Cynthia Willis-Esqueda
Brian H. Bornstein *Editors*

The Witness Stand and Lawrence S. Wrightsman, Jr.

The Witness Stand and Lawrence S. Wrightsman, Jr.

Cynthia Willis-Esqueda • Brian H. Bornstein
Editors

The Witness Stand and Lawrence S. Wrightsman, Jr.

Editors
Cynthia Willis-Esqueda
Department of Psychology
University of Nebraska-Lincoln
Lincoln, NE, USA

Brian H. Bornstein
Department of Psychology
University of Nebraska-Lincoln
Lincoln, NE, USA

ISBN 978-1-4939-2076-1 ISBN 978-1-4939-2077-8 (eBook)
DOI 10.1007/978-1-4939-2077-8

Library of Congress Control Number: 2015947278

Springer New York Heidelberg Dordrecht London
© Springer Science+Business Media New York 2016
This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.
The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.
The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made.

Printed on acid-free paper

Springer Science+Business Media LLC New York is part of Springer Science+Business Media (www.springer.com)

Contents

Introduction 1
Cynthia Willis-Esqueda and Brian H. Bornstein

Larry Wrightsman: A Pioneer in Injecting Social-Psychological Knowledge Into the Legal System 9
John C. Brigham

Psychological Science on Eyewitness Identification and the U.S. Supreme Court: Reconsiderations in Light of DNA-Exonerations and the Science of Eyewitness Identification 17
Laura Smalarz, Sarah M. Greathouse, Gary L. Wells, and Karen A. Newirth

The Credibility of Witnesses 41
Stanley L. Brodsky and Ekaterina Pivovarova

False Confessions: From Colonial Salem, Through Central Park, and into the Twenty-First Century 53
Saul M. Kassin

Identifying Juror Bias: Moving from Assessment and Prediction to a New Generation of Jury Selection Research 75
Margaret Bull Kovera and Jacqueline L. Austin

Race and Its Place in the United States Legal System 95
Cynthia Willis-Esqueda

Law and Social Science: How Interdisciplinary Is Interdisciplinary Enough? 113
Brian H. Bornstein

From War Protestors to Corporate Litigants: The Evolution of the Profession of Trial Consulting 129
Amy J. Posey

Undergraduate Education in Law and Psychology 153
Edie Greene and Kirk Heilbrun

Reflections on Psychology and Law 171
Lawrence S. Wrightsman

Index 175

Introduction

Cynthia Willis-Esqueda and Brian H. Bornstein

This book is based on the substantial influence of Dr. Lawrence S. Wrightsman, Jr. It is a means to honor his many contributions to the field of psychology and law and allow for current scholars to demonstrate the significance (both theoretical and professional) of an outstanding researcher, teacher, colleague, and friend. By virtue of his conducting research on so many of the core topics in the discipline, the book provides an overview of the current status of the field of psychology and law and places the contributions of Wrightsman within that field.

The field of psychology and the law turned 100 years old in 2008—that year marked the centennial of the book by Hugo Münsterberg, titled *On the Witness Stand*, which contained remarkably prescient chapters on many contemporary topics, including eyewitness accuracy, confessions, hypnosis, and criminal psychology (now called forensic psychology; for a contemporary assessment of Münsterberg's work, see Bornstein & Meissner, 2008). That book is honored in the title, since it is also the title of two co-edited volumes by Lawrence S. Wrightsman. This book is meant to highlight the contributions of Lawrence S. Wrightsman, who has produced some 45 books on psychology and law, including his landmark textbook *Psychology and the Legal System*, over a nearly 50-year career. The book is designed to stand alone as an integrated digest of the various ways in which psychology informs legal practice and legal outcomes.

Following the publication of Münsterberg's book, the field of psychology and law did not receive much attention until 1954, when a brief by 32 "Concerned Social Scientists" influenced the Supreme Court in the *Brown v. Board of Education* decision.

C. Willis-Esqueda (✉)
University of Nebraska-Lincoln, Burnett Hall 335, Lincoln, NE 68588-0308, USA
e-mail: cwillis@unlserve.unl.edu

B.H. Bornstein
Department of Psychology, University of Nebraska-Lincoln,
Burnett Hall 335, Lincoln, NE 68588-0308, USA
e-mail: bbornstein2@unl.edu

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_1

The acknowledgment of a brief on psychological issues associated with a legal case (signed by Kenneth C. Clark and Stuart Cook, among others) was the first major example of how psychology might be of use to legal understanding. While the theoretical notions about how law is bound to social forces and interests were highlighted by legal scholars, such as Pound (see Gardner (1961) for a review), psychologists were bereft of formal interest in psychological processes that occurred within the legal system. And, indeed, after *Brown* there was another lull until the mid-1970s, when many social psychologists, including Wrightsman, despaired over the field's failure to be relevant to public policy (Deaux & Wrightsman, 1988). This "crisis in social psychology," as exemplified by other calls for real-world relevancy (Deaux & Wrightsman, 1988), led to a profusion of research that had addressed modern day problems. Predictably, and in light of Münsterberg's work, research on witness memory was a foremost topic. But in the last 30 years the field of psychology and law has mushroomed and broadened into such disparate topics as jury and judicial decision making; confessions and interrogation techniques; alibi witnesses, informants, and snitches; expert witnesses; jury selection; mentally ill offenders; and hate crimes. Wrightsman's writings and research have had an impact on each of these. Moreover, public policy makers are now paying attention to, and adopting, psychologists' research-based recommendations. Impressive examples include the adoption by the U.S. Department of Justice of guidelines for police in collecting evidence from eyewitnesses to crimes (Technical Working Group on Eyewitness Evidence, 1999) and the Supreme Court decision in *Lawrence v. Texas* (2003) that ruled unconstitutional any laws prohibiting sexual relations between homosexual persons.

This volume provides "state-of-the-art" chapters on a number of topics at the forefront of psycholegal research. The contributors' expertise covers the vast majority of topics that now define the field of psychology and the law: eyewitness identification, interrogations and confessions, expert testimony, jury and judicial decision making, discrimination, and forensic assessment and treatment. The book provides an overview of the various approaches to, methodologies used, and findings of psychology and how that discipline informs our understanding of the legal system. Fittingly, many of the contributors were students or close professional associates of Larry. The chapters thus honor Larry's past contributions to the field, but they are also significant indicators of what current knowledge is and where the field is headed for the future.

The breadth of topics covered reflects Larry Wrightsman's expansive contributions and sets the stage for any scholar or would-be scholar in the field, as evidenced in Chap. 2. In Chap. 2, John (Jack) C. Brigham, himself a Ph.D. student of Stuart Cook (one of the signers to the amicus brief in *Brown*) and a colleague of Larry's for over 40 years, offers an overview of the contributions of Larry's work in the context of a growing discipline. *A Pioneer in Injecting Social–Psychological Knowledge into the Legal System* is how Brigham characterizes Larry's contributions. This chapter situates the influence of Larry's training on his subsequent research and writing career, with an insider's view of how a successful academic like Larry can expand theories and techniques learned in an established discipline

into a new field. Larry's early work in psychology and law issues helped to transform that field into a new, interdisciplinary field of study.

Laura Smalarz, Sarah M. Greathouse, Gary L. Wells, and Karen A. Newirth provide Chap. 3: *Psychological Science on Eyewitness Identification and the U.S. Supreme Court*: *Reconsiderations in Light of DNA Exonerations and the Science of Eyewitness Identification*. Eyewitness research has been at the forefront of psychology and law since the work of Münsterberg, and just over 100 years later, it is starting to have significant impacts on how the legal system (law enforcement, attorneys, and courts) interact with and evaluate eyewitnesses. Yet despite advances in many jurisdictions, the U.S. Supreme Court is, in many respects, behind the curve in paying attention to the issue (Wells & Quinlivan, 2009). In their chapter, Smalarz et al. review the issues surrounding the accuracy and meaning of eyewitness identification in light of the mounting evidence, from DNA exonerations, that eyewitness error is a leading cause of false convictions (Wells & Olson, 2003). They argue that the Court's current jurisprudence does little to suppress unreliable identifications or provide a disincentive for suggestive procedures. Their proposed solution is to eliminate suggestive procedures from the eyewitness identification process and ensure that courts and juries evaluating identification evidence have appropriate, scientifically supported tools to help them weigh that evidence appropriately.

Eyewitnesses are not, of course, the only type of witnesses to testify at trial. A leading scholar in the field of witness credibility, Stanley Brodsky, along with Ekaterina Pivovarova, examines the testimony of witnesses. Such testimony is a central component of the legal process. In depositions and trials alike, witnesses report what they have seen, have heard, or know related to the litigation issues. In the case of expert witnesses, the testimony extends further to the methods they have used, the results, the conclusions they have drawn, and the opinions that they have formulated from those conclusions. The Federal Rules of Evidence specify five bases on which individuals may be qualified as experts: knowledge, education, training, experience, and skills. Nevertheless, within the psychological study of witnesses, including expert witnesses, researchers do not focus on witnesses' qualifications (with the exception of competency concerns, especially regarding child witnesses or mentally impaired witnesses). Instead the emphasis is placed on how judges and jurors perceive witnesses.

A common approach to witness credibility is to investigate the relative contributions of central processing by jurors or judges of the probative content of testimony versus the peripheral processing of characteristics such as credentials or the manner in which the testimony is presented (Petty & Cacioppo, 1996). As Brodsky and Pivovarova describe, much of the contemporary research on peripheral processing and witness credibility has focused on the nonverbal behaviors, traits, and attitudes of effective and ineffective witnesses and the related jurors' characteristics that influence impression formation and legal decision making.

Brodsky and Pivovarova describe research from the Witness Research Lab, where the psychological meaning of witness behavior has been examined. The first goal has been the study of the effects of various witness behaviors, which have been methodically varied in videotapes of standardized scenarios. In the study of witness

behaviors, the chapter outlines the effects of race and gender of witnesses on credibility and meaning. Confidence and witness self-efficacy have been the focus of other studies.

Another important contribution by Brodsky has been the development of reliable and meaningful outcome measures for the study of witness behaviors and testimony. Here, Brodsky has made a lasting contribution in understanding the psychological experience of being a witness. This chapter serves, then, to introduce the empirical foundation for expert and lay witnesses who wish to improve credibility. More importantly, it serves as a foundation for future work on the meaning of being a witness and how the legal system treats and reacts to witnesses.

In Chap. 5, Saul Kassin provides a review of the theoretical underpinnings for false confessions and legal concerns. The latest research on the causal features involved with confessions is also reviewed. As indicated in the chapter's subtitle, *From Colonial Salem*, *through Central Park*, *and into the 21st Century*, false confessions are not a new phenomenon. From colonial times, and probably throughout history, in countries all over the world, many innocent people have confessed to crimes they did not commit in criminal justice, military, and corporate settings. Within psychology, Münsterberg wrote about "untrue confessions" in 1908, and the 1960s brought some interest in the issue with the work of Bem (1966) and Zimbardo (1967), who provided the first social psychological perspectives. Kassin and Wrightsman (1985) began to systematically examine the process of confessions and introduced a taxonomy with types of false confessions that served as a platform for current research. Since then, Kassin has published extensively on the issue of confessions and the features of confessions that will lead to inaccurate perceptions of guilt. In light of this background, and coupled with recent DNA exonerations which highlight the precariousness of confessions, this chapter reviews psychological research specifically aimed at three questions: Why do police often target innocent people for interrogation? Why do innocent people often confess as a result of that process? And why do prosecutors, judges, and juries invariably believe false confessions—resulting in wrongful convictions? This chapter, then, goes to the heart of a substantial feature of both criminal and civil law—the use of confessions to determine causality for behaviors that are illegal or harmful.

Before any jury trial begins in the USA, judges and attorneys evaluate venire persons (i.e., possible jurors) for signs that they may possess biases that would interfere with a juror's duty to evaluate the evidence fairly and make decisions that follow the law. Those jurors who are deemed biased may be excluded from the jury in a process known as jury selection. When social scientists began studying jury selection in the late 1970s, research focused on identifying predictors of jury verdicts and the development of measures to assess juror bias. Larry Wrightsman was at the forefront of this movement, developing the first scale of general juror bias (Kassin & Wrightsman, 1983). For decades, researchers have used the Juror Bias Scale and other measures of juror bias to predict juror verdicts. Only recently have researchers turned their attention to new questions about jury selection, including questions about how the process of collecting information from jurors (i.e., voir dire) might alter the responses obtained from potential jurors and the verdicts that seated jurors render.

In the chapter by Margaret Bull Kovera and Jacqueline Austin, the authors trace the history of jury selection research over the last three decades, drawing on the history of social psychological research on the attitude–behavior relationship. They also provide evidence from a new program of research that the behavior of both attorneys and jurors during the jury selection process makes the identification of juror bias more difficult, and they discuss the implications of this research for debates surrounding the continued use of peremptory challenges in jury selection.

Race has become a contentious issue within the law. *Race and its Place in the United States Legal System*, in Chap. 7, examines the conceptualization of race within the law and how such conceptualization has allowed race constructs to permeate legal reasoning and legal decision making. In this chapter, Cynthia Willis-Esqueda reviews the use of the social category of race within the law and the psychological place of race in the legal system. Race is not a biological human feature, but a socially created construct. Nevertheless, the construct of "race" was used in the earliest colonial experience in what would become the USA, and it continues to be used as an official designation of human groups. Thus, race carries psychological meaning in law and legal processes. It has been used to legally regulate nearly all aspects of social life (e.g., interpersonal relationships, public transportation, voting rights, citizenship rights, slavery, land acquisitions, housing, criminal sanctions, and employment). The importance of such meaning is evident in race bias that permeates each phase of the legal process today. For example, within criminal law, the USA leads the world in incarcerations (The Sentencing Project, 2014), and men of color are disproportionately the target of those incarcerations at local, state, and federal levels. In this chapter, the construction of race, slavery, and racial designations, colorism and the impact on legal issues, racial profiling, decision making, and sentencing are reviewed. The chapter examines methods to eliminate racial bias and provides recommendations to improve the minority experience within the legal system. The latter is particularly cogent, since people of color will be the majority population in the near future.

The modern field of psychology and law, which Larry Wrightsman helped to create, is, by definition, interdisciplinary. Chapter 8, by Brian H. Bornstein, addresses the question, "How interdisciplinary is interdisciplinary enough?" His conclusion is "the more the better." He argues that although interdisciplinary research has challenges and potential pitfalls as well as benefits, the benefits outweigh the drawbacks. The chapter begins with a discussion of the pros and cons of interdisciplinarity, followed by an application of these themes to research and training in law and social science. The chapter next considers the illustrative example of research on judging, one of the many topics on which Larry Wrightsman has conducted pioneering research (e.g., Wrightsman, 1999, 2006). The chapter concludes with recommendations for increasing interdisciplinary research and training opportunities in law and social science.

Psychologists have worked with attorneys since Münsterberg's day, but trial consulting as a profession did not become well established until roughly the 1970s (Posey & Wrightsman, 2005; Wiener & Bornstein, 2011). Since then, it has increased dramatically. As a graduate student of Larry Wrightsman, Amy Posey became

interested in the ways that social psychologists are involved in the trial process, particularly in trial consulting. Chapter 9, *From War Protestors to Corporate Litigants*: *The Evolution of the Profession of Trial Consulting*, provides a description of the trial consulting profession, especially focusing on its history and the primary activities of trial consultants. The chapter includes a critique of the profession, highlighting empirical and ethical concerns, and discusses the ways in which the profession has worked to address those concerns. Thus, in the trial consulting arena, Posey seeks to broaden the field of psychology and law to examine the ways in which the discipline can best serve the trial process.

Chapter 10, by Edie Greene and Kirk Heilbrun, provides the meaning of psychology and law scholarship as a part of undergraduate education. As authors of the eighth edition of Lawrence Wrightsman's popular textbook, *Psychology and the Legal System* (Greene & Heilbrun, 2013), Edie Greene and Kirk Heilbrun trace the history of undergraduate education in psychology and law and Wrightsman's influence thereon. They describe the organizing framework featured in every edition of *Psychology and the Legal System*, namely the broad psychological and philosophical issues that Wrightsman termed "dilemmas" at the intersection of the two fields. The chapter explores in depth two of these dilemmas: rights of individuals versus the common good, and equality versus discretion. In particular, they comment on the research, law, and policies relevant to those issues. In doing so, Greene and Heilbrun illustrate how the two disciplines of psychology and law have independently and jointly examined topics of broad societal concern and provided complementary perspectives on their resolution.

The last chapter in this volume comes from Larry Wrightsman. His comments are typical of the scholar and the man himself. He is humble, astute, and aware of the unfinished research that still engulfs the psychology and law field. His ability to see beyond psychological theories generated for one area of behavior and utilize those theories to understand and explain the behaviors that occur in the theorizing and practice of law is evident from his own description of his work. More importantly, Larry reminds scholars who study psychology and law (and any discipline) to focus on the source, in order to understand why behaviors occur and what can be done to transform them. In the end, Larry's approach to his scholarly work derives from the legacy of his own training in psychology. He reminds us that psychology is really a discipline to be given away (Lewin, 1946). Consequently, through his research, teaching, and numerous textbooks, Larry Wrightsman has given much to the field of psychology and law. Our greatest hope is that the present volume, and the future research it will stimulate, continues to give in his honor.

References

Bem, D. J. (1966). Inducing belief in false confessions. *Journal of Personality and Social Psychology, 3*, 707–710.

Bornstein, B. H., & Meissner, C. A. (2008). Basic and applied issues in eyewitness research: A Münsterberg centennial retrospective. *Applied Cognitive Psychology, 22*(6), 733–736.

Deaux, K., & Wrightsman, L. S. (1988). *Social psychology*. Pacific Grove, CA: Brooks/Cole.
Gardner, J. A. (1961). The sociological jurisprudence of Roscoe Pound (Part 1). *Villanova Law Review, 7*, 1–26.
Greene, E., & Heilbrun, K. (2013). *Wrightsman's psychology and the legal system* (8th ed.). Belmont, CA: Wadworth.
Kassin, S. M., & Wrightsman, L. S. (1983). The construction and validation of a juror bias scale. *Journal of Research in Personality, 17*, 423–442.
Kassin, S. M., & Wrightsman, L. S. (1985). Confession evidence. In S. M. Kassin & L. S. Wrightsman (Eds.), *The psychology of evidence and trial procedure* (pp. 67–94). Beverly Hills, CA: Sage.
Lawrence v. Texas. (2003). 539 U.S. 558.
Lewin, K. (1946). Action research and minority problems. *Journal of Social Issues, 2*, 34–46.
Petty, R. E., & Cacioppo, J. T. (1996). *Attitudes and persuasion*. Boulder, CO: Westview Press.
Posey, A. J., & Wrightsman, L. S. (2005). *Trial consulting*. New York: Oxford University Press.
Technical Working Group on Eyewitness Evidence. (1999, October). Eyewitness evidence: A guide for law enforcement. NCJ 178240. Washington, DC: U.S. Department of Justice.
The Sentencing Project. (2014). *Incarceration*. Retrieved from http://www.sentencingproject.org/template/page.cfm?id=107
Wells, G. L., & Olson, E. A. (2003). Eyewitness testimony. *Annual Review of Psychology, 54*, 277–295. doi:10.1146/annurev.psych.54.101601.145028.
Wells, G. L., & Quinlivan, D. S. (2009). Suggestive eyewitness identification procedures and the Supreme Court's reliability test in light of eyewitness science: 30 years later. *Law & Human Behavior, 33*, 1–24.
Wiener, R. L., & Bornstein, B. H. (2011). *Handbook of trial consulting*. New York: Springer.
Wrightsman, L. S. (1999). *Judicial decision making: Is psychology relevant?* New York: Springer.
Wrightsman, L. S. (2006). *The psychology of the Supreme Court*. New York: Oxford University Press.
Zimbardo, P. G. (1967). The psychology of police confessions. *Psychology Today, 1*(17–20), 25–27.

Larry Wrightsman: A Pioneer in Injecting Social-Psychological Knowledge Into the Legal System

John C. Brigham

For over five decades, Lawrence S. Wrightsman has exemplified a remarkably productive *social problem*s orientation in applying social-psychological knowledge, theories, and research findings to important areas of American society. His contributions to psychology as a writer, a teacher, and a researcher, are vast. It is my great pleasure to begin this volume with a brief overview on Larry Wrightsman's life and work. Larry has been my good friend and mentor for more than 40 years, and I owe him a great debt of gratitude. The quotations that I use here are taken mostly from a short autobiographical statement that he wrote at the request of his students.

Larry Wrightsman was born on Halloween in Houston, Texas in 1931. His father was a petroleum engineer for a pipeline company in Texas and his mother taught high school English before their marriage. Larry was an only child and remembers playing with the neighborhood kids, riding bikes, and going to baseball games, but also being alone a lot, reading and enjoying his stamp collection. Larry went to public schools in an affluent part of Houston, completing his public school education at Lamar High School. In the early 1940s, he was the youngest child selected from the Houston area to compete in the "Quiz Kids" radio program out of Chicago. He was the only team member still in elementary school. The team performed in the Houston Coliseum and he did well, leading him to reflect much later that perhaps he "peaked" at age 10, and that "intellectually for me it was all downhill from there."

Wrightsman had planned to attend Rice University in Houston but at the last minute decided that it would be better to go away for college, so he entered Southern Methodist University in Dallas as a pre-business major. He chose SMU, he recalled later, mostly because he was a fan of the football team. He joined a fraternity and served as chapter president for a while, but was ousted because he would not permit a certain hazing activity during initiation week. He became editor of the University newspaper, the *SMU Campus*, and completed his B.A. in psychology, minoring in

J.C. Brigham (✉)
Florida State University, Tallahassee, FL, USA
e-mail: brigham@psy.fsu.edu

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_2

journalism, in 1953. He stayed at SMU and received his M.A. in psychology in 1954. After working for a short time as a newspaper reporter for the *Houston Post*, he decided to further his graduate education in psychology. He was interested in the measurement of intelligence and his advisor at SMU told him that the two best places were the University of Iowa and the University of Minnesota. He wanted to leave Texas, and since Minnesota was farther away from Texas than Iowa was, he applied to Minnesota. Minnesota was almost "a foreign experience" for him, not only because of the cold weather but also because of the Scandinavian names and accents. He had no idea that he had a "Texas accent" until he got to Minnesota and was told so in no uncertain terms.

Larry married Shirley Fish, a fellow graduate student, in 1955. During his second year in grad school, he enrolled in small graduate seminar taught by Stanley Schachter and, in his words, "I found him to be a stimulating and provocative teacher. He and I were very different—he was from New York City (and went back there every chance he got), he called me Yiddish names (which only later did I come to understand), and showered me with affection and aggression in almost the same breath." Wrightsman switched to social psychology and became a Schachter student, conducting his dissertation on the psychology of affiliation (Wrightsman, 1960). As he was finishing his dissertation he had job interviews at Duke (his first airplane flight), Dartmouth, and Indiana, but did not get a job offer. By May he was getting discouraged—his son Allan had been born that month and he did not yet have a job for the fall. But an interview at George Peabody College for Teachers in Nashville, TN came up, and he joined the faculty there in August of 1958. Although Peabody was a small school with an enrollment of only about 1800 students, it had 30 faculty members in psychology. The department chair, Nicholas Hobbs, was "truly one of the most impressive psychologists I have ever met… someone who encouraged his faculty to grow on their own." (Hobbs was also the first Director of Selection for the Peace Corps.) Wrightsman found the Peabody College psychology faculty to be a congenial group that shared a concern about studying social issues. He had no desire to continue Schachter's work because it involved the deception of subjects. Instead, he became interested in studying philosophies of human nature and constructed an attitude scale to measure these. From about 1962 to 1974 this was his primary research interest.

Given his social problems orientation, Wrightsman was interested in, and concerned about, the racial issues of the day. All of the schools that he had attended, even college, had been racially segregated, and it was not until he returned to the South after his Ph.D. in 1958 that he began to have any equal-status contact experiences with minority group members. During the 1960s, Wrightsman became the local coordinator in Nashville for the long-term "railroad game" research program directed by Stuart Cook, who was at the University of Colorado. Each iteration of the study involved a group of three female college students—an unprejudiced black woman, an unprejudiced white woman (both were confederates of the experimenter), and a highly prejudiced white woman (whose racial attitude had been measured earlier in a completely different setting under different sponsorship). The prejudiced white woman was the only true subject. There were two experimenters,

one black and one white. The “game” was described as a study of small group interactions sponsored by the military, and consisted of filling shipping orders as efficiently as possible, in a system involving 10 stations, 6 railroad lines, and 500 freight cars of 6 different types. The situation was designed to create equal status for the three participants—they trained, and were trained by, each other in the three roles that they would play. The black participant disconfirmed the negative stereotypes likely held by the subject, and the situation encouraged a mutually interdependent relationship that had a high “acquaintance potential,” where the subject was given the opportunity to see the black confederate as an individual, not simply as an outgroup member. The social norms of the context situation, as expressed by the confederates and the experimenters, embodied group equality and tolerance. The women worked together in an equal-status environment for 2 hours a day, 5 days a week for 4 weeks, and were paid only after they had completed their 4-week stint.

When the subjects’ racial attitudes were measured in a group setting several weeks after the game had ended (again in an entirely different location under different sponsorship), in 40–50 % of the cases the participants expressed significantly more positive racial attitudes on three separate racial attitude measures (Cook, 1969, 1984). Those who changed to this degree tended to have positive attitudes toward people in general, lower self-esteem, and a higher need for approval than those who did not (Cook & Wrightsman, 1967). This research program is, in my view, perhaps the pioneering research program studying the effects of equal-status contact on strongly held racial attitudes (Brigham, 2000). The program was aptly characterized by Smith (1994, p. 521) as “surely the most laborious and realistic laboratory study of attitude change ever attempted.” The “railroad game” studies laid the foundation for the rise of research programs in the 1970s and 1980s, such as “jigsaw groups” and “cooperative learning groups,” that utilized interracial contact situations as a means of reducing prejudice and racism.

During the 1968 presidential election, Wrightsman (1969) conducted a clever study that he entitled “Wallace supporters and adherence to ‘law and order.’” In 1968, Davidson County TN passed a regulation requiring automobiles to display a tax sticker, to be purchased for a $15 fee. Wrightsman and his students canvassed over 1600 parked automobiles to assess whether each had the required sticker and also had a bumper sticker supporting Wallace, Nixon, or Humphrey for president, or had none. Although Wallace portrayed himself as the “law and order” candidate, cars bearing his bumper stickers were significantly *less* likely to have the required auto tax sticker, even when the age and the condition of the cars were controlled for: about 75 % of the Wallace cars had stickers, compared to about 87.5 % of the Nixon and Humphrey cars and 81 % of the controls. This study was often cited in the ensuing years in debates about the consistency (or inconsistency) between attitudes and behavior.

In the early 1970s, George Peabody College was absorbed by Vanderbilt University and Wrightsman decided to look for a change of scene. In 1976, he accepted a 5-year term as chair of the Psychology Department at the University of Kansas. Although he recalled that he found it a difficult job, in an atmosphere that

was "much more competitive" than Peabody had been, he remained a highly productive member of the KU faculty through his retirement in 2007.

Larry Wrightsman's contributions as a textbook writer in social psychology and in the field of psychology and law are legendary. In all, he has authored almost 50 books. It began in the late 1960s—while on sabbatical at the University of Hawaii, he was approached by Terri Hendrix, an editor at the new publishing firm of Brooks/Cole, to do a reader in social psychology. That book, *Contemporary Issues in Social Psychology* (Wrightsman, 1968), was the first of many that he was to publish with Brooks/Cole (which later became Wadsworth). A couple of years later, he invited me to co-edit the subsequent three editions of this reader, an invitation that I gratefully accepted (e.g., Brigham & Wrightsman, 1982). At the request of Brooks/Cole, Wrightsman revised an introductory psychology textbook written by the late Fillmore Sanford for several more editions (e.g., Wrightsman, Sigelman, & Sanford, 1979). He co-edited a book on mixed motive games (Wrightsman, O'Connor, & Baker, 1972) and in the same year published *Social Psychology in the Seventies*, a landmark social psychology textbook (Wrightsman, 1972). This textbook continued through six editions into the 1990s, with Kay Deaux and later Frank Dane joining him as coauthors (e.g., Deaux, Dane, & Wrightsman, 1993). In the 1970s, he also published a book summarizing his research on assumptions about human nature (Wrightsman, 1974; second edition in 1992), and volumes on personality development into adulthood (Wrightsman, 1988, 1994a, 1994b). He collaborated with Selltiz and Cook on the third edition of *Research Methods in Social Relations* (Selltiz, Wrightsman, & Cook, 1976) and co-edited volumes on measures of personality and social-psychological attitudes (Robinson, Shaver, & Wrightsman, 1991), measures of political attitudes (Robinson, Shaver, & Wrightsman, 1999), and measures of legal attitudes (Wrightsman, Batson, & Edkins, 2003).

In the 1980s, Larry Wrightsman turned his attention, and his prolific writing skills, to the analysis of how social-psychological knowledge could be applied to the legal system. He was a pioneer in the emergence of "psychology and law" as a vibrant subdiscipline. After he arrived at the University of Kansas, he began a research program on jury decision making. During his third year there, Saul Kassin arrived as a postdoctoral student and they became frequent collaborators for the next 30 years. After his term as chair ended, Wrightsman received a fellowship to spend the year at the KU law school, where he sat in on law classes and developed materials for an undergraduate class in psychology and law, which he began teaching 1982. This eventuated in the publication of *Psychology and the Legal System* (Wrightsman, 1987). This pioneering and influential textbook for psychology and law classes went through five editions with Wrightsman and his coauthors (e.g., Wrightsman, Greene, Nietzel, & Fortune, 2002). Two newer editions have been authored by Greene and Heilbrun (2010), entitled *Wrightsman's Psychology and the Legal System*.

In addition, Larry has written numerous other books that cover a wide spectrum of psychology-law issues, including the psychology of evidence and trial procedure (Kassin & Wrightsman, 1985); courtroom and jury issues (Kassin & Wrightsman, 1988; Wrightsman, Kassin, & Willis, 1987; Wrightsman, Willis, & Kassin, 1987);

child witnesses (Perry & Wrightsman, 1991); the rights of children (Walker, Brooks, & Wrightsman, 1998); rape (Allison & Wrightsman, 1993); confessions (Wrightsman & Kassin, 1993); and trial consulting (Posey & Wrightsman, 2005). An influential textbook on forensic psychology is now in its third edition as well (Fulero & Wrightsman, 2008). Wrightsman has also analyzed judicial decision making (Wrightsman, 1999) and the psychology of the U.S. Supreme Court (Wrightsman, 2006). Two other books on the Supreme Court followed: *Oral Arguments Before the Supreme Court: An Empirical Approach* (Wrightsman, 2008) and *The Miranda Ruling: Its Past, Present, and Future*, coauthored with Mary Pitman (Wrightsman & Pitman, 2010). He also was a co-editor of a volume commemorating the monumental 1954 *Brown v. Board of Education* Supreme Court decision that outlawed school segregation in the USA (Adams, Biernat, Branscombe, Crandall, & Wrightsman, 2007).

In recognition of his contributions to social psychology, Larry was elected president of the Society for the Study of Social Issues (SPSSI) in 1977 and elected president of the Society for Personality and Social Psychology (Division 8 of APA) in 1979. In further recognition of his vast contribution to the psychology-law field, in 1998 Wrightsman received the American Psychology-Law Society award for "Distinguished Contribution to Psychology and Law," an award that had been given only six times in the 30-year history of the organization. In 2001, Wrightsman went on "phased retirement" at the University of Kansas, in order to have more time to write. He received a Career Achievement Teaching Award from KU in 2004, and retired officially from the university in 2007. However, he continues to be actively engaged in the field, and has completed a draft of a book titled *Ten Myths about the Supreme Court*.

Over the last four decades, Larry Wrightsman has taken an active role in mentoring young social psychologists. Aware that while in graduate student I had worked with Stuart Cook, he contacted me shortly after I joined the faculty at Florida State in 1969, fresh out of grad school. I received a letter from Larry, whom I had never met, welcoming me to the South as a social psychologist, which was at that time a rare breed in that region. There was a tendency among many conservative Southerners to see social psychologists as potential troublemakers, dangerous liberals who were likely to be integrationists and antiwar activists. Therefore, few were hired by Southern schools in the 1960s. I have always greatly appreciated Larry's gracious gesture. In the ensuing years, Larry brought several young social psychologists in as coauthors on later editions of his books, as he did me, allowing them an unusual opportunity for professional growth and visibility.

Larry Wrightsman has told me that he still finds writing "fun" (a position that mystifies me) and he continues to write prolifically. He enjoys seeking out and organizing material to "create a chapter in my head," and describes "the joy of finding a fascinating little nugget in a magazine or a study and sharing that with readers." When asked, he says that his favorite books are his social psychology text, because of its innovativeness and the visibility that it gave him, his psychology and law text, because of its role in establishing and shaping psychology and law courses, and his work on the psychology of the Supreme Court. These latter volumes did not sell as

well as he would have liked, he noted, but he feels that it was unique and worthwhile because it addressed an issue that had not previously been analyzed in this depth from a psychological perspective.

Larry Wrightsman's prodigious output of books, book chapters, and research articles have, in my view, made a most valuable contribution to psychology, particularly to the area of psychology and law. His fresh, lively, and unpretentious writing style, and his ability to search out interesting bits of information that highlight important concepts, is an exceptional and valuable talent. Through his plethora of books, he is perhaps unique in the degree to which he has made both theoretical concepts and research findings in social psychology, and in psychology and law, come alive for several generations of students, colleagues, and interested laypersons.

References

Adams, G., Biernat, M., Branscombe, N., Crandall, C., & Wrightsman, L. S. (Eds.). (2007). *Commemorating Brown: The social psychology of racism and discrimination*. Washington, DC: American Psychological Association.

Allison, J. A., & Wrightsman, L. S. (1993). *Rape: The misunderstood crime*. Newbury Park, CA: Sage.

Brigham, J. C. (2000). Stuart Cook: A 'complete psychologist.'. In G. A. Kimble & M. Wertheimer (Eds.), *Portraits of pioneers in psychology* (Vol. 4, pp. 303–319). Washington, DC: APA.

Brigham, J. C., & Wrightsman, L. S. (Eds.). (1982). *Contemporary issues in social psychology* (4th ed.). Monterey, CA: Brooks/Cole.

Cook, S. W. (1969). Motives in a conceptual analysis of attitude-related behavior. In W. J. Arnold & D. Levine (Eds.), *Nebraska Symposium on Motivation* (pp. 179–235). Lincoln, NE: University of Nebraska Press.

Cook, S. W. (1984). Cooperative interaction in multi-ethnic contexts. In M. Brewer & N. Miller (Eds.), *Groups in contact: The psychology of desegregation* (pp. 155–184). New York: Academic.

