



The Jury

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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.

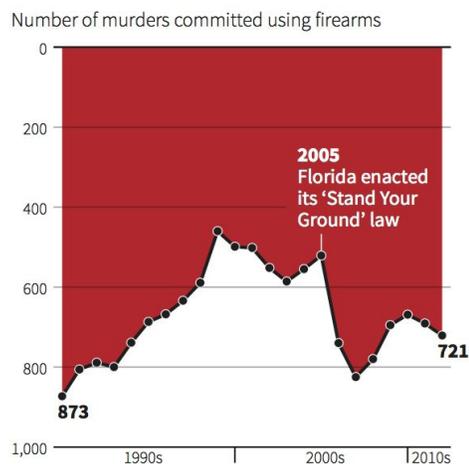
Potential Bias in Visual Evidence

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.”

Gun deaths in Florida



Source: Florida Department of Law Enforcement

C. Chan 16/02/2014

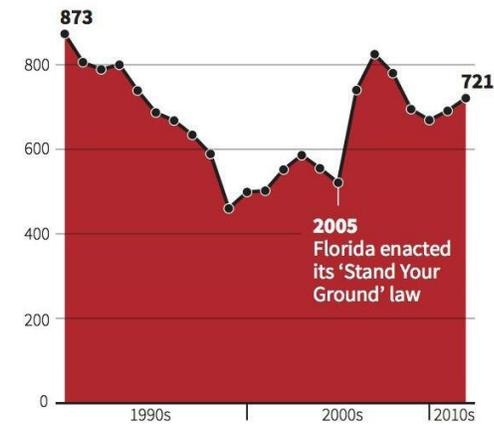
REUTERS

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.

Gun deaths in Florida

Number of murders committed using firearms

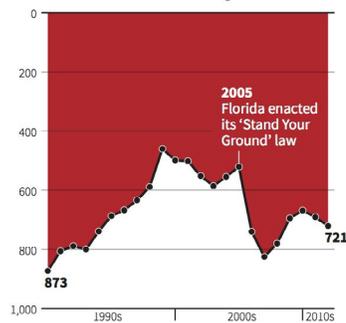


Source: Florida Department of Law Enforcement

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

Gun deaths in Florida

Number of murders committed using firearms

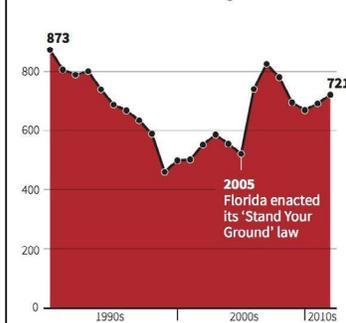


Source: Florida Department of Law Enforcement

C. Chan 16/02/2014

Gun deaths in Florida

Number of murders committed using firearms



Source: Florida Department of Law Enforcement

© REUTERS

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, PhD. [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. ©