



## 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.*

**I**MAGINE 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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## References

- Boalick, S. R. (1998). Preliminary proceeding: Joinder and severance. *Georgetown Law Journal*, 86, 1427-1444.
- Bordens, K. S., & Horowitz, I. A. (1983). Information processing in joined and severed trials. *Journal of Applied Social Psychology*, 13, 351-370.
- Dawson, R. O. (1979). Joint trials of defendants in criminal cases: An analysis of efficiencies and prejudices. *Michigan Law Review*, 77, 1379-1455.
- Effron, R. J. (2012). The shadow rules of joinder. *Georgetown Law Journal*, 100, 759-821.
- Greene, E. & Loftus, E. F. (1985). When crimes are joined at trial. *Law and Human Behavior*, 9, 2, 193-207.
- Hamilton, D. L. & Sherman, S. J. (1996). Perceiving persons and groups. *Psychological Review*, 103, 336-355.
- Harvard Law Review (2008). Seventh Circuit holds that a codefendant's repeated and violent outbursts, coupled with intimidation from the gallery, denied defendant a fair trial. *Harvard Law Review*, 121, 2238-2245.
- Horowitz, I. A. & Bordens, K. S. (1988). The effects of outlier presence, plaintiff population size, and aggregation of plaintiffs on simulated civil jury decisions. *Law and Human Behavior*, 12, 209-229.
- Horowitz, I. A. & Bordens, K. S. (2000). The consolidation of plaintiffs: The effects of number of plaintiffs on jurors' liability decisions, damage awards, and cognitive processing of evidence. *Journal of Applied Psychology*, 85, 909-918
- Horowitz, I. A., Bordens, K.S., & Feldman, M.S. (1980). A comparison of verdicts obtained in severed and joined criminal trials. *Journal of Applied Social Psychology*, 10, 444-456.
- Kerr, N. L., & Sawyers, G. W. (1979). Independence of multiple verdicts within a trial by mock jurors. *Representative Research in Social Psychology*, 10, 16-27.
- Leipold, A. D. & Abbasi, H. A. (2006). The impact of joinder and severance on federal criminal cases: An empirical study. *Vanderbilt Law Review*, 59, 349-402.
- Leon, M., Oden, G. C., & Anderson, N. H. (1973). Functional measurement of social values. *Journal of Personality and Social Psychology*, 3, 301-310.
- Parker v. United States* (1968). 404 F.2 1193.
- Reed, K., & Bornstein, B.H. (March, 2015). *Culpable by association: Juror decision making in civil trials*. American Psychology-Law Society. San Diego, CA.
- Richardson v. Marsh* (1987). 481 U.S. 200, 209.
- Rottenstreich, Y., & Tversky, A. (1997). Unpacking, repacking, and anchoring: Advances in support theory. *Psychological Review*, 104, 406-415.
- Ruva, C., McEvoy, C., & Bryant, J. B. (2006). Effects of pre-trial publicity and jury deliberation on juror bias and source memory errors. *Applied Cognitive Psychology*, 21, 45-67. doi: 10.1002/acp.1254
- Tversky, A., & Koehler, D. J. (1994). Support theory: A nonextensional representation of subjective probability. *Psychological Review*, 101, 547-567.
- United States v. Foutz* (1976). 540 F.2d 733 (4th Cir.).
- United States v. Mannie* (2007). 509 F.3d 851 (7th Cir.).
- United States v. Snyder* (2006). 184 F. App'x 356 (4th Cir.).
- Waytz, A. & Young, L. (2012). The group-member mind trade-off: Attributing mind to groups versus group members. *Psychological Science*, 23, 77-85. doi: 10.1177/0956797611423546
- Windschitl, P. D., & Chambers, J. R. (2004). The dud-alternative effect in likelihood judgments. *Journal of Experimental Psychology: Learning, Memory, and Cognition*, 30, 198-215. doi: 10.1037/0278-7393.30.1.198.

#### 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.<sup>[1]</sup>

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. ☪