Cook, S. W., & Wrightsman, L. S. (1967, April). *The factorial structure of "positive attitudes toward people"*. Symposium presentation, Southeastern Psychological Association meeting, Atlanta, GA.

Deaux, K., Dane, F. C., & Wrightsman, L. S. (1993). *Social psychology in the nineties* (6th ed.). Pacific Grove, CA: Brooks/Cole.

Fulero, S., & Wrightsman, L. S. (2008). *Forensic psychology* (3rd ed.). Belmont, CA: Cengage/Thomson/Wadsworth.

Greene, E., & Heilbrun, K. (2010). *Wrightsman's psychology and the legal system* (2nd ed.). Belmont, CA: Wadsworth.

Kassin, S. M., & Wrightsman, L. S. (Eds.). (1985). *The psychology of evidence and trial procedure*. Beverly Hills, CA: Sage.

Kassin, S. M., & Wrightsman, L. S. (1988). *The American jury on trial*. Washington, DC: Hemisphere Press.

Perry, N. W., & Wrightsman, L. S. (1991). *The child witness*. Newbury Park, CA: Sage.

Posey, A. J., & Wrightsman, L. S. (2005). *Trial consulting*. New York: Oxford University Press.

Robinson, J. R., Shaver, P., & Wrightsman, L. S. (Eds.). (1991). *Measures of personality and social psychological attitudes* (2nd ed.). New York: Academic.

Robinson, J. P., Shaver, P., & Wrightsman, L. S. (Eds.). (1999). *Measures of political attitudes*. Orlando, FL: Academic.
Selltiz, C., Wrightsman, L. S., & Cook, S. W. (1976). *Research methods in social relations* (3rd ed.). New York: Holt, Rinehart & Winston.
Smith, M. B. (1994). Stuart W. Cook (1913-1993). *American Psychologist, 49*, 521–522.
Walker, N. A., Brooks, C., & Wrightsman, L. S. (1998). *The rights of children in the United States*. Newbury Park, CA: Sage.
Wrightsman, L. S. (1960). The effect of waiting with others on changes in level of felt anxiety. *Journal of Abnormal and Social Psychology, 61*, 216–222.
Wrightsman, L. S. (Ed.). (1968). *Contemporary issues in social psychology*. Belmont, CA: Brooks/Cole.
Wrightsman, L. S. (1969). Wallace supporters and adherence to "law and order.". *Journal of Personality and Social Psychology, 13*, 17–22.
Wrightsman, L. S. (1972). *Social psychology in the seventies*. Monterey, CA: Brooks/Cole.
Wrightsman, L. S. (1974). *Assumptions about human nature: A social psychological approach*. Monterey, CA: Brooks/Cole.
Wrightsman, L. S. (1987). *Psychology and the legal system*. Monterey, CA: Brooks/Cole.
Wrightsman, L. S. (1988). *Personality development in adulthood*. Newbury Park, CA: Sage.
Wrightsman, L. S. (1992). *Assumptions about human nature* (2nd ed.). Newbury Park, CA: Sage.
Wrightsman, L. S. (1994a). *Personality development in adulthood: Vol. 1. Theories and concepts*. Newbury Park, CA: Sage.
Wrightsman, L. S. (1994b). *Personality development in adulthood: Vol. 2. Applications*. Newbury Park, CA: Sage.
Wrightsman, L. S. (1999). *Judicial decision-making: Is psychology relevant?* New York: Plenum.
Wrightsman, L. S. (2006). *The psychology of the Supreme Court*. New York: Oxford University Press.
Wrightsman, L. S. (2008). *Oral arguments before the Supreme Court: An empirical approach*. New York: Oxford University Press.
Wrightsman, L. S., Batson, A., & Edkins, V. (2003). *Measures of legal attitudes*. Belmont, CA: Wadsworth.
Wrightsman, L. S., Greene, E., Nietzel, M. R., & Fortune, W. (2002). *Psychology and the legal system* (5th ed.). Belmont, CA: Wadsworth.
Wrightsman, L. S., & Kassin, S. M. (1993). *Confessions in the courtroom*. Newbury Park, CA: Sage.
Wrightsman, L. S., Kassin, S. M., & Willis, C. E. (Eds.). (1987). *In the jury box: Controversies in the courtroom*. Beverly Hiils, CA: Sage.
Wrightsman, L. S., O'Connor, J., & Baker, N. J. (Eds.). (1972). *Cooperation and competition: Readings on mixed-motive games*. Belmont, CA: Brooks/Cole.
Wrightsman, L. S., & Pitman, M. L. (2010). *The Miranda ruling: Its past, present, and future*. New York: Oxford University Press.
Wrightsman, L. S., Sigelman, C. K., & Sanford, F. H. (1979). *Psychology: A scientific study of human behavior* (5th ed.). Monterey, CA: Brooks/Cole.
Wrightsman, L. S., Willis, C., & Kassin, S. M. (Eds.). (1987). *On the witness stand: Controversies in the courtroom*. Newbury Park, CA: Sage.

Psychological Science on Eyewitness Identification and the U.S. Supreme Court: Reconsiderations in Light of DNA-Exonerations and the Science of Eyewitness Identification

Laura Smalarz, Sarah M. Greathouse, Gary L. Wells, and Karen A. Newirth

The U.S. Supreme Court has not reexamined the test for admission of eyewitness identifications that are the product of suggestive procedures in over 35 years (*Manson v. Brathwaite*, 1977). Since then, there have been over 220 DNA-based exonerations of individuals who were wrongfully convicted on the basis of mistaken eyewitness identification (www.innocenceproject.org), and an extensive and rich scientific literature on eyewitness identification has emerged. We discuss the Court's 1977 ruling, which was meant to be a safeguard against wrongful conviction, and we note how the DNA-based exonerations can only be a small fraction of the total cases of wrongful convictions based on mistaken identification. We then use the science of the last 30 years to show the ways in which the *Manson* ruling is flawed. We explain how the three objectives considered by the Court in the *Manson* ruling, namely presenting reliable evidence to the jury, ensuring the administration of justice, and deterring police use of suggestive procedures, cannot be met with the basic approach inherent in *Manson*. We then consider possible alternatives to *Manson* and describe two recent court cases that have rejected *Manson* in favor of other approaches to determining admissibility.

> In my view, the Court's totality test will allow seriously unreliable and misleading [eyewitness identification] evidence to be put before juries. Equally important, it will allow dangerous criminals to remain on the streets while citizens assume that police action has given them protection (p. 128).
>
> —Justice Marshall's dissent in *Manson v. Brathwaite* (1977)

Justice Marshall's 1977 written dissent represents a prescient analysis of the *Manson* ruling, which still stands in place today as the legal standard for determining

L. Smalarz (✉) • S.M. Greathouse • G.L. Wells • K.A. Newirth
Department of Psychology, Williams College, Bronfman Science Center,
18 Hoxsey Street, Williamstown, MA 01267, USA
e-mail: laura.smalarz@williams.edu

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_3

the admissibility of suggestive eyewitness identification evidence. Although the *Manson* decision was characterized by marked disagreements in the majority and dissenting opinions, it has generally been applied uncritically by lower courts, both state and federal, in almost all jurisdictions throughout the country. Since *Manson* was decided, an extensive and rich scientific literature on eyewitness identification has emerged, and post-conviction DNA testing has uncovered 330 cases of wrongful conviction (as of August 20, 2015), the vast majority (over 70 %) of which were cases involving mistaken identification (www.innocenceproject.org). Each of these cases represents a failure of the criminal justice system to protect innocent people from wrongful conviction based on faulty eyewitness-identification evidence. This chapter reviews the original *Manson* ruling, using as an analytic framework the Court's own justifications for implementing a *Manson* test for determining the admissibility of suggestively obtained identification evidence. We describe the flaws inherent in *Manson* in light of scientific research on eyewitness identification and argue that *Manson* fails to provide an adequate safeguard against wrongful conviction based on mistaken identification and paradoxically may incentivize police to use suggestive procedures.

Throughout this chapter, we refer to eyewitness-identification procedures as being either suggestive or non-suggestive. In doing this, we do not mean to imply that suggestiveness is a binary, either/or concept. Instead, we recognize that suggestiveness is best construed as a continuous variable. For example, failing to instruct an eyewitness prior to the administration of a lineup that the actual culprit might not be present is considered to be a suggestive procedure. However, this procedure is still relatively less suggestive than telling the witness explicitly that a suspect is in custody or that there is incriminating evidence against the suspect. Moreover, it could be argued that no identification procedure can be 100 % devoid of suggestion. After all, the mere presentation of a lineup suggests to an eyewitness that there is reason to suspect that someone in that lineup is the culprit. Accordingly, a low level of suggestion might be inherent and unavoidable in any identification procedure. For purposes of this chapter, we are not trying to quantify degrees of suggestion. Instead, we call a procedure suggestive if it reliably influences witnesses beyond the default level of suggestiveness that is inherent in even a properly conducted, unbiased lineup identification procedure.

Manson v. Brathwaite (1977) examined whether identification evidence that was obtained through the use of a suggestive single-photo display to the case's sole witness—undercover agent Jimmy Glover—should have been suppressed. Officer Glover had participated in an undercover heroin purchase, during which he observed the seller through a 12- to 18-inch opening in an apartment door. After leaving the apartment, Glover provided a general description of the seller to fellow officer D'Onofrio, who—upon suspecting that the description matched that of Brathwaite—produced to Officer Glover a single photo of Brathwaite. Glover's photo identification of Brathwaite became the primary evidence upon which Brathwaite was convicted.

The question at issue in *Manson* was not whether the single-photo identification procedure was impermissibly suggestive; both the Second Circuit and the Supreme

Court concluded that it was. But whereas this type of suggestion would have warranted the automatic suppression of the identification according to the per se exclusion rule that was in place prior to 1972, the *Manson* Court considered the application of a more lenient approach for assessing admissibility, which ultimately rested on the "totality of the circumstances." This "totality" or "reliability" approach had precedence in *Neil v. Biggers* (1972) and was based on the idea that an identification that was the product of suggestion could nevertheless be sufficiently reliable as to warrant its admission in evidence.

The *Manson* Court upheld and reaffirmed this reliability approach, concluding that the admissibility of suggestively obtained identification evidence hinged ultimately on the reliability of the identification. According to this approach, once a threshold of impermissible suggestion has been established by the defendant, a balancing test is applied in order to weigh the corrupting influence of the suggestive procedures against various factors intended to assess reliability. These factors, first set forth in *Biggers*, include the witness's opportunity to view the offender, the witness's degree of attention during the crime, the accuracy of the witness's description of the offender, the time elapsed between the crime and the pretrial identification, and the level of certainty demonstrated by the witness at the time of the identification.[1] If, after weighing the procedure's suggestion against the reliability factors, the Court determines that the suggestive procedure created a "very substantial likelihood of irreparable misidentification," (*Simmons v. United States*, 1968) the identification will be suppressed. In Brathwaite's case, although the Court agreed that the single-photo procedure was impermissibly suggestive, they ruled on the basis of the five reliability factors that the identification was nevertheless reliable and hence admissible into evidence.

Relatively early in the scientific literature on eyewitness identification, the *Biggers* and *Manson* criteria for assessing reliability were called into question based on the science available at the time (Wells & Murray, 1983). As the science progressed, problems with the *Manson* approach have become even clearer. Recently, a number of works have reviewed the problems with *Manson* in light of empirical research on eyewitness identification (Smalarz & Wells, 2012; Wells & Quinlivan, 2009) and explored the reasons why motions to suppress suggestively obtained identification evidence virtually never succeed (Wells, Greathouse, & Smalarz 2011). The present chapter draws on each of those works in an examination of the extent to which the *Manson* test has fulfilled the roles that were originally intended of it by the Court. Specifically, the *Manson* Court's justification for reaffirming a reliability approach over the per se exclusion rule centered on three main considerations: (1) the presentation of reliable and relevant evidence to the jury; (2) the administration of justice; and (3) the deterrence of police use of suggestive procedures. We argue in the current chapter that *Manson* permits the routine admission of flawed identification evidence, fails to administer justice, and acts as an incentive—not a deterrent—for police use of suggestion.

[1] We refer to these factors as view, attention, description, passage of time, and certainty, and collectively as the *Manson* factors.

Manson Permits the Routine Admission of Flawed Identification Evidence

One of the primary concerns expressed by the *Manson* Court about the per se exclusion rule in place prior to *Manson* was that its automatic and preemptive application to identifications resulting from suggestive procedures would too often exclude relevant evidence from consideration and evaluation by the jury. Rather than requiring the automatic suppression of an identification when an unnecessarily suggestive procedure had been used, *Manson* opened the door to the consideration of "alleviating factors" for the evaluation of the evidence on the basis that reliability is the "linchpin" for determining admissibility.

There is nothing inherently wrong with the notion that, under some circumstances, an identification that was made in the presence of suggestive procedures might nevertheless be sufficiently reliable so as to warrant its admission into evidence. In particular, eyewitness scientists generally agree that if the eyewitness's memory is strong enough, then suggestive procedures should not undermine reliability. Wells and Quinlivan (2009) gave an extreme example to support this idea. If a victim of an abduction had been held for 3 months during which the culprit's face was viewed clearly and repeatedly, it is unlikely that the victim would identify someone simply because he was suggested by the police. In this extreme instance, a reliability approach would appropriately trump concerns about suggestiveness. However, these are not the types of situations in which *Manson* is routinely applied. Instead, eyewitnesses often observe crimes under suboptimal conditions—quickly, under duress, when it is dark, when the perpetrator is wearing a disguise, etc. Under these conditions—when memory strength is relatively weak—the potential effects of suggestion are of much greater concern and the logic of the *Manson* test begins to break down.

The *Manson* Court's endorsement of the *Biggers* factors for evaluating reliability came at a time when there was relatively little known about the psychological science of eyewitness memory and eyewitness identification. Today, we are much wiser. Decades of empirical eyewitness research has exposed severe flaws in the assumptions underlying the Court's reasoning in *Manson*. First, the Court assumed that *Manson* would enable judges to identify and weed out unreliable identifications. Second, the Court assumed that juries would be capable of critically analyzing identification evidence, giving appropriate weight to factors such as suggestion when assessing the credibility of an eyewitness's testimony. Eyewitness research now shows us that *Manson* is virtually useless for weeding out unreliable identifications, especially when suggestion was present. Further, it shows us that jurors are heavily persuaded by eyewitness testimony (whether accurate or mistaken) and that the typical safeguards in place at trial (e.g., cross-examination) do not help jurors differentiate between accurate and mistaken eyewitnesses.

Manson Fails to Weed Out Unreliable Identifications

The *Manson* admissibility test for identifying and weeding out unreliable identifications that are a product of suggestive procedures typically functions as a two-pronged inquiry.[2] The first prong involves determining whether the identification evidence was obtained through the use of an unnecessarily suggestive procedure. If the procedure was not unnecessarily suggestive, then the inquiry ends and the identification evidence is admitted. If the procedure is found to have been suggestive, then the second prong of the inquiry is carried out in which the corrupting influence of the suggestion is weighed against the five factors intended to assess reliability (view, attention, description, passage of time, and certainty).[3] If on the basis of these five factors the judge believes that the identification was reliable despite the suggestion, then the identification will be admitted into evidence. Only in the event that the Court believes that the suggestive procedure produced a "very substantial likelihood of irreparable misidentification" (*Simmons v. United States*, 1968) will the identification be suppressed.

The First Prong of **Manson***: Was the Procedure Suggestive?*

Manson's two-pronged structure creates two sources of potential error that could lead to the admission of unreliable identification evidence. A "first-prong" error would be constituted by a judge ruling that an identification procedure was not unnecessarily suggestive when in fact it was. There are a couple of reasons why this might occur. First, the judge (and the defense for that matter) might not be aware that the suggestion took place to begin with. Wells and Quinlivan (2009) cite a number of reasons why it is often very difficult or even impossible to establish that suggestion has occurred. Whereas some types of suggestion are readily discoverable because they inhere in the lineup procedure itself and are therefore documented (e.g., the use of poor lineup fillers or the absence of fillers in the case of a show-up), many of the suggestive procedures that have been shown through research to have a large impact on eyewitnesses are not ever recorded or documented. For example, verbal or nonverbal cues from the lineup administrator, failure to instruct the witness that the culprit might not be present, and selectively reinforcing a witness's response to a specific lineup member are all powerful factors that can influence a witness, yet the discovery of these types of suggestion depends almost entirely upon the detective and/or the witness to report that they occurred. Even if the detective

[2] Even in jurisdictions still following the per se exclusionary rule (e.g., New York, Massachusetts), the *Manson* factors are generally appropriated for the "independent source" analysis, recreating the *Manson* balancing test for the in-court identification.

[3] Although the *Manson* Court specified that these factors were not exhaustive, they are generally applied as such by the lower courts (see O'Toole & Shay, 2006).

and the witness are properly motivated to report the presence of suggestion, it would require that they noticed the suggestion when it occurred, that they interpreted it as such, and that they remembered its occurrence at the time of questioning. But psychological research has indicated that people generally lack a strong awareness of the factors that influence their thoughts and behavior (e.g., Nisbett & Wilson, 1977) and tend to believe that their actions are largely self-directed (e.g., Wegner, 2002). And, there is now abundant evidence that human attitudes and behavior are regularly influenced by factors that operate outside of conscious awareness (Greenwald & Banaji, 1995; Jacoby & Kelley, 1987), examples of which might include lineup bias and verbal or nonverbal cues from the lineup administrator. Because of the difficulties associated with uncovering the presence of suggestion, Wells and Quinlivan argued that the actual prevalence of suggestive procedures likely greatly exceeds our abilities ever to prove that they occurred.

Even if the suggestion is discovered and brought to the attention of the trial judge, a "first-prong" error might still occur if the judge—despite being objectively aware of some suggestive aspect of the identification procedure—fails to recognize it as such or does not believe that the suggestion rises to an undue level. In fact, the tendency for judges to underestimate the impact of suggestive procedures has been cited as one of the primary reasons why motions to suppress suggestive identifications routinely fail (Wells, Greathouse, & Smalarz, 2012). Judges' evaluations of whether or not a procedure was unnecessarily suggestive are tethered closely to their ideas about whether the suggestion likely influenced the witness. And to the extent that judges lack familiarity with the psychology of eyewitness identification, it is not surprising that they might fail to appreciate the power of suggestive procedures. Take, for example, the case of DNA-exoneree Thomas Doswell, who was convicted of rape and a series of other crimes on the basis of photo identifications made by the victim and a co-witness. Doswell's photo was the only photo in the lineup that was marked with a letter "R"—an indication that he had been charged with rape. Doswell's defense raised concerns about the suggestiveness of the lineup, but the judge ruled that the presence of the "R" did not constitute unnecessary suggestiveness:

> I don't believe that it was unduly suggestive. I am not saying it is the best practice in the world, but just to have the letter R on the plaque which also contains other numbers… there is no evidence that the victim would have had any background or any other knowledge that would give her an idea of what the R would stand for…

The judge admitted the identification evidence, Doswell was convicted, and then Doswell was later exonerated of the crime based on DNA testing. This anecdote provides just one illustration of a disconnect that exists between intuitive judicial reasoning and the findings of psychological science, which indicate that even the subtlest of cues can strongly influence people's thoughts and behaviors, especially in situations characterized by uncertainty or ambiguity. But there are many more examples of cases like this one. In fact, judges' failure to fully appreciate the impact of suggestion can be traced at least in part to the very fundamental human tendency to underestimate the impact of situational forces on behavior (Ross, 1977).

The tendency for judges to underestimate the power of suggestion also manifests itself in the judicial endorsement of the idea that identifications tainted by suggestive procedures can be corrected through the later application of pristine identification procedures. Even Justice Marshall, who demonstrated an impressive grasp of the psychology of eyewitness memory, suggested in his dissenting opinion in *Manson* that an identification that was rendered unreliable by suggestion can somehow be corrected in a later identification task: "when a prosecuting attorney learns that there has been a suggestive confrontation, he can easily arrange another lineup conducted under scrupulously fair conditions…" (p. 126–127). It is likely due to this type of reasoning that multiple-procedure identifications are frequently admitted even when the initial identification is suppressed. In an effort to bring judicial reasoning more in line with scientific conceptions of memory, eyewitness scholars have promulgated the "eyewitness memory as trace evidence" analogy, first proposed by Wells in 1993. Not unlike physical evidence, eyewitness evidence is subject to contamination at the time of collection, storage, or at testing. And, once the memory of the eyewitness has been contaminated—through the use of suggestive procedures, for example—it cannot be restored to its earlier, uncontaminated state simply through the application of pristine testing procedures.

The DNA-exoneration files are replete with examples of cases involving multiple identification procedures. Take, for instance, the case of Larry Youngblood, who was wrongfully convicted of kidnapping, sexual assault, and child molestation on the basis of multiple identifications made by the 10-year-old victim. The victim's first in-person identification of Youngblood was during a one-man show-up procedure at a pretrial hearing in which Youngblood was handcuffed and in prison garb with police officers at his side. Youngblood's defense moved to suppress the show-up identification along with the subsequent in-court identification on the grounds that the show-up was impermissibly suggestive and that it would taint any later identification. The trial judge did, in this case, recognize the inherent suggestiveness in the show-up procedure, and therefore suppressed it: "I feel that the procedure was improper in that it's improper to present one person in handcuffs with corrections officers at his side and then obtain an identification of that individual." However, the judge also opined that "[the show-up] is not tainting the in-court identification of the defendant" and ruled on those grounds to admit the in-court identification. Although this type of reasoning occurs routinely in the legal evaluation of eyewitness cases, it flies in the face of psychological principles about the fragility of memory. As is suggested by the "trace evidence" analogy of eyewitness memory, psychological scientists generally agree that memory contamination is largely irreversible and that the effects of suggestion cannot somehow be neutralized by later procedures.

Because transcripts of pretrial suppression hearings are not easily obtained and opinions resulting from these hearings are generally unpublished, it is difficult to know how often first-prong inquiries result in a ruling that the identification procedures were unnecessarily suggestive. The number likely varies from jurisdiction-to-jurisdiction and even from one judge to another, but our impression is that it occurs rarely. However, in the event that the "first-prong" hurdles have been jumped (i.e., the suggestion was discovered or identified and ruled upon as such), the identification

evidence is then subjected to the second-prong inquiry. During this inquiry, the influence of the suggestion is weighed against the five reliability factors. The second-prong inquiry presents a new set of problems, most of which reflect fundamental issues with the reliability factors themselves, which we will review in turn.

The Second Prong of **Manson***: The Reliability Criteria*

Perhaps the most obvious problem with the five reliability factors is that none of them bears a clear or linear relationship with identification accuracy. This means that none of the factors can be unconditionally relied upon to indicate whether the witness's identification was accurate or mistaken. Take for example the *description* factor. A witness who gives a very detailed and very specific description of the culprit is not necessarily more likely to make an accurate identification of the culprit than is a witness whose description did not contain a great amount of detail. One reason for this dissociation is that the mental processes that lend themselves to accurately describing a face from memory are not the same as those that lend themselves to accurately recognizing a face (Wells & Hryciw, 1984). Thus, witnesses who study a face in order to accurately describe the face are the very same witnesses who might encounter difficulties when it comes to recognizing the face. Further, to the extent that the quality of a witness's description can predict identification accuracy, it is often attributable to the fact that faces that are easier to describe are easier to identify, and not necessarily to the propensity of the witness to make an accurate identification (Wells, 1985). In general, research has found little to no reliable relationship between an eyewitness's description of a perpetrator following a crime event and the eyewitness's subsequent identification accuracy (Meissner, Sporer, & Susa, 2008; Pigott & Brigham, 1985).

Another one of the reliability factors is the amount of time that passed between the witnessed event and the identification procedure. As a general rule, the more time that has passed between the witnessed event and the identification procedure, the greater will be memory loss. However, there is no clear "cut-off" point that would serve as a useful indicator of whether or not the witness's memory was reliable enough to make an accurate identification. We know that memory loss is a decelerating process over time, with the greatest memory loss occurring immediately after the event and subsequent memory loss decreasing with each time frame (Ebbinghaus, 1885). But in a given case, the effects of memory decay are relative and depend on a variety of other factors. In instances in which the witness had a very strong memory to begin with, he or she might be capable of making an accurate identification weeks, months, or even years after the event. In other cases, a witness with a poor memory of the culprit from the outset might not be able to make an accurate identification even within minutes of the event. Eyewitness memory researchers have therefore avoided relying on the *time* factor per se to provide very useful information about the reliability of a witness's identification. What they have tended to focus on instead are the types of events that can occur *during* the passage of time that have an impact on memory. A long line of work on the corrupting

influences of post-event information has clearly demonstrated that eyewitnesses' recollections are subject to contamination from a variety of post-event sources (Loftus, 1979). Reports of co-witnesses (Wright, Self, & Justice, 2000), the framing of questions by police (Loftus & Palmer, 1974), and false information implanted in leading questions (Loftus, 1974) have all been shown to contaminate and distort witnesses' memories of events. Thus, *Manson*'s narrow focus on the absolute amount of time that has passed—in the absence of a query about post-event influences that might be operating—bypasses the real issue of memory contamination and consequently fails to provide a useful gauge of reliability.

The remaining three *Manson* reliability factors—*certainty*, *attention*, and *view*—are characterized by the same problem as *time* and *description* in that none of them is unequivocally related to identification accuracy. The precarious relation between each of these factors and identification accuracy is described in detail by Wells and Quinlivan (2009). Our focus for the current purpose, however, is on the fact that these reliability factors are flawed in such a way that makes them not only useless but outright misleading indicators of accuracy in cases involving suggestion.

The first thing that should be noted about the factors of certainty, view, and attention is that they are self-reported by the witness. In other words, the witness's standing on the factors is assessed by simply asking the witness questions such as: "How certain were you when you made the identification?", "How long was the person's face in view?", and "How much attention were you paying to the face of the person?" Relying on witnesses' self-reports is problematic for a number of reasons. First, self-reports all too often fail to map onto the objective reality. For example, people often report that they were affected by variables that did not in fact affect them and that they were unaffected by variables that did in fact affect them (Nisbett & Wilson, 1977). Further, eyewitness researchers have documented a systematic bias that exists in eyewitnesses' self-reports whereby eyewitnesses tend to overestimate the duration of witnessed events—a tendency that is exacerbated by stress (Loftus, Schooler, Boone, & Kline, 1987). This tendency for witnesses to overestimate their exposure to witnessed events also illustrates how witnesses' reports about the degree of *attention* they paid and how good of a *view* they had during witnessing might likewise be distorted. Moreover, self-reports have long been known to be susceptible to bias arising from demand-characteristics and social desirability concerns (Nederhof, 1985), such as when a witness enhances his/her reported level of certainty, quality of view, and degree of attention paid in an effort to be perceived as a good or helpful witness and to ensure the progression of the investigation. Self-reports are far from an objective reflection of reality; instead, they are a reflection of the witness's subjective—and sometimes inaccurate—experience. Thus, to reply on self-reports as a way to assess eyewitness reliability is a questionable practice, particularly given the persuasive nature of identification evidence at trial, which we will return to in a later section on jurors' perceptions of eyewitness testimony.

Obviously, in a *Manson* hearing witnesses are aware that their reliability is being assessed. From the view of psychological science, it seems peculiar to rely on the self-reports of witnesses themselves to, in effect, assess their own reliability.

But aside from the basic problems associated with people's self-reports, there is a much more serious problem with using witnesses' recollections of their certainty, view, and attention to assess reliability—namely, that these reliability factors are not independent of the suggestion itself. Instead, the witness's standing on each of these criteria can become inflated by the very presence of suggestive procedures. Wells and Quinlivan (2009) termed this phenomenon the "suggestiveness augmentation effect," and they cited it as a principal reason why identifications obtained using even the most egregiously suggestive procedures are almost never suppressed.

In one of the first studies demonstrating the suggestiveness augmentation effect, Wells and Bradfield (1998) examined the impact of suggestive post-identification feedback on a variety of testimony-relevant judgments, including witnesses' self-reports of their certainty, view, and attention. In this study, mock-eyewitnesses viewed a video of a man planting a bomb in an air shaft and then attempted to identify the man from a photo lineup. Unbeknownst to the witnesses, the actual culprit was not in the lineup; hence, all the witnesses' identifications were mistaken. Following their mistaken identifications, some witnesses were given confirming feedback by the lineup administrator: "Good, you identified the suspect in the case," whereas other witnesses were told nothing. The witnesses were then asked questions about their certainty, view, attention, etc. The dramatic results of this study and many studies that have since followed it (see Steblay, Wells, & Douglass, 2014) indicated that witnesses who received the suggestive confirming feedback from the lineup administrator were much more likely to recall having been very certain, having had a good view, and having paid very close attention than were witnesses who were told nothing about their identifications.

Had these mistaken eyewitnesses been subjected to a *Manson* test, they would have had a higher standing on the reliability criteria than the witnesses who were not given the suggestive feedback. But it is not because their identifications were actually more reliable; after all, the feedback was not delivered until after the witnesses had viewed the video and made their (mistaken) identifications. Rather, the ostensibly greater "reliability" among witnesses who received post-identification feedback is attributable solely to the effects of the suggestion. In other words, suggestion itself increases the likelihood that a witness's identification will be judged as reliable. Whereas the *Manson* Court intended for the reliability factors to provide a measure of reliability *despite* the suggestion, these factors can instead be conceived of as a product of the suggestive procedure itself; the witness's standing on these factors cannot be separated from the effects of the suggestion.

This suggestiveness augmentation effect has been found to occur under other conditions of procedural suggestiveness. Biased lineup instructions that fail to inform the witness that the culprit might not be present produce identifications made with greater confidence than do unbiased instructions (Steblay, 1997). And identifications made from suggestive lineups containing highly dissimilar fillers are made with more confidence than are identifications made from unbiased, fairly composed lineups (Charman, Wells, & Joy, 2011). Thus, to the extent that suggestion is present in an identification procedure, it can be reasonably assumed that the

witness is going to have an enhanced standing on the second prong of the *Manson* test, thereby increasing the chances that the testimony will be deemed reliable and admitted. The main idea here is that these reliability factors are coming into play under precisely the conditions in which they cannot be relied upon to indicate accuracy. Instead of ensuring that only reliable identifications are admitted into evidence, *Manson* operates in such a way that suggestive procedures virtually guarantee that the identifications will be deemed admissible.

Issues in the Application of the **Manson** *Factors*

Aside from the fundamental flaws in *Manson*'s two-pronged architecture, there are a number of other problems that have been identified regarding the application of *Manson* in the trial courts. The *Manson* ruling did not delineate the conditions under which it could be determined that a procedure caused a "very substantial likelihood" of misidentification. Thus, there is a degree of arbitrariness surrounding the manner in which the reliability factors are applied in a given case. The impression of many legal scholars has been that the vagaries of *Manson* permit judges to fall back on a "nevertheless" mentality, overlooking issues on one or many of the reliability factors so long as the witness has a high standing on some other criterion. In general, it appears that the ultimate criterion is the witness's level of certainty[4] (Smalarz & Wells, 2013; Wells, Greathouse, & Smalarz, 2011; Wells & Quinlivan, 2009). The legal archives and DNA-exoneration case files contain many instances of rulings handed down by judges in which identification testimony is admitted on the basis of the witness's level of certainty, despite other obvious signs of unreliability. Wells and Quinlivan cite cases in which witnesses' poor standing on the time, attention, and view factors are disregarded in light of the fact that the witnesses were certain (e.g., *Neil v. Biggers*, 1972; *State v. Ledbetter*, 2005). Hence, it seems that a witness can fall short on all of the other reliability factors, so long as he or she is certain. As was described above, research on the distorting effects of suggestion on witnesses' certainty indicates the very serious problem created by this judicial overreliance on the *certainty* factor.

Eyewitness Testimony Is Persuasive to Jurors

Manson's inability to help judges identify and weed out unreliable identifications at the pretrial level would be less of a concern if jurors themselves were capable of appropriately weighing the effects of suggestion in order to distinguish between

[4] Although *Manson* instructs trial courts to consider the witness' certainty at the time of the identification, courts frequently settle for witnesses' expressions of certainty during testimony. The suggestiveness augmentation effect problem—reviewed above—illustrates the dangers inherent in the courts' failure to distinguish between certainty at identification and certainty at testimony.

accurate and inaccurate identification testimony. Indeed, the *Manson* Court placed a great deal of trust in juries to do so:

> We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature (p. 116).

Justice Marshall, however, warned in his dissenting opinion of juries' general willingness to "credit inaccurate eyewitness testimony" (p. 126). Indeed, the large proportion of wrongful convictions resulting from mistaken identification provides at least some evidence that juries are persuaded by inaccurate eyewitnesses. But is this the exception rather than the rule?

Eyewitness research has generally supported the claim that jurors are heavily persuaded by eyewitness testimony. In a pivotal experiment demonstrating the powerful influence of eyewitness-identification evidence on jurors' verdicts, mock-jurors read a case about a grocery store robbery that resulted in the death of the owner and his granddaughter. They then indicated whether they believed the defendant was guilty or innocent. In the absence of eyewitness testimony, only 18 % of the jurors believed that the defendant was guilty. However, when the case contained testimony from a single eyewitness who had identified the defendant, a full 72 % of jurors voted to convict (Loftus, 1974). Researchers agree that eyewitness identification is a strong form of incriminating evidence that can greatly impact juror verdicts (e.g., Boyce, Beaudry, & Lindsay, 2006). More troubling, however, are findings from a number of research studies indicating that jurors are not differentially persuaded by the testimony of accurate and inaccurate eyewitnesses. In the first experiment to demonstrate this, Wells, Lindsay, and Ferguson (1979) created videotaped cross-examinations of witnesses who had attempted to make a photo identification of the perpetrator of a mock-theft. Tapes of accurate and inaccurate eyewitnesses were then shown to a new group of mock-jurors who tried to determine whether the witness had made an accurate or a mistaken identification. Results indicated that jurors believed the witnesses approximately 80 % of the time, regardless of whether the witness had accurately identified the thief or mistakenly identified an innocent person. This study, along with many others, indicates that jurors have a difficult time discriminating between accurate and inaccurate eyewitness testimony.

There are a number of reasons why jurors are not very good at discriminating between accurate and inaccurate eyewitnesses. First, jurors are somewhat insensitive to the factors that influence eyewitness memory. For example, Lindsay, Wells, and Rumpel (1981) examined the impact of varied viewing conditions on identification accuracy and on observers' perceptions of the reliability of eyewitnesses. Witnesses in this study observed a staged crime under poor, moderate, or strong viewing conditions. They then attempted to identify the culprit from a photo lineup, and they indicated how confident they were in their identifications. Although the viewing-condition manipulation significantly affected identification accuracy (74 %, 50 %, and 33 % accuracy in strong, moderate, and poor viewing conditions, respectively), mock-jurors' evaluations of the eyewitnesses were not similarly affected.

