniel Lassiter and Christian A. Meissner
Rita Handrich

Disability Wrongs, Disability Rights
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FAVORITE THING

The Mona iPad Stand and Evernote
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Musings from the Deliberation Room: The Impact of Humor on Juror Decision Making
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NOTE FROM THE EDITOR

Neither rain, nor snow, nor sleet, nor hail...

NOR EVEN HURRICANE SANDY shall keep us from publishing on time! Although we extended some deadlines and burned a bit of midnight oil—we are grateful to our Hurricane Sandy writers and contributors who went without electricity, WiFi and, in a few cases, bathing, but still managed to get their work submitted so we could publish this issue!

And quite the issue it is! We start with a trio of pieces on the topic of false confessions. We have a review of the false confessions research with comments by a varied group of professionals, a false confessions supplemental jury questionnaire for civil trials and a book review of a collection containing contributions from many of the top researchers in the field. It's a disturbingly eye-opening collection and yet, a must-read group of articles crafted for Jury Expert readers.

We also have a thought-provoking piece on political construal (in this case, that's the question of whether your political orientation is related to bias) and prejudice, an intriguing consideration of "truthiness" and disability litigation/advocacy, a thoughtful piece on how humor is used during deliberations to positive (and negative) effect, and some original research on the impact of media exposure and juror decision-making.

Finally, we have a new Favorite Thing. We hope you have Thanksgiving leftovers still to enjoy as you read this veritable cornucopia of contributions. And if not, coffee is always a good choice.

We here at The Jury Expert are grateful for our committed contributors who come through even when Mother Nature throws an extreme curveball.

We are grateful for our readers who keep coming back and, as in this issue, agree to our requests that they themselves respond to our articles.

And, last but not least, we are grateful the election is over, the barrage of political advertisements has ceased, and hopeful the future will bring unity despite our differences.

So. Read us. Pass on our URL (<http://www.thejuryexpert.com>) to your friends, colleagues, competitors, and even your family members. And know that throughout the upcoming holiday season, we'll be wrapping our next issue (due in late January) for your enjoyment. Let me know if there is something "on your list" you'd like to see included in upcoming issues!

Rita R. Handrich, PhD
Editor, *The Jury Expert*

On “Thin Slices of Testimony”:

As I started to read this article I was nervous, because I have pretty strong opinions about jurors’ judgments of witnesses. And as much as I respect Stan and the work done by his grad students, I was praying we agreed. And we do! I typically tell my clients that if what we want to test is the credibility and character of witnesses, 6-8 minutes of video of active testimony is all we need. I have had a couple of cases that tested it out informally.

In a focus group we gathered feedback on these relatively short (6-8 minute) excerpts, and then we conducted a mock trial wherein the witnesses went longer (up to 23 minutes), so they were presenting the content which would otherwise be described by the attorneys in their presentations. What we found was that the longer presentations had an effect on juror perceptions of expertise, knowledge, and usefulness of their testimony. But the shorter video presentations produced the same ratings on credibility, character, and whether the jurors would rely on the witness for an accurate version of the facts.

It seems to me that an exception to this rule would be in cases where the witness is starkly “not like me”. If the jury needs a longer time to adjust to the witness (due to their having a foreign accent or unusual appearance, or some other feature that jurors need to adjust to) I believe that a longer exposure is likely to produce a diminished effect due to the “differentness” dimension.

Thank you for sharing this well thought-out paper. [-Doug Keene](#)

Brilliant piece with respect to research as well as trial application. [-Philip Monte](#)

On “Getting the Most of Your iPad During Litigation”:

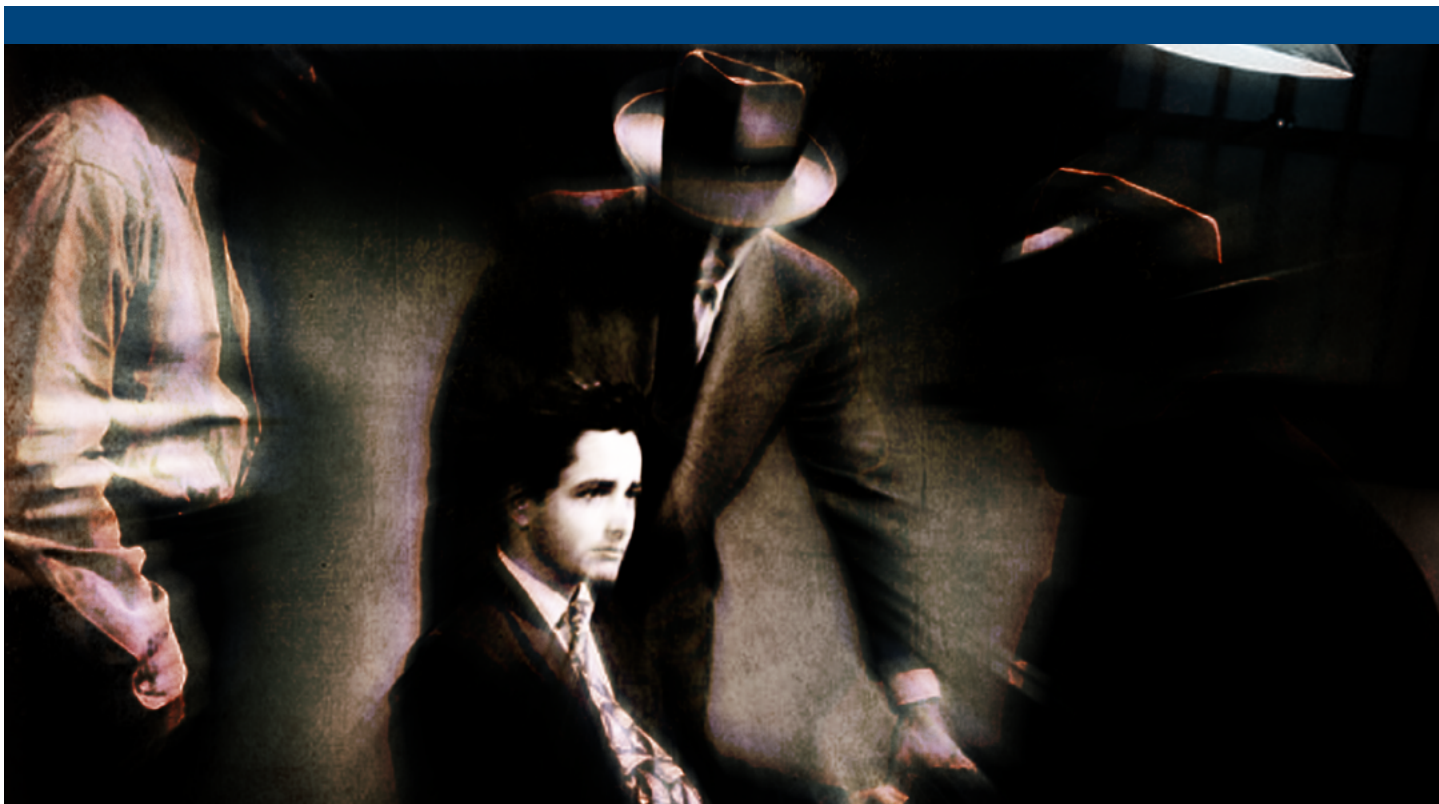
Great overview of apps for the iPad. Dropbox is especially helpful and it seems that most legal specific apps opt to use Dropbox rather than iCloud. With the iJuror app we followed the same approach. [-Scott](#)

On “Hydrolic Fracking & The Environment: Juror Attitudes, Beliefs, and Priorities”:

This is an excellent summary of the existing public opinion research. Beth Foley and I will be speaking to lawyers on this very topic later this week and this is entirely consistent with our background work. Research for fracking litigation will have to be venue- and case-specific to tell us what we all need to do to prepare cases effectively (for either side of the debate). Attitudes toward fracking are all wrapped up with attitudes about Jobs, Economy, the Role and Size of Government, Rules and Regulations, Energy Dependence and Development, and so much more. Thank you for providing the litigation community with a solid foundation for future research and another great article in TJE. [-Charli Morris](#)

- 4** “Only the Guilty Would Confess to Crimes”: Understanding the Mystery of False Confessions
by Douglas L. Keene and Rita Handrich
- 22** False Confessions: “I Can’t Believe I Said That.”
by Diane Wiley
- 30** Book Review: Police Interrogations and False Confessions Edited by G. Daniel Lassiter and Christian A. Meissner
by Rita Handrich
- 32** Disability Wrongs, Disability Rights
Steven E. Perkel, Paul J. Tobin, and James Weisman
- 37** Abstract Thinking Reduces Conservatives’ Prejudice Against Stigmatized Groups
Jamie L. Napier and John F. Dovidio
- 47** The Mona iPad Stand and Evernote
Kelley Tobin and Brian Patterson
- 48** Musings from the Deliberation Room: The Impact of Humor on Juror Decision Making
by Jaime Bochantin
- 53** Media Exposure, Juror Decision-Making, and the Availability Heuristic
Judith Platania and Jessica Crawford

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“Only the Guilty Would Confess to Crimes”

Understanding the Mystery of False Confessions

By Douglas L. Keene and Rita Handrich

“I would never confess to something I didn’t do!”

IT IS NATURALLY hard to understand why anyone would confess to a crime they had not committed. Yet, in North America we can trace false confessions back to at least 1692 and the Salem Witch Trials where “large numbers of mostly women were tried for witchcraft on the basis of confessions extracted by torture and threats” (Kassin, 2010).

More than 300 years later, people continue to falsely confess to crimes ranging from academic cheating to murder. But the mystery of why someone would falsely confess persists. Unlike the Salem Witch Trials, most false confessions today are provided under psychological duress, but without torture or threats of physical harm. Do the generally accepted modern police methods still produce false confessions, or does the responsibility for false confession fall entirely on the confessor?

There is a tendency to believe “others” might well confess under duress—but most people think they, themselves, would never do such a thing (Horgan, Russano, Meissner & Evans, 2012). This belief illustrates the reality that most of us have no idea of what it feels like to undergo an interrogation. More than 80% of those taken into custody by the police waive their Miranda rights (Sangero & Halpert, 2011).

“In any kind of interrogation, anybody with any common sense wouldn’t agree to confessing to a murder. I mean that is... that is absurd.”—Mock juror

To better understand the psychological experience of interrogation subjects, a recent experiment was designed to simulate a police interrogation and resulted in 81% of the subjects designated as “innocent” waiving their right to silence while only 36% of those designated “guilty” did the same (Kassin, 2008). This is very similar to the numbers waiving their rights in actual custody situations, and comports with the general impression that “if you have nothing to hide you have no reason to insist on legal counsel”. Kassin, a leading researcher in the false confessions area, refers to this as the innocence-confession paradox--wherein the Miranda warning does not protect those most in need of protection--the innocent.

Innocent people think, since they did nothing wrong, that cooperating with the interrogators will simply expose their innocence. Instead, waiving their right to silence exposes them to the risk of false confession. Those who have a criminal past

are much less likely to waive their right to silence (Sangero & Halpern, 2011).

“Your parents do that to you growing up. I mean your brother is not going to tell on himself. I have never once said, ‘All right, I did it’, when I didn’t do it. Not once. I don’t care how much she told me that he has done told on me, I am in trouble, it would be easier if I would go ahead and admit it.”—Mock juror

Still, why would anyone confess to something they have not done? If you believe justice will prevail, why would you confess, especially to a very serious crime? There are a number of possible reasons, but the most compelling relates to the power of the interrogation process. The majority (about 65%) of suspects in custody either “fully or partially confess” to the police (Redlich, Kulish & Steadman, 2011). Something powerful clearly happens during the interrogation process itself.

[The Innocence Project](#) has cleared 297 former prisoners found guilty via trial in the criminal justice system. Their [FAQ on false confessions](#) offers the following summation of false confessions:

“Over 25 percent of the more than 290 wrongful convictions overturned by DNA evidence in the U.S. have involved some form of a false confession.”

Why Do False Confessions Occur?

When someone confesses to committing a crime, it only stands to reason that they are guilty. After all, why would they confess if they didn’t do it (Adams, 2011)? The common sense of this is so powerful that juries tend to weigh the confession (even if recanted after legal counsel is provided) as the single most compelling piece of evidence. Saul Kassin lists the [three major forms of false confessions](#):

1. **Voluntary confessions:** This is a confession made to protect someone else, made because you are delusional and believe you did the crime, or made to attract attention to yourself. Examples include the 200 people who confessed to kidnapping the Lindbergh baby, or more recently, [John Mark Karr’s confession](#) to killing JonBenet Ramsey or [Amanda Knox’s false confession](#) to and subsequent conviction for murdering her roommate in Italy. [Kassin says the police do a good job of identifying these false confessions and they are unlikely to result in wrongful convictions.]
2. **Internalized false confessions:** This type of confession can happen when interrogation eventually persuades the accused they did something that they objectively know did not occur. If the suspect is a juvenile, mentally handicapped, experiencing extreme grief, or sleep-deprived—under the pressure of the interrogation session, they can actually come to believe they committed the crime and thus confess. [This type of confession can and has resulted in wrongful convictions.]

3. **Compliant false confessions:** Finally, the largest category of false confessions occurs when (even though the confessor knows he or she is innocent) they break down and give a confession to escape the interrogation process itself. [Kassin says [the boys confessing to raping the Central Park Jogger](#) are an example of this sort of confession. They were tried, found guilty in 1990 and imprisoned until the actual rapist confessed in 2002 and DNA evidence showed him to be the real perpetrator.]

But what could possibly happen in the interrogation process that would lead one to the point of confessing to, in many cases, heinous crimes? While there are certainly personality variables that play into false confessions, most people in the legal system (judges, attorneys and jurors) under-estimate the power of the situational forces acting upon police suspects. Even “normal” people without impairments that reduce resilience (like mental illness) can be worn down by an interrogation and give false confessions (Davis & Leo, 2012).

What an innocent (and many guilty) interrogation subject wants to do is to explain their innocence, and be reassured that their explanation is valid. The “wearing down process” in interrogation thwarts such attempts on the detainee’s part. Instead, the interrogation focuses on the detainee’s wish to be understood, but from the perspective of guilt: how they want to be seen as cooperative, how they want to share with the interrogator a less culpable sense that the detainee must have been caught up in the moment and behaved atypically. As part of this process, the interrogator reassures them that they will be seen as a better person if they cooperate, that the legal outcome could be improved if they confess, or tells the detainee that co-perpetrators, if any, are also being interrogated and that he or she may want to assign blame to them before they assign it to the detainee (Davis & Leo, 2012).

“They never even gave him a psych evaluation. Like they just kept battering him in the interrogation room and just on and on and on. I mean anybody is going to be mentally broke down or emotionally broken down after so long.”—Mock juror

If the interrogation process continues without food, drink or sleep, “a perfect storm of glucose depleting stress, fatigue and sleep deprivation” occurs. Even if offered food or drink, a detainee may be too anxious or overwhelmed to accept. This results in poor decision-making, cognitive decline and over-reactivity to stress (Davis & Leo, 2012). This experience [shared by detainees and soldiers] has been studied in combat situations and is also described as the “fog of war”.

The more depleted the detainee becomes, the less compelling the arguments of the interrogator need to be in order to persuade. Further, as they become more depleted, their ability to perceive manipulation by interrogators also declines. In this distorted environment, detainees are more likely to blindly see what the authorities are saying as a simple reality from which there is no escape (Wentzel, Tomczak & Herrmann, 2010).

Without a clear-headed act of will (which is undermined by

the stress and circumstances of interrogation), the easiest path for a detainee is to do or say whatever must be said to make the interrogation stop (Davis & Leo, 2012).

Other researchers refer to the state of mind during a difficult interrogation as “interrogation myopia” (Scherr & Madon, 2011). When under the stress of the interrogation, all the detainee can “see” is the short-term situation in which they feel trapped. Their decisions are thus driven in-the-moment and not by their long-term interests. In academic research, when participants are falsely accused of having engaged in cheating--their ability to understand Miranda warnings was significantly lower than those not accused of cheating. Being falsely accused, which happens during the interrogation of those who falsely confess, causes tremendous stress and interferes with comprehension of the warnings meant to protect the innocent. The detainee simply doesn’t “hear” or understand the words being said to them. It all seems unreal since they know they are innocent and a horrible mistake is occurring.

Additionally, the expectation of a lengthy interrogation has been found to exacerbate the vulnerability of the detainee to make short-sighted decisions about confessing falsely to simply avoid the ongoing (and seemingly never-going-to-end) interrogation (Madon, Yang, Smalarz, Gyll & Scherr, 2012). This short-sightedness is thought to be particularly likely among innocent detainees as well as those with psychological or cognitive vulnerabilities. The innocent presume their innocence will prevail and that a false confession will be proven false in the long run and, in the short run, the interrogation will end. Those with psychological or cognitive vulnerabilities tend to be impulsive and that can also lead to a false confession due to the pressures felt in the interrogation room.

“In regards to this ‘confession’ that I made last night, I want to make it very clear that I’m very doubtful of the verity of my statements because they were made under the pressures of stress, shock and extreme exhaustion.”
—Amanda Knox

Finally, contrary to popular belief and what we see on weekly television crime shows, the administration of the Miranda warning is not at all standardized. Warnings differ across jurisdictions in the United States in length, reading difficulty and whether they are administered verbally or in writing. Further, if the police interrogators minimize the importance of the Miranda warnings, it can send the message to the suspect that waiving their rights is in their long-term interests—even though it most assuredly is not (Scherr & Madon, 2011).

Interrogation Process Errors and Investigator Bias

While police investigators estimate about 5% of the confessions they elicit are actually false confessions, scholars reviewing field studies estimate a false confession rate ranging from 42% to 76%. There is, of course, no way to reliably estimate the actual rate of false confessions, but it is thought higher than commonly believed (Davis & Leo, 2012).

There are three errors that are most prone to lead to a false confession (Adams, 2011).

1. **Misclassification error:** The investigator enters the room believing the suspect is guilty (sometimes due to evidence or a “hunch”).
2. **Coercion error:** The interrogator accuses the suspect of committing the crime and makes implied or direct threats to convince the suspect it is better to confess now to quickly end the stress of the interrogation (necessarily without regard to the long-term consequences of confession).
3. **Supplying key details:** The interrogator knowingly or unknowingly provides the suspect with key non-public details of the crime which the suspect then incorporates into a false confession.

What researchers refer to as “investigator bias” is a key factor in false confessions. If the detainee is examined with an intent to simply gain information, they are less likely to confess, either truly or falsely. But if the investigator approaches the interrogation believing the detainee is guilty, the ensuing interrogation is more pressure-filled and coercive. This results in the innocent detainee (who is likely to waive their rights) being at increased risk for false confession due to the pressure of the interrogation process.

“The police probably put him between a rock and a hard place, like, ‘You are going to be convicted anyways. If you go to trial, even though you didn’t do it, you will be convicted. If you are convicted, you will get twenty years. If you tell us you did it, then we can get you eight years.’ So it is more like, ‘Well, I would rather leave for eight years than twenty’.”
—Mock juror

Using the interrogation strategies of minimization or maximization (e.g., the suspect being led to believe that punishment will be more lenient or more stringent, respectively) was found to increase the incidence of false confessions. Further, using these common interrogation strategies increased the likelihood of false confession from innocent suspects, but had no impact on confessions being elicited from guilty suspects (Narchet, Meissner & Russano, 2011). When the interrogator has drawn conclusions prior to the interrogation itself, the value of the resulting interrogation is greatly reduced.

Investigators are able to lie [use “deceptive strategies”] to suspects. One version of this is a strategy called “the bluff”. The bluff consists of the interrogator pretending to have evidence without actually claiming the evidence implicates the suspect.

In research studies, the bluff results in innocent participants falsely confessing. However, the actual bluff effect hypothesis was identified from retrospective reports of those who had actually falsely confessed. Police investigators believe that the bluff will elicit confessions from the guilty (who believe they have been found out) but not the innocent (who know full well that any evidence would not implicate them). The reality may be quite the opposite since the innocent person believes the

bluff implies future exoneration from suspicion.

“Todd Johnson, who was ultimately acquitted, had confessed to his wife’s murder after 19 hours of interrogation when police said that they found blood in his car to be sent to a laboratory for DNA testing. Knowing that the blood could not be his wife’s, this defendant explained later that he confessed because he was exhausted and knew that the test results would show his innocence,” (Missouri v. Johnson, 2001).

This logic was also revealed in the case of Jeffrey Deskovic. During a 6-hour interrogation, police asserted that they had collected DNA at the rape and murder scene for testing. At that point, despite—or because of—his innocence, Deskovic confessed and was later convicted. After his exoneration, he explained why he confessed: “Believing in the criminal justice system and being fearful for myself, I told them what they wanted to hear.” Knowing that the DNA testing would show his innocence, he said, “I thought it was all going to be okay in the end”. Interestingly, there was DNA evidence in this case and the test did exclude Deskovic. He was tried anyway, however, and convicted by a jury. Sixteen years later, he was released when the DNA was matched to the actual perpetrator (Perillo & Kasson, 2011).

Another deception often used in interrogation is the “false evidence ploy”. The false evidence ploy consists of either demeanor evidence (“I can see the guilt on your face”); testimonial evidence (“We have witnesses/video placing you at the scene”); or scientific evidence (“We have DNA/fingerprints/forensic evidence”). Deception increases the rate of false confessions (Forrest, Woody, Brady, Batterman, Stastny & Bruns, 2012).

Overall, two factors appear to be associated with the elicitation of false confessions: using psychologically manipulative techniques (e.g., minimization, maximization, the bluff, false evidence ploys) and the documented individual differences (poor health, young or old age, limited intellect, mental impairment) that leave some more vulnerable than others to falsely confessing (Narchet, Meissner & Russano, 2011; Perillo & Kasson, 2011). In proven false confession cases, the accused experiences the police methods as unbearable pressure, and confess in spite of what they knew to be the truth (Redlich, Kulish & Steadman, 2011).

Who Falsely Confesses?

In addition to the situational stressors to which anyone is susceptible, there are also certain groups of people who are more likely to falsely confess. Researchers refer to these people as being more vulnerable to external pressure and therefore, especially vulnerable in the interrogation room. Who are they?

Those who are young, intellectually impaired, low in self-confidence, naïvely believing in the positive intent of the interrogator, mentally ill, dependent or anxious, those who wish to please others, the angry, the extraverted, and those taking psychiatric medication in the year prior to the false confession (Davis & Leo, 2012; Perillo & Kasson, 2011; Redlich, Kulish

& Steadman, 2011; Sango & Halpert, 2011). Two other groups are also at risk for false confession: the innocent and African American or Hispanic detainees.

“To actually admit to a murder, something had to occur during that interview for him to start following what they wanted him to say. I mean you know if you killed somebody or not, you don’t miss that. You know without a doubt. So what happened during those hours that made him finally say, ‘Okay, yes, I will say I did it?’”—Mock juror

The innocent detainee has a naïve belief in justice prevailing and so they waive their Miranda rights and behave in a forthcoming and cooperative manner with interrogators. Ironically, laboratory research indicates that mock interrogators conduct even more pressurized interrogations when paired with an innocent suspect who is adamant in their denial of wrongdoing (Perillo & Kasson, 2011). In other words, the louder the detainees protestations of innocence, the more interrogation pressure results.

African American and Hispanic detainees are at risk of false confession simply because they feel that many will believe they are guilty due to stereotypes associating their racial groups with criminal behavior (Davis & Leo, 2012; Najdowski, 2011; Vrij, 2008). Thus, while in the interrogation room, they experience anxiety, and behave in ways that may be suspicious to the interrogator (smiling, moving their hands, controlling speech, avoiding eye contact, speaking in a higher pitched voice) as well as engaging in more deceptive behaviors when interacting with the police than do White American detainees (Najdowski, 2011).

This experience is not solely those of adult minority males. In a sample of individuals wrongfully convicted and later exonerated—85% of the juvenile false confessors were African American, while somewhere between 53% and 73% (data had to be extrapolated from various sources) of the adult false confessors were African American (Najdowski, 2011). When the 2011 US Census reports only 13.1% of the population is African American—the proportion of African Americans falsely confessing are highly skewed. Multiple researchers believe this over-representation of minority detainees falsely confessing reflects their sense of hopelessness and futility in overcoming the stereotypes of their racial groups.

Why is It So Hard to Distinguish Between False and True Confessions?

This is actually an oddly simple answer. False confessions and true confessions look very alike—particularly when there is no video of the interrogation itself (Redlich, Kulish & Steadman, 2011). False confessions occur for every type of crime—not just very serious crimes. Research has long shown that humans are very poor at detecting deception, even after being trained. People typically are only about 54% able to distinguish truth from lies when not using specialized techniques for detection deception, or essentially no better than random chance. This

number is no higher for police detectives who specialize in lie detection. Even researchers often cannot distinguish between lies told by experienced criminals and the truth (Willén & Strömwall, 2012).

