



The Jury

August 2015
Volume 27, Issue 3

EXPERT

The Art and Science of Litigation Advocacy

A publication of the American Society of Trial Consultants



The Collapse of Civil Jury Trial and What To Do About It

Renée Lettow Lerner

Abolition of Juries: The Switzerland Experience

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M.SC., and Stanley L. Brodsky, PH.D.**

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NOTE FROM THE EDITOR

Is the Civil Jury System Dying?

Rita R. Handrich Ph.D.

Is the Civil Jury System Dying?

When we at *The Jury Expert* saw [Renée Lettow Lerner](#)'s writing on the collapse of the civil jury system in the *Washington Post* as she guest-blogged for the [Volokh Conspiracy](#) it was clear the ideas she expressed were not ideas that resonated with our own experiences in the courtroom. So we asked her to write for our readers here at *The Jury Expert* and she graciously agreed. Professor Lerner discusses her perspective and a trial consultant (Susie Macpherson) and a well-known litigator (Tom Melsheimer) offer very different points of view.

After Professor Lerner's thoughts on problems with the US justice system, we have an article on changes in the Swiss civil system as they moved to abolish jury trials. This article is by two Swiss scholars (Gwladys Gilliéron and Yves Benda) and an American scholar (Stanley Brodsky). It describes the existing Swiss system and how abolishing the civil jury trial changed (and did not change) the application of justice in Switzerland.

Shortly after Renée Lerner's work in the *Washington Post*, [Adam Benforado](#) wrote an excerpt from his new book *UNFAIR* that was published at [The Atlantic website](#) and titled: "Reasonable Doubts About the Jury System: Trial consultants allow the affluent to manipulate the biases of those who judge them, putting justice up for sale". As you might expect, the article isn't likely to fit the point of view of most trial consultants, so his viewpoint is important for any trial consultant to understand. I contacted Professor Benforado, and invited him to write an article for us that addressed the issues he raised in *The Atlantic*. He agreed, in the face of knowing there was vigorous disagreement among trial consultants with the position he took in *The Atlantic*. His article elicited thorough responses from Diane Wiley (representing all trial consultants), Jason Barnes and Brian Patterson (representing visual trial consultants), and Stanley Brodsky (representing academic and research trial consultants).

Following those first three articles about problems in our justice system, Hailey Drescher (a trial consultant) offers an interview with Steve Susman (a well-known litigator) and Tara Trask (a trial consultant) on Susman's new [Civil Jury Project at New York University](#). This ambitious, long-range project is unlike anything that's been done before in this country and will attempt to examine the civil jury trial and offer suggestions for improving it. Read the interview if you want to know more about this project or the [upcoming conference they will be sponsoring](#).

Then we move on to other exciting new research and ideas on the jury system from here in the United States. Krystia Reed and Brian Bornstein (academic researchers) offer recommendations on how to use joinder differently if you are in a civil versus a criminal trial. Sonia Chopra and Charli Morris (trial consultants) respond to this article and offer insightful questions and suggestions on implementing the research. Richard Gabriel (a trial consultant) saw the issue of [peremptory strikes in the New York Times](#) (again) and provides us with new ways to think about strikes (both peremptory strikes and strikes for cause). Allen Campo (a trial consultant) describes a

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The Jury Expert logo was designed in 2008 by: Vince Plunkett of [Persuasium Consulting](http://www.persuasium.com)

The Jury Expert [ISSN: 1943--2208] is published bimonthly by the:

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Timonium, MD 21093

Phone: (410) 560-2563
<http://www.astcweb.org/>

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NOTE FROM THE EDITOR (con't)

newer way he's been helping attorneys understand their cases—he calls it a feedback group. And finally, Bill Grimes updates us on the research literature about deception—do we know how to tell who's lying yet?

It's an intriguing quandary—the numbers of [civil juries are declining](#), yet there is a plethora of ideas, programs, research, and strategies for improving our ability to work together to improve litigation advocacy. Is our system dying? That is questionable, although it is undoubtedly changing, as it always has. The energy around these new and exciting ideas makes me think perhaps our system isn't dying. It is merely evolving and thus has to face hard questions as a new definition of our justice system emerges.

The role of trial consultants has evolved over time, as well. The idea that the trial consulting profession contributes to bias (while most trial consultants feel they are in the business of rooting out bias, not creating it) produced deep reactions from responders who are members of the *American Society of Trial Consultants*. Many of the founders of the profession are still alive and actively practicing—trial consulting is a young profession. I appreciate the measured responses from our trial consultant members in this issue and I appreciate the generosity and courage shown by Renée Lettow Lerner and Adam Benforado in writing about and standing behind their convictions despite disagreement. Both their offerings and the thoughtful commentary by ASTC members give us all much to consider. Combined, these contributors keep *The Jury Expert* an intellectually and morally stimulating forum, for which we are all grateful.

Rita R. Handrich, Ph.D.
Editor, *The Jury Expert*

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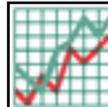


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The Collapse of Civil Jury Trial and What To Do About It

by Renée Lettow Lerner

Editor Note: When we at The Jury Expert saw Renée Lettow Lerner's writing on the collapse of the civil jury system in the Washington Post as she guest-blogged for the Volokh Conspiracy it was clear the ideas she expressed were not ideas that resonated with our own experiences in the courtroom. So we asked her to write for our readers here at The Jury Expert and she graciously agreed.

I WAS DELIGHTED to receive this invitation to write about the civil jury for the *Jury Expert*. We academics often are concerned about reaching a relevant audience—or, indeed, any audience at all. In this forum, I have no such worries. I am looking forward to comments from persons working in and with the civil litigation system as a career.

I will come to the point: The civil jury is dying, and should be abolished. I propose an alternative system of adjudication, one that draws on practices that have proven to be effective.

The Decline of the Civil Jury

Readers of the *Jury Expert* are well aware of the decline of the

civil jury. The best information available indicates that jury trials constitute less than 1% of civil dispositions in federal and state courts. The decline has been steady, and despite the guarantees of civil jury trial in the federal Constitution and nearly all the state constitutions.

What happened? Civil jury trial—and the process leading to it—has become so long, so expensive, and so unpredictable that the vast majority of parties would rather settle than endure it. The adversarial system as it developed in America has made it impossible for jury trial to resolve cases on a regular basis. The changes include extensive *voir dire* and other means of jury selection, detailed rules of evidence, elaborate testimony by dueling experts, and exhaustive cross-examination. The merger of law and equity (beginning in the mid-nineteenth century and

Don't miss the responses at the end of the article:

- [Susan Macpherson, ASTC Member](#)
- [Tom Melsheimer, Attorney](#)
- [Plus, a reply from the author](#)

continuing into the twentieth) introduced extensive discovery before jury trial, and also confronted juries with the types of cases they were never meant to decide: cases with multiple parties, claims, and complicated facts and law. Lay jurors, especially ones that have been picked over during jury selection by lawyers with the aid of trial consultants, have difficulty deciding these complicated disputes.

Distinction between Civil and Criminal Cases

I support lay participation in deciding serious criminal cases. Private disputes are another matter. Concerns about limiting the government or providing community representation are not as strong in private disputes, and do not justify the limitations and costs of jury adjudication.

In considering the different costs of jury adjudication, we must remember the burden on jurors. For many persons, jury service is a significant financial hardship, and a burden also to their families and employers. For a fascinating study of the burdens of jury service, see trial consultant David Tunno's book *Fixing the Engine of Justice: Diagnosis and Repair of Our Jury System* (2013), pp. 3-12. Supporters of jury trial too easily downplay this burden on the public.

Why Settlement Is Not the Solution

What is wrong with settlement "in the shadow of the jury," based on the expectation of what a jury would do? There is often a significant degree of uncertainty about what a jury might do, including about the likelihood of different outcomes. In some types of cases, systematic juror bias affects settlements. The risk aversion of particular parties, and sometimes even their ability to understand the risks, can play a large role in settlement negotiations. The costs of litigation and the lack of a fee-shifting rule in most cases create enormous pressure to settle. Thanks to the American Rule, in general the losing party does not pay the winner's litigation costs. Even a party with a good chance of success, therefore, has great incentive to settle to avoid the costs of discovery and jury trial. In short, to put it mildly, a settlement often does not reasonably reflect the merits of a case.

Adjudication by Judges, Done the Right Way

The main alternative to civil jury trial or settlement is adjudication by judges. This is the primary method used to resolve civil cases by other countries with decent legal systems. Civil juries as they existed at common law have never been part of the legal traditions of the Continent of Europe or of the legal systems derived from those traditions, including in Latin America and Asia. Even England and its former colonies of Australia, New Zealand, and Canada have abolished the jury for almost all civil cases and hold bench trials instead.

These countries have not been hampered by constitutional rights to civil jury trial, as has the United States. To resolve

some cases, judges in this country may grant motions to dismiss or for summary judgment. State and federal constitutional rights to civil jury trial, however, have blocked full and effective development of judicial adjudication. It is time to reinterpret these rights or to repeal them.

Moving to judicial adjudication need not mean merely a switch from jury trials to bench trials. It could have a profound effect on all aspects of litigation, including the elimination of "trials" altogether. In the United States, we often fail to recognize the many ways our system has been affected by the limitations of the jury. Removing the jury could allow faster, less expensive, and more accurate resolution of cases.

The Main Danger of Judicial Adjudication

Other countries are well aware of the main danger of judicial adjudication: the biased or corrupt judge. They take steps to guard against this danger. I will draw on their experiences in the recommendations that follow.

There is a special danger in the United States because of judicial elections. Judges should be selected adequately and given proper career incentives. This might mean elimination of or strong modifications to the system of judicial elections in many states, a topic beyond the scope of this article. But the dangers of judicial elections, though they should be addressed, need not prevent a switch to judicial decision-making on the merits. Federal judges and those of a number of states are for the most part reasonably competent and free from malignant pressures. Furthermore, even in those states with a problem, changes in procedure can be made to lessen the danger from corrupt or biased judges.

Specific Recommendations

Following are a few key recommendations to improve litigation and judicial decision-making. This is not an exhaustive list.

- **Use of a Panel of Judges in the First Instance**

One of the main safeguards against judicial bias in countries that traditionally use judges to resolve cases is having a panel of judges decide a case in the first instance, rather than a single judge. These panels allow colleagues to correct a biased judge. Besides, several heads are often better than one at legal decision-making.

An argument one frequently hears from proponents of juries is that "many heads are better than one." Precisely, which is why a panel of three or five judges should be used in important cases in the first instance. A single judge is not the only alternative to a jury, as many proponents of juries assume.

- **More Efficient Courtroom Proceedings**

Court hearings would speed up considerably. There would

be no need for conducting *voir dire* and the rest of jury selection, instructing the jury, or administering rules of evidence. The law of evidence is the law of jury control. We fear that lay juries will not be able to handle properly certain kinds of evidence, and so we exclude it. (This is clear in England, which has abolished the hearsay rule in civil cases, because these are now decided by bench trial.)

Judges could come into court having reviewed written evidence from the parties and prepared to ask questions of witnesses that can get directly to the point. No juries means a more active bench. A courtroom proceeding without a jury would resemble an efficient business meeting, rather than an often tedious scripted performance.

- **Sequential Proceedings in Logical Order**

Judges could focus on different points in separate hearings, and address threshold questions first. If a defendant is not liable, there is no need to hear evidence about damages.

Such discontinuous proceedings are not possible with lay juries. It is not fair to ask lay jurors to keep coming back to court at different times. The jury requires trial of all issues at once, with related confusion and waste of time.

- **Focused, Effective Discovery**

Such sequential proceedings should help judges to control discovery. Judges can order and be more active in guiding discovery on each point as it arises. Parties should no longer be able to inflict or threaten to inflict horrible costs and delays on each other with little gain in knowledge of relevant facts.

- **Reform of Expert Testimony**

Dueling, and confusing, party-financed and party-controlled experts are a major problem in litigation today. More active, involved judges would allow innovations in expert testimony such as the Australian system of “hot-tubbing,” or concurrent testimony, which mitigates partisan bias. In Australia, judges consider this system to be appropriate only for bench trials because it requires an informed and active fact-finder.

- **Keeping Cases Moving**

One advantage of jury trial is that at least a jury has to make a prompt decision. Deliberations cannot drag on for months.

Some judges will need encouragement to keep cases moving and to make prompt decisions on the merits. These incentives might include time limits and review of performance by judicial peers and superiors.

- **Reasoned Decision-Making**

One of the most important changes in shifting to judicial adjudication is that decisions on the merits would be accompanied by written opinions explaining facts found and application of law to facts.

Juries do not give official reasons. The requirement that judges explain their reasoning to the parties and to the

public, besides being more satisfying to the litigants, acts as a safeguard in several ways. A biased or corrupt judge would have a harder time justifying a bad decision. In addition, the reasoning of the judge or judges in the first instance can be thoroughly reviewed on appeal.

- **Appeal De Novo, of Fact and Law**

A thorough appeal is a vital safeguard in legal systems that rely on judges to make decisions. Appeals in these systems are often de novo, with no presumption of correctness attaching to the decision below, and of fact as well as law. These appeals need not be time-consuming. Appellate courts in other systems often rely on the record developed below, although they may add to it if necessary.

These systems are thorough in guarding against error in decisions on the merits. Our limited appeals are a legacy of the jury system. We try to control inputs, such as what evidence the jury hears or the judge’s instructions on law, but there is little control over outputs, that is, the correctness of the verdict. Judicial decisions leading to settlement, such as a decision in a dispute over discovery or the denial of a motion for summary judgment, are virtually unreviewable. The terms of settlement can almost never be reviewed on appeal.

- **The Need for Thinking Boldly**

Timid reforms will not solve the many problems with the civil litigation system today. It is time to think boldly. We should save lay participation in adjudication—with all of its costs and limitations—for criminal cases, in which it is most needed. 19

Renée Lettow Lerner works in the fields of U.S. and English legal history, civil and criminal procedure, and comparative law. She focuses on the history of U.S. procedure and legal institutions, especially juries. She also examines the differences between current adversarial and non-adversarial legal systems. She regularly speaks to groups of U.S. and non-U.S. judges about comparative procedure and institutions. You can read more about her work at [George Washington University Law School](#)

Susan Macpherson responds:

Susan Macpherson is a founding member and Vice President of NJP Litigation Consulting’s Midwest regional office located in Minneapolis. She has been conducting jury research since 1976, and has advised attorneys across the country on complex commercial, antitrust, intellectual property, class action, product liability, medical negligence, eminent domain, police misconduct, employment and criminal cases. You can contact Susan Macpherson at smacpherson@njp.com.

Response to Professor Lerner

Professor Lerner’s provocative proposal raises a number of important questions, but in doing so, she ties together some issues that have no inherent connection. The problems she

describes with current civil litigation procedures, chiefly the cost of discovery and length of trial, are significant concerns that need to be addressed, and a number of organizations have taken up that challenge.^[1]

Eliminating the participation of jurors in civil trials should be considered as a separate issue, particularly when that proposal is based on unsupported assumptions about the *voir dire* process, the ability of a jury to handle complex cases, and the superiority of judges as fact finders. While a great deal of research on the civil jury can be cited to challenge Professor Lerner's assumptions about its performance, I want to focus on considering its value. Jury verdicts play an important role in determining the type of conduct that we as a society are going to permit and the type of conduct that we are not going to tolerate.

The fact finders in a civil trial are not only deciding what did or did not happen, but also the nature of the conduct or the decisions or the intentions in dispute. Depending on the type of case, juries are deciding whether one or more parties acted reasonably, fairly, sufficiently, in good faith, in compliance with legal obligations and government regulations, or generally behaved in a manner that is consistent with community standards. In that way, jury verdicts can have an impact on how business is conducted, how medicine is practiced, how other professional services are provided, how products are manufactured and sold, how private property is valued when taken by eminent domain, how employers treat employees, and the conduct of law enforcement officials. The list could go on. In each case, the "common sense" jurors apply to the task of reaching consensus on these issues plays an important role that seems to be overlooked by Professor Lerner's proposal. The fact that there are fewer verdicts does not eliminate their value; in some instances, it actually may increase the broader impact of a jury's decisions. While attorneys understand that case specific factors drive verdicts, the last jury verdict in a comparable case often influences the risk/benefit equation that determines whether the case will go to trial.^[2]

While Professor Lerner seems to believe that a panel of judges can do a better job of playing this role, research has demonstrated the benefits of diversity in decision making groups.^[3]

We need to work on increasing the level of diversity in the jury pool as well as in the panels of jurors seated for trial, but even with the current limitations, it is safe to assume that the typical three judge panel will be far less diverse than the typical jury panel. While the judiciary in many jurisdictions has become more diverse in regard to gender, race, and ethnicity, the uniform education and training of judges and their shared experience in the legal profession stands in sharp contrast to the wide range of occupations, educational backgrounds, and life experiences found in the typical jury panel. Professor Lerner seems to recognize the value and importance of a more diverse group of decision makers in criminal trials when she cites the need for community representation in the latter. Community

participation also maintains public confidence in the legal system, and that requires giving the public the right to make decisions that limit the government's reach in criminal cases as well as those decisions that set community standards in civil cases.

The opportunity to set community standards by being part of "something important, weighty and real" may explain why the jury selection process often "transforms citizens into jurors" as discussed by Nancy Marder in a recent article.^[4]

She describes that "palpable moment" when prospective jurors stop looking for a way to get excused and take on the "heartfelt obligation to serve," and this is something we see in almost every jury selection.

The desire to serve does not outweigh the important point that Professor Lerner makes about the need to address the burden of jury duty. There are significant financial pressures on jurors whose employers do not continue to pay their regular salary or wages while they are serving, and that problem should no longer be ignored. Creative solutions have been implemented in some jurisdictions, such as increasing the amount jurors are paid after three days or asking jurors who receive their regular salary or wages while serving to donate their jury pay to a fund that covers increased daycare costs for other jurors. But legislation is still needed to reduce the number of jurors who do not receive their regular salary or wages while serving.^[5]

The difficulty jurors face in being absent from work or from their normal responsibilities of caring for others at home also requires that trials be conducted in a manner that makes the best use of their time. Courts have made real progress in that regard, by making changes in trial procedures (e.g., preadmission of exhibits, prequalifying experts, et cetera) and by experimenting with scheduling (e.g., a trial day that runs from 8:30 to 1:30, with a few shorter breaks rather than a long lunch.)

Research on decision making does support Professor Lerner's contention that "several heads are better than one," but does not support her assumption that increased accuracy in fact finding will result from the "heads" belonging to judges. Using the term "accuracy" in connection with judicial decisions implies that jurors often make the wrong decisions due to confusion and/or complexity. There is a debate to be had about using the term "accuracy" in regard to deciding the subjective issues described above, but we can agree that having the ability to understand and critically evaluate the evidence and competing arguments is the basic requirement for making a well-informed decision. Almost 40 years of conducting trial simulations and post-trial jury debriefings leads me to believe that most jurors can easily identify the statements, issues or concepts in the evidence that they don't fully understand. Jurors know when they need more information or additional clarification, what they often lack is a procedure that allows them to get it. Even when they have a question that could be answered by simply reviewing a portion of the transcript, their requests are often discouraged or denied. Judges, unlike juries,

can always get their questions answered. Juries who can't ask questions may be more often confused about the facts than judges, but the appropriate remedy is to level the playing field rather than booting the jury off the field.

The jury trial innovations movement that gathered national momentum after the Jury Summit in 2000 produced a great deal of the bold thinking that Professor Lerner calls for, although it was directed at improving rather than replacing the civil jury trial. In most states, there was a critical review of the jury system and the trial process that led to many changes in the rules of procedure. In many states, jurors are now allowed access to the same tools that judges use to increase comprehension and make better informed decisions. Jurors are allowed to take notes, to ask questions, to get a notebook of background materials such as a glossary of technical terms, a chart of the witnesses and a chronology, the judge may review the elements of the claims and burden of proof at the outset of the case, and the jurors may get instructions in writing at the end of the trial. But unfortunately what is allowed is not necessarily what is done. In far too many instances, *bold action* is still needed to make those tools available to jurors in every trial. For example, a survey conducted by the National Center for State Courts found only 25% of lawyers and judges reporting that jurors were allowed to ask questions in their most recent trial. Perhaps the unfortunate but predictable consequence of jurors resorting to internet research when they are not allowed to ask questions will finally reduce the stubborn resistance to answering their questions in the courtroom.