The jurors did not appropriately account for the impact of viewing conditions on identification accuracy, as evidenced by their general overbelief of witnesses, particularly when viewing conditions were poor (77 % belief, 66 % belief, and 62 % belief for strong, moderate, and poor viewing conditions, respectively). Rather than scaling back their belief judgments in light of information about viewing conditions, the jurors' evaluations were overwhelmingly influenced by the certainty expressed by the witnesses. Confirming this observation are other studies showing that the certainty expressed by an eyewitness is the primary indicator of whether the witness will be believed (Wells, Ferguson, & Lindsay, 1981). In fact, in a study designed to assess jurors' appreciation of various factors known to influence identification accuracy, jurors disregarded virtually every other indicator of eyewitness accuracy, relying almost exclusively on the certainty of the witness (Cutler, Penrod, & Dexter, 1990; Cutler, Penrod, & Stuve, 1988). And yet, eyewitness certainty is only moderately correlated with accuracy, and in many situations, it is not related to accuracy at all (Wells, Olson, & Charman, 2002).

In addition to jurors' overreliance on witnesses' expressions of certainty and their insensitivity to factors that affect eyewitness memory, there is yet another problem with jurors' assessments of eyewitnesses, which is particularly relevant to the assumptions made by the *Manson* Court about jurors' fact-finding abilities in eyewitness cases. Jurors, much like judges, have a tendency to underestimate the impact of suggestive procedures on the accuracy and reliability of eyewitnesses' identifications. In a study examining jurors' sensitivity to suggestive procedures, Lindsay and Wells (1980) had mock-eyewitnesses make identifications from either biased (low-similarity fillers) or unbiased (high-similarity fillers) lineups. They then showed videotaped testimony of these witnesses to a new group of mock-jurors who evaluated whether they believed the witnesses were accurate and indicated how confident they were in their judgments. Although the similarity manipulation had a dramatic impact on the mistaken identification rate (31 % in the unbiased lineup versus 70 % in the biased lineup), the mock jurors were no less likely to believe witnesses who made an identification from a biased rather than from an unbiased lineup, nor were they any less confident in their decision to believe such witnesses. In a similar experiment, Devenport, Stinson, Cutler, and Kravitz (2002) found that although jurors were somewhat aware of the suggestive nature of failing to instruct witness that the culprit might not be present, this awareness did not translate to their verdict decisions.

In a recent experiment, Smalarz and Wells (2014) examined the extent to which suggestive post-identification feedback influenced evaluators' abilities to discriminate between accurate and inaccurate eyewitnesses. Witnesses in this study viewed a crime video and then made accurate or mistaken identifications from a photo lineup. Some witnesses were then given confirming feedback ("Good, you identified the suspect"), and others were given no feedback. All of the witnesses were videotaped providing testimony about what they witnessed and whom they identified, and their testimony was later shown to a new group of evaluators who indicated whether they believed that the witnesses had made accurate or mistaken identifications. For witnesses who received no feedback, testimony-evaluators were approximately

twice as likely to believe accurate witnesses (70 %) as they were to believe inaccurate witnesses (36 %), indicating that they were capable of distinguishing between accurate and inaccurate witnesses. However, for witnesses who received confirming feedback, evaluators were equally likely to believe accurate and inaccurate witnesses (about 63 % belief rate). This research indicated that suggestive post-identification feedback eliminated evaluators' abilities to discriminate between accurate and inaccurate identification testimony.

To make matters even worse, it has been noted that the primary safeguard in place at trial for dealing with eyewitness evidence, namely the cross-examination of the eyewitness, is generally ineffective in helping jurors distinguish between accurate and mistaken eyewitnesses (Wells et al., 1998). The purpose of cross-examination is to uncover inconsistencies or gaps in an eyewitness's testimony. But when the evidence in question comes from a genuinely mistaken eyewitness, the adversarial tactics typically utilized by the defense will be inefficacious for uncovering unreliability. The problem stems from the fact that mistaken eyewitnesses are not lying; they are telling the truth as they believe it. Thus, this supposed "greatest legal engine ever invented for the discovery of the truth" (Wigmore, 1970) sputters in the face of an honest but mistaken eyewitness and does little to guard against wrongful convictions based on mistaken identifications.

In light of these research findings, it becomes clear that the *Manson* majority was overly optimistic in their presupposition that jurors would be able to make accurate determinations about the reliability of eyewitnesses at trial. Eyewitness science has revealed that jurors are heavily persuaded by eyewitness testimony, evaluate eyewitnesses on the basis of factors that are not good indicators of accuracy (e.g., the witness's confidence), and are generally insensitive to the effects of suggestion; that suggestion can eliminate jurors already-modest abilities to discriminate between accurate and mistaken eyewitnesses; and that cross-examination is not a cure for these problems. Thus, it becomes critically important that judges' determinations about whether or not to admit identification evidence are derived from a framework that enables the suppression of unreliable identification evidence.

Manson Fails to Administer Justice

Perhaps the most important of the three issues considered by the *Manson* Court involves the relative impact of the reliability approach versus the per se exclusion approach on the administration of justice. The majority expressed concern that automatic suppression dictated by the per se rule was a "Draconian sanction" (p. 113) in cases where the identification is reliable despite the suggestion. They reasoned that a per se approach lends itself to judicial error, as it would frequently lead to the suppression of evidence and consequently result in acquittals of the guilty. A reliability approach, in contrast, would enable judges to act as gatekeepers—letting in contested evidence to the extent that it has indicia of reliability. Setting aside the many issues that were raised in the previous section that make it difficult for judges to

fulfill this role as gatekeepers, it was reasoned by the *Manson* Court that a reliability approach would be less likely than the per se exclusion rule to result in the guilty going free. However, this narrow focus on loss of convictions stood in contrast to Justice Marshall's concerns regarding the risks of mistaken identification leading to convictions of the innocent. Justice Marshall made the important point that every time an innocent person is wrongfully convicted, the guilty party inevitably goes free: "For if the police and the public erroneously conclude, on the basis of an unnecessarily suggestive confrontation, that the right man has been caught and convicted, the real outlaw must still remain at large" (p. 127). Eyewitness scholars have articulated a similar argument with regard to the relative costs associated with an eyewitness misidentification versus an eyewitness's failure to identify the culprit from an identification procedure (Steblay, Dysart, & Wells, 2011). Steblay and her colleagues presented two equations to illustrate that a mistaken identification is a greater error than a failure to identify the culprit:

$$\text{Mistaken identification} = \text{Inculpate the innocent} + \text{Culprit escapes detection.} \quad (1)$$

$$\text{Failure to identify the culprit} = \text{Culprit escapes detection.} \quad (2)$$

Thus, whereas misidentification of an innocent person results in two errors—an innocent person is inculpated and the culprit escapes detection—a failure to identify the culprit results in only one error—the culprit escapes detection. This same argument extends beyond the level of identification to the trial level when a judge is considering whether or not to suppress a suggestively obtained identification. The *Manson* test—touted by the Court as the preferred method for minimizing acquittals of the guilty—casts a wide net over the types of suggestive procedures that will be tolerated at trial, thereby putting innocent people at risk of wrongful conviction. What the majority in *Manson* failed to recognize, however, is that an error of wrongful conviction is always accompanied by the very error about which they were most concerned: the guilty party going free.

How frequently has *Manson* led to the wrongful conviction of an innocent person? Although there is no way to know the true number, to date there have been more than 220 mistakenly identified individuals whose wrongful convictions were uncovered through DNA testing, and the list continues to grow (www.innocenceproject.org). All of these individuals had the benefit of *Manson* when they were tried, and in each and every case, unreliable identification evidence made its way into the courtroom to be heard by juries who, on every occasion, voted to convict an innocent person. Meanwhile, the real perpetrators responsible for these crimes went on to commit additional ones. In total, unindicted perpetrators committed an additional 57 rapes, 17 murders, and 18 violent crimes while innocent people served time for their offenses (Innocence Project Research Department as of December 18, 2012).

Perhaps one could view the number of DNA-exonerations as a relatively small problem relative to the much larger number of convictions based on eyewitness evidence each year. However, it is important to consider that these exoneration cases

largely underestimate the extent of the problem. Wells and Quinlivan (2009) point out several reasons why the true numbers of wrongful conviction based on mistaken identification must be dramatically higher than 220.

First, the vast majority of the known wrongful convictions were from sexual assault crimes because those are the crimes that left behind DNA-evidence that could later be tested for claims of innocence. It has been estimated, however, that fewer than 5 % of lineups conducted are for cases of sexual assault or other crimes that would leave behind DNA-evidence (Wells et al., 2011). The other 95 %—crimes such as murders, robberies, drive-by shootings, and the like—typically do not leave behind biological evidence that could trump the account of a mistaken eyewitness. Furthermore, these exonerated individuals are the few lucky ones not only because there was biological evidence left behind at the scene of the crime, but also because that evidence was properly collected and was preserved and maintained over time. Indeed, many innocence claims (even for cases of sexual assault) can never be tested because the biological evidence was not collected properly or it has been lost, has deteriorated, or has been destroyed.

One final troubling characteristic of the DNA-exoneration cases is that the mistaken eyewitnesses in those cases—most of whom were sexual assault victims—probably constitute some of the best eyewitnesses because they typically get a closer and longer look at the perpetrator than do witnesses to other crimes. Witnesses to robberies and drive-by shootings, for example, would be expected to perform far more poorly on an identification task than would victims of sexual assault. But, we will never know about these cases because of the absence of DNA-evidence. For all of these reasons, Wells and Quinlivan, along with other scholars, have argued that the DNA-exoneration cases represent only a small fraction of the people who have been convicted based on mistaken eyewitness-identification evidence.

The Pleading Effect

The foregoing analysis supports the conclusion that there are far more individuals who have been wrongfully convicted based on eyewitness evidence than can ever be definitively proven. But this conclusion might be of minimal practical use to judges who are faced with the task of determining in a given case whether to admit or suppress the identification evidence. For judges, the more relevant question might be: what is the likelihood that the case I am evaluating is a case of mistaken identification? All other things being equal, a judge might estimate that the chances of encountering a mistaken eyewitness at trial will reflect the rate of mistaken identification at the lineup level. Importantly, however, all else is not equal; one must take into account that the cases that are being brought forward to pretrial hearings are only those in which the defendants have refused to confess or plead guilty. Because innocent people are less likely to plead out than are guilty people, the proportion of guilty versus innocent people changes from the lineup level to the trial level. Specifically, the proportion of mistaken identifications that come before a judge at

trial will likely be much higher than the proportion of mistaken identifications occurring at the lineup stage. Wells, Memon, and Penrod (2006) provide an illustrative example of this phenomenon, first coined as the *pleading effect* by Charman and Wells (2006).

First, we know from recent analyses that well over 90 % of all criminal convictions do not involve trials but instead are resolved via plea. For purposes of their analysis, Wells et al. (2006) used a very conservative 80 % figure (although the argument is stronger at 90 %) and made a further assumption that all of those 80 % were actually guilty. Now, even if some proportion of mistakenly identified suspects plead guilty—say 10 %—then we know that 90 % of the innocent suspects and 20 % of the guilty suspects will go to trial. How do these numbers unfold if we assume a mistaken identification rate of 4 %? This would mean that 90 % of the 4 % (3.6 % of the innocent suspects) and 20 % of the 96 % (19.2 % of the guilty suspects) will go to trial. Hence, at the trial level, 16 % of the defendants (3.6 % of the 22.8 % going to trial) will be cases of mistaken identification. The main idea here is that a judge would be wrong in assuming that the chances of encountering a mistaken eyewitness in his courtroom are too low to be of concern. In reality, what might start out as a 96 % guilty rate (in terms of being charged) becomes reduced, yielding a much higher base rate of innocent people whose cases of eyewitness identification might be heard by a judge. Moreover, it is likely that failed suppression motions would only serve to boost the plea rate among guilty suspects, thereby further increasing the chances that a jury or a trial judge would encounter an innocent defendant (who rejected the plea) at trial.

Given that the *Manson* framework does not fulfill the gatekeeping function for which it was intended, it is no surprise that *Manson* has been similarly inept at serving the administration of justice. The *Manson* admissibility test results in the routine admission of flawed identification evidence even when it was obtained using egregiously suggestive procedures. Given what we know about the persuasiveness of eyewitness testimony to juries, it is perhaps not so surprising that scores of innocent people have been convicted on the basis of such evidence.

Manson Acts as an Incentive: Not as a Deterrent—For Police Use of Suggestion

The third factor considered by the Court in *Manson* was the extent to which a reliability approach would serve as a deterrent for police use of suggestive procedures. Although neither the majority nor the dissent addressed the issue of deterrence at length, it was generally acknowledged by both sides that a per se approach that requires the automatic suppression of identifications obtained through suggestion would be the stronger deterrent of the two. Nevertheless, the majority argued that the reliability approach would have an influence on police behavior: "The police will guard against unnecessarily suggestive procedures under the totality rule, as well as the per se one, for fear that their actions will lead to the exclusion of identifications as unreliable" (p. 112).

In order for the Court's deterrence argument to hold true, the presence of suggestive procedures would need to increase the chances that identifications would be excluded under *Manson*, thereby sending a message to police that suggestive procedures should be avoided. From the research reviewed here, we know that in actuality many of the reliability factors the second prong of *Manson* considers—witness certainty, attention, and view—are inflated by suggestion. As a result, witnesses exposed to suggestive procedures appear even more reliable to the Court. Under *Manson*, then, there is almost no chance that suggestively obtained identifications will be excluded, and police have no disincentive to obtaining identifications through suggestive means.

Not only does *Manson* fail to act as a deterrent, but scholars have suggested that *Manson*, as it stands now, actually creates an *incentive* for police use of suggestive procedures (Wells & Quinlivan, 2009). Police arguably have the intuitive sense that witnesses appear more reliable when they express a high degree of certainty and report optimal viewing conditions. If identifications are rarely excluded at *Manson* hearings, then why wouldn't police implement suggestive procedures that ensure that a witness appears as certain and credible as possible? We are not suggesting that police are implementing suggestive identification procedures with malicious intentions. Rather, in accordance with basic human tendencies, police are likely responding to prior *Manson* rulings that rewarded the use of suggestive procedures by admitting the identification evidence. For the most part, police genuinely believe that the suspects they are pursuing are guilty, and in the interest of justice, they want to ensure convictions. If police are rewarded with admitted identification evidence, even when suggestive procedures are used, then it makes sense that they would continue to employ those procedures that increase the chances of identifications and the later perceived reliability of witnesses. As it stands now, we see no reason why police would be motivated to cease employing suggestive identification procedures, and in fact, under *Manson* they may even be incentivized to continue using suggestive procedures.

What Is the Solution?

The idea that there is a simple solution to what is in fact a very complex problem is, of course, mythical. But to the extent that there is an ideal solution, it would be this: Jettison suggestive procedures from the eyewitness-identification process and ensure that courts and juries evaluating identification evidence have appropriate, scientifically supported tools to help them critically evaluate and weigh that evidence.

If suggestive procedures did not occur in the first place, we would not need to be doing all of this hand wringing over the problem of how to evaluate eyewitness-identification evidence that was obtained from suggestive procedures. In fact, the elimination (or at least dramatic reduction) of suggestiveness via the development of scientific protocols for obtaining eyewitness-identification evidence is at the heart of the system variable approach in eyewitness science (Wells, 1978), and concrete

protocols have been developed (e.g., Wells et al., 1998) that are not difficult to implement. An increasing number of states (e.g., New Jersey, North Carolina, Connecticut, Texas) now require compliance with some or all of these protocols, national law enforcement organizations (e.g., Department of Justice; International Association of Chiefs of Police; Police Education Research Foundation) endorse some or all of them, and law enforcement agencies across the country are voluntarily conforming their practices to the scientific research. Part of any solution, then, must be that police-orchestrated identification procedures be conducted in a manner demonstrated by scientific research to minimize the risk of misidentification. This requirement, however, will not be sufficient if courts refuse to identify and sanction suggestive procedures (or breaches of protocol) when they occur. Likewise, any solution must involve a reframing of the legal test for evaluating identification evidence that resolves the problems intrinsic to the *Manson* test described above. Any new legal framework for evaluating identification evidence must:

1. Eliminate the balancing test and disaggregate suggestion from reliability in favor of a totality of the circumstances evaluation that allows for the consideration of the full range of factors that scientific research has shown bear on the accuracy and reliability of an identification
2. Permit robust pretrial hearings, particularly in cases where the risk of misidentification is highest, where courts consider all relevant information from all witnesses, including eyewitnesses and experts. The initial burden of proof of reliability should be borne by the proponent of the evidence (usually the state), as it is the party with the best access to relevant information (i.e., the nature of the procedure; the witness's experience and statements)
3. Eliminate the all-or-nothing (suppression/admission) approach and provide meaningful intermediate remedies that ensure that fact finders have sufficient context and guidance to evaluate and weigh the evidence
4. Institute remedies that have a meaningful deterrent effect on suggestive police conduct

A legal framework that does these things, coupled with law enforcement who abide by mandatory, science-based protocols for conducting non-suggestive, non-biased identification procedures, will reduce the risk of misidentification and future wrongful convictions.

In the last few years, two state supreme courts have considered whether their states' *Manson*-based tests meet the goal of ensuring the reliability of identification evidence admitted at trial. Both evaluated the scientific literature and concluded that a *Manson* test is no longer viable in light of the research. In *State v. Henderson* (2011), the New Jersey Supreme Court concluded that the *Manson* test "does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate" (p. 878). In *State v. Lawson* (2012), the Oregon Supreme Court concluded that the *Manson* test "does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence. Not only are the

reliability factors ... both incomplete and, at times, inconsistent with modern scientific findings, but the … inquiry itself is somewhat at odds with its own goals and with current Oregon evidence law" (p. 688).

Whereas the two courts reached the same conclusion about *Manson*'s failings, they offered different solutions, grounded in divergent legal theories. The *Henderson* Court took the more traditional approach, grounding its inquiry in a defendant's state constitutional due process right to a fair trial—i.e., the defendant's right not to be convicted based on unreliable evidence that is the product of state action. The *Lawson* Court grounded its new approach in the state code of evidence, a development that holds special promise for courts and litigators throughout the country, as it does not require courts to find (as the New Jersey Supreme Court did) that its state due process protections are broader than those of the federal constitution.

Under the new framework set forth in *Henderson*, a defendant will have to show "some evidence" of suggestion in order to obtain a pretrial hearing, at which a Court can consider any variable alleged to have affected the reliability of the identification. The Court will then determine whether the evidence is sufficiently reliable to be admitted in evidence; if it is admitted, the Court then has a range of intermediate remedies that can be used to ensure that the jury properly evaluates the evidence. Chief among these tools are expansive, scientifically based jury instructions that identify and explain the factors that may have affected the reliability of an identification. The New Jersey Supreme Court allowed that these instructions might be read to the jury both before the witness testifies and at the close of evidence, and that experts might be warranted in some cases. Finally, *Henderson* imposed additional procedural requirements on law enforcement conducting an identification procedure (something the New Jersey Supreme Court has unique jurisdiction to do).

In contrast, the *Lawson* Court began by shifting the burden to the state to demonstrate in all cases that the identification evidence is admissible. In order to make this showing, the state must demonstrate by a preponderance of the evidence that the evidence is relevant (most identification evidence will be relevant) and that it is otherwise admissible. The Oregon Supreme Court identified several relevant provisions of the evidence code that the state must be able to satisfy for the evidence to be admitted. For example, the state must be able to show that the witness had sufficient personal knowledge to support the identification (i.e., "an adequate opportunity to observe or otherwise personally perceive the facts to which the witness will testify, and did, in fact, observe or perceive them" (p. 692); that the identification was rationally based on the witness's perceptions; and that the identification will be helpful to the trier of fact. Once these showings have been made, the defendant will then have an opportunity to demonstrate that the evidence's probative value is outweighed by any prejudice it would cause (such as when a suggestive procedure was used) or other evidentiary concerns. In rejecting the false dichotomy of suppression versus admission, the Oregon Supreme Court set forth a host of intermediate remedies, including partial exclusion of witness testimony, expert testimony, and jury instructions.

Despite there being no perfect solution, we consider both the New Jersey approach (in *Henderson*) and the Oregon approach (in *Lawson*) to be vast

improvements over *Manson*. Both require trial judges to be conversant with the scientific literature on eyewitness identification, both articulate alternatives to the false dichotomy of admission versus suppression, both see a role for expert testimony under the right circumstances, both set the bar higher for scrutiny of the eyewitness-identification evidence, and both acknowledge the scientific evidence that shows that the *Manson* reliability criteria are not appropriate trump cards for dismissing concerns about reliability when there was suggestiveness. Moreover, both *Henderson* and *Lawson* create a situation in which there are disincentives for using suggestive eyewitness-identification procedures. To the extent that other states replace their versions of *Manson* with something closer to *Henderson* or *Lawson*, we expect more law enforcement jurisdictions to adopt better (less suggestive) eyewitness-identification protocols and more innocent defendants to have fairer proceedings.

References

Boyce, M., Beaudry, J. L., & Lindsay, R. C. L. (2006). Belief of eyewitness identification evidence. In R. C. L. Lindsay, D. F. Ross, J. D. Read, & M. P. Toglia (Eds.), *Handbook of eyewitness psychology: Memory for people* (pp. 219–254). Mahwah, NJ: Erlbaum.

Charman, S. D., & Wells, G. L. (2006). Applied lineup theory. In R. C. L. Lindsay, D. F. Ross, J. D. Read, & M. P. Toglia (Eds.), *Handbook of eyewitness psychology: Memory for people* (pp. 219–254). Mahwah, NJ: Erlbaum.

Charman, S. D., Wells, G. L., & Joy, S. (2011). The dud effect: Highly dissimilar fillers increase confidence in lineup identifications. *Law and Human Behavior, 35*, 479–500. doi:10.1007/s10979-010-9261-1.

Cutler, B. L., Penrod, S. D., & Dexter, H. R. (1990). Juror sensitivity to eyewitness identification evidence. *Law and Human Behavior, 14*, 185–191. doi:10.1007/BF01062972.

Cutler, B. L., Penrod, S. D., & Stuve, T. E. (1988). Juror decision-making in eyewitness identification cases. *Law and Human Behavior, 12*, 41–55. doi:10.1007/BF01064273.

Devenport, J. L., Stinson, V., Cutler, B. L., & Kravitz, D. A. (2002). How effective are the cross-examination and expert testimony safeguards? Jurors' perceptions of the suggestiveness and fairness of biased lineup procedures. *Journal of Applied Psychology, 87*, 1042–1054. doi:10.1037//0021-9010.87.6.1042.

Ebbinghaus, H. E. (1885). *Memory: A contribution to experimental psychology*. New York: Dover, 1964.

Greenwald, A. G., & Banaji, M. R. (1995). Implicit social cognition: Attitudes, self-esteem, and stereotypes. *Psychological Review, 102*, 4–27. doi:10.1037/0033-295X.102.1.4.

Jacoby, L. L., & Kelley, C. M. (1987). Unconscious influences of memory for a prior event. *Personality and Social Psychology Bulletin, 13*, 314–336. doi:10.1177/0146167287133003.

Lindsay, R. C. L., & Wells, G. L. (1980). What price justice? Exploring the relationship of lineup fairness and identification accuracy. *Law and Human Behavior, 4*, 303–314. doi:10.1007/BF01040622.

Lindsay, R. C. L., Wells, G. L., & Rumpel, C. (1981). Can people detect eyewitness identification accuracy within and across situations? *Journal of Applied Psychology, 66*, 79–89. doi:10.1037//0021-9010.66.1.79.

Loftus, E. F. (1974). Reconstructing memory: The incredible eyewitness. *Psychology Today, 8*, 116–119.

Loftus, E. F. (1979). *Eyewitness testimony*. Cambridge, MA: Harvard University Press.

Loftus, E. F., & Palmer, J. C. (1974). Reconstruction of automobile destruction: An example of the interaction between language and memory. *Journal of Verbal Learning and Verbal Behavior, 13*, 585–589. doi:10.1016/S0022-5371(74)80011-3.

Loftus, E. F., Schooler, J. W., Boone, S. M., & Kline, D. (1987). Time went by so slowly: Overestimation of event duration by males and females. *Applied Cognitive Psychology, 1*, 3–13. doi:10.1002/acp.2350010103.

Manson v. Brathwaite. (1977). 432 U.S. 98.

Meissner, C. A., Sporer, S. L., & Susa, K. J. (2008). A theoretical and meta-analytic review of the relationship between verbal descriptions and identification accuracy in memory for faces. *European Journal of Cognitive Psychology, 20*(3), 414–455. doi:10.1080/09541440701728581.

Nederhof, A. J. (1985). Methods of coping with social desirability bias: A review. *European Journal of Social Psychology, 15*, 263–280. doi:10.1002/ejsp.2420150303.

Neil v. Biggers. (1972). 409 U.S. 188.

Nisbett, R. E., & Wilson, T. D. (1977). Telling more than we can know: Verbal reports on mental processes. *Psychological Review, 84*, 231–259. doi:10.1037//0033-295X.84.3.231.

O'Toole, T. P. & Shay, G. (2006). *Manson v. Braithwaite revisited: Towards a new rule of decision for due process challenges to eyewitness identification procedures* (pp. 109–148). 41 Val. U. L. Rev. 109.

Pigott, M. A., & Brigham, J. C. (1985). Relationship between accuracy of prior description and facial recognition. *Journal of Applied Psychology, 70*, 547–555. doi:10.1037//0021-9010.70.3.547.

Ross, L. (1977). The intuitive psychologist and his shortcomings: Distortions in the attribution process. In L. Berkowitz (Ed.), *Advances in experimental social psychology* (Vol. 10). New York: Academic Press.

Simmons v. United States. (1968). 390 U.S. 377.

Smalarz, L., & Wells, G. L. (2012). Eyewitness identification evidence: Scientific advances and the new burden on trial judges. *Court Review, 48*, 14–21.

Smalarz, L., & Wells, G. L. (2013). Eyewitness certainty as a system variable. In B. L. Cutler (Ed.), *Reform of eyewitness identification procedures*. Washington, DC: American Psychological Association Press.

Smalarz, L., & Wells, G. L. (2014). Post-identification feedback to eyewitnesses impairs evaluators' abilities to discriminate between accurate and mistaken testimony. *Law and Human Behavior, 38*, 194–202. doi:10.1037/lhb0000067.

State v. Henderson. (2011). 208 N.J. 208, 218.

State v. Lawson. (2012). 352 Or. 724.

State v. Ledbetter. (2005). 275 Conn. 534.

Steblay, N. M. (1997). Social influence in eyewitness recall: A meta-analytic review of lineup instruction effects. *Law and Human Behavior, 21*, 283–298. doi:10.1023/A:1024890732059.

Steblay, N. K., Dysart, J. E., & Wells, G. L. (2011). Seventy-two tests of the sequential lineup superiority effect: A meta-analysis and policy discussion. *Psychology, Public Policy, and Law, 17*, 99–139. doi:10.1037/a0021650.

Steblay, N. M., Wells, G. L., & Douglass, A. L. (2014). The eyewitness post-identification feedback effect 15 years later: Theoretical and policy implications. *Psychology, Public Policy, and Law, 20*, 1–18. doi:10.1037/law0000001.

Wegner, D. M. (2002). *The illusion of conscious will*. Cambridge, MA: MIT Press.

Wells, G. L. (1985). Verbal descriptions of faces from memory: Are they diagnostic of identification accuracy? *Journal of Applied Psychology, 70*, 619–626. doi:10.1037/0021-9010.70.4.619.

Wells, G. L., & Bradfield, A. L. (1998). "Good, you identified the suspect:" Feedback to eyewitnesses distorts their reports of the witnessing experience. *Journal of Applied Psychology, 83*, 360–376. doi:10.1037//0021-9010.83.3.360.

Wells, G. L., Ferguson, T. J., & Lindsay, R. C. L. (1981). The tractability of eyewitness certainty and its implication for triers of fact. *Journal of Applied Psychology, 66*, 688–696. doi:10.1037/0021-9010.66.6.688.

Wells, G. L., Greathouse, S. M., & Smalarz, L. (2011). Why do motions to suppress suggestive eyewitness identifications fail? In B. L. Cutler (Ed.), *Conviction of the innocent: Lessons from psychological research*. Washington, DC: American Psychological Association Press.

Wells, G. L., & Hryciw, B. (1984). Memory for faces: Encoding and retrieval operations. *Memory and Cognition, 12*, 338–344. doi:10.3758/BF03198293.

Wells, G. L., Lindsay, R. C. L., & Ferguson, T. J. (1979). Accuracy, confidence, and juror perceptions in eyewitness identification. *Journal of Applied Psychology, 64*, 440–448. doi:10.1037//0021-9010.64.4.440.

Wells, G.L. (1978). Applied eyewitness testimony research: System variables and estimator variables. *Journal of Personality and Social Psychology, 36*, 1546-1557. doi: 10.1037/0022-3514.36.12.1546.

Wells, G. L., Memon, A., & Penrod, S. D. (2006). Eyewitness evidence: Improving its probative value. *Psychological Science in the Public Interest, 7*(2), 45–75. doi:10.1111/j.1529-1006.2006.00027.x.

Wells, G. L., & Murray, D. M. (1983). What can psychology say about the Neil vs. Biggers criteria for judging eyewitness identification accuracy? *Journal of Applied Psychology, 68*, 347–362. doi:10.1037/0021-9010.68.3.347.

Wells, G. L., Olson, E. A., & Charman, S. D. (2002). The confidence of eyewitnesses in their identifications from lineups. *Psychological Science, 11*, 151–154. doi:10.1111/1467-8721.00189.

Wells, G. L., & Quinlivan, D. S. (2009). Suggestive eyewitness identification procedures and the Supreme Court's reliability test in light of eyewitness science: 30 Years later. *Law and Human Behavior, 33*, 1–24. doi:10.1007/s10979-008-9130-3.

Wells, G. L., Small, M., Penrod, S. J., Malpass, R. S., Fulero, S. M., & Brimacombe, C. A. E. (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads. *Law and Human Behavior, 22*, 603–647. doi:10.1023/A:1025750605807.

Wigmore, J. H. (1970). *Evidence in trials at common law (Chadbourn Revision)*. Boston: Little, Brown, and Company.

Wright, D. B., Self, G., & Justice, C. (2000). Memory conformity: Exploring misinformation effects when presented by another person. *British Journal of Psychology, 91*, 189–202. doi:10.1348/000712600161781.

The Credibility of Witnesses

Stanley L. Brodsky and Ekaterina Pivovarova

It is unfortunate. It probably is unfair. It may even be wrong. The "it" referenced here is the issue of how witnesses' testimony is sufficiently important that dozens of books and thousands of articles are devoted to critiquing, reshaping, or improving witness credibility.

In a fair and proper world, it would and should be the substantive content of witness testimony that is the sole focus. The probative value of testimony by both lay and expert witnesses would contribute to understanding, would help triers of fact move to conclusions, and would stand alone to be assessed clearly for what it is. Unfortunately, the probative value of testimony can be elusive when sorting out the broader swampland of delivery style, speaking mannerisms, and personal traits of legal actors. It is the reason an attorney recently described to us her decision not to call an important witness in a civil case because the prospective witness came across interpersonally as slippery and slimy and was not amenable to changing this style of relating.

The argument can equally be made that the variability in attorney style is unfair. Bumbling and inarticulate attorneys are less able to make probative evidence salient and to apply effective logical thinking in the courtroom (and out) than are skilled and articulate attorneys. But attorney traits are beyond the scope of the present chapter.

Furthermore, addressing legal inequities is a task that is well beyond the reach of most social scientists. In his book *Time enough for Love*, Robert Heinlein (1973) wrote, "Never attempt to teach a pig to sing; it wastes your time and annoys the

S.L. Brodsky, Ph.D. (✉)
Department of Psychology, The University of Alabama, Tuscaloosa, AL 35487, USA
e-mail: biminip@gmail.com

E. Pivovarova, Ph.D.
Department of Psychiatry, Division of Law and Psychiatry, University of Massachusetts Medical School, Worcester, MA, USA
e-mail: EPIVOVAROVA@partners.org

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_4

pig." Social scientists seeking to minimize peripheral path effects of witness testimony are faced with similar obstacles that can seem hard-wired at times. In the face of such difficulties, a reasonable step is to learn more about it. This chapter addresses the aspects of witness testimony that make a difference in how substantive content makes its way through the fog of style. We begin to look at style of testimony initially through the recent growth of a new profession.

Witness Preparation and the Growth of a Profession

The improvement of witness credibility is sufficiently important and thus a new field of trial consultation as a professional task has emerged in the last 30 years. The field of trial consultation also looks at jury selection, case conceptualization, and preparation of visual teaching materials for trials, but it has a major investment in witness preparation (Brodsky, 2009). The relevance to the present discussion is that an organized and identified group of practitioners with their own sets of ethical standards and membership criteria devotes itself to the practice of preparing witnesses to be more credible. As Chopra and Hess (2009) point out, mental health professionals who testify are often intimidated, fearful, and have performance anxiety. At its best, the trial consultation field seeks to relieve the anxiety and intensely prepare witnesses without compromising the substantive content of their testimony.

Trial consultants have organized into The American Society of Trial Consultants (see astcweb.org). The fact that a group exists to promote responsible practice as well as to promote thriving business by its members merits a comment. Preparing witnesses started as a part-time or informal task by a few social scientists or attorneys involved in unsystematic efforts in the midst of many other tasks. It has grown to becoming an independent profession with at least 500 members who draw in large part on social science knowledge to assist attorneys in jury selection, in preparing their (mostly civil) cases, and in preparing witnesses to be persuasive on the stand. When a phrase like *persuasive witness* is used, there is a tendency for readers to think that they know just what is meant. However, the construct is not obvious and attending to the meaning and measure of credible witnesses is a central issue.

Witness Credibility: The Concept and the Scale

The foundation for much of the research on the credibility of witnesses has been the concept of source credibility. Source credibility has been identified and studied sufficiently since at least the mid-twentieth century and the common scholarly task at this point has been to conduct meta-analyses—that is, critical summaries and reviews of studies. For example, in one review of five decades of research, Pornpitakpan (2004) drew on 153 articles about whether source credibility was

related to persuasiveness. Pornpitakpan concluded that the answer was mostly yes and drew that conclusion from many examples where the studies compared high versus low credibility sources, although a number of caveats were also identified. This review was particularly focused on implications for the field of advertising. In contrast, Sternthal, Phillips, and Dholakia (1978) were interested in circumstances in which high source credibility did not contribute to persuasiveness, including the many times when the target audience was low in authoritarianism. They concluded that no simple inferences may be drawn and that researchers need to look at how situational factors and individual differences contribute to the impact of source credibility on persuasion. They added (unconvincingly to our reading of it) that only an understanding of attribution theory and cognitive processes could lead to a reasonable understanding of the issues.