“But the whole confession part just angers me, because obviously if he wouldn’t have confessed and had stood his ground, we probably wouldn’t be here. So I don’t think he was coerced in any, I mean obviously pressured, but forced to say he did it? No.”
—Mock juror

Yet we persist in our beliefs that we, ourselves, can detect deception much better than can others. We [hear this belief routinely](#) from our mock jurors who rely on nonverbal cues (such as eye contact or fidgeting).

In truth, the main strategy that increases your accuracy in detecting deception is when you rely on content as opposed to behavioral cues. Liars often contradict themselves. According to recent research, those who rely on content do the best in identifying deception while those who rely on signs of shifty behavior do no better than chance (Hamezelou, 2012). Lies are best detected by transcript, not by tape.

Sangero & Halpert (2011) list multiple reasons that jurors and the courts are largely unable to identify the false confession.

1. A belief that “If you confess, you must have done it.”
2. Police investigators, prosecutors, jurors and even judges are unable to distinguish between truth and lies.
3. Confessions are contaminated with disclosure of undisclosed details (also known as “non-public details”) of the crime by police investigators. Sometimes it is done consciously and sometimes without being aware. The detainee then incorporates these facts into the false confession, making them appear to be aware of information that would only be known to the guilty.
4. “Inside information” that’s been incorporated into the false confession is seen as supporting the truth of the confession. If inaccurate details are included in the confession--the tendency is to dismiss them from consideration.
5. Little attention is paid to denials of having committed the crime--whether those denials come after the confession or were consistently made throughout interrogation prior to the ultimate confession.
6. Even when the defendant has falsely confessed to other crimes, the current false confession is still used (if there is no proof the defendant did not commit it) to obtain a conviction.
7. Errors tend to propagate throughout an investigation, and can distort the reasoning of subsequent efforts by police and prosecutors. For instance, if there is an error in a statement made during an initial interview, and a witness later attempts to correct the impression, the statement is often seen as truth, and the effort to correct it is seen as a sign of guilt.
8. The system is not self-correcting. The law enforcement system considers itself highly redundant. The expectation is

that if one department (the investigators, for example) force a false confession--another department (the prosecutor, the jurors, the appeals court) will identify that error and the innocent false confessor will not be imprisoned. In truth, the various departments of law enforcement are dependent on each other and tend to support the pre-existing errors rather than reviewing evidence individually and coming to separate conclusions. That is, the prosecutors rely on the police investigators (who come before them) and on the judges (who come after them) to prevent wrongful convictions. The judges tend to rely on the prosecutors and police investigators and assume they have produced the guilty rather than the innocent for trial. The appeals judges tend to rely on lower court judges.

“They say, ‘Why confess if you didn’t do it?’ But they don’t have the whole understanding of what I was going through at the time. It’s like, yeah--I wanted to get it over with, get home, and get some sleep.” He laughs softly. “Eighteen years and nine months later, I finally get to go home.” —Frank Sterling

Finally, in a particularly cruel twist, the advocates for the accused themselves are often involved in the wrongful conviction. According to preliminary results of an archival review of the first 273 DNA exoneration cases from the Innocence Project files, there was more likely to be “bad lawyering” (9.1% vs 3.4%) and “government misconduct” (21.2% vs 15.5%) in false confession cases. Further review shows false confessors are more likely to plead guilty (25.97%) than those who do not confess (3.78%). Pleading guilty makes it impossible to ask for a new trial and makes it very difficult to obtain post-conviction case review and assert one’s innocence at a later date (Kassin, 2012). Yet the decision to plead guilty is one made in close consultation with one’s defense attorney.

“Thus, from the moment critical errors are committed (the innocent targeted, a confession forced or contaminated), all these dependent systems collapse, leading in the final analysis to a wrongful conviction.” [snip] When a false confession “occurs, in most cases it leads to a wrongful conviction” (Sangero & Halpert, 2011).

It is as though there is a “corroboration inflation” (Kassin, 2012) when a false confession occurs. Other evidence is interpreted (or rather re-interpreted) in a manner that supports the confession. File review has shown repeated instances of evidence contamination in those cases where there is a false confession. English courts require confessions be corroborated by other independent evidence. In the US, however, if other evidence could have resulted in a conviction, the admission of a false confession is viewed as “harmless error” (Kassin, Bogart & Kerner, 2012). This review of the research clearly indicates that a false confession is far from harmless error.

Rather, it results in a cascade of additional errors that greatly increase the prospects of a wrongful conviction. And it isn’t just

academic research on undergraduates or mock juror studies that confirm this result, nor is it merely actual jurors who are interviewed post-verdict. It's judges too!

"Recently a doctoral student at John Jay and I collected some data with judges—one hundred thirty-two judges, to be precise, from three different states. We found exactly the same pattern in this sample as we have with mock juries. Even in cases where judges ruled that a highly coerced confession was not voluntary by law, they continued to use that confession as a basis for conviction. Drawing on criminal justice statistics involving proven false confessions, Professors Steven Drizin and Richard Leo found that among innocent confessors who pled not guilty and went to trial, approximately four out of five were convicted. 'Here's the reason why I think these safety nets are doomed to fail and why I often ask the questions: What in God's name does it take to exonerate an innocent confessor? How can we get judges, juries, and other decision makers past the commonsense judgment that only perpetrators confess?' " (Kassin, 2010; see also Wallace & Kassin, 2011).

In one study of the effects of confession, false confessors are four times more likely to receive a prison sentence than true confessors (Redlich, Kulish & Steadman, 2011). They examined a group of 65 people who confessed. Thirty-five of them later said (in effect) "Wait-- that confession was false and I didn't do it." Thirty of them confessed, but continued to argue for their innocence on other grounds. The study was a retrospective analysis of criminals with mental health issues. A careful look at the differences between the two groups showed that those who later said that their confessions were false were questioned more times, took longer to confess, perceived the evidence against them to be weaker, and felt higher levels of external pressure to confess. And ultimately, those who recanted were found guilty of the charged offenses 4 times as often.

The Cascade of Errors That Follow a False Confession

The preceding section illustrates what researchers call a "cascade of errors" that typically occur following a false confession. Reviews of actual cases show between 73% and 86% of false confessions lead to wrongful convictions (Sangero & Halpert, 2011). Additionally, cases based on confession only (with no supporting evidence) were more likely than typical eye witness cases to contain forensic science errors--67% versus 45%--and to be accompanied by information errors--24% versus 6% (Kassin, Bogart & Kerner, 2012). There are multiple hypotheses (Kassin, Bogart & Kerner, 2012) as to why the cascade of errors occurs following a false confession:

1. When witnesses know about the confession, they form a firm belief that the defendant is guilty. They then see proof of their accuracy due to confirmation biases resulting from their newly-formed belief in the guilt of the accused. A confession is not merely a key data point; it overwhelms the entire data landscape. Knowledge of the confession

may result in an increased desire of witnesses to aid the prosecution and the police. Research shows that not only do we tend to see what we expect to see, we also tend to see what we want to see.

2. Police and prosecutors may seek support for previously taken, recanted or disputed confessions by inadvertently (or perhaps consciously) leading witnesses to falsely identify their suspect in a lineup.

"The police say, 'We did nothing wrong.' A confession kind of steered them in a different direction, but obviously, there couldn't have been any physical evidence to tie him to it. So I guess you would have to say, the prosecutors did a very good job and the defense attorneys did a poor job."—Mock juror

Some researchers believe the evidence corruption problems are likely under-estimated:

"At present, only anecdotal data are available on this point. In one case, for example, John Kogut, who was eventually exonerated on the basis of DNA evidence, had alibi witnesses who withdrew their support once told by police that he had confessed. In a second case, Barry Laughman confessed to rape and murder. When two witnesses insisted that they had seen the victim alive after the confessed murder, police sent them home and said that they must have seen a ghost" (Kassin, Bogart & Kerner, 2012).

The 1989 case of 17-year-old Marty Tankleff, who was wrongly convicted for the murder of his parents, illustrates the point. During a five-plus hour interrogation, the lead detective outright lied to Tankleff about the evidence—e.g., claiming that his hair was found in his mother's grasp and that his father, who was in a coma, regained consciousness and identified his son as the attacker. By citing the most trusted source in his life, police led Tankleff to wonder if he had blacked out and murdered his parents, ultimately leading him to question his own innocence. On the basis of a confession he gave but quickly retracted, Tankleff was convicted. Nineteen years later, his conviction was overturned and all charges were dismissed (Firstman & Salpeter, 2008).

Very recent research (Chrobak & Zaragoza, 2012) also illustrates that even when people fabricate explanations for memory gaps (aka "make things up") if the explanation contains a causal element they are likely to incorporate that fabrication into their own future retellings of the story. There is no sense that they are any longer making things up--the fabrication becomes part of the memory, part of the story we tell.

We simply [long to know "why" things happen](#) or "why" someone chose to behave in a certain way. In other words, what is recalled about a memory [may not be the memory itself](#) but what we recalled on a subsequent telling or retelling! This finding can have disastrous impact on the detainee who has falsely confessed. When witnesses hear that someone has confessed, they may (without consciously understanding what

they are doing) refine their recollection to support the believed-to-be true but actually false confession (Bridge & Paller, 2012).

What We Do Know About True and False Confessions

While the legal system has grave difficulty distinguishing between true and false confessions, there are some things we actually do know about the differences between true and false confessions. What we know (from research) is displayed in tabular format below for ease of comparison and review.

False Confessions	True Confessions	Research Conclusions
Typically result from the experience of external pressure (such as police interrogation).	Typically result from the experience of internal pressure (such as guilt, shame or feeling caught by the weight of the evidence).	Focus on interrogation techniques that increase internal pressure on suspects (Horgan, Russano, Meissner & Evans, 2012).
Contain more self-deprecations and doubts about own testimony. These are emotionally-based indicators.	Contain more unexpected complications in story. These are cognitively-based indicators.	Criminals tell convincing lies (Willêm & Strömwall, 2012) so proceed with caution.
Short-term gain in stopping interrogation, threats, protecting the true perpetrator as reasons for confessing.	Guilt & honesty, perceived proof against them, and confusion and ignorance as reasons for confessing.	False confessors more likely to claim external pressures while true confessors identify internal pressures as reason for confessing (Hamezelou, 2012; Redlich, Kulish & Steadman, 2011).
False confessors were interrogated more often.	True confessors were interrogated less often.	External pressure of repeated interrogations can lead to false confessions (Hamezelou, 2012; Redlich, Kulish & Steadman, 2011).
False confessors were interrogated for longer periods of time (sometimes for days).	True confessors were interrogated for shorter time periods.	The length of interrogation wears down the detainee and results in false confession (Garret, 2010).
False confession interviews were far more likely (12%) to be 4 hours or more in length.	True confession interviews were only 4 hours or more in length 7% of the time.	Most interrogations only last 1 to 2 hours and 3 to 4 hours is seen as sufficient for longer interrogations (Redlich, Kulish & Steadman, 2011).
False confessions were made significantly later in the interrogation process.	True confessions are made earlier in interrogation.	External pressure increases the number of false confessions (Redlich, Kulish & Steadman, 2011).

Suggestions for Decreasing Rate of False Confessions

After reviewing the literature, Sangero & Halpert (2011) believe a confession should only be viewed as corroboration of other key evidence, if any exists. Doing otherwise, which is common practice in the US, raises too much risk for the acceptance of a false confession, which is four times more likely to result in wrongful conviction. Essentially, Sangero & Halpert suggest up-ending the process so that a confession is considered last and not first on the road to prosecution and ultimate conviction. Other recommendations for decreasing the incidence of false confessions follow.

Training: Preventing false confessions begins with training. It is not, in most cases, due to police or prosecutorial misconduct. “That’s what makes these cases so terrifying. These people are innocent, and yet the cases against them appear to be very strong because what happened in the interrogation room was not documented.” (Adams, 2011).

Helping investigators understand techniques for increasing internal pressures rather than less reliable external pressure would

reduce false confessions. Building an evidence trail that does not rely on a recanted confession would further reduce error.

"I think the other thing he has to be careful about too is there are so many precedents and if you start doing this, like you said, because you don't want to give him too little, because then everybody is going to say, 'Well, I will just wrongfully say I did this and then five or ten years down the road, I can get \$20 million or \$5 million'." —Mock juror

Banning Deception: [Saul Kassin suggests](#) banning the use of deception and outright lying during interrogation.

"I don't have a problem with confrontation using real evidence. But, once you confront a suspect with false evidence, you're treating the innocent just like the guilty. Once you do that, even the innocent are going to get really anxious and start looking guilty. It's a cycle that goes nowhere good."

Instead of lying, police often use bluffing. They don't say, "we have your DNA." Instead they say, "we picked up DNA and sent it to the lab." Kassin used to think this was a good approach. But now he notes that although bluffing can prompt the guilty to confess in order to cut a better deal, it can backfire when it comes to someone who is innocent. In this instance, innocent people often believe that the evidence will exonerate them, which paradoxically makes it easier for them to confess."

Videotaping: Many researchers suggest videotaping all interrogations, and not just the resulting confession. It is much easier for prosecutors, investigators, jurors and even judges to assess the validity of a confession if they can view a videotape of how the confession was achieved (Kassin, 2010). However, when videotaping it is critically important to pay attention to camera angles as how the videotape is shot can result in differences in guilt presumption (Lassiter & Meissner, 2010)! Specifically, research shows that when after a confession and retraction—a confession video only trained on the defendant is seen as more convincing/persuasive than one that displays both the defendant and the detective. Clearly, this is not an area of defense control—courts and law enforcement authorities who are committed to reducing false confessions would need to adopt different standards. It is also true that interrogation videotaping will provide defense counsel more material to work with in attempting to criticize police methods, which police and prosecutors will understandably resist. On the other hand, videotaping all interrogation sessions also offers police videotaped proof of legal interrogation practices when accused.

Using Transcripts: Research has also found focusing on content rather than suspicious or shifty behavior is the best way to identify deception. If interrogation sessions are transcribed, there are ample opportunities for counsel to show deception, coercion, threats and intimidation—or conversely, the lack thereof.

**"I mean they have got to pressure you, and put pressure on you. But if you are innocent, you shouldn't feel any pressure. You should just stand your ground, 'No, I didn't do it, no, I didn't do it,' and be emphatic about it. So nobody could coerce me to say I committed murder if I did not do it. I don't care what you said was going to happen if I didn't."
—Mock juror**

Shortening Interrogation Sessions: As interrogation sessions lengthen, the incidence of false confessions rises. Perhaps the simplest reform is a limitation on length of interrogation. This is not a new suggestion as a 6 hour limit was suggested back in 1997 and prominent interrogation manuals suggest 4 hours or less (Davis & Leo, 2012).

Avoid Presuming Guilt: Finally, maintaining curiosity rather than presuming guilt is imperative in the interrogation process. Much research shows that the presumption of guilt results in a more pressure-filled interrogation process which, in turn, leads to an increase in false confessions. Instead, researchers recommend that you presume the suspect is innocent and attempt to [consider how an innocent might think](#) during interrogation.

"He confessed and I still don't know why he confessed. Obviously, I think we all can assume that he was scared or lacked intelligence, I don't know. I don't know. So I am just more and more confused."—Mock juror

Juror Education: While it is not typically allowed (or if allowed, the bar is set very high), there is ample evidence that teaching jurors about the possibility of false confession (by summarizing the research) may raise considerable doubt regarding the certainty of conviction ([Blandon-Gitlin, Sperry & Leo, 2011](#); Forrest, Woody, Brady, Batterman, Stastny & Bruns, 2012; Sangero & Halpert, 2011). As shown in the mock juror comments throughout this paper, it is an automatic reaction to presume that you would never, ever confess to a serious crime unless you are guilty. The research itself offers a counter-intuitive conclusion.

This paper offers an overview of some perspectives drawn from the research on false confessions, and strategies for reducing their occurrence. Our goal in presenting this material is not to obstruct authorities from catching and convicting criminals, but to minimize error. In other words, to maximize the probability of getting it right, when both public safety and individual rights are at stake. ©

Photo illustration by Brian Patterson of Barnes & Roberts. Original image from 1949 film, "Knock on Any Door."

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[Rita R. Handrich, Ph.D.](#) joined Keene Trial Consulting in 2000 and has since worked on cases ranging from medical negligence to commercial litigation and intellectual property disputes. She is a psychologist with extensive experience as a testifying expert witness, management consultation and training in the multi-generational workplace. In addition to providing trial consulting services through KTC, she is Editor of The Jury Expert. Rita is a frequent contributor to "[The Jury Room](#)" – the Keene Trial Consulting blog [and ABA Blawg 100 honoree for 2010, 2011 and 2012].

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We asked four trial researchers and experts to respond to Douglas Keene and Rita Handrich's article. Saul Kassin, Walter Katz, Karen Franklin, and Larry Barksdale share their thoughts below.

Saul Kassin is a Distinguished Professor of Psychology at John Jay College of Criminal Justice in New York. Several years ago, Kassin pioneered the scientific study of false confessions, research for which he received a presidential award from the American Psychological Association. Currently funded by the National Science Foundation, he is senior author of a 2010 White Paper entitled "[Police-Induced Confessions: Risk Factors and Recommendations](#)."

Saul Kassin responds:

A new Ken Burns documentary just opened in theaters around the world. It's called *The Central Park Five* and it tells the story of five boys, 14 to 16 years old, who confessed in 1989 to the infamous rape of a young female investment banker who was jogging in New York's Central Park. Four of their confessions were on videotape—and they were compelling. At the time, the crime was considered one of the most heinous in the city's history. Within 72 hours, as the world watched, the NYPD had solved it.

The boys were promptly tried, convicted, and sentenced to prison for varying amounts of time. And almost no one blinked—until 2002, when Matias Reyes—a serial rapist serving a life sentence—stepped out from the shadows of prison and proclaimed that he alone was the Central Park jogger rapist. When the District Attorney's office pulled out their case file to re-examine the evidence, they discovered that the DNA taken from the rape kit thirteen years earlier had indeed belonged to Reyes. He, not the boys, was the rapist. They were innocent. Their confessions, all five of them, were false.

This case illustrates the two psychology-rich subplots surrounding confession evidence that Keene and Handrich (2012) describe in "Only the Guilty Would Confess to Crimes". Encased by their question, "Why do false confessions occur?" the first subplot concerns the psychology of social influence and decision-making and the interrogation tactics that police are trained to use to get suspects to waive their Miranda rights and confess. Keene and Handrich note that interrogation can wear down just about anyone, producing a state of short-term or myopic decision-making. Some suspects are particularly weak and malleable—notably, juveniles, people with cognitive deficiencies, and people who are compliant, anxious, delusional, suggestible, or otherwise psychologically disordered. Still, it is important to understand about American police interrogation that it is, at its core, a highly guilt-presumptive process (I have lost count of the number of investigators who have uttered the words "I don't interrogate innocent people")—which explains its often relentless nature, as detectives refuse to take NO for answer, calling the suspect a liar, and plowing forward with accusations and assorted means of trickery and deception.

The inconceivable fact that innocent people can be induced to confess to crimes they did not commit is only half the story. As signaled by the question "Why is it so hard to distinguish between true and false confessions," the second subplot found in virtually all false confession cases concerns the fact that prosecutors, judges, juries, appeals courts, and just about everyone else have the nasty habit of believing false confessions—hence, there are no safety nets among decision-makers in the criminal justice system. Part of the problem is that common sense arms us to trust confessions, which are after all, statements against self-interest. Another part of the problem is that false confessions—just like true confessions—often contain details about the crime that are accurate and not in the public domain, providing alleged "proof" of the suspect's involvement. A third and particularly troubling problem concerns, as Keene and Handrich put it, "The Cascade of Errors That Follow a False Confession." In recent years, my colleagues and I have observed that confessions are so prejudicial that knowledge of their mere existence can taint eyewitness identifications as well as the judgments of forensic science experts. The result is a forensic confirmation bias in which additional errors of evidence multiply the influence of the true or false confession on which they are based.

In addition to describing the limits and pitfalls of confession evidence, Keene and Handrich describe the suggestions for reform that my colleagues and I have proposed over the years. Chief among reforms is to require the electronic recording of interrogations—not just the final confessions, as in the Central Park jogger case, but the entire process that was used to elicit these statements. Just before the Central Park defendants were exonerated in 2002, I wrote an [op-ed article in the New York Times](#) in which I noted that "this simple procedural reform will deter police coercion, deter frivolous defense claims of coercion, and enable trial judges and juries to assess the veracity of taped confessions." A dozen states and hundreds of jurisdictions are now taping full suspect interviews and interrogations. [New York City added itself to the list](#) this past month. This will help. Keene and Handrich go on from there to describe other suggestions arising from the research community—most importantly, in my view, a ban or at least serious curtailment of the false evidence ploy by which interrogators lie to suspects about eyewitness identifications, polygraph results, forensic examinations, and other allegedly incriminating evidence that does not exist. Outright lies about evidence—which many Americans do realize to be lawful—cause suspects to feel trapped, disoriented, and in need of escape via confession.

To the average person, false confessions are indeed a mystery. In laboratories and field settings, however, and informed by case files from wrongful convictions, psychologists and other researchers have begun to demystify the phenomenon. With help from Keene, Handrich, and others, what we have learned will become matters of public knowledge. With this knowledge, I believe, will come justice. ●

[Walter Katz](#) served for seventeen years as a criminal defense attorney in Southern California first at the San Diego Public Defender and then the Los Angeles County Alternate Public Defender. He left the defense practice in late 2010 to join the Office of Independent Review which manages the oversight and monitoring of the Los Angeles Sheriff's Department and other agencies and has also taught courses in the use of technology and persuasion in the courtroom.

Walter Katz responds:

For a criminal defense trial attorney, the challenge raised by Drs. Keene and Handrich is how to translate the counterintuitive nature of a false confession to a panel of jurors so that the natural tendency to discount such a "don't believe me then, but believe me now" claim is overcome. As the authors point out, however, jurors are not the only actors in the trial process whose natural tendency is to discount the recantation. The police investigator, the prosecutor, the judge and even the defense attorney are all prone to disbelieve the claim of a false confession on its face, but for different reasons. The defense attorney must overcome his or her own assumptions and experiences with the power of the confession to provide an effective defense.

To understand what the defense attorney must do to prepare for this complex defense, it helps to have some insight into how and why the interrogation actually happened. In many cases, the interrogation is the last step of the investigation after the police interviewed witnesses and collected physical evidence. The interrogator will often use the suspect to clean up loose ends, or as I have seen, where there is nothing but a weak identification, the suspect's confession makes the case.

It is important for the trial practitioner to understand how the investigator was trained to interrogate a suspect. It is essential to know the techniques taught by John E. Reid and Associates. The company conducts training seminars, provides expert testimony and publishes materials that are the foundation of police interrogations across the country. Their text book *Criminal Interrogations and Confessions* by Inbau, Reid, Buckley and Jayne is an absolute must-read as it lays out in stark detail the hows and whys of police interrogations and is forged in the belief there is a "behavioral model of the truthful individual versus the subject who is withholding or fabricating relevant information." If the defense attorney is engaged in a serious case, like a murder trial, it is highly likely that the detectives were trained in the Reid method or at least have read their materials.

While *Criminal Interrogations and Confessions* spends some time on the notion of false confessions, it treats them largely as a fabricated defense because it views its trained interrogators as having the penetrative insight to distinguish a "good" confession from a "bad" confession. The challenge, of course, is for the defense attorney to try to weigh the claim that a confession is false before embarking on pulling together all the necessary tools to challenge the reliability of the confession at trial.

In a typical trial, the confession is some of the most powerful evidence to present to the jury. Who better, the prosecution will ask, to tell the story than the actual perpetrator? A strong prosecutor will often begin or end her presentation of evidence

with the confession as either the springboard for the evidence to follow or as the icing on the cake. It is very dispiriting for a defense attorney to put his or her full effort into challenging the various pieces of evidence coming before the jury knowing that at the end they will hear a recording of the client's confession. It is very important then to remove any preconceptions that the confession is good or bad and carefully examine all the other evidence, the content of the confession and the behavior of the client to determine if challenging the authenticity of the confession in front of the jury is a viable defense. To instead assume that the confession is "good" will undermine the attorney's effectiveness right out of the gate.

It is also critical to know the client extremely well. Because those who are young or who have "psychological or cognitive vulnerabilities," are the most susceptible to provide a false confession, they present the additional hurdle of being some of the more difficult clients with whom to develop a productive attorney-client relationship. It is incumbent on the attorney to develop their trust, because important information will have to be gleaned to effectively challenge a confession's reliability. The attorney will need to obtain the client's consent to obtain medical, behavioral and education records to learn about his or her background in detail. Friends and family will have to be interviewed and the right questions have to be asked of the client. Asking the client whether he ever had a traumatic brain injury may not get the attorney very far, but look out for a far better response rate by asking, "Have you ever been knocked out," or "were you ever in a car accident," or "were you in special ed. in school?"

The criminal defense attorney will also need the right experts. If the attorney is a public defender or a private court-appointed counsel, the options of what psychiatrist or psychologist will be available for the initial evaluation may be limited. Choose a doctor who has worked with and understands the type of client being represented. If the medical records or initial evaluation disclose some cognitive deficit, consideration should be given to seeking the expertise of a neuropsychologist or neuropsychiatrist.