Bold action is also needed to implement other changes for improving the trial process that have been suggested and proven viable in pilot tests. Many of these techniques are in line with some of the recommendations made by Professor Lerner, such as back-to-back sequencing of opposing experts, interim argument, and imposing time limits on case presentations. Greater use of these procedures would provide the same benefits for jurors as they would for judges.^[6]

As to the claim that "extensive" *voir dire* is a significant problem, the amount of time devoted to jury selection in the courtroom can be reduced in a number of ways.^[7]

But given Professor Lerner's focus on speed, the disagreement here may really come down to whether **any** amount of time spent on *voir dire* is too "extensive" because she assumes we would simply eliminate it by having three to five judge panels decide all civil disputes.

The model proposed by Professor Lerner is very similar in many respects to the Financial Industry Regulatory Authority arbitration process that promises "fair, efficient, and effective" resolutions of securities related disputes. However, a recent study of the process FINRA uses to seat its arbitration panels illustrated the need for adding *voir dire* in order to ensure that the parties can obtain meaningful and reliable information to assess bias as well as potential conflicts. If judges were to take

on the jury's fact finding role in every case that would also raise similar questions about using a *voir dire* procedure to evaluate potential bias of those judges, as it is well-documented that any self-assessment of bias would not be reliable.^[8]

Although it makes no sense to forgo the value of the civil jury due to the length of time it takes to conduct the *voir dire*, we should still be looking at ways to improve the results of that process. As Shari Diamond and other commentators have pointed out, we can increase the chances of seating a jury that reflects the diversity of the community by going back to a jury of 12. This would have the added benefit of improving the quality of the jury's decision making process. To reduce the reliance on stereotyping that can lead to the discriminatory exercise of peremptory challenges, law schools and trial consultants need to keep teaching attorneys to ask questions that will elicit information about attitudes, beliefs, and life experiences that could lead to prejudgment or a predisposition to find in favor of one party or the other. The role of trial consultants in the jury selection process is not to recommend striking all of the "smart" jurors as Professor Lerner implies, but rather to help their attorney clients identify cause challenges and base their peremptory challenges on substantive information rather than unreliable and discriminatory stereotypes. Trial consultants also recommend and design case-specific jury questionnaires for cases involving issues that are difficult for jurors to candidly discuss in open court in order to increase the chances of obtaining the information that is needed to make the best use of those challenges. And most jurors appreciate rather than resent the opportunity to express their opinions on paper.^[9]

I suspect Professor Lerner has more faith in jurors' capabilities than the article implies because she does not question whether jurors are capable of deciding criminal cases that can also involve complex and highly technical scientific evidence, dueling forensic experts, and multiple defendants. While Professor Lerner recognizes the critical role juries play in limiting the government, I believe she is ignoring the critical role jurors play in setting standards for how we govern ourselves. Professor Lerner's concerns about jury selection and the performance of jurors in civil cases suggest the need for improvements in the civil trial process rather than eliminating the role of jurors.

19

References

^[1]The most recent example is NYU School of Law's Civil Jury Project, <http://civiljuryproject.law.nyu.edu>. There have also been a number of pilot programs that tested expedited trials with limited discovery. See for example; "A Return to Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs," IAALS, the Institute for the Advancement of the American Legal System, October 2012. "Action on the Ground: A Summary of Civil Justice Reform Projects Across the United States," [IAALS-
http://iaals.du.edu](http://iaals.du.edu) Last updated April 11, 2014.

^[2]Professor Lerner raises important points about what drives settlements and whether settlements reflect the merits of the cases. I defer to those who have the appropriate training and expertise

to debate the underlying public policy issues on those points.

^[3]Shari Seidman Diamond, et al., “Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge”, *Journal of Empirical Legal Studies*, 425-449, (2009).

^[4]Nancy Marder, “Juror Bias, Voir Dire, and the Judge-Jury Relationship,” 90 *Chicago-Ken Law Review* 927 (2015).

^[5]NCSC, Juror Pay by State: www.ncsc.org/topics/jury/jury-management/state-links.aspx?cat=juror%20pay

^[6]See ABA’s 2005 [Principles for Juries and Jury Trials](#) for a discussion of these options.

^[7]NCSC survey data does not support the conclusion that extensive *voir dire* is a widespread problem. Lawyers and judges reported that 2 hours was spent on *voir dire* in their most recent trial in 2005, and in 2015, they were still reporting 2 hours for federal trials and 3 hours for trials in state court.

^[8]Jason R. Doss, “The Importance of Arbitrator Disclosure”, *PIABA Bar Journal*, 21 (2014).

^[9]This typically does not require the use of a lengthy questionnaire that has to be mailed out ahead of time. Four-to-six page questionnaires can be filled out and photocopied in the jury assembly room without creating any undue burden on jurors.

Tom Melsheimer responds:

Tom Melsheimer is the Managing Principal of the Dallas office of Fish & Richardson, and the head of that office’s trial practice. He has been described as “one of the most sought after trial lawyers in the country” by the publishers of The American Lawyer, and as a “game changing ringer” by another national legal publication. Mr. Melsheimer has published several articles and spoken many times in support of the civil jury trial.

A Response to “The Collapse of the Jury Trial”

In all the various discussions of the decline of the civil jury trial I have seen, there have been many suggestions to remedy its decline and improve its operation. Rarely, if ever, have I seen someone advocate for the complete abolition of the jury trial in civil cases. It is a terrible idea that is not saved by the author’s allowance of jury trials in criminal cases.

There can be no doubt that the jury system in civil cases, which separates the United States from almost every country in the world, and is constitutionally guaranteed by the Seventh Amendment, would benefit from improvements. Indeed, the author’s primary justification for abolishing the jury trial in civil cases is rooted in various observations of what is wrong with the civil jury trial. Let me address the alleged problems that she identifies.

1. Jury trials are long and expensive.

There can be no doubt that many jury trials suffer from the bloat of excess time and expense. But there are a variety of remedies short of abolishment. I have written extensively on this subject. See *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 *Rev. Litig.* 431 (2013). For example, timed trials, which many federal judges already employ, notably in the jury trial rich Eastern District of Texas, force economy on the parties, limiting the time commitments of the jurors and the expense for the parties. Time limits can apply to

any stage of the trial, including *voir dire*, opening statements, and closing arguments. There can also be more limits on pre-trial discovery, which is the single biggest factor in the overall cost of civil litigation.

2. The issues put before juries are complex and hard to understand.

This argument is one used by corporations and other “Chamber of Commerce” type groups to justify taking issues away from juries. In my experience, it’s bunk. The wisdom of juries in separating fact from fiction, truth from spin, and actual damage from greed is second to none. When juries fail to understand something, it is usually the fault of the lawyers or, in some instances, the judge. I have tried cases to juries involving complex technology and sophisticated financial transactions. I have argued on behalf of plaintiffs and defendants. My clients have won in most instances and lost in a few, but in no instance did I come away thinking the jury did not understand the issues. Of course, I might disagree with their conclusions, and I have argued legal error. But that is not grounds for an attack on the jury system, which comes with long-established legal checks and balances in the trial court and the appellate courts.

Moreover, there are well established and proven ways of empowering the jury with better tools to understand the issues before them. One is the practice of juror questions. Allowing jurors to ask questions, in a procedure supervised by the attorneys and judges, is an excellent way of improving juror comprehension. Issues can be clarified in real time, and the attorneys can better tailor their presentations to what is on the jurors’ minds. Similarly, providing the jurors with instructions on the legal issues in the case at the beginning of trial adds to juror comprehension.

3. Jury service is a burden on jurors.

Shortening trial length is one way to minimize the burden on jurors. But I reject the notion that jurors, for the most part, feel burdened by their service. My experience, which is echoed by the judges with whom I have discussed the issue, is that jurors embrace and enjoy their experience in the judicial process as a way for them to be involved in

one branch of our democratic government. Indeed, that is the primary reason that I think a discussion of burden is misplaced. We ask citizens to participate in adjudicating a variety of disputes because it is the collective wisdom, as embodied in our federal constitution and most state constitutions, that citizen participation is a civic virtue and one that should be encouraged. The decision made by a group of citizens is more likely to be accepted by the population as a whole and, given that it reflects the collective wisdom or common sense of a group, the decision ought to be deemed legitimate by the parties as well.

The author's solution of deciding civil cases by judges does not really address the problems she identifies with jury trials. Bench trials can be just as lengthy as jury trials. Consequently, they can be just as expensive if not more so. The ability of a judge to recess a case and return to it later, which the author presents as an advantage to judge-decided cases, is actually a recipe for more lawyer time and expense associated with delay. Moreover, there is no reason to believe that judges are any better than ordinary citizens at deciding the key elements of a typical civil dispute—for example, who is telling the truth or how much personal or economic harm has occurred—than a schoolteacher, a warehouse foreman, or a nurse. Similarly, why should we believe that a judge is better able to understand a complex or sophisticated issue than an ordinary citizen? Because they have a degree and more education? That strikes me as either elitism or intellectual snobbery. It is also anti-democratic.

Perhaps the most outrageous characterization by the author is that it would be a more desirable situation for the adjudication of disputes by judges to resemble an “efficient business meeting” than what currently exists in what she calls the “scripted” presentations in a jury trial. In this characterization, the author fundamentally misapprehends the purpose of our jury system and how it performs. First, juries are often called upon to decide what happens in the “business meetings” that the author elevates as a paradigm—business meetings that allow, for example, dangerous airbags and faulty ignition switches to be placed in cars. Or meetings that allow pharmaceutical products intended for a narrow patient population to be marketed to children. Or business meetings that lead to the breaking of promises or the abdication of fiduciary duties. We do not need our civil justice system to resemble business meetings. We need the common sense and good judgment of juries to police the occasionally bad decisions that come out of those very meetings. Second, a jury trial is anything but a scripted presentation, at least the ones in which I have been privileged to participate. A jury trial is a dynamic process with an ebb and flow of witness testimony and documentary evidence that is anything but scripted, and a trial lawyer that treats it as such is likely to end up on the losing side of the argument.

Our civil jury system is not perfect. But it is a key part of our participatory democracy. Attempts to improve the jury system should be met with encouragement. Attempts to abolish it should be met with derision. 🍷

Reply by Renée Lerner

I am grateful for the responses of Ms. Macpherson and Mr. Melsheimer. They highlight important issues.

I would like to address first a fundamental point that Ms. Macpherson discusses most thoroughly, and that Mr. Melsheimer alludes to: the application of “community standards” in civil litigation. This phrase raises important questions. Is the application of “community standards” desirable in individual civil cases? What is the relevant community, and how could one determine its standards? If it is achievable, are the costs worth it?

The question of applying “community standards” in civil cases has created a debate over several centuries of U.S. history. At the time of the founding, the Anti-federalists were in favor of local juries deciding civil cases according to their ideas of justice, whereas Federalists in general were not. Federalists were concerned that local juries and their verdicts were unpredictable and changeable, so that rules were not clear and could not be known in advance. Also, verdicts could vary considerably depending on locality. This level of uncertainty and variability in the civil system, Federalists argued, was damaging to the ability to plan activities and therefore to social and economic development. Federalists and many others throughout U.S. history argued for, and often got, clearer legal rules and less jury discretion.

Even if one were to agree that application of “community standards” is desirable in civil cases, how is one to achieve that? There may be sharp divides within the “community” on standards, a situation that becomes more likely the more diverse a community is. Who is going to determine community standards? Juries today are not representative of persons living in a certain geographic area, if that is how we are going to define community. There is a considerable problem with no-shows and persons who otherwise seek to avoid jury service. Both responses argue that most persons who actually serve on a jury appreciate it and learn from it. That may be true, but it does not address the problem of the many persons who succeed in avoiding jury service altogether.

More fundamentally, by its nature, the party-driven process of jury selection in the United States weeds out potential jurors with certain experiences and views. This process distorts any representative function of the jury. Cutting back or eliminating jury selection is an important way the jury can be made more representative so that it has a more plausible claim to apply “community standards.” There is a tension between juries serving a representative function and applying the law in unbiased fashion.

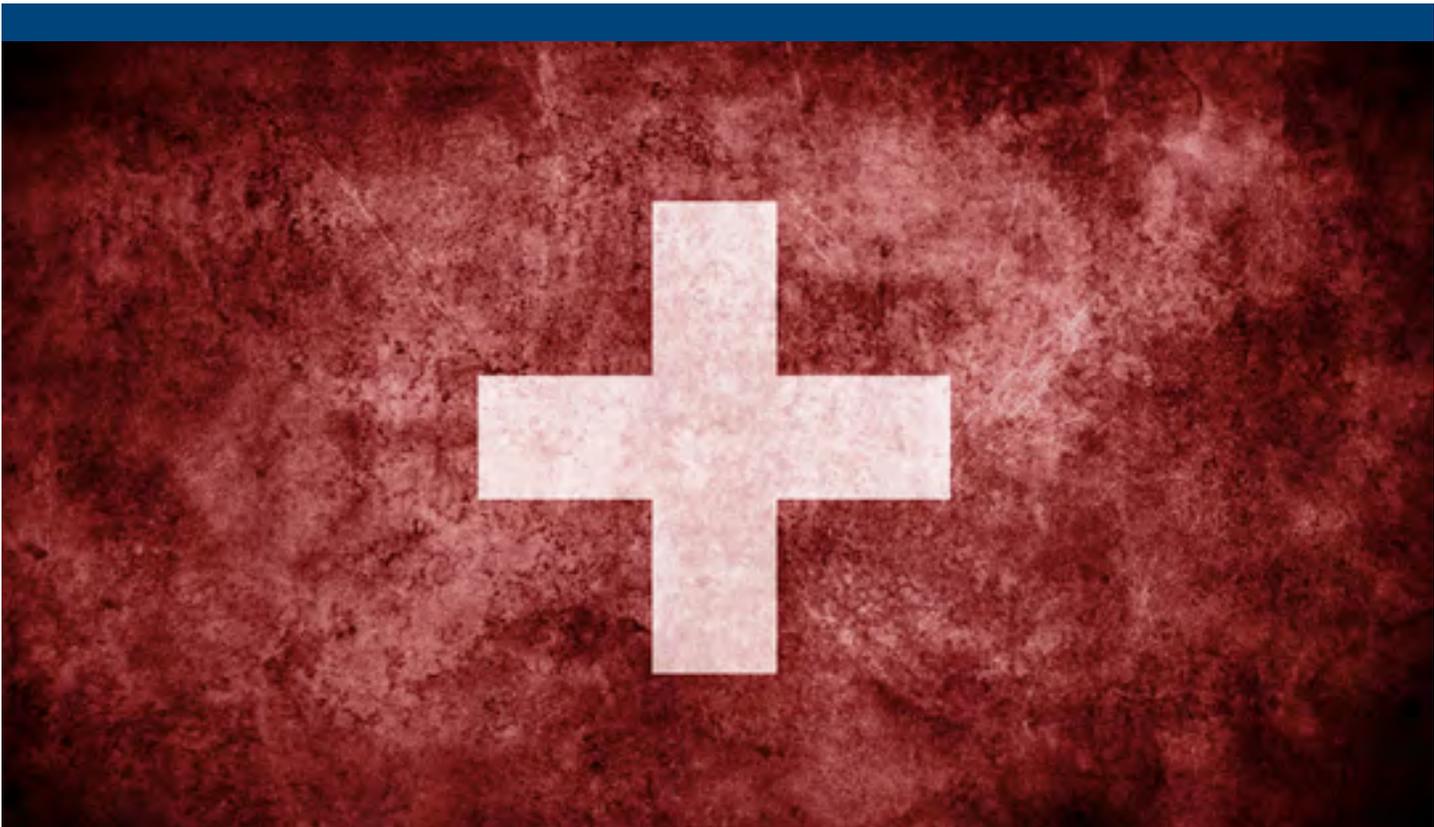
Furthermore, it is unlikely that the sole purpose of jury selection as practiced by trial consultants or trial lawyers is to eliminate biased jurors. Presumably these persons are trying to select jurors who will be as favorable as possible to their client. The classic argument of proponents of the adversarial system is that

the partisan efforts of each side will cancel each other out and the resulting jury will be impartial. This argument assumes that each side has equally skillful lawyers and trial consultants and equal bias among the venire, a set of conditions that must often fail. Thus the civil jury today neither represents the community nor is it selected for impartiality.

On juror performance, certainly jury trial may be made faster, and juror comprehension improved. I have devoted much of my career to studying how jury trial got bogged down. Even with improvements, however, jury trial carries with it necessary shortcomings. One is the need for trials at all, as opposed to sequential, targeted hearings. Mr. Melsheimer makes the important point that having sequential hearings might result in greater delay. There are ways to address this issue. For example, other legal systems set time limits on judicial handling of actions, and give judges professional incentives to keep cases moving diligently.

A huge shortcoming of jury trial, one that neither response addresses, is that lay jurors do not and cannot give official reasons for their decisions, and there is no thorough appeal on the merits of their verdict. Judges must give reasoned decisions. In most legal systems, the decisions of judges of the first instance are subject to a thorough appeal on both law and fact. This is a crucial safeguard, missing in our system because of juries.

I was interested in Mr. Melsheimer's critique of my suggestion that civil proceedings should resemble an efficient business meeting. I meant a calm, reasoned discussion of evidence and the law, with orderly participation of all present as needed. Such a discussion by no means precludes moral judgment, but it does help to control blinding emotions and bias. Mr. Melsheimer demonstrates the rhetorical skills that have made him a successful jury trial lawyer in repeating the word "business" while describing various apparently reprehensible actions that employees of corporations might take. A calm, reasoned discussion with multiple participants is an effective way to determine facts and application of law to facts, as I have observed in this country and in others. Such a discussion is also useful in debates about the civil jury, and I thank *The Jury Expert* for providing a forum for it. ©



Abolition of Juries: The Switzerland Experience

by Dr. Gwladys Gilliéron, LL.M, Yves Benda, M.SC., and Stanley L. Brodsky, PH.D.

Editor Note: After reading Renée Lerner’s article on the collapse of the civil jury system, we wondered what has happened after abolishing civil jury trials. Two Swiss scholars and an American scholar explain the experience of abolishing the civil trial in Switzerland.

I. Introduction

AMONG ITS MANY MEANINGS, the term “American Exceptionalism” has been used to characterize the United States as the epitome of liberty, fairness, and equality. It is sometimes used to suggest that the country is superior to all other nations past and present in terms of fundamental morality, statements often made by individuals without substantive scholarly knowledge of the history and political systems of other nations. Our preferred interpretation of the term is that it is an expression of national pride, loyalty, and patriotism rather than necessarily a fact-based assertion. In the introduction to his edited book on [American Exceptionalism](#), Michael Ignatieff (2005) has argued that there are many complex and ambivalent faces to the concept of exceptionalism.

One aspect commonly presented about American Exception-

alism is the fairness and protections of the justice system. A common saying about the jury system in America is that it is terribly flawed, but it is much better than anything else that we or anybody else has. At the same time, Marcus (2014) has argued that what is exceptional in the American civil law, compared to much of the rest of the world, is the compelling emphasis on procedure. Thus, he argues that in the USA, the most salient features are the relaxed burdens on plaintiffs along with extremely broad discovery in the context of the jury system.

In this paper we address briefly the typically identified flaws of the USA jury system and then turn to an alternative system, that of Switzerland, that has challenged this repeated assertion by having trials without juries, at least as we know them. The problems in the USA jury system are many, including emotionally driven verdicts in which peripheral and prejudicial processing of information seem legion. Verdicts in criminal cases sometimes are reversed on appeal or still later found to have been unequivocally incorrect.

In her recent article titled [What juries get wrong and why they’ll never deliver true justice](#)^[1], Diane Frances points out

the poor judgment and emotionality, of juries, as well as the courtroom theatrics and media pressure on juries. She argues that juries ought to be replaced by panels of legal experts who would apply the law rather than being distracted by the theater often present in American jury trials. Indeed, as of this writing, [The Innocence Project](#)^[2] reports 330 persons convicted by juries who were exonerated through subsequent DNA testing. The [6th Amendment to the U.S. constitution](#) guarantees the right to trial by an impartial jury, but this simple statement does not delve into the myriad of problems in which impartial juries do not necessarily produce accurate and just verdicts.