In a series of studies of witness credibility, much attention has been drawn to extrapolations of source credibility. The research bases about persuasion have addressed variables associated with successful changing of individual evaluations of specific content in testimony. As noted earlier, sources of information that yield high credibility are associated with greater levels of persuasion than sources with low credibility (Smith, De Houwer, & Nosek, 2013). The concept of credibility is customarily defined as believable, convincing, and likely to be convincing.

The applications of credibility of parties or media from which opinions or judgments arise apply to most areas of human functioning. People are influenced by the credibility of product reviews, of commercial claims, assertions of competence of professionals ranging from dentists to massage therapists, of products that are supposed to increase resistance of the body to illness, and on to a lengthy list. For the present purposes, the issue is credibility of a particular kind of source: the information presented by witnesses. To a modest extent, the credibility of witnesses is addressed in police questioning, but the largest amount of pertinent attention is directed towards witnesses on the stand. How believable are they? What about them that makes them more or less credible? What does the knowledge presented by experts have to do with observations presented by lay witnesses?

Our interest has been in the credibility of expert witnesses testifying in depositions, hearings, and trials. Expert witnesses have a special status in the legal arena. The Federal Rules of Evidence (FRE 702) specify that a person may be admitted as an expert on the basis of education, training, skill, experience, or knowledge, criteria that cover a large territory. Admission of individuals as experts is a subjective decision made by trial judges, and their tendency is to admit most well-educated persons proffered as experts. Despite the failure of judges to sort out with discriminating care the genuine true-blue experts from the wanna-bes, expert testimony is widely believed to make a difference. Kwartner, in her 2007 dissertation, conducted a meta-analysis of 29 mock jury studies and concluded that expert testimony has a small but significant effect on findings of perceived degree of guilt, especially when the expert had rendered an opinion. In a follow-up book chapter, Kwartner and Boccaccini (2008) developed a series of evidence-based suggestions about how to make expert testimony more credible.

The Assessment of Credibility

A number of typologies have been organized to identify the component elements that make up source credibility and expert witness credibility. For example, McCroskey (1966) developed a 30-item scale that evaluated authoritativeness and character. Shortly afterwards, Whitehead (1968) divided the components of effective testimony into the dimensions of objectivity, dynamism, competence, and trustworthiness. Berlo, Lemert, and Mertz (1969) used 83 differential adjective pairs to investigate various elements of source credibility. Their 3-factor solution yielded dimensions of safety, qualifications, and dynamism. DeBono and Harnish (1988) made the useful addition to the literature that characteristics of the participant-perceivers are important. They found that self-monitoring traits differentiated people who processed information itself as opposed to using heuristics.

One effort to explore the construct of witness credibility has been to parse out the elements that seem to make up credibility and examine whether these elements lend themselves to reasonable efforts at measurement for research purposes. In a series of studies in the Witness Research Lab at The University of Alabama, an instrument was developed for assessing just these questions. The research through 2010 on the Witness CredibilityScale has been summarized by Brodsky, Griffin, and Cramer (2010). The process began by critical examination of the literature on source credibility and expert witness credibility. Successive iterations yielded four major factors and studies of items that made up the factors were conducted. Two of the initial hypothesized factors, believability and intelligence, were discarded. The four surviving factors were knowledge, likability, trustworthiness, and confidence. The likability component was drawn in part from the Likeability Scale (Stone & Eswara, 1969), as well as from what can be considered the basic source of all adjective scale items, the Osgood, Suci, and Tannenbaum (1957) book on the measurement of meaning that was the source of many of the adjective pairs used in scale development.

A pool of 41 items was reduced to 20 items, and the largest amount of variance in perceived credibility was accounted for by the factor of confidence (almost 50 % of the variance), followed by trustworthiness, likability, and knowledge, respectively. Cramer, Brodsky, and DeCoster (2009) presented data supporting the construct validity of the Witness CredibilityScale. In short, this 20-item Likert-type scale with five items for each factor has been used sufficiently to indicate that it is a reasonable outcome measure for studies of the effectiveness and persuasiveness of expert testimony.

The fundamental rationale drawn from testifying experience, from the literature, and from these studies conducted by Brodsky and colleagues were:

1. Jurors believe experts who are knowledgeable (and they should believe them).
2. Jurors believe experts they like.
3. Jurors believe experts they trust.
4. Jurors believe experts who are confident about their findings and conclusions.

Women Experts and Personally Intrusive Questions

Considerable reasons exist to believe that the experiences of women as expert witness may be different and may be more difficult than those of men. Anecdotal reports have described the ways women in particular are pursued and asked questions that are overly personal and arguably unrelated to the probative issues at hand (Brodsky, 1999). In her unpublished doctoral dissertation, Dixit-Brunet (2006) described the results of interviewing 15 women psychologists who served as expert witnesses. Ten of the women were Caucasian and five were women of color. While no men were interviewed as a control group, the results nevertheless allow glimpses into the experiences of these experts. For example, all of the women reported difficult cross-examinations when testifying about examinees of a different ethnicity from them. Almost all of the women reported major role conflicts, ethical dilemmas, and negative experiences. Nevertheless, the women conducting child custody evaluations did report that there was a palpable advantage in being a woman for such assessments and testimony, in contrast to the reported stressors and difficulties in insanity and dangerousness assessments.

In the give and take between expert witnesses and cross-examining attorneys, the quality of the discourse can be aggressively adversarial and an emotional strain on the experts. Some attorneys actively seek to elicit personal content from the experts to devalue the worth, objectivity, and integrity of their testimony. Some compelling reasons exist to believe this is especially true for women who testify as experts. In their research on intrusive questions within the courtroom, O'Connor and Mechanic (2000) found that a quarter of women psychological experts had been asked intrusive questions, while none were asked of men in their sample. It is almost exclusively women who are asked about parenting, marital status, abuse in their childhoods or current lives, and whether they are currently taking any medication.

Support has appeared in the literature indicating that attempts to invalidate and impeach testimony of women often draw on personal and inappropriate attacks (Brodsky, 2004; Gutheil, Commons, & Miller, 2001). Consider these examples of intrusive questions that have been asked of female but not male expert witnesses (Brodsky, 2004):

"Have you ever miscarried?"
"Do you have children?"
"Have you ever been divorced?"
"Have you ever been arrested or charged with any offense?"

Larson and Brodsky (2010, 2013) have studied style of responses to intrusive questions as well as gender and testimony. With 293 undergraduate students serving as research participants, Larson and Brodsky (2010) presented a case drawn from the literature in which a man had killed his wife, son, and niece. The testifying psychologist opined for the defense that the defendant was suffering from a paranoid delusional disorder and, in terms of psychological functioning, was not responsible for his actions. Four research conditions were used: female expert—nonintrusive questioning, female expert—intrusive questioning, male expert—nonintrusive questioning, and male expert—intrusive questioning. Two examples of intrusive

questions were, "Do you often encourage your clients to talk about their sexuality and sexual concerns with you?" and "To your knowledge has your husband/wife ever cheated on you, or have you ever cheated on your husband/wife?" (p. 818).

Two findings from this study stand out. First, along every dimension, the ratings of the experts differed, with men rated higher on every dimension of credibility, despite male and female experts having been closely matched in a manipulation check. Second, the intrusive questions increased the favorability of the verdict for the defense. In the nonintrusive condition, 19 % of the participants found the defense evidence more persuasive. In the intrusive questioning condition, 34 % found the defense case more persuasive. The experts subjected to intrusive questions were judged as more believable, trustworthy, and credible. The implications were that women experts may require more preparation to succeed than men, and that the typically silent, objection-free demeanor of the retaining counsel during aggressive cross-examinations may be a logical and sensible strategy.

In a follow-up study, Larson and Brodsky (2013) investigated the efficacy of various responses to intrusive questions about sexuality, about parenting, about lying, and about being threatened, assuming it may be useful to examine the nature of replies on the stand to intrusive questions posed to women experts. Larson and Brodsky (2013) constructed questions about threats, sexuality, parenting, and lying that were presented in videotapes of simulated expert witness testimony. These questions were drawn from examples reported by women experts. As in the prior study, the men experts were judged to be more credible than women experts, a pattern that is both concerning and worthy of further investigation.

Two patterns of expert responding were studied: defensive responses and assertive responses, both drawn from observations of the ways in which experts manage such intrusions on their privacy. An example of an assertive reply is, "I am not here to testify about my personal feelings as a mother (father). I am testifying as a clinical psychologist who was asked to assess this individual and give my professional findings to the court." The same case was used as described in Larson and Brodsky (2010).

The attorneys who asked intrusive questions were rated as rude, intimidating, irrelevant, and accusatory. When experts ask retaining counsel why they have not objected to intrusive questions by opposing counsel, the frequent answer is because it was doing more harm to the side asking the intrusive questions. That observation was supported. Intrusive questions do not affect perceptions of experts. However, these results conflicted with the earlier study that intrusive questioning increases credibility of experts. There was no difference. The more important finding was that assertive replies to intrusive questions worked well, compared to defensive replies. The bottom line finding was a compelling case for being non-defensive when asked intrusive questions.

Scientific Expertise

One of our working hypotheses about witness credibility addresses the specificity of content. We hypothesize that the less specific and scientific the content of the testimony, the more the triers of fact will rely on peripheral elements in the testimony.

In contrast, we also posit that the more specific and scientific the testimony, the more triers of facts will rely on central, probative content. As noted earlier, we hold that mental health professionals should aspire towards testimony that is based on reliable and valid methods and towards testimony in which *res ipsa loquitur*, that is probative and cogent in its own right.

It is common for opposing counsel in depositions and in cross-examinations to challenge the scientific foundations of all mental health and psychological content. A question attorneys ask in one form or another goes something like this:

> Isn't it true that psychology is the king of the inexact sciences?

One preferred response is, "No, that is a position that seems to be occupied by Sociology." To the extent that the testifying expert is comfortable and skilled with taking on this broadsword attack with the lightheartedness it merits, experts may also reply, "No, not at all; many have come to think of psychology as the queen of the inexact sciences." The unwary attorney who follows up with a query about what this means is likely to receive a blast of information about the history of psychology, the popularization of psychological concepts, the development of valid measures, and the demands for evidence-based approaches to treatment.

Some areas of mental health testimony would appear at initial examination to lend themselves to being both probative and scientific. Testimony that is based on validated tests of intelligence would be one such example. In another example, over the last dozen years more neuroscience experts and their testimony have made their way into the courtroom. In this section, we critically consider the research relating to neuroscience testimony.

Neuroscience Experts on the Stand

The use of neuroscience in the courtroom has a long and controversial history (Baskin, Edersheim, & Price, 2007). Some observers will recall introduction of computerized tomography (CT) scans to support a diagnosis of Schizophrenia at the John Hinckley Jr. trial for his attempted assassination of President Reagan (*United States v. Hinckley*, 1982). In subsequent years, much has changed in neuroscience and the law. Recent advances in technology and methods for collecting and analyzing imaging data, coupled with decreasing costs and greater availability of training, have resulted in an explosion of neuroscientific research (Rosen & Savoy, 2012). The ability to track fluctuating brain activity (i.e., functional data), as opposed to examining structural or anatomical images, has allowed for research in a wide array of applied fields.

It is not surprising that techniques that could presumably measure thought patterns, identify lying, detect psychopathology, and assess for violence and impulsivity incite interest in the legal community (Jones, Wagner, Faigman, & Raichle, 2013). The MacArthur Foundation Research Network on Law and Neuroscience has tracked peer-reviewed publications in the field of neurolaw (application of neurosciences to

legal questions). Between 2003 and 2013, the total number of articles skyrocketed from less than 100 to more than 1100 (Jones et al., 2013). A debate has ensued about the appropriate use of neuroscience research in the courtroom. Many researchers urge strong caution in applying this nascent field to complicated psycho-legal questions (Appelbaum, 2009; Rushing & Langleben, 2011).

Despite the controversial nature of this topic, attorneys have attempted to bring in neuroscience experts on a wide range of criminal and civil issues (Jones et al., 2013). In general, the courts have been conservative about allowing in neuroscientific findings. For some issues, such as deception, there are consistent state and federal precedents in rejecting any neuroscientific findings (dating back to *Frye v. United States*, 1923). However, in other areas of the law, neuroscientific data and expert testimony have been allowed (e.g., in areas of competency, insanity, diminished capacity), particularly during the sentencing phases. Some defendants have argued that failure to exhibit or obtain brain-imaging data amounts to ineffective assistance of counsel (*Ferrel v. State*, 2005). Thus, it seems likely that admissibility of neuroscientific data and testimony is likely to continue being debated.

Impressions of Neuroscience

One concern about neuroscience testimony is that the jury or judge may be unfairly prejudiced by the technical nature of the field. One study has found that simply placing unrelated pictures of the brain next to complicated explanations made those explanations seem more "scientific" (McCabe & Castel, 2008). Other findings indicate that psychological phenomena are determined to be "good" when accompanied by neuroscientific explanations (Weisberg, Keil, Goodstein, Rawson, & Gray, 2008). In part, this research has raised concerns about unrealistic expectations that triers of fact may have about neuroscientific research.

A few studies have sought to understand what the public thinks neuroscience can do. Wardlaw and colleagues (2011) asked laypeople ($n=660$) and experts ($n=303$) to complete an online survey about the uses of neuroimaging. About half of the non-expert respondents (47 %) were at least "a little" aware about the potential uses of neuroimaging, with 10 % being "very aware." The majority (84 %) of the public responders believed that neuroimaging could diagnose brain diseases such as tumors "very well." In contrast, fewer had confidence that neuroimaging could be used to identify mental illness (64 % responded "to some extent" and 17 % answered "very well"). With respect to deception, 62 % believed that neuroimaging could be used to detect lying to "some extent" and 5.6 % endorsed "very well." Neuroscience experts, a group that included psychologists, psychiatrists, and neuroscientists, did not believe that current adaptions of neuroimaging could be used to detect deception or understand criminal behavior. When experts were asked about the frequency that such tools were used in United State courts, approximately three fourths believed it to be fewer than 30 times in the past 5 years. In contrast, the authors reported that it had been used in excess of 100 times (actual numbers are unavailable).

These findings are concerning. The public appears to harbor beliefs that current neuroimaging technology is able to answer psycho-legally relevant questions, in marked contrast to experts' beliefs. Equally important is the misconception that neuroscience experts have that there are fewer applications of neuroimaging in court-related matters than there actually are.

Impact of Neuroscience on Juror Decision-Making

Researchers have explored how neuroscientific images and data may impact juror decision-making. The findings are equivocal. There appeared to be an initial consensus that neuroimages (and potentially testimony) sway jury decision-making. However, recent studies have qualified this finding and offered a more nuanced view about what may actually influence the jury.

McCabe, Castel, and Rhodes (2011) examined how neuroscientific explanations, with and without descriptions about the limitations of imaging tools, would impact legal judgments. Undergraduates ($N=330$) read a vignette about a defendant who allegedly killed his wife and her lover. Participants were randomly assigned to one of six groups based on the type of testimony offered about the defendant lying. The groups were: polygraph, fMRI, fMRI with its validity questioned, thermal imaging (TI), TI with its validity questioned, and no testimony. No neuroimages were presented. Respondents were more likely to find the defendant guilty in the fMRI (no description of the limitations) condition than any other group. There were no significant differences between any of the other conditions, including between the control group and that of fMRI and TI with validity questioned groups. This study highlights that a comprehensive and accurate portrayal of the limitations of neuroscientific tools may reduce prejudicial impact of such evidence.

Schweitzer and Saks (2011) also examined the impact of neuroscience testimony, specifically as it compared to other types of testimony and neuroimages. The authors devised a six-by-four experiment comparing types of evidence to verdict type. The participants ($N=1170$) were asked to read trial proceedings about a defendant who punched his victim unconscious. Evidence was presented by the defense to show that the defendant was suffering from a mental illness that resulted in aggression and inability to control his behavior. The six groups of evidence were: neurologist's testimony and a brain image, neurologist's testimony and a neurograph (bar graph of frontal lobe function), neurologist's testimony, neuropsychologist's testimony, clinical psychologist's testimony, and control (no testimony or images). The four types of verdicts were based on mental state at the time of the crime defenses. There was a main effect for the type of evidence proffered. Individuals in the neuroimaging condition (testimony by a neurologist and a neuroimage) were significantly more likely to find the defendant as Not Guilty by Reason of Insanity (NGRI) or Guilty but Mentally Ill (GBMI; 53.2 %) than the control group (12 %) and the clinical psychology group (43.2 %) condition. There were no significant differences between the other three types of conditions, all of which

were around the 50 % mark. Respondents were also queried about what type of evidence that they had not seen would be most helpful to them in deciding the case. Those who did not see the neuroimage asked for it, while those who did see it asked for clinical psychology testimony.

This study suggests that any scientific explanation, with and without testimony, is likely to be more powerful to the jury than its absence (i.e., control group). Further, this research emphasizes that it is not the neuroimages themselves per se that impact decision making, because there were no differences between evidence types with and without neuroimages. However, it is potentially the testimony, an explanation by the expert, behind the neuroscientific findings that makes the deciding difference. The most surprising aspect of this research was that the only testimony significantly less likely to result in NGRI/GBMI finding was that of a clinical psychologist (the nature of whose testimony was the same as that of a clinical neuropsychologist). It is possible that the jury believed that brain-related explanations necessitated an expert trained in neurological bases or simply one that had the word "neuro" in the title.

Cautionary Notes

Jones and colleagues (2013) offer advice to neuroscience experts about testifying in legal proceedings. The authors emphasize that certain issues may be particularly problematic to neuroscientists. For example, they describe "two fonts of confusion" about wording used in testimony. First, neuroscientists and lawyers may have different meanings for the same terms. Second, neuroscientists and lawyers may use terms that are specialized in one field while general in the other. More broadly, Jones and colleagues suggest that like other types of expert witnesses, neuroscientist will need to become familiar with legal terms and process. The authors outline key basics about neuroscience that will need to be relayed to decision-makers. The expert will need to distinguish between structural and functional data, explain that research data and images are amalgamations of multiple brain images from multiple individuals, highlight that neuroimages are not analogous to brain x-rays, and finally, that like mental states, individuals' brains change over time.

Conclusion

We began the chapter by acknowledging the unfairness of the "it" factor—the importance of appearing credible, above and beyond being a competent and knowledgeable (i.e., scientifically credible) expert. We have indicated that witness credibility is a burgeoning field, which includes credibility consultants, specialized instruments to measure the construct, and empirically supported maxims about what constitutes a credible expert. Based on this and other research, many observers

would agree that perception of credibility may be as important as actually being knowledgeable and accurate (different issues altogether). Yet our review of literature has also unearthed that there are subtypes of experts who may have additional hurdles to overcome. Women experts are more likely to receive intrusive, personal questions, which may negate their credibility and potentially reduce their efficiency in their role experts. We have offered suggestions about how to handle such difficulties, but also noted that attorneys who engage in such offensive behavior are just as likely to hurt their own credibility as they are of the witness. A different issue emerges with neuroscience experts, a group that is likely to become increasingly more common in the courtroom. Those experts will need to overcome erroneous biases that the jury may have about neuroimaging as a field and the limitations of answering psycho-legal questions. It is essential to continue conducting research on credibility of experts, especially about how non-neuroscience experts compare to those equipped with visually compelling neuroimages. These issues inherent to credibility of witness will continue to be an area of debate and fruitful research.

References

Appelbaum, P. S. (2009). Through the glass darkly: Functional neuroimaging evidence enters the courtroom. *Psychiatric Services, 60*, 21–23. doi:10.1176./appi.ps.60.1.21.

Baskin, J. H., Edersheim, J. G., & Price, B. H. (2007). Is a picture worth a thousand words? Neuroimaging in the courtroom. *American Journal of Law & Medicine, 33*, 239–269. Retrieved from http://www.bu.edu/law/central/jd/organizations/journals/ajlm/.

Berlo, D. K., Lemert, J. B., & Mertz, R. J. (1969). Dimensions for evaluating the acceptability of message sources. *Public Opinion Quarterly, 33*, 563–576.

Brodsky, S. L. (1999). In S. L. Brodsky (Ed.), *The expert expert witness: More maxims and guidelines for testifying in court* (pp. 63–66). Washington, DC: American Psychological Association.

Brodsky, S. L. (2004). *Coping with cross examination and other pathwas to effective testimony*. Washington, DC: American Psychological Association.

Brodsky, S. L. (2009). *Principles and practice of trial consultation*. New York: Guilford.

Brodsky, S. L., Griffin, M. P., & Cramer, R. J. (2010). The Witness Credibility Scale: An outcome measure for expert witness research. *Behavioral Sciences & the Law, 28*(6), 892–907.

Chopra, S., & Hess, D. T. (2009). Mental health professionals in the witness chair: Strategies for more effective legal testimony. *Directions in Psychiatry, 29*(4), 269–282.

Cramer, R. J., Brodsky, S. L., & DeCoster, J. (2009). Expert witness confidence and juror personality: Their impact on credibility and persuasion in the courtroom. *The Journal of the American Academy of Psychiatry and the Law, 37*, 63–74.

DeBono, A., & Harnish, R. (1988). Source expertise, source attractiveness, and the processing of persuasive information: A functional approach. *Journal of Personality and Social Psychology, 55*(4), 541–546.

Dixit-Brunet, A. (2006). A qualitative study exploring the factors that contribute to stress in women forensic psychologists who testify in court as expert witnesses. *Dissertation Abstracts International, 67*(4-B), 2221.

Ferrel v. State. (2005). 918 So. 2d 163 (S.C FL 2005).

Frye v. United States. (1923). 293 F. 1013 (D.C. Cir. 1923).

Gutheil, T. G., Commons, M. L., & Miller, P. M. (2001). Personal questions on cross-examination: A pilot study of expert witness attitudes. *The Journal of the American Academy of Psychiatry and the Law, 29*, 85–88.

Heinlein, R. (1973). *Time enough for love*. New York: Ace.
Jones, O. D., Wagner, A. D., Faigman, D. L., & Raichle, M. E. (2013). Neuroscientist in court. *Nature Reviews Neuroscience, 14*, 730–736. doi:10.1038/nrn3585.
Kwartner, P. P. (2007). The impact of educative and evaluative expert witness testimony on trial outcome: A meta-analytic review. Unpublished doctoral dissertation, Sam Houston State University, Huntsville, TX.
Kwartner, P. P., & Boccaccini, M. T. (2008). Testifying in court: Evidence-based recommendations of expert-witness testimony. In R. Jackson (Ed.), *Learning forensic assessment* (pp. 565–588). New York: Routledge/Taylor & Francis Group.
Larson, B. A., & Brodsky, S. L. (2010). When cross-examination offends: How men and women assess intrusive questioning of male and female expert witnesses. *Journal of Applied Social Psychology, 40*(4), 811–830.
Larson, B. A., & Brodsky, S. L. (2013, March). *Managing personally intrusive cross-examination questions: Gender & response style*. Paper presented at the Annual Meeting of the American Psychology-Law Society, Portland, OR.
McCabe, D. P., & Castel, A. D. (2008). Seeing is believing: The effect of brain images on judgments of scientific reasoning. *Cognition, 107*(1), 343–352. doi:10.1016/j.cognition.2007.07.017.
McCabe, D. P., Castel, A. D., & Rhodes, M. (2011). The influence of fMRI lie detection evidence on juror decision-making. *Behavioral Sciences and the Law, 29*, 566–577. doi:10.1002/bsl.993.
McCroskey, J. C. (1966). Scales for the measurement of ethos. *Speech Monographs, 33*, 65–72.
O'Connor, M., & Mechanic, M. (2000, June). *A broader exploration of the role of gender in expert testimony*. Paper presented at the annual meeting of the Society for the Psychological Study of Social Issues: Ann Arbor, MI.
Osgood, C. E., Suci, G. J., & Tannenbaum, P. H. (1957). *The measurement of meaning*. Urbana, IL: University of Illinois Press.
Pornpitakpan, C. (2004). The persuasiveness of source credibility: A critical review of five decades evidence. *Journal of Applied Social Psychology, 34*(2), 243–281.
Rosen, B. R., & Savoy, R. L. (2012). fMRI at twenty: Has it changed the world? *NeuroImage, 62*(2), 1316–1324. doi:10.1016/j.neuroimage.2012.03.004.
Rushing, S. E., & Langleben, D. D. (2011). Relative function: Nuclear brain imaging in United States courts. *Journal of Psychiatry & Law, 39*, 567–593. Retrieved from http://www.federal-legalpublications.com/journal-of-psychiatry-law.
Satel, S., & Lilienfeld, S. O. (2013). *Brainwashed: The seductive appeal of mindless neuroscience*. New York: Basic Books.
Schweitzer, N. J., & Saks, M. J. (2011). Neuroimage evidence and the insanity defense. *Behavioral Sciences and the Law, 29*, 592–601. doi:10.1002/bsl/.995.
Smith, C., De Houwer, T., & Nosek, B. A. (2013). Consider the source: Persuasion of implicit evaluations is moderated by source credibility. *Personality and Social Psychology Bulletin, 39*(2), 193–205.
Sternthal, B., Dholakia, R., & Leavitt, C. (1978). The persuasive effect of source credibility: Tests of cognitive response. *Journal of Consumer Research, 4*(4), 252–260.
Sternthal, B., Phillips, L. W., & Dholakia, R. (1978). The persuasive effect of source credibility: A situational analysis. *Public Opinion Quarterly, 24*, 285–314.
Stone, V. A., & Eswara, H. S. (1969). The likeability and self-interest of the source in attitude change. *Journalism Quarterly, 46*, 61–68.
United States v. Hinckley. (1982). 599 F. Supp. 1342 (D. C. District 1982).
Wardlaw, J. M., O'Connell, G., Shuler, K., DeWilde, J., Haley, J., Escobar, O., et al. (2011). "Can it read my mind?" What do the public and experts think of the current (mis)uses of neuroimaging? *PLoS One, 6*(10), 1–9. doi:10.1371/journal.pone.0025829.
Weisberg, D. S., Keil, F. C., Goodstein, J., Rawson, E., & Gray, J. R. (2008). The seductive allure of neuroscience explanations. *Journal of Cognitive Neuroscience, 20*(3), 470–477. Retrieved from http://www.mitpressjournals.org/loi/jocn.
Whitehead, J. L. (1968). Factors of source credibility. *Quarterly Journal of Speech, 54*, 59–63.

False Confessions: From Colonial Salem, Through Central Park, and into the Twenty-First Century

Saul M. Kassin

False confessions are not a new or novel phenomenon. From colonial Salem through the twenty-first century; in countries all over the world; in criminal justice, military, and corporate settings; many innocent people have confessed to crimes they did and would not commit. Within psychology, Munsterberg (1908) wrote about "untrue confessions" more than a hundred years ago; in *On the Witness Stand*, Bem (1966) and Zimbardo (1967) provided the first social psychological perspectives in the 1960s. Kassin and Wrightsman (1985a, 1985b) introduced a taxonomy consisting of three types of false confessions that served as a conceptual platform for current research. In light of this background, coupled with the recent wave of DNA exonerations indicating the prevalence of false confessions, this chapter overviews the history of research in this area and then summarizes recent work specifically aimed at four questions: Why are innocent people often targeted for interrogation? Why do innocent people confess as a result of that process? Why do juries invariably believe false confessions—resulting in wrongful convictions that are later difficult to overturn? Finally, what can be done to prevent future miscarriages of justice caused by false confessions?

Historical Overview

In 1908, Harvard psychology professor Hugo Munsterberg published his precocious, controversial, and prescient book, *On the Witness Stand: Essays in Psychology and Crime*. Although the chapters of his book were not numbered, the sixth chapter, which was entitled "Untrue Confessions," spanned pages 135–171. Munsterberg's

S.M. Kassin (✉)
Department of Psychology, John Jay College of Criminal Justice,
445 West 59 Street, New York, NY 10019, USA
e-mail: skassin@jjay.cuny.edu

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_5

chapter is fascinating for several reasons. First, he opened with a "sad story" of a man who was sentenced to death for murder based solely on a confession. Munsterberg was convinced that the man was innocent and that his confession was false; yet within 1 week of the man's conviction, "he was hanged for a crime of which he was no more guilty than you or I" (p. 140). Interestingly, the case took place in Chicago—dubbed more than a hundred years later "The false confession capital" (CBS *60 Minutes*, December 9, 2012). Second, Munsterberg clearly understood the potency of confession evidence in the courtroom because "it would be inconceivable that any man who was innocent should claim the infamy of guilt" (p. 142). Third, Munsterberg went on to discuss the Salem witch trials and speculate in general terms about the psychological causes of false confessions, using such words as *hope, fear, promises, threats, suggestion, cunning calculations, passive yielding, real conviction, shock, fatigue, emotional excitement, melancholia, auto-hypnosis, dissociation, insanity, and self-destructive despair*. Finally, it appears that Munsterberg's opinion found its way into the Chicago newspapers, where he was roundly criticized in headlines that screamed about "Harvard's Contempt of Court," "Science Gone Crazy," and "long-distance impudence."

Munsterberg's early insights did not spur action within psychology, a yet-to-become applied science, or within the law—even in the wake of *Brown v. Mississippi* (1936), a US Supreme Court opinion that banned third-degree interrogation tactics and articulated a measure of distrust in confessions. This sparked the development of explicit psychological approaches to interrogation—notably featuring the Reid technique first developed in the 1940s by criminologist Fred Inbau and Chicago police officer John Reid (entitled *Criminal Interrogations and Confessions*, the first edition of their manual was published in 1962; for an historical overview, see Leo, 2008).

Fifty years later, there was still only an occasional foray into the subject among social scientists. Putting his new self-perception theory to the test, Bem (1966) published an empirical article in the *Journal of Personality and Social Psychology* entitled "Inducing belief in false confessions" in which he offered a self-perception analysis in the laboratory of how saying (induced confession) can lead to believing (feelings of guilt). Then in the wake of *Miranda v. Arizona* (1966)—in which the US Supreme Court critically described psychological interrogation as "inherently coercive" and required police to apprise suspects in custody of their rights to silence and to counsel—Zimbardo (1967) published a social-psychological analysis of police interrogations in the inaugural issue of *Psychology Today*. At about the same time, occasional law review articles were published that offered "psychological" analyses of confessions—such as sociologist Driver's (1968) "Confessions and the Social Psychology of Coercion," published in the *Harvard Law Review*; and law professor Foster's (1969) "Confessions and the Station House Syndrome," which likened police interrogation to a trance-like state of hypnosis.

This was the spotty state of the pre-literature in 1978 when I defended my dissertation at the University of Connecticut ("Causal Attribution: A Perceptual Approach"), got married 1 week later, and traveled to Lawrence, Kansas for a postdoctoral fellowship to work with Larry Wrightsman. Larry, then Chair of the Psychology Department at KU, was studying jury decision-making—a burgeoning area of applied research for

psychologists interested in the law. The opportunity to work with Larry provided one of those *carpe diem* moments in one's life. Having been trained in basic social psychology, and interested in attribution theory, the application to juries, collaborating with Larry, was a natural fit (it did not hurt that when I arrived in town, Larry hosted a reception in his home, where he arranged for me to meet my intellectual hero, Fritz Heider—a professor emeritus whose classic 1958 book, *The Psychology of Interpersonal Relations*, inspired attribution theory; meeting Heider provided me a sense of closure, to use an old term from Gestalt psychology).

To get started, I proceeded to gather, solicit, pilot-test, and edit as many trial transcripts and videotapes I could get my hands on to develop a library of stimulus materials. An obvious pattern in these early returns could not be missed. It seemed that in trials that contained confessions in evidence, regardless of the circumstances, just about everyone voted guilty. Our first impulse was to edit out all confessions which, after all, reduced the variability of responses among mock jurors. Then we realized that this *nuisance* variable constituted a potent *signal* in jury decision-making—one that was often fraught with attributional ambiguity concerning a profound causal question: Why did the defendant confess—was he or she guilty or was the confession elicited by pressure from police?

In our first systematic jury studies, we discovered what we called a "positive coercion bias," indicating that juries were more willing to discount the guilt implications of a confession when it was induced by threats of harm and punishment than by promises of leniency or other reward (Kassin & Wrightsman, 1980). In our second set of studies, we replicated this phenomenon and added that judge's instructions as to what constitutes legal voluntariness and coercion did not keep jurors from convicting defendants induced to confess by promises (Kassin & Wrightsman, 1981). We later summarized this research in *The American Jury on Trial*: *Psychological Perspectives* (Kassin & Wrightsman, 1988).

Picking up on the history of scholarly interest in confessions within psychology, new developments were noteworthy on four fronts: (1) *Miranda* rights to silence and to counsel; (2) the social psychology of police interrogations; (3) the reformist movement in Great Britain; and (4) the Innocence Project's DNA exoneration cases.

Miranda: The Right to Remain Silent

In *Miranda v. Arizona* (1966), the US Supreme Court sought to protect suspects from conditions that might produce involuntary and unreliable confessions. Essentially, the court required police to inform suspects of their rights to silence and counsel. Only if suspects waive these rights "voluntarily, knowingly, and intelligently" can the statements produced be admitted into evidence. *Miranda* issues are often a source of dispute in the courts, particularly on the question of whether the warning-and-waiver requirement is sufficiently protective of the accused.

First and foremost is the concern that some number of suspects—because of their youth, lack of intelligence, lack of education, or mental health status—lack the

capacity to understand and apply the rights they are given. Early on, Thomas Grisso reasoned that a person's capacity to make an informed waiver requires various cognitive abilities. As described in his book, *Juveniles' Waiver of Rights: Legal and Psychological Competence*, Grisso (1981) developed four instruments for measuring Miranda-related comprehension. Over the years, research with these instruments showed that adolescent suspects under age 15 do not comprehend their rights as fully or know how to apply them as well as older adolescents and adults (e.g., Grisso, 1998; Oberlander & Goldstein, 2001). This research soon morphed into a broader set of concerns about the interrogation of juveniles and the developmental risk of false confessions (Grisso et al., 2003; Owen-Kostelnik, Reppucci, & Meyer, 2006; Redlich & Goodman, 2003).

Following upon Grisso's groundbreaking work, recent studies have focused on other aspects of *Miranda* and whether it sufficiently protects the accused. One line of research has shown that all warnings are not created equal. Rogers and his colleagues (2007) identified 560 different Miranda warning forms used by police throughout the U.S. and found that these warnings varied substantially in content, wording, and format. With regard to the *effects* of Miranda, and based on naturalistic observations of live and videotaped police interrogations, Leo (1996a) reported that four out of five suspects routinely waive the rights they are given and submit to questioning, in large part because police use various tactics designed to elicit the waiver. In an article entitled "Miranda's Revenge," Leo described this process as a confidence game (also see Leo & Thomas, 1998). Indeed, the waiver rate in the U.S. is similar to that found in Great Britain (e.g., Moston, Stephenson, & Williamson, 1992). In a third recent development, Rebecca Norwick and I proposed that innocence is a naïve mental state that leads people to trust the system, beginning with the decision to waive their *Miranda* rights. In a mock crime study, we found that participants who were truly innocent were far more likely than those who were guilty to waive their rights and agree to talk—81 to 36 %. The reason: They had done nothing wrong, had nothing to hide, and nothing to fear (Kassin & Norwick, 2004; Moore & Gagnier, 2008; for an overview, see Kassin, 2005). For an excellent review of the law and psychology surrounding Miranda, I refer you to one of Larry's more recent books, *The Miranda Ruling*: *It's Past*, *Present*, *and Future* (Wrightsman & Pitman, 2010).