Once the defense attorney is ready to move on from the initial evaluations of the client's behavioral and cognitive qualities, the question becomes to what extent can evidence be established that the confession was indeed false? I would highly recommend that the attorney becomes familiar with the work of Dr. Gísli Guðjónsson who was instrumental in the overturning of two notorious cases in the United Kingdom whose convictions relied on what were later found to be false confessions – the Birmingham Six and the Guildford Four. Dr. Guðjónsson developed the Guðjónsson Suggestibility Scale (GSS), which is designed to measure how suggestible a subject is to coercive interrogations. His *The Psychology of Interrogations and Confession: A Handbook* is a valuable source. Ask your expert whether they are familiar with the GSS, and whether they have administered it and testified about it before.

In the United States, I am most familiar with the work of Dr. Richard Leo, PhD, JD, who is on the faculty of the University of San Francisco School of Law. He has researched and written

extensively about false and coerced confessions.^[1] I have used Dr. Leo in the past as an appointed expert and as a resource for assistance in establishing a false confession defense and have found him to be extremely knowledgeable on the subject and very approachable.

During trial, the defense attorney will be faced with a number of hurdles in seeking to challenge the reliability of the client's confession. Drs. Keene and Handrich alluded to most of them, but I believe that there are three basic components to effectively challenge the confession's reliability:

1. The first obstacle is voir dire. As mentioned, most jurors believe they would never confess to something they didn't do. Potential jurors will have to be carefully questioned to examine whether he or she has sufficient insight to question his or her own pre-conceptions. Asking outright, "do you agree that someone can confess to something he didn't do?" may not be effective as the prosecutor is likely to strike any juror who readily agrees. The attorney may be better off, for example, finding jurors who have a history where either they or a family member has faced the same types of behavioral or cognitive challenges the defendant has dealt with.
2. The attorney has to be ready for an all-out fight to get the

confessions expert on the witness stand. From the outset, one has to think about establishing the foundation that the reliability of the confession is at issue and that the proposed testimony is beyond the common experience of a juror so that the expert's testimony will have value. The prosecutor will strenuously argue that reliability of the confession is a matter of "common sense" which, of course, does not require an expert. Many judges are disinclined to allow testimony in areas such as confessions, memory and identification. Thus the defense attorney will have to work hard to educate the judge about the various factors present during interrogations, which only an expert can explain, and how those factors interrelate with someone who shares the suspect's various behavioral or cognitive traits.

3. The attorney will in all likelihood have to prepare his or client to testify to disavow the confession and explain why he originally confessed. The testimony will present a paradox, as the defendant has to cogently explain what occurred during the interrogation that so overwhelmed the natural inclination not to admit to something he is innocent of but, at the same time, the client must not do so well on the witness stand that the jury will conclude that the defendant is too capable to have confessed falsely. ☹

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[1] "False confession" and "coerced confession" are not interchangeable terms. A false confession is where the subject has confessed to a crime they did not actually commit. During trial, the defense will challenge the reliability and weight of that confession. A coerced confession may not be false, but the defense is alleging that it is inadmissible because of the egregious conduct of the interrogators.

Karen Franklin, PhD is an award-winning forensic psychologist in Northern California and an instructor at Alliant International University in San Francisco. She blogs about forensic psychology topics at forensicpsychologist.blogspot.com.

Karen Franklin responds:

Disputed Confessions: The Many Hats of the Expert Witness

This is a terrific overview of a troubling phenomenon that is far more common than most people realize. With its concise summary of current research findings and references, the article should be required reading for criminal attorneys, investigators, judges, law enforcement officials, and students of law and public policy.

The article raises a next question: As a well-informed practitioner, what can you do when confronted with a case in which the confession seems problematic? In what ways might an expert be able to help you explain the confession to a judge or jury, or even help you get it excluded from court altogether?

There are several types of expert evidence that can be introduced in court in cases of disputed confessions. These broadly involve "pure" academic research, clinical assessment, and a combination of the two.

Scientific Research on Confessions and Memory

Expert testimony is considered admissible in court when the subject matter is beyond the ken of the average juror. Police detectives' use of psychologically manipulative techniques that elicit false and unreliable confessions (such as minimization, maximization, the bluff, and false evidence ploys as described in this article) are often subtle and their coercive power is not readily apparent absent specialized knowledge. In addition, most people find it counterintuitive that, absent outright physical torture, a person would confess to a crime he or she did not commit. Thus, expert testimony may be essential in order to educate jurors and judges as to the mechanisms that may produce false and unreliable confessions.

Contrary to Keene and Handrich's assertion that such evidence is "typically not allowed," courts are increasingly recognizing that failure to allow such testimony may contribute to miscarriages of justice. Accordingly, social psychologists have been permitted to present the scientific research on confessions to juries in hundreds of trials (Costanzo & Leo, 2007). However, such proposed testimony is often subjected to rigorous Daubert or Frye evidentiary challenges. Depending in part on the evidentiary standard and case law in a given jurisdiction, such evidence has been excluded in some cases as scientifically unreliable, not generally accepted, or even – in some cases – not beyond the common-sense awareness of the jury (Quintieri & Weiss, 2005).

In addition to testimony on police techniques that may generate false confessions, academic testimony may be desirable to educate jurors about the vagaries of memory. Such evidence can help triers of fact understand how a suspect's memory may be contaminated by being fed false information – either intentionally or inadvertently – by police. Also, as Keene and Handrich note, people may incorporate distortions into their future retellings of a story, becoming oblivious to the fact that their memory is faulty (Chrobak & Zaragoza, 2008).

The Person, the Situation and the Interplay Between the Two

Besides coercive police techniques, the other central element in many false confessions is individual vulnerability, as well summarized here. Indeed, a long line of case law admonishes courts to consider not only an individual's vulnerabilities, but also the specific circumstances of the interrogation, and the interaction between the two (e.g., *Crane v. Kentucky*, 1986). Thus, as opposed to purely theoretical evidence, courts are even more inclined to allow clinical testimony connecting a confession with the person's individual vulnerabilities.

For a lengthy appellate exposition on the distinctions between pure expert testimony on false confessions and clinical testimony about the defendant's psychological makeup, see *Michigan v. Kowalski*, 2012, in which the former was ruled properly excludable but the latter was not. The Michigan Supreme Court majority dismissed the dissenters' alarmist rhetoric that allowing clinical testimony would "open up the floodgates for expert testimony" and turn criminal trials into "battles of psychological experts." Rather, they said, such expert testimony is important to furthering a trial's "principal mission, the search for the truth."

As Keene and Handrich explain, among those who are more susceptible than the average person to coercive psychological tactics are young people and individuals with psychiatric and/or cognitive vulnerabilities. For example, developmentally disabled people are not only easily confused, but they are often quite acquiescent, tending to go along with the suggestions of authority figures (Sigelman, Budd, Spanhel & Schoenrock, 1981). Young people, in turn, are not only inexperienced at dealing with police, but they are also notoriously impulsive, often overvaluing immediate rewards over long-term consequences. Thus, they may say whatever they think detectives want to hear just to escape the stressful confines of the interrogation room.

As Keene and Handrich importantly describe, African American and Latino suspects are another group at heightened risk of false confession. Their awareness that their captors will assume them guilty can lead to feelings of hopelessness and heightened anxiety. Paradoxically, this very anxiety can translate into physical behaviors that the interrogator perceives as evidence of guilt, such as fidgeting or avoiding eye contact (Najdowski, 2011).

Psychological evaluations may also be helpful in determining whether an individual has personality traits that are associated with a greater-than-average tendency to accede to interrogative pressure, such as anxiety, dependency or naïveté. In particular, forensic psychologists who specialize in this area may assess for

interrogative suggestibility, or the tendency of an interviewee to acquiesce to leading questions, especially after being subjected to negative feedback. Useful in such assessments is a specialized instrument, the Gudjonsson Suggestibility Scales (Gudjonsson, 1997), developed to help identify people who are particularly susceptible to giving erroneous accounts of events when subjected to police questioning.

The clinical evaluator will also assess for temporary psychological states that are known to contribute to false confessions. These include sleep deprivation, intoxication, and emotional states such as sadness, grief or anger.

Evaluations of Miranda Procedure

Distinct from whether a confession is reliable, to be admissible in court it must have been given knowingly, intelligently, and voluntarily (*Miranda v. Arizona*, 1966). Evaluating whether a criminal suspect understood his rights when he talked to police is a specialized area of forensic practice with parallels to other areas of legal competency, such as competency to stand trial or competency to execute a will (testamentary capacity). Typically, this evidence is presented at a pretrial hearing to determine whether the confession must be excluded altogether because it was illegally obtained.

My one substantive criticism of this excellent overview is that it perpetuates a subtle dichotomy between good (innocent) and bad (guilty) suspects, suggesting that the innocent are in special need of protection from coercive police tactics. In actuality, multiple studies show that about half to three-quarters of all people who are arrested for a crime – and a far higher proportion of juvenile suspects – make incriminating statements to police (Gudjonsson, 2003). The fact that most of these suspects are in fact guilty in no way detracts from their vulnerability. For our Constitutional guarantee of freedom from forced self-incrimination to mean anything, it must apply equally to both the innocent and the guilty.

Indeed, in my work both as a psychologist and as a criminal investigator, I have seen numerous examples of police trampling the rights of suspects, both guilty and not. One particularly egregious practice that is gaining traction in the current repressive climate is the "implicit waiver" technique, which recent court rulings have upheld as legal. Rather than reading a suspect each *Miranda* right and then checking for comprehension, a detective will race through all of the warnings and then launch directly into questioning, without even perfunctorily asking the suspect if he understands his rights. If the suspect does not object or explicitly voice a lack of comprehension, this is taken as evidence that he understood his right to remain silent, and knowingly and intelligently waived it.

In one recent case that I was involved in, for example, this procedure was used on a 15-year-old Mexican boy of below-average intelligence, for whom English was a second language, and who was intoxicated on drugs and alcohol at the time of his arrest. It is not hard to see how a clinical evaluation and expert testimony might help provide perspective on the legality of the *Miranda* waiver in such a case.

Evaluation of a defendant's competency to waive *Miranda*

rights typically includes administration of psychological tests to determine intelligence and to identify any psychiatric impairment. The evaluator also conducts an in-depth interview focused on the exact circumstances of the interrogation and the Miranda admonishments.

Thomas Grisso and colleagues have developed a set of four specific tests, newly revised, to evaluate Miranda waiver competency (Goldstein, Zelle & Grisso, 2012). These tests assess a defendant's understanding of the warnings, ability to communicate that understanding, and appreciation of the purpose of the warnings and the risks inherent in waiving them. Although these tests provide a standardized method of evaluating a suspect's capacities, they do have limitations. Chief among them is the time gap between the interrogation

and the forensic evaluation. The defendant may have a greater understanding of his Miranda rights than he did at the time of the interrogation or, alternately, he may have acquired an understandable motivation to distort his prior level of understanding.

No matter what type of expert testimony one is seeking to introduce, and at what stage of the criminal proceedings, it is important to keep in mind that the expert cannot answer the so-called "ultimate issue" of whether the confession is true or false. The expert's role is to provide relevant information about the individual and/or the applicable scientific research, information that can assist the trier of fact in deciding the ultimate legal issues. 

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Larry Barksdale, MA is an Assistant Professor of Practice Forensic Science at the University of Nebraska and owner of [LEB Investigations](#). He has four decades of experience in various law enforcement roles, including case manager, police officer, law enforcement instructor, supervising technical teams at crime scenes, and working as a crime scene analyst. "Most People Who Confess to Crimes are Guilty"

Larry Barksdale responds:

Only the Guilty Confess to Crimes

After 41 years of experience as a law enforcement officer, my perspective on confessing to crimes is based on several assumptions that I believe are widely, though informally, recognized by the law enforcement community.

Assumption 1: There are no absolutes.

No one tells the truth because there is no such thing as the truth. The truth is only what is accepted in court as fact. Research in cognition and perception seem to bear this out

as phenomena of the human condition. Law Enforcement officers are therefore in the information gathering business. It is their job to get as much information as possible on a given event. In any event, an interviewer gets only the first best story, or, as it is often facetiously called, the "first best lie." An experienced interviewer knows that there is often more to the story. Witnesses often have additional information to add to the first story. Victims often remember more after time. Suspects change stories just like job applicants reveal more about themselves the longer you talk to them. Ferreting out as much information as possible is the avenue to getting close to a reasonable and believable story. It is the process used by law enforcement officers to get as close as possible to reality.

Assumption 2: Interviewing skills matter.

Interviewing techniques and skills can elicit more information than single direct questions such as, "Did you see anything?" or, "What do you know?" Engaging in verbal and non-verbal feedback cues such as "OK," "Thank you, this helps. Anything else?" and, "What do you think might have happened?" are cues that may help facilitate the information gathering, keep

narrative going and maximize the information. Cognitive interviewing techniques such as telling a story backwards, thinking of color or smells in relation to an event, and thinking of sounds can often help get more information in victim and witness interviews. As examples, simple techniques used by the interviewer to get additional information may be those that play upon a suspect's sense of fairness, persistence and insistence, actually providing information about physical evidence, or allowing a suspect to tell "their side of the story".

Promises, threats, money, and "interviewing and interrogation techniques" can also elicit more information. Inflicting physical pain or communicating the threat of physical pain gets more information as well. Legal and ethical issues may prohibit some interviewer behaviors. I don't mean to lessen the depth or applicability of techniques, or to approve techniques, by the preceding comments, but merely to establish that skill, training and experience often identify those who are able to get more information from an interview or an interrogation. There are enumerable training courses on interviewing and interrogation techniques. It is the mandate of every law enforcement officer to continuously develop their information gathering skills via narrative from people they interview. It is also the mandate, however, to maintain legal and ethical standards during interrogations. There are tactics that may well be very effective—but that are neither legal nor ethical.

Assumption 3: Only the guilty confess.

Another way to think of this is that those who are not involved as perpetrators will provide as much information as they are able to provide when asked to provide the information. Unfortunately, it is a false assumption that all "good citizens" will come forward with any information they might have on an event. Examples of how we expect this to happen are evidenced by the news broadcasts of suspect's descriptions, Facebook and other websites "wanted persons" postings, Twitter crime alerts, and the Crimestoppers programs. Law enforcement officers know, however, that neighborhood canvasses, business contacts, and other sources have information that must be specifically solicited if it one is to get the facts required. All good citizens and not guilty persons do not always come forward voluntarily with information. Sometimes they must be helped to provide that information. The bottom line is that more people who are not guilty provide information than do people who are guilty.

Assumption 4: Everyone has a price tag.

This is a button to be pushed by the interviewer that goes far beyond money alone. Good citizenship appeals, lessening of culpability, money, revenge, spitefulness, fear of exposure or harm to oneself or significant others, self-promotion, sense of guilt, and wanting to get the interrogation over with are some of the buttons that can be pushed to get information. The utility of button-pushing includes the not guilty as well as the guilty. The duty of the interviewer is to be persistent in pushing those buttons to get the maximum information from every source.

Assumption 5: There are rules to play by.

For example, waterboarding is not permitted by civil law enforcement agencies in the United States. Private and public interviewers are trained in the limits of the rules. These rules are not always clear however, and experienced law enforcement officers know that the rules change on a regular basis. In my 41 years as an active law enforcement officer, the required process for Miranda warnings has changed numerous times. At one time there was not a requirement to read Miranda warnings on misdemeanor arrest situations. Few law enforcement officers read Miranda on traffic citation cases if the offense, such as a speeding violation, did not have a penalty that included incarceration.

However, in 2012, on felony and misdemeanor arrests, when the person is in custody or there is a possible jail sentence, the rule is to read Miranda warnings. Twenty years ago, the requirement was to "read" Miranda when an investigation focused upon a person and that person was in custody. Today, the rule seems to be that Miranda only needs to be read if a person is in custody and only if they are not familiar with Miranda rights. Hence, if you are standing on a street corner "talking" and then let the person go, you do not need to read Miranda rights if you can testify you were "only gathering information and had no immediate plans to arrest the person."

When I first started in law enforcement in the late 1960s, it was acceptable to put a pencil between a suspect's fingers and squeeze the fingers to use pain to cause a person to talk. I even recall being told that if a female was resisting arrest or not being cooperative that squeezing and twisting her nipples would make her cooperative. Over the years, I have attended interview and interrogation schools in which several days were spent on developing "lies" that would convince a person that you had information about physical evidence or information from an accomplice or informant. It is not easy to be a good liar. It takes training and practice for most people, because "good" people are raised to tell the truth.

In 2012, in the United States, civil police practices are such that inflicting physical pain or touching intimate body areas are not allowed and would be criminal behavior by the police. Blatant lies that can be construed as coercing a person are often suppressed in a confession. A response to this issue is to say something such as "What would you say if I told you we had your fingerprints that matched, and your DNA is on the bathroom door?" An awareness of the rules, a compliance to the rules, and a willingness to test the boundaries of the rules are the mandate of contemporary law enforcement interviewers, in the quest to maximize the gathering of information.

Assumption 6: Without physical evidence a confession is meaningless.

You do not have a case without evidence. I was told this repeatedly by experienced officers and investigators who were training and mentoring me during my early years as a police officer. Whether you were investigating traffic accidents or helping with a burglary investigation: physical evidence was all-important to a successful investigation. This was advice intended to reinforce the importance of physical evidence

and to justify the time spent to gather and interpret physical evidence.

Confessions were also an important part of an investigation, but evidence was important to corroborate witness, victim, and suspect statements. The idea was that physical evidence and testimonial evidence had to all come together to provide a theory of what took place in a given event. If there was a glitch between physical evidence and stories, including that of a suspect confession, then more information was needed to “prove” the case. A contemporary movement is the concept of “evidence-based” investigation. I wholeheartedly support this orientation towards criminal investigations, but acknowledge that confession are very powerful information in convincing a jury of guilt.

There were mistakes. In my 41 years as an active police officer, I have been involved at least peripherally with well over a dozen cases in which a person was wrongly convicted or falsely accused, or wrongly not accused or wrongly not convicted. Just as there are cases in which a person was wrongly accused and wrongly convicted there are cases in which there was overwhelming information to accuse a person but due to political reasons, lack of oversight, or lack of thorough and competent evaluation of information, there were not legal charges brought in the case.

I totally agree with the authors, Douglas L. Keene and Rita R. Handrich, that people confess to crimes when they did not commit the crime. I accept the reasons put forth as valid explanations of what leads to people confessing to crimes when they did not do the crime. I concur that withholding information that would tend to disprove the validity of a confession is a miscarriage of justice. Inflicting physical pain, deception, psychological abuse, and other acts that fall outside the legal definition as acceptable interview and interrogation behavior have no place in the behavior of the civil police. I wholeheartedly support review, supervision, and punitive personnel actions for law enforcement personnel who violate the rules.

However, the authors also seem to suggest that the primary culpability in cases of false confessions lies with the law enforcement component of the process. I do not agree with this. Outside of intentionally or grossly negligent violation of rules both statutory or administrative, the culpability lies also with the practicing attorneys and the courts.

The police are the primary information gatherers. I submit that putting in place training and practices that negate or lessen the assumptions outlined in my response would serve to minimize the information gathering function of law enforcement. This does not mean that law enforcement should not be kept up to date with research results, legal interpretations, techniques of information gathering, and other methods to improve the information gathering process. I suggest, however, that defense and prosecution components of the process and the courts need to be the watchdogs of rule violations. They need to be proactive in evaluating the information gathering process and in interpreting the information so gathered.

The authors suggest several avenues for decreasing the rate of false confessions: training, banning deception, videotaping,

using transcripts, shortening interrogation sessions, avoiding presumption of guilt, and juror education. These are excellent suggestions, but seem to me more directed at handcuffing the initial information gatherers (e.g., the law enforcement component) as opposed to addressing the total systemic response to wrongful confessions leading to wrongful convictions.

As one example, the law enforcement component gathers information from various sources to focus an investigation on a suspect. When it reaches the point that a person is brought in for an interview as a suspect, the mindset of the law enforcement interviewer should be that the person is guilty and that the job is to get the guilty person to provide information that corroborates their guilt. This is not a simple task. Interview and interrogation in a criminal investigation setting can be a physically and mentally demanding process. It is just not a go in, sit down, strike up a casual conversation, read the Miranda warnings, ask “tell me what you know,” and then walk away with a successful interview. It can take persuasion, breaking down the tendency of the guilty to not tell on themselves, mental strength to stay with the interview and to be on your toes to interpret and respond to interviewee responses, and finally, the physical energy to stay at the interview for hours. The goal of law enforcement is maximize the information and not act as an advocate for the suspect.

My opinion is that law enforcement interviewers need to believe that “only the guilty would confess to crimes” in order to effectively complete the hard work of information gathering and interviewing. I submit that otherwise law enforcement interviewers are asked to be more soothsayers than information gatherers. They are asked to try to resolve a “cognitive dissonance on the run” in which they continuously evaluate if they are getting a false confession or a true confession and focus more on probative evaluation of information than information gathering. I am speaking here of the actual interview process and not the after-interview evaluation of the evidence.

Training to be aware of false confessions, enhancing interviewing techniques to include an awareness of creating internal pressures, restricting the scope of deception, videotaping interrogations, and use of transcripts are all suggestions I would support. I don’t know though, how you can put a time limit on interviews and how you can enforce banning deception. I suggest that if all interrogations are taped from being to end, without shutting off the tape if there is a break, the courts have the role of deciding if the interrogation was beyond acceptable behavior.

I think litigation against law enforcement agencies for interrogations that go beyond acceptable behavior is a method to enforce reasonableness related to length of time. If a person started to confess after 3 hours and 45 minutes it would not seem good practice to shut down the interrogation at the 4 hour mark. I also don’t know how to enforce banning deception. There are many levels of deception. For example, expressing disbelief by facial expression and other non-verbal communication can be a form of deception. I would not condone telling a suspect that “we have your fingerprint on the gun at the scene” if the suspect’s fingerprint was not on the gun at the scene. I would support an interrogator saying

something like “How would you explain your fingerprint being on the gun at the scene?”. You would expect someone who was not guilty to adamantly say something like “My fingerprint would not be on the gun because I was not at the scene and I don’t know what you mean about the gun, because I have never had a gun in my hand.” If the person said “I don’t know. What gun are you talking about?” there would be a different response than the previous questions. There needs to be room in the interrogation process to pose questions that are probing in order to use the response to help guide the future stages of the interview.

I would like to offer a few additional suggestions for lessening the probability of false confessions.

Involving forensic linguists and techniques of statement analysis can help the information gathering process. A simple process is to ask a person to write out the story of what they know about a certain event. This is a technique useful for witnesses, victims and suspects since it provides a narrative transcript in the words and style of the author. It provides opportunity for analysis in terms of the ability of the author to communicate and put together thoughts; it speaks to the sophistication of the author in using language; and it can suggest areas that warrant exploration in a subsequent interrogation. I have had persons who wrote out a confession who would not talk during a formal interrogation. I have had witnesses for which the handwritten statement indicated a change in thought, and when questioned, the witness provided information that exonerated a person previously thought to be a suspect.

There is ongoing research in statement analysis and in formal forensic linguistic analysis. Law enforcement interrogators, attorneys, and judges should not assume they know all there is to know about language and discount the value of intuitive, pragmatic, and scientific analysis of language. It is also interesting that forensic linguistics have successfully testified to exonerate persons based on linguistic analysis. Dr. Roger Shuy, Dr. John Olsson, and Dr. Carole Chaski are a few practicing linguists who have engaged in forensic linguistic analysis.

Consilience: The concept behind consilience is that all the information must come together to point to a single believable explanation. If this is not the case, there is a need for more information or a better interpretation of the information. The authors have noted the need to focus on physical evidence as the basis for identification of suspects and for assuming guilt. They have suggested that interrogations follow collection of physical evidence. I think this is an excellent theoretical proposition, but I do not think it is a very useful practical process. There is a need, I suggest, for iteration in investigations. Information from interviews and interrogations should feed back into discovering physical evidence, and physical evidence should feed back into guiding interrogations. In other words, the physical evidence and interview and interrogation results should go hand-in-hand throughout the process.

Physical Evidence: The authors suggest a focus on physical evidence. I whole-heartedly agree with this. I would go so far to say that without physical evidence to corroborate a confession, the confession should not be admitted as evidence in a court. The problem with physical evidence is that the system is

bogged down due to specialization, compartmentalization, law enforcement heroics and antiquated systems of evidence identification, collection, documentation and evaluation. In many law enforcement jurisdictions uniformed law enforcement officers must wait hours for specialists to come process evidence. Evidence based investigation that starts with the first responder is a viable approach to investigations that puts confessions and information gathering in the proper perspective with the total process.

For example, in many jurisdictions, a law enforcement officer stops a vehicle for erratic driving. The driver gives permission to search the vehicle. The law enforcement officer finds a handgun under the front seat. The law enforcement officer must wait for a crime scene investigator to come to the scene, photograph the vehicle and the position of the handgun, remove the handgun and place it in evidence, wait for the handgun to be examined for fingerprints of trace evidence, wait for information on the status of the handgun as stolen gun or one used in another crime. The uniformed officer must allow someone in the criminal division to follow-up on this information, to do interviews, and prepare any reports for charges. The mere time factor in the log jam of information takes away any element of surprise in an interrogation and the application of internal pressures. It lessens the consilience aspect of information use, and it makes the uniformed officer less of a stake-holder in the successful resolution of the problem.