The problems with juries are problems for all of us. The grand jury and petit jury systems in the United States have a number of problems in administering justice, and the closer one looks, the more glaring the problems appear. For example in the context of improving jury instructions – which are typically full of jargon, lengthy, and convoluted, Schwarzer (1981) observed the depth of concern about jury trials producing fair, informed verdicts. He noted, “Because the law has become more complex and the trials more lengthy, the issues submitted to jurors are often technical and foreign to their experience. As a result the juries’ capacity to serve as the repository of the people’s sense of justice, reason and fair play is being questioned” (pp. 731).

We are setting aside for the moment the benefits of juries to note that it is fair to observe that the criticisms of the American jury system have been sweeping, emotional, and frequent. What are the specific criticisms? In their review of the use of lay jurors, Shuman and Champagne (1997) concluded that

“First, experts testify to scientific, technical or other specialized knowledge with which jurors, not chosen because they possess any specialized knowledge, are unlikely to be familiar. Second, jurors, unlike judges, are not generally worldly, well educated, and trained in rigorous analytical skills necessary to assess critically the new, unfamiliar information that experts present. Third, lacking the requisite worldliness, education, and analytical skills, jurors resort to irrational decision making strategies that rely on considerations such as the expert’s appearance, personality, or presentation style to determine whether to believe an expert . . . What is so obviously important about these criticisms is that they do not come from occasional amateur courtroom observers but instead from respected jurists in reported cases (p. 251-252).

Nevertheless, Shuman and Champagne conclude with an optimistic view of the use of juries. Indeed, their positions accurately reflect what United States critics have to say. Jury problems are serious but can be mended. It is rare that cries for trashing the system are made and taken seriously: remember the 6th amendment. But that leads us to considering a national system of criminal justice in which juries were abolished. As in every cross-cultural comparison, many elements of the two national systems do not match fully, but let us now look at Switzerland.

II. The Swiss Jury System

Switzerland, like the United States, is a federal state. It consists of 26 federated states called cantons. The cantons of Switzerland historically arose in the 14th century and have many parallels to the individual states in the United States, in terms of having their own constitutions, courts, and legislatures, although all cantons are unicameral (i.e., there is only one legislative chamber). Similar to the United States, the cantons retain all sovereign powers unless delegated to or assumed by the Federal Government. While a [Swiss Criminal Code](#) was adopted by the Federal Parliament in 1937, the organization of the judiciary has always been the responsibility of the individual cantons, so that they could decide whether they wanted to implement a jury system or not. The idea of jury trials has, however, never prevailed, since most courts in Switzerland are composed of professional and lay judges (Gadola-Duerler & Payne, 1996). The jury system was mainly found in the cantons of Swiss Romande, the French-speaking part of Switzerland (Schubarth, 2014). This was probably due to its geographical proximity to France, by which it was originally introduced in the late 18th century after Napoleons victory (O’Brien, 1966/1967).

Since 1997, only 5 out of 26 Swiss cantons have had the institution of juries. At federal level, jury verdicts were rendered in some serious criminal offenses (i.e. high treason against the Confederation, insurgence and acts of violence against the federal authorities) subject to federal jurisdiction. Because federal jury trials played a minor role, the system was abolished in 2000 at federal level (Hauser, Schweri & Hartmann, 2005). In civil cases, jury trials have never been provided on any level of the government.

Since the second half of the 19th century, cantons where jury trials were guaranteed moved away from a pure jury trial where the jury has the power to determine guilt in the absence of a professional judge to a collaborative court model, where professional judges and lay jurors or lay assessors decide together about guilt or innocence of the accused and the punishment. Only in Geneva, the judge, although present during deliberation to answer questions, could neither issue advice nor vote on the verdict (Jackson & Kovalev, 2006/2007).

The number of professional judges and lay jurors were determined by cantonal law in each individual canton. The pool of prospective jurors was usually randomly selected by officials from the register of electors (Jackson & Kovalev, 2006/2007). In the canton of Zurich, for instance, the jury system consisted of 3 professional judges and 9 jurors who previously had been elected by popular vote into a pool of potential jurors. To be eligible for election as a juror, one had to have the right to vote (Swiss citizenship and at least 18 years of age) and one had to apply for the privilege of serving as a juror. Due to the enormous amount of time the jurors had to dedicate to each trial, it was mostly retired people who applied for the task (Hürli-mann, 2011). In the canton of Geneva, jurors were sitting in 2 different types of courts. The presiding professional judge was sitting with 6 jurors in the cour correctionnelle and with 12 ju-

rors in the cour d'assises (Jackson & Kovalev, 2006/2007). The cour correctionnelle judged criminal cases where the prosecutor requested a prison sentence under 5 years, while the cour d'assises handled criminal cases where the prosecutor asked for a prison sentence of more than 5 years.

In all cantons, prosecution and defense were usually each allowed to challenge 4 jurors without cause. Simple majorities on a jury could return convictions and acquittals. Juries were required to give explanations for their verdicts (Jackson & Kovalev, 2006/2007).

Jury trials were usually reserved for the most serious criminal cases such as homicide, murder, and robbery. In Zurich, Geneva, and Ticino, an accused pleading guilty might waive jury trial. In Zurich, the case would then have been judged by the criminal division of the cantonal supreme court, while in the others, 1 or 3 judges without lay jurors would have issued the verdict (Hauser, Schweri & Hartmann, 2005). Thus, jury trials were only rarely used. In Zurich, the jury court ruled on average 12 times annually (Supreme Court of the Canton of Zurich, 2011).

III. Abolition of the Swiss Jury System

Incompatibility of Jury Trials with the Swiss Code of Criminal Procedure

The introduction on 1 January 2011 of the first [Swiss Code of Criminal Procedure \(CCrP\)](#) replaced the 26 cantonal procedure codes, and had a crucial impact on the criminal procedures in place at that time in some cantons. The most important change was the choice of a single model of criminal procedure for the entire country. Prior to 2011, the inquiry models varied widely across the country concerning the prosecuting and investigating authorities. While some cantons followed the system of the examining magistrate, inspired by the French legal system, others had adopted the German system of the prosecutor with one or more district prosecutors (Federal Council, 2006). These prosecutors are in many respects comparable to U.S. district attorneys. The CCrP has opted for the German prosecutor model, and thus, the examining magistrate, previously used in some cantons, has been abolished.

Although criminal proceedings are now carried out in the same way throughout the country, the cantons remain responsible for the organization of the courts (article 123 para 2 [Swiss Federal Constitution](#)). Thus, cantons could theoretically still provide for jury trials. However, the rules governing the proceedings are not compatible with trials by juries. In fact, the law provides that the court should base its findings not only on evidential sources that it actually hears during the trial but also on evidence taken in the preliminary proceedings. This requires the court to be familiar with the evidence before the start of the trial and thus, infringes the principle of immediacy governing jury trials. Furthermore, the section about the conduct of the main hearing does not contain any special provision that would be necessary for jury trials. Because the law

is deemed to be exhaustive, such regulations cannot be introduced or maintained by the cantons (Federal Council, 2006). Finally, the CCrP provides a right to appeal against the judgment on grounds of law and fact. An entire review of facts is, however, not compatible with jury trials (Schubarth, 2014). Given this situation, the few remaining cantons where a jury system existed, decided to abolish it with the exception of the canton of Ticino, where in a referendum in November 2010, the people (with 52%) surprisingly voted for the support of the jury system.

“Jury Trials” in the Canton of Ticino?

The Ticino juror is called “assessori-giurati” and thus suggests that his or her position may be situated between a lay assessor (assessori) and a juror (giurati) (Kuhn et al., 2014). In the proceedings at first instance, he or she is sitting in the cour d'assises. This court is composed of 3 judges and 4 “assessors-jurors” and rules in criminal cases where the prosecutor requires the imposition of a prison sentence of more than 2 years. The appeal court is composed of 3 judges who are assisted by 4 “assessors-jurors” when the judgment of first instance has been issued by a court composed with “assessors-jurors” The “assessors-jurors”, (90 for the court of first instance and 60 for the appellate court) are elected by the cantonal parliament for a period of 10 years. They are distributed among the political parties in proportion to the votes obtained by the electoral list in the last election of the cantonal parliament. The jurors for a specific trial are selected at random in public session. Parties each may challenge 4 jurors. Once the composition of the court (i.e., the 3 judges and the 4 “assessor-jurors”) is established, the files of the case circulate among all its members, including the “assessors-jurors”. The Ticino “jury court” is obliged to give an explanation for its decisions. Given the peculiarities of the “assessor-juror”, Swiss scholars have come to the conclusion that the canton of Ticino has not maintained jury trials (Bommer, 2014; Kuhn et al., 2014).

IV. Swiss Criminal Procedure

Ordinary Proceedings

The Swiss criminal procedure model combines accusatorial and inquisitorial elements and thus, it is a mixed system of prosecution. Basically, preliminary proceedings are non-adversarial, written, and secret, while the trial stage is oral, adversarial, and public (Piquerez & Macaluso, 2011).

The investigation is assigned to the prosecutor, whose duty is to investigate incriminatory and exculpatory evidence with equal care. The written dossier prepared by the prosecutor is transmitted to the court if he or she considers that there is sufficient reason to suspect the accused person of committing the criminal offense and the prosecutor has not issued a penal order. The decision to bring charges cannot be challenged.

There is also no board of indictment that would independently review the charges brought by the prosecutor. The indictment is thus directly submitted to the court. However, the judge in

charge of conducting the proceedings (which is called *Verfahrensleitung*) has to examine whether the indictment and the files have been properly compiled and whether procedural requirements have been met and whether any procedural bars exist. This preliminary review is limited to a formal and summary examination of the indictment and the files. The judge in charge of conducting the proceedings has, among other tasks, to examine whether the described behavior constitutes a criminal offense. Neither the accuracy of the conclusion drawn by the prosecutor, nor whether the evidence would be enough to justify a guilty verdict has to be examined (Federal Council, 2006).

Usually, the criminal trials are open to the public and oral. The court is required to actively investigate the case and responsible to find the material truth. There is no cross-examination as such. However, parties may suggest to the judge additional questions to be asked. Expert witnesses are appointed by the prosecution, or by the court, after the decision to charge a defendant with a crime has been made. The court renders a verdict of “guilty” or “not guilty”. The law mandates cantons to provide for a two-instance judiciary system, so that judgments of the cantonal court of first instance can be appealed to the cantonal higher court. Finally, the case might be brought before a third instance, namely the Federal Supreme Court. At federal level, the Federal Criminal Court is the court of first instance for criminal offenses falling under federal jurisdiction such as money laundering, organized crime, and economic crimes. Its decision can normally be appealed to the Federal Supreme Court.

Depending on the seriousness of the crime and the respective cantonal organization, a single judge or a panel of 3 or 5 judges (*Kollegialgericht*) rules on cases at first instance. In the canton of Zurich for instance, a single judge adjudicates offenses for which the prosecutor requests a penalty of no more than one-year imprisonment. The court of second instance usually sits as a panel of 3 or 5 judges. At the federal level, judgments are generally issued by panels consisting of 3 or 5 judges, all of whom are trained lawyers and who have been elected by the Federal Parliament for a term of 6 years with possible re-election .

At the cantonal level, judges are elected either by the people, the cantonal parliament, the government, or by a particular voting committee upon nomination of the political parties represented in the cantonal government. Judges are elected for a period of 4 to 6 years, with possible renewal upon expiration of the term (Swiss Federal Supreme Court, 2013). A few cantons require the judges to have received legal education. In other cantons where legal training is not a prerequisite, it is de facto the case that lay judges are very rarely elected.

While lay judges rarely act as single judge, they often sit in mixed panels with at least 1 professional judge (Beutler, 2012). Since the introduction of the CCRP, there is a tendency to abandon or to reduce the participation of lay judges. This may be due to the ever-growing complexity of the law that makes

it difficult for lay judges to handle criminal matters. The more frequent law reforms and the complexity of the system of sanctions require lay judges to attend training courses with the consequence that lay judges are getting closer to professional judges (Arn, Kuhn & Saurer, 2011). Law clerks with legal training are always part of the court’s composition.

Alternative Proceedings

Penal Order

Today, the overwhelming majority of criminal cases are dealt with by alternative proceedings in which the prosecutor plays the central role. In the Swiss criminal justice system, penal order proceedings play a predominant role. The penal order proceeding is a simplified written procedure where the prosecutor reaches his decision mainly on the basis of the police files. There is no duty of the prosecutor to hear the accused person, and during the process, the defendant is usually not represented by a lawyer. The prosecutor issues a penal order if the accused person has accepted responsibility for the factual circumstances of the case, or if the circumstances have been otherwise sufficiently resolved, and provided that the sentence to be imposed does not exceed 6 months imprisonment. It is estimated that more than 90% of the convictions across Switzerland are based upon a penal order (Hutzler, 2010). In some cantons, this can even reach 98% (Gilliéron, 2014).

If the defendant refuses the order, he or she has 10 days to raise written objection. In the absence of an objection, the penal order becomes final and has the same effect as a judgment following a main hearing. The prosecutor is obligated to choose the penal order proceedings as soon as the legal requirements for the use of this alternative are fulfilled. This summary proceeding is a highly efficient way to deal with an increasing caseload. However, as a study by Killias, Gilliéron & Dongois (2007) has shown, this kind of summary proceedings is inclined to produce wrongful convictions.

Abridged Proceedings

The introduction of the abridged proceedings with the enactment of the CCRP has further enlarged the prosecutor’s power. This procedure is quite similar to the plea bargaining process under the U.S. system. Prior to the introduction of the CCRP, 3 out of the 26 cantons already implemented such an alternative procedure (Gilliéron, 2014). It allows the prosecutor to make a deal with the defendant provided that the defendant agrees to plead guilty and that the prosecution requests the imposition of a prison sentence not exceeding 5 years. If the case is heard by way of abridged proceedings, the defendant must be represented by a lawyer.

Informal negotiations are closed by an indictment that the prosecution transmits together with the files to the court of first instance. In contrast to ordinary proceedings, the court does not evaluate the legal circumstances of the case. The responsibility of the court is to determine whether the carrying out of abridged proceedings is lawful and appropriate, whether the

charge corresponds to the conclusions of the principal hearing and to the files, and whether the sanctions requested are reasonable. Although the prevailing legal opinion rejects the abridged proceedings for constitutional reasons (Gilliéron, 2014), the popularity of this procedure is steadily growing (Hürlimann, 2013). In the canton of Zug for instance, abridged proceedings accounted for 7-14% of the criminal proceedings subject to the ordinary procedure from 2011 to 2014 (Supreme Court of the Canton of Zug, 2013, 2015).

V. Swiss Civil Procedure: A Short Overview

Civil procedure is regulated by the Swiss Code of Civil Procedure, which entered into force on 1 January 2011. Prior to the enactment of the code, every canton had its own code of civil procedure. As in the criminal procedure, despite the unification of procedural rules, the organization of the judiciary remains a matter for the cantons (article 122 para 2 Swiss Federal Constitution). Federal law obliges the cantons to provide for a two-level judiciary system and grants the cantons the option to establish a specialized commercial court. The cantons of Zurich, Bern, St. Gallen, and Aargau have established such a court. This court is part of the cantonal higher court and acts as a court of first and single instance for commercial matters.

Many cantons have established specialized courts, such as labor and tenant law courts. Labor courts are composed of equal representatives from employers' and employees' organizations. In principle, a conciliation hearing before a conciliation authority takes place before the actual decision-making proceeding is conducted. The justice of the peace oversees the conciliation hearing either alone or with two assessors as laypersons. In the proceedings at first instance, depending on the value in dispute, a single judge or a panel of 3 judges, is responsible for judging the case. If the value in dispute is below 30,000 Swiss Francs^[3], the dispute is typically referred to a single judge, while cases where the value in dispute exceeds 30,000 Francs are referred to a panel of 3 judges. The higher courts generally sit as a panel of 3 or 5 judges. The main role of the higher court is to examine appeals against judgments of the first instance. As an exception, higher courts as sole instance are competent to decide disputes related to intellectual property law and cartel law, as well as disputes under the Collective Investment Act and Stock Exchange Act. Final cantonal court decisions may be appealed to the Federal Supreme Court provided that the value in dispute exceeds 30,000 Francs. The judges are elected in the same way as judges handling criminal matters.

VI. Conclusions

The abandonment of the jury system for criminal trials in Switzerland less than 5 years ago has been relatively trouble-free. Although the jury system in this country has never been applied to civil cases, the experience with criminal cases is instructive. The cantons in which lay juries had been used adapted well to the change. More consistency has been seen among the cantons. The flow of alleged offenders through the system has been

smooth and facilitated by the abandonment of the jury system.

What does it mean for the United States? Of course, caveats have to be offered: different countries, different cultures, markedly different historical backgrounds are just some of them. Furthermore, we may be certain that the sputtering, inconsistent, sometimes dead-wrong, sometimes really good jury system of the United States will continue to plod along, often getting it just right, and now and then totally missing the target.

Nevertheless, the Switzerland experience is instructive. With the abolishment of the jury system, the CCRP carried on the tendency that had already taken place in certain cantons. Mainly for reasons of consistency and fairness, such a system was discarded nationwide. And from what we can tell at this point, it has worked.

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- [1] Huffington Post, 10/05/2013
- [2] <http://www.innocenceproject.org/>
- [3] One Swiss Franc is approximately the value of one US dollar.



Do Trial Consultants Spell the End of Justice?

by Adam Benforado, J.D.

*Editor Note: We asked Adam Benforado to write for us in this special issue. While Adam's recently published book, **UNFAIR: The New Science of Criminal Injustice** isn't really about the demise of the jury trial, an article in the Atlantic adapted from one of the chapters caused concern among some trial consultants who saw the article as negatively slanted toward our profession. Some of us have followed Adam's work for years and were surprised by the seeming tone of the Atlantic article. When I expressed this reaction to Adam, he was surprised since he saw his book as offering strong support to the value of trial consultants' work, while advocating for a reorientation of the industry. Given the disconnect between his perspective and the reaction of some to his work—we are pleased that he has agreed to write for us and allow a few trial consultants to weigh in on his perspective.*

IT WAS DURING my first semester in law school that I began to have doubts about the conventional account of what determines legal outcomes. The psychology of police officers, judges, and jurors seemed far more important than the statutory language or existing precedent. I remember going to office hours and asking my Constitutional Law professor why we focused our attention on deducing doctrine by reading Su-

preme Court opinions rather than studying how people make decisions and uncovering the forces that influence judicial behavior. He said that wasn't his thing.

So, I made it my thing. I began reading every psychology and neuroscience article I could get my hands on. And when I became a professor, I started working with psychologists on developing experiments to better understand the truth about what moves our legal system.

The conclusion I have reached is that our justice system is largely built on incorrect assumptions about human behavior. In my new book, *UNFAIR*, I make the case that for our laws and practices to be effective we need to commit ourselves to evidence-based justice. Until we embrace what the scientific

Don't miss the trial consultant responses at the end of the article:

- [Diane Wiley](#)
- [Jason Barnes and Brian Patterson](#)
- [Stanley Brodsky and Bronwen Lichtenstein](#)
- [Plus a response from the author](#)

research has to say about eyewitness identification procedures, interrogation protocols, judicial bias, and the effects of solitary confinement, we will continue to see wrongful convictions, trampled rights, and terrible abuse.

I argue that change is entirely feasible and that there are already models of success not only internationally, but in certain jurisdictions in the United States. But I also suggest that there are challenges to accomplishing science-based reform and, ironically, one of those challenges is presented by the trial consulting industry.

The irony is that many trial consultants are scientists—indeed, psychologists—themselves. And the trailblazers of the industry were firmly on the side of evidence-based justice. When the Duke psychology professor [John McConahay](#) offered the tools of social science to defend [Joan Little](#), an African-American inmate accused of murdering a white guard she alleged had raped her, the purpose was to remove bias and level the scales of justice. But that's not the true goal anymore and that's where the problem lies.