Social Psychology of Police Interrogations

A second set of developments was initiated in 1985, when Larry and I edited a book on *The Psychology of Evidence and Trial Procedure*. In that edited volume, we wrote a chapter on "Confession Evidence" in which we overviewed the law, described common social influence practices of police interrogation, reviewed the scant research literature, and introduced a taxonomy that is still currently and universally used to distinguish three types of false confessions—*voluntary*, *coerced-compliant*, and *coerced-internalized* (Kassin & Wrightsman, 1985a, 1985b).

This three-part taxonomy of false confessions provided a starting point for understanding the psychological complexity of this counterintuitive phenomenon

and the different types of influences that can put innocent people at risk to confess. By drawing on the literature on social influence, we distinguished, first, between the types of false confessions that arise when innocent people volunteer confessions without pressure (often to high-profile crimes that are in the news, the classic instance being the 200 false confessions volunteered to the 1932 kidnapping of Charles Lindbergh's infant son) and those that come about through a process of police interrogation. Within the latter category, we then distinguished between cases in which innocent people, despite knowing they are innocent, transition from denial to confession as a mere act of *compliance*, to escape a harsh interrogation or because they are led to perceive that confession serves their own self-interest (when it comes to stress, discomfort, and the deprivation of need states, everyone has a breaking point) and those rarer instances of *internalization* in which innocent people, after having been subjected to highly misleading claims about the evidence, question their own innocence, come to infer that they were involved, and in some cases confabulate memories to support that inference (the baggage-heavy term "brainwashing" can loosely be used to describe this process).

Focused on American police interrogation tactics, as embodied in the popular Reid technique (Inbau & Reid, 1962; Inbau, Reid, Buckley, & Jayne, 2013), Kassin and McNall (1991) then identified two predominant clusters of tactics, referred to them by the terms *maximization* and *minimization*, and found that their presence in an interrogation leads people to infer varying degrees of consequence upon confession. Over the years, the US courts had ruled that confessions extracted by promises of leniency and threats of harm or punishment were not voluntary and, hence, not admissible in court. But what about the use of subtler, lawful tactics that covertly produce the same net effects on suspects' expectations?

The specific problem that Kassin and McNall addressed was critical to the Reid technique in which interrogators minimize the seriousness of the crime through "theme development," which provides the suspect with moral justification and face-saving excuses. Interrogators are thus trained to suggest to suspects that their actions were spontaneous, accidental, provoked, peer-pressured, drug-induced, or otherwise justifiable by external factors. In one of their studies, Kassin and McNall (1991) had subjects read transcript of an interrogation of a murder suspect. Three versions were produced in which the detective: (1) made a conditional promise of leniency, (2) used minimization by blaming the victim, or (3) used neither technique. Subjects read one version and estimated the sentence that they thought would be imposed on the suspect upon confession. The result: Minimization tactics led people to infer by pragmatic implication that leniency in sentencing will follow from confession—as if an explicit promise had been made. This research was conducted as part of Karlyn McNall's undergraduate senior thesis. All of this early research was reviewed in a scholarly book, largely written by Larry, entitled *Confessions in the Courtroom* (Wrightsman & Kassin, 1993).

I should mention that Karlyn, a student at Williams College, became interested in the topic of false confessions because in 1984 a friend of her family, a young Berkeley student by the name of Bradley Page, was induced to confess to the murder of his girlfriend, Bibi Lee. This "confession"—a statement of speculation that Page gave when asked to imagine how he would have committed the crime—came after

16 h of relentless, guilt-presumptive, deception-filled interrogation in which Page was made to feel responsible for the death of his girlfriend; in which he was threatened with what would happen if he refused to confess; and in which he was misled into believing that he failed a polygraph, that his fingerprints were found at the crime scene, that his car was seen there by a witness, and that the killing appeared accidental. Page recanted his confession almost immediately, saying he was scared and confused. It was too late; the damage was done. In one trial the jury acquitted Page of first- and second-degree murder, but could not reach a verdict on the charge of voluntary manslaughter. In a second trial, a jury convicted Page of voluntary manslaughter. Ultimately, Page spent time in prison (for a description of this case, see Leo & Ofshe, 1998, 2001). It is worth noting, by the way, that the Bradley Page case is significant for another reason: On March 30, 1988, social psychologist Elliott Aronson testified as an expert for the defense on how someone could be induced to confess to a crime he did not commit (Davis, 2010; Tavris & Aronson, 2007).

Looking to study the "Milgramesque" interrogation tactics sanctioned by the Reid technique, my colleagues and I sought to develop an ethical laboratory paradigm that would both meet with IRB approval and confront innocent participants with a personally meaningful decision to confess. It was clear that entrapping people to cheat, steal, or otherwise commit an act that would embarrass them and cast them in a negative light would not be permitted. As part of her undergraduate honor's thesis at Williams College, Katherine Lee Kiechel and I came up with an experimental paradigm that worked—the first to be used in the study of false confessions. What we came up with is now variously referred to as the computer crash or ALT key experiment in which the experimenter accused participants typing on a Dell desktop computer of causing the hard drive to crash by inadvertently pressing a key he had explicitly instructed to avoid. The experimenter, in his role, was upset—perhaps too much so (this experimenter went on to medical school). The first time we pilot-tested the paradigm, our participant, a female undergraduate, started to cry. We then dialed down the intensity of the experimenter's reaction to the "crime," however, and proceeded to run a study published in *Psychological Science* in which we found that people can be induced not only to sign a confession, but to internalize the belief in their own culpability and confabulate false memories *when confronted with false evidence*—in this study, a confederate witness claimed to have seen the participant hit the ALT key (Kassin & Kiechel, 1996). Soon replicated in other labs, as we will see shortly, this study served as a basis for a critical analysis of police-induced false confessions—and, in particular, the coercive effect of lying about evidence, which American police are permitted to do—which appeared in an *American Psychologist* article entitled "The psychology of confession evidence" (Kassin, 1997).

Developments in Great Britain

While my students and I were seeking to understand the social-psychological influences of police interrogations, a parallel set of important developments originated, across the Atlantic, led by Gisli Gudjonsson and his colleagues. A former police

officer from Iceland, Gudjonsson is a clinical psychologist and professor of forensic psychology at the Institute of Psychiatry of King's College in London. He had served as an expert in a number of high-profile false confession cases in England during the 1980s—including those of the "Guildford Four" and the "Birmingham Six." Gudjonsson introduced the term "memory distrust syndrome" to help explain coerced-internalized false confessions (Gudjonsson & MacKeith, 1982) and he devised the popular Gudjonsson Suggestibility Scale, or GSS, to measure individual differences in susceptibility to influence during an interrogation (Gudjonsson, 1997).

Gudjonsson was at the forefront of a reform movement in the United Kingdom during the 1980s and 1990s that altered the nature of interrogation to make it less confrontational and required that these sessions be recorded. He has published a voluminous body of work, largely focused on individual differences in personality, mental health, and cognitive functioning and the tendency to confess or resist confession. The early work was comprehensively summarized in Gudjonsson's (1992) *The Psychology of Interrogations*, *Confessions*, *and Testimony*, a highly influential book that was later supplanted by his 706-page *The Psychology of Interrogations and Confessions*: *A Handbook* (Gudjonsson, 2003). In light of Gisli's British and clinical-personality perspectives, which contrast with my own American and social-cognitive perspectives, we have collaborated on several projects in an effort to provide a comprehensive overview of the literature as a whole (e.g., see Kassin & Gudjonsson, 2004, 2005; Kassin et al., 2010).

I should note that Gudjonsson's early work coincided in time with the regulation of interrogations and confession evidence in England and Wales by the Police and Criminal Evidence Act of 1984 (PACE; Home Office, 1985). The most important interview procedures set out in PACE were that suspects who are detained must be informed of their legal rights; in any 24-h period, the detainee must be allowed a continuous period of rest of least 8 h; detainees who are vulnerable in terms of age or mental functioning should have access to a responsible adult; and all interviews shall be electronically recorded.

A few years later, in sharp contrast to the confrontational approach to interrogation characteristic of the American Reid technique, investigative interview practices in England became less confrontational. This new approach was developed through a collaboration of police officers, lawyers, and psychologists—such as Tom Williamson, Ray Bull, and Becky Milne. The acronym PEACE was used to describe the five distinct parts of the new interview approach ("Preparation and Planning," "Engage and Explain," "Account," "Closure," and "Evaluate"). PEACE continues to exist, with success, to this day—and has been adopted as an alternative to confrontation in Norway and New Zealand as well (for a review, see Williamson, 2006).

The Innocence Project's DNA Exoneration Cases

Starting in the 1990s, historic developments outside of psychology conspired to cast a consciousness-raising spotlight on false confessions. In 1989, Gary Dotson became the first wrongfully convicted person to be exonerated by DNA testing.

At a rapid pace, others soon followed. Three years later, the Innocence Project was founded by lawyers Barry Scheck and Peter Neufeld at the Benjamin Cardozo School of Law in New York to assist prisoners who could be proven innocent through DNA testing. Since that time, more than 300 people in the United States have been exonerated by DNA, including several who served time on death row. To everyone's astonishment, false confessions have been a contributing factor in over 25 % of these wrongful convictions (www.innocenceproject.org/; Garrett, 2011).

Neither wrongful convictions in the U.S. nor the existence of false confessions as a problem was new (most notably, see Borchard, 1932). But in addition to the DNA exonerations, other high-profile cases began to surface and were reported in books, newspapers, TV documentaries, and analyses of actual case files. Today, such names as Michael Crowe, Marty Tankleff, the West Memphis Three, the Norfolk Four, Christopher Ochoa, Juan Rivera, Eddie Joe Lloyd, Jeffrey Deskovic, and Gary Gauger dot the landscape of wrongful convicted confessors like celebrities. The horrific injustices they suffered now animate reform efforts.

This individual and aggregated case study approach can be seen in the writings, mostly published in law reviews, of sociologist Richard Ofshe; criminologist Richard Leo, his Ph.D. student; and Northwestern University law Professor Steven Drizin. In one article, Leo and Ofshe (1998) described 60 cases of proven, highly probable, and probable false confessions, which triggered a critique by Cassell (1999) in which he challenged the actual innocence of many of the confessors included in their sample, followed by a rejoinder by Leo and Ofshe (2001) entitled "The truth about false confessions and advocacy scholarship." As measured by subsequent DNA and other exonerations, it is now clear that Cassell had denied the innocence of many innocents and that Leo and Ofshe were correct in most and possibly all of the "probable" and "highly probable" cases they had described.

Later focusing on a larger, more rigorous sample of proven exonerations, Drizin and Leo (2004) were able to describe the characteristics of 125 cases of proven false confession in the United States from 1971 to 2002. They found that 93 % of the false confessors were men. Overall, the vast majority of the confessions occurred in murder cases (81 %), distantly followed by rape (8 %) and arson (3 %). The most frequent bases of exoneration were that the real perpetrator was identified (74 %) or that new scientific evidence was discovered (46 %). Most recently, University of Virginia Law Professor Garrett (2010) compared 38 proven false confessions from the Innocence Project case files to the actual crime facts and found that 36 (95 %) contained accurate details about the crime that were not in the public domain—details that often served as a centerpiece for the prosecution at trial. This finding highlights the fact that most false confessions are contaminated with true facts about the crime that were known only to the perpetrator—and the police.

Taken together, the burgeoning literature in the United States and in Great Britain, in the laboratory and in actual cases, has shown that false confessions occur with some unknown frequency; that they share certain common features; and that many of the stories that accompanied these cases were incredible. Some of the cases that now breathe life into the study of false confessions are shocking and downright historic in their dimensions. *The Central Park Five*, a 2012 documentary, tells the tale of one

such case. In 1989, a female jogger was raped, beaten, and left for dead in New York City's Central Park. She managed to survive but could not remember anything about the attack—then or now. Within 72 h, five African- and Hispanic-American boys, 14–16 years-old, confessed to the brutal assault. Solely on the basis of these oral confessions, four of which were videotaped for all to see, the boys were convicted and sentenced to prison. Almost nobody questioned their guilt. The tapes themselves were compelling in that every one of the defendants described in vivid—though often erroneous—detail where and how the jogger was attacked and by whom.

Thirteen years later, Matias Reyes, in prison for three rapes and a murder committed subsequent to the jogger attack, stepped forward to admit that he was the Central Park jogger rapist and that he acted alone. I recall busily preparing for the upcoming semester in August of 2002 when I received a phone call from a producer at ABC *Prime Time* in which she asked if I could review the 1989 confessions in that case because ABC was about to get an exclusive interview with Reyes. I was stunned at the prospect that the Central Park jogger case was in doubt. Yet once I pored through the case files—the original police reports, suppression hearing and trial testimonies, confessions, and so on—and observed the new interview with Reyes; there was little doubt in my mind that the original confessions were false. After the ABC show aired on September 26, it was not clear if the city's newspapers were willing to accept the new narrative on this heinous case and consider that the original defendants were innocent and wrongfully convicted. Nor was it clear how the Manhattan District Attorney's office would react. Having reviewed the entire case, and uniquely positioned to educate the public on false confessions, I wrote an op-ed article entitled "False confessions and the jogger case," which appeared in the New York Times on November 1 (Kassin, 2002).

Reinvestigating the case, the Manhattan district attorney questioned Reyes and discovered that he had accurate and independently corroborated guilty knowledge of the crime and that the DNA samples originally recovered from the victim's body belonged to him. In a 58-page report released on December 5, the DA issued a report that dismantled the confessions and other evidence, noting that "Perhaps the most persuasive fact about the defendants' confessions is that they exist at all" (p. 44). Two weeks later, on December 19, State Supreme Court Justice Charles Tejada vacated the original convictions. The Central Park jogger case now stands as a shocking demonstration of five false confessions resulting from a single investigation—an investigation conducted, I should add, not in a back alley of some small town when nobody was watching, but right in the heart of New York City at a time when the whole world was watching (for an overview, see Burns, 2011).

The Current Study of False Confessions

Picking up where Munsterberg left off, contemporary research on false confessions has analyzed various aspects of the confession-taking process and has relied on a range of methodologies. As noted earlier, one approach has involved a focus on

actual case studies and aggregations of individual cases based on archived records. Other empirical methods include naturalistic observations of live and videotaped police interrogations; self-report surveys and interviews that purport to describe normative practices and beliefs; correlational studies that link various personal suspect characteristics and the tendency to confess; and controlled experiments—in laboratory and field settings—designed to assess police judgments of truth and deception, the effects of certain interrogation tactics on confessions, and the impact that confessions have not only on judges and juries but, more recently, on lay witnesses and forensic examiners. This literature is now sufficiently mature that it has served as the basis of a recent White Paper of the American Psychology-Law Society, only the second in its history (Kassin et al., 2010)—and a number of *amicus curiae* briefs submitted by the American Psychological Association (see Kassin, 2012).

The remainder of this chapter will provide a selective overview of the current empirical research literature on false confessions. In particular, I would like to frame this overview around four questions that must be asked about each and every case: (1) Why are innocent people interrogated in the first place? (2) What personal and situational forces lead innocent people confess to crimes they did not commit? (3) Why do judges, juries, and just about everyone else for that matter so often believe these statements? (4) What can be done to prevent future miscarriages of justice based on false confessions?

Why Are Innocent People Interrogated?

During the course of an investigation, police identify one or more suspects for interrogation. Sometimes, this identification is based on witnesses or other evidence, but often it is based on a judgment made during a pre-interrogation interview. In *Criminal Interrogations and Confessions*, Inbau et al. (2013) have for many years advised that the accusatory process of interrogation be preceded by an information-gathering interview designed to determine whether or not the suspect is lying, guilty, and in need of interrogation.

To determine if a suspect is telling the truth or lying, investigators are advised to ask a series of special “behavior provoking questions” and then observe changes in the suspect’s verbal and nonverbal behavior, noting pauses, changes in eye contact, facial expressions, postural shifts, fidgety movements, and other cues presumed to be diagnostic of deception. There is a dearth of solid research indicating that this technique produces high rates of accuracy at distinguishing truth and deception. In fact, research has consistently shown that most of the demeanor cues touted by the Reid technique do not empirically discriminate between truth-telling and deception (DePaulo et al., 2003). It is not surprising, therefore, that laypeople on average are only 54 % accurate and that police and other professionals perform only slightly better, if at all (Bond & DePaulo, 2006; Vrij, 2008).

In studies specifically aimed at evaluating the Reid approach to lie detection, the results are not impressive. Vrij, Mann, and Fisher (2006) had some participants not but others commit a mock crime they were motivated to deny. All participants were

then interviewed using the Reid protocol. Results showed that substantive responses to the behavior-provoking questions did not significantly distinguish between truth tellers and liars in the predicted manner (e.g., the liars were not more anxious or less helpful). There is also no evidence to support the diagnostic value of the verbal and nonverbal cues that investigators are trained to observe. Kassin and Fong (1999) randomly trained some college students, but not others in the use of "behavioral symptoms" analysis cited by the Reid technique. All students then watched videotaped interviews of mock suspects, some of whom committed one of four mock crimes; others did not. Upon questioning, all suspects denied their involvement. As in so many experiments, observers could not reliably differentiate between the two groups of suspects. In fact, those who underwent training were significantly less accurate, more confident, and more biased toward seeing deception. Using these same taped interviews, Meissner and Kassin (2002) found that experienced police investigators exhibited the same low level of accuracy, albeit with higher levels of confidence.

As a natural consequence of the process whereby investigators make a judgment of truth and deception, research shows that police presume guilt when questioning suspects and that this guilt bias can lead them to engage in more aggressive interrogations with innocent suspects who vigorously deny involvement. To demonstrate, Kassin, Goldstein, and Savitsky (2003) had some participants but not others commit a mock crime, after which all were questioned by interrogators who by random assignment were led to presume guilt or innocence. Interrogators who presumed guilt asked more incriminating questions, conducted more coercive interrogations, and tried harder to get the suspect to confess. In turn, this more aggressive style made the suspects sound-defensive and led observers who later listened to the tapes to judge them as guilty, even when they were innocent. Follow-up research has replicated this effect, indicating the dangers of presuming guilt (Hill, Memon, & McGeorge, 2008; Narchet, Meissner, & Russano, 2011).

Why Do Innocent People Confess?

In recent years, false confessions have been uncovered in many cases involving innocent people who were wrongfully convicted—and these cases represent the tip of an iceberg. As a result of these miscarriages of justice, researchers have sought to identify two sets of risk factors: (1) dispositional risk factors indicating that some people are more malleable than others in an interrogation setting and more vulnerable to giving a false confession, and (2) situational risk factors indicating that some interrogation tactics in particular increase the likelihood that innocent people confess.

Personal Risk Factors

Some people are more vulnerable to influence than others—and at greater risk for false confessions. Focusing on personality traits, Gudjonsson (2003) has found that individuals who prone to compliance in social situations are especially vulnerable

because of their eagerness to please others and a desire to avoid confrontation, particularly with those in authority. Individuals who are prone to suggestibility—whose memories can be altered by misleading questions and negative feedback—are also more likely to confess under interrogation. Most importantly, Gudjonsson notes that people who are highly anxious, fearful, depressed, delusional, or otherwise psychologically disordered are often at a heightened risk to confess under pressure.

Clearly, a suspect's age and cognitive maturity is an important consideration. The 1989 Central Park jogger case described earlier illustrates the point, wherein five youths, 14–16 years old, were induced to give false confessions. In general, youths are overrepresented in the population of false confessions, thus suggesting that juveniles are at an increased risk in the interrogation room (see Drizin & Leo, 2004; Scott-Hayward, 2007). Criminal justice statistics are supported by a strong convergence of self-report studies and laboratory experiments (e.g., Grisso et al., 2003; Gudjonsson, Sigurdsson, & Sigfusdottir, 2009; Redlich & Goodman, 2003). These findings are consistent with basic research in developmental psychology indicating that adolescents are cognitively and psychosocially less mature than adults—exhibiting an "immaturity of judgment" that manifests itself in impulsive decision-making, a diminished focus on long-term consequences, and increased susceptibility to influence from external sources (for a review, see Owen-Kostelnik et al., 2006).

People with intellectual disabilities are also overrepresented (see Gudjonsson, 2003). Drizin and Leo (2004) identified at least 28 mentally retarded defendants in their sample of 125 false confessions and were quick to note that this 22 % likely underestimates the problem (intelligence test scores were not available or reported in most cases). Specifically addressing this problem, Appelbaum and Appelbaum (1994) note that people who are mentally retarded might confess to a crime merely to avoid the discomfort of police interrogation—that "Friendliness, as well as threats and coercion, can result in waivers and confessions" (p. 493).

With regard to tendencies toward compliance, people who are mentally retarded exhibit a high need for approval, particularly from others in positions of authority, which reveals itself in an acquiescence response bias (Shaw & Budd, 1982). A heightened suggestibility in response to misleading information, which can increase the risk of internalized false confessions, is also problematic. In studies conducted in England and the United States, respectively, Gudjonsson and Henry (2003) and Everington and Fulero (1999) found that people who are mentally retarded as a group score high on psychological measures of interrogative suggestibility, being more likely to yield to leading questions and to change their answers in response to mild negative feedback.

Situational Risk Factors

Just as some individuals are especially susceptible to giving false confessions, certain interrogation tactics can also increase the risk. If overused, three interrogation tactics in particular are problematic. The first concerns custody and interrogation time. Observational studies and police surveys in the United States have shown that most

interrogations last from 30 min to 2 h (Feld, 2013; Kassin et al., 2007; Leo, 1996a, 1996b; Wald, Ayres, Hess, Schantz, & Whitebread, 1967). In contrast to these norms, police-induced false confessions are substantially longer. In their study of 125 false confessions, Drizin and Leo (2004) found, in cases in which interrogation time was recorded, that 34 % lasted 6–12 h, that 39 % lasted 12–24 h, and that the mean was 16.3 h.

A second tactic that can induce confessions from innocent people is the presentation of false evidence. In confronting suspects, American police will sometimes present false evidence of guilt (e.g., a fingerprint, eyewitness identification, or failed polygraph). In the United States, it is permissible for police to outright lie to suspects about the evidence. Yet empirical research clearly indicates that it can induce false confessions. There are two sources of evidence for this proposition. First, numerous proven false confessions featured the use of the false evidence ploy. In an illustrative case, 17-year-old Marty Tankleff was accused of murdering his parents, in 1989, despite the complete absence of evidence against him. Tankleff vehemently denied the charges for hours. Then his interrogator told him that his hospitalized father had emerged from his coma to say that Marty was his assailant (in fact, the father never regained consciousness and died shortly thereafter). Following this lie, and others, Tankleff became disoriented and confessed. Solely on the basis of that confession, he was convicted—a conviction that was not vacated until 2008 (Firstman & Salpeter, 2008).

The second source of evidence comes from basic psychology research showing that human malleability to influence through misinformation is broad and pervasive. By misrepresenting reality—through the use of confederates, bogus norms, false physiological feedback, counterfeit test results, and the like—one can substantially alter people's visual perceptions, beliefs, behaviors, emotions, personal memories, and even certain medical outcomes, as seen in studies of the placebo effect. Studies specifically aimed at inducing false confessions have similarly shown that the presentation of false evidence increases the rate at which innocent research participants confess to prohibited acts they did not commit. In the first such study, Kassin and Kiechel (1996) accused college students typing on a keyboard of causing the computer to crash by pressing a key they were pre-instructed to avoid. Despite their innocence and initial denials, subjects were asked to sign a confession. In some sessions but not others, a confederate said she witnessed the subject hit the forbidden key. This false evidence nearly doubled the number of students who signed a written confession, from 48 to 94 %. Follow-up experiments have replicated the effect with different participant samples and under varying circumstances (Horselenberg et al., 2006; Horselenberg, Merckelbach, & Josephs, 2003; Perillo & Kassin, 2011; Redlich & Goodman, 2003).

A third problem concerns the use of minimization tactics. With suspects weakened by the highly confrontational stages of interrogation, interrogators are trained to minimize the crime through "theme development," a process of providing moral justification or face-saving excuses, making confession seem like an expedient means of escape. Interrogators may suggest to suspects that their actions were spontaneous, accidental, provoked, peer-pressured, or otherwise justifiable by

external factors. As described earlier, early studies showed that minimization tactics may lead people to infer that leniency in sentencing will follow from confession—even without an explicit promise (Kassin & McNall, 1991). In a laboratory paradigm more recently designed to elicit true and false confessions to cheating, Russano, Meissner, Narchet, and Kassin (2005) found that innocent participants were more likely to confess when leniency was promised than when it was not—and when minimization was used. In short, minimization provides police with a loophole in the rules of evidence by serving as the implicit but functional equivalent to a promise of leniency (which itself renders a confession inadmissible). The net result is to increase the rate of false confessions.

Does *Innocence* Put *Innocents* at Risk?

In 2005, I proposed a paradoxical hypothesis—that false confessions are facilitated not only by dispositional characteristics of weak and vulnerable suspects and situational aspects of custody and interrogation, but by the phenomenology of innocence. This hypothesis began with an observation, followed by a laboratory experiment indicating that innocent people are more likely than perpetrators to waive their *Miranda* rights to silence and to counsel (Kassin & Norwick, 2004; Moore & Gagnier, 2008). Additional research has since shown that innocent people behave in ways that are open and forthcoming in their interactions with police (Hartwig, Granhag, & Strömwall, 2007); offer up alibis freely, without regard for the fact that police would view minor inaccuracies with suspicion (Olson & Charman, 2012); and exhibit less physiological arousal on critical items of a concealed information polygraph test even when told about the crime (Elaad, 2011). Experiments in another context have shown that many participants who are accused of a transgression they did not commit—compared to those who are guilty—refuse to accept a plea offer, often to their own detriment, because they are confident of acquittal (Gregory, Mowen, & Linder, 1978; Tor, Gazal-Ayal, & Garcia, 2010).

Innocence as a mental state can have unpredictable effects on a suspect's response to interrogation. Theorizing that innocence leads people to trust that justice will prevail, Jennifer Perillo and I examined the relatively benign bluff technique by which interrogators pretend to have evidence without further claiming that it implicates the suspect (e.g., stating that biological evidence was collected and sent for testing). The theory underlying the bluff is simple: Fearing the evidence to be processed, perpetrators will succumb to pressure and confess; not fearing that alleged evidence, innocents would not succumb and confess. Yet in two experiments, Perillo and Kassin (2011) found that innocent participants were substantially more likely to confess to pressing a forbidden key, causing a computer to crash, when told that their keystrokes had been recorded for later review. In a third experiment, innocent participants were more likely to confess to willful cheating when told that a surveillance camera had taped their session. Consistently, these participants noted that the bluff represented a promise of future exoneration, despite confession, which paradoxically made it easier to confess.

How Do Juries Perceive Confessions?

Confession evidence is devastating when presented in court. In fact, the power of confessions to influence juries is what led Larry and I to become interested in this type of evidence in the first place (Kassin & Wrightsman, 1980, 1981). When a suspect retracts a confession, pleads not guilty, and goes to trial, a judge determines at a pretrial suppression hearing whether the confession was voluntary and hence admissible as evidence. There are no simple criteria for making this judgment, but over the years the courts have ruled that whereas various forms of trickery and deception are permissible, confessions cannot be produced by physical violence, threats or harm or punishment, explicit promises of leniency, or interrogations conducted in violation of a suspect's *Miranda* rights. Whatever the criteria, confessions ruled voluntary are admitted at trial. Hearing the admissible confession, the jury then determines whether the defendant is guilty beyond a reasonable doubt. But are people accurate and discriminating judges of confessions? The wrongful convictions of innocent confessors suggest a negative answer to this question.

To test whether police can distinguish between true and false confessions to actual crimes, Kassin, Meissner, and Norwick (2005) recruited male prison inmates from a corrections/facility in massachwsetts to take part in a pair of videotaped interviews. Each inmate gave both a true narrative confession to the crime for which he was incarcerated and a false confession to a crime he did not commit. Using this procedure, Kassin et al. compiled a videotape of ten confessions known to be true or false. College students and police investigators judged these statements, and the results showed that neither group exhibited significant accuracy, but that police were more confident in their judgments.

Over the years, mock jury studies have shown that confessions have a great impact on jury verdicts. This research has shown that confessions have more impact than eyewitness and character testimony (Kassin & Neumann, 1997) and that people do not adequately discount confession evidence even when the confessions are perceived to have been coerced by police (Kassin & Sukel, 1997; Kassin & Wrightsman, 1980); even when jurors are told that the defendant suffers from a psychological illness or interrogation-induced stress (Henkel, 2008); even when the defendant is a juvenile (Redlich, Ghetti, & Quas, 2008; Redlich, Quas, & Ghetti, 2008); even when the confession was given not by the defendant but by a second-hand informant who was motivated to lie (Neuschatz et al., 2012; Neuschatz, Lawson, Swanner, Meissner, & Neuschatz, 2008); and even when the confession is contradicted by exculpatory DNA that is explained away by the prosecutor (Appleby & Kassin, 2011).

In a study that well illustrates the potency of confession evidence, Kassin and Sukel (1997) presented subjects with one of three versions of a murder trial transcript. In a low-pressure version, the defendant was said to have confessed to police immediately upon questioning. In a high-pressure version, participants read that the suspect was in pain and interrogated aggressively by a detective who brandished his gun. A control version contained no confession in evidence. In some ways, participants presented with the high-pressure confession responded in a legally appropriate manner: They judged

the statement involuntary and said it did not influence their decisions. Yet this confession significantly boosted the conviction rate. This pattern of results was recently replicated in a study of judges (Wallace & Kassin, 2012). In short, it appears that people are so influenced by confession evidence as a matter of common sense that they do not discount it when it is legally and logically appropriate to do so.

In actual cases, there is an additional reason why people place so much faith in confessions, even those that are false. Garrett (2010) recently compared 38 proven false confessions from the Innocence Project DNA exoneration case files to the actual crime facts and found that 36 (95 %) contained accurate details about the crime that were not in the public domain. Often the details served as a centerpiece for the prosecution at trial, with interrogating detectives testifying that these facts could have only been known by the perpetrator. The confessors in these cases were innocent, so they could not have possessed firsthand guilty knowledge. Thus, it appears that police had communicated these details—purposefully or not—through leading questions, factual assertions, photographs, or taking the suspect to the crime scene.

Illustrating that matters are even more complicated, Appleby, Hasel, and Kassin (2013) content-analyzed 20 false confessions and found that most contained vivid details about the crime and how, when, where, and why it was committed—including descriptions of the crime scene and the victim. Eighty percent also contained motive statements, often accompanied by a minimization theme that justified, excused, mitigated, or externalized blame. Half of the false confessors asserted that their statements were voluntary; 40 % expressed remorse; and 25 % apologized. In short, false confessions contain the kinds of cues that create an illusion of credibility.

What Consequences Follow from Confession?

Mock jury studies on the power of confession evidence are bolstered by archival analyses of actual cases, which show that approximately four out of every five proven false confessors who pled not guilty were convicted at trial (Drizin & Leo, 2004; Leo & Ofshe, 1998). These figures led Drizin and Leo to describe confessions as "inherently prejudicial and highly damaging to a defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is ultimately proven false beyond any reasonable doubt" (p. 959).

One reason confessions are so powerful is that it is hard to understand as a matter of common sense why anyone would confess to a crime he or she did not commit (Henkel, Coffman, & Dailey, 2008; Leo & Liu, 2009). When the statement also contains vivid details about the crime, the impact is even greater (Appleby et al., 2013). It now appears that the problems spawned by false confessions are even more troubling. In an article entitled "Why confessions trump innocence," I reviewed research indicating that confessions, which elicit a strong inference of guilt, can bias witnesses and forensic examiners, thereby corrupting other evidence (Kassin, 2012). Hence, the wrongful convictions of innocent people who confess are based in part on the confessions themselves and in part on the cognitive confirmation biases triggered by these confessions (Kassin, Dror, & Kukucka, 2013).

In a demonstration of this point, Hasel and Kassin (2009) had participants witness a staged theft and then make an identification decision from a target-absent lineup. Two days later, they were given additional information and an opportunity to change their decision. When told that another suspect had confessed, 61 % of participants changed their initial decision and identified the suspect who had allegedly confessed. Those who were told that the individual they had identified confessed became more confident in their decision. Other researchers have shown that the belief in a suspect's guilt can bias people's judgments of inconclusive polygraph tests (Elaad, Ginton, & Ben-Shakhar, 1994), degraded speech recordings (Lange, Thomas, Dana, & Dawes, 2011), handwriting samples (Kukucka & Kassin, 2014), latent fingerprint samples (Dror & Charlton, 2006), and even complex DNA mixtures alibis (Marion et al., in press), (Dror & Hampikian, 2011).

A recent archival analysis is also consistent with the hypothesis that confessions can corrupt other evidence. Looking at the DNA exoneration files from the Innocence Project, Kassin, Bogart, and Kerner (2012) tested the hypothesis that confessions prompt additional evidentiary errors by examining whether other contributing factors were present in DNA exoneration cases containing a false confession. Sure enough, additional evidence errors were present in 78 % of these cases. Specifically, false confessions were accompanied by invalid or improper forensic science (63 %), mistaken eyewitness identifications (29 %), and snitches or informants (19 %). Consistent with the causal hypothesis that the false confessions had influenced the subsequent errors, the confession was obtained first rather than later in the investigation in approximately two thirds of these cases.

Proposed Reforms to Policy and Practice

When Larry and I started to explore the social psychology of confession evidence, there was no recognition of a problem to be solved and no reason for reform. In the wake of the DNA revolution, the discovery of numerous heart-wrenching false confessions, and psychological research explaining the mechanisms by which this can occur and how it can be prevented, there is now a wave of reform in the air. In that vein, many social scientists, legal scholars, and practitioners have recommended a policy that favors the electronic recording of entire suspect interviews and interrogations. In the recent American Psychology-Law Society White Paper noted earlier, Kassin et al. (2010) concluded with a strong recommendation for the mandatory electronic recording of interrogations. Currently, statutory provisions or supreme court rules require the recording of custodial interrogations for serious felonies in 20 states and the District of Columbia, with hundreds of other jurisdictions doing so on a voluntary basis (Sullivan, 2012). Importantly, the U.S. Department of Justice recently reversed its long standing opposition by establishing the presumptive requirement that the FBI and other federal law enforcement agencies record the custodial interrogations of felony suspects (Schmidt, 2014).