Let’s contrast this process to that of a nearby jurisdiction, where the uniformed officer makes the traffic stop, gets permission with his or her pocket tape recording all conversations and her police vehicle video camera recording all actions. The officer finds the handgun, uses a department-issued digital camera to take photographs, removes the handgun and looks it over for any trace evidence, gets the information on the handgun and runs it to see if it was stolen. Finally, the officer does a quick interview at the scene, with tape recorder running, and then makes decisions on whether to arrest the driver of the car, tow the car, or ask for assistance.

If the person is arrested, the officer follows through with that, and processes the handgun for fingerprints in the field. All the physical information that might apply is readily available for the interrogation, it is timely, and the entire process is in the hands of the police officer who had the most intuitive and realistic information. I submit that in the second scenario the physical evidence is more useful, the interrogation is of a better quality, there is the chance for oversight, less of a chance of officer misconduct, and the entire investigation is more complete. Experience in jurisdictions where there is a generalist officer concept such as just described have borne out this belief.

Physical evidence utility goes beyond the previous street scenario. Efforts to vigorously gather physical evidence are not nearly as robust as they once were. Many jurisdictions have dropped trace evidence efforts and cut back on comparison on footwear impressions, tire track impressions, toolmarks, and fracture matches. The void in physical evidence gathering has not been filled by other practitioners. All lab physical evidence primarily focuses on DNA, toxicology, fingerprints, or firearm examination.

A new model for physical evidence needs to be developed to address the relationship between physical evidence and false confessions. It may be the case that first responders are more in a position to identify, gather, and interpret physical evidence in the comparative evidence genres. I would hate for my DNA to be on a firearm I sold to someone and discover they had used the firearm to commit a crime. I would further hate to be accused of murder in a situation where there were a number of dog hairs on a victim body, and long blue and red cotton fibers on the body but I did not own a dog nor have any clothing that was red or blue. I would further hate for there to be a partial footprint of a waffle stomper shoe pattern when I didn't own such a pair of shoes. I would hate to be accused of the crime because my DNA was at the scene. Let's even say I talked with police and denied involvement but admitted I hated the victim, and the police charged me with a crime but did not consider the dog hairs, shoe impression, and fibers. This would be especially egregious if the person to whom I sold the gun had waffle stomper shoes, a dog, and a University of Nebraska red sweatshirt, blue sweat pants, and had been seen knocking

on the back door of the victim's house. Perhaps uniformed officers and detectives can be trained to do an initial evaluation of dog hairs, partial shoe tread marks, and fibers so physical evidence is not overlooked, discounted, and is timely enough to be used in an interrogation.

In conclusion, I think the authors have provided a great service in sharing their research. It should be the goal of all involved in the criminal justice process to be vigilant against mistakenly using false confessions. It is especially important for the law enforcement interrogators to gather all possible information, but to evaluate all confessions in the after-interrogation process.

It is the function of all involved in the criminal justice system to promote the concept of consilience as a component of the vigilance against the generation of false confessions and the misuse of false confessions. I submit that this vigilance is not only something that must be addressed by police behavior, but more importantly it must be addressed and vigorously applied by defense attorneys, prosecutors, and judges. ©



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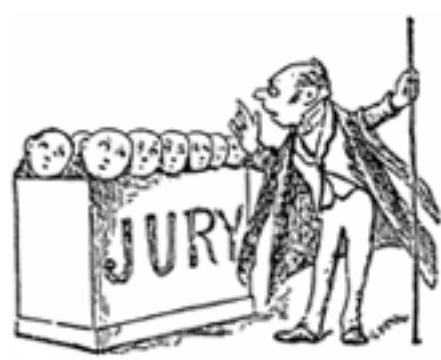
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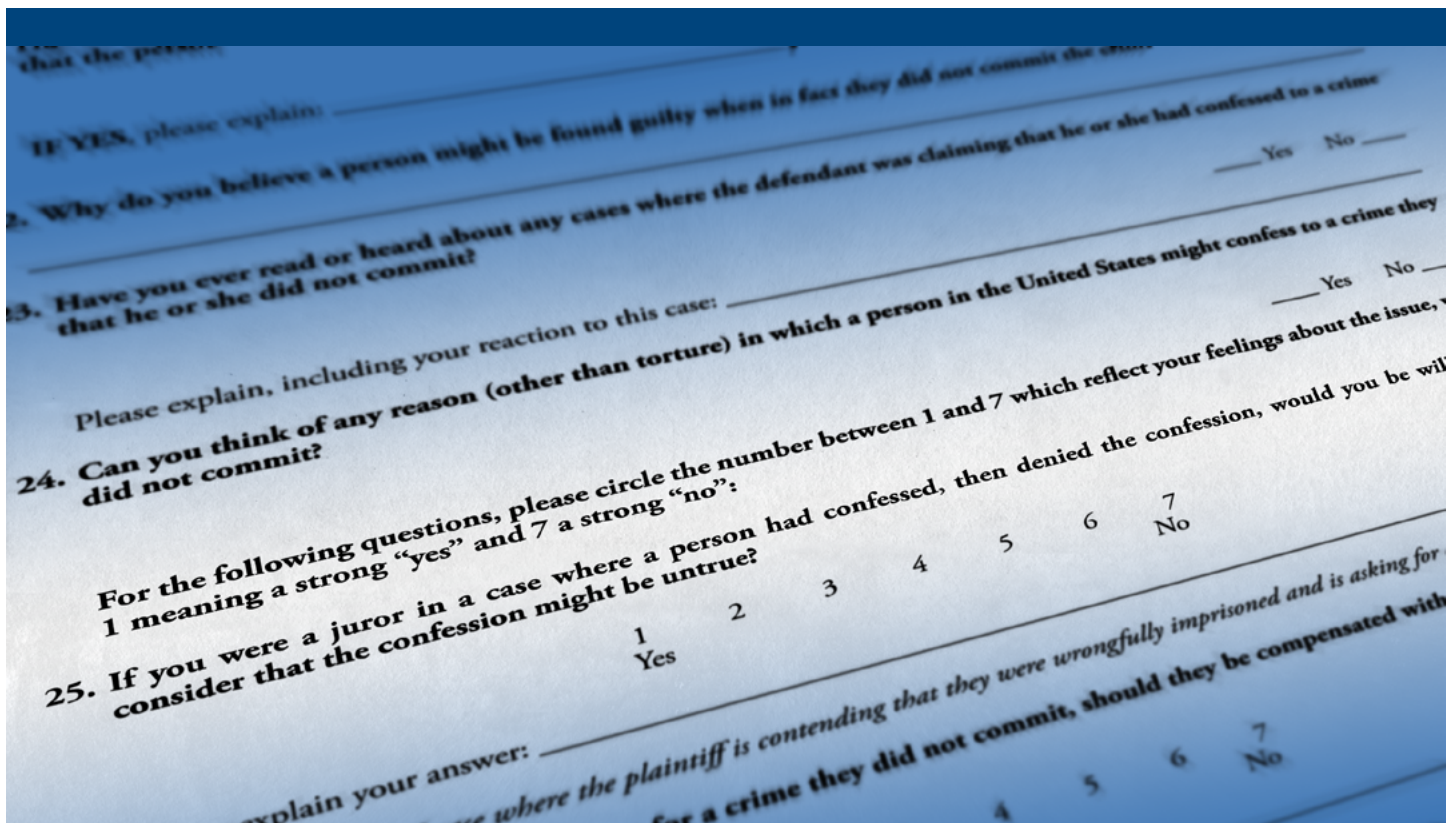


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False Confessions

“I can’t believe I said that”

By Diane Wiley

AS RITA HANDRICH AND DOUG KEENE have so clearly laid out in this issue, [false confessions](#) are very difficult for jurors to understand and believe. Why in the heck would someone confess to something they didn’t do unless they were crazy? Sometimes they are. But most of the people who confess do so under the pressure of the interrogation, whether they are mentally ill or not. Due to the difficulty and strength of jurors’ attitudes and emotional reaction to false confessions, supplemental juror questionnaires are essential to distinguish the jurors who will be able to even consider that a person could confess to something they didn’t do.

From the defense standpoint, as with most criminal cases, the more black and white the thinker, the less likely they will be to even consider the defense. The ability to understand that someone could become so stressed or sleep deprived, confused or fearful, or be so impulsive that they would confess to something they didn’t do depends on a person being able to put themselves in someone else’s shoes. Since the research shows that most people don’t believe that they would ever confess to something they didn’t do, the ability to evaluate another’s situation as distinct from their own is very important. The

defense needs to find leadership jurors who have enough of a sense of human frailty that they will be able to look at all the variables that affect an interrogation.

Jurors will have to be able to consider the psychological ramifications of pressure, fear of the police and the conditions of the interrogation, combined with the defendant’s personality and situation. Asking about experience with mental health issues and attitudes towards psychology can help to identify those jurors who most need to be challenged. A questionnaire is a particularly good way to ask about such sensitive issues which jurors might not want to talk about in open court. Keep in mind that not everyone who has had a mental illness or dealt with someone who has had a mental illness will be good for the defense. It’s important to explore attitudes about the impact of mental illness and about those who are mentally ill if this is a part of your defense. But in general, jurors who “don’t believe” in the influence of psychological factors are not going to be able to consider any kind of defense to false confession.

There are questions which should be asked in the questionnaire based on the specifics of the case. If the

defendant is a young person with emotional problems, you would want to know if jurors have had a job where they worked with this kind of population and then in voir dire you can explore what their attitudes are about these kinds of kids. As with any experience, it's the attitude and lessons the juror draws from their experience that is important.

Attitudes towards the police and criminal justice system are always useful indicators of a juror's ability to be fair in a criminal case. False confession cases necessarily involve extensive criticism of the interrogation techniques utilized by the police, thus it is important to ask numerous questions to determine which jurors will be able to consider that the police were overzealous. Questions about jurors' experience with, connections to and support for law enforcement are essential. In general, those who are more supportive of law enforcement will have a harder time finding that interrogation techniques could produce a wrong

result. Again, the juror's reaction to their experience with the police can help you to understand how they may, or may not, react to the defendant's reaction during their interrogation.

Of course, any jury questionnaire has to be tailored to the case and the jurisdiction. Trial consultants and lawyers should be aware of local and possibly national news stories that involve claims of false confessions. In persuading the judge to allow a questionnaire, cite the research which shows that there is widespread skepticism about the defense. If the case involves a horrendous crime, point out that the attitudes of jurors will be even stronger that no one who is not guilty would confess, unless they were tortured or significantly mentally ill. If the defendant is not white or has other personal characteristics which could produce prejudice in jurors, those issues should be included as well.

Finally as with all questionnaires, you

have to consider the voir dire conditions in your jurisdiction. The more restrictive the jurisdiction, the more questions you may want to include in the questionnaire. Under the best voir dire circumstances, questionnaires help to identify issues that will be fruitful for follow-up questioning during jury selection. One of the benefits of having a questionnaire is that it gives jurors a chance to think about some of their experiences and attitudes without the pressure of public testimony and we get fuller answers during jury selection. Sometimes referring to their anxiety in jury selection can help them to begin to understand the defendant's anxiety in being questioned by the police.

Following are some of the questions that will be useful in a juror questionnaire in a case involving false confessions. Some are general, some are more case-specific, depending on the facts. Many of these same questions would be useful in a civil wrongful imprisonment case.

Questions to identify experience with and support for law enforcement:

1. Do you or any member of your family or close friends belong to any organization such as neighborhood Crime Watch, Crime Stoppers, or Mothers Against Drunk Drivers, Domestic Abuse Project, etc.?

_____ Yes _____ No _____

IF YES, which ones? _____

2. Have you ever taken any courses or training in or worked in the field of law enforcement or criminology, such as for the police, highway patrol, FBI, sheriff, corrections, state crime bureau, security, investigation?

_____ Yes _____ No _____

Please explain, including courses or jobs held and dates of employment: _____

3. Have you or anyone you know ever worked in the field of law enforcement or criminology, such as for the police, highway patrol, FBI, sheriff, corrections, state crime bureau, security, bureau of compliance?

_____ Yes _____ No _____

IF YES, is this: ☐ Spouse/partner ☐ Child ☐ Family ☐ Friend/Acquaintance

Please explain, including job held and dates of employment: _____

4. Do you or anyone close to you have any connections to the _____ County Sheriff's Department, the _____ Police Department or the _____ County Prosecutor's Office, State Bureau of Criminal Investigation (BCI), _____ State Crime Lab?

_____ Yes No _____

IF YES, is this: ☐ You ☐ Spouse/partner ☐ Child ☐ Family ☐ Friend

Please explain: _____

5. You will be hearing testimony from several police officers in this case. Would you be able to judge the believability of law enforcement witnesses the same as any other witnesses (rather than giving more or less credibility to law enforcement)?

_____ Yes No _____

Please explain your answer: _____

6. Have you or has anyone you know ever had a particularly good, or particularly bad, experience with a police officer, another law enforcement officer, or a law enforcement agency?

_____ Yes No _____

IF YES, is this: ☐ You ☐ Spouse/partner ☐ Child ☐ Family ☐ Friend

Please explain, including where and when that was, and what law enforcement agency was involved: _____

7. Generally, would you give more credibility to the testimony of a police officer than to the testimony of another person, if their testimony conflicted?

_____ Yes No _____

Please explain: _____

8. Do you think police officers might make mistakes as often, or more or less often, than people who aren't police officers?

☐ More often ☐ As Often ☐ Less often

9. Do you think if a police officer makes a mistake, they are more, or less, likely to admit their error than people who aren't police officers?

☐ More likely ☐ Less likely

10. Do you think that because police officers are trained to be observers, they are more likely to be accurate in their observations about people and things that they have seen?

_____ Yes No _____

Please explain: _____

11. Do you think that police officers should have limits on the techniques that they use to interrogate suspects?

____ Yes No ____

Please explain: _____

12. Have you ever served in the military?

____ Yes No ____

IF YES, please list branch, rank at discharge, place and date of service and if you ever served in the military police or worked in military court system: _____

13. Have you or anyone close to you, ever had any of the following experiences? (“Spouse” also refers to partner.)

Have you ever...	No	Person	Please Explain
Been a victim of a crime?		☐ Self ☐ Spouse ☐ Family ☐ Friend	
Witnessed a crime?		☐ Self ☐ Spouse ☐ Family ☐ Friend	
Been stopped by the police?		☐ Self ☐ Spouse ☐ Family ☐ Friend	
Been interviewed or questioned by the police?		☐ Self ☐ Spouse ☐ Family ☐ Friend	
Been interviewed or questioned by an investigator or attorney?		☐ Self ☐ Spouse ☐ Family ☐ Friend	
Been charged with a crime?		☐ Self ☐ Spouse ☐ Family ☐ Friend	
Been convicted of a crime?		☐ Self ☐ Spouse ☐ Family ☐ Friend	
Made a charge against someone?		☐ Self ☐ Spouse ☐ Family ☐ Friend	

Questions to identify experience with, knowledge of and attitudes towards mental health issues, psychology and psychological processes

14. Have you ever taken any courses, training or worked in psychology, social work, child development, mental or physical health or chemical dependency?

____ Yes No ____

IF YES, please explain: _____

15. Have you or someone you are close to had serious emotional problems?

____ Yes No ____

IF YES, is this: ☐ You ☐ Spouse/partner ☐ Child ☐ Family ☐ Friend

Please explain: _____

What type of treatment has this person received? _____

16. Have you or someone close to you suffered from depression, anxiety, ADHD, emotional distress or mental illness of any kind?

____ Yes No ____

IF YES, is this: ☐ You ☐ Spouse/partner ☐ Child ☐ Family ☐ Friend

What kind of treatment was received: _____

17. Do you think that anyone can overcome any kind of psychological trauma or mental health problem if they try hard enough?

____ Yes No ____

Please explain: _____

18. What is your general opinion about counseling, psychologists, psychiatrists, social workers and other mental health professionals?

☐ Favorable ☐ Negative ☐ Mixed

Please explain your answer: _____

19. Have you ever had any training in interviewing or conducted interviews?

____ Yes No ____

IF YES, please describe: _____

It's important to ask about jurors' experience with the specific kind of crime that the defendant is charged with.

20. Have you or someone close to you ever been the victim of a violent crime, such as being stabbed, shot, assaulted, or anyone you know ever been murdered, or died a violent death?

____ Yes No ____

IF YES, is this: ☐ Spouse/partner ☐ Child ☐ Family ☐ Friend

Please briefly describe the circumstances: _____

thejuryexpert.com 27

Have you heard anything about this case or the people involved or did you see or hear any news reports about it on the radio, TV, internet or in the newspaper?

_____ Yes No _____

IF YES, what have you heard or read about this case? _____

What stands out in your mind about what you have read or heard? _____

Do you or anyone you know have any connection to this case or the people involved? This could include police officers, investigators, people who were interviewed, family members of people who were interviewed or who know the family of the deceased.

_____ Yes No _____

IF YES, please explain: _____

Have you ever expressed an opinion as to Mr. _____'s guilt or innocence?

_____ Yes No _____

General questions on agreement with criminal justice principles

28. Do you have any problem with the legal proposition that a defendant must be presumed innocent unless and until the prosecution can prove he or she is guilty?

_____ Yes No _____

Please explain: _____

29. Do you have any problem with the legal proposition that a defendant must be proved guilty beyond a reasonable doubt or he or she must be found not guilty?

_____ Yes No _____

Please explain: _____

30. Do you have any feelings that a defendant must prove his or her innocence?

_____ Yes No _____

Please explain: _____

31. A defendant has the constitutional right to not testify. Would you have any problem not considering that a defendant did not testify in reaching your decision as to whether the defendant is guilty or not guilty?

_____ Yes No _____

Please explain: _____

32. Is there anything else the judge and attorneys should know about you in relation to serving on this jury?

____ Yes No ____

IF YES, please explain: _____

33. Do you or anyone you are close to know or do business or have any other kind of social or personal connection with any of the following people, law firms or organizations?

No connection	Have heard of	Know or have met	Know someone with a connection	Please explain the connection

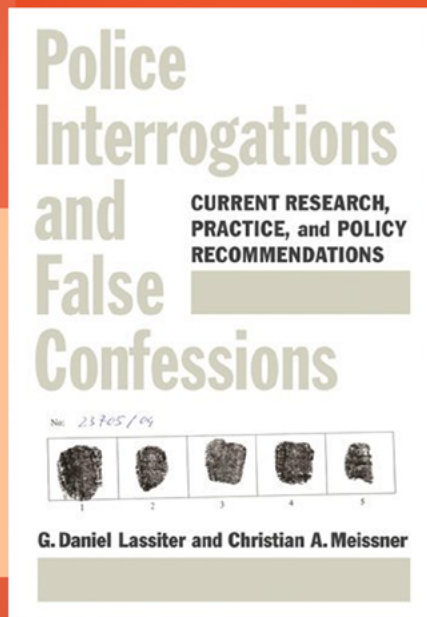
34. Is there any subject covered in this questionnaire that you would not want to discuss in front of the other jurors in open court?

____ Yes No ____

What question or questions are those? _____

For more information about juror questionnaires in general, including jurisdictions where they have been used, sample questionnaires and motions, see JURYWORK: Systematic Techniques (Krauss, Elissa, West Group, 2d Ed., 1978, updated annually).

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THE JURY EXPERT BOOK REVIEW

POLICE INTERROGATIONS AND FALSE CONFESSIONS

EDITED BY
DANIEL LASSITER AND
CHRISTIAN A. MEISSNER

Book Review: Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations.

Edited by G. Daniel Lassiter and Christian A. Meissner.

Publisher: American Psychological Association, Washington, DC. 2010.

249 pages.

by Rita R. Handrich, PhD

THE TITLE OF THIS BOOK assumes a disturbing premise—that police interrogations are linked to confessions of people for crimes they didn’t commit. And of course, for many people it is a controversial position, perhaps even “anti-cop”. To those who have served as officers, studied false confessions, or observed the strengths and weaknesses of the criminal justice system, there is no controversy. The connection is inescapable.

This is a collection of chapters written by well-known scholars in the area of false confessions and police interrogations. A review of the [Table of Contents](#) shows a stimulatingly broad range of topics. You will find the expected reviews of research on police interrogations and false confessions and then everything from juvenile interrogations, the difference between false confessions and false guilty pleas (which takes you into the shadowy arena of plea bargains), chapters on recording the interrogation (one of which educates on camera angles that reduce observer bias), how to most effectively give the oral *Miranda* warning, the expert witness (including identification of the five most common challenges to expert testimony and suggestions for refuting those challenges), and a whole lot more.

I read this book as part of the research review for our [lead article on False Confessions](#) (co-authored with Douglas L. Keene, PhD). Thanks to a comment in the introduction of this book (and contrary to my approach in reading fiction), I began at the end.

“This volume’s coda comes in the form of a brief afterword by Saul M. Kassin, perhaps the most recognized scholar associated with the science of interrogations and confessions. Kassin first takes stock of the current state of research, policy and practice in the area. He then offers suggestions on future directions, with the ultimate goal being that the criminal confessions that are the most compelling are those whose truthfulness has been rigorously assured.” [page 7]

I found Kassin’s coda to be a useful framework for organizing the voluminous data covered by these researchers. The coda is, by itself, a terrific summation of the well-organized research presented in the body of the book. In truth, I wish I’d read this book first rather than at the end of my review of the enormous body of writing on false confessions. In 249 pages, these writers cover the essentials and much more. Most of the chapters use

case examples to bring the issues to life and help the reader to apply the research findings to a real person struggling with systemic problems. The case examples are compelling and bring, as Robin Hanson is fond of saying over at the [Overcoming Bias](#) blog, the issues from “far” to “near”. In other words, the research (which is distant and theoretical—that is, “far”) is brought much more “near” to us as we are confronted with the true-life experience of an actual fellow human being.

I found myself especially intrigued (read: especially disturbed) with the chapter by Allison Redlich comparing false confessions and false guilty pleas. While I knew generally about the concept of false guilty pleas, I found the descriptions and research in this chapter gave me a much more resonant understanding of the intense emotional commitment I see so many criminal defense attorneys bringing to the work they are driven to perform.

If you enjoy reading blogs (as I do) I would encourage you to take a look at [Gamso For the Defense](#), or the anonymous blog of [a public defender](#). These are not happy, feel-good writers. But they write blogs replete with examples of the emotional toll it takes to defend those charged with (often) heinous offenses and the constant energy required to push back against the legal system to ensure the rights of their clients are protected.

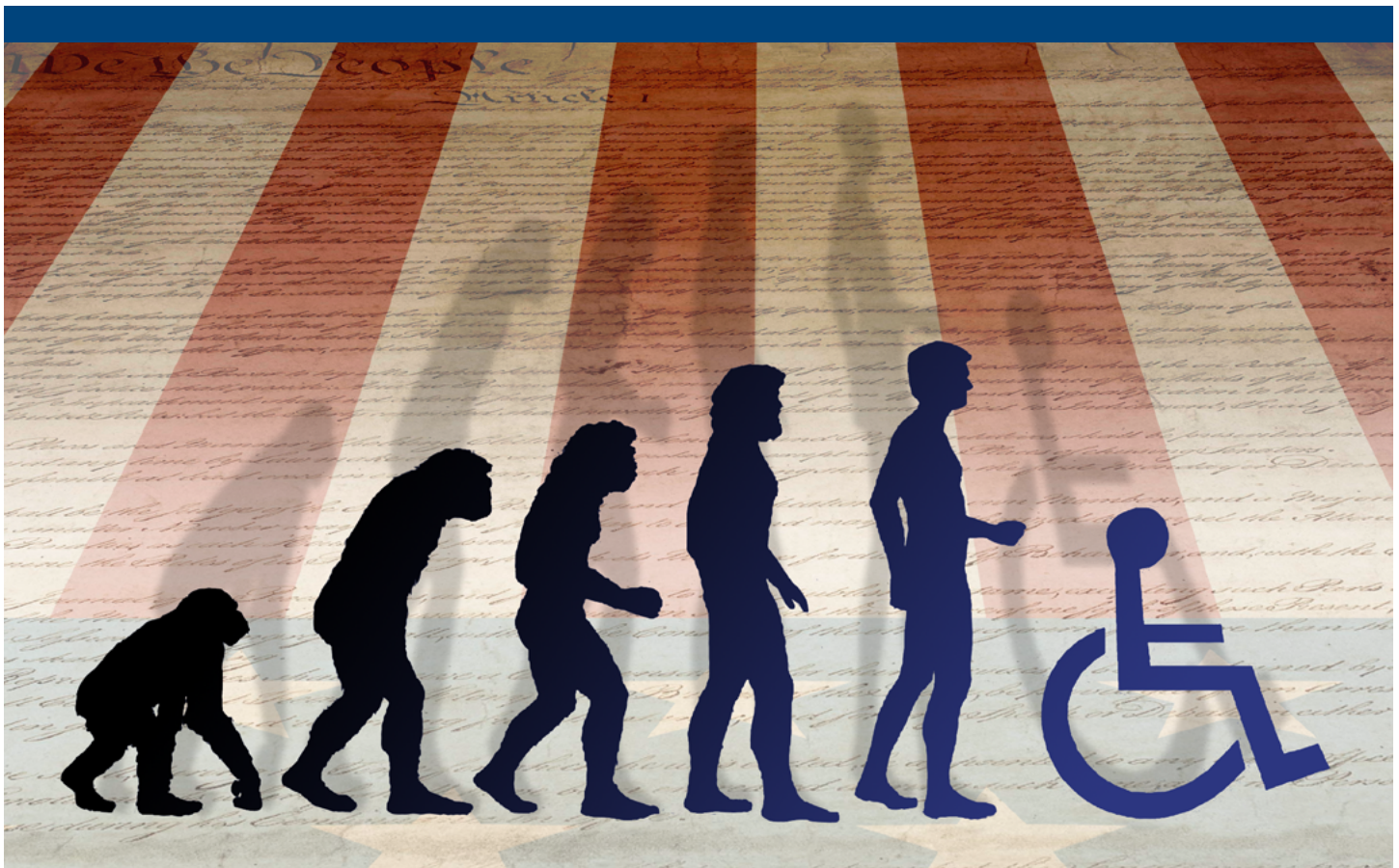
I also found the chapter by Ray Bull and Stavroula Soukara on police interviews as they occur now in England and Wales of special interest. The literature on false confessions invariably includes discussion of how interrogations are conducted in

Great Britain, and the reforms they have instituted. Their emphasis has moved away from working toward a confession and toward an intense focus on maximizing the information gathered so they can identify the truly guilty with more confidence. Obtaining the confession (a tidy way to wrap up the investigation) is not the focus of the effort, and this is a major strategic shift in methodology. I found the data presented from actual police interviews in both England and Wales to be intriguing. While it takes time to shift from one goal (e.g., confession) to another (e.g., information-gathering)—this chapter shows us that it actually is happening.