My concern with the trial consulting industry, then, is not the familiar one: that consultants are selling snake oil by offering services of dubious worth. Indeed, my entire book is devoted to showing the incredible value of a psychological understanding of our legal processes. I think trial consultants are already effective and I think they are going to become far more effective in the coming decades. With ever-growing knowledge of how individuals think and act at trial, consultants are the savviest of any courtroom players about how our legal system actually functions. My worry is with how they use that special knowledge.

The role of trial consultants is no longer to ensure fairness and equality. People aren't paying thousands of dollars in fees to achieve balanced proceedings; they are paying to win. And that means that consultants work, not to remove bias, but to manage bias and even to enhance biases that favor the client. Voir dire is a case in point: the consultant's aim is not to impanel a neutral jury, but as favorable a jury as possible. As one of my trial strategist Twitter followers put it recently, "I like my juries like I like my cheeseburgers: Stacked." Go to any of the top trial consultant firm websites and you'll see what's for sale: access to valuable insights about judges and jurors to help attorneys gain a winning edge and clients to be successful.

I see two big issues with this reality. First, for the sake of our system, I don't think anyone should be using scientific insight to imbalance the scales of justice. That's antithetical to our basic principles. The whole reason we have a voir dire process, for example, is to screen out bias, not screen for it. Second, only a very limited stratum of the population is able to make use of the full array of services offered by trial consultant firms. In practical terms that means the wealthy get to bias the system in their favor; the poor don't. If you care about rising inequality in the United States, that disparity cannot stand. In the words

of Justice Hugo Black, "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

To be clear, this is not a matter of those within the industry being greedy, immoral, or callous. Efforts to vilify consultants or the lawyers who hire them are entirely misguided. The root of the problem comes down to the situation that trial consultants find themselves in. We have created a recipe for injustice: have anyone act under the same set of incentives and constraints and you'd get the same result.

The most critical force in producing distortion is an unexpected one—the adversarial system itself. In the United States, we've long believed that the vigorous clash of opposing legal teams is the best way to ensure fairness and get to the truth. But in practice it creates a damaging "us" versus "them" dynamic that encourages the two sides to focus on defeating their opponent rather than achieving justice. And instead of promoting restraint, the adversarial approach seemingly sanctions more and more aggressive maneuvers. Many deeply troubling tactics can be cast as simple zealous advocacy. Inserting questions into voir dire that unfairly bias jurors before the case has even begun are easily rationalized as framing the issues from the outset so that jurors hear a consistent message. Even in cases where consultants and lawyers may feel they've crossed a line or betrayed the underlying intent of some process or procedure, the adversarial system provides a ready justification: this is just balancing out the other side's unfair advantages.

Compounding matters is the weakness of the oversight of trial consultants. The self-regulatory [Professional Code of the American Society of Trial Consultants](#) is well intentioned, but the standards are quite general and aren't likely to bar the types of actions that I'm most concerned about. Consider the research we have on eyewitnesses that suggests that memories are incredibly fragile, malleable, and easily corrupted. The Standards state that "Trial consultants shall advocate that a witness tell the truth." But all that does is prohibit telling the witness to lie; it does nothing to prevent trial consultants from preparing witnesses in ways that irreparably alter their recollections and their surety in those memories. Indeed, the Guidelines explicitly sanction practices that appear likely to produce distortions, like "[w]ork[ing] to increase witness comfort and confidence in testimony" and engaging in multiple "mock examinations."

The Professional Code also lacks teeth. When the Grievance Committee finds a serious violation, the worst of the listed sanctions are a public letter of reprimand and expulsion from the American Society of Trial Consultants.

Making matter worse, in certain cases the regulatory regime actually encourages trial consultants to engage in behavior that is likely to introduce bias into a case. The Code, for instance, explains that rigorous preparation of witnesses is not only allowed; it is required: "The ABA's model rules for maintaining ethical behavior by attorneys require that a lawyer never pres-

ent a witness without knowing what his or her testimony will be.”

We Need to Change What We Are Doing. But How?

As I see it, if you agree that the status quo is unacceptable, there are three options.

The first is to enhance access to trial consultants. Many consultants already engage in pro bono service, but as with lawyers, the need far exceeds the supply. And asking people to donate more of their time for free just isn't a promising avenue for making meaningful reform. A better approach may be to establish a due process right to services for indigent and low-income defendants. This seems an intuitive solution—a logical extension of the choice to provide counsel to the impoverished in criminal cases. But I have serious doubts as to its effectiveness in reducing inequality. I expect that those with more money—in particular, white-collar criminals—will always have access to the best consultants offering the most extensive services. By contrast the have-nots will be left to make-do with the least competent individuals and limited access. Just as important, I anticipate that the next development will be to expand access to trial consultants for prosecutors' offices. At that point, we'll be in a worse position than before, with both sides trying to manipulate the system to get to the desired outcome. That seems like a profound waste of societal resources.

The second possibility is to ban trial consultants altogether. I strongly oppose this approach because it amounts to a rejection of psychological expertise. Trial consultants are dedicated to understanding what is actually shaping the behavior of courtroom participants and if we are committed to evidence-based justice, we need to embrace their special knowledge and skills, which leads to the third option.

The final and most intriguing alternative is to shift how trial consultants are used within the system. What if we ended the use of partisan trial consultants and created a new entity within the judiciary focused on ensuring fair trials? This independent body—call it a trial integrity unit—would be charged with learning about, tracking, and addressing biases affecting witnesses, judges, jurors, attorneys, experts, and other legal actors. The task of jury selection, for example, would be handled entirely by members of the unit. With the elimination of attorney participation and peremptory challenges, trial consultants could return the process back to what it was meant to be about: ensuring a fair and representative jury. The unit might also be charged with reviewing all evidence for known psychological biases, flagging potential false confessions, corrupted eyewitness identifications, and video footage that exhibited camera perspective bias. In addition, consultants could track the behavior of judges and others, as a way to capture unappreciated skew. It can be hard to notice patterns, like the fact that African-Americans are receiving higher bails or that drunk drivers fare better with bench trials, without seeing the broad data. Where disparate outcomes were noted, the unit could be

entrusted with developing interventions to address the underlying dynamics.

Existing trial consultants are ideally suited for this type of work and it would have a powerful positive impact on our justice system. It may seem radical, but is it? The whole idea of a government trial integrity unit is simply to ensure that our legal system delivers what it promises. That seems downright mundane. ¹⁹

Adam Benforado is an Associate Professor of Law at the Drexel University Kline School of Law in Philadelphia, Pennsylvania. His research is focused on applying insights from psychology and neuroscience to legal issues. His articles have appeared in a diverse range of publications, including Cognitive Science, the Emory Law Journal, the New York Times, Scientific American, and the Atlantic. You can learn more about his new book at www.adambenforado.com/unfair.

Diane Wiley responds:

Diane Wiley is a founder of the National Jury Project, now NJP Litigation Consulting, President of the Midwest NJP Office in Minneapolis and is a pioneer in the field of trial consulting, having begun her work in the jury system in 1973. She prides herself on making her work available to attorneys on criminal, civil and commercial cases both big and small all across the country; has written numerous articles and chapters for legal publications, and teaches at seminars.

Response to Adam Benforado's "Do Trial Consultants Spell the End of Justice?"

When I first saw the title of this article, I was amazed. With all the problems in the judicial system, holding trial consultants responsible for the "end of justice" strikes me as pretty weird. First of all, that assumes that before trial consultants, there was justice. Pure, squeaky clean justice. Having been a trial consultant since 1973, I can say without reservation that I don't think that that has ever been true. "Justice" has always been a prickly problem in our judicial system.

As far as juror bias goes, we had even more serious problems in the "good old days" when potential jurors were handpicked by community "leaders" and women and people of color were excluded. Today there is still systematic exclusion of African-Americans, Native Americans and Latinos as jurors in some jurisdictions, but nowhere near as much. And this reduction is thanks in large part to trial consultants and other social scientists working with lawyers to challenge the composition of jury pools.

Our current problems with bias are more complex because media coverage of cases is so ubiquitous and frequently one-sided or wrong; many of the jurors think they are experts in the law because they've seen it all on TV; a lot of people are very cyni-

cal about the courts; and we are a very polarized people. There's still a lot of bias to be rooted out during jury selection. And because there are more complex cases in our complex society, there are massive communication problems that trial consultants can help with.

Adam Benforado initially asserts that trial consultants have a lot to offer in dealing with bias, in fact he makes it seem like if we wanted, we could root it all out with our "evidence-based" approach. But then, we become a threat to justice for two reasons - first, he asserts that we can unethically stack the system in the favor of the client we are working for and two, we make the system unbalanced and unequal. Again, history and the realities on the ground are important. While I'm flattered that Professor Benforado thinks that trial consultants are so omnipotent that we are the deciding factor for cases, the reality is that we work with lawyers to help them do the best job they can with the clients and facts they have. We don't have crystal balls and we don't use subliminal messages and underhanded psychological tricks. And more importantly, some people have always been disadvantaged in our justice system - particularly the poor and people of color. While trial consultants can be a part of that inequality, we are only a small part and many of us have devoted our lives to making our knowledge and services as widely available as possible through training for lawyers, writing, sliding fee scales and pro bono work.

Can a Jury Be Stacked?

It's unfortunate that one of our trial consultant colleagues said he likes his juries "stacked". I have been involved in hundreds of trials over the last 42 years and I can't say I ever come out of jury selection saying, "Fabulous - we really stacked that one!" Most of the time we're happy if we got rid of *almost* all of the people we felt were biased against our side from the get-go.

This kind of talk makes me crazy, especially when repeated to a lay audience. What the layperson doesn't know is that jury selection does not really involve "selecting" jurors. All we can do is hope that the judge will let the attorneys do a probing voir dire; that the attorneys have the skills and will prepare enough to do a decent voir dire; that the judge will excuse people who express their biases instead of rehabilitating them; and then that we have enough peremptory challenges to excuse the biased people who are left. And of course, we often don't have very many challenges. Most states and federal courts give each side 2 or 3 peremptory challenges for civil cases. The ability to "stack" a jury is a myth and I wish that Professor Benforado had noted how absurd the statement was.

The History of Trial Consulting Is an Honorable History

The American judicial system requires that trials be "fair". In a society like ours, what does that mean?

The first trial I ever worked on was the first of many that were re-

ferred to as the "[Wounded Knee trials](#)" in 1973. They arose out of a situation on the Pine Ridge Indian Reservation in South Dakota where there were over 300 state and federal charges. There was an occupation of the reservation by Native American activists in response to massive corruption and violence on the reservation. Frankly, those of us who volunteered to help didn't really know exactly what we were doing - but we felt we had to do something. [Dr. Jay Schulman](#), who is considered the "father of jurywork" came to Minnesota and talked about what he and Dr. Richard Christie had done for the Harrisburg 7 case involving the Berrigan Brothers and others in 1972. They had used various social science techniques to try and get a fair trial for the defendants. At the same time, Beth Bonora and others were also working with Dr. Schulman on the Attica Prison trials involving numerous serious charges against mostly African American prisoners relating to a prison riot. And Margie Fargo was working with Dr. Schulman on the Gainesville 8 trials in Florida where the defendants were Viet Nam Veterans against the War and were falsely charged with planning violence to disrupt the Republican National Convention in 1972.

In all of those cases, there was intensive media coverage and the defendants were people of color or people who were protesting. We all knew that many of the jurors who would be judging them would have biases against them before the trials even started. That's why we all volunteered to help.

It was not long after that that the National Jury Project was formed (now also called NJP Litigation Consultants). Many of the lawyers we worked with from the National Lawyers' Guild were involved in the beginning. Beth Bonora, Margie Fargo and I were staff and Susie Macpherson and Elissa Krauss soon joined us.

In 1975, I then also worked on the [Joanne Little](#) case with many others. My role was to gather data for a change of venue - which we did by going door to door in small towns in the remote part of North Carolina where Ms. Little had stabbed her jailer to death with an ice pick as he attempted to rape her in her jail cell. Like with some of the other trials, the bias in the county where Ms. Little was to be tried was so extreme that a fair trial required that the trial be moved.

Trial consulting was founded by people who cared deeply about justice. And we still do. We take it personally when we are accusing of losing our way and becoming part of the problem. The trial consultants I know who have joined our ranks over the years also take their responsibilities seriously. Are there consultants who want to win at all costs? I presume no more than there are lawyers who want to win at all costs. There will always be people in any profession whose ethics are not the best. But 99.9% of us do our best within an ethical framework.

Why Lay Problems with Justice at the Feet of Trial Consultants?

But the real question about Professor Benforado's question -

whether trial consultants spell the end of justice – is why the heck he would focus on us?

If trial consultants work for the prosecution, which has numerous advantages over the defense, does that spell the end of justice?

If trial consultants work for large corporations being sued by injured people or those discriminated against with far less resources, does that spell the end of justice?

And perhaps the larger question is, has our system really been “just” all these years?

I was young and had no training in the law when I participated in my first jury selection for the first Wounded Knee trial. It took 3 weeks, which in those days was incredibly long. Our jury selection team had 10 to 16 people on it and we met every day after court, including a medicine man. It was federal court and the judge - who was a very fair, wonderful man - asked all the questions, which was the custom at the time (and still is in most federal courts). If you could see a transcript of the jury selection, you would be amazed. After cursory questions about the juror’s occupation and family, there would be one after the other of rambling, half page closed-ended questions from the judge about the highly publicized case, Native Americans and protests. Then the juror would answer, yes or no. The judge spent a half hour or so on each juror and the answers were rarely more than one word or if we were lucky, one sentence. That was the custom. And it still is in some places.

Things have changed, but not enough. Professor Benforado makes some very good points about the problems the judicial system faces - false confessions, police officers and prosecutors not including exculpatory evidence, eyewitness identification protocols, solitary confinement, judicial bias, and obviously biased jurors not being excused by judges. I just find it hard to see how the work of trial consultants to help their clients identify bias fits in here.

Most of these problems take place well before trial and have nothing to do with trial consultants - we can’t impact them. Other threats, such as unrepresentative jury pools or venues where defendants have already been convicted in the eyes of the community are something trial consultants can help with in the rare instances where we can assist in a challenge to the jury pool or a change of venue.

Once a case gets to trial, the biggest threats to justice we still encounter are lousy jury selection procedures, inadequate judging and inadequate lawyering. And of course, the always and ever present issue of unequal resources. For the most part, trial consultants are part of the solution to these problems. Trial consultants can help with the lousy jury selections and we can help with the substandard lawyering. Sometimes we can help lawyers impact substandard judging by supporting motions for better voir dire conditions or making their presentations and

arguments clearer.

Unequal resources, on the other hand, are the bane of our society in most arenas of human life, no less so in the courts. They are pretty much out of our control. Rather than banning trial consultants as some have suggested and Professor Benforado, to his credit, opposes, courts could appoint trial consultants for indigent defendants much more often than they do and that would help. And they could pay for more training for public defenders by trial consultants on voir dire and case presentation.

Problems with Identifying Bias in Jury Selection

One of the most important keys to a fair trial for anybody is a “fair” jury. I think most of us consider a fair jury to be one that does not have people on it who have already made up their minds or are leaning strongly towards one side or the other.

In his writings, Professor Benforado talks about the serious problem of judges rehabilitating jurors who have stated that they have a bias by asking them to set it aside. Research shows clearly that humans can rarely just ignore their feelings. I agree that this is a huge threat to a fair trial. Trial consultants can and do help by training lawyers how to ask questions to get around rehabilitation. But there is only so much we can do. Is this trying to “stack” a jury? I don’t think so.

There are a myriad of other problems in jury selection. For example, I can’t count how many jury selections I’ve been in where the judge conducts the voir dire and basically asks such ridiculous questions as, “How many of you are biased and prejudiced? Please raise your hand”. You don’t need a PhD in psychology to know that kind of question is not going to get you very far. Judges also don’t know the case issues as well as the lawyers do and frankly, most of them just want to get finished with jury selection. If the questions are not directed to each juror individually, it’s very easy for some jurors to just sit there and never raise their hand. The chances of accurately identifying and excusing the most biased jurors are slim with judge-conducted voir dire.

Another aspect of this type of truncated voir dire is that lawyers are not supposed to excuse jurors based on age, race, national origin or gender considerations. Yet, if there is no real information from the voir dire, what else do we all have to go on?

Trial consultants help by structuring questions to be given to the judge that are better than the questions lawyers and judges think up on their own. We give speeches to legal associations and write articles about using open-ended questions and letting the jurors talk. We’ve been doing that for decades. And that’s part of the solution.

Other problems occur when attorneys are allowed to do the questioning, but the judges don’t allow them to ask meaningful questions of the jurors or take the time they need to assess bias.

Some judges won't let attorneys ask about "the law", but we know from research that there are going to be jurors in every jury panel who don't agree with certain laws. When allowed to ask, we've all encountered the juror who will say that he or she doesn't really believe in the presumption of innocence or that not testifying means a defendant is guilty. We find jurors who don't believe that injured people should be provided money in compensation for physical pain or emotional suffering. Ridding a jury of people with these kinds of prejudices is key to a fair trial, but we're often precluded from getting that information about them.

Another serious problem is that some judges will insist that jurors say the magic words, "I can't be fair" to be excused, even though that's psychologically difficult for people to do. Some judges have this practice even though it's within judges' discretion to evaluate jurors' bias based on what they have testified to, regardless of their ability to admit to not being able to be "fair". Depending on the panel, attorneys may not have enough strikes to get rid of all such biased jurors and that's a problem.

When we first started consulting, we were all amazed that lawyers had such poor skills in questioning jurors. To this day, trial consultants emphasize the importance of interviewing rather than interrogating jurors. Legal training does not prepare lawyers for conducting jury selection, so it's left to other lawyers and trial consultants to help them learn how to construct questions, use open-ended questions as well as closed-ended questions and just generally understand the role of bias and how to ferret it out.

Professor Benforado contends that trial consultants are using their education and experience to design questions to "stack" the jury or "persuade" them unfairly. I don't know about other consultants, but I'm just hoping that the judge will ask one or two decent, open-ended questions of the jurors so we have something to go on when we exercise our peremptory challenges. And I'm hoping that the attorneys will have the skills and will be allowed enough time to use them to identify bias. It is very unrealistic to think that jurors with decades of life experience will be persuaded by sneaky questions in jury selection. Do we introduce issues from the case in order to see what the jurors' thinking is on those issues? (Depending on the judge allowing those types of questions, which can be another problem.) Of course we do - that's what bias is all about. And do we use our knowledge to help the attorneys try to win? Of course we do. That's what the system is based on - it would be unethical not to do so.

Professor Benforado wants to ban attorney (and I presume) judge voir dire and peremptory challenges and have a supposedly neutral unit of some kind select the jurors. Not only is this unrealistic, it makes no sense. Attorneys know their cases and what juror biases might be problematic. No "unit" is going to be able to understand a case in more than a perfunctory way. Eliminating peremptory challenges would also be a huge mistake. Peremptory challenges are a fail-safe for making sure

that juries don't include people whom the judge doesn't believe are biased but who the attorneys do think are biased. It would really undermine the integrity of the system to take away peremptories and force attorneys - and as importantly, their clients - to have a number of people on the jury who they feel are against them from the beginning.

The role of trial consultants and the social sciences in making jury selection more likely to uncover bias has been and will continue to be extremely important. In the early days, trial consultants wrote evidence-based affidavits and gave testimony to judges outlining the social science behind asking open-ended questions to really understand jurors' opinions; about the need for questioning outside of the hearing of other jurors on sensitive subjects; and, about the differences in attorneys asking the questions versus judges asking the questions.

Open-ended questions were not the norm when we first began assisting lawyers, now everyone understands their importance because trial consultants make presentations in seminars. Jury questionnaires were another innovation trial consultants have been able to convince judges (and attorneys) to use in some situations. Working with our lawyer clients, we hope to help them figure out what life experiences, attitudes, assumptions and ideology they need to identify in voir dire in order to select a jury which will give them a decent hearing and hopefully find for them. I fail to see how that undermines justice.

The Adversary System

We work within an adversary system. I think we all recognize that while there may be some philosophical problems with the concept, there is probably not a better system to ensure fairness for all people who have a problem the courts are going to solve - whether in the criminal or civil realm.