Still other recommendations for reform focus on the protection of vulnerable suspect populations (e.g., a requirement that minors be accompanied by a professional

advocate, preferably an attorney) and a ban or limit on the use of certain police interrogation practices (e.g., the false evidence ploy and minimization tactics that imply leniency). In addition, the American Psychological Association has recently submitted a number of *amicus curiae* on the subject of confessions. Drawing upon the research these briefs' stated that innocent people can be induced to confess through processes of interrogation, that judges and juries have difficulty assessing confession evidence, that the phenomenon of false confession is counterintuitive, and that psychological experts should be permitted to testify at trial because their testimony would draw from generally accepted research, and that it would assist the trier of fact (see Kassin, 2012).

Closing Thought

It's now been over 100 years since Munsterberg (1908) had the audacity to dedicate a chapter of *On the Witness Stand* to "Untrue Confessions"—a proposition no one at the time was prepared to accept. Seventy years later, not much had changed. Now, however, thanks to contributions from psychologists and other social scientists in the United States and abroad; reformers in Great Britain; the DNA revolutionaries of the Innocence Project; countless individuals wrongfully convicted and imprisoned by false confessions; and courageous judges, lawyers, and lawmakers; there is now both the recognition that innocent people can be induced to confess to crimes they did not commit and a determination to prevent it from happening in the future. Larry Wrightsman has been an important part of this story.

Finally, I should mention that I do own and cherish a yellowed, frayed, hardbound copy of Munsterberg's classic book. The title is embossed in gold block lettering. Several notes and comments are handwritten into the margins. Written on the front inside cover, in blue ink, there is also this personal note: "Dear Saul, This book is even older than our relationship!—Happy Birthday, Larry." Back at ya, buddy—and thank you for everything.

References

Appelbaum, K. L., & Appelbaum, P. S. (1994). Criminal justice-related competencies in defendants with mental retardation. *Journal of Psychiatry and Law, 22*, 483–503.

Appleby, S. C., Hasel, L. E., & Kassin, S. M. (2013). Police-induced confessions: An empirical analysis of their content and impact. *Psychology, Crime & Law, 19*, 111–128.

Appleby, S. C., & Kassin, S. M. (2011). *When confessions trump DNA: Relative impacts of self-report and DNA evidence on juror decisions*. Paper presented at the annual meeting of the American Psychology-Law Society, Miami, FL.

Bem, D. J. (1966). Inducing belief in false confessions. *Journal of Personality and Social Psychology, 3*, 707–710.

Bond, C. F., Jr., & DePaulo, B. M. (2006). Accuracy of deception judgments. *Personality and Social Psychology Review, 10*, 214–234.

Borchard, E. M. (1932). *Convicting the innocent: Errors of criminal justice*. New Haven, CT: Yale University Press.

Brown v. Mississippi. (1936). 297 US 278.

Burns, S. (2011). *The Central Park Five: A chronicle of a city wilding*. New York: Knopf.

Cassell, P. G. (1999). The guilty and the “innocent”: An examination of alleged cases of wrongful conviction from false confessions. *Harvard Journal of Law and Public Policy, 22*, 523.

Davis, D. (2010). Lies, damned lies, and the path from police interrogation to wrongful conviction. In M. Gonzalez, C. Tavris, & J. Aronson (Eds.), *The scientist and the humanist: A festschrift in honor of Elliot Aronson* (pp. 211–247). New York: Taylor & Francis.

DePaulo, B. M., Lindsay, J. J., Malone, B. E., Muhlenbruck, L., Charlton, K., & Cooper, H. (2003). Cues to deception. *Psychological Bulletin, 129*, 74–112.

Driver, E. D. (1968). Confessions and the social psychology of coercion. *Harvard Law Review, 82*, 42–61.

Drizin, S. A., & Leo, R. A. (2004). The problem of false confessions in the post-DNA world. *North Carolina Law Review, 82*, 891–1007.

Dror, I. E., & Charlton, D. (2006). Why experts make errors. *Journal of Forensic Identification, 56*, 600–616.

Dror, I. E., & Hampikian, G. (2011). Subjectivity and bias in forensic DNA mixture interpretation. *Science & Justice, 51*, 204–208.

Elaad, E. (2011). Effects of incomplete information on the detection of concealed crime details. *Applied Psychophysiology and Biofeedback, 36*, 159–171.

Elaad, E., Ginton, A., & Ben-Shakhar, G. (1994). The effects of prior expectations and outcome knowledge on polygraph examiners’ decisions. *Journal of Behavioral Decision Making, 7*, 279–292.

Everington, C., & Fulero, S. (1999). Competence to confess: Measuring understanding and suggestibility of defendants with mental retardation. *Mental Retardation, 37*, 212–220.

Feld, B. C. (2013). *Kids, cops, and confessions: Inside the interrogation room*. New York: New York University Press.

Firstman, R., & Salpeter, J. (2008). *A criminal injustice: A true crime, a false confession, and the fight to free Marty Tankleff*. New York: Ballantine Books.

Foster, H. H. (1969). Confessions and the station house syndrome. *DePaul Law Review, 18*, 683–701.

Garrett, B. L. (2010). The substance of false confessions. *Stanford Law Review, 62*, 1051–1119.

Garrett, B. L. (2011). *Convicting the innocent: Where criminal prosecutions go wrong*. Cambridge, MA: Harvard University Press.

Gregory, W. L., Mowen, J. C., & Linder, D. E. (1978). Social psychology and plea bargaining: Applications, methodology, and theory. *Journal of Personality and Social Psychology, 36*, 1521–1530.

Grisso, T. (1981). *Juveniles’ waiver of rights: Legal and psychological competence*. New York: Plenum.

Grisso, T. (1998). *Instruments for assessing understanding and appreciation of Miranda rights*. Sarasota, FL: Professional Resource Press.

Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., & Graham, S. (2003). Juveniles’ competence to stand trial: A comparison of adolescents’ and adults’ capacities as trial defendants. *Law and Human Behavior, 27*, 333–363.

Gudjonsson, G. H., & MacKeith, J. A. (1982). False confessions: Psychological effects of interrogation. In A. Trankell (Ed.), *Reconstructing the past: The role of psychologists in criminal trials* (pp. 253–269). Deventer, The Netherlands: Kluwer.

Gudjonsson, G. H. (1992). *The psychology of interrogations, confessions, and testimony*. London: Wiley.

Gudjonsson, G. H. (1997). *The Gudjonsson Suggestibility Scales manual*. Hove, England: Psychology Press.

Gudjonsson, G. H. (2003). *The psychology of interrogations and confessions: A handbook*. Chichester, England: Wiley.

Gudjonsson, G. H., & Henry, L. A. (2003). Child and adult witnesses with learning disabilities: The importance of suggestibility. *Legal and Criminological Psychology, 8*, 241–252.

Gudjonsson, G. H., Sigurdsson, J. F., & Sigfusdottir, I. D. (2009). Interrogation and false confessions among adolescents in seven European countries. What background and psychological variables best discriminate between false confessors and non-false confessors? *Psychology Crime and Law, 15*, 711–728.

Hartwig, M., Granhag, P. A., & Strömwall, L. A. (2007). Guilty and innocent suspects' strategies during police interrogations. *Psychology Crime and Law, 13*, 213–227.

Hasel, L. E., & Kassin, S. M. (2009). On the presumption of evidentiary independence: Can confessions corrupt eyewitness identifications? *Psychological Science, 20*, 122–126.

Heider, F. (1958). *The psychology of interpersonal relations*. New York: Wiley.

Henkel, L. A. (2008). Jurors' reactions to recanted confessions: Do the defendant's personal and dispositional characteristics play a role? *Psychology Crime and Law, 14*, 565–578.

Henkel, L. A., Coffman, K. A. J., & Dailey, E. M. (2008). A survey of people's attitudes and beliefs about false confessions. *Behavioral Sciences and the Law, 26*, 555–584.

Hill, C., Memon, A., & McGeorge, P. (2008). The role of confirmation bias in suspect interviews: A systematic evaluation. *Legal & Criminological Psychology, 13*, 357–371.

Home Office. (1985). *Police and Criminal Evidence Act 1984*. London: HMSO.

Horselenberg, R., Merckelbach, H., & Josephs, S. (2003). Individual differences and false confessions: A conceptual replication of Kassin and Kiechel (1996). *Psychology, Crime & Law, 9*, 1–8.

Horselenberg, R., Merckelbach, H., Smeets, T., Franssens, D., Peters, G., & Zeles, G. (2006). False confessions in the lab: Do plausibility and consequences matter? *Psychology, Crime & Law, 12*, 61–75.

Inbau, F. E., & Reid, J. E. (1962). *Criminal interrogation and confessions*. Baltimore, MD: Williams & Wilkins.

Inbau, F. E., Reid, J. E., Buckley, J. P., & Jayne, B. C. (2013). *Criminal interrogation and confessions* (5th ed.). Burlington, MA: Jones & Bartlett Learning.

Kassin, S. M. (1997). The psychology of confession evidence. *American Psychologist, 52*, 221–233.

Kassin, S. M. (2002, November 1). False confessions and the jogger case. *The New York Times OP-ED*, p. A31.

Kassin, S. M. (2005). On the psychology of confessions: Does innocence put innocents at risk? *American Psychologist, 60*, 215–228.

Kassin, S. M. (2012). Why confessions trump innocence. *American Psychologist, 67*, 431–445.

Kassin, S. M., Bogart, D., & Kerner, J. (2012). Confessions that corrupt: Evidence from the DNA exoneration case files. *Psychological Science, 23*, 41–45.

Kassin, S. M., Drizin, S. A., Grisso, T., Gudjonsson, G. H., Leo, R. A., & Redlich, A. D. (2010). Police-induced confessions: Risk factors and recommendations. *Law and Human Behavior, 34*, 3–38.

Kassin, S. M., Dror, I., & Kukucka, J. (2013). The forensic confirmation bias: Problems, perspectives, and proposed solutions. *Journal of Applied Research in Memory and Cognition, 2*, 42–52.

Kassin, S. M., & Fong, C. T. (1999). "I'm innocent!": Effects of training on judgments of truth and deception in the interrogation room. *Law and Human Behavior, 23*, 499–516.

Kassin, S. M., Goldstein, C. C., & Savitsky, K. (2003). Behavioral confirmation in the interrogation room: On the dangers of presuming guilt. *Law and Human Behavior, 27*, 187–203.

Kassin, S. M., & Gudjonsson, G. H. (2004). The psychology of confession evidence: A review of the literature and issues. *Psychological Science in the Public Interest, 5*, 35–69.

Kassin, S. M., & Gudjonsson, G. H. (2005). True crimes, false confessions: Why do innocent people confess to crimes they did not commit? *Scientific American Mind* (June), 24–31.

Kassin, S. M., & Kiechel, K. L. (1996). The social psychology of false confessions: Compliance, internalization, and confabulation. *Psychological Science, 7*, 125–128.

Kassin, S. M., Leo, R. A., Meissner, C. A., Richman, K. D., Colwell, L. H., Leach, A.-M., et al. (2007). Police interviewing and interrogation: A self-report survey of police practices and beliefs. *Law and Human Behavior, 31*, 381–400.

Kassin, S. M., & McNall, K. (1991). Police interrogations and confessions: Communicating promises and threats by pragmatic implication. *Law and Human Behavior, 15*, 233–251.

Kassin, S. M., Meissner, C. A., & Norwick, R. J. (2005). "I'd know a false confession if I saw one": A comparative study of college students and police investigators. *Law and Human Behavior, 29*, 211–227.

Kassin, S. M., & Neumann, K. (1997). On the power of confession evidence: An experimental test of the "fundamental difference" hypothesis. *Law and Human Behavior, 21*, 469–484.

Kassin, S., & Norwick, R. (2004). Why people waive their Miranda rights: The power of innocence. *Law and Human Behavior, 28*, 211–221.

Kassin, S. M., & Sukel, H. (1997). Coerced confessions and the jury: An experimental test of the harmless error rule. *Law and Human Behavior, 21*, 27–46.

Kassin, S. M., & Wrightsman, L. S. (1980). Prior confessions and mock juror verdicts. *Journal of Applied Social Psychology, 10*, 133–146.

Kassin, S. M., & Wrightsman, L. S. (1981). Coerced confessions, judicial instruction, and mock juror verdicts. *Journal of Applied Social Psychology, 11*, 489–506.

Kassin, S. M., & Wrightsman, L. S. (Eds.). (1985a). *The psychology of evidence and trial procedure*. Beverly Hills, CA: Sage.

Kassin, S. M., & Wrightsman, L. S. (1985b). Confession evidence. In S. Kassin & L. Wrightsman (Eds.), *The psychology of evidence and trial procedure*. Beverly Hills, CA: Sage.

Kassin, S. M., & Wrightsman, L. S. (1988). *The American jury on trial: Psychological perspectives*. Washington, DC: Hemisphere.

Kukucka, J., & Kassin, S.M. (2014). Do confessions taint perceptions of handwriting evidence? An empirical test of the forensic confirmation bias. *Law and Human Behavior*, 38, 56–70.

Lange, N. D., Thomas, R. P., Dana, J., & Dawes, R. M. (2011). Contextual biases in the interpretation of auditory evidence. *Law and Human Behavior, 35*, 178–187.

Leo, R. A. (1996a). Miranda's revenge: Police interrogation as a confidence game. *Law and Society Review, 30*, 259–288.

Leo, R. A. (1996b). Inside the interrogation room. *Journal of Criminal Law and Criminology, 86*, 266–303.

Leo, R. A. (2008). *Police interrogation and American justice*. Cambridge, MA: Harvard University Press.

Leo, R. A., & Liu, B. (2009). What do potential jurors know about police interrogation techniques and false confessions? *Behavioral Sciences & the Law, 27*, 381–399.

Leo, R. A., & Ofshe, R. J. (1998). The consequences of false confessions: Deprivations of liberty and miscarriages of justice in the age of psychological interrogation. *Journal of Criminal Law and Criminology, 88*, 429–496.

Leo, R. A., & Ofshe, R. J. (2001). The truth about false confessions and advocacy scholarship. *Criminal Law Bulletin, 37*, 293–370.

Leo, R. A., & Thomas, G. C. (1998). *The Miranda debate: Law, justice, and policing*. Boston: Northeastern University Press.

Marion, S. B., Kukucka, J., Collins, C., Kassin, S. M., & Burke, T. M. (in press). Lost proof of innocence: The impact of confessions on alibi witnesses. *Law and Human Behavior*.

Meissner, C. A., & Kassin, S. M. (2002). 'He's guilty!': Investigator bias in judgments of truth and deception. *Law and Human Behavior, 26*, 469–480.

Miranda v. Arizona. (1966). 384 U.S. 436.

Moore, T. E., & Gagnier, K. (2008). "You can talk if you want to": Is the police caution on the right to silence comprehensible? *Criminal Reports, 5*, 233–249.

Moston, S., Stephenson, G. M., & Williamson, T. (1992). The effects of case characteristics on suspect behaviour during police questioning. *British Journal of Criminology, 32*, 23–39.

Munsterberg, H. (1908). *On the witness stand*. Garden City, NY: Doubleday.

Narchet, F. M., Meissner, C. A., & Russano, M. B. (2011). Modeling the influence of investigator bias on the elicitation of true and false confessions. *Law and Human Behavior, 35*, 452–465.

Neuschatz, J. S., Lawson, D. S., Swanner, J. K., Meissner, C. A., & Neuschatz, J. S. (2008). The effects of accomplice witnesses and jailhouse informants on jury decision making. *Law and Human Behavior, 32*, 137–149.

Neuschatz, J. S., Wilkinson, M. L., Goodsell, C. A., Wetmore, S. A., Quinlivan, D. S., & Jones, N. J. (2012). Secondary confessions, expert testimony, and unreliable testimony. *Journal of Police and Criminal Psychology, 27*, 179–192.
Oberlander, L. B., & Goldstein, N. E. (2001). A review and update on the practice of evaluating *Miranda* comprehension. *Behavioral Sciences and the Law, 19*, 453–471.
Olson, E. A., & Charman, S. D. (2012). "But can you prove it?": Examining the quality of innocent suspects' alibis. *Psychology, Crime & Law, 18*(5), 453–471.
Owen-Kostelnik, J., Reppucci, N. D., & Meyer, J. D. (2006). Testimony and interrogation of minors: Assumptions about maturity and morality. *American Psychologist, 61*, 286–304.
Perillo, J. T., & Kassin, S. M. (2011). Inside interrogation: The lie, the bluff, and false confessions. *Law and Human Behavior, 35*, 327–337.
Redlich, A. D., Ghetti, S., & Quas, J. A. (2008). Perceptions of children during a police interview: A comparison of suspects and alleged victims. *Journal of Applied Social Psychology, 38*, 705–735.
Redlich, A. D., & Goodman, G. S. (2003). Taking responsibility for an act not committed: Influence of age and suggestibility. *Law and Human Behavior, 27*, 141–156.
Redlich, A. D., Quas, J. A., & Ghetti, S. (2008). Perceptions of children during a police interrogation: Guilt, confessions, and interview fairness. *Psychology, Crime & Law, 14*, 201–223.
Rogers, R., Harrison, K. S., Shuman, D. W., Sewell, K. W., & Hazelwood, L. L. (2007). An analysis of Miranda warnings and waivers: Comprehension and coverage. *Law and Human Behavior, 31*, 177–192.
Russano, M. B., Meissner, C. A., Narchet, F. M., & Kassin, S. M. (2005). Investigating true and false confessions within a novel experimental paradigm. *Psychological Science, 16*, 481–486.
Schmidt, M. S. (2014, May 22). In policy change, justice dept. to require recording of interrogations. *The New York Times*. Retrieved from http://www.nytimes.com/2014/05/23/us/politics/justice-dept-to-reverse-ban-on-recordinginterrogations.html
Scott-Hayward, C. S. (2007). Explaining juvenile false confessions: Adolescent development and police interrogation. *Law and Psychology Review, 31*, 53–76.
Shaw, J. A., & Budd, E. D. (1982). Determinants of acquiescence and nay saying of mentally retarded persons. *American Journal of Mental Deficiency, 87*, 108–110.
Sullivan, T. P. (2012). A Compendium of state and federal statutes, court rulings, departmental practices, national organizations' policy statements, and law review articles regarding electronic recording of custodial interviews of felony suspects. *Judicature, 95*(Whole No. 5).
Tavris, C., & Aronson, C. (2007). *Mistakes were made (but not by me)*. New York: Harcourt.
Tor, A., Gazal-Ayal, O., & Garcia, S. M. (2010). Fairness and the willingness to accept plea bargain offers. *Journal of Empirical Legal Studies, 7*, 97–116.
Vrij, A. (2008). *Detecting lies and deceit: Pitfalls and opportunities*. Chichester, England: Wiley.
Vrij, A., Mann, S., & Fisher, R. P. (2006). An empirical test of the behaviour analysis interview. *Law and Human Behavior, 30*, 329–345.
Wald, M., Ayres, R., Hess, D. W., Schantz, M., & Whitebread, C. H. (1967). Interrogations in New Haven: The impact of Miranda. *The Yale Law Journal, 76*, 1519–1648.
Wallace, D. B., & Kassin, S. M. (2012). Harmless error analysis: How do judges respond to confession errors? *Law and Human Behavior, 36*, 151–157.
Williamson, T. (Ed.). (2006). *Investigative interviewing: Rights, research, regulation*. Devon, England: Willan.
Wrightsman, L. S., & Kassin, S. M. (1993). *Confessions in the courtroom*. Newbury Park, CA: Sage.
Wrightsman, L. S., & Pitman, M. L. (2010). *The Miranda ruling: Its past, present, and future*. New York: Oxford University Press. Retrieved from www.innocenceproject.org/.
Zimbardo, P. G. (1967). The psychology of police confessions. *Psychology Today, 1*(17–20), 25–27.

Identifying Juror Bias: Moving from Assessment and Prediction to a New Generation of Jury Selection Research

Margaret Bull Kovera and Jacqueline L. Austin

We were delighted to be invited to contribute to this festschrift that celebrates Lawrence Wrightsman's contributions to law and psychology. We both owe a great debt to Larry. One of us (MBK) was among the first generation of students who encountered forensic psychology as seen through the Wrightsman lens when she was assigned the first edition of Larry's now classic textbook, *Psychology and the Legal System*, when she was an undergraduate at Northwestern University. The other (JLA) was the last student that Larry mentored in research before his retirement from the University of Kansas, completing an undergraduate honors thesis under his direction that examined the contents of oral arguments before the Supreme Court. Whether it was through his writing or long conversations in his office, Larry opened our eyes to a future in which we could pursue our love of law without becoming attorneys, for which we are eternally grateful. Larry also served as a role model for how we could construct our professional lives: using psychological theory and methods to test the assumptions that the legal system had made about human behavior and mentoring others to do the same.

One of the behavioral assumptions made by the legal system that attracted Larry's attention, and ours, is the assumption that jurors can make decisions that are free from bias (Wrightsman, 1987). Indeed the sixth Amendment to the U.S. Constitution guarantees defendants' right to be tried by a representative body of peers who are free of prejudice or bias against them. In an attempt to ensure that seated juries are comprised of jurors who are free from bias, venirepersons (i.e., potential jurors) are interviewed in a pretrial procedure called *voir dire*. During this procedure, venirepersons respond to questions that are designed to elicit responses

M.B. Kovera (✉)
Department of Psychology, John Jay College of Criminal Justice, City University of New York, New York, NY, USA
e-mail: mkovera@jjay.cuny.edu

J.L. Austin
University of the Pacific, Stockton, CA, USA

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_6

that will allow judges and attorneys to evaluate whether they may have knowledge or biases that would interfere with their duty to evaluate the evidence fairly and make decisions that comport with the law. Depending on the jurisdiction, these voir dire questions may be asked by the judge, the attorneys, or both. In this chapter, we review the psychological assumptions that the law and legal actors make about the identification of venireperson bias during voir dire and the extent to which the process results in the removal of problematic jurors from jury service. We review the empirical literature from the first generation of jury selection research, which was devoted to identifying traits or developing attitudinal measures that predict juror verdicts. Finally, we describe several studies that represent a new generation of jury selection research that moves beyond mere prediction of venirepersons' verdict inclinations to an evaluation of the extent to which social cognitive and social influence processes interfere with judges' and attorneys' abilities to effectively exercise their challenges to venirepersons' potential jury service.

Psychological Assumptions Underlying Jury Selection

Venirepersons who hold opinions or know facts that could limit their abilities to be fair and impartial or to apply the law as it is written when deciding a case may be removed from service for cause, either by the judge *sua sponte* (spontaneously, without a request from either of the attorneys) or after one of the attorneys challenges the impartiality of the venireperson and the judge concurs with the attorney's assessment (Crocker & Kovera, 2011; Kovera & Cutler, 2013). Because the accused is guaranteed the right to an impartial jury, there is no limit on the number of challenges for cause an attorney may be granted during the voir dire process. If the judge deems that the venirepersons' responses reveal bias, they are excused from the panel. If the judge denies a challenge for cause, attorneys may still remove venirepersons they believe to be unfavorable to their party's case by using their peremptory challenges (Diamond & Zeisel, 1974; Fulero & Penrod, 1990a, 1990b). Peremptory challenges differ from challenges for cause in that they are limited in number, the exact number varying based on factors such as jurisdiction, type of case (e.g., civil or criminal), and the severity of charges against the defendant. Moreover, peremptory challenges may be used to remove venirepersons for any reason other than the removal of certain cognizable groups, such as classifications based on race (*Batson v. Kentucky*, 1986) and gender (*J.E.B. v. Alabama*, 1994), with the judge ruling on the propriety of the challenge only if the opposing attorney alleges that the challenges are being used to remove a cognizable group.

Thus, it is through these mechanisms of challenges for cause and peremptory challenges that unfavorable venirepersons are removed from the jury panel during jury selection. For attorneys to effectively use their challenges to remove potential jurors whom they believe will be unfavorable for their side, they need to be able to identify venireperson characteristics that predict verdict outcomes and then challenge those venirepersons who have characteristics that are related to the undesired outcome. It appears that attorneys rely on stereotypes when making decisions

about whether to challenge venirepersons during jury selection (Fulero & Penrod, 1990a; Olczak, Kaplan, & Penrod, 1991). Attorneys develop these stereotypes about juror characteristics that are related to verdicts through trial experience, lessons passed on from other lawyers, popular guides to trial tactics, and handbooks of jury selection (Fulero & Penrod, 1990a, 1990b). Fulero and Penrod (1990a, 1990b) reported on a selection of attorneys' beliefs that they had compiled, including that some attorneys have advised against seating women as jurors in criminal trials but encourage their use in civil cases. Some advocates argue that wealthy individuals are conviction prone unless the defendant is charged with a white-collar crime. Some defense attorneys argue that the use of poor jurors may be strategic in a civil trial because poor people are uncomfortable with large sums of money and are thus likely to deliver smaller damage awards. Other defense attorneys argue, in contrast, that poor jurors should be avoided in civil cases because the poor may be bitter about their indigent status and may be more likely to deliver an exorbitant reward—a kind of "Robin Hood" effect. However, these types of demographic characteristics (socioeconomic status, gender, age, occupation, race) are not generally predictive of verdict preferences. Indeed, individual demographic factors usually only account for about 2 % of verdict variance and may account for less than 5 % of verdict variance even when multiple demographic characteristics are considered together (Diamond, Saks, & Landsman, 1998; Hastie, Penrod, & Pennington, 1983).

Attorneys may also rely on simple heuristics about which jurors are likely to be biased toward which defendants. For example, defense attorneys relying on the similarity-leniency hypothesis would want to strike venirepersons who are dissimilar to their clients because they believe that jurors who are similar to their clients will have more empathy for them (Blue, 1991; Kerr, Hymes, Anderson, & Weathers, 1995). In contrast, defense attorneys relying on the Black Sheep hypothesis would strike venirepersons who are similar to their clients, believing that people will want to punish in-group members who reflect poorly on their group (Marques, Abrams, Paez, & Martinez-Taboada, 1998). However, these basic heuristics may not be sufficiently complex to completely capture the factors jurors consider when rendering a decision. For example, a juror who is the same race as the defendant may be more punitive toward that defendant only when most members of the jury are of a different race and there is robust, damning evidence against the defendant (Kerr et al., 1995). Overall, what becomes evident from these examples is that attorneys' classic common sense strategies to jury selection may lead them to rely on strategies that lack any validity or reliability about which venirepersons would be most helpful or most harmful to have on a jury, with many of the proposed relationships between demographic characteristics and verdict being in direct opposition to each other.

Predicting Juror Verdicts

Social scientists began to study jury selection in the 1970s to examine whether there are systematic individual differences in jurors' verdict preferences. For example, social scientists attempted to link certain personality characteristics such as locus of

control (Phares & Wilson, 1972), belief in a just world (Gerbasi, Zuckerman, & Reis, 1977), and authoritarianism (Bray & Noble, 1978; Lamberth, Krieger, & Shay, 1982) with juror verdicts. These personality traits are defined by behavioral tendencies toward determining wrongdoing and punishing the transgressions of others; therefore, knowing whether venirepersons have these traits might allow attorneys and consultants to predict their trial judgments. Although there have been a few studies of the value of personality traits other than these for predicting legal decision making, these three traits have received the most empirical attention. Of these personality characteristics, traditional authoritarianism, defined as a tendency to defer to authorities and to follow conventional rules, demonstrated some success at predicting jurors' decisions (Garcia & Griffitt, 1978; Werner, Kagehiro, & Strube, 1982); however, this trait better predicts jurors' sentencing than their propensity to convict or acquit (Kassin & Wrightsman, 1983). Scores on scales designed to assess legally relevant authoritarianism such as the Legal Attitudes Questionnaire (Boehm, 1968) and the revised version of the scale (RLAQ; Kravitz, Cutler, & Brock, 1993), which measures people's legal attitudes toward civil liberties and the rights of the accused, are better predictors of verdicts than are general measures of authoritarianism (Narby, Cutler, & Moran, 1993).

Measures of General Juror Bias

As there was limited success in identifying personality traits that correlated with verdict preferences, some scholars began to develop scales to measure juror attitudes that might be related to their verdict preferences across a number of different cases. At the forefront of this effort was Larry Wrightsman, who—along with Saul Kassin—developed the first scale of general juror bias: the Juror Bias Scale (JBS) (Kassin & Wrightsman, 1983). The impetus behind the development of the scale was to create a measure of general pretrial predilections toward guilt or innocence. The scale was intended to capture individual differences in two constructs represented in many models of juror decision making: (a) the probability of commission (i.e., the likelihood that the defendant committed the crime) and (b) reasonable doubt (i.e., the level of certainty that is necessary before voting for conviction). These models hold that if jurors' assessments of the probability of commission exceed their threshold for reasonable doubt, they will render a guilty verdict. However, if the jurors' assessments of the probability of commission are less than their threshold for reasonable doubt, the juror will render a not guilty verdict (Kassin & Wrightsman, 1983). Kassin and Wrightsman hypothesized that there could be individual differences in pretrial tendencies to believe a defendant had committed a crime and in the criteria jurors use to judge reasonable doubt and that a scale that measured these tendencies would be able to predict verdicts across criminal trials.

The 17-item JBS was composed of nine items that measure jurors' bias regarding the probability of commission (e.g., "If a suspect runs from the police, then he probably committed the crime"; "If the grand jury recommends that a person be brought

to trial, then he probably committed the crime") and eight items that measure jurors' bias regarding reasonable doubt (e.g., "Too often jurors hesitate to convict someone who is guilty out of pure sympathy"; "Extenuating circumstances should not be considered—if a person commits a crime, then that person should be punished"). Responses to the scale were uncorrelated with a measure of socially desirable responding but moderately to highly correlated with measures of locus of control, belief in a just world, and traditional authoritarianism, demonstrating its convergent and discriminant validity.

The examinations of the predictive validity of the JBS produced mixed results. To begin, Kassin and Wrightsman (1983) categorized undergraduate participants as either pro-prosecution or pro-defense based on their JBS scores and then examined whether this classification predicted the verdicts that participants rendered after reading four short trial summaries. Pro-prosecution jurors rendered more guilty verdicts than did pro-defense jurors (Kassin & Wrightsman, 1983). In one follow-up study, undergraduate students watched videotaped reenactments of an automobile theft and a conspiracy trial and read a detailed written summary of an assault trial. When verdicts across all three trials were combined into a single measure of preference for a guilty verdict, participants indicating a pro-prosecution bias on the JBS rendered guilty verdicts in more trials than did pro-defense participants (Kassin & Wrightsman, 1983). However, analyses of the verdicts for the individual trials revealed that JBS scores predicted guilty verdicts only in the automobile theft case and not in the assault or conspiracy cases. In yet another follow-up study, jury-eligible community members recruited from juror registration lists watched videotapes of either a conspiracy or a rape trial simulation (Kassin & Wrightsman, 1983). Participants' JBS scores predicted verdict preferences in the conspiracy case but not in the rape trial. Indeed the proportion of pro-prosecution participants voting guilty was less than the proportion of pro-defense jurors, although this difference was not statistically significant (Kassin & Wrightsman, 1983). Another study also failed to find a relationship between JBS scores and verdicts in a rape trial (Weir & Wrightsman, 1990).

At least in its original form, the JBS is an inconsistent predictor of verdicts (Kovera & Cutler, 2013; Lecci & Myers, 2008). Researchers have made several attempts to improve both the construct and predictive validity of the JBS (Myers & Lecci, 1998) with limited success. Confirmatory factor analysis revealed that neither the two-dimensional hypothesized structure (probability of commission and reasonable doubt) nor the unidimensional scale described in the original Kassin and Wrightsman (1983) paper was a reasonable fit to the data (Myers & Lecci, 1998). Exploratory and confirmatory factor analyses revealed that dropping some items from each of the previous scales of the JBS and splitting the probability of commission scale into two subscales (confidence in the criminal justice system and cynicism about the system) provided a better description of the constructs underlying the scale, although a unidimensional scale also provided a good fit to the data (Myers & Lecci, 1998). However, these revisions did little to improve the predictive validity of the scale. Although the confidence in the system and reasonable doubt subscales predicted verdicts rendered by an undergraduate sample (Myers & Lecci, 1998),

only the revised reasonable doubt subscale predicted verdicts in a community sample (Lecci & Myers, 2002).

Maybe the JBS underperforms in its prediction of bias because its items underrepresent the full spectrum of possible pretrial biases (Lecci & Myers, 2008). Juror bias may take many forms other than prejudice against charged defendants and lowered thresholds for conviction. To create a general measure of juror bias that is truly predictive of verdict across samples and case types, it may be necessary to augment the items contained in the original JBS with new items that tap these additional biases. In one such attempt to improve the predictive validity of the JBS, Lecci and Myers (2008) had college undergraduates generate items that they thought represented a belief that would bias verdicts. After the generated items were revised to remove those that were redundant or irrelevant and to reverse key some of the items, new participants rated each item for how prototypical it was of a pretrial bias. Community members then rated their agreement with the 30 most prototypical items as well as the items from the JBS.

Exploratory factor analyses revealed six factors that were substantiated by a confirmatory factor analysis: conviction proneness, system confidence, cynicism toward the defense, racial bias, social justice, and innate criminality. The Pretrial Juror Attitudes Questionnaire (PJAQ) consists of the 29 items, including some of the original JBS items, that loaded on these factors (Lecci & Myers, 2008). There is some overlap among the subscales of the PJAQ and the JBS, with conviction proneness being conceptually and empirically similar to the reasonable doubt scale of the JBS. Similarly the system confidence and cynicism toward the defense subscales overlap with the probability of commission subscale of the JBS. The three remaining subscales of the PJAQ (racial bias, social justice, and innate criminality) are conceptually distinct from earlier measures of general juror bias. Although the PJAQ may predict as much as 21 % of the variance in jurors' verdicts (Lecci & Myers, 2008), to date there is limited information on its reliability and discriminant validity (Kovera & Cutler, 2013). Moreover, in addition to predicting individual juror verdicts over and above the prediction provided by JBS scores, PJAQ scores also predict *jury* verdicts as well as the likelihood that jurors will shift their verdicts throughout deliberation (Lecci & Myers, 2009).

Using Case-Specific Attitudes to Predict Juror Bias

The failure of general personality traits (e.g., locus of control, belief in a just world, traditional authoritarianism) to predict specific behaviors (i.e., verdict in a specific trial) should come as no surprise, as Mischel (1968) began questioning the usefulness of personality traits—relative to situational pressures—for predicting specific behaviors almost fifty years ago. Similarly, scholars have raised concerns about the ability of general attitudes to predict any specific behavior (Fishbein & Ajzen, 1974; Wicker, 1969). Given these concerns, perhaps it should not be surprising that general juror biases, operationalized as general beliefs about defendants and about the criminal justice system, are inconsistent in their ability to predict juror verdicts in

specific cases. Given research demonstrating that attitudes and behaviors measured at similar levels of specificity are more likely to be correlated (e.g., Weigel & Newman, 1976), perhaps attitudinal measures that are designed to assess beliefs that are relevant to the decisions in a specific case will better predict attitudes than will measures of jurors' general pretrial attitudes.