Overall, this is a very useful overview of the ever-increasing research on this controversial and ultimately very sad area of our justice system. Yet, I felt hopeful after reading it. There are horribly discouraging case examples, yes. But there are also recommendations (much like we bring you in *The Jury Expert*) for how to use this research in your day-to-day practice of litigation advocacy.

There are times when I read a book and then move on. There are other times when I read a book and find myself returning to its content over and over again as I consider practice issues. This book is most definitely of the latter variety. For that reason, I would recommend this volume to attorneys, law students, trial consultants and, honestly, to anyone who is interested in our legal system and the pitfalls to fairness and justice that can lie in wait along the way. 🍷

[Rita R. Handrich, PhD](#) is the Editor of *The Jury Expert* and has been a trial consultant with Keene Trial Consulting since 2000. She is an unrepentantly voracious reader and blogs regularly at Keene Trial Consulting’s [The Jury Room](#) blog.



Disability Wrongs, Disability Rights

By Steven Perkel, Paul J. Tobin, and James Weisman

ON APRIL 30, 2006 Stephen Colbert addressed the White House Correspondents and President and Mrs. Bush. During this speech when referring to where truth lies, Colbert pointed to his stomach and stated, “right down here in the gut.” Colbert went on to mention a “truthy” mainstay of American culture – the myth of self-sufficiency that exemplifies an ableist ideology by saying “I believe in pulling yourself up by your own bootstraps. I believe it is possible - I saw this guy do it once in Cirque de Soleil. It was magical.”^[1] These quotes are examples of “truthiness”, a neologism that Colbert introduced during his first television show and which was voted Merriam Webster’s Word of the Year in 2006:

“Merriam-Webster’s #1 Word of the Year for 2006:

Truthiness (noun)

1: “truth that comes from the gut, not books” (Stephen Colbert, Comedy Central’s “The Colbert Report,” October 2005)

2: “the quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true” (American Dialect Society, January 2006)”^[2]

People who embrace “truthiness” according to Colbert embrace ideas and issues that feel true to them. They are gut thinkers and they put forth their ideas, beliefs and policies regardless of the facts by asserting the defense “that is how I see it. I have a right to my opinion and we will just have to agree to disagree.” Gut thinkers rely on truthiness regardless of facts, critical analysis, and arguments that prove them wrong.^[3] Gut thinkers are a clear threat to our justice system and the policy-making process. Gut thinkers are a dangerous force in litigation and policy making.

As litigation consultants and attorneys we have an ethical obligation to avoid arguments and policies that are based on “truthiness”, bias, stereotypes and misinformation.^[4] We do this in court proceedings through voir dire, the application of rules that demand arguments be based on legitimate facts and through judicial oversight. However, despite best efforts there are times when “truthiness”, bias, misinformation and ideological arguments influence litigation, legislation and the regulatory process. The authors of this article caution litigation consultants and attorneys to be particularly aware of “truthiness” whenever matters involve concepts of disabilities, or its contrasting and more prevalent belief system of ableism.

Ableism is an ideology that values able-bodied individuals and devalues persons with disabilities. Ableism can be thought of as

a lens through which people are viewed as inferior by virtue of their non-normative physical, emotional or cognitive status (deficits) instead of being valued for their capacities and humanity. Ableist ideology frames disability as a medical “problem” to be “treated” in an effort to find a “cure.”^[5] In this discriminatory understanding of disability, people with disabilities are viewed as deficient and dependent because of their diagnoses and related impairments. Ableist attitudes reflect a fear of, an aversion to, or discrimination or prejudice against people with disabilities.^[6] Historically, not being “able-bodied” has often been perceived as an economic threat to the collective and contradicted the deeply held American values of autonomy and economic self-sufficiency.

Eugenics, Truthiness and Disability Policy in America

For many years preceding the industrial revolution, persons with disabilities were scorned, ostracized, institutionalized and not provided equal protection before the law. We need only study the words of Justice Oliver Wendell Holmes, writing the majority opinion for the Supreme Court of the United States (SCOTUS) in *Buck v. Bell* (274 U.S. 200, 1927) for an example of how eugenics, a popular application of Anglo-Saxon supremacy philosophy and pseudo-science, set a legal precedent allowing the involuntary sterilization of thousands of men and women in more than twenty-seven states.

Carrie Buck was the daughter of Emma Buck, a widowed mother of three. Emma Buck supported herself through prostitution and charity until her children were taken from her and she was institutionalized. Carrie went to live with the Dobbs family and progressed normally through five years of school. When Carrie was in the sixth grade, she was pulled from school so she could assume an increased load of household duties for the Dobbs and for neighbors to whom she was “loaned.”^[7] At age 17, Carrie claimed she had been raped and became pregnant. Years later, she revealed her rapist to be Mr. and Mrs. Dobbs’ nephew.^[8]

Mr. Dobbs, the local peace officer who was responsible for institutionalizing

Emma, wanted Carrie and “her shame” removed from his home. He filed commitment papers with local authorities claiming that Carrie was feeble-minded, epileptic or both and coincidentally that he could no longer afford to look after her. Carrie was given an I.Q. test, which revealed she had a mental age of 9. As soon as Carrie gave birth to a daughter, Vivian, the Dobbs’ had Carrie committed to the Virginia Colony for the Epileptic and Feeble-minded (“Colony”) and the Dobbs’ took custody of Vivian.

The Colony was the same institution where Carrie’s mother had been confined and found to have a mental age of 8. The staff of the Colony and in particular Dr. Albert Sidney Priddy – the Colony’s superintendent – concluded that Carrie had inherited feeble-mindedness from her mother and that her recently born daughter Vivian had undoubtedly inherited the same affliction. He recommended that Carrie be sterilized because she was feeble-minded and a moral delinquent. Priddy, a devout believer in the eugenics movement, saw Carrie’s situation as the perfect test case for Virginia’s recently passed sterilization law – a law that Priddy helped author and coax through the Virginia legislature.

Dr. Priddy’s recommendation to sterilize Carrie was approved by the Colony’s Board of Directors. Aubrey Strode was hired as counsel to represent the Colony and a former Colony Board Member and friend of Strode and Priddy, Irving Whitehead, was retained to represent Carrie. Whitehead was also a staunch eugenicist and founder of the Colony. “Whitehead, Priddy and the board [of the Colony] voiced satisfaction that the case was proceeding as planned. He had betrayed his client, defrauded the court, and set in motion a series of events that history has uniformly condemned.”^[9] Priddy and Whitehead would test Virginia’s new sterilization law in the courts.

In 1924, *Buck v. Priddy* was argued in the Circuit Court. Strode called eight witnesses and presented one witness’ written expert testimony. Those testifying alleged that Carrie had inherited her mother’s feeble-mindedness. Vivian, Carrie’s infant daughter, then eight months old was described “as not

quite a normal baby.”^[10] The claim was made that three generations of Buck women inherited feeble-mindedness and moral turpitude. Because Carrie had one illegitimate baby, she was characterized as being the probable potential parent of [more] socially inadequate offspring according to Dr. Joseph “Sterilization” DeJarnette, an expert witness for the Colony.^[11] The fact that Carrie’s pregnancy was the result of an alleged rape was disregarded. Priddy claimed that Carrie “would cease to be a charge on society if sterilized”. Priddy, like DeJarnette asserted that sterilizing Carrie “would remove one probable potential source, of likewise afflicted [as feeble-minded] offspring... without detriment to her general health and that her welfare and that of society shall be promoted by her sterilization.”^[12]

Whitehead offered no meaningful defense for Carrie in this collusive challenge of the Virginia sterilization law. He neglected to point out Carrie’s church attendance and normal progress in elementary school. While Whitehead knew he would have to argue on his client’s behalf in higher courts, he did not zealously argue to protect Carrie’s interests. Their intention was to exhaust the gamut of appellate courts to affirm Virginia’s eugenics sterilization law. In 1925, Whitehead petitioned the Virginia Supreme Court of Appeals, which ultimately upheld the lower Circuit Court. By this time Priddy had died and Dr. James H. Bell – Priddy’s assistant – became superintendent of the Colony hence the change in the case caption to *Buck v. Bell*. Committed to testing the validity of the Virginia law, the U.S. Supreme Court (SCOTUS) was Whitehead’s next step.

In his brief to SCOTUS, Whitehead half-heartedly claimed that the Virginia law was void because it denied Carrie due process and equal protection before the law as guaranteed by the Fourteenth Amendment. Strode, on the other hand, vigorously argued that Carrie had been given “a great deal of due process” citing the administrative and clinical “protections” offered by the Virginia law. Justice Holmes writing the three-page majority opinion of the Court offered:

“There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and...every step in this case was taken in scrupulous compliance with the statute...”

(Buck v. Bell, 274 U.S. 207 (1927))

The Court also rejected Whitehead’s claim regarding a violation of the right to equal protection by finding that the mandatory Virginia sterilization law treated all individuals like Carrie in a similar manner.

Justice Holmes agreed with the philosophy of eugenics, as did seven other Justices that society must be protected. He wrote “[i]t is better for all the world, if instead of waiting to execute offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind... Three generations of imbeciles are enough.” (Buck v. Bell, 274 U.S. 207, 1927)

In October of 1927 Dr. Bell surgically sterilized Carrie Buck and then released her from the Virginia Colony for the Epileptic and Feeble-minded. Carrie went on to marry, be widowed and then become remarried. Later recollections of her minister, neighbors, friends, and health care providers plus letters she wrote to the Virginia colony seeking custody of her mother all suggest Carrie was truly not “feeble-minded.” Little Vivian, while being raised by the Dobbs’, enrolled in school and earned a place on the honor roll until, at the age of eight, she died of an infectious disease.^[13]

Fast Forward to the Present

The scientific community has discredited the “truthy” pseudoscience of eugenics, yet many negative biases, attitudes and stereotypes about being disabled are historically rooted in eugenics. With passage of the American with Disabilities Act in 1990, progress was made to protect the civil rights of persons with disabilities from discrimination. However, truthiness in the form of prejudice, misinformation, bias and stereotypes about persons with disabilities remain a part of the fabric of American history and a significant challenge today.

The Americans with Disabilities Act of 1990 (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. §§ 12101 et seq.)

The purpose of the Americans with Disabilities Act of 1990 (ADA) is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”. (42 U.S.C. §§12101 (b) (1))

The Act’s preamble states “... individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.” (Emphasis added, 42 U.S.C. §§12101 (a)(7))

While the ADA provides a framework and guidance to eliminate discrimination on the basis of disability, truthiness influences outcomes in litigation and in social policy.

The first ADA case to be decided by the U.S. Supreme Court, Bragdon v. Abbott (524 U.S. 624 (1998)), concerned an HIV-positive woman seeking dental assistance. Bragdon refused to treat Abbott. His gut told him that both he and his staff would be in danger if they provided dental services to Abbott in an office setting. Bragdon dismissed scientific information and expert guidance produced by the Center for Disease Control which stated that ordinary precautions (i.e. eye protection, mask and gloves) were all that were necessary to treat her safely. Truthiness about the perceived risk of treating an HIV-positive individual without extraordinary measures determined the dentist’s behavior. The Supreme Court found that Abbott was disabled and was therefore entitled to protection under the ADA.

Based on thirty-years of experience as a civil rights attorney for people with disabilities, James Weisman asserts that truthiness usually mitigates against an equitable result for people with

disabilities. For example, James tells the story of a wheelchair user’s attempt to use a public pool in her community. She was told she could only use the pool between 12-2pm on weekdays (low use hours) and in order to do so she had to pass a swimming test administered by a lifeguard. Non-wheelchair users were granted access to the pool at all hours regardless of their proficiency in swimming.

The truthiness (i.e., the gut belief) expressed by the pool operators about swimmers who use wheelchairs outside of the pool is that they cannot swim and would be dangerous to themselves and everyone else in a public pool because they would distract the lifeguards. It did not matter that the law prohibited limiting access to a place of public accommodation for a specific minority of people with disabilities because it was a discriminatory practice.

In another example, Mayor Michael Bloomberg of New York City, responding to a reporter’s inquiries about why the City opposed making its “Taxi of Tomorrow” wheelchair accessible, stated that it would be a dangerous condition for wheelchair users when they attempt to hail cabs.^[14] On other occasions, the Mayor asserted that the ride in an accessible cab would be uncomfortable for able-bodied passengers.^[15] Finally, the Mayor also held (and this is our personal favorite) that people using wheelchairs would “sit too far from the driver to establish a “dialogue” and therefore will be poor tippers.”^[16] It is clear to disability rights advocates that the Mayor holds “truthy” beliefs about people with disabilities (and also about taxis and the conversations held in taxis between the driver and his or her passengers.)

Mayor Bloomberg has never stated a cogent reason for opposing accessible taxis yet City policy appears to follow the Mayor’s gut instinct, which in the absence of other stated reasons, appears to have been the basis of his opposition. The resulting legislation and litigation has taken years and has severely limited the transportation, mobility and employment opportunities for people with disabilities. The attitudes and beliefs of the Mayor regarding people

with disabilities has had real-world implications upon people with disabilities. New York City has only 231 accessible cabs out of a fleet of more than 13,000. Had the fleet been fully accessible, as they are in London, England, they could have provided a safe, affordable option to evacuate people with disabilities in advance of Hurricane Sandy. However, people with disabilities were placed at even greater risk when New York City shut down the paratransit system well in advance of other mass transit options, leaving many people stranded and unable to evacuate.

“Truthy” underestimations of the abilities of people with disabilities and their capacity to enjoy a high quality of life makes for bad public policy, discriminatory employment practices and unnecessarily separate facilities and programs. These policy outcomes create great social expense to society and to people with disabilities. When similar “truthy” beliefs influence the decision making of jurors, litigators, judges or policy makers, the impact upon people with disabilities can be devastating.

Exploring Disability (Ableism) in Litigation and Public Policy: Can Litigation Consultants Help?

Andrew M. Sheldon, JD, PhD is an experienced trial consultant with specific experience in civil rights murder cases and a broad knowledge of trial consulting. In Sheldon’s paper, [Defending Racially Charged Cases: Advice from a Trial Consultant’s Perspective](#), written with Matthew McCusker, they posit that:

“[I]t has long been our experience that racial bias is such a common source of dispute between employers and employees, between colleagues and coworkers, that it is not likely to recede as a source of litigation anytime soon. A century ago, mentioning a belief in racial equality may have raised an eyebrow or worse in mixed company. Today, outwardly expressing any racial prejudice has become socially unacceptable and can lead to serious rebuke. However, this clearly does not mean that an internal bias does not still exist in many Americans.”¹⁷

As evidenced by Mayor Bloomberg, the recent outward expression of biases and “truthy” beliefs about people with disabilities has not yet “led to serious rebuke.” Yet as surely as racial biases can be the basis for dismissing a prospective juror for cause during voir dire, so too must the discriminatory biases

concerning ableism and disability held by jurors, litigators, judges and policy makers be recognized and addressed if justice is to be served.

Regardless of whether serving the defense or prosecution of a case involving disability, Sheldon contends that community surveys, focus groups, supplemental jury questionnaires, witness preparation, trial observation and pre- and post-trial public relations issues used in cases and initiatives involving racism, can also be effectively used in litigation and policy-making involving disability. He likens the importance of these tools to their use in the civil rights murder cases and states in personal correspondence with the authors that “Isn’t racism the disabling of a person based on something having to do with the color of his/her skin?”

As an example, pre-trial and community attitude surveys can help probe latent attitudes concerning attitudes and belief systems. The use of disempowering phrases such as “confined to a wheelchair”, “retarded” or “crazy” can reveal a potential juror’s biases regarding disability during voir dire. Trial consultants familiar with disability rights issues can be helpful in crafting voir dire questions that identify disqualifying biases.

Conclusions and Recommendations

Trial consultants can help attorneys, legislators, regulators and policy makers involved in disability rights matters overcome the historical truthiness that has characterized the American socio-political response to persons with disabilities. However, as Andy Sheldon accurately pointed out in his correspondence with the authors, it is up to the trial consulting community to inform disability rights advocates of the knowledge trial consultants have and the types of services that can be offered.

In the immediate future, beginning a dialogue between trial attorneys, disability rights lawyers and scholars, as well as consumers with disabilities are steps we recommend. Such a dialogue is also consistent with ensuring that the fruits of democracy, including equal and fair treatment before the law, is available to everyone.

Finally, we recommend lawyers and policy advocates explore the services trial consultants offer including but not necessarily limited to persuasive communication, research strategies including focus groups and community surveys as well as helping prepare members of disability rights organizations to become more effective advocates. ¹⁸

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Notes

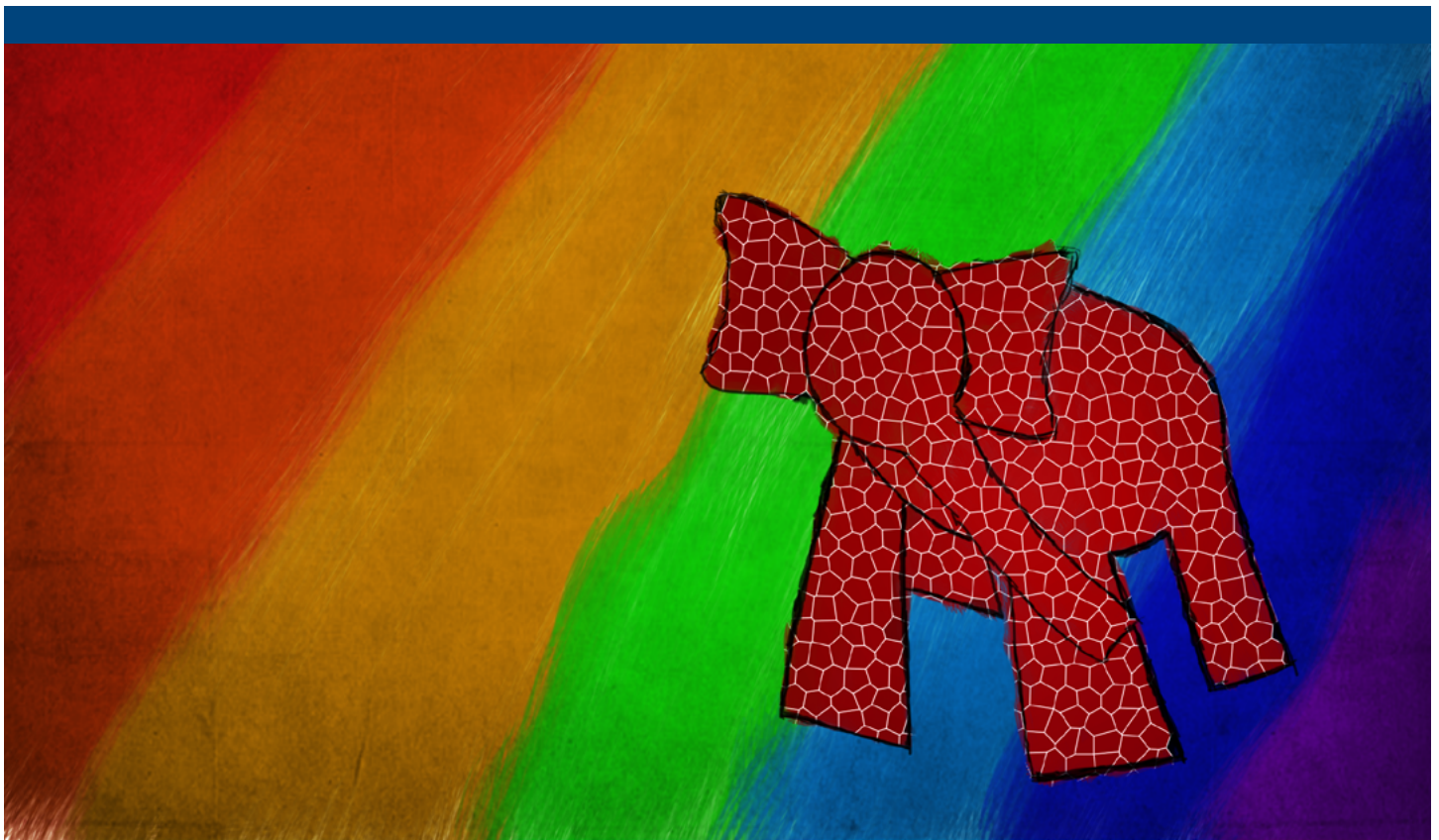
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Abstract Thinking Reduces Conservatives' Prejudice Against Stigmatized Groups

by Jamie L. Napier and John F. Dovidio

The “American Dilemma” is . . . the ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the “American Creed,” where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where . . . consideration of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook.

—Myrdal (1944, p. xliii)

IN HIS INFLUENTIAL STUDY of American race relations in the 1940s, Swedish economist Gunnar Myrdal identified a fundamental “American dilemma”—a conflict between two planes of existence in American society at that time. On the general, more abstract plane, the American Creed of fairness and equality was promoted and cherished. On the more concrete, day-to-day plane, however, many individuals in the 1940s overtly expressed biases and prejudice that conflicted with these abstract values.

Overt expressions of bias toward racial minorities are no longer tolerated as they were during the time of Myrdal’s writings (Schuman, Steeh, Bobo, & Krysan, 1997), which perhaps has resolved, or at least diminished, the conflict between the societal treatment of racial out-groups and the abstract value of fairness. However, this conflict likely remains in many Americans’ attitudes toward certain individuals, such as gay men and lesbians and members of religious out-groups (e.g., atheists and Muslims), who are perceived as being nonnormative, or deviating from Judeo-Christian values, and thus are often the targets of overt discrimination (Edgell, Gerteis, & Hartmann, 2006; Hebl, Foster, Mannix, & Dovidio, 2002; Herek, 2000). This conflict may be especially pronounced among political conservatives, who advocate for Judeo-Christian values to have public and national precedence (Republican National Committee, n.d.). We investigated how abstract and concrete mind-sets can differentially affect concerns about fairness and thereby influence prejudice toward members of nonnormative groups (specifically, gay men, lesbians, Muslims, and atheists) among political conservatives and liberals.

Members of nonnormative groups in the United States commonly face challenges—particularly from politically

conservative people—to achieving equal rights and privileges. For example, gay men and lesbians are currently denied the right to marry in most states and face overt discrimination from employers, politicians, and religious leaders, especially those who are politically conservative (Herek, 2000). In a survey having a nationally representative sample (Nisbet & Shanahan, 2004), more than half of the respondents thought that the rights of Muslim Americans should be restricted, a trend that was largely driven by politically conservative and highly religious respondents. Public-opinion polls have also revealed an ideological divide with respect to the acceptance of atheists: In one recent poll, only 14% of Republicans (vs. 44% of Democrats) said they would be willing to vote for a well-qualified, party-nominated presidential candidate who was an atheist (Pew Research Center, 2007).