Trial consultants are part of that system. We work as a team with the lawyers, legal workers, client and other experts to present the best case possible for the client. Professor Benforado says that we've forgotten about justice and now we just want to use our "valuable insights about judges and jurors to help attorneys gain a winning edge and clients to be successful". Do we want the most favorable outcome possible? Of course we do. Does that mean that we don't care about justice? No. Does that mean we will engage in unethical behavior? I would venture that there are no more trial consultants acting unethically than there are lawyers who do so. In fact, there are probably fewer trial consultants who engage in unethical behavior because our job is so different from the attorneys. And we have our own standards promulgated by the American Society of Trial Consultants.

This idea that trial consultants can plant ideas in the jurors' heads through psychological mechanisms is crazy. We use psychology, sociology, anthropology, neuroscience and any other science we can to try to understand how jurors think and act together. And yes, we use communication theory to help lawyers.

But we're not ad agencies who bury our subliminal messages in videos. The techniques we help lawyers use are designed to get their arguments across in ways that can be remembered and which are persuasive.

Using jurors' biases against a party in court, such as intimating that an injured person doesn't deserve money because they have a certain lifestyle or suggesting that a witness isn't as credible because they are unemployed or a gang member are techniques that insurance defense lawyers and prosecutors have used for years. Plaintiffs' lawyers relying on the positive biases of the jury towards believing that people should be treated fairly at work or that corporations should honor their contracts are a part of the landscape. No advocate in their right mind would not use the biases jurors have in their favor. Trial consultants can help skillful attorneys hone their presentations and identify feelings that jurors have which could help them win their case or which can hurt their case. And of course we also help witnesses feel more comfortable with testifying so that they are more credible. Lawyers have been doing this for centuries. They would be negligent if they didn't. We help lawyers do the best they can with the clients and facts they have. There is nothing unethical about any of this - it's the whole point of an adversary system. Everyone fights their hardest and justice will hopefully be done.

Unequal Resources

One of Professor Benforado's main issues is that some people can afford a trial consultant and others can't. I certainly agree. But this is part of a larger problem that has always been ingrained in our system. The richer client can (and has always been able to) hire more - and more expensive - attorneys, associates, legal assistants and paralegals, testifying experts, investigators, videographers and, of course, trial consultants. We live in an unequal society. Some of us offer sliding fee scales to try to even it up a bit. We do pro-bono work. We conduct seminars to train lawyers. We write books and articles. Fortunately there are lawyers who take on Goliath with only a sling shot, but they have such good aim, they win. But we cannot solve society's problems with inequality.

The most damning problem of unequal justice is that state and federal government offices have such vast resources compared to what most defense attorneys have. Public defenders are woefully underfunded. In all these years, I've never been in or heard of a public defender office that had enough lawyers for their caseloads or enough money to hire the investigators and other experts they need. Sometimes the courts will appoint trial consultants to help, but it's rare. If anyone wants to help make trials more just, they should lobby their legislators to fund these offices on par with the prosecutors' offices and give them more money for all kinds of experts, including trial consultants.

Trial consultants can be court appointed and are in some limited circumstances. We've been appointed for jury composition

challenges, venue evaluations and for case assistance and jury selection, particularly in high profile and death penalty cases. Given the disparity between the resources of the prosecution and the biases against criminal defendants, justice would certainly be served by making trial consultants more available to criminal defendants.

Professor Benforado's proposal that there be "trial integrity units" for the courts is interesting. I think that the data collection he's talking about is done to some extent by the [National Center for State Courts](#) as well as the few states that have a similar organization. But the part of his idea that a state or federal unit actually select juries makes no sense. As I stated above, the best way to get a fair jury is that attorneys who know their cases be allowed to ask probing, open-ended and insightful questions for as long as they need, and allowing jurors to sometimes answer out of the hearing of the other jurors. Questionnaires on sensitive issues should also be used in many cases. Attorneys should be allowed a decent amount of time to make their decisions about peremptories. And it is essential that judges be trained not to rehabilitate jurors who express biases.

Trial consultants as part of a trial team are not a threat to justice, we're part of the solution. ©

Jason Barnes and Brian Patterson respond:

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

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

Response to "Do Trial Consultants Spell the End of Justice?"

In a word, no. Trial consultants do not spell the end of justice. In fact, the opposite is much closer to the truth: trial consultants support and add to justice.

Professor Benforado has provoked a full-throated response from two of our respected colleagues. We fully support those responses and will not cover the same ground. However, we will add our voice to the chorus on one issue that we find particularly offensive. Professor Benforado cavalierly maligns the individual and collective character of members of our profession. For support, he cites a flippant comment from an unnamed Twitter follower. In the face of his call for "evidence-based jus-

tice,” this attack, which is wholly lacking in both evidence and justice, drips with irony. The remainder of his article stands on equally shaky ground, full of opinion but shockingly light on empirical evidence and, from what we can deduce, based on a fundamental misapprehension of actual trial practice.

Frankly, it would be easy to dismiss both the work and the author. However, we recognize that there are shortcomings to the justice system, both criminal and civil, that the professor is attempting to address.

Trial Integrity Unit

One thing the author suggested that caught our attention was the idea of a “trial integrity unit.” It seems apparent to us that one already exists – it is called “The Judiciary.” The judge in any case is charged with the application of law and procedure with absolute impartiality and integrity.

In the accompanying responses, our colleagues have identified and addressed areas where judges could perform their duties better, especially in the jury selection process. Trial consultants have done much to educate judges in handling this process more fairly and are to be commended for their work. There is, sadly, still more to do. Any person, including the professor, who wants to see an effective “trial integrity unit” need not imagine creating a new system of oversight but should instead focus on educating judges on issues of fairness and methods to root out prejudice wherever it may be hidden.

Increased Access

Another of the options Mr. Benforado suggests for increasing fairness in trials, in regard to trial consultants, is to increase access to consultants for everyone. We agree that access would go a long way toward increasing fairness, and that public policy should aim toward that. Indeed, many resources are already available to the public.

1. The Jury Expert

The Jury Expert contains many articles addressing the very areas Mr. Benforado seems concerned are being withheld from the public. Scholarly articles written by academics, along with responses from experienced trial consultants, are published alongside trial consultant authored articles covering a wide range of topics.

2. The Public Library

Numerous books explaining trial consulting methods and practices, as well as related areas, are available in libraries and bookstores.

3. ASTC Consultant Locator

A search is available through the ASTC listings to find ASTC members who do pro bono work.

4. The Red Well

Far from a shadowy band of Svengalis, trial consultants openly discuss their techniques and profession online. Many trial consultant blogs are aggregated [here](#).

5. The ABA Journal Website

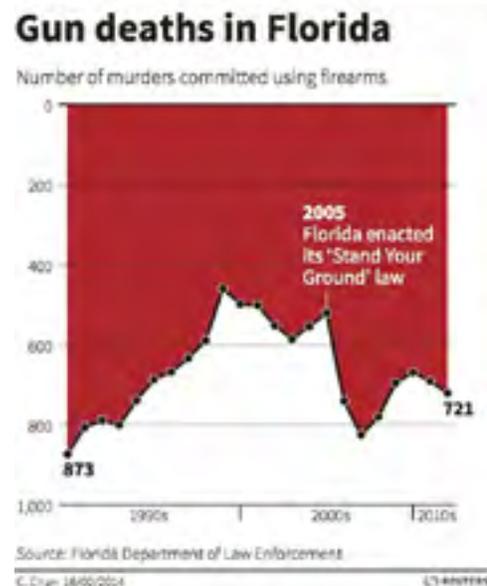
The American Bar Association also keeps a [list of blogs](#) available, and it is searchable by topic. Many trial consultant blogs are listed.

Potential Bias in Visual Evidence

Others have written here on the history and practice of trial consulting, voir dire, and jury selection, but we would like to respond within the area of our expertise, visual communication. Our practice does not focus on jury selection. Rather, we are involved in the design and presentation of visual evidence: documents, video, charts, graphs, diagrams, photographs, illustrations, animations, models, and live demonstrations. Of course, we strive to be as persuasive as possible while, like our colleagues in the ASTC, we still observe the highest ethical standards in our work. However, not everyone is an ASTC member and not every person producing demonstratives feels their ethical duties as strongly as we do. Occasionally, we see visual evidence that, purposefully or accidentally, has the potential to be misleading.

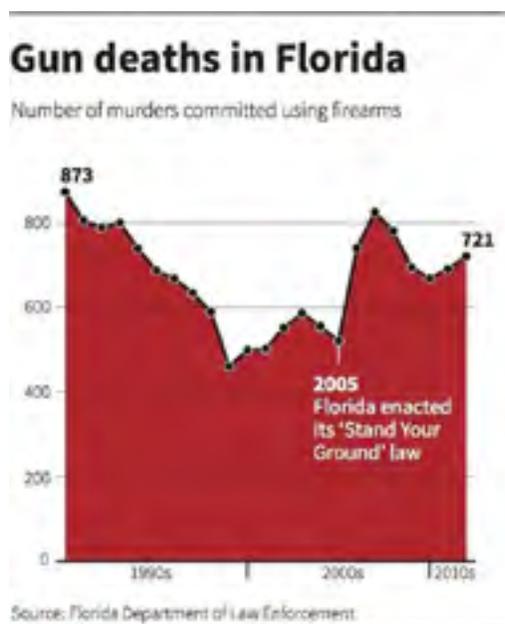
This can happen in a variety of ways. Some distorting factors are logarithmic scale, a truncated y-axis, unevenly spaced time-lines, perspective problems introduced by 3D charts, a misunderstanding of area when using shapes or pictures, and [the list goes on](#).

An interesting example of a misleading chart stirred traffic on the internet last year. It was created by a designer at Reuters and published by *Business Insider* with the title “Gun Deaths in Florida.”

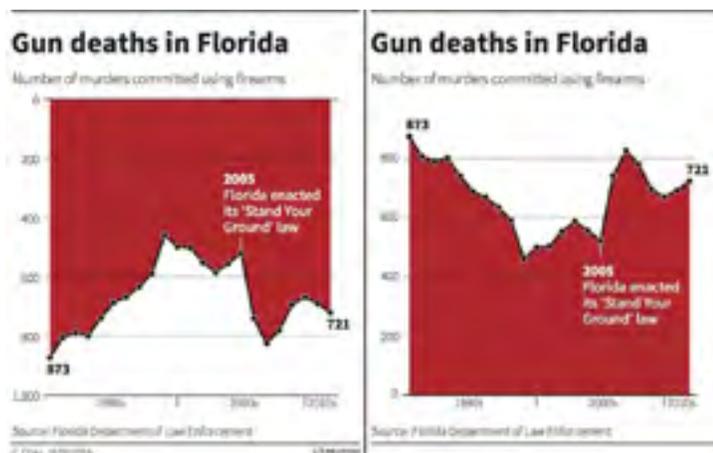


At first glance, the graphic seemed to show a sudden decrease in gun deaths after the passage of Florida's Stand Your Ground Law. On closer inspection, however, we see that the zero point on the vertical axis, representing the number of gun deaths, had been placed at the top, so that when the line went down it actually meant an increase and when the line went up it meant a decrease, literally turning what we expect from a line chart on its head. Although the [designer's intention](#) had been to pay homage to [this chart on American military deaths in Iraq](#), she broke some fundamental rules and created something that many people completely misunderstood.

An updated chart, reformatted in the standard vernacular of charts, was later added to the Business Insider article, and gives us the representation that we are accustomed to seeing in graphs such as this.



Here they are, side-by-side, for direct comparison:



Checks and Balances

The example above is especially egregious even though the designer and the publisher had no intent to deceive or mislead. How is it that, in the zero-sum game of trial, each party is not purposefully distorting their visuals to introduce unfair prejudice and mislead jurors? Rampant malfeasance doesn't happen because most attorneys and trial consultants are ethical and, for those that are not, the adversarial system, played out before a neutral judge and a critical jury, works remarkably well.

Trial consultants play an important role in educating attorneys and judges in identifying and understanding visually misleading demonstrative evidence. When we receive an exchange of graphics from opposing counsel, it is our job as the experts in information design to identify issues, explain them to our client, and help them craft a cogent objection. When surprised with a misleading graphic in the courtroom, which does occasionally happen, we flag it and find a way to help our clients cross examine the witness on the "visual lie." We work in an argument for closing about the other side trying to pull a fast one on the jury. No attorney wants to have their own graphic thrown back in their face.

We teach our clients that accuracy is not the enemy of persuasiveness. To the contrary, accuracy is the very heart of persuasion. The corollary is equally true: inaccuracy undercuts persuasion by undercutting integrity.

In a perfect world, trial attorneys would learn how to ferret out prejudice before ascending to the bench. But even decades of practicing law do not prepare judges to handle all the unfair prejudice they will have to detect and control in their courtrooms. If judges are to be an effective "Trial Integrity Unit," they will need some help. That help should take the form of a "judge's school" and should include continuing education.

It is our opinion that a school for judges ought to include instruction from trial consultants on subjects such as voir dire, eyewitness testimony, visual evidence, and many other important areas. Additionally, to help judges fulfill their duty of impartiality, they must be educated on their own inherent biases. Trial consultants, especially those among us holding advanced degrees in social science combined with decades of research and practical experience in the courtroom, are uniquely qualified to educate our judiciary on strategies to identify and work through their own biases.

Mastery of procedure and the law are necessary but not altogether sufficient to guarantee fairness in a trial, just as an enhanced knowledge of human bias is not the end of justice. Yet injustice does exist. As trial consultants we should be mindful of our unique position in the justice system and work with attorneys and judges to eliminate bias in the system, advancing the evolution of American justice away from its past and present failings, and toward a future where the founding ideas of fairness and equality are finally realized.

Stanley Brodsky and Bronwen Lichtenstein respond:

Stanley L. Brodsky, Ph.D. is a Professor and Coordinator of the Psychology-Law Ph.D. Concentration in the Department of Psychology, The University of Alabama, directs the Witness Research Lab (witnesslab.ua.edu) there and is an active practitioner in forensic evaluations, trial consultation, and expert testimony. His contact information is biminip@gmail.com and <http://sbrodsky.people.ua.edu>.

Bronwen Lichtenstein, Ph.D. [Blichten@ua.edu] is a Professor of Sociology in the Department of Criminal Justice at The University of Alabama. Dr. Lichtenstein's research and contact information is at http://cj.ua.edu/faculty_and_staff/faculty/lichtenstein/.

Evidence-Based Justice

The reason that we are fascinated by the Benforado concept of evidence-based justice is because of its inherent internal contradiction. On the one hand, all justice should be probative and evidence-based. That is the essence of what the courts should seek. On the other hand, by criticizing all of the impediments to our legal system working well and properly, he reconceptualizes the task as a need for real, honest-to-goodness and fair evidence-based justice. Benforado is right in tune with the concepts of *evidence-based anything*. We have a burgeoning literature on evidence-based medicine, evidence-based psychotherapy, evidence-based physical activity, evidence-based health policy, evidence-based grading, evidence-based decision making, and evidence-based special education: well, you get the idea. Just about anything we care about that has to do with important decisions can be described as evidence-based. Despite this flood of uses for evidence-based everything, some writers have critiqued it as value-laden and driven by both special interests and an overweening faith in empiricism (Greenhaigh & Russell, 2009). Still, we love the creative use of evidence-based justice that Adam Benforado has proposed as an alternative to the current system. Without it, he asserts, we will continue to have “wrongful convictions, trampled rights, and terrible abuse”.

Sometimes a really good concept such as evidence-based justice is enough to dig us out of the well-entrenched habits in our thinking. There is a solid scientific foundation for the power of new language and concepts like this one. Lera Boroditsky (2011) developed a program of research on how language usage helps interpret what events have happened. Her work is built in part on the hypothesis that language controls our thinking and worldviews. Boroditsky would say that as we describe what has happened to us, we incorrectly assume we are covering all the conceptual territory, but, instead, are limited by our language and constructs. The good concept of evidence-based justice permits us to grasp meanings and implications otherwise not considered, such as reframing our thinking about the actual functioning of the criminal justice system.

How do new concepts and terms free us from unseen bonds?

In his provocative book *The Language of Change*, Paul Watzlawick drew on early concepts of brain functioning to argue that concepts embedded in language usage serve to change both who we are and how we manage our lives. Back in 1978, Watzlawick focused on the differences that were known at the time between right and left hemisphere thinking. He asserted that what allows us to think creatively, productively, and as whole people, was to integrate organized factual thinking with creative non-linear thinking. He wrote about how aphorisms, ambiguities, and figurative language help get our thinking unstuck, and how new combinations and uses of words and concepts, like Benforado's evidence-based justice, can loosen and improve our creativity.

Now let us jump past all of the problems of false confessions, coerced interrogations, eyewitness inaccuracy, and jury dysfunction in Benforado's book to his three proposals relating to the role of trial consultants in attaining the objective of evidence-based justice. Benforado identifies three options: enhanced access to trial consultants, exclusion of trial consultants, and, his most radical proposal, inclusion of the non-partisan trial integrity unit. For the same reasons that we love fantasy novels, we love his idea of the trial integrity unit. It is the development of such original ideas that allow us to experiment with possibilities in justice and to move forward with fairer juror selection, among other steps. Alas, he is unrealistic in proposing that we toss out attorney participation and peremptory challenges.

In this context of unrealism, the Haruki Murakami (1998) novel *Hard Boiled Wonderland and the End of the World* describes specially trained people who recover memories and lives from the dried skulls of unicorns. That possibility is only somewhat less likely than the proposed trial integrity unit, although once again we admire the Benforado choice of constructs and language.

Let us return to the three proposals. Benforado brushes off the possibility of truly enhanced access to trial consulting. However, there is a mechanism in place that could move in that direction. Just about every law school has many service-oriented clinics. At our law school alone, we have a Civil Law Clinic, a Community Development Clinic, a Criminal Defense Clinic, a Domestic Violence Clinic, an Elder Law clinic, and a Mediation Law Clinic. Harvard Law School has 16 in-house clinics including a Cyber-law Clinic and a Food Law and Policy Clinic. Perhaps one way of enhancing access to trial consulting is to have specific clinics offered by law schools. Why not have a Jury Selection Clinic or a Witness Preparation Clinic, available free or at minimal cost to all parties in need of such services? In practice, this would mean providing such services for parties who could not afford to hire trial consultants and who do not have the public visibility or social importance to draw pro bono trial consultants. It would surely mean hiring trial consulting professionals to be part of law faculties and making lawyers a larger part of the profession of trial consultants. It would be costly, but also potentially feasible and a nice step

towards realizing Benforado's vision.

The careful observer will note that we, like Benforado, have wandered a long way from evidence-based justice, our starting point, to trial consultation as a means of promoting just and fair outcomes. However, trial consultation is a small profession, practiced by relatively few people, and affecting a tiny proportion of criminal actions. Furthermore, it is a small part of the Benforado book. The limited scope, however, is just why we can introduce changes and just why we can experiment. If we can indeed introduce non-partisan trial integrity units or trial consultation clinics in pilot programs to see experimentally if they make a small difference, then it is a start for which we would happily settle.

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The author, Adam Benforado, responds:

I thank all of the contributors for their responses. After reading them, I think it's worth offering a couple of clarifications.

A major source of disagreement seems to come from the title of the piece. It was suggested by the Editor and I thought it seemed like an appropriate frame for the discussion as it was posed as a provocative question and not a statement. I think my essay makes clear that I don't hold trial consultants responsible for the end of justice—the main problem I identify is that our legal system is built on incorrect assumptions about human behavior. Instead, I argue that the trial consulting industry presents one of the challenges to accomplishing science-based reform. Jason Barnes and Brian Patterson suggest that in identifying this challenge, I “cavalierly malign” the individual and collective character of members of the profession. I strongly disagree. My assertion is that the problem is not about “character”—trial consultants are good people, just like the lawyers who hire them. The problem is that our adversarial system and a lack of effective regulation create constraints and pressures that encourage a focus on winning rather than achieving justice.

In truth, I thought that was an uncontroversial claim. I was particularly surprised by the assertion it is “wholly lacking in . . . evidence.” I didn't write this short essay as an academic article because that wasn't the charge from the editor, but I certainly could have. For those who are doubtful about what is for sale, I urge you to visit the most prominent trial consultant websites to see how services are described and think about the true purposes of offerings like venue analysis and jury selection assistance. Do clients think they are paying for help only to remove bias and ensure a fair trial? When they ask for aid in identifying factfinders most likely to side in their favor are they told, “Sorry, but our focus is only on ensuring impartiality”?