Indeed, case-specific attitudes have proven to be good predictors of verdict in a variety of studies. In one survey, attitudes toward tort reform reliably predicted community members' verdict preferences in a civil case (Moran, Cutler, & De Lisa, 1994). Attitudes toward drugs predicted community members' perceptions of defendant culpability in drug cases (Moran, Cutler, & Loftus, 1990). Finally, attitudes toward psychiatrists predicted community members' verdict preferences for a case in which the defendant was proffering an insanity defense (Cutler, Moran, & Narby, 1992). However, all of these studies consisted of community surveys conducted for the purposes of trial consultation and did not present the participants with a trial simulation before collecting their verdict preferences.

Are case-specific attitudes similarly predictive of verdict after the presentation of trial evidence? There is strong evidence in at least two areas—cases involving an insanity defense and capital cases—that they are. The Insanity Defense Attitudes-Revised scale measures the extent to which people believe that (a) mental health affects the quality of offender decision making and legal responsibility and (b) the insanity defense is unjust and allows dangerous offenders to go free (Skeem, Louden, & Evans, 2004). This scale predicted verdicts across several different trials with different fact patterns (Crocker & Kovera, 2010; Louden & Skeem, 2007; Skeem et al., 2004). Moreover, the IDA-R explains variance in jurors' verdicts even after controlling for general measures of juror bias such as the PJAQ (Peters & Lecci, 2012). Similarly, attitudes toward the death penalty predict both verdicts and sentencing decisions in capital cases (Butler & Moran, 2002; Luginbuhl & Middendorf, 1988; O'Neil, Patry, & Penrod, 2004), with attitudes being more strongly associated with sentencing decisions than with determinations of guilt (Nietzel, McCarthy, & Kern, 1999).

Taken together, these studies suggest that attitudes, especially when they are case relevant, may provide some information about how a particular juror is likely to vote during jury deliberations. Even though case-specific attitudes may provide the best predict of jurors' verdict preferences, they rarely account for much variance in juror judgments, with some estimates suggesting that they explain no more than about 4 %, with the remaining variance explained by factors such as the strength of the trial evidence or the skill of the attorneys (Moran et al., 1994).

Moving Beyond the Assessment of Juror Bias: A New Generation of Jury Selection Research

Until recently most scholars studying jury selection have focused their attention on identifying venireperson characteristics (e.g., demographics, traits, and attitudes) that predict verdict preferences. There are a few notable exceptions to this

characterization of the jury selection literature, including a few studies that examine the effects of different types of voir dire questioning (Dexter, Cutler, & Moran, 1992; Jones, 1987; Middendorf & Luginbuhl, 1995) and a few studies examining racial and gender biases in attorneys' decisions to exercise peremptory challenges (Norton, Sommers, & Brauner, 2007; Rose, 1999; Sommers & Norton, 2007). But generally, jury selection research has been focused on a relatively simple question: Do attitudes or traits predict juror judgments? Moreover, there have been few significant advances in our understanding of jury selection and voir dire in the past decade. Perhaps the atheoretical nature of jury selection research and the simplicity of the central questions under investigation have led to the stagnation of research in this area.

A similar stagnation of research progress occurred in the examination of the links between attitudes and behavior during the 1960s. Reviews of the attitude–behavior literature at that time concluded that attitudes rarely explained more than 10 % of the variance in people's behavior (Wicker, 1969), similar to the amount of variance in jurors' verdict preferences that can be explained by demographic characteristics, traits, and attitudes (Lecci & Myers, 2002; Moran et al., 1994). Social psychological research on attitudes moved forward only when researchers began to ask new questions about the relationship among attitudes and behaviors. Perhaps scholars of jury selection research may begin to make new and significant contributions to our understanding of jury selection and voir dire if they begin to ask different questions about the relationship between juror characteristics and verdicts.

In social psychology, after a generation of research examining whether attitudes predict behavior, researchers began to explore whether there are moderators of the attitude–behavior relationship, in response to the criticism that there was a relatively weak correlation between attitudes and behavior (Kraus, 1995). Specifically, they examined whether there were certain types of people, certain situations, and particular measurement techniques that produce stronger attitude–behavior links. Other than an exploration of whether attitudes measured at the same level of specificity as the verdict were more predictive, the field has generally ignored the question of whether there are moderators of the relationship between venireperson characteristics and verdict. Certainly, there must be moderators of the relationship between juror bias and verdict, and it may be especially important to explore whether there are situations that eliminate even the weak relationship between juror bias and verdict preference that has been established in the literature.

After a generation of research examining the role of moderating variables in the attitude–behavior relationship, attitudes researchers began to look at the underlying psychological mechanisms that might explain how attitudes guide behavior (Fazio, 1990). In contrast, jury selection scholars have relatively neglected not only the question of how juror characteristics influence verdict preferences; but in addition, there has been relatively little attention to the issue of whether exposure to the voir dire process influences the expression of juror bias in verdicts (cf., Greathouse, Sothmann, Levett, & Kovera, 2011; Haney, 1984), despite the fact that Larry Wrightsman noted that the voir dire process may be a *source* of bias in some of his early writings on jury selection (Wrightsman, 1987).

In our laboratory, we have begun to turn our attention to questions about voir dire and jury selection other than the traditional question of whether individual differences in jurors predict their verdicts. These questions include whether juror rehabilitation procedures during voir dire can serve as a remedy for juror bias; whether there are psychological processes, such as biased hypothesis testing and behavioral confirmation, at work in voir dire that might limit attorneys' abilities to collect accurate attitudinal information from jurors; and whether the voir dire process may be a source of, rather than a remedy for, juror bias. In the remainder of this chapter, we provide a summary of these recent investigations.

Juror Rehabilitation as a Moderator of Juror Bias

As discussed previously, if venirepersons express biases during voir dire that could threaten their ability to be fair jurors, judges may excuse them for cause. Before that happens, however, either the judge or the attorneys may attempt to rehabilitate the venirepersons by asking them to set aside their bias, educating them on the related law, and eliciting commitments that they will render a verdict based only on the evidence and the law (Cosper, 2003). Venirepersons who make this commitment are judged fit for jury duty. Because it can be inefficient to excuse large numbers of venirepersons who hold beliefs that may interfere with their responsibilities as jurors, rehabilitation is a common voir dire practice (Giewat, 2001; Neises & Dillehay, 1987; Nietzel, Dillehay, & Himelein, 1987).

Our laboratory has now conducted a few studies that examine whether juror rehabilitation remedies juror bias. In the first of these studies, community members participated in a simulated voir dire in which an actress played the role of a judge (Crocker & Kovera, 2010, Experiment 1). Participants were tested before coming to the laboratory to assess the extent to which they held biases against the insanity defense that would have made them ineligible to serve as jurors in a trial in which the defendant claimed insanity (i.e., they had expressed a belief that it was never appropriate to find a defendant Not Guilty by Reason of Insanity). Half of the community members held views of the insanity defense that would have prevented them from being impartial jurors, whereas the remaining participants were unbiased toward the insanity defense. The mock judge questioned all of the participants individually, in a mock courtroom, but only half of the voir dires contained a rehabilitation attempt. When present in the voir dire, the rehabilitation procedure consisted of the judge instructing the venirepersons on the law governing the insanity defense and eliciting a commitment from them to set aside any biases that they may have against the defense. Participants then viewed a videotaped simulation of a murder trial in which the defendant proffered an insanity defense.

We hypothesized that rehabilitation might have one of three possible effects. If rehabilitation has no effect on juror bias, then we would expect to see a main effect for juror bias on jurors' verdicts, with biased participants more likely than unbiased participants to find the defendant guilty, but no effect of rehabilitation. In contrast,

juror rehabilitation in this context could persuade jurors to adopt more favorable attitudes toward the insanity defense, resulting in main effects of both juror bias and rehabilitation on verdict but no interactive effects of this variable. Although in this scenario rehabilitation affects verdicts, it does not have the intended effect of eliminating the effects of juror bias on verdicts. Finally, if juror rehabilitation corrects juror bias as intended, then we would expect to find an interaction of juror bias and rehabilitation on verdicts; rehabilitation would reduce the likelihood of guilty verdicts among biased jurors but not among unbiased jurors. In this study, rehabilitation made both biased and unbiased jurors more favorable toward the insanity defense (as measured by their responses on the IDA-R; Skeem et al., 2004) and less likely to render a guilty verdict even though the intended effect was to correct only for the bias among biased jurors (Crocker & Kovera, 2010).

In a replication and extension of this first study, the delivery of rehabilitative instructions and the solicitation of a commitment to be impartial were manipulated independently. The strength of the evidence supporting an insanity defense was also manipulated. Participants who heard the rehabilitation instructions were less likely to vote guilty, but the elicitation of a commitment had no effect; neither rehabilitation procedure increased juror sensitivity to evidence strength (Crocker, 2011, Experiment 1). In another experiment, a rehabilitative voir dire in which jurors were instructed to suppress the influence of pretrial publicity on their verdicts eliminated the effects of pretrial publicity exposure on verdict; in contrast, a rehabilitative voir dire in which jurors were instructed to concentrate on the evidence had no effect on pretrial publicity bias (Crocker, 2011, Experiment 2). Perhaps attempts to rehabilitate biased jurors will be more successful when the bias comes from some external source—like pretrial media coverage—as opposed to an internal source such as prejudicial attitudes. However, in some instances, rehabilitation may cause biased jurors to overcorrect for their bias and cause unbiased jurors to "correct" for bias that does not exist (Crocker, 2011; Crocker & Kovera, 2010). Given the desirability of rehabilitating biased jurors so that they are fit for service, more research is needed to determine the conditions under which rehabilitation will have its desired effects.

Biased Hypothesis-Testing and Voir Dire

During voir dire, attorneys generate hypotheses about which prospective jurors may be more favorable to their side and then exercise their challenges in a way that maximizes the likelihood that the jury will be favorably disposed to the arguments they present. To accomplish this goal, attorneys must generate hypotheses about the relationship between jurors' traits or attitudes and their verdict inclinations and then gather information during voir dire that tests these hypotheses. Once attorneys have gathered information about the venirepersons during the voir dire, they must make an inference about whether that information supports their hypotheses and then make a decision about whether to challenge particular jurors. These stages correspond well with what social psychologists propose to be some of the different stages

in testing hypotheses: hypothesis generation, information gathering, and inference (Trope & Liberman, 1996).

At each stage of the hypothesis testing process, attorney behavior may impact the efficacy of jury selection. During the hypothesis generation phase, attorneys often rely on a small number of demographic and personality characteristics in their decisions about which jurors would be favorable to their side (Olczak et al., 1991). However, common sense strategies to jury selection often fail to provide attorneys with jurors who are favorable to their side (Olczak et al., 1991). Thus, the hypotheses attorneys wish to test may be inaccurate.

Inaccurate hypotheses may not be problematic if attorneys can gather information during voir dire that will help them make accurate decisions about whether a venireperson is inclined to support their side. However, when at the information-gathering stage, people tend to ask questions that are biased toward confirming their hypothesis rather than questions that are designed to test the accuracy of their hypothesis (Snyder & Swann, 1978). That is, people are prone to seek information that confirms a preexisting belief rather than disconfirm it. If biased hypothesis testing is also prevalent in voir dire, an attorney with the hypothesis that a potential juror was pro-prosecution might ask, “Do you believe that criminals should be punished to set an example for others?” Because most people’s response to this question would be “yes,” the question is unlikely to provide diagnostic information about the venireperson’s tendencies to convict or acquit. Attorneys would be more likely to gather useful information if they posed questions to venirepersons designed to provide differential support for their hypotheses and the alternative hypotheses by asking diagnostic questions (Skov & Sherman, 1986).

During the inference stage, attorneys must conclude whether the information they have gathered supports their hypotheses. Attorneys’ inferences may be affected by three different types of bias: (a) hypothesis bias—when attorneys believe the hypothesis is more likely to occur because the hypothesis is more readily available, (b) question bias—when attorneys may be more influenced by a “yes” response than a “no” response (i.e., they may be influenced more by the presence of information than the absence of information), and (c) answer bias—when attorneys’ inferences are overly influenced by the responses they receive to their questions (Hodgins & Zuckerman, 1993). Thus, the success of detecting juror bias during voir dire may be restricted by the hypotheses attorneys wish to test, the questions they ask to test these hypotheses, the responses that venirepeople provide, and by the inferences that the attorneys derive from the information they obtain.

Our laboratory recently conducted two studies to test whether biased hypothesis testing is likely to affect the voir dire and jury selection processes. In the first of these studies (Experiment 1; Otis, Greathouse, Kennard, & Kovera, 2014), we asked practicing prosecuting and defense attorneys to read the profile of a hypothetical venireperson in a death penalty case. We varied the description of the venireperson to manipulate the attorneys’ expectations about whether the venireperson supported or opposed the death penalty. After reading the venireperson’s profile, attorneys wrote two voir dire questions designed to test one of two hypotheses: the venireperson supports the death penalty or the venireperson opposes the death penalty.

In addition, attorneys estimated the percentage of people who would *support* the death penalty if they answered yes to the voir dire question, estimated the percentage of people who would *oppose* the death penalty if they answered yes to the voir dire question, opined whether the venirepersons supported or opposed the death penalty if they answered yes and if they answered no to the question, and also provided an estimate of the likelihood that the venirepersons supported the death penalty if they answered yes and if they answered no to the written questions. Using Bayesian analyses, we compared attorneys' answers with the responses they should have generated if they made normatively correct inferences.

In this first study, attorneys did not generate hypothesis-consistent questions; rather, attorneys posed more diagnostic questions when the jurors' attitudes about the death penalty appeared inconsistent with the hypothesis they were asked to test. However, there was evidence of bias in the inferences that attorneys made based on their questions and the anticipated responses to those questions. First, the questions that attorneys asked influenced their inferences about the attitudes held by the hypothetical venireperson. For instance, if they asked a question that was testing the hypothesis that the venireperson supported the death penalty, they would subsequently overestimate the probability that the venireperson supported the death penalty. Second, venirepersons' answers to the questions biased attorneys' inferences. For example, attorneys were more likely to overestimate that a venireperson supported the death penalty if the venireperson responded yes to a question testing whether the person supported the death penalty and no to a question testing the alternative hypothesis (that the person opposed the death penalty).

Attorneys might be aware of the low base rate of death penalty opposition in the general population, and if so, this knowledge could have influenced the inferences attorneys made about the venireperson's attitudes. Indeed, when attorneys read the death penalty opponent juror profile, attorneys tended to overestimate the probability that the venireperson was pro-death penalty. To replicate our findings for a different attitude, we conducted a second study by asking 50 lawyers and 132 law students to test the hypothesis that a prospective juror is a legal authoritarian, a civil libertarian, or to determine whether the prospective juror is either a legal authoritarian or civil libertarian (i.e., the double hypothesis). In addition, we manipulated the base rate that the venireperson was a legal authoritarian (80 % likelihood, 50 % likelihood, or 20 % likelihood). We followed the same procedure discussed in the first experiment (Experiment 2, Otis et al., 2014).

In this study, attorneys formulated hypothesis-confirming questions (consistent with previous research on biased hypothesis testing; Hodgins & Zuckerman, 1993), and the inferences that they made about the venireperson's attitudes were again biased in predictable ways. The hypothesis that attorneys were asked to test biased their inferences, with attorneys who tested the legal authoritarian hypothesis overestimating that the venireperson was a legal authoritarian. As in the first study, the actual question that the attorneys asked biased their inferences, with attorneys overestimating that the venireperson held attitudes consistent with the hypothesis they tested with their question. Attorneys again overestimated the value of a yes response that tested the hypothesis and undervalued no responses that tested the opposing

hypothesis. Thus, it appears that attorneys may engage in biased hypothesis testing during voir dire and that their strategies for testing hypotheses about venirepersons may bias the conclusions they draw about the favorability of retaining a particular venireperson during jury selection.

Behavioral Confirmation and Voir Dire

Many studies on dyadic interactions demonstrate that when one participant (often called the perceiver) is given an expectation about another participant (often called the target), the target tends to behave in a manner consistent with the perceiver's expectation—a process called behavioral confirmation (e.g., Snyder, Tanke, & Berscheid, 1977; Stukas & Snyder, 2002). Thus, in the context of voir dire, attorneys' expectations about venirepersons may alter attorneys' behavior toward venirepersons, consequently affecting venirepersons' behavior.

The motivational goals of the perceiver may influence the conditions under which behavioral confirmation occurs. For example, behavioral confirmation is more common when perceivers are told to gather information about the target that would help them form a stable, reliable impression of that person than when the perceiver is instructed to have a smooth interaction with the target (Snyder & Haugen, 1994). In voir dire, behavioral confirmation may be more prevalent when attorneys use voir dire as an information-gathering process in which the attorneys' goal is to form a stable, reliable impression of the juror. Alternatively, if attorneys' goals during voir dire are to ingratiate themselves with jurors, behavioral confirmation may be less likely to occur. In addition, the motivational goals of targets may influence the conditions under which behavioral confirmation occurs (Snyder & Haugen, 1994). Thus, venirepeople who are motivated to please the court with their responses may be more likely to behaviorally conform to an attorney's expectation than those jurors who are motivated to be excused from the panel.

To test whether behavioral confirmation occurs during jury selection, we asked advanced law students to prepare voir dire questions to ask a community member during a mock voir dire (Greathouse, Otis, Kennard, Austin, & Kovera, 2014). To participate, jury-eligible community members needed to be death qualified; thus, all community members participate in a screening process in which they answered Witt qualification questions and completed the Death Penalty Attitudes Questionnaire (DPA; O'Neil et al., 2004). We manipulated the mock attorneys' expectations about the venirepersons' favorability toward the prosecution or the defense by providing the attorney with information about the venirepersons' criminal justice attitudes. In reality, we randomly assigned attorneys to receive information that the venireperson with whom they would be interacting held either pro-prosecution or pro-defense attitudes, regardless of their true attitudes. In addition, we manipulated the motivation of the attorneys (i.e., either ingratiate self or gather accurate information) and the motivations of the venireperson (i.e., get on or off the jury). Attorneys then

provided perceptions of the venireperson's desirability for their capital case and community members completed the DPA again.

Generally, attorneys asked questions that provided general information about the venireperson rather than questions that tested directly hypotheses about the venireperson's death penalty attitudes. However, when attorneys did ask questions to test hypotheses about death penalty support/opposition, they tended to ask hypothesis-confirming questions: Those given pro-prosecution expectations asked more questions to test a pro-prosecution hypothesis, and those given pro-defense expectations asked more questions to test a pro-defense hypothesis. Further, we found support for behavioral confirmation in the voir dire process. Attorneys' pre-voir dire expectations accounted for a significant amount of the variance in attorneys' ratings of the venireperson's attitudes post-voir dire, even after controlling for post-voir dire death penalty attitudes and independent coders' ratings of jurors' pro-prosecution behavior. Note that this effect of pre-voir dire expectations survived the opportunity for attorneys to gather information during a one-on-one voir dire. Finally, attorney's expectations about the venireperson's attitudes changed venirepersons' self-reported attitudes toward the death penalty, demonstrating that voir dire questioning may actually influence the attitudes that jurors hold.

In a second study, we examined whether behavioral confirmation processes interfered with the efficacy of traditional voir dire (Kennard, Otis, Austin, Zimmerman, & Kovera, 2014). We used snowball sampling to recruit 40 practicing criminal attorneys from the New York City area (20 Assistant District Attorneys, 20 public defenders) who had conducted an average of 13 jury selections to conduct voir dires of eligible community members. In this study, we again manipulated the attorneys' expectation of the attitudes (pro-prosecution or pro-defense) held by each of 12 community members; the expectation associated with each community member was randomly assigned. Based on this manipulated expectation and general demographic information that was collected from the community member, attorneys generated hypotheses about individual venirepersons, formulated questions to test their hypotheses, and then conducted a mock voir dire with the 12 community members. We instructed attorneys to conduct the voir dire with the goal of selecting a jury of six. Following the voir dire, attorneys then indicated which six community members they would most want to serve on the jury; community members read a summary of a death penalty case and rendered a verdict.

Again, our randomly assigned expectation of juror attitudes influenced attorneys' decisions. Prosecuting attorneys struck more venirepersons whom they expected to have pro-defense leanings and defense attorneys struck more venirepersons whom they expected to have pro-prosecution leanings. The effect of attitudinal expectation on strike decisions was observed even after attorneys had an opportunity to question venirepersons and occurred irrespective of a venireperson's pre-voir dire attitudes, which suggests that voir dire may not be an effective method of identifying juror biases. In addition, we again found evidence of behavioral confirmation in voir dire. Venirepersons rendered more guilty verdicts when the attorney's expectation of the juror was pro-prosecution than when the attorney expected the venireperson to be pro-defense.

Behavioral confirmation and cognitive dissonance. When attorneys engage in biased hypothesis testing and elicit information from jurors that is consistent with their expectations about the venireperson (e.g., behavioral confirmation), then venirepersons may experience what social scientist Festinger (1957) called cognitive dissonance. People desire consistency between attitudes and behavior; when they are in conflict, they may experience an uncomfortable psychological state: dissonance. Further, once people commit to a counterattitudinal behavior, they will likely express attitudes that are consistent with that behavior to reduce the unpleasant feeling associated with the inconsistency. For example, imagine that an attorney is trying to test the hypothesis that a venireperson is pro-prosecution and supports the death penalty and asks the hypothesis-confirming question: "If someone commits premeditated murder, do you think that person should be prosecuted to the full extent of the law?" Many people would likely respond affirmatively to this question. However, this question is not particularly diagnostic of whether a venireperson is in favor or opposed to the death penalty. Furthermore, pro-defense juror might now experience some discomfort with their response. Do venirepersons who feel uncomfortable for responding in counterattitudinal ways later attempt to relieve the discomfort by voting consistently with the attitude expressed during voir dire?

Thus, in our final study of this series (Zimmerman, Otis, Kennard, Austin, & Kovera, 2014), we tested whether experienced dissonance mediated the effects of hypothesis-confirming questions during voir dire on jurors' verdicts seen in earlier studies. Because people must feel personal responsibility for their counterattitudinal behavior to feel cognitive dissonance (Cooper & Fazio, 1984), we expected venirepersons to experience cognitive dissonance and to shift their verdicts in the counterattitudinal direction only when venirepersons provided a more detailed counterattitudinal expression rather than a simple "yes" or "no" response to a voir dire question. To examine this issue, we tested two forms of attorney questioning methods—closed-ended and open-ended questions. We expected greater evidence of experienced dissonance and behavioral confirmation when attorneys posed open-ended questions because the open-ended format should provide the venireperson with the opportunity to provide more detailed answers and to invest more resources into developing the more detailed responses.

Confederates, posing as attorneys, asked either closed-ended or open-ended voir dire questions testing a pro-prosecution hypothesis of jury-eligible community members who were generally opposed to the death penalty. Participants then completed a measure of experienced dissonance (Elliot & Devine, 1994) and watched a trial that varied in evidence strength (strong, ambiguous, or weak). We predicted that venirepersons would experience cognitive dissonance as a result of their counterattitudinal expression and consequently would render a verdict consistent with the hypothesis tested by the confederate attorney when the evidence strength was ambiguous. That is, participants should not feel dissonance as a result of their voir dire behavior if the evidence clearly supported a not guilty or guilty verdict and would return a verdict consistent with the evidence. However, when the evidence is ambiguous, participants should experience dissonance as a result of their voir dire behavior and would render a verdict consistent with the hypothesis tested by the

attorney. After the video, participants rendered a verdict and again completed the cognitive dissonance scale.

We found evidence of behavioral confirmation that depended on attorney questioning style and evidence strength. Specifically, for the trial with ambiguous evidence, when jurors were asked open-ended voir dire questions testing a pro-prosecution hypothesis, jurors rendered more guilty verdicts than when they were asked closed-ended questions. As predicted, the effects of pro-prosecution hypothesis testing were not present when the trial had strong or weak evidence against the defendant. In terms of dissonance reduction, jurors reported higher levels of cognitive dissonance after voir dire than after rendering a verdict, but the attorneys' questioning method or evidence strength did not influence the amount of participants' experienced dissonance. Finally, jurors expressed more support for the death penalty and pro-prosecution attitudes post-trial than they did pre-trial, consistent with our earlier findings that exposure to voir dire questions testing the hypothesis that venirepersons hold a particular attitude results in attitude change in the direction of the hypothesis being tested.

Conclusion

These studies provide evidence that Larry Wrightsman's suspicions, voiced in some of his early writing on juror bias, were correct. Although voir dire is intended to identify juror bias, it also may cause juror bias (Wrightsman, 1987). Juror rehabilitation does not work as intended; rather than making biased jurors render verdicts that are similar to those rendered by unbiased jurors, rehabilitation causes all jurors, biased and unbiased, to shift their verdicts in the direction advocated by the rehabilitation process. Moreover, attorneys appear to ask hypothesis-confirming questions during voir dire, questions that cause jurors' attitudes and verdicts to shift in the direction of the hypothesis being tested. Taken together, these studies question the role of voir dire in identifying bias and suggest that it may even create bias.

The evidence that voir dire influences the content of juror bias supports our call to move beyond the development of measures of general pretrial juror bias to predict verdict behavior toward a new generation of jury selection research that examines moderators of juror bias and psychological processes underlying the expression of these biases in jury verdicts. If the social interactions that occur among judges, attorneys, and venirepersons during voir dire ultimately alter the biases with which jurors enter a deliberation room, perhaps it is time to turn empirical attention to these interactions and their ability to influence jury behavior. As it is unlikely that the practice of voir dire will be eliminated even if empirical research demonstrates that it is not as effective at eliminating juror bias as one might hope, continued research in the area might identify ways of eliminating the influence of these social interactions among the actors in the voir dire process. These efforts might include training judges and attorneys to formulate voir dire questions that more reliably detect bias and to recognize their own biases in using the information they gather

from venirepersons to make inferences about their verdict inclinations with the goal of eliminating the influence of those biases on their jury selection decisions. In this context, reliable and valid measures of juror bias—like those originally conceived by scholars like Larry Wrightsman (Kassin & Wrightsman, 1983)—will remain important but may be more likely to serve as dependent rather than independent variables in these new lines of research.

Acknowledgment This material is based upon work supported by the National Science Foundation under Grant Numbers 0520617 and 0921408, awarded to the first author. Any opinions, findings, and conclusions or recommendations expressed in this material are those of the authors and do not necessarily reflect the views of the National Science Foundation.

References

Batson v. Kentucky. (1986). 476 U.S. 79.

Blue, L. A. (1991). Jury selection in a civil case. *Trial Lawyers Quarterly, 21*, 11–25.

Boehm, V. R. (1968). Mr. Prejudice, Miss Sympathy, and the authoritarian personality: An application of psychological measuring techniques to the problem of jury bias. *Wisconsin Law Review, 3*, 734–750.

Bray, R. M., & Noble, A. M. (1978). Authoritarianism and decisions of mock juries: Evidence of jury bias and group polarization. *Journal of Personality and Social Psychology, 36*, 1424–1430. doi:10.1037/0022-3514.36.12.1424.

Butler, B. M., & Moran, G. (2002). The role of death qualification in venirepersons' evaluations of aggravating and mitigating circumstances in capital trials. *Law and Human Behavior, 26*, 175–184. doi:10.1023/A:1014640025871.

Cooper, J., & Fazio, R. (1984). A new look at dissonance theory. In L. Berkowitz (Ed.), *Advances in experimental social psychology* (Vol. 17, pp. 229–266). San Diego, CA: Academic.

Cosper, C. A. (2003). Rehabilitation of the juror rehabilitation doctrine. *Georgia Law Review, 37*, 1471–1508.

Crocker, C. B. (2011). *An investigation of the psychological processes involved in juror rehabilitation*. Unpublished doctoral dissertation, The Graduate Center of the City University of New York.

Crocker, C. B., & Kovera, M. B. (2010). The effects of rehabilitative voir dire on juror bias and decision making. *Law and Human Behavior, 34*, 212–226. doi:10.1007/s10979-009-9193-9.

Crocker, C., & Kovera, M. B. (2011). Systematic jury selection. In R. L. Wiener & B. H. Bornstein (Eds.), *Handbook of trial consulting* (pp. 13–31). New York: Springer.

Cutler, B. L., Moran, G. P., & Narby, D. J. (1992). Jury selection in insanity defense cases. *Journal of Research in Personality, 26*, 165–182. doi:10.1016/0092-6566(92)90052-6.

Dexter, H. R., Cutler, B. L., & Moran, G. (1992). A test of voir dire as a remedy for the prejudicial effects of pretrial publicity. *Journal of Applied Social Psychology, 22*, 819–832. doi:10.1111/j.1559-1816.1992.tb00926.x.

Diamond, S. S., Saks, M., & Landsman, S. (1998). Juror judgments about liability and damages: Sources of variability and ways to increase consistency. *DePaul Law Review, 48*, 300–325.

Diamond, S. S., & Zeisel, H. (1974). A courtroom experiment on juror selection and decision-making. *Personality and Social Psychology Bulletin, 1*, 276–277. doi:10.1177/014616727400100193.

Elliot, A. J., & Devine, P. G. (1994). On the motivational nature of cognitive dissonance: Dissonance as psychological discomfort. *Journal of Personality and Social Psychology, 67*, 382–394. doi:10.1037/0022-3514.67.3.382.

Fazio, R. H. (1990). Multiple processes by which attitudes guide behavior: The MODE model as an integrative framework. In M. P. Zanna (Ed.), *Advances in experimental social psychology* (Vol. 23, pp. 75–109). New York: Academic.

Festinger, L. (1957). *A theory of cognitive dissonance*. Stanford, CA: Stanford University Press.

Fishbein, M., & Ajzen, I. (1974). Attitudes towards objects as predictors of single and multiple behavioral criteria. *Psychological Review, 81*, 59–74. doi:10.1037/h0035872.

Fulero, S. M., & Penrod, S. D. (1990a). Attorney jury selection folklore: What do they think and how can psychologists help? *Forensic Reports, 3*, 233–259.

Fulero, S. M., & Penrod, S. D. (1990b). The myths and realities of attorney jury selection folklore and scientific jury selection: What works? *Ohio Northern University Law Review, 17*, 229–253.

Garcia, L., & Griffitt, W. (1978). Evaluation and recall of evidence: Authoritarianism and the Patty Hearst case. *Journal of Research in Personality, 12*, 57–67. doi:10.1016/0092-6566(78)90083-1.

Gerbasi, K. C., Zuckerman, M., & Reis, H. T. (1977). Justice needs a new blindfold: A review of mock jury research. *Psychological Bulletin, 84*, 323–345. doi:10.1037/0033-2909.84.2.323.

Giewat, G. R. (2001). Juror honesty and candor during voir dire questioning: The influence of impression management. *Dissertation Abstracts International, 62*.

Greathouse, S. M., Otis, C. C., Kennard, J. B., Austin, J. L., & Kovera, M. B. (2014). *Attorney expectations influence the voir dire process.* Manuscript in preparation.

Greathouse, S. M., Sothmann, F. C., Levett, L. M., & Kovera, M. B. (2011). The potentially biasing effects of voir dire in juvenile waiver cases. *Law and Human Behavior, 35*, 427–439. doi:10.1007/s10979-010-9247-z.

Haney, C. (1984). On the selection of capital juries: The biasing effects of the death-qualification process. *Law and Human Behavior, 8*, 121–132. doi:10.1007/BF01044355.

Hastie, R., Penrod, S., & Pennington, N. (1983). *Inside the jury*. Cambridge, MA: Harvard University Press.

Hodgins, H. S., & Zuckerman, M. (1993). Beyond selecting information: Biases in spontaneous questions and resultant conclusions. *Journal of Experimental Social Psychology, 29*, 387–407. doi:10.1006/jesp.1993.1018.

J.E.B. v. Alabama ex rel. T. B. (1994). 114 S.Ct. 1419.

Jones, S. E. (1987). Judge- versus attorney-conducted voir dire: An empirical investigation of juror candor. *Law and Human Behavior, 11*, 131–146. doi:10.1007/BF01040446.

Kassin, S. M., & Wrightsman, L. S. (1983). The construction and validation of a juror bias scale. *Journal of Research in Personality, 17*, 423–442. doi:10.1016/0092-6566(83)90070-3.

Kennard, J. B., Otis, C. C., Austin, J. L., Zimmerman, D. M., & Kovera, M. B. (2014). *Behavioral confirmation in voir dire: Effects on jury selection and verdict choices*. Unpublished manuscript.

Kerr, N. L., Hymes, R. W., Anderson, A. B., & Weathers, J. E. (1995). Defendant-juror similarity and mock juror judgments. *Law and Human Behavior, 19*, 545–567. doi:10.1007/BF01499374.

Kovera, M. B., & Cutler, B. L. (2013). *Jury selection*. New York: Oxford University Press.

Kraus, S. J. (1995). Attitudes and the prediction of behavior: A meta-analysis of the empirical literature. *Personality and Social Psychology Bulletin, 21*, 58–75. doi:10.1177/0146167295211007.

Kravitz, D., Cutler, B. L., & Brock, P. (1993). Reliability and validity of the original and revised Legal Attitudes Questionnaire. *Law and Human Behavior, 17*, 661–677. doi:10.1007/BF01044688.

Lamberth, J., Krieger, E., & Shay, S. (1982). Juror decision making: A case of attitude change mediated by authoritarianism. *Journal of Research in Personality, 16*, 419–434. doi:10.1016/0092-6566(82)90003-4.

Lecci, L., & Myers, B. (2002). Examining the construct validity of the original and revised JBS: A cross-validation of sample and method. *Law and Human Behavior, 26*, 455–463. doi:10.1023/A:1016335422706.

Lecci, L., & Myers, B. (2008). Individual differences in attitudes relevant to juror decision making: Development and validation of the Pretrial Juror Attitude Questionnaire (PJAQ). *Journal of Applied Social Psychology, 38*, 2010–2038. doi:10.1111/j.1559-1816.2008.00378.x.

Lecci, L., & Myers, B. (2009). Predicting guilt judgments and verdict change using a measure of pretrial bias in a videotaped mock trial with deliberating jurors. *Psychology Crime and Law, 15*, 619–634. doi:10.1080/10683160802477757.

Louden, J. E., & Skeem, J. L. (2007). Constructing insanity: Jurors' prototypes, attitudes, and legal decision-making. *Behavioral Sciences & the Law, 25*, 449–470. doi:10.1002/bsl.760.

Luginbuhl, J., & Middendorf, K. (1988). Death penalty beliefs and jurors' responses to aggravating and mitigating circumstances in capital trials. *Law and Human Behavior, 12*, 263–281. doi:10.1007/BF01044384.