We propose that the discrepancy between the abstract value of fairness and a bias against certain nonnormative groups, a conflict that is more pronounced among political conservatives than among liberals, may be moderated by the mind-set that people adopt when thinking about these groups. In the present research, we used construal-level theory to examine how two different mind-sets (or “planes”)—abstract and concrete—might influence conservatives’ feelings toward nonnormative groups. A large body of research has shown that people can perceive objects, events, and individuals in either concrete (low-level) or abstract (high-level) terms (for a review, see Trope & Liberman, 2010; see also Vallacher & Wegner, 1989). These perspectives are called “construal levels” and are described in a body of research called “construal-level theory”. Construal level has a strong influence on people’s judgments, attitudes, and behaviors, from feature perceptions and morality judgments to self-control and social perceptions (Eyal, Liberman, & Trope, 2008; Fujita, Trope, Liberman, & Levin-Sagi, 2006; Trope & Liberman, 2000).

In the research reported here, we investigated whether construal level can influence perceptions and attitudes toward not only objects, events, and individuals, but also groups (see also Levy, Freitas, & Salovey, 2002). We hypothesized that abstract thinking, insofar as it is related to Myrdal’s (1944) “general plane,” should lead to a reduction of prejudice, particularly prejudice toward nonnormative out-groups, because people whose construal level is more abstract should be more likely to operate under the broad societal values of fairness and justice. This hypothesis is consistent with work by Eyal et al. (2008), who found that participants who thought abstractly rather than concretely were more likely to apply their moral principles in judgments of others’ actions. Additionally, Torelli and Kaikati (2009) demonstrated that values were a stronger predictor of judgments and behaviors when people were thinking more abstractly.

In three experiments, we investigated whether thinking abstractly (vs. concretely) can increase positive feelings toward nonnormative groups (gay men, lesbians, Muslims, and atheists)—groups that experience overt prejudice that is antithetical to the value of fairness, or the “American Creed.” Moreover, because more conservative individuals show greater explicit bias toward nonnormative groups and thus exhibit

greater conflict between their concrete feelings about members of these groups and the more abstract principles of equality and fairness, we hypothesized that the predicted effect of abstract thinking on bias against nonnormative groups would be stronger for conservatives than for liberals. In our first two studies, we examined how construal level—either characteristic (Study 1) or induced (Study 2)—related to both conservatives’ and liberals’ explicit feelings toward a variety of social groups. In Study 3, we manipulated participants’ mind-sets and tested whether the societal value of fairness is indeed a mediator of the effects of construal level on bias.

Study 1

In Study 1, we investigated whether individual differences in mindset level (abstract vs. concrete), assessed with Vallacher and Wegner’s (1989) Behavioral Identification Form, were related to differences in prejudice toward nonnormative social groups. We measured feelings toward different social groups using feeling thermometers, which have been shown to be reliable and precise measures of feelings toward various groups (Alwin, 1997). Our focus was on participants’ feelings toward four nonnormative groups (gay men, lesbians, Muslims, and atheists), but we also assessed feelings toward racial-ethnic minority groups (Blacks, Latinos) and dominant groups (Whites, Christians). We predicted that more politically conservative participants would display more negative feelings toward the nonnormative groups, which would be in line with results from prior research (Nosek, Banaji, & Jost, 2009), but that this effect would be moderated by individual differences in mindset level. Specifically, we expected that conservatives would have less negative feelings toward nonnormative groups if they characteristically adopted a more abstract mind-set. We expected that mind-set would have no such effect on feelings toward racial-ethnic minority groups (because they are legally guaranteed equal rights and because the American Creed is more commonly perceived to apply to them than to nonnormative groups) or toward dominant groups. Because liberals tend to support equal rights for non-normative groups, and thus should not experience a conflict between their abstract values and feelings toward these groups, we did not expect mind-set to affect their responses.

Method

Participants. Sixty-three participants (35 women) were recruited online and took part in this study in exchange for a chance to win a gift certificate.

Procedure. We assessed participants’ mind-sets using Vallacher and Wegner’s (1989) Behavioral Identification Form, which asks participants to make a dichotomous choice whether actions are best described in concrete or abstract terms. Participants were given ten different actions, such as “pushing a doorbell”, and then asked whether they were best described concretely (“moving a finger”) or abstractly (“seeing if someone is home”). For each participant, we used the proportion of actions described as abstract (vs. concrete) as our measure of mind-set.

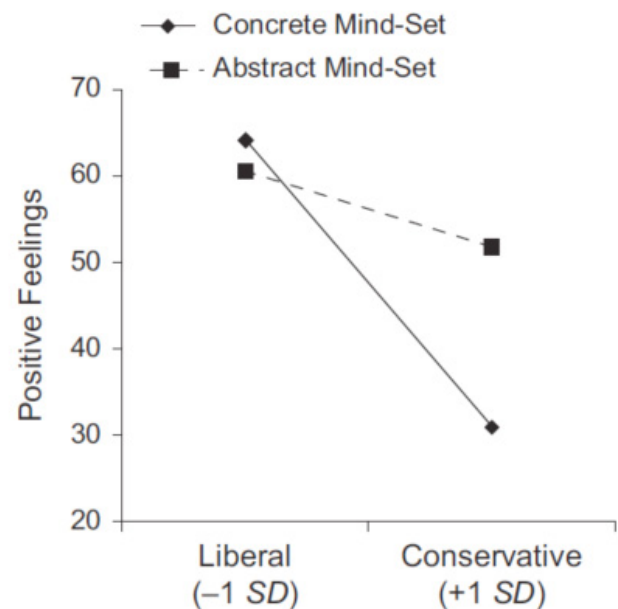
Participants then rated eight groups, using two feeling

thermometers one assessing warmth and the other assessing liking. Participants were asked to using a sliding scale to indicate their feelings toward each group, on a range from 0 – 100. The warmth and liking ratings for each group were highly correlated, we therefore averaged the two ratings to create a score for feelings toward each group. Using this measure, we computed ratings for (a) nonnormative groups (lesbians, atheists, gay men, and Muslims), (b) racial-ethnic minority groups (Blacks and Latinos), and (c) dominant groups (Whites and Christians). Finally, participants responded to demographic questions and rated their political orientation on a scale from 1 (very liberal) to 6 (very conservative; see Jost, Federico, & Napier, 2009).

Results and Discussion

To test our main predictions, we conducted three linear regressions predicting feelings toward (a) nonnormative groups, (b) racial-ethnic minority groups, and (c) dominant groups; abstract mind-set (centered), political orientation (centered), and the interaction of political orientation and mind-set were entered as independent variables (for specific statistics, see appendix). As predicted, conservatives were less warm toward nonnormative groups than liberals (by about 7.5 points out of 100). However, political orientation interacted with mindset level (abstract or concrete, see Fig. 1 below). For liberals, there was no relationship between how abstractly they were thinking and their feelings toward nonnormative groups. However, for conservatives, there was a significant relationship. Conservatives who were thinking concretely felt less positively about nonnormative groups than conservatives who were thinking abstractly. For conservatives, the difference between concrete and abstract thinkers was about 35 points out of 100 (see Fig 1 below). Looking at it another way, among concrete thinkers we observed the predicted difference between liberals and conservative, such that concrete thinking liberals felt more positively toward nonnormative groups than concrete thinking conservatives. Among abstract thinkers, there was no difference between liberals and conservatives in feelings toward nonnormative groups. As predicted, there was no interaction

of political orientation and mindset level on feelings toward racial minorities or dominant groups.



The results from Study 1 are thus in line with our hypothesis that conservatives' prejudice against nonnormative groups is reduced when they think abstractly as opposed to concretely. Indeed, there was no difference in bias at all between liberals and conservatives with abstract mind-sets. It does not seem to be the case that liberals are chronically more likely to think in abstract terms and that this accounts for their lower levels of prejudice. In fact, there was a relatively weak but reliable correlation between mind-set and political orientation, such that more conservative participants tended to endorse more abstract descriptions of actions on the Behavioral Identification Form¹¹. In our two next studies, we sought to replicate our results from Study 1 using established experimental manipulations of mindset level.

Study 2

In Study 2, we induced abstract or concrete mindsets via a why/how paradigm in which participants must give increasingly concrete (subordinate) or abstract (superordinate) reasons for engaging in a certain behavior (Freitas, Gollwitzer, & Trope, 2004; Fujita et al., 2006; Ledgerwood, Trope, & Chaiken, 2010). Participants were asked to think about the issue of maintaining good physical health and to explain either why they would do so (abstract construal) or how they would do so (concrete construal). We assessed participants' political orientation and their feelings about the same nonnormative, racial-ethnic, and dominant groups that were used in Study 1. We predicted that more conservative participants would display less positive feelings toward nonnormative groups, but that this effect would be less pronounced in the abstract-construal condition than in the concrete-construal condition.

Method

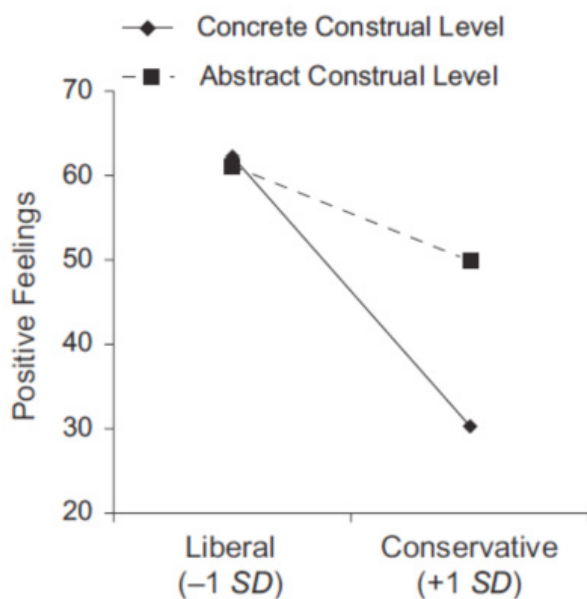
Participants. Sixty-four participants (34 women) were recruited online and took part in this study in exchange for a chance to win a gift certificate.

Procedure. Participants reported their political orientation and were then randomly assigned to construal condition and asked to fill out a ladder questionnaire about good physical health. In the abstract condition, participants started at the bottom of the ladder and moved up, generating increasingly abstract (superordinate) answers to the question of why they would maintain good physical health; in the concrete condition, they moved down the ladder, generating increasingly concrete (subordinate) answers to the question of how they would maintain good physical health (Freitas et al., 2004; Fujita et al., 2006). Following this manipulation, participants used feeling thermometers to rate their feelings of warmth and liking

toward the same eight groups used in Study 1. The warmth and liking ratings for each group were highly correlated, so we again averaged them to create measures of positive feelings toward nonnormative groups, racial-ethnic minorities, and dominant groups.

Results and Discussion

Results supported our findings from Study 1. We found that manipulating participants' construal level had an impact on their feelings toward nonnormative groups, but only for those who were political conservative (see Fig. 2 below). More specifically, liberal participants felt relatively positive toward nonnormative groups regardless of their mindset (abstract or concrete). On the other hand, conservatives were more positive toward nonnormative groups when they were thinking abstractly (vs. concretely). Put another way, among the participants who were induced to think concretely, liberals felt more positive toward nonnormative groups than conservatives. Among those who were induced to think abstractly, there was no difference between liberals and conservatives in their feelings toward nonnormative groups (for specific statistics, please see the appendix).



Results from our first two studies offer convergent support for the hypothesis that for politically conservative individuals, thinking with an abstract mind-set rather than a concrete mind-set can reduce expressed prejudice toward people who are viewed as somehow "deviant" from prototypical Americans. In both studies, there was no effect of construal level on feelings toward racial-ethnic minorities or feelings toward dominant groups. This finding is consistent with our conjecture that the endorsement of overt prejudice and discrimination toward nonnormative groups creates a dilemma by conflicting with the American ideal of promoting fairness and equality.

In our final study, we examined the process underlying the effects that emerged in our first two studies by manipulating

construal level and assessing concerns about fairness as well as feelings toward nonnormative groups. We hypothesized that abstract thinking would bring the value of fairness to the forefront of participants' minds and thereby reduce prejudice, particularly prejudice toward groups that are perceived as deviant and that are not consistently included in the American Creed of fairness for all.

Study 3

Past research has demonstrated that emphasizing moral ideals such as fairness can serve as a means of improving intergroup relations (Does, Derks, & Ellemers, 2011). We hypothesized that the effect of mindset on expressed prejudice that we found in our first two studies was due to a shift in the salience of central values. We reasoned that when thinking on an abstract (as opposed to concrete) level, people should be more likely to rely on broad-based moral principles such as fairness (Graham, Haidt, & Nosek, 2009). In Study 3, we tested this hypothesis by examining how construal level influenced participants' concerns about fairness and whether shifts in the salience of values accounted for (i.e., mediated) changes in feelings toward nonnormative groups.

Method

Participants. One hundred sixty-eight participants (106 women) were recruited online and took part in this study in exchange for a chance to win a gift certificate.

Procedure. Participants completed a construal-level priming manipulation (developed by Fujita et al., 2006) in which they were randomly presented with 20 words, 5 at a time. Participants assigned to the concrete condition were asked to generate a subordinate exemplar for each word by answering the question, "An example of _____ is what?" They were told to fill in the blank with each of the words presented and then answer the question for that word. For example, if one of the words presented was dog, participants could answer "poodle" (a type of dog) or even "Odie" (a specific name for a dog). Participants in the abstract condition were asked to generate a superordinate category label for each word by answering the question "_____ is an example of what?" (again, filling in the blank with each of the words presented). For example, if one of the words presented was dog, participants could answer "pet" or "animal."

Participants responded to four items from the Moral Foundations Questionnaire (Graham et al., 2009) that assessed concerns about fairness (e.g., "Justice is the most important requirement for a society"). Participants used feeling thermometers to rate their feelings of warmth and liking toward the nonnormative groups, racial-ethnic minorities, and dominant groups. Finally, participants answered a variety of demographic questions, including an item measuring political orientation.

Results

As in the first two studies, the construal level manipulation had an effect on conservatives. While the manipulation had no effect on liberals, conservatives who were induced to think

abstractly rated their feelings toward the nonnormative groups about 10.5 points higher than conservatives induced to think concretely (see appendix for specific statistics).

We next tested whether differences in the salience of the moral value of fairness could statistically account for the relationship between construal level and positive feelings. We evaluated whether fairness caused (i.e., mediated) the relationship between construal condition and positive feelings for conservative participants. The results support our predictions: Among conservatives, abstract (as opposed to concrete) thinking significantly increased endorsement of fairness, which had a significant direct effect on feelings toward the nonnormative groups. The indirect effect of construal level on positive feelings through fairness was significant^[2]; in other words, conservatives increased tolerance toward non-normative groups was due to their increased concerns about fairness when thinking abstractly as opposed to concretely.

Summary and Implications

Results from our three studies indicate that straightforward interventions aimed at changing people's mindsets may be effective for improving their attitudes, at least temporarily, toward highly stigmatized social groups. Across three studies, we found that adopting an abstract mindset heightened conservatives' tolerance for groups that are perceived as deviating from Judeo-Christian values (gay men, lesbians, Muslims, and atheists). Among participants who adopted a concrete mindset, conservatives were less tolerant of these nonnormative groups than liberals were, but political orientation did not have a reliable effect on tolerance among participants who adopted an abstract mindset. Attitudes toward racial out-groups and dominant groups (e.g., Whites, Christians) were unaffected by construal level.

We found that the effect of abstract thinking on prejudice was mediated by an increase in concerns about fairness. This research suggests that abstract thinking can reduce partisan differences insofar as everyone—conservatives and liberals alike—cares about fairness on some level. Thus, although many Americans may react to gay men and lesbians with disgust (Inbar, Pizarro, Knobe & Bloom, 2009) or view atheists and Muslims as socially, or even physically, threatening (Edgell et al., 2006), enduring concerns about justice and fairness can perhaps mitigate discriminatory responses toward members of these groups.

Though we did not conduct this research with the courtroom in mind, we believe this research could have some important applications in that realm. It suggests that when jurors immerse themselves in the myriad of details and specific, concrete

information about a case, they might lose sight of the larger picture and care less about justice in general. Additionally, the current studies may provide a relatively low-effort and innocuous way to reduce jurors' prejudice toward certain clients. Though we do not know for sure that the reduction in prejudice we found would lead to less discriminatory decisions, our findings at least suggest that lawyers who are representing nonnormative clients (gay men, atheists, Muslims, etc.) might be able to reduce the amount of bias in the jury toward these clients through prompting the jury to think "big picture," that is, to think abstractly (rather than concretely).

However, we do not think that abstract thinking is a tool that will always reduce bias in the jury. For example, we did not find that construal level had an impact on attitudes toward racial minorities. Additionally, though it is still an open question, it is unclear whether abstract thinking would improve attitudes toward people accused of child molestation or other heinous crimes. In fact, taking into account the results from Study 3, we would not expect abstract thinking to improve attitudes because negative attitudes toward these groups are generally perceived as being fair and legitimate (and so there is not a dilemma between the concrete prejudices and the abstract value of fairness). In fact, some construal level literature would suggest that in these cases, abstract thinking might exacerbate moral blame (Eyal, Liberman, & Trope, 2008).

More generally, we believe that the research on construal level theory could have important implications in the courtroom above and beyond the specific findings of the current research. A large body of literature in this area has highlighted the fact that the level on which people construe the world has large downstream implications on their attitudes and judgments (Trope & Liberman, 2010; Ledgerwood, Trope, & Chaiken, 2010). For example, abstract construal causes people make dispositional judgments of actions, whereas concrete construal causes them to take the situation more into account (Nussbaum, Trope, & Liberman, 20003).

In conclusion, our results from three studies provide converging evidence that adopting an abstract mindset (as opposed to a concrete mindset) can reduce expressions of prejudice toward nonnormative groups, primarily among people who are politically conservative. Study 3 directly demonstrated that the influence of abstract construal on bias is mediated by an increase in the salience of concerns about fairness. Overall, this research brings construal-level theory to bear on the investigation of prejudice and opens several avenues for future endeavors to understand how mindset level might be important in the courtroom. ©

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[1] $r(60) = .27$, $p = .03$

[2] $b = 4.62$, $SE = 2.48$, $p < .05$

Appendix

Statistics for Study 1:

To test our main predictions, we conducted three linear regressions predicting feelings toward (a) nonnormative groups, (b) racial-ethnic minority groups, and (c) dominant groups; abstract mind-set (centered), political orientation (centered), and the interaction of political orientation and mind-set were entered as independent variables. The model predicting feelings toward nonnormative groups yielded the predicted main effect of political orientation; participants who were more liberal, on averaged, scored about 7.5 points higher on positive feelings toward these groups, $b = -7.53$, $SE = 2.04$, $p < .001$. This effect was qualified by the predicted Mind-Set $\times$ Political Orientation interaction, $b = 16.88$, $SE = 6.89$, $p = .02$ (see Fig. 1 below).

In probing this interaction, we find that mindset did not affect positive feelings toward nonnormative groups among liberals (1 SD below the mean political-orientation score), $b = -11.45$, $SE = 15.48$, $p = .46$ (see Fig. 1). However, mindset did affect conservatives (1 SD above the mean political-orientation score). Conservatives who had more abstract mind-sets, as compared to concrete mind-sets, were over 35 points higher on positive feelings toward these nonnormative groups, $b = 35.49$, $SE = 13.44$, $p = .01$.

Thinking about it another way, among the concrete thinkers (1 SD below the mean Behavioral Identification Form score), there was a significant relationship between political orientation and feelings toward nonnormative groups; liberals reported more positive feelings toward these groups than conservatives did, $b = -11.92$, $SE = 2.99$, $p < .001$. Among abstract thinkers (1 SD above the mean Behavioral Identification Form score), however, there was no relationship between ideology and intolerance, $b = -3.14$, $SE = 2.63$, $p = .24$.

Analyses of feelings toward racial-ethnic minority groups revealed only a marginally significant effect of political orientation; more conservative participants had less positive

feelings toward racial-ethnic minorities, $b = -3.59$, $SE = 2.04$, $p = .08$. The Mind-Set $\times$ Political Orientation interaction was not significant, $p = .53$; in other words, the mindset manipulation did not affect conservatives' view of minority groups. Also, more conservative participants felt more positively toward dominant groups, $b = 4.64$, $SE = 1.84$, $p = .02$. Again, the Mind-Set $\times$ Political Orientation interaction was not significant, $p = .35$. Thus, as expected, construal level affected only feelings toward the nonnormative groups.

Although, on average, the nonnormative groups were rated somewhat more negatively than the racial-ethnic minority groups were (a result consistent with findings from surveys of representative samples), as predicted, mind-set exclusively moderated feelings toward nonnormative groups, rather than reducing negative feelings toward out-groups in general. That is, feeling-thermometer ratings for gay men and lesbians were comparable to those for Blacks and Latinos, but participants' feelings about gay men and lesbians displayed the expected Mind-Set $\times$ Political Orientation interaction ($ps < .01$), whereas their feelings about Blacks ($p = .44$) and Latinos ($p = .43$) did not.

Statistics for Study 2:

We found the expected main effect of political orientation on feelings toward nonnormative groups, such that conservative participants were about 11 points lower on positive feelings toward these groups than liberal participants did, $b = -11.06$, $SE = 2.47$, $p < .001$. This effect, again, was dependent on mind-set, $b = 7.18$, $SE = 3.41$, $p = .04$. Specifically, in the concrete condition, political orientation was significantly related to feelings toward the nonnormative groups, such that more conservative participants showed less positive feelings toward these groups, $b = -11.06$, $SE = 2.47$, $p < .001$. In the abstract condition, this difference was significantly reduced (from 11 points to about 4 points), and no longer reliably different from zero, $b = -3.88$, $SE = 2.36$, $p = .11$. Examined another

way, results showed that conservatives were almost 15 points more positive toward the nonnormative groups when thinking abstractly than when thinking concretely, $b = 14.74$, $SE = 6.97$, $p = .04$, whereas liberals expressed the same level of positive feelings in the two conditions, $b = -5.95$, $SE = 6.89$, $p = .39$.

As in Study 1, there were no effects of construal on feelings toward the racial-ethnic minority groups or dominant groups. More conservative participants reported somewhat less positive feelings toward racial-ethnic minorities, $b = -3.39$, $SE = 2.37$, $p = .16$, and more positive feelings toward dominant groups, $b = 3.71$, $SE = 1.95$, $p = .06$.

Statistics for Study 3:

There was a main effect of political orientation, such that more conservative participants showed less positive feelings (in terms of about 9 points) toward the nonnormative groups, $b = -9.27$, $SE = 1.37$, $p < .001$. This effect was qualified by a marginally significant Mindset $\times$ Political Orientation interaction, $b = 3.45$, $SE = 1.92$, $p = .07$. Political orientation was a stronger predictor of positive feelings in the concrete condition, $b = -9.27$, $SE = 1.37$, $p < .001$, than in the abstract condition, $b = -5.81$, $SE = 1.35$, $p < .001$). Conservatives' feelings toward the nonnormative groups were about 10.5 points more positive in the abstract condition than in the concrete condition, $b = 10.47$, $SE = 4.12$, $p = .01$. There was no effect of construal level on liberals' feelings toward these groups, $b = 0.04$, $SE = 4.02$, $p = .99$. 

[Charlotte A. \(Charli\) Morris, M.A.](http://trial-prep.com/publications) is the author of *The Persuasive Edge* [<http://trial-prep.com/publications>]. She lives in Raleigh, North Carolina and works wherever the cases take her.

Charli Morris responds:

Pardon Me, Counselor, You've Got A Bit of Bias on Your Shirt: Flipping the Script on the Role of Prejudice in the Courtroom

We spend a lot of our practice time thinking about how jurors' bias and prejudice will affect their judgment of our clients, our cases and the evidence. We study the bias, attempt to eliminate it with peremptory strikes, and find strategies to address it. Luguri, et al. acknowledge that certain aspects of their research may prove useful to our assessment of jurors whose bias can negatively affect their judgments at trial.

But attorneys bring bias to the courtroom too. It colors your judgment of your clients, the witnesses, and your potential jurors. So let's flip the script and focus on what happens if we don't check our own prejudice at the door before jury selection begins.

I've written before about the importance of approaching voir dire with more than strikes in mind. When you focus exclusively on areas of bias, you unnecessarily alienate prospective jurors with pointed questions and a defensive posture. Jurors know when you don't like or trust them and the feeling becomes mutual. It even has the potential to spread to jurors who are otherwise neutral – the ones you mistakenly ignore because

they aren't on your profile (good or bad) – and their worst fears and beliefs about lawyers are realized as they watch you wrestle to remove anyone who dares to think differently from your point of view.

For these and other reasons I encourage attorneys to spend equal amounts of time covering the areas of agreement between what jurors already believe and what you will tell them. Beyond the benefit of establishing rapport at the earliest stage of trial, you can be much more persuasive if you are able to connect the life experience of jurors directly to your theory of the case in opening statement, direct and cross examinations, and closing argument.

To do that you have to recognize that your own bias may be getting in the way of making a genuine (and purposeful) connection with people who will be on your jury after all of the strikes are made.

How Does it Work?