I am a lawyer and a law professor, with many friends who regularly hire trial consultants, and that is not the legal system I know. In the real system, lawyers use trial consultants to win—and that means, in practical terms, trying to bias as many factors as possible in your favor within the bounds of the law. No one loses sleep because we've all been sold the idea that impartiality is achieved through the clash of vigorously partial advocates. But when you stop to think about it, that seems like a really foolish way to try to ensure a neutral process. If we want impartiality, we should make trial consultants impartial from the get go. An independent trial integrity unit could make that possible. ©



Hunting Dinosaurs? A Conversation with Steve Susman and Tara Trask on the Vanishing Jury Trial

by L. Hailey Drescher, M.A.

Editor Note: In response to the question of whether the civil jury trial is dying, we are proud to publish an interview about the new Civil Jury Project at New York University.

The empirical evidence is clear; the civil jury trial is vanishing. The Bureau of Justice Statistics reports that from 1992 to 2005, the number of jury trials fell from 22,451 to 10,813 in the 75 most populated cities nationwide. In 1962, jurors decided roughly 5.5 percent of the federal civil cases. That number plummeted to less than 1 percent in 2005. Steve Susman, a founding partner of the law firm [Susman Godfrey](#) and litigator of over 50 jury cases, is not standing idly by while the 7th amendment subsides quietly into the night. Instead, in partnership with [NYU Law School](#), Mr. Susman established the [Civil Jury Project \(CJP\)](#). The project was conceptualized to study the decline of the civil jury trial and to determine what, if anything, may reduce its slip into extinction. The CJP combines the efforts of attorneys, academics, judges, and trial consultants to brainstorm, analyze, and conduct research, which might prove useful to reforming the system. As trial consultants, we have vested interest in the civil system, and the stakes are high. Tara Trask is the CEO of the trial consulting firm of [Tara Trask and Associates](#) and is a past President of the [American Society of Trial Consultants \(ASTC, 2011-2012\)](#). Trask currently chairs the [Civil Jury Project Jury Consultants Advisory Group](#) and serves as the [ASTC liaison](#) to the project. This piece serves as a thought-provoking conversation between two allies: litigator, Steve Susman (SS) and practicing trial consultant, Tara Trask (TT).

Tara Trask: *You donated two million dollars of your own money to underwrite this project initially. Where does your passion for this project originate?*

Steve Susman: It really goes back to the mid 90's when I was the chair of the Texas Supreme Court Discovery Advisory Committee that met monthly in Austin, Texas. The big concern then was the expense of discovery. The biggest expense was the depositions. We debated and debated and we came up with a plan to limit the number of depositions. We thought we needed to limit the expense of pre-trial discovery because it was ridiculous. You couldn't afford to do a jury case. Through that experience,

I learned that the rule-making process is very slow. Everyone involved is concerned that it is going to be unfair for either the plaintiffs or the defense. That's where I came up with the idea of [trial by agreement](#). Both sides make and agree to rules for their case, and then it works great. It's always been a concern of mine that we need to make things cheaper. At first, I proposed only "pretrial" agreements. Because they worked so well, I then proposed a list of "trial" agreements. These related mainly to how to expedite jury trials and make them more comprehensible to lay jurors. But it became apparent that the number of jury trials is vanishing. I have taught trial advocacy on CLE courses to future trial attorneys and I was thinking about doing the same as an adjunct law professor. However, it occurred to me that teaching those classes was like teaching people how to hunt dinosaurs. There are no dinosaurs left; so, why do you want to learn how to hunt them? I made a speech about it at Yale Law School. Then someone heard that and asked me speak at the 2013 ABOTA ([American Board of Trial Advocates](#)) Jury Trial Summit, and that led to me being appointed as co-chair of ABOTA's [Save Our Juries Committee](#), a position I have now held for two years.

Unfortunately, bar associations are not good places for garnering attention on issues like this because they only meet three times a year, and they are gung-ho at those meetings, but then no one does anything in between. Trial lawyers are busy looking for a case to try, and that's understandable. Also, trial lawyers are viewed as having a big economic interest in saving the civil jury trial. I thought if I really wanted to get something done, I would have to devote a major part of my time and do something as part of an academic institution. To create a permanent center at a law school would cost five million dollars, and I didn't want to do that. At the end of four years, I will either put in my own money or raise money to continue, or declare that the civil jury trial is dead. I have to use my own money so I don't have to report to anyone, and I can do what I see fit. I've never worked for a boss, and I am at an age where I don't want to start now. I am not going to quit practicing law- I'm going to continue to do that. That's how the idea of setting up the Project came about. I did it at NYU because my home is in Houston and New York. I decided that NYU had the gravitas that a project like this needed. So, I chose NYU, and I've been working with the people there since.

TT: *I do think that it's obvious, and others have voiced this in the CJP discussions I've been a part of—that it is the time and expense that it takes to go to trial that seems to be putting downward pressure on the number of cases that go to trial.*

SS: We are selling a service called dispute resolution, and we are competing with arbitration in selling that service. And when we are seen as selling a service that is expensive, time consuming, unsafe and unpredictable, we will never win that war. It's like privatizing education. There is plenty of room for private schools- just not all schools should be private. There is room for alternative dispute resolution, but requiring everyone

to give up their rights... like if you want to buy a 99 cent iTunes song, but to complete the purchase you have to click yes and give up your right to litigation, that's not right.

I believe both judges and lawyers have been at fault. Judges have gotten to be so managerial. They are trying to clear as many cases off their schedules as possible. They do it through granting summary judgment and Daubert motions, by compelling arbitration, by dismissing cases on the pleadings: there are so many ways to clear a docket other than trying cases. Meanwhile, attorneys are afraid of trying cases or want to do it the same way they have always done it. As co-chair of the ABOTA committee, I looked for academics that had written about juries. We found a lot of them, and we got them to join. Then I knew that we needed judges, they need to push the attorneys to try some of these innovations we're talking about. Most of the innovations that people are suggesting, they are not necessarily provided for by the rules, but they aren't denied either. The judge has tremendous power over the litigants to get them to do what she/he wants.

Then I wondered, where are the trial consultants? They have as much to lose as we do. Arbitration will leave you some work, but not the same. Jury consultants have a big stake in this. By conducting mock trials, they come the closest we can come to analyzing what happens in a real trial. The biggest innovation of all, which I learned through mock trials, is simply to set time limits. If you limit a trial to five or six days, you get high quality jurors rather than just retired people, and you present a better case. The fact that mock trials with time constraints are used shows us that they would reach about the same result that a long trial would reach. That's when I had the idea to get the jury consultants involved. They are natural allies.

TT: *The time limits out in the Eastern District of Texas have been in place for 10-12 years. Limiting patent trials, jury selection, and opening statements can be very useful. I've heard jurors ask questions that were so sophisticated and so smart. It was clear they were following the attorney presentations and understanding well. I think time limits are important—if you can limit discovery and the time at a trial, those would make a big impact. Those address two big umbrella areas. But for people who haven't worked in venues with significant time limits, they tend to be skeptical that it can be done.*

Like you mentioned, there is a feeling sometimes that a jury trial is unsafe or unpredictable. That's where I think that jury consultants have an interesting perspective that speaks to what companies, parties, and industries have put out there in the public arena and makes people and parties feel like the process is unsafe or unpredictable. Like the McDonald's hot coffee case. That always comes up during voir dire. What that highlights for me is that lots of people, including attorneys, think juries make crazy, unpredictable decisions, and I can't speak for my entire field, but I can say that is not the way most trial consultants view it.

SS: Of course all this tort reform focuses on the runaway jury, the verdict that is deemed to be crazy, and the Chamber of Commerce publishes the hot coffee case as the example. Although when you look at the facts of that case, the jury was very reasonable. Very few people read the specifics of the case. I would like the Civil Jury Project to establish some sort of calendar where we can keep track of where the significant civil trials are going on in the country. If you could know where the big cases are being deliberated, then you could monitor them. You could go and publicize information about how the jury got it right. I just read something this morning, there was a patent case where Judge Andrews in Delaware set aside a jury verdict. The article was called something like, "Why try a patent case to a jury in the first place if the judge is just going to throw it out." That's typical of the type of press we get. The bad verdicts get the attention, not the good ones.

TT: *When there is a lot of press, it can seem largely one-sided. There was tort reform, and I hear a lot of that when talking to jurors in cases. I do a lot of intellectual property cases, and the anti-troll narrative is strong and goes largely unanswered. You don't hear a lot about the inventor that was unable to bring the product to market and instead got beaten out of the court system by massive companies. You do hear a lot about Apple and Google trying to fend off the trolls. Tort reform, press, and public opinion really permeate certain aspects of the culture and change the way that attorneys and parties look at litigation.*

SS: I think it is important that the project phrases the question in an open kind of way- both for plaintiffs/defendants, conservatives/liberals, and therefore, I have to be careful. Of course I'm an advocate, but we have to phrase the question in a way where we maintain independence and the integrity. We're asking this question seriously: if you were writing a constitution today for a democracy, would you insert the 7th amendment? While my hunch is that most Americans would say yes- we don't like our rights being taken away when we feel they have already been established. But, I believe that attorneys and most appellate judges would say no. We no longer need juries. Com-

merce and laws have become so complex... Although, I think the opposite, that we need juries in civil case, I recognize that there is another side of the argument.

TT: *I agree, and that's not just a self-serving view. That comes from listening to jurors. I'm so impressed by, whether for or against my client, how correct they are in whatever they determine. I do believe that what the framers intended was that we should not have conflicts resolved by one person. Not a king, or governor, or an elite body. I see very complicated trials resolved all the time by juries.*

SS: How many times have you been able to produce a different result from a mock jury than you got in trial? I can't think of any. I'll have two panels against me in mock out of the three, and I'm going to lose that case at trial. It doesn't change.

TT: *Sometimes if you still have discovery open, there are still things that you can tweak a bit. What I think is really amazing is when you put a shadow jury in a case. As social scientists, we don't like to say that it's predictive, and it's not, but I've never had one go 180 degrees from the actual jury. Not in 20 years. To me, that lends to the credibility of the jury. You put different people in there, and it goes largely the same direction.*

What would a successful four years at the Civil Jury Project look like? What type of change or reforms do you envision stemming from a successful program?

SS: Here's what I hope it will look like in four years: General public awareness that jury trials are disappearing and outrage over this trend. The widespread judicial adoption of many of the innovations we are testing in order to make for better jury trials, principally short time limits on all civil jury trials and the streamlining of jury selection. And finally, the legislative adoption of restrictions on how consumers, patients and customers can waive the right to a jury trial, and the frequent use of private juries in disputes resolved by arbitration. ©

The inaugural CJP conference, [The State and Future of Civil Jury Trials](#), will be held at NYU Law on September 11, 2015.

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Juries, Joinder, and Justice

by Krystia Reed, M.A. and Bryan H. Bornstein, Ph. D., MLS

Editor Note: If the civil jury system was truly dying, would we continue to showcase new research on improving litigation advocacy? Probably not. We are grateful to the researchers who continue to teach us how to apply the results of their work in day-to-day efforts on behalf of clients and parties to lawsuits.

IMAGINE A CLIENT approaches you saying that he and a friend were involved in a fight with a group of people at his local bar. There were several injuries and property damage. As he is describing his situation, you may identify several potential criminal charges, such as assault and battery. You might also identify several potential civil tort actions both for the injuries and the property damage. You may suspect that his friend would be listed as a co-defendant both criminally and civilly, and that it is likely that more than one plaintiff would be involved in a civil case. In fact, you likely take it for granted that several criminal charges will be brought in the same case against both defendants and that all civil claims will be brought in the same action involving multiple plaintiffs and multiple defendants. However, should you be concerned about joinder in any of these instances? If his friend was the primary aggressor in the situation, would you fear that your client appears

more culpable by association with the friend?

As this example highlights, joinder is common in the American legal system. In fact, over 60% of criminal cases involve some form of joinder, with 26% of cases involving both joinder of charges and joinder of parties (Leipold & Abbasi, 2006). In criminal court, charges and/or parties may be joined if they involve the same action ([Federal Rules of Criminal Procedure 8](#)), and defendants who have furthered the affairs of the same criminal enterprise may be joined even if the crimes are unrelated ([Racketeer Influenced and Corrupt Organizations Act](#)). Civil joinder rules are even more liberal – claims against a defendant may be joined even if they are unrelated (Effron, 2012; [Federal Rules of Civil Procedure 18](#)) and parties may be joined if there are similar issues involved ([Federal Rules of Civil Procedure 20](#)). Moreover, in certain circumstances joinder is actually required or future lawsuits are precluded ([Federal Rules of Civil Procedure 13, 19](#)).

Courts see joinder as a vital component of the legal system (Parker v. United States, 1968; Richardson v. Marks, 1987). The courts have stressed that there is a “substantial public interest

in this procedure” because joinder is efficient and economical (Parker v. United States, 1968 at 1198). By joining cases together, courts save valuable resources (such as time and money), for parties, jurors, witnesses, and the legal system as a whole. Reducing the number of trials is particularly favorable given the already overfull dockets of most courts.

Severance

Given the concerns about efficiency and economy, cases are typically joined liberally. Nevertheless, there are concerns that joinder may create unfair prejudice (Dawson, 1979; Leipold & Abbasi, 2006). Therefore, the judge has the discretion in both the criminal and civil systems to sever cases when joinder is prejudicial ([Federal Rules of Criminal Procedure 14](#); [Federal Rules of Civil Procedure 21, 42](#)). In making the decision to sever cases, judges employ a balancing test pitting the legal system’s interest in efficiency and economy against the parties’ interests in a fair trial. In practice, the standard for severance is quite high (Boalick, 1998) and there is a strong bias toward joining trials (Dawson, 1979).

In fact, the Supreme Court has held that severance should be granted only if the party requesting severance can demonstrate actual prejudice (Zafiro v. United States, 1993). A “spill over” effect from one defendant to another (such as presenting evidence of the other defendant’s prior criminal record) is typically not considered a sufficiently compelling prejudice, especially if the jury is given limiting instructions (Boalick, 1998). The standard of actual prejudice is higher than challenging the constitutionality of the trial generally, which only requires the party to prove potential prejudice (Harvard Law Review, 2008; United States v. Mannie, 2007; United States v. Snyder, 2006). Consequently, it is important to understand how joinder can be prejudicial in various situations.

Prejudicial Influence of Joinder

Research on jury decisions in joined trials provides some support for the notion that joinder may be prejudicial, particularly for criminal defendants. Joinder can result in higher conviction rates than if the cases were tried individually (Leipold & Abbasi, 2006; Bordens & Horowitz, 1983; Greene & Loftus, 1985; Horowitz, Bordens, & Feldman, 1980; Kerr & Sawyers, 1979). The Supreme Court has identified four potential sources of prejudice in joined cases: confusion of the evidence, accumulation of the evidence, culpable disposition, and forcing the defendant to mount the same defense for all charges in a single trial (United States v. Foutz, 1976). Additionally, joined parties may also need to be concerned about perceptions of culpability by association (Leipold & Abbasi, 2006). Psychological research can help explain how these concerns may operate in trials involving joinder of parties and trials involving joinder of charges or claims.

Joinder of Parties

When parties are joined at trial, the potential arises for juror bias for two primary reasons. First, jurors may confuse the evidence. Both criminal and civil attorneys should be concerned that when parties are joined, jurors may mistakenly use evidence that is directed toward one party against a different party. Psychological research has not directly addressed the issue of confusion of the evidence when parties are joined; however, research on pretrial publicity indicates that jurors often cannot remember whether they learned information from the case or from an outside source (see e.g., Ruva, McEvoy & Bryant, 2006). Additionally, research on joinder of charges indicates that when jurors are trying to make a decision about one case, information from the other charges may interfere with their memory (Bordens & Horowitz, 1985). Evidence confusion is most problematic when the sources of the information are similar in nature (Postman & Underwood, 1973), as many joined cases are. These source-monitoring errors suggest that jurors may get evidence confused when parties are joined as well.

The second concern with joinder of parties is that members of groups are often perceived differently than individuals. Psychologists can offer more insight on this concern. Research on groups indicates that people tend to make judgments about individuals based on perceptions of their group (Waytz & Young, 2012), with people seeing all group members as similar (Wilder, 1978). This is particularly true when the group is perceived as cohesive, in which case individual members are seen as more responsible for the group’s collective actions (Hamilton & Sherman, 1996; Waytz & Young, 2012). Of concern for attorneys, people may use the most extreme group member as representative of the rest of the group members (Leon, Oden, & Anderson, 1973). For example, in the situation described earlier, an attorney might be particularly concerned for a client who is joined with his friend who was the primary aggressor because the jury (or possibly the judge) may use the friend’s extreme behavior as representative of the client.

For civil plaintiffs being joined in a case (such as a class action), joinder is a potential concern because juries may not be able to assess damages accurately for each individual plaintiff. Research indicates that when an extremely injured plaintiff is joined with less injured plaintiffs, the extremely injured plaintiff receives a lower damage award than s/he would have alone (Horowitz & Bordens, 1988). The total damage award, however, was greater and the less-injured plaintiffs received higher individual damage awards than they would have alone. Thus, it is possible that jurors analyze joined plaintiffs’ cases based on the group rather than the individual plaintiff.

Joining defendants, particularly in civil cases, has received less attention than joining plaintiffs. Psychological research suggests that having another defendant may increase the likelihood the defendants would be found guilty or liable because there are fewer alternative explanations for what happened (Rottenstreich & Tversky, 1997; Tversky & Koehler, 1994). It is also possible that having less culpable defendants involved may increase liability or guilt ratings of the more culpable de-

defendants, particularly if the defendant(s) appear more culpable in contrast (Windschitl & Chambers, 2004). We recently conducted a study (Reed & Bornstein, 2015) that varied the number of defendants (one v. three), how cohesive they were as a group (strong v. weak), and the number of claims (one v. five) in a civil case in which the primary claim was false imprisonment. Our results indicated that when defendants are joined in a civil trial, they may be perceived as more culpable by association. Although there were no differences in verdicts based on the number of defendants, damage awards (both economic and non-economic) were significantly higher against an individual defendant when defendants were joined than when there was a single defendant. This was particularly true when the group of defendants, who were coworkers, was highly cohesive (i.e., when they worked together closely as opposed to working relatively independently).

Joinder of Charges or Claims

Joinder of charges in criminal court or claims in civil court creates the potential for several more sources of prejudice. As with joinder of parties, there are similar concerns with joinder of charges and claims in terms of confusion of evidence. Moreover, the court in Foutz indicated the additional concern that evidence may accumulate when charges or claims are joined, meaning that evidence from one case may reinforce evidence in another, making the evidence appear stronger in a joined trial.

Another concern with joinder of charges or claims as outlined in Foutz is that when charges or claims are joined, the defendant appears more culpable. Psychologically, we tend to assume that another person's behavior is a consequence of his or her disposition, rather than the situation[1] (Ross, 1977). Thus, multiple charges or claims may result in jurors blaming the defendant's disposition (thinking the defendant is a culpable person). Additionally, the type of charge or claim that the defendant is facing may create a generic prejudice that biases the jury against the defendant (Vidmar, 1997). Culpable disposition is one of the reasons the rules of evidence prevent criminal history from being used against a defendant in most criminal cases – courts are afraid that the defendant will be presumed guilty because of his prior behavior. Research supports this fear, as admitting a criminal history increases the likelihood of conviction, particularly when the crimes are similar (Doob & Kirshenbaum, 1972; Hans & Doob, 1976; Wissler & Saks, 1985)—that is, when the current charge is related to the criminal history (Wissler & Saks, 1985). Limiting instructions are generally ineffective in these cases (Doob & Kirshenbaum, 1972; Greene & Dodge, 1995; Hans & Doob, 1976; Wissler & Saks, 1985).