Let's deal with just one finding in the research that may have some impact on attorney success in the courtroom: namely, that Conservatives who think more abstractly have stronger positive feelings about "non-normative groups." We can think of these "non-normative" folks more broadly as "outsiders," if you will. You know who they are: people who just don't fit your profile of acceptable, agreeable jurors who are likely to identify with your "insider" clients who happen to be White, Judeo-Christian business owners (for example). And go ahead: be honest enough to count yourself among the Conservative thinkers because there is no question that description fits a sizable number of attorneys and our clients who read *The Jury Expert*.

So what does the research suggest about what will happen if you bring your bias and your prejudice to the jury selection process? Evidence of your own bias may be apparent in the questions you are asking.

Let's use a hypothetical case:

An attorney represents a law enforcement officer in a products liability case involving claims about a defective handgun. He hires me to develop the jury selection strategy and prepare voir dire questions that are designed to identify strikes and advance our themes for the case. As I draft voir dire, he tells me that we need to ask people (or have the judge ask) if they have ever been arrested. He says he is looking to eliminate anyone who might be "anti-cop." This, to me, is a perfect example of concrete thinking about voir dire: a question that can be answered simply yes or no to determine whether someone fits a strike profile.

And even though I understand why he might want to know if prospective jurors have ever been arrested – or more specifically anti-cop – that degree of specificity would most certainly create an atmosphere of "us" against "them" that is completely unrelated to what we believe to be the most important issue in the case. The truth is, this hypothetical civil lawsuit isn't about cops and robbers or "good guys" versus "bad guys." It is, rather, about a product that is dangerously defective for all gun owners.

We don't want or need to call attention with our voir dire strategy to the fact that his client is a law enforcement officer if what we really want people to understand is that the product is dangerous no matter which side of the law you might be on. The concept of "safe for all users" is abstract, (as in "justice for all"). So we could first ask people about their gun ownership experience and have jurors tell us why they think it is important for the people who manufacture guns to make guns as safe as possible for even the most experienced users.

In addition to identifying the people who might be "anti-cop" because of a concrete and specific experience (being arrested), we can also use a more abstract question as a test of what potential jurors think and feel about our better view of the case. Some may say – in response to our abstract question – that there really is no way to make an inherently dangerous product "safe" for all users and we can exercise our strikes wisely against those who do. In this way we haven't lost an opportunity to identify strikes even as we open up the dialogue to more abstract ways of thinking.

In fact, when you prime jurors with both types of questions you are also engaging in both types of thinking. You may have seen before my suggestions to [structure voir dire questions that go from personal experience to shared beliefs](#). As a practical matter, this is the best way to get around an objection from the other side because you start the conversation with a juror who has responded to a direct and specific question. I have also argued that it is important not to toss around questions that merely suggest vague notions of "justice" and "equality" without connecting that to something more specific in your case, because often those attitudes prove to be a mile wide but only an inch deep. But, perhaps, I was also onto something the authors identify as "construal-level theory." In practice, we want the best of both worlds.

In a breach of contract case, for example, consider the sequence of questions below and notice that it goes from (concrete) experience to (abstract) attitude:

- Raise your hand if you have ever been responsible for coming up – or complying – with the terms of a written contract.
- Tell us about that.
- Why is it important that both parties should agree to – and abide by – the terms of the contract?
- Are there ever any exceptions? Why or why not?

Using a combination of concrete and abstract questions and engaging in your own abstract thinking will allow you (Conservative and Liberal lawyers alike) to be more open to the answers you get, and less likely to allow bias or prejudice to interfere with your judgment about prospective jurors. 16

James McGee is a trial consultant based in New York City. He is also a graduate student at Columbia University and a graduate fellow of the Advanced Consortium on Cooperation, Conflict, and Complexity at The Earth Institute.

James McGee responds:

"A fox should not be on the jury at a goose's trial"

– Thomas Fuller

The Challenges of Juror Bias

One of the greatest challenges that trial consultants face in their daily practice is the assessment of potential juror bias. It is a force that can have profound effects on the outcome of a trial, shaping the ways jurors perceive and process information, and how they make decisions based on that information. The voir dire process was designed to mitigate its influence, but every seated juror is left with some degree of bias. It is simply an aspect of how the human mind works.

Juror bias is often hidden from direct observation. From the limitations of jurors' own self-awareness, to the social desirability effects of giving one's opinion in front of a courtroom filled with people, to the so-called "stealth jurors," who may purposefully misstate their beliefs to secure a seat on the jury, there are many reasons why bias can be difficult to detect. Biases that are subject to strong social norms, such as some types of intergroup bias, are particularly prone to conscious suppression. It requires a skilled, experienced trial consultant to aid the trial team in understanding what biases may be present in potential jurors and the myriad ways they can influence a case.

One reason juror bias is so challenging to manage is its complexity. While biases can sometimes predict behavior, observable behavior during jury selection does not necessarily predict bias. Frequently, bias can lead to surprising outcomes. Different target groups, different contexts, and different mindsets can elicit very different responses. In some cases, as the authors of this article suggest, conflict between the accepted societal treatment of certain outgroups and more abstract values of fairness may contribute to the multifaceted nature of bias.

Construal Level Theory as a Lens

In making sense of potential juror bias, these findings suggest that construal-level theory (CLT) is a valuable tool for trial consultants. It is well-supported by experimental evidence in a variety of contexts and has increasingly broad-reaching implications. Fundamentally, CLT predicts specific relationships between the ways we think and what we think. Specifically, it links psychological distance with abstraction. As we think about things with greater psychological distance, whether that distance is physical, temporal, or social, we tend to think in higher levels of abstraction (Trope & Liberman, 2010). Research on its applications suggests that CLT can help to predict how people make decisions, how they deal with risk, and how they negotiate (Fiedler, 2007).

The Findings and Their Implications

In this article, authors Luguri, Napier, and Dovidio have investigated an application of construal level theory by examining the relationship between abstract thinking and bias. Not only does this research further elucidate the nature of prejudice, but it also gives applied researchers and trial consultants a predictive association between an ideological group, a mindset, and a specific kind of bias.

First, let us examine what the authors did not find, as negative results can be just as telling as the positive ones. As the authors of this article show across several studies, there is evidence that feelings toward racial-ethnic minorities and dominant groups are unrelated to political ideology and unaffected by mind-set. In line with previous research, these data suggest that some biases are relatively persistent and pervasive (e.g., prejudice regarding the elderly; see Cuddy, Norton, & Fiske, 2005). This is an important consideration for jury trials. It suggests that the sole defense against some sorts of bias may be the jury selection process. Little hope remains for dealing with these biases during the trial. This may have been the kind of bias to which Clarence Darrow was referring when he famously wrote, "Never forget, almost every case has been won or lost when the jury is sworn."

Next, the findings suggest that political ideology can be a powerful predictor of how people think. From these results, we see that conservatives' feelings toward nonnormative groups are closely tied to their characteristic construal level, or mind-set, whereas liberals do not show the same relationship. Liberals demonstrate more positive feelings toward nonnormative groups regardless of their mindset. These results are in keeping with previous research by Jonathan Haidt and his colleagues showing that liberals and conservatives think and make judgments differently (for an example, see Graham, Haidt, & Nosek, 2009). Thus, trial consultants have two more variables – political ideology and mind-set – to consider for juror questionnaires and during voir dire, especially when their clients are representing members of a nonnormative group. These factors may also play a role in the alliances that can be expected to form within the jury if some jurors are members of such groups.

As critical as jury selection is to every trial, this article furthers the case that the trial consultant's work must not end there. It suggests that effective trial strategy may be able to further reduce juror bias. The findings of this research lend empirical support to the notion that some biases, for some people, can be changed. Conservative individuals' prejudice against stigmatized outgroups is one type of bias that can be mitigated by manipulating construal level. The authors were able to perform this manipulation using brief sets of questions: a series of superordinate why questions to cue abstract thinking, and a series of subordinate how questions to cue concrete thinking. Thus, it may also be possible to induce jurors to adopt a more abstract or concrete construal level, at least temporarily, during a trial. Of course, there are many practical limitations during a trial. By nature, witness testimony and the presentation of evidence tend to be detail-rich, which could impede jurors' ability to consider the case in abstract terms.

Nevertheless, opening and closing arguments often include rhetorical questions for the jury to consider. Such questions could be modified with an eye on their potential influence on juror mind-set.

The authors leave us with an important caveat. Referring to research by Nussbaum, Trope, and Liberman (2003), it is noted that construal level is also associated with the tendency to make dispositional versus situational attributions. Abstract thinking leads to more dispositional judgments, while concrete thinking leads to more situational judgments. Here, we can know a conflict may arise if, for example, the goal is to reduce prejudice while also encouraging situational judgments. Abstract thinking may encourage the former and interfere with the latter.

Take Away Points

How can we implement this new information in our daily practice? First, we should be aware that certain kinds of biases are less malleable than others and are best dealt with during jury selection. Second, we can be mindful of the relationship between the variables presented here during jury selection. In the absence of information on a juror's characteristic mind-set, liberal jurors have a higher baseline level of positive feelings toward nonnormative groups. This may influence their reactions to litigants, witnesses, and even other jurors. Third, we can recommend case strategies that provide the greatest opportunity to mitigate any potential remaining bias, particularly among more conservative jurors, by cuing abstract thinking, perhaps through a series of superordinate why questions. This may encourage jurors to focus on fairness when rendering decisions about members of nonnormative groups.

The results of this work also inspire many further questions about the mechanism behind the effects demonstrated here. For example, what factors other than construal level can influence fairness salience, and what are some of the other downstream effects of increased fairness salience? I look forward to more research in this field to provide some of the answers. ☛

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The Mona iPad Stand and Evernote

By Kelley Tobin and Brian Patterson

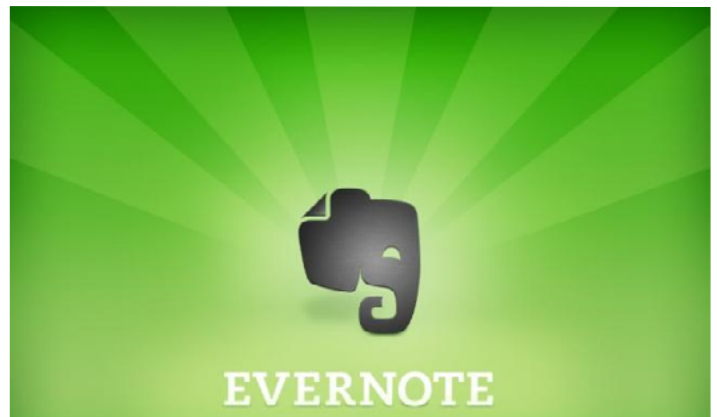
This month we again have not one but two Favorite Things. One will help you work more beautifully and practically while the other might help you with practically everything.

The first comes from Kelley Tobin of [Tobin Trial Consulting!](#)

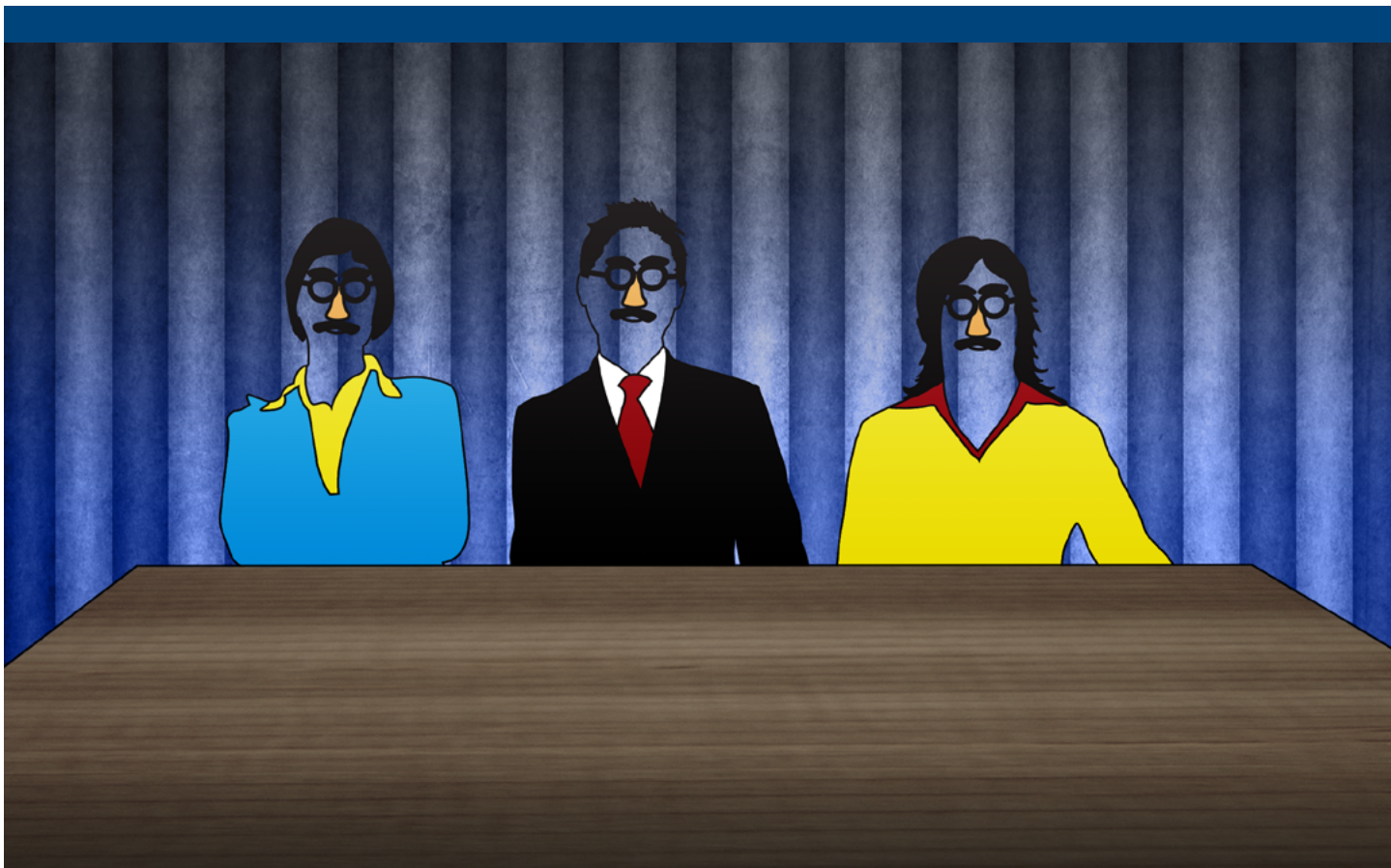


“It’s called the [Mona iPad stand](#). It’s light. It’s portable. It’s beautiful. Works with the iPad 2 and iPad 3. Great for tabletop video work with witnesses and \$29.95.”

And the second is from Brian Patterson of [Barnes and Roberts!](#)



“You may already be using this, it’s been around for a few years now, but searching through the Jury Expert archives, I can’t find that anyone has mentioned it here before. [Evernote](#) is, at it’s simplest, an online notebook. It’s available on pretty much every computing platform, so a note you make on your computer is automatically synced to your smartphone, your tablet, your laptop, your other tablet, etc. But it’s not just a notebook for text notes, it’s a notebook for audio notes, images, handwritten notes, web pages, etc. There is a lot of [et cetera](#) with Evernote. And it’s not just a single notebook, it’s notebooks within notebooks within notebooks. Organize your all your thoughts and bits of information into a strict hierarchy, or leave it all in one place and use Evernote’s fantastic search capabilities to find the note you are looking for. And it’s free.”



Musings from the Deliberation Room: The Impact of Humor on Juror Decision Making

By James Bochantin

DID YOU HEAR THE ONE about the priest, the rabbi and the trial consultant? Just kidding. I believe it was Winston Churchill who said: “Humor is a very serious thing.” The very nature of humor is that it is misunderstood more often than not. This makes humor a proverbial two edged sword – it can slice through the toughest of situations to your advantage, or cut sharply against you. This goes for the courtroom experience as well.

Research shows that successful humor boosts both likeability and group effectiveness. According to Michelle Gielan, an expert in positive psychology and cofounder of the Institute for Applied Positive Research, when something makes us smile or laugh, the feel-good chemical dopamine is dropped into our systems, which turns on all the learning centers in the brain and heightens creativity, productivity and engagement. Similarly, Anthony Pascosolido, a management and organizational behavior professor at the University of New Hampshire, believes that humor can serve to facilitate trust among strangers, ease tension and establish a sense of group cohesion. In his research, he found that effective humor provides a sense of “psychological safety” that helps manage emotions and makes group members more willing to accept challenging goals (Pascosolido, 2002).

Using humor also increases attentiveness and persuasiveness. For a leader (or a foreperson), it helps people relate by breaking down power structures and equalizing individuals. That said, it is easy to see how these concepts might translate to the courtroom. This article is a look at how juror decision making is affected by humor and how understanding and recognizing various humor styles can help both trial consultants and attorneys get a leg up on opposing counsel. Before turning our attention to those issues, let us first look at how humor has been conceptualized.

What Is Humor?

Although there does not exist one way to define or conceptualize humor, the following definitions have been used extensively in the literature: Booth-Butterfield & Booth-Butterfield’s definition of humorous communication states that humor is: “intentional verbal and nonverbal messages which elicit laughter, chuckling, and other forms of spontaneous behavior taken to meant pleasure, delight, and/or surprise in the targeted receiver” (2007, p. 206). Robinson (1991) notes a difference between humor and laughter asserting that while humor is a cognitive communication process, laughter is simply a manifestation of that process while McGhee (1996) defines humor as a type of intellectual interplay. Regardless of how one conceptualizes

humor, there are four types of humor that are pervasive in the literature:

Affiliative Humor	Used to amuse others and facilitate relationships; often used to cheer people up
Self-Enhancing Humor	Used to cope with stress and maintain a humorous outlook over the situation
Aggressive Humor	Use of sarcastic, manipulative, put-down, offensive or disparaging humor
Self-Defeating/Deprecating Humor	Amusing others at one's own expense; laughing along with other's when being ridiculed

The first two styles are considered positive uses of humor and are negatively correlated with anxiety and depression and positively correlated with self-esteem, extraversion, openness and agreeableness. The last two are negatively correlated with agreeableness and conscientiousness and positively correlated with neuroticism, hostility and aggression. Essentially, affiliative and self-enhancing humor are productive uses of humor while aggressive and self defeating/deprecating humor are thought to be unproductive. But aside from these correlations, of more importance is the question, what do these styles tell you about the personality of the person with this distinct style pattern?

In 2003, Rod Martin and Patricia Doris developed The Humor Styles Questionnaire (HSQ) to measure individual differences in styles of humor. Humor has been shown to be a personality characteristic that remains relatively stable over time and is sometimes viewed as a one-dimensional trait (Martin, Puhlik-Doris, Larsen, Gray & Weir, 2003). However, individuals seem to differ in the ways in which they use humor in their everyday lives, and different styles of humor seem to have different outcomes. The Humor Styles Questionnaire was developed to identify the ways in which individuals differ in humor styles and how these differences influence health, well-being, relationships, likeability, and other outcomes (Kuiper & McHale, 2009).

Results of the questionnaire reveal that participants with high average scores on all 4 styles are outgoing, impulsive and open to new experiences. Those below average on all of the styles are restrained, not outgoing, but are well-focused and organized. Those above average on the positive humor styles and below average on the negative humor styles are well balanced, low in anxiety, and positive towards themselves and others. They mostly use more lighthearted humor content, such as satire, irony, and philosophical humor.

Those who score above average on the negative styles and below average on the positive styles are not open to new experiences and negative towards themselves as well as others.

All this considered, how might these differing styles and personalities of jurors effect the group decision-making process during juror deliberations? More importantly, are certain people more likely to utilize a certain style over others?

Mock Trial Research

In order to find out the effect humor and humor styles can have on the group-decision making process, especially that of jurors deliberating the outcome of a case, a review of mock

jury research was conducted. This review uncovered different classifications of how humor gets used and what style an individual is likely to use based on a number of demographic factors. For this current study, three deliberation groups containing 8 jurors each in 15 mock trials (n=45 groups total) were reviewed to determine an individual's propensity toward certain kinds of humor use based on sex, age, race, class/status, geographical location and religion.

To begin, humorous communication was used quite frequently throughout each deliberation group that was observed. In general, each deliberation group, lasting about 60-minutes on average, revealed between 20 and 30 instances of humor episodes where laughter or chuckles were elicited. That translates to one instance of humor every two-three minutes, give or take, making humorous communication an ever-present part of the deliberation process.

With regard to the findings, this research found no significant differences between men and women on adaptive/productive humor styles. However, there was a significant difference between men and women on the maladaptive/unproductive styles. The results showed that male jurors tend to endorse both the aggressive and the self-defeating humor styles more often than female jurors. Male jurors told more jokes on average. Their jokes, often inappropriate, mean-spirited or self-deprecating, were usually more successful than when females used the same kind of humor. However, female jurors joke much more when no male jurors were present (which was the case in 5 of the 45 groups).

In addition, over 40% of male juror's humor productions were other-oriented, meaning they were making a joke at the expense of either someone else in their deliberation group or someone outside of the group itself, compared with 26% of female jurors who used humor. Interestingly, of the women who used other-oriented humor, three out of four instances were using outsider-directed humor, meaning they were not making jokes at the expense of anyone in the group. They would poke fun at the attorneys who presented, the parties involved in the case and sometimes even the trial consultant!

With regard to age, it should come as no surprise that younger participants (aged 18-28) scored significantly higher on the aggressive humor styles than older jurors. Jurors over the age of 60 tended to use more self-defeating/deprecating humor as well as adaptive/affiliative humor.

This research found that Caucasian respondents averaged higher scores than both African-American and Hispanic

respondents with regard to using aggressive humor in deliberation groups. African-American respondents averaged higher scores on self-deprecating/defeating humor. Furthermore, results from this study indicate that Caucasians place more importance on humor production (e.g., telling jokes) while Hispanic jurors place more emphasis on using humor to cope with difficult situations heard in the case (e.g., loss of a child, wrongful death). There were several instances where Hispanic jurors more than any other race would initiate a humorous exchange when discussing sensitive topics in order to lighten the moods of jurors in the group and deter any unwanted emotions.

One interesting finding that emerged from this research without regard to sex or race is that being the object of repeated interruptions makes speakers less likely to volunteer a humorous remark. And, being a frequent participator and interrupter made one more likely to engage in successful humor. In looking at demographic information and comparing it to jurors who were more likely to be interrupted, those who hold a non-supervisory position and earn less than \$35,000 per year were more likely to get interrupted as opposed to their higher-earning counterparts. Putting all of these patterns together, there is fairly consistent support for the proposition that joking and using humorous communication is a behavior in which high status people engage (at least in status differentiated group contexts). Therefore, group leaders/forepersons or those who have high standing within the group because of some status characteristic imported from the larger social structure are more likely to engage in the usually positive and always powerful acts of humor production.

With regard to geographical location, there is the potential for various regions to have an influence on jurors' use of humor. Comparing three different regions of the United States (California, East Texas, and New York), there was a significant difference in humor styles across these regions. For example, participants in East Texas scored significantly higher on affiliative humor than those in New York and California. Jurors in East Texas use humor to foster relationships and forge connections among participants.

They joke about food (sometimes the food being served at the focus group facility or hotel where the mock trial was taking place), their jobs, children and a myriad of other relational topics. Furthermore, they engaged three times more than both their New York and California counter-parts in humor directed at the attorneys, witnesses and clients at the mock trial. Typically being of lower socio-economic status than both New York jurors as well as California jurors in this study, East Texas jurors tend to use damage discussions, especially in cases where damages were over \$50 million, as a way to differentiate themselves from the parties in the mock trial. They would make jokes with one another about the amount of money parties were requesting as a way to relate to one another and bond as a group, often leading to more harmonious and unanimous end results.

Jurors in New York venues tend to use aggressive humor more often than their East Texas and California counter-parts. Often times, their use of aggressive humor was directed at other

members of the jury, which caused contention and hostility among the group and detracted from the deliberations. While California jurors also use aggressive humor, it was more often than not directed at parties and situations outside of the group. Like East Texas jurors, California participants tend to use humor as a way to foster solidarity and group cohesion by poking fun or joking about something outside of the group.

More than half of the deliberation groups participating at New York mock trials had results that were not based on a consensus but more based on the negative affect of groupthink. They came to an outcome but it was often not unanimous or if it was, there was usually some coercion involved. Over three-quarters of the deliberation groups in East Texas that was observed for this research reached successful outcomes where all members were in agreement in the end and left the table appearing as though they were satisfied and happy. Similarly, over half of the deliberation groups in California mock trials also achieved harmonious end results with group members seeming satisfied with the process. It can be inferred that humor may have had something to do with these results.

With regard to religion/spirituality, results from this study suggest jurors who score high on religiosity/spirituality tend to use aggressive humor less often than those who score lower on religiosity/spirituality measures. On the whole, jurors from parts of Texas and Louisiana tend to report stronger affiliations with religious institutions than in other parts of the country such as Southern California and New York. When observing deliberation groups, it was evident that jurors from Texas and Louisiana used more affiliative forms of humor rather than aggressive types of humor. They also used self-deprecating/defeating humor more often than any of the other deliberation groups outside of Texas and Louisiana. Based on this research, it can be said that being religious implies a different kind of humor utility.