Research indicates that defendants should be concerned about joinder of charges in criminal cases. In fact, the probability of conviction increases as a function of the number of charges (Tanford & Penrod, 1982). Defendants are rated more negatively and as more culpable when charges are joined (Bordens & Horowitz, 1983; Greene & Loftus, 1985; Horowitz, Bor-

dens, & Feldman, 1988; Kerr & Sawyers, 1979), and these negative ratings have been found to be related to verdicts. In our research which manipulated the number of claims, defendants, and group cohesiveness in a civil case, findings indicate that joinder of claims may not be as damaging for defendants as joinder of charges in criminal cases (Reed & Bornstein, 2015). Joinder of claims did not influence verdicts or ratings of the parties (e.g., responsibility, trustworthiness, believability).

Conclusion and Implications

Although joinder is commonplace in our legal system, research indicates that attorneys may have reason to fear that joining parties, charges, or claims can create unfair prejudice. Many of the issues are similar in criminal and civil litigation. Joinder creates the potential of the jury confusing the evidence and making sweeping culpability decisions. Defense attorneys in particular need to be aware that when they are facing multiple plaintiffs or multiple criminal charges, jurors may be more likely to find them guilty or liable and award harsher penalties or higher damages. Our results suggest that joined defendants may have less reason to be concerned in civil trials, potentially because of the differences in potential penalties (e.g., monetary penalty v. imprisonment) or the burden of proof.

Limiting instructions are generally not effective in these situations. Therefore, defense attorneys should consider petitioning the judge for severance. However, if severance is not granted (which is likely given the high standard), attorneys should at least attempt to present their case in a way that explicitly highlights how each piece of evidence should be used (i.e., for which charges and/or parties).

Plaintiffs also should consider the effects of joinder in their case. For plaintiffs, joinder may be beneficial in some ways. It is possible that joining defendants will increase the likelihood of a favorable verdict or increase their damage awards. Our results suggest that plaintiffs get much higher damage awards when defendants are joined, particularly when defendants are members of a cohesive group. Joinder of plaintiffs also tends to be beneficial to the plaintiffs. However, extremely injured plaintiffs should be wary because while damages on average tend to increase, the specific award for the extremely injured plaintiff may be lower than what it would have been if the plaintiff had brought the case individually. ●

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Footnotes

[1] This tendency is known as the Fundamental Attribution Error.

Sonia Chopra responds:

Sonia Chopra is a senior consultant with NJP Litigation Consulting and has been involved in the litigation consulting field for over 18 years specializing in personal injury, employment, commercial and criminal cases. She has served on the Board of Directors of the American Society of Trial Consultants and is the Co-Editor of the trial manual, Jury-work:® Systematic Techniques.

Response to Juries, Joinder, and Justice

Joinder of criminal defendants and/or criminal charges has long been deemed to be prejudicial to the adjoining parties, but as the authors suggest, severance is extremely rare, even in capital trials where the stakes are the highest. The detrimental effects of joinder on criminal defendants has been well researched, but as is the case in many areas where social science and the law intersect, judges have not been particularly persuaded by these studies.

My experience in criminal cases where there are multiple charges against one defendant has been that there are many potential jurors who prejudge the defendant's guilt based on the number of counts alone. Public opinion polls have taught us that many people believe a defendant would not be arrested, charged, and brought to trial if he or she were not "guilty of something". Multiple charges, especially when they are similar in nature or involve a series of similar victims only amplifies this already existing bias. As many a juror has said in voir dire in these types of cases, "where there's smoke there's fire". Joinder of criminal defendants is almost always detrimental to at least one of the parties, but not necessarily to both/all of them. For example, younger defendants tried with older defendants can benefit from the perception that the older party had more control over the younger defendant and thus more culpability for the crimes. The most problematic scenario I have encountered occurs in capital cases where one of the defendants is death-eligible, but the other(s) are not. This results in the non-capital co-defendants being tried by a death-qualified jury. And the evidence that death-qualified juries are more conviction-prone is almost incontrovertible.

As there are very few studies on the effects of joinder on civil plaintiffs and/or civil defendants, the authors' research on these frequently encountered issues is a welcome addition to the literature. A good next step would be to continue this line of study using a different type of civil litigation that would have more applicability to a wider range of trial lawyers and consultants. In thinking about the author's choice of a civil case scenario involving false imprisonment, I'm wondering if they were intentionally choosing a story that could also be

used for a criminal trial to explore the impacts of joinder on judgements of guilt. This is understandable in terms of research economy, but I wish they had used a more common civil trial scenario where joinder comes up. A civil false imprisonment case for money damages against individual defendants is very specific, and I would dare to say, pretty rare. In many personal injury cases there are a number of defendants amongst whom the juries have to apportion fault—and there is almost always one company among the defendants as opposed to being all individual defendants. Litigators always want to know what impact this will have in terms of apportionment of responsibility and damage awards. Research examining the impact of joinder amongst multiple companies, or companies being tried with state entities and/or individuals would be a welcome addition to the existing literature. Other potential questions I encounter are does it benefit smaller, mom-and-pop companies to be tried with larger businesses in terms of apportionment of liability and damages? What about an individual driver being sued along with a state agency in a road defect case? In many scenarios there are primary defendant targets and a number of supplemental defendants, for example in a construction defect case where many different contractors are involved. What variables impact who benefits (if any party) when the plaintiff chooses to sue more as opposed to fewer entities? I look forward to reading more from Reed and Bornstein and other researchers in this area. 📖

Charlotte A. Morris responds:

*Charlotte Morris, M.A. is a trial consultant in Raleigh, NC who has worked since 1994 in venues across the country. You can find out more about Charli and her book *The Persuasive Edge* by checking out <http://www.trial-prep.com>.*

Education and Awareness: Two Powerful Tools for Persuasion

"Reducing the number of jury trials is particularly favorable given the already overfull dockets of most courts," says Reed and Bornstein. Particularly favorable for the courts themselves, obviously, but clearly not favorable for the parties who need them or the lawyers and consultants who work together on them.

The ongoing studies and efforts to promote jury trial innovations – such as mini-opening statements before voir dire or instructions of law before closing argument – which might offer some relief from the prejudicial practices of joinder are encouraging. But as the authors also say, pre-trial motions for severance most often fail and we are still likely years away from employing the innovations across the board in State and Federal courts.

So how do we best play the hand we are dealt?

There are two primary consequences of joinder that I would say trial attorneys could address: 1) the likelihood of juror con-

fusion, and 2) the psychological tendency of jurors to “lump together” the joined parties. For both of these, we already have proven strategies for educating jurors and mitigating bias.

Educating Jurors

As one great trial lawyer from New Orleans – Russ Herman – once said, “Even a blind hog finds a nut now and again.” Overcoming juror confusion takes us back to practical basics.

If you spend the majority of your time talking to other lawyers or the experts in your case you’ll need to visit with others to find out how well you are doing at explaining the evidence. For the most cost-effective measure, buy a few hours of time with a trial consultant and get the benefit of all the focus groups and mock trials they’ve ever done. For conducting pre-trial research, there is a wide range of options available for every stage in litigation but be aware that not all research methods produce the same kind of results.^[1]

Witnesses must also be aware of what the jury needs to learn (not just what they need to hear). It is time-consuming to prepare witnesses properly for deposition and trial, but you should not expect to educate a jury all by yourself. During prep and again at trial, include in your direct examinations questions such as, “Mr. Witness what is the most important thing you think this jury should know about this case?” and “Mrs. Expert, you spent eight years in post-graduate work to learn this subject but we don’t have that kind of time in a trial, so if you had to teach this concept to a junior in high school how would it look and sound?” Do not assume you will just tie it all together in opening or closing without considering the fact that these are the two shortest parts of every trial.

My colleagues who do the job of designing and creating compelling demonstrative exhibits for trial agree with me that many lawyers and law firms today do recognize the importance of having a visual strategy to teach jurors the important concepts in a case. Attorneys and their staff have basic tools available on their own desktop – such as PowerPoint – to create graphic images to illustrate evidence and support their arguments. But too often those steps are taken late in the game, on the weekend before opening statement, instead of being developed over time and throughout discovery to be used at important stages in the case.

Time and again I’ve seen an entire day of important motions argued without the use of a single demonstrative exhibit to persuade the judge. My own reports of pre-trial research almost always include a list of suggested demonstrative exhibits that were not used or tested in the research itself. Pay close attention to your own notes while you discover a case. Are you drawing flow-charts or diagrams to help you remember who’s who or how the witnesses relate to one another? Is your expert sketching on your legal pad while he explains technical terms to you? When you do a site visit, what photos do you take and will those photos by themselves convey size, scale, and perspective,

or will they need to have graphic elements added to do the trick?

There is also no substitute for the repetitive work of refining and revising your messages for trial. Some of the most gifted public speakers I know craft their openings and closings in narrative form, carefully considering the order of their thoughts, the transitions between subjects, the language that will tie facts to law, and the ultimate conclusions they want their audience to reach. Once you’ve done that, stay true to your outline instead of winging it with jurors; they appreciate a well-constructed story that is consistent from start to finish at trial. In fact, they crave it.

In short, your most basic trial skills are still the antidote for confusion every time.

Mitigating Bias

Although I recognize the difficulty for multiple civil plaintiffs in cases that are joined, about this I am less convinced by the research that joinder presents a unique challenge when it comes to damages. We see mock jurors reach their limits in the discussion of damages even in cases with only one party on each side. In jurisdictions where the multiple elements of damage are itemized on a verdict form (instead of damages awarded in one lump sum) we often see juries lose their steam after the first two or three. Many times each juror begins deliberations with a ballpark total in mind and the process of reaching a verdict is no different than the typical negotiation patterns we see in mediation, or it is the result of a simple averaging exercise (which itself is sometimes prohibited by the jury instructions).

Where there are a number of different opinions in the deliberations – something we might think of as the “joinder” of six or twelve independent thinkers – the problem of reaching damage awards in jury deliberations is inherent in every civil case, resulting at times in lower amounts for plaintiff(s). Likewise, where the majority of damages requested are non-economic and therefore highly subjective, attorneys need to be very deliberate about teaching jurors how to quantify each element in a distinct and rational way.

It is, therefore, important for the attorney with multiple plaintiffs to recognize that he or she should present their clients’ damages in very individual ways – including some recognition of where the amounts should be different (including the idea that one should get less than another) – and to acknowledge the reasons why. Likewise for defendant, it is a good idea to highlight where you believe plaintiff’s attorney may be bootstrapping money for one in the argument about money for another.

On the question of prejudice to multiple defendants (civil or criminal) who are found “guilty by association” my thoughts go to the jury selection process, where we have the first opportunity in a trial to address the issues that cause us the most

concern. I routinely recommend that lawyers embrace the bias in their cases and address them head-on from the start.

Consider creating a conversation with jurors during voir dire along these lines:

- Has there ever been a time when you worked with a group of people or went to school with a group of people whose ideas were very different from your own? What did you learn from that?
- Tell me about the social and professional and religious groups that you have belonged to in your life. How much did you have in common with the other members of the group? What are some of the ways that you are not like the others?
- What other kinds of groups do you think we fall into? Is there anyone who identifies closely with an ethnic group? Tell me about that.
- Do we always choose the groups we are in, or are we sometimes included by circumstances that are not of our choosing?
- Do you think people who belong to social or professional or religious groups are all alike? For example, everyone in a sorority or a fraternity believes the same thing? Or, everyone who belongs to one political party or another is of the same mind? Why or why not?
- Raise your hand if your parents ever told you to be mindful of “the company you keep”. What did they mean? Why?
- Has there ever been a time when you thought you were judged unfairly or that people made assumptions about you because of your membership in a certain group?

Once jurors have told you from their own experience that they have walked in your clients’ shoes, you are more likely to be persuasive on the issue without sounding like you are whining about the circumstances of your case.

Given the further difficulty for defendants in criminal cases who rarely testify on their own behalf, it is important to speak directly to this in closing argument. Tell the jury if you are worried that they will throw one in with all the others and explain why that would be the wrong result. Remind them that the right to trial by jury is an individual right, but because of the limits on time and budget in our court system, they are often tried together. Justice should not suffer for the short-falls of government when our most precious resource is still the jury’s ability to reason and decide the case fairly for all parties.

Finally, it may be important to ask the judge to allow special

interrogatories that deviate slightly from the pattern. It could be effective to present the jury with separate verdict forms (one for each defendant, or one for each plaintiff) instead of putting all the questions together in one form. You may also want an instruction from the judge that they must deliberate to verdict individually, with a break in their deliberations that allows them to “start over” instead of accumulating their decisions and applying them broadly to the group. In your motion for changes to the status quo, be sure to cite the important work of empirical social science research like that presented by Reed and Bornstein.

It is safe to say that jurors themselves are unaware of the prejudicial effects of joinder. Raising that awareness during the trial and being the better teacher in the courtroom might go a long way to minimizing the harm. ☪

Footnote

[1] For information about how to select a consultant and evaluate the quality of his or her work, see Chapter 13 of *The Persuasive Edge*. <http://www.amazon.com/Persuasive-Second-Edition-Richard-Crawford/dp/1933264993>

Krystia Reed and Brian H. Bornstein reply:

We appreciate the responses from Sonia Chopra and Charlotte Morris and agree with their thoughtful comments. The considerate suggestions from Chopra and Morris will be helpful to us and other researchers who conduct this research in the future. Specifically, Chopra’s suggestion that future studies include corporate defendants rather than individual defendants is very practical, especially since we know that jurors treat individual and corporate defendants differently. Such research would likely aid companies who are in a joinder situation in the future, which is increasingly common.

Morris’s suggestion that attorneys should explicitly address joinder in closing arguments is a great idea that deserves to be tested. Although we are not aware of any research that has empirically tested this suggestion in terms of joinder, research on PTP and other sources of bias suggests that debiasing techniques, during closing arguments or judge’s instructions, are not typically successful. Finally, Morris comments that plaintiffs could minimize joinder problems by emphasizing differences among plaintiffs during the trial, which is an interesting suggestion that could also be empirically tested. However, it might be difficult to highlight these differences in reality because in many cases each plaintiff has his or her own attorney advocate who is attempting to get the largest award possible, which likely results in differing suggestions to the jury of who is deserving of more damage awards.

While our study was a first step in investigating the effect of joinder on civil plaintiffs, as these attentive comments recognize, more research on this topic is needed and could be extremely useful to attorneys facing joinder in their cases. ☪



Thank and Excuse: Five Steps Toward Improving Jury Selection

by Richard Gabriel

Editor Note: Yet another indication that the civil jury system is likely not dying. A deeply felt piece on why peremptory strikes and jury selection processes are so important for justice.

PERIODICALLY OVER THE YEARS there have been calls to eliminate peremptory challenges, the challenges that attorneys use to strike jurors they believe will be unfavorable toward their cases. The main arguments given for removing the peremptory challenge are that the challenges can be used to discriminate against a particular protected class (e.g., minorities, women) or that they can unfairly stack a jury in favor of one side over the other.

The elimination of peremptory challenges would, in fact, harm the rights of the parties to obtain a fair and impartial jury and is a wrong-headed solution to a very real problem that does exist in today's jury selections across the country.

Most of the existing problems in the court system today related to jury selection stem from the fact that we have a poorly understood definition of juror bias as it truly exists, and poorly implemented procedures to investigate and discover if a juror

has a bias that would impair his or her ability to be fair and impartial in how they listen to the evidence. In the court system, we do not really make distinctions between biases, prejudices, habits, preferences, inclinations, or even impressions. These distinctions are important in discerning whether a particular attitude or belief might impair the neutral, objective evaluation of the evidence by a juror. Some jurors may have biases against minority groups simply because they have not interacted with these groups in day to day life, while others may have very strong feelings against a particular group and blame them for the social and economic ills in this country. Bias is perception with innumerable variables and colors.

Courts, for the most part, only recognize explicit bias, a bias that the juror himself or herself recognizes and acknowledges. On the rare occasions a juror does identify an experience or attitude that may affect their ability to be fair and impartial, the courts simply asks the juror whether they can "set it aside". Most jurors dutifully answer in the affirmative. Compounding this problem is the fact that attorneys and judges traditionally ask closed-ended Yes/No questions about biases without giving the juror the opportunity to explain. So, if a prospective

juror identifies a bad experience they had with a doctor when being selected for a medical malpractice case, they are usually just asked whether they can “set that experience aside”, and are forced to only answer yes or no. While some judges may dismiss the juror for cause if they express a particularly hostile attitude, many judges will seat the juror if they say they can set it aside, no matter how bad their experience.

Additionally, many attorneys still believe they should spend their time in voir dire inculcating or priming the jury about the themes of their case. Judges typically hate this and this behavior is a primary reason that voir dire time has been so drastically reduced in recent years. It creates a focus on the case rather than the juror, with attorneys and judges exacting a series of promises from jurors about open-mindedness and ability to follow the law that they don't know if they can keep, rather than exploring potential issues and areas of bias.

The net result is that the attorneys are left with little or scant information about jurors. They then resort to stereotypes and biases, implicit or explicit, when making their peremptory strikes, which can in fact result in a Batson situation where strikes are being discriminatorily used based on demographic information.

What's missing from this process is a frank and candid discussion with jurors during voir dire about *how* their experiences and attitudes might affect their ability to listen to the case or deliberate to a verdict. If the judge is inclined to even allow attorneys to inquire about bias (which can be rare, particularly in Federal Court), the courts mistakenly believe that the main job of jury selection is to identify and neutralize biases rather than take a serious look at how biases affect a juror's thought and decision making process. It is not the *presence* and *acknowledgment* of a bias that automatically creates an inability to be fair and impartial, it is whether that bias is significant enough to *impair* the ability of a juror to fairly and impartially judge the case. So in a personal injury case involving a car accident, it is not whether a juror believes there are too many reckless drivers, but a juror's own personal rules of the road when they drive that will steer their collection of evidence: do they always signal a lane change? Do they drive at or above the speed limit? Do they use a cell phone in the car?

But with the lack of skill in asking questions that elicit a juror's true feelings, the lack of skill in identifying bias, and the limited time and questioning the courts now allow, attorneys resort to their own demographic formulas in selecting juries. Do I want men or women on this panel? Old or young? Educated or uneducated? Blue collar or white collar? Attorneys then exhibit their own biases by forming rules about whom they do and don't select. Civil defense attorneys are often suspicious of teachers and union members. Plaintiff attorneys often don't like engineers, bankers, and executives. Criminal defense lawyers don't like Republicans. And it has been shown, that in some trials and even jurisdictions, prosecutors have used peremptory challenges to systematically try and eliminate Afri-

can-Americans from juries.

But that doesn't mean we should eliminate peremptory challenges; instead we should reform the voir dire process and ensure peremptory challenges are being used properly. The concept of peremptory challenges has been in place since Roman times when each side would choose one hundred jurors and then eliminate fifty from their opposing side's ranks, leaving a panel of one hundred jurors. English common law originally allowed for thirty-five peremptory challenges before Parliament finally eliminated the prosecutorial right to challenges in 1305 and eliminated peremptories for the defense in 1988. While there is no explicit Constitutional right to peremptory strikes in this country, we do have a right to an impartial jury. These days, jurors have knowledge of (or at least access to via the internet) a broad range of topics that directly relate to the cases we try. Opinion often accompanies knowledge, which can affect impartiality.

Better procedures can be implemented that allow both the judge and the attorneys to have a fuller understanding of a juror's potential biases so they can make more informed choices about cause and peremptory challenges. These procedures can be remarkably efficient and even time saving as long as the judge and litigants agree that the purpose of jury selection is to get to really know the jurors on the panel: to understand if and how their experiences, attitudes, and temperament may affect how they listen to and decide the case. Please note that some of the recommendations below are completely counterintuitive to how attorneys and judges are trained.

1. Each side identifies all the issues in their case that they believe may give rise to a bias or negative impression of their case or client. This requires attorneys to step into opposing counsel's shoes. It also requires planning and time when attorneys are usually focused on opening statements and first witnesses.
2. Formulate open-ended questions about that bias or impression. These include questions like, “How do you feel about...?” or “How do you think about...?” or “What's your opinion about...?” Which question would yield better information about whether a juror could be fair and impartial in a criminal case? “Will you agree to treat a police officer's testimony the same as any other witness?” or “How do you feel about law enforcement?”. There is a world of difference in the quality of responses to these questions, and only one of these questions truly reveals a potential bias. This is counterintuitive to attorney training as sometimes vague or ambiguous questions are the best voir dire. They invite the jurors to impose their interpretation of the question, giving the attorneys and the judge more of a juror's genuine feelings and beliefs. Please note that asking *whether* they have an opinion provides an excuse for jurors not to speak.