What Does All Of This Mean?

Based on the research conducted, it can be suggested that certain uses of humor such as affiliative and self-enhancing humor can help to build group cohesion. This finding is consistent with several theoretical developments concerning the relationship between positive emotion and group cohesion. Lawler and his colleagues (1992) argue that positive emotion leads to increased commitment to the group. Lovaglia and Houser (1997) argue that positive emotion (especially when experienced by high status individuals) decreases resistance to influence and works to equalize status relations. Similarly, other social psychological research reveals that people in a good mood are more compliant and engage in more benevolent behaviors (see review in Isen, Daubman & Nowicki, 1987). Thus, if we assume that humor serves to, among other things, increase positive emotion, we might expect joking to be used as a strategy for increasing members' affective ties to the group resulting in more productive and consensual verdicts among deliberation groups.

Of course, all of this is true for humor that works. Affiliative humor, which has a positive intent and arises out of one's compassion for a person or situation, serves people

well. Conversely, aggressive humor undermines productivity in a group, well-being and group solidarity. In many of the deliberation groups where aggressive humor was spotted, group discussions broke down and individuals were distracted from the goal at hand focusing, instead, on personality related differences. This type of humor negatively targets an individual for a misdeed or character flaw. Someone may use it to show his or her superiority, as a form of passive aggressiveness or as punishment. It causes people to withdraw, feel more irritated and less motivated to come to a decision in a group setting.

While developing the HSQ, which was discussed earlier in this article, Martin et al. (2003) hypothesized the different humor styles would each correlate with the Big 5 personality traits. After constructing the HSQ, Martin and his colleagues administered the HSQ to a sample of university students. These researchers found Openness and Extraversion to be positively correlated with both adaptive styles of humor, Agreeableness and Conscientiousness to be negatively correlated with both maladaptive styles of humor, and Neuroticism to be negatively correlated with self-enhancing humor and positively correlated with self-defeating humor.

These findings support the results of this current study on jurors' use of humor. The more open and outgoing a juror was, especially if they were elected as the foreperson, the less likely they were to use maladaptive/aggressive humor. Similarly,

the more agreeable and self-aware a juror is, the more likely they are to use affiliative/productive humor. Interestingly, jurors who displayed characteristics of neuroticism (either in their discussions or in their intake questionnaires) such as anxiety, stress, and negative feelings were often found to be quite humorous by fellow jurors. Usually, these types of individuals used self-defeating/deprecating humor poking fun at themselves for the benefit of the group. In these instances, group harmony was often established and there was less tension and disagreement while deliberating the verdict.

Courtroom Implications

So what does all of this research mean for the courtroom? For one thing, it illustrates that humor matters during the group deliberation process. It can help us understand why some groups are more harmonious and cooperative than others and how effective a foreperson can be especially if they use humorous communication. Again, out of the 45 groups observed, humor was observed 20-30 times during each deliberation group.

Humor can help us determine which jurors are best suited for the panel based on their interaction with attorneys during voir dire as well as the questionnaires they fill out for jury duty. Below is a chart that summarizes ideal vs. non-ideal jurors based on humor use that was collected for this study:

Ideal Jurors Based on Humor Style

Affiliative Humor Use:	Self-Enhancing Humor Use:
Women (all ages)	Hispanics
Men > 60	California/West Coast
Religious	Non-religious
E. Texas/South/Bible belt	Low-income earners
High-income earners/supervisory positions	

Non-Ideal Jurors Based on Humor Style

Aggressive Humor Use:	Self-Defeating/Deprecating Humor Use:
People aged 18-28	African-Americans
Males < 60	Religious
Caucasian Males	People > 60
New Yorkers	Women > 60
California	
Non-religious	

What this chart and this research reveals is that ideal jurors are those likely to engage in affiliative humor as well as self-enhancing humor use. They are individuals who aim to foster connections and solidarity through their use of humor in the deliberation room. They are also likely to help quickly diffuse any tension or stress that the group may experience through their use of humor.

On the other hand, less ideal jurors are those that partake in the more maladaptive styles of humor such as aggressive and self-

deprecating types of humor. These individuals are more likely to have the potential to distract from the group deliberation process by provoking hostility or dismay through their joke-telling or humor use. Individuals who use self-defeating or self-deprecating humor are less likely to be taken seriously and will most likely not emerge as leaders. For these non-ideal jurors, their use of humor will be less productive to the group process and will be less likely to result in a cooperative, consensual outcome.

Like everything else in the business of trial consulting, this chart is meant to be a quick reference tool used when evaluating potential jurors and is also completely dependent on the trial venue as expectations will differ region by region. This chart and research is also meant to bring humor to the foreground of the group deliberation process. It is evident that different types of humor can affect decision making and the emotional climate of the group.

For attorneys and trial consultants, it may prove useful to pay attention to humorous exchanges during voir dire. Referring back to personality traits, if a juror happens to use one of the four humor styles discussed in this article, it could offer insight to their personality and behavior as a potential juror. This research revealed that individuals who used aggressive humor tended to be perceived as manipulative and coercive which may make them ineffective jurors. Similarly, jurors who engaged in self-defeating/deprecating humor were perceived as lacking confidence making them unlikely to be listened to or serve as leaders.

On the other hand, jurors who used affiliative humor were

positively correlated with agreeableness and extraversion. They were usually the more outgoing of the jurors and often served as leaders with other members listening to what they had to say. Similarly, jurors who used self-enhancing humor in order to diffuse stress were seen as the “heroes” of the group and rewarded with others paying attention to what they have to say.

This information becomes useful for attorneys and trial consultants at jury selection. Perhaps a juror cracks a joke about attorneys or the entire judicial process during voir dire. To the opposing side and the court as a whole, this person may come off as confident and potentially even a leader based on their willingness to joke while being questioned. On the contrary, if this joke could be classified as aggressive humor use, we know that this person is likely to disrupt the group process and cause an unhealthy group climate during deliberations potentially damaging the outcome of the case. It becomes important to know what kinds of humor use correlate with specific personality traits. Below is a chart that outlines personality traits commonly associated with the different types of humor usage:

Affiliative Humor	Self-Enhancing	Aggressive Humor	Self-Defeating Humor
Agreeable	Compassionate	Cold	Insecure
Friendly/Outgoing	Sensitive	Careless	Cautious/Shy
Curious	Inventive	Manipulative	Nervous

This chart, along with the chart above on demographic information as it pertains to humor use should be used in tandem when evaluating a potential juror. Their use of humor can be prove to be a strong indicator of the kind of juror they will be once engaged in the deliberation group. Knowing what you are looking for in a juror can be revealed through their use of humor. Used effectively humor can help people get along, be perceived as being more likeable and increase persuasive ability. Humor use among jurors in the deliberation room can also make the difference between a win and a loss in court. And that’s no joke. ©

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J&J to Pay \$158M to Settle Texas Drug Case

\$1,979,228 Verdict for Retired Los Angeles Brickmason

Jury Awards \$1.5 Million in Suicide Malpractice Suit

Massachusetts Family Receives \$3.582 Million Verdict Following Untimely Death of 12-year-old Son

\$13,227,939 Verdict for Retired San Francisco Electrician

Media Exposure, Juror Decision-Making, and the Availability Heuristic

By Judith Platania and Jessica Crawford

ALTHOUGH MUCH OF THE RESEARCH regarding media exposure has centered on the harmful effects of pretrial publicity in criminal cases, it has been argued that civil cases may be more vulnerable to its effects compared to criminal cases (Bornstein, Whisenhunt, Nemeth, & Dunaway, 2002). In large part this appears to be due to the potential influence of media depiction of high-profile lawsuits and atypical verdict awards on judgments of liability and damages (Robbennolt & Studebaker, 2003). In our study we examined the effect of exposure to a news article (relating a verdict award in a product liability case) on juror decision-making in a conceptually similar case. We varied the amount of damages awarded by the jury in the news article as well as the amount of time between reading the article and the case summary. Our goal was to investigate whether and to what extent jurors use available information when awarding damages. In addition, we were interested in the influence of media exposure on perceptions of the plaintiff and defendant.

Media Exposure, Juror Decision-making, and the Availability Heuristic

Research addressing media exposure and trial outcome has generally focused on the role of pretrial publicity (PTP) in the context of the criminal trial. The published findings demonstrate the negative influence of pretrial publicity on verdict choice, perceptions of the defendant, and other criminal trial components (Studebaker & Penrod, 1997). Media depiction of high-profile lawsuits over the last decade however, has expanded the focus of this research into the civil arena. In various paradigms, researchers have assessed the influence of pre-trial publicity on standard of proof, liability and award determinations, and perceptions of the plaintiff and defendant. Similar to the criminal context, research finds that pretrial publicity negatively impacts the civil trial process. For example, in a study conducted by Landsman and Rakos (1994) [\[1\]](#), potential jurors as well as judges read a summary depicting a product liability case. The level of biasing information

presented in the summary favored the plaintiff. However, instructions regarding how to consider the information were varied (as admissible or inadmissible). Participants exposed to pro-plaintiff information labeled as inadmissible were also instructed to disregard the information. The researchers discovered that judges as well as potential jurors perceived the defendant as liable regardless of whether or not they were instructed to disregard biasing information. Similarly, Bornstein et al. (2002) found increased ratings of liability when individuals were presented with negative information regarding the defendant compared to neutral information. Alternatively, exposure to negative media-related information about the plaintiff led to decreased ratings of liability on the part of the defendant, although not to the same extent as the plaintiff.

Exposure to media can influence perceptions of other case-related factors in addition to verdict. Specifically, individuals perceived air bags more negatively after reading news articles stating only the risks associated with their use compared to articles presenting both the risks and benefits of air bag use (Feigenson & Bailis, 2001). Similarly, Otto, Penrod, and Hirt (1990) exposed participant-jurors to negative pretrial publicity regarding the defendant and plaintiff's negligence. They found that jurors judged the defendant less negligible when they were exposed to negative information about the plaintiff (e.g., police reports) compared to exposure to neutral information regarding the plaintiff. Research also finds the magnitude of the link between media exposure and bias to be quite substantial. For example, Saks (1998) reported that his class of law students overestimated the amount awarded to individuals who experienced non-fatal injuries. Finally, Garber's (1998) large-scale study of newspaper coverage of product liability cases revealed that over 40% of plaintiff victories and 60% of punitive damages involving automobile manufacturers received newspaper coverage. This was in sharp contrast to an obvious lack of coverage of defense verdicts. This type of media exposure has the potential to shape perceptions of how the civil litigation process works.

Excessive media coverage of high profile civil settlements in recent years^[2] has also influenced perceptions of the civil trial process – specifically many people accept the idea that large monetary awards are commonplace in the legal arena (Robbennolt & Studebaker, 2003). One explanation for this belief has been offered through the availability heuristic. According to the availability heuristic, judgments of the likelihood of a particular event are a function of the ease of recalling similar, past events (MacLeod & Campbell, 1992). Additionally, our judgments of uncharacteristic events as the norm are frequently a function of the availability heuristic (Kahneman & Tversky, 1982; Tversky & Kahneman, 1974; 1973). Research has demonstrated that the availability heuristic influences a variety of decision-making situations from workplace ethics to plea-bargaining (Gregory, Mowen, & Linder, 1978; Hayibor & Wasieleski, 2009). Results converge on the idea that the manner in which information is presented can drastically alter an individual's response to that information. Unfortunately, reliance on the availability

heuristic can often lead to biased judgments. In the context of civil litigation, the consequences of relying on the availability heuristic to determine liability and damages can be significant, specifically when the available information is in the form of media coverage of the atypical award. The risk is that jurors will use this information as an anchor (i.e., a "typical" award) and adjust their own case-specific damage awards accordingly (Robbennolt & Studebaker, 2003). Ultimately, this can lead to larger damage awards decided by juries.

Our Study

In our study, we investigated the effects of exposure to a news article summarizing a verdict award in a product liability case on award determinations in a conceptually similar case. We were primarily interested in whether participants would use the availability heuristic when determining award. If so, we should also find that participants would frame their award based on the verdict award presented in the news article. In addition, we tested whether and to what extent the media exposure would influence perceptions of the plaintiff and the defendant.

An equal number of jury-eligible undergraduates and community members (N = 174) read one of three news articles describing a verdict award in a product liability case^[3]. We varied the amount awarded to the plaintiff as either \$14.25 million, \$4.75 million (the actual award), or \$800,000. We also included an article on drug testing in the workplace as a control. Three days or three weeks later, they read a case summary in a product liability case^[4] and assessed liability and damages. In the summary, the plaintiff claimed \$24,000 in past medical expenses and \$10,000 in future medical expenses. She returned to the operation of her business and did not make a claim for lost wages. In the actual case, the jury found 100% negligence against the defendant and awarded \$424,500 to the plaintiff. In addition to reading the case summary, all participants read a specific jury instruction in which they were told to disregard any information they may have received before the actual evidence was presented as a basis for judgment in the case. Eighty-seven percent indicated they understood the instructions.^[5]

Overall, 70% of our sample found the defendant liable and awarded damages. Students and community members did not differ in judgments of liability or in the amount awarded to the plaintiff (\$298,000 v. \$390,000). Of jurors who found liability on the part of the defendant, damages ranged from \$8,000 to \$5M,^[6] with the average award \$344,500, the median award \$175,000. It appears that the most salient effects of the availability heuristic were found for jurors who read the article indicating the largest award three days prior to reading the case summary. Thus, exposure to the recent verdict award in the medical device case, influenced their assessment of the printing press case. As Figure 1 demonstrates, jurors who read the article indicating an award of \$14.25M three days prior to reading the case summary, awarded the plaintiff \$1,286,000. This was significantly different from all other conditions in which awards ranged from \$96,000 to \$226,000. To echo other scholars, "even when a focal number is not particularly relevant, it can exert a bias on judgment under uncertainty"

(Birke & Fox, 1999, p. 10). Thus, our findings demonstrate the convincing effect of the availability heuristic in this context.

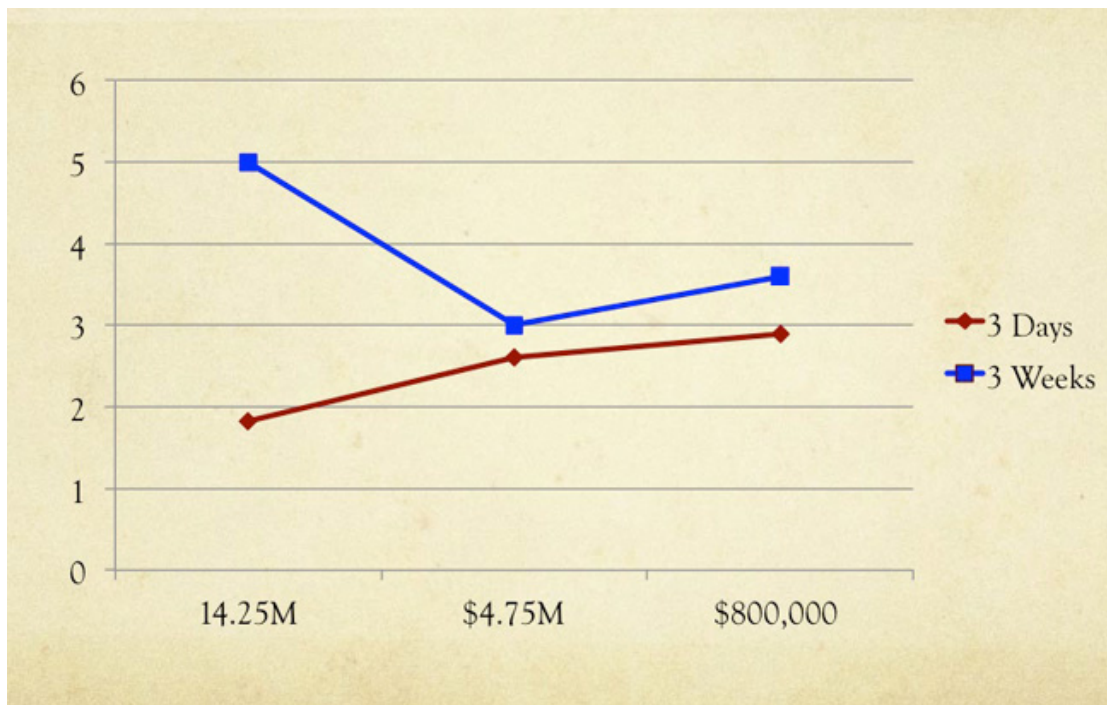


Figure 1. Amount awarded to plaintiff as a function of timing of news article and varied verdict award

Perceptions

We also tested whether media exposure would influence perceptions of the plaintiff and defendant as well as time spent considering award. As Table 1 indicates, jurors who read the article on drug testing (our control group) reported the most positive perceptions of the plaintiff. (The scores represent participant responses to a 7-point Likert scale 1 = negative and 7 = positive). In addition, this group reported spending the most time considering an award for the plaintiff. In all conditions, perceptions of the plaintiff were significantly better than perceptions of the defendant

Table 1. Verdict Award

Item	\$14.25M	\$4.75M	\$800,000	Control
Plaintiff perception	3.9	4.0	4.3	5.0
Defendant perception	3.0	3.1	3.1	3.0
Time spent considering award	3.9	4.0	4.0	4.8

As can be seen in Table 2, jurors who read the news article three weeks prior to reading the case summary reported more positive perceptions of the plaintiff and greater levels of sympathy for the plaintiff compared to our three-day delay. Similarly, jurors who read the news article three weeks prior to reading the case summary were less likely to think the plaintiff could have avoided injury compared to those who read the article three days before reading the case summary. The means reported in Table 2 were not significantly different from one another.

Table 2. Time Delay

Item	3 days	3 weeks
Plaintiff perception	4.0	4.4
Could plaintiff avoid injury	4.4	4.0
Sympathy for plaintiff	3.9	4.3

At the completion of the study we asked our participants a series of questions regarding the news article designed to test the efficacy of our manipulation. Almost all participants (90%) accurately recalled article-specific information, including award. Next, keeping in mind that 87% of our sample reported understanding the instructions, we asked our participants to indicate the impact (if any) of the article on their award determination in the printing press case on a scale ranging from 0 = No impact at all to 6 = A great deal of impact. As Figure 2 demonstrates, jurors who read the article indicating a \$14.25M verdict award three weeks prior to the case reported a greater impact on their decision in the printing press case compared to those who read the same article only three days prior to reading the case.

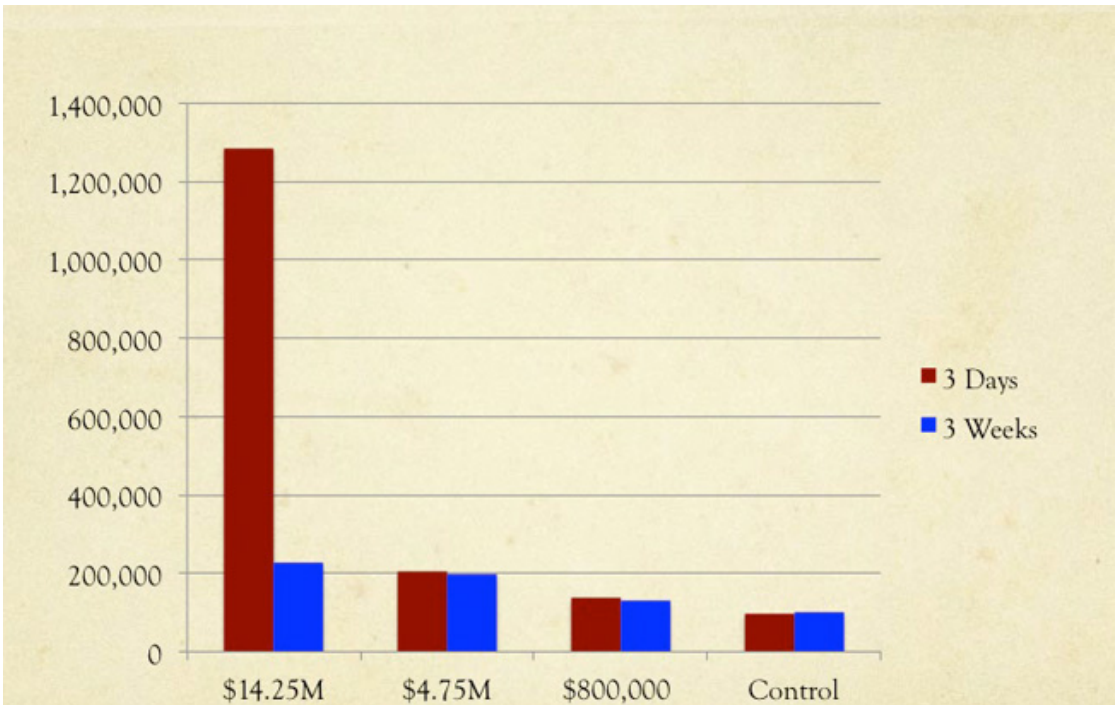


Figure 2. Responses to: “What impact (if any) did the article have on your judgment in this case” on a scale of 0 – No impact at all to 6 = A great deal of impact.

Conclusion

Although the current results support earlier research that demonstrates the biasing effects of the availability heuristic (Robbennolt & Studebaker, 2003), our findings seem to identify an important, yet subtle consequence of relying on the availability heuristic to determine liability and damages. Namely, while jurors will use available information to determine awards, they fail to acknowledge doing so (and insist they understand the directive to not consider previously observed information). In addition, perceptions of the plaintiff differed significantly as a function of media exposure, particularly in the most salient condition – better perceptions of the plaintiff were not related to larger awards. To our knowledge, the current study is the first to demonstrate this counterintuitive finding, emphasizing the strength of the biasing effects of using available information to

determine awards. That is, exposure to the atypical award has a stronger biasing influence compared to positive perceptions of the plaintiff. Thus, the important question is how to counter the effects of the availability heuristic in this context.

In the current study, our goal was to investigate whether and to what extent jurors use available information when awarding damages. The data in our study suggest several ideas to reduce anticipated biases:

A brief continuance (for example, three days versus three weeks) significantly lessens the salient effects of media exposure, thus improving juror objectivity. However, the issue remains regarding how to effectively balance award determinations with perceptions.

One of the factors affecting availability is an object's distinctness. According to research, objects that are distinct are easier to retrieve (Tversky, & Kahneman, 1974). One way to increase availability is through repetition. In the current context, the availability heuristic appeared resistant to altering perceptions. Based on the research, in order to overcome this bias one suggestion would be to provide frequent references to vivid client- as well as case-specific information throughout the trial process. The implication is the potential for favorable decision-making through the use of repetition and vivid language.

Finally, we are aware that research has demonstrated the resistance of the availability heuristic to various remedies when presented in the context of PTP (Studebaker & Penrod, 1997). With this in mind, the evidence we provide does not directly test remedial efforts such as extended voir dire, judicial instruction, or jury deliberation. Rather, we offer data to support other researchers' findings (see Studebaker & Penrod, 1977) and to increase awareness to the biasing effects of the availability heuristic in this context. ●

Illustration by Brian Patterson of Barnes & Roberts

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Endnotes

- [1] Stimulus materials were not depicted as pretrial publicity, but rather as information presented during trial.
- [2] E.g., tobacco industry litigation, celebrity cases, etc.
- [3] An actual case in which a jury ordered a medical-device company to pay \$4.75 million to a Portland man in a product liability lawsuit (Jung, 2010). To summarize the case: The jury found I-Flow Corporation liable for destroying the cartilage in the plaintiff's right shoulder and leaving the 38-year-old father of four with constant pain and a disabled arm. The plaintiff picked up a muscle injury in 2004 playing football with his children. He underwent arthroscopic surgery to repair the muscle at which time the surgeon also inserted the pain pump into the shoulder joint where it delivered medicine for several days. The plaintiff began to recover but after six months found himself in excruciating pain. He has had a partial shoulder replacement and faces three to five replacements in his lifetime, the plaintiff's expert testified. Although he can still do his job as a commodities broker, it's unlikely he will be able to continue in his work until retirement age because of intensifying pain. He now suffers from a condition called chondrolysis, which is a severe deterioration of cartilage.
- [4] An actual case taken from Jury Verdict Review and Analysis (2001). To summarize the case: The female plaintiff, age 46 at trial, alleged that the defendant printing press service company negligently failed to advise her that the safety mechanism on her printing press was not functioning. As a result, the plaintiff alleged she sustained permanent injuries to her dominant right arm when it was crushed under a portion of the press. The defendant maintained that it was not asked to perform a safety evaluation of the subject printing press and had no duty to advise the plaintiff concerning its safety features. The plaintiff's mechanical engineer testified that the printing press short-circuited causing the unexpected cycle of the press. He testified that a safety mechanism, which should have prevented operation of the machine when the glass was raised, had been deactivated from the printing press. The plaintiff's expert also testified that the injury to the plaintiff's arm could not have occurred had the safety mechanism been in place at the time in question.
- [5] The average response was 5.4 on a scale of 1 = No understanding at all to 6 = Complete understanding.
- [6] \$5M was not an outlier value. Ten values were between \$1M and \$5M.
- [7] excluding our control group