3. Ask follow-up questions. Given the foreign and intimidating environment of a courtroom, jurors are naturally reluctant to speak candidly about their opinions on difficult subjects. Their first responses don't always express their true feelings. By making follow-up questions like "What else?" or "Tell me more about that", a juror is prompted to reveal deeper or more meaningful attitudes he or she may have on specific case issues.
4. Ask hard questions. Cases involve tough issues and jurors have to make tough decisions. Jurors don't always have quick and ready responses to questions about the death penalty or antitrust laws. While, some jurors don't believe in the death penalty or in anticompetitive business conduct, many jurors do not know how they themselves feel about these complex and difficult issues. So, in an employment case, a question like, "How do you feel about race relations in this country?" may bring a considered pause as the juror reaches inside to look at how he or she really feels and to figure out the best (and most socially desirable) response. Leave room for their silence. That struggle, by itself, can tell the attorneys and judge a great deal about the juror.
5. Be open-minded and curious. In the legal profession, lawyers and judges are used to controlling and judging information, but it is much more useful in jury selection to forego judging a juror's response and just follow their train of thought. This will tell you the full extent of their attitudes and whether their response is an impression or a full-blown bias. If the attorney (and the judge) is open minded, curious and non-judgmental, jurors will be more candid in their responses. With good questioning, jurors should spend 80% of voir dire speaking, while the attorneys or judge should only spend 20%.

The reason these steps are so important is because jurors are not naturally impartial. We all form impressions and opinions very quickly. Sometimes those attitudes are deeply embedded below conscious awareness. The courts have started recognizing the role of this "implicit bias" and how it drives decision-making, so it takes real cognitive effort to achieve the neutral objectivity the courts expect of jurors. This effort is even heavier lifting when we already have preconceived beliefs or habits borne of years of driving cars, working in various employment situations, or using products and now they are sitting on a jury in

a lawsuit with those same issues. Trials are decided by people with their own sensibilities and preferences, and the courts instruct them not to abandon their common sense, so during voir dire we should find out the composition of their common sense.

As for charges that attorneys use peremptory strikes to somehow "stack" a jury in their favor, this is true with one important caveat. Of course each side wants a more favorable jury for their case. That is advocacy. But each side has an equal ability to ask questions and exercise challenges, thus both have equal opportunity to "manipulate" the jury composition. If there a great juror that one side wants to have on the jury, no doubt the other side sees this and will use a peremptory strike to eliminate that juror. Thus, these challenges provide balance to one side's supposed manipulations.

In 1965, our Supreme Court ruled that peremptory challenges didn't need to be justified (*Swain v. Alabama*), opening the door to the discriminatory use of strikes. This was modified more than twenty years later in *Batson v. Kentucky* and *J.E.B. v. Alabama ex rel T.B.* where the Supreme Court explicitly prohibited the use of peremptory challenges for excluding jurors based on race or gender. If a judge finds a prima facie case of potential misuse of challenges, counsel has to justify why they struck a particular juror. With better quality information about a juror, it would be much easier for a judge to conclude whether counsel had good reasons for their strikes.

In jury selection, the overall goal should be to improve the quality of information that attorneys and judges use to exercise cause and peremptory challenges. Instead of eliminating peremptory challenges, it would be wiser to ensure this important procedure is used properly to secure a fair and impartial jury. Education should always precede elimination. We seek to fully understand and improve this important procedural safeguard before we decide to get rid of it. 10

Richard Gabriel is a former President of the American Society of Trial Consultants and author of the book [Acquittal: An Insider Reveals the Stories and Strategies Behind Today's Most Infamous Verdicts](#) (Berkley Press) as well as the co-author of [Jury Selection: Strategy and Science](#) (Thomson West). Mr. Gabriel is a frequent commentator on high profile trials for CNN.



Feedback Groups: A Useful Low-Cost Tool for Trial Consultants and Their Clients

by Allan Campo

Editor Note: Here's a new technique for helping attorneys get additional pretrial feedback on their case.

TRIAL CONSULTANTS, like the attorneys they serve, often find themselves being asked to provide high-level service and aggressive cost-containment at the same time. One common request from clients focused upon managing expenses is for the consultants to forgo case specific jury research and rely upon their consulting experience with similar cases or similar venues. Interestingly, this pressure can increase as the perception of the consultant's level of experience increases.

The problem the consultant sees, of course, is that no two cases are really the same. Wise consultants are rarely fooled into generalizing based upon the experience and perspective of just one person, whether it is himself or herself or anyone else. Whenever possible, most consultants will seek to ground their advice and input to trial counsel in the wellspring of wisdom for us all: the viewpoints of surrogate jurors with regard to *this case* with *these precise facts* brought at *this time* in *this venue*.

Consultants on either side of the bar learned years ago from as-

bestos and tobacco cases and other mass torts that similar facts and similar venues can nevertheless produce quite dissimilar results both with surrogate and actual jurors. The case tried last month that looks a lot like the case to be tried next month could end up looking surprisingly different on the verdict form. Much of the time, it is little things: a variation in the injury pattern with the plaintiff, a new expert, a closing argument with a new emphasis. Small contrasts in input can produce big contrasts in outcome. But, which differences? What will matter to the fact finders? There is only one reliable way to find out. Someone has to ask. (Part of the cause of this variance, of course, is chance-induced differences in the composition of juries from one case to the next. This article puts that question aside for the moment, focusing instead upon the differences between *cases* as opposed to the differences between *juries*.)

One of the devices consultants can utilize is what has been termed the *feedback group*. The feedback group is the smallest-scale device available to consultants for getting input from surrogate jurors on issues in a case. It is designed to make the consultant smarter, to arm the consultant with the increased confidence that can only come from discussing the case or

elements of the case with dispassionate jury-eligible citizens. What it is NOT is *research* that aspires to be predictive or empirically evaluative. It is not research at all, in the conventional sense. It is instead simply a source of qualitative data, stimulating the consultant's thought process, and perhaps generating new ideas. It is information only, but it is particularly valuable information because its source is the minds and hearts of surrogate jurors.

It may be useful to think of feedback groups (or feedback group sub-varieties such as witness evaluation groups or graphics-testing groups) as *process* tools for consultants to use in the performance of their service to client attorneys. These are to be distinguished from *evaluation* experiments such as multi-group focus studies, on-line surveys, or multi-jury mock trials. Process tools are more informal and less difficult to utilize and thus less expensive than evaluation tools. These latter usually are of significantly larger scale and are executed in a fashion that adheres at least generally to the rules of experimental design.

When a client attorney asks, "Do you think they will like my expert witness?" a consultant might be willing to say what he or she *thinks*, but may want first to test that thinking by use of a process tool: showing and discussing a video of the witness with a small group of surrogate jurors. If a client attorney asks, "What are our chances of prevailing on liability?" the question is much harder, since it is asking for something that is most aptly provided by a research tool of the evaluative type. Process tools can't predict anything with the reliability and validity required of serious prediction-of-opinion research. But, process tools are nevertheless highly useful in the course of developing the case. Want to understand what might come up for at least some jurors when a certain expert goes to the stand? Go talk to ten of them about it for two or three hours - *before* you prep that expert!

Feedback groups are best when stripped of any pretense to be more than they are. The number of subjects is too small to do statistics, so why be tempted? Questionnaires, if utilized, should strictly avoid asking for responses that lend themselves to quantification. In other words, a consultant who wants to get some initial feel for the viability of a theme for a case shouldn't ask yes/no or ratings questions which beg to be counted. Counting can create illusions.

Questionnaire items such as the following create a risk:

"Please check "yes" or "no" below: Based on what you heard, do you think Acme should win this case against The Widget Corp?"

Let's say that seven of the ten people in the group check "yes". Those "yes" and "no" boxes are likely to get counted, and *somebody*, maybe even a well-meaning consultant, might be just a little bit persuaded to think that 70% of jurors will love Acme's

case. As any statistician will explain, descriptive quantification, even at this level, can be an invitation to generalization. Such generalization isn't merely risky. It's wrong. The likelihood is quite high that chance alone could produce a result of this sort in a group of only ten people. The *information* gained from the perspectives of the individual group participants is what is of value here, not the rate at which those perspectives occur.

The smarter course with a small group is to use a questionnaire restricted to open-ended questions that invite surrogate jurors to think privately about the topic and then write down their thoughts. This is ultimately more informative and, from a research validity standpoint, more sound. Just a few carefully considered general questions will stimulate a great deal of thinking on the part of the surrogates. The resulting discussion is benefited greatly by the surrogates' having organized at least some of their thoughts as responses to the questionnaire. The jurors' questionnaire responses might serve as notes for the consultant and the client attorney, but, hopefully, they will not be seen or treated as a score sheet.

Importantly, feedback groups should also not be lent unintended importance by the generation of a document titled a "Report" or a "Report of Findings". Just as with quantification, titling of documents can give the contents value they do not deserve. Familiar titles and terms such as "Report of Findings" or "Focus Group Report" or "Research Report" all can generate inappropriate expectations. Such skewed expectations can lead to selective reading and digestion of the material. The end result just might be a client who thinks he has learned more than he actually has learned.

A good record of a feedback group might at most be a short memo recounting interesting elements of the conversation between the consultant and a group of subjects. Short in length and styled as a memo, it is a perfect match for that which it describes. Useful and potentially stimulating information may have been generated, but the information is purely qualitative. It is "thought food". As said earlier, it makes the consultant smarter, and it makes the consultant more able to provide quality input that is current and on-point to the client attorney.

Clients who want to give their attorneys a sufficient budget for thorough preparation of the case probably should be willing to authorize the expense of one or more feedback groups for the use of the trial consultant retained on the case. The price is "right", and there can be terrifically useful material generated in a very short time. The only significant expense over and above the consultant's time is the recruiting cost for around ten surrogate jurors. There should be no major questionnaire development or analysis costs and, as suggested above, virtually no report-generation costs. Video-related costs can be eliminated as well. There is no real need for video-recording of feedback sessions, unless the consultant or the attorney client wishes to forgo note-taking of their own during the "live" conversation and make notes later from a review of the video. In such an event, informal video-recording tools should be sufficient. No

expensive camera rentals, no video-recording technician needed.

Feedback groups are also less expensive than larger scale evaluative tools because they require much less active participation from the lead trial counsel or other senior attorneys in the case. Does this impact the work-product protection? Consider this: Feedback groups are of course done only at the direction of trial counsel, are based upon materials he or she has provided, and are reflective of the issues in which counsel is interested. While attorneys must *always* evaluate confidentiality questions for themselves when it comes to the work of consultants, it is this author's experience that few attorneys see feedback group work as anything other than typical "yellow-pad" attorney work product produced for the attorney by another, whether it be a paralegal or a retained consulting expert. For this reason, many consultants and attorneys are comfortable with the idea of feedback group work being conducted without any attorney presence. More cautious lead attorneys and the consultants with whom they work might elect to have an associate

well versed in the case oversee and assist as a resource in the feedback session. In either event, the expense is much less than it would be if the lead attorney were heavily involved, as in a multi-jury mock trial.

The feedback group, stripped of the burden of expectations that exceed its capabilities, can then be a wonderfully helpful process tool for trial consultants and those whom they serve. It should be an option to consider when cost concerns prohibit larger scale research. While it cannot *ever* predict the predisposition of a venire or the outcome of a trial, it can often foreshadow at least some aspects of juror thinking. For that alone, it is immensely valuable. ©

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Looking for Lying in All the Wrong Places

by Bill Grimes

Editor Note: An update on the deception research. For years, we've tried to figure out who is lying and who is telling the truth and it's been quite a conundrum. Here's an overview of the more recent research on deception responding to the age old question: "Are we there yet?"

LYING IS PART of everyday life. We lie to escape punishment: "I had no idea I was going over the speed limit, Officer." We lie to protect others from being hurt: "Honey, does this outfit make me look fat?" Lying even helps regulate various aspects of society, such as the judicial system: "Despite what you think of lawyers you can be fair and follow my instructions, can't you?"--"Yes, your honor." Despite our familiarity with untruthfulness – or maybe because of it – we seem to be on an endless quest to unmask the deceiver. This is easier said than done. The research is surprising.

- Even the professionals aren't very good at catching people in a lie.
- When we do catch a lie, it's often not for the reasons you

may expect.

- There is no "Pinocchio's nose". That is, there is no single verbal, nonverbal or physiological cue uniquely related to deception.

To Catch a Liar: Easier Said Than Done

In 2006, two of the premier researchers in the field of deception detection, Charles Bond and Bella DePaulo, re-examined the results of over two hundred studies on how well people detect lying. They found that people were able to detect lies 54% of the time. You'd get 50% right by pure chance, so that's not very impressive (Bond & DePaulo, 2006). Another study tested 13,000 people to see how many of them were good at spotting lies (O'Sullivan, 2008). Thirty-one were good at it. That is 2-tenths of one-percent (.02%), again, not very impressive.

For years it was thought that the reason most people are so bad at catching liars was because many of the "cues" people had been relying on were in fact *not* reliable. When two thou-

sand people from all over the world (Bond, 2000) were asked how they spotted liars, the most common answer was, “Liars won’t look you in the eye”. But studies have shown time after time that people who are telling the truth have poor eye contact about as much as liars do. The same is true with fidgeting, face touching, clearing the throat, speech rate and other cues thought to be red flags of deceit. Studies show that liars and truth tellers do those things with fairly equal frequency. Behavioral differences between liars and truth tellers are small (Vrij, 2008).

Research also shows that lie experts – police interrogators, customs agents, even lawyers – aren’t any better at detecting lying than anyone else (Bond & DePaulo, 2006). Decades of research show that lie detection is a near-chance game.

Cues: True and False

The problem becomes that focusing on false cues causes people to miss real ones. But which are the real cues to deception? The highly motivated liar is going to do everything possible to keep from being discovered. The best way to do that is to appear honest. What makes lie detection so difficult is that truth tellers have the same motivation – they want to appear honest.

Several studies indicate that effective deception detection is not based in what liars *do*, it’s based instead in what they *don’t do* (Bond & DePaulo, 2008; Vrij et al, 2004; Colwell et al, 2006). When lying, people tend to move around less, blink less, have longer eye contact, make fewer speaking errors and do not try to backfill omitted details. In other words, the liar is trying to make us think he or she is being honest. Motivated liars, in an attempt to control their body language, may overdo it and appear more rigid than usual, and show a reduction in hand and arm movements (gestures) in trying to appear calm (*The Truth About Lies* 2010).

The Dual Tracks of Lying

Keep in a mind a couple things as we go through this, the research is pretty clear that we are not very good at detecting deception. However, that does not mean people don’t *think* they’re good at it. People gauge truth-telling in their daily lives and throughout the judicial process. Attorneys need to be able to gauge prospective juror’s honesty in jury selection. Attorneys want to know if their witnesses are telling the truth. Jurors want to know the same thing. Are they able to? Probably not, but ‘perception is reality’. If jurors think your witness is being deceitful, it doesn’t matter if he or she is or not since the jurors have made up their minds.

Actual and perceived judgments require lying to be observed on dual tracks. You have to look at it from the perspective of the liar and the perspective of the observer who judges the lying.

- One track requires a focus on what liars actually do – actual behavioral cues.
- The other track focuses on what judges of lying think liars do – the perceived behavioral cues.

Some very interesting findings emerged from a meta-analysis of over two hundred studies done a few years ago (Hartwig & Bond, 2011). What people say indicates lying to them (e.g., what they observe in others) is remarkably consistent. For example, the belief in a link between gaze behavior (e.g., direct eye contact) and deception was the most frequently reported. But, there are limits to what we know about ourselves. The behaviors we say tip us off that someone is lying may not actually be what we use to conclude they are being deceptive (Nisbett & Wilson, 1977). It is quite possible that we are unaware of the basis for our truth-telling assessments. When we say, “I knew he was lying because he wouldn’t look us in the eye,” or “He couldn’t sit still,” it is only a reflection of stereotypical deceptive behavior that has little impact on actual decision-making.

The behavior of liars and truth tellers shows that cues to deception are scarce and that many subjective cues are unrelated to deception. We discussed gaze aversion and the lack of a relationship to actual deception. In addition, the assumption that liars are more nervous, which is characterized by fidgeting, blushing or speech disturbances, is not linked to deception.

Most of the past research on lying relied on what people think indicates deception. When Hartwig and Bond took another look at decades of research, they wanted to account for the fact that people exist in an uncertain environment and that judgments and inferences about what’s going on around them are made on the basis of uncertain information. For example, a musician may play the same tune but with different emotions (e.g., anger, sadness, happiness) each time (see Juslin, 2000). A listener may be able to identify the tune being played, but have a difficult time judging what emotion the musician is attempting to convey.

What people actually rely on to detect truthfulness is different than what had been thought in large part because we are not very good at describing why we think someone is lying. It is more of a feeling, not unlike what former U-S Supreme Court Justice Potter Stewart wrote about hardcore pornography, “It’s hard to define, but I know it when I see it”. The cues tend to be impressions such as indifference. This shows that our intuition is more accurate than previously thought.

How Does It Feel?

Hartwig & Bond’s analysis placed less emphasis on self-reporting – because we aren’t very good at it and often articulate what sounds logical, such as poor eye contact – and placed more reliance on indirect lie detection tasks. Individuals were not asked whether they thought someone was lying and what made them think so. Instead they were asked if a person displayed certain

characteristics. For example, did they look “uncomfortable”, “uncertain”, “positive” or “spontaneous”? Did their story sound plausible? The results show that actual cues to truth-telling (and thus to detecting deception) are not single behaviors, such as the liar not sitting still, but instead, more global impressions from the observer. The theory is liars might be less familiar with and have less emotional investment in what they are saying, so they come across as indifferent and ambivalent.

Here are some of the prominent cues to actual deception identified in the Hartwig & Bond analysis:

Deception Detection improves when we ask the right questions of the observer	
DECEPTION	TRUTH-TELLING
Uncertain	Positive
Indifferent	Consistent
Ambivalent	Cooperative
Implausible/Illogical	Realistic
Few sensory details	Spontaneous

Notice that eye contact is not a prominent cue for deception or truth-telling. People think it is, even when describing their own lying behavior, but we may have limited insight into our own cognitive processes (Strömwall, Granhag, & Hartwig, 2004). Those judging liars have a more intuitive reaction. They don't seem to know what behaviors indicate truth-telling, but they react more suspiciously when watching a deceptive statement than when watching a truthful statement. For example, as illustrated in the visual above, observers will see the liar as more indifferent, uncertain or ambivalent and the truth-teller as more consistent, realistic and spontaneous.

Group vs. Individual

A very recent study indicates groups do a better job of detecting lying than individuals (Klein & Epley, 2015), which is a boost to the jury system. To be precise, the study found that the dynamic of group discussion rather a collection of individual responses – for example a poll or survey – accurately detected deception a greater percentage of the time. However, this author suggests a healthy dose of skepticism in these findings since the increase was not overwhelming (even though statistically significant). Here are the percentages of time groups and individuals were correct in identifying lying. Remember 50% would be as good as a guess.

Conclusion

While it is important to know the real indicators of deception, it is equally important to know what people, such as jurors, *perceive* to be indicators of lying. When preparing a witness, it

Experiment	Accurately detects lying	
	Groups	Individuals
1	62%	54%
2	60%	54%
3	53%	49%

is prudent that he or she be positive, consistent, cooperative and spontaneous because observers (jurors) intuitively attribute those characteristics to honesty. This opens up a new area to explore in jury research.

Explore mock jurors' reactions to witnesses in focus group debriefings, “What did you feel as you watched/listened to this juror?”. Prepare prospective jurors in voir dire not to ignore their intuitive feelings as they listen to a witness. Instead, teach jurors to ask themselves different questions in assessing credibility and work in witness preparation to help your witnesses tell their truth effectively.

It is also important that the witness exercise effective eye contact, avoid fidgeting, face touching and clearing the throat because, while not reliable cues to deception, people explicitly think they are reliable and watch for them. (By the same token, don't assume a member of the venire is untrustworthy because she won't look you in the eye, fidgets and is constantly playing with her hair. Research shows people telling the truth do those things with similar frequency as those who are lying.)¹⁶

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