Marques, J., Abrams, D., Paez, D., & Martinez-Taboada, C. (1998). The role of categorization and in-group norms in judgments of groups and their members. *Journal of Personality and Social Psychology, 75*, 976–988. doi:10.1037/0022-3514.75.4.976.

Middendorf, K., & Luginbuhl, J. (1995). The value of a nondirective voir dire style in jury selection. *Criminal Justice and Behavior, 22*, 129–151. doi:10.1177/0093854895022002003.

Mischel, W. (1968). *Personality and assessment*. New York: Wiley.

Moran, G., Cutler, B. L., & De Lisa, A. (1994). Attitudes toward tort reform, scientific jury selection, and juror bias: Verdict inclination in criminal and civil trials. *Law & Psychology Review, 18*, 309–328.

Moran, G., Cutler, B. L., & Loftus, E. F. (1990). Jury selection in major controlled substance trials: The need for extended voir dire. *Forensic Reports, 3*, 331–348.

Myers, B., & Lecci, L. (1998). Revising the factor structure of the Juror Bias Scale: A method for the empirical validation of theoretical constructs. *Law and Human Behavior, 22*, 239–256. doi:10.1023/A:1025798204956.

Narby, D. J., Cutler, B. L., & Moran, G. (1993). A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability. *Journal of Applied Psychology, 78*, 34–42. doi:10.1037/0021-9010.78.1.34.

Neises, M. L., & Dillehay, R. C. (1987). Death qualification and conviction proneness: *Witt* and *Witherspoon* compared. *Behavioral Sciences and the Law, 5*, 479–494. doi:10.1002/bsl.2370050411.

Nietzel, M. T., Dillehay, R. C., & Himelein, M. J. (1987). Effects of voir dire variations in capital trials: A replication and extension. *Behavioral Sciences and the Law, 5*, 467–477. doi:10.1002/bsl.2370050410.

Nietzel, M. T., McCarthy, D. M., & Kern, M. J. (1999). Juries: The current state of the empirical literature. In R. Roesch, S. D. Hart, & J. R. P. Ogloff (Eds.), *Psychology and law: The state of the discipline* (pp. 23–52). Dordrecht, The Netherlands: Kluwer Academic.

Norton, M. I., Sommers, S. R., & Brauner, S. (2007). Bias in jury selection: Justifying prohibited peremptory challenges. *Journal of Behavioral Decision Making, 20*, 467–479. doi:10.1002/bdm.571.

O'Neil, K. M., Patry, M. W., & Penrod, S. D. (2004). Exploring the effects of attitudes toward the death penalty on capital sentencing verdicts. *Psychology, Public Policy, and Law, 10*, 443–470. doi:10.1037/1076-8971.10.4.443.

Olczak, P. V., Kaplan, M. F., & Penrod, S. (1991). Attorneys' lay psychology and its effectiveness in selecting jurors: Three empirical studies. *Journal of Social Behavior & Personality, 6*, 431–452.

Otis, C. C., Greathouse, S. M., Kennard, J. B., & Kovera, M. B. (2014). Hypothesis-testing in attorney-conducted voir dire. *Law and Human Behavior, 38*, 392–404. doi:10.1037/lhb0000092.

Peters, M., & Lecci, L. (2012). Predicting verdicts, adherence to judge's instructions, and assumptions about the disposition of the defendant in a case involving the insanity defense. *Psychology, Crime & Law, 18*, 817–831. doi:10.1080/1068316X.2011.566872.

Phares, E., & Wilson, K. G. (1972). Responsibility attribution: Role of outcome severity, situational ambiguity, and internal-external control. *Journal of Personality, 40*, 392–406. doi:10.1111/j.1467-6494.1972.tb00069.x.

Rose, M. R. (1999). The peremptory challenge accused of race or gender discrimination? Some data from one country. *Law and Human Behavior, 23*, 695–702. doi:10.1023/A:1022393506784.

Skeem, J. L., Louden, J. E., & Evans, J. (2004). Venirepersons' attitudes toward the insanity defense: Developing, refining, and validating a scale. *Law and Human Behavior, 28*, 623–648. doi:10.1007/s10979-004-0487-7.

Skov, R. B., & Sherman, S. J. (1986). Information-gathering processes: Diagnosticity, hypothesis-confirmatory strategies, and perceived hypothesis confirmation. *Journal of Experimental Social Psychology, 22*, 93–121. doi:10.1016/0022-1031(86)90031-4.

Snyder, M., & Haugen, J. A. (1994). Why does behavioral confirmation occur? A functional perspective on the role of the perceiver. *Journal of Experimental Social Psychology, 30*, 218–246. doi:10.1006/jesp.1994.1011.

Snyder, M., & Swann, W. B. (1978). Hypothesis-testing processes in social interaction. *Journal of Personality and Social Psychology, 36*, 1202–1212. doi:10.1037/0022-3514.36.11.1202.

Snyder, M., Tanke, E. D., & Berscheid, E. (1977). Social perception and interpersonal behavior: On the self-fulfilling nature of social stereotypes. *Journal of Personality and Social Psychology, 35*, 656–666. doi:10.1037/0022-3514.35.9.656.

Sommers, S. R., & Norton, M. I. (2007). Race-based judgments, race-neutral justifications: Experimental examination of peremptory use and the *Batson* challenge procedure. *Law and Human Behavior, 31*, 261–273. doi:10.1007/s10979-006-9048-6.

Stukas, A., & Snyder, M. (2002). Targets' awareness of expectations and behavioral confirmation in ongoing interactions. *Journal of Experimental Social Psychology, 38*, 31–40. doi:10.1006/jesp.2001.1487.

Trope, Y., & Liberman, A. (1996). Social hypothesis-testing: Cognitive and motivational mechanisms. In E. T. Higgins & A. W. Kruglanski (Eds.), *Social psychology: Handbook of basic principles* (pp. 239–270). New York: Guilford Press.

Weigel, R. H., & Newman, L. S. (1976). Increasing attitude-behavior correspondence by broadening the scope of the behavioral measure. *Journal of Personality and Social Psychology, 33*, 793–892. doi:10.1037/0022-3514.33.6.793.

Weir, J. A., & Wrightsman, L. S. (1990). The determinants of mock jurors' verdicts in a rape case. *Journal of Applied Social Psychology, 20*, 901–919. doi:10.1111/j.1559-1816.1990.tb01467.x.

Werner, C. M., Kagehiro, D. K., & Strube, M. J. (1982). Conviction proneness and the authoritarian juror: Inability to disregard information or attitudinal bias? *Journal of Applied Psychology, 67*, 629–636. doi:10.1037/0021-9010.67.5.629.

Wicker, A. W. (1969). Attitudes vs. actions: The relationship of verbal and overt behavioral responses to attitude objects. *Journal of Social Issues, 25*, 41–78. doi:10.1111/j.1540-4560.1969.tb00619.x.

Wrightsman, L. S. (1987). The jury on trial: Comparing legal assumptions with psychological evidence. In N. E. Grunberg, R. E. Nisbett, J. Rodin, & J. E. Singer (Eds.), *A distinctive approach to psychological research: The influence of Stanley Schachter* (pp. 27–45). Hillsdale, NJ: Lawrence Erlbaum Associates.

Zimmerman, D. M., Otis, C. C., Kennard, J. B., Austin, J. L., & Kovera, M. B. (2014). *Behavioral confirmation during voir dire: The effects of biased voir dire questions on juror decision-making*. Manuscript in preparation.

Race and Its Place in the United States Legal System

Cynthia Willis-Esqueda

As the first female and only minority Ph.D. graduate student of Lawrence S. Wrightsman, Jr., I am more than happy to contribute to this volume, honoring the legacy of his work. He became and remains my intellectual parent, and he was a guiding force in how I have come to conceptualize both theoretical and applied issues of behavior—particularly with reference to the intersection of law and psychology. As a student of Stanley Schacter (who studied with Kurt Levine, until his untimely death, and Leon Festinger), Larry was profoundly centered in the explanatory approach to social behavior that considers both the person and the environment. His interest in psychology and law topics (confessions, legal decision making, and judges' behaviors) has certainly maintained that Levinian tradition by considering intrapersonal features of actors and the context within which behavior occurs and he has maintained an interest in the application of psychology throughout most of his career (Wrightsman & Brigham, 1973). In light of that approach, the purpose of this chapter is to review how we have conceptualized the social category of race within the law and how race contributes to systematic disparities in various contexts in the US legal system.

Early Colonial Experience

Although it is hard to imagine, race has not always been a practicable construct. The earliest use of the "race" construct occurred in the colonial experience in what would later become the USA (Levin, 2002; Lyons, 2004), and the evolution of the

C. Willis-Esqueda (✉)
Department of Psychology, University of Nebraska-Lincoln,
336 Burnett Hall, Lincoln, NE 68588-0308, USA
e-mail: cwillis-esqueda1@unl.edu

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_7

race construct within the law signaled the means for legalized social stratification within the USA (Coates, 2003; Gross, 2008; Martinez, 1997). Consequently, as a social construction and not a biological one, the concept of race and the boundaries of what constitutes race categories changed over time and geographical region. In spite of the indistinct nature of race, the concept has been at the forefront of social life since Europeans came in contact with the American continent (Tischauser, 2002). For example, racial profiling of American Indians occurred in colonial settlements, in order to convert Indians to Christianity and regulate their behavior (Segal & Stinebeck, 1977). This nebulous concept of race was used to determine who belonged in praying towns, where Indians' behaviors were monitored for true piety and relinquishment of Indian spirituality and traditions. This was deemed necessary, because Indians' inward qualities were akin to "wild" animals in human form (Takaki, 1992). Such beliefs by early colonists were indicative of the dehumanization of the indigenous peoples (Haslam, 2006).

However, by the time of the conception of the USA as a nation in 1776, scholars had developed a human classification system with race as the categorizing feature, including a taxonomy by Blumenbach (Gould, 1994). Rudimentary forms of taxonomy are still used today. Consequently, flagrant racial biases against the American indigenous peoples were present in the Declaration of Independence of 1776, where the founders rebelled against King George III who had "…endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions."

Slavery

In a review of early legal cases involving race, Coates (2003) maintained that "…law serves as an inimitable instrument in the cultural production, maintenance, and perpetuation of race, racism, and racialized social systems" (p. 330). Beginning in colonial times then, courts in the Americas grappled with race as a means to regulate social behavior and the status of people of color (both indigenous populations and Blacks) as slave labor (Coates, 2003; Cobb, 1858/1969). Based on their status as a racial "other," American indigenous populations were the first slaves and were sold for labor in the Americas and in Europe by European colonists (Brooks, 2002; Segal & Stinebeck, 1977). Many are familiar with the tale of Squanto (or Tisquantum), a Patuxit, who was kidnapped, sold into slavery in Europe, made his way back to the colonies, and taught the pilgrims survival skills. Nonetheless, European colonists viewed the indigenous peoples as inferior and subhuman (Segal & Stinebeck, 1977; Takaki, 1992). By 1619, British ships (one flying a Dutch flag) brought 20 slaves to Virginia from Veracruz, and their status as slaves was not questioned. After all, African slaves had been imported all through the Americas for nearly a century. Thus, in Virginia (as well as other colonial states), being of African appearance

was nearly synonymous with being a slave, and by 1661 Virginia was the first colony to pass a slave law, making African descent a marker for life-long, slave status (see *Act CII Laws of Virginia*; Coates, 2003).

Colorism

In spite of the social and legal use of race, definitions and assignment to race categories differed by geographical region and state laws (Banks & Eberhardt, 1998; Gross, 1998, 2000; Hickman, 1997; Ramos, 2001). Ancestry was the defining feature that indicated racial categorization, and, hence, status as a slave. However, in instances where clear race classification was not apparent, judges resorted to skin color, other physical features, or to testimony from the public about the lifestyle and character of the person in question (Banks & Eberhardt, 1998; Coates, 2003; Gross, 2008; Maillard, 2007). Long after the civil war, one's appearance, social affiliations, and ancestry were enough to determine what race category was appropriate for marriage contracts, for Blacks as well as other ethnic groups, such as Latinos and Chinese (Pascoe, 1996). Race was thought to be an indication of deeper, essential qualities (Banks & Eberhardt, 1998), so that phenotype was supposed to be indicative of genotype. In fact, in some instances phenotype was the only information available to the courts in deciding issues such as the legality of marriage (Pascoe, 1996) or of inheritance from a "legal" spouse (Maillard, 2012). In other instances, phenotype may have indicated a stereotypical "White" person, but documented ancestry indicated non-White status. For example, in *Plessy v. Ferguson* (1896), Plessy's appearance would have indicated a "White" person, but he was one eighth African by descent—enough to secure the "Black" designation under Louisiana's law, which used any Black ancestry as the defining feature (Golub, 2005). Latinos' ancestry was also an indicator of racial category as Indian or White (Gross, 2006), and even today darker skin can impact Latinos' outcomes and social class (Frank, Akresh, & Lu, 2010).

Psychological Meaning

Most importantly, race carries a psychological meaning in law and legal processes. Such meaning is evident in race bias which permeates nearly every legal process (Wooldredge, 1998). For example, cultural stereotypes and biases influence the use of race in a myriad of legal contexts. In eyewitness identification (Brigham, 2007), profiling (Willis-Esqueda, 2007), arrest (Aguirre, 2004; Willis-Esqueda, 2007), jury selection (*Batson v. Kentucky*, 1986; Haney Lopez, 2000; *Hernandez v. Texas,* 1954; *Swain v. Alabama*, 1965), jury decision making (Levinson, 2007; Perez, Hosch, Ponder, & Chanez Trejo, 1993), and sentencing decisions (Demuth & Steffensmeier, 2004; Eberhardt, Davies, Purdie-Vaughns, & Johnson, 2006; Pizzi, Blair, & Judd, 2005; Steffensmeier & Demuth, 2000; Thomson, 1997; Willis-Esqueda, Espinoza,

& Culhane, 2008), the racial stereotype construct has been shown to influence perceptions of and decisions about legal disposition. Race can also impact perceptions of attorney conduct (Aguirre, 2004; Espinoza & Willis-Esqueda, 2008; Foley, Kidder, & Powell, 2002; Pearce, 2005), and judges' own race membership and racial biases influence their legal interpretations and decision making (Hernandez-Julian & Tomlin, 2006; Johnson & Fuentes-Rohwer, 2005).

Even today, we rely on physical appearance, such as "White" and "not White," to determine race status, and this reliance on Whites as superior has become ingrained in our thinking about what constitutes an "American." For example, while we may report that everyone should be treated equally as Americans, we categorize White faces as American more quickly, compared to African American or Asian American faces (Devos & Banaji, 2005). In fact, those who believe in the essentialist notion of race (i.e., that race is a biological, nonmalleable, construct with underlying genetic determinants of behavior) are more likely to show race bias (Hong, Manchi Chao, & No, 2009).

The underlying psychological construct that drives much of race bias research is the notion of the stereotype. Stereotypes are organized configurations of knowledge about an identifiable group and the group members. The use of stereotypes indicates a set of beliefs (and sometimes emotions) that are attached to social groups and group members (Rothbart & John, 1985). In terms of race bias, stereotypes represent the cognitive attachment of certain inner qualities, traits, and behaviors to people based on race appearance—i.e., the process of essentialism (Keller, 2005). Through media and cultural learning, one can develop stereotypes without ever encountering a targeted group or group members. And, race-based stereotypes develop early. Children as young as three can articulate the negative stereotypes about minority groups (Katz, 2003), and young children learn to control explicitly biased responding based on race (Baron & Banaji, 2006). Within such research, both explicit and implicit measures are tools to understand and identify race prejudice and discrimination, and both explicit and implicit behaviors provide meaningful results. For example, explicit race bias within the legal system still occurs. Within this decade, a judge has called Black female attorneys "the Supremes" in court (Associated Press, 2008), a judge has referred to Latinos as "Wetbacks" (Cassens Weiss, 2011), and the U.S. Supreme Court has admonished a U.S. district attorney for declaring in court that Blacks and Hispanics would be present at a crime scene (Williams, 2013). However, implicit race bias (e.g., bias without awareness in the cognitive processing of information) has also become an important issue facing legal procedure experts (Jolls & Sunstein, 2006; Kang et al., 2012).

Based on negative race stereotypes and maintenance of a racialized social structure in place since colonial times, biased legal outcomes (or discrimination) can occur in a variety of contexts. Both civil (e.g., child adoption procedures, loan approvals, employment, school segregation, marriage and divorce, voting rights) and criminal (e.g., arrest, jury decision making, attorneys' behaviors, judges' behaviors, sentencing) arenas involve biased race outcomes. For the purposes of this chapter, race issues within the criminal justice system will be the focus. Such legal contexts often involve race-based profiling, legal decision making, and sentencing, and those issues are meaningful to review.

Racial Profiling

In racial profiling, the reliance on the stereotyped link between race and criminality is demonstrated. Racial profiling refers to "law enforcement practices that use race to make discretionary judgments" (Aguirre, 2004, p. 929). The National Institute of Justice defines race profiling as "…a practice that targets people for suspicion of crime based on their race, ethnicity, religion or national origin" (National Institute of Justice, 2013). Martin and Glaser (2012) also make distinctions between racial profiling and two other uses of race and of profiling: (1) criminal profiling and (2) the use of race for suspect descriptions.

In racial profiling, law enforcement can detain and exercise power over individuals of color with irrelevant or no evidence for doing so. Racial profiling has become a serious issue within the legal community (Banks, 2003; Gross & Barnes, 2002; Hickman, 2005; Johnson, 2003; Totman & Steward, 2006; *Traffic Stops Statistics Study Act*, 2001), in part owing to the public's (particularly Blacks' and Latinos') growing awareness of the problem (Carlson, 2004) and the increased pressure to eliminate it at international (Amnesty International, 2004), federal (Apuzzo, 2014), and state (Johnson, 2014) levels. Prevalence rates also indicate the problem. For example, the Texas state population is nearly 40 % Hispanic, and Latinos (and Blacks) are much more likely to be consent searched after a traffic stop, compared to Whites (Totman & Steward, 2006). Numerous studies have indicated the higher prevalence of stop and frisk incidents for Blacks and Latinos, in comparison to Whites (Rice, Reitzel, & Piquero, 2005). In a recent study of university students (tomorrow's educated public), attitudes about expectations for involvement with law enforcement and the criminal justice system were examined. People of color (compared to Whites) were more likely to believe their group had been unfairly targeted by police, they had personally witnessed others in their group being unfairly treated by police, police operate with biased race notions, and disparities in prison incarceration between people of color and Whites was due to unfair law enforcement and profiling (Willis-Esqueda, Delgado, & Orozco Garcia, 2014). This finding builds upon earlier work on notions of trust and confidence in law enforcement by minorities and Whites (Tyler, 2005).

If there is an acknowledged problem with racial profiling, why, then, does it continue? In addition to the use of negative stereotypes that connect race with illegality, racial profiling allows the dominant culture to maintain the social hierarchy (Sidanius, Levin, & Pratto, 1996). More importantly, racial profiling keeps minorities, mostly men of color, in a perilous psychological state. One lives with the constant knowledge that interactions with law enforcement can occur at any time and with no prior, miscreant behavior. "Driving while Black," "Driving while Brown" (DWB), and "Driving while Indian" (DWI) are common occurrences for people of color in the USA, particularly for men. Thus, minorities are more likely to expect negative police encounters in future, compared to Whites (Willis-Esqueda et al., 2014).

Being of high socioeconomic status (or SES) does not protect against the experience of racially motivated police stops, interrogations, and detainments for Blacks or Latinos (Johnson, 2014; Maillard, 2013). The experience of Henry Louis Gates,

Jr. is a noteworthy example of how racial profiling can occur against those least likely expected to be a target (Harcourt, 2009). Dr. Gates, a renowned educator and scholar, was detained and arrested after police received a call about a possible break-in at Gates' own home. Dr. Gates, who is African American, did break into his home, because he could not find his house keys, but he was arrested even after showing identification. More recently, the vice president of the National Hispanic Christian Leaders Conference, Tony Suarez, claimed racial harassment by law officers who stopped him in the state of Iowa as a drug dealer who fit a profile (Zilbermints, 2014).

In addition to the public response and field studies on prevalence, the cognitive connection between racial minorities and illegality is demonstrated with research, and is of long standing (Sellin, 1928). Dixon and Maddox (2005) found a dark skinned Black perpetrator is remembered better and generates more emotional concern, as opposed to a White perpetrator. Moreover, Eberhardt, Goff, Purdie, and Davies (2004) examined biases against Blacks versus Whites for criminal related notions. Participants were primed with a degraded Black or White face that was presented below awareness. Then, they were to indicate recognition of a crime object (gun or knife) as quickly as possible. Results indicated the cognitive association between crime objects and Blacks was much stronger than for crime objects and Whites, and this was found regardless of participants' explicit measure of race prejudice. Moreover, with police officers as participants, a prime with crime-related words (again below awareness) facilitated the ability to select a Black face over a White one. Thus, priming concepts (even without awareness) demonstrates the connection between crime and Blacks, as opposed to Whites.

Correll, Park, Judd, and colleagues have conducted a number of studies, some with police officers, to demonstrate that implicit responding to visual stimuli and decisions to "shoot" or "not shoot" are biased negatively toward Blacks, compared to Whites. In other words, decisions to shoot a Black target with a gun were faster than when the target was White, and decisions to not shoot without a gun were faster when the target was White compared to Black. In a more recent study (Sadler, Correll, Park, & Judd, 2012), this effect was extended to other minority groups, especially Latinos, in comparison to Whites. Thus, racial profiling is still an issue where the meaning of race leaves an impact on legal processes.

Biased Legal Decision Making

For the criminal justice system, race issues in legal decision making research can take a myriad of forms (see *State of Florida v. Henry Alexander Davis*, 2004). Some research has focused on attitudes and decisions of individual jurors, with the understanding that individual attitudes and decisions will influence jury decision making (Bornstein & Greene, 2011). Other research examines actual legal processes (e.g., arrest procedures, jury deliberation, and sentencing mandates) where race is a factor. Finally, the focus of research can be on legal actors (e.g., defendant, attorney, and judicial behaviors) and the implications for race bias.

Mitchell, Haw, Pfeifer, and Meissner (2005) conducted meta-analyses to examine effects of race on jury decision making and focused on decisions made for out-group defendants. First, more bias was found "…for Black participants; when a continuous measure of guilt was utilized; when jury instructions were not provided; and in studies conducted or published in the 1970s" (p. 627). In addition, for sentencing there was increased racial bias when community members were the participants, for published studies, and with Black participants. Thus, racial bias may be better detected when examining a variety of features attached to research methodology.

Pizzi et al. (2005) found evidence of biased decision making by individuals without their explicit awareness. They had faces rated for Afrocentric features in pretesting and found Black and White males with higher rated Afrocentric features (e.g., darker skin tone) were more likely to be judged with stereotypically negative Black attributes (criminal, drugs) and with more aggression, compared to those with low ratings of Afrocentric features. In addition, those targets with higher rated Afrocentric features (compared to those with low-rated features) were expected to be more aggressive, even with evidence of prior nonaggressive behaviors.

Although Canada has a different historical perspective on race/ethnic groups, compared to the USA, Maeder and Burdett (2013) examined culpability decision making and varied whether the defendant was Black, White, or Aboriginal Canadian. Gang membership was another factor that was manipulated. When the defendant was Black and a gang member, mock jurors indicated higher ratings on a guilt/confidence measure, compared to when the defendant was White, and Aboriginal Canadians received more guilty verdicts, compared to Whites.

As part of a program of research to examine stereotypic notions of Mexican Americans and the influence on explicit criminality decisions, my colleague and former graduate student, Russ Espinoza, and I have conducted studies to examine the effects of a number of factors that might interact with race of a Latino defendant, and even race of an attorney, to produce biased legal outcomes. We have been particularly interested in SES, since Latinos have high poverty rates in the USA (Macartney, Bishaw, & Fontenot, 2013) and those low in SES may be more likely to be incarcerated (McDaniel, Simms, Monson, & Fortuny, 2013). Latinos have a long history of negative connections to the legal system (United States Commission on Civil Rights, 1970), and Latinos are overrepresented in incarcerated populations (Sentencing Project, 2014). We have hypothesized that SES functions as a non-race-related cue that pulls bias from decision makers and allows for race-biased outcomes. Thus, in one study (Willis-Esqueda et al., 2008) participants were told to act as though they were part of a grand jury. They read a true bill of indictment that described a crime which varied the crime status (a high level or low level crime, such as art theft and auto theft), SES (high or low), and race of defendant (European American or Mexican American). Participants then provided trait, culpability, and guilt ratings. The study was conducted in two geographic locations—one with a high demographic majority of Whites (Lincoln, Nebraska) and one with a high demographic majority of Mexican Americans (El Paso, Texas). In the White majority environment, European American participants gave the low SES Mexican

American defendant more guilty verdicts, a lengthier sentence, and higher culpability ratings, compared to a high SES Mexican American or a European American defendant, regardless of crime status. The low SES Mexican American defendant with a low status crime also received higher negative trait ratings, compared to the other conditions. In the Mexican American majority location, Mexican American participants showed a different decision making. No differences emerged for guilty verdicts, recommended sentence, or culpability assignment between the Mexican American or the European American defendant.

In a follow-up study (Espinoza & Willis-Esqueda, 2008), participants were instructed to review a criminal case carefully and treat the study process as though they were actual jurors rendering a decision. Participants were randomly assigned to one of eight conditions that varied defendant's race/ethnicity (European American or Mexican American), defendant's SES (high or low), and the attorney's race/ethnicity (European American or Mexican American). The prosecuting attorney was always shown as European American. Based on condition assignment, participants were shown resumes of the prosecuting attorney (always European American) and defense attorney (Mexican American or European American). Within the transcript of the court case, the defendant's race/ethnicity, the defendant's SES, and the defense attorney's race/ethnicity were varied. Results confirmed earlier findings. The low SES Mexican American defendant was given a longer sentence, compared to the other conditions, and more importantly, the low SES Mexican defendant who was represented by a Mexican American attorney was thought less believable and more to blame, compared to the other conditions. In addition, the attorney for the low SES Mexican American defendant was thought less competent. These findings are reminiscent of Cohen and Peterson's (1981) research where an African American defendant who was represented by an African American attorney was given a longer sentence, compared to an African American defendant with a European American attorney.

Sentencing

Disparities in sentencing are one of the most profound areas where race is an issue. It goes to the heart of racial disparities in the U.S. legal system, involving prisons at federal, state, and local levels (NAACP, 2014). Thus, empirical examinations of mechanisms that might contribute to such disparities are crucial in an effort to modify both individual and system variables.

While the State of Florida found no evidence for biased sentencing based on race, Pizzi et al. (2005) considered that Afrocentric features might be an underlying cause of bias to produce racial disparities. Using State of Florida criminal mug shots (which were rated for Afrocentric features) and actual adjudicated crimes, Pizzi, Blair, and Judd examined actual sentencing. Crime seriousness and number of offenses were predictive of sentence length, but race category was not. However, controlling for race category and crime seriousness, those targets who are rated as

having more Afrocentric features received longer sentences. Clearly, new and innovative approaches to the study of sentencing disparities are needed to better clarify how such disparities occur, as in the Pizzi, Blair, and Judd study.

In addition, while the *McCleskey v. Kemp* (1987) decision is nearly 30 years old, the death penalty remains a contentious issue with regard to racial bias in legal proceedings (see Baldus, Woodworth, & Pulaski, 1994; Cohen, 2012) and studies continue to indicate sources of bias in decision making about the death penalty.

Eberhardt et al. (2006) provided Black male faces from an actual criminal data base and had participants (who were not aware of the purpose of the research) rate those faces for stereotypicality of Blackness. Results indicated the more stereotypically Black a man appeared, the more likely he was to have received a death sentence, regardless of the crime committed. In this self report, then, participants demonstrated a bias without direct awareness of their bias or how that bias operated in legal decision making.

Moreover, there is evidence that aversive racism may account for situations where low prejudiced Whites will be more likely to endorse a harsh sentence (like the death penalty) with a Black defendant, compared to a White defendant. Dovidio, Smith, Gershenfeld Donnella, and Gaertner (1997) found high prejudiced Whites recommended the death penalty more for the Black defendant than the White one, regardless of jury composition. However, low prejudiced Whites showed the bias against the Black defendant and death penalty only when a Black juror also recommended it. Thus, even low prejudiced Whites may find expression for race bias, given cues that bias will not be considered race based.

Further evidence for aversive racism effects on capital sentencing comes from the findings of Espinoza and Willis-Esqueda (2013). Here, a defendant's race/ethnicity (European American or Latino), SES (high or low), and the presence of strong or weak mitigating information were varied in a transcript of a capital case where guilt had already been determined. Both European American and Latino actual venire persons (exiting a County Courtroom in California) acted as mock jurors and provided culpability and sentencing decisions. European American mock jurors gave higher culpability ratings and the death sentence more frequently to the low SES Latino defendant with weak mitigating information. At the same time, strong mitigating information worked to the benefit of the European American defendant with the lowest frequency of death penalty judgments, compared to the other conditions. The Latino mock jurors did not show the same results. Latino jurors attributed less lying to police from the high SES Latino defendant, regardless of mitigating information, compared to the low SES European American defendant with weak mitigating information. However, no differences in culpability ratings or death sentencing occurred for the Latino jurors. These findings highlight two important findings in race bias research in legal settings. First, aversive racism may still exist such that European American jurors are more likely to provide harsh sentencing, even the death penalty, when non-race-related cues are in place to obfuscate the decision making, and secondly, minority groups may not adhere to the same patterns of bias as European Americans in race-based legal decision making.

Elimination

Since the 1940s, an emphasis has been on methods to change or lessen race bias (i.e., change attitudes) in order to impact behavior (Fairchild & Gurin, 1978). At the same time, behavior can change our stereotypes and prejudice as well (Rothbart & John, 1985). This is the foundation of why changes in law (which regulates behavior) can subsequently produce changes in prejudice and discrimination. When our racism is curtailed, our attitudes are also modified.

While legal attempts to extricate race bias in society have been present since colonial times (Finkelman, 2009), race disparities and discrimination remain a central feature of American life. Today, there are significant disparities in all areas of social life (e.g., employment health, education, income, and media representation) for American Indians, Latinos, and Blacks, compared to Whites. What methods, then, have been developed to eliminate race bias recently? It appears that methods can be used at both the explicit and implicit levels.

In terms of explicit interventions, Pizzi et al. (2005) provided cautionary instructions or no instructions to determine if participants would continue to make judgments based on the connection between negative attributes with Blacks. The no instructions condition produced results that replicated earlier findings—a negative construct was connected to Blacks, compared to Whites. However, cautionary instructions (either a caution to not use race stereotypes or a caution to not rely on Afrocentric features to make decisions) eliminated the biased decision making.

Likewise, Bucolo and Cohn (2010) found mentioning a defendant's race in defense attorney's opening and closing statements influenced assignment of a guilt verdict, for both a Black and a White defendant. With just a Black defendant, Cohn, Bucolo, Pride, and Sommers (2009) found the use of a race salience statement by a witness was enough to lower guilty verdicts, compared to when no race salience statement was introduced. With a guilt/confidence combined measure, similar results were obtained. Moreover, this effect was true with those who reported high modern racism attitudes, compared to lower racist attitudes (e.g., race salience statements lowered guilt ratings for those who were high in racist attitudes).

This explicit caution to not discriminate is reminiscent of the research by Czopp, Monteith, and Mark (2006). They provided participants with ambiguous sentences that could be interpreted with race stereotypes or non-race notions. Examples included sentences such as "This person can be found behind bars" or "This person can be found wandering the streets." Participants were to write a word that describes the sentence, which could produce stereotypic responses (criminal or bum) or non-stereotypical responses (bartender or tourist). When participants provided stereotypical responses, the bogus "partner" in the study confronts them about the use of race stereotypes, with either a mild or harsh tone. After the direct confrontation, participants' reactions centered on acknowledgement and apology or denial and hostility. Most importantly, after confrontation, on a subsequent test of race stereotypes, the use of such race stereotypes decreased. Explicit opposition to the use of race bias produced less subsequent bias.

Contact with out-group members has long been assumed to lower race bias. The Supreme Court findings in *Brown v. Topeka Board of Education* was possibly the first time that social science research was considered as part of a decision (Wrightsman, Nietzel, & Fortune, 1994). Kenneth Clark and several other social scientists based their amicus brief on the possibility that contact, as in integration, would allow for dispelling of stereotypes, possibilities for collaboration, and new social norms. Pettigrew and Tropp (2008) conducted a meta-analysis of studies that examined how contact with outgroup members reduced bias. The findings indicated that such integrated contact enhanced information about another group, reduced anxiety, and increased empathy. Moreover, the presence of a Black jury foreperson (Foley & Pigott, 2002) or the presence of Black jury members (Sommers, 2006) appears to quash race-biased decision making. Thus, the tenets about integration in *Brown* are still viable, and integration can lower explicit bias.

Perhaps, the inclusion of information regarding societal investments in nondiscriminatory legal systems might mitigate bias throughout the system. Stangor, Sechrist, and Jost (2001) were able to change people's stereotyped biases about Blacks (both positive and negative biases). Participants were provided with "false" consensus information that implied others shared their same attitudes. Hearing that others shared the attitude changed participants' views in the direction of the others. In other words, participants conformed to the influence of consensus information.

Implicit responding can also be manipulated, as a means to reduce bias. Sinclair, Lowery, Hardin, and Colangelo (2005) designed research to "…contribute to the understanding of the malleability of automatic attitudes by showing that individuals tune their attitudes to those of another social actor to the extent that they experience affiliative motivation toward this person." (p. 584). They manipulated the social context by having an experimenter model antiracist sentiments or no message and be likeable or rude. Participants demonstrated less automatic, stereotyped prejudice when in the condition with the experimenter who espoused antiracist sentiment and who was likeable. Social norm changes can signal modification in implicit responding.

Moskowitz and Li (2011) also examined modifications to implicit responding by providing reminders of goals or value principles. Participants were told to envision a time when they violated their egalitarian principles (crucial manipulation) or when they violated a neutral principle (traditions). Next, participants were exposed to a Black or a White face, and then participants responded to stereotype relevant or irrelevant words. Using latency response measures with the Black and White faces as primes, Moskowitz and Li found that a reminder of egalitarian goals was enough to block usage (slower response) of automatically triggered negative race stereotypes of Blacks.

Similarly, Mendoza, Gollwitzer, and Amodio (2010) examined the effects of inhibiting and facilitating goal directions on the use of stereotyped responding in the "shoot" or "don't shoot" paradigm. A Black or a White person is shown with a gun or without a gun. Participants are shown the image for milliseconds and must make a decision to shoot or not. The usual finding was demonstrated with no goal direction—participants were more likely to incorrectly shoot a Black person (no

gun present) than a White person. However, the provision of goal directions enhanced accuracy and modified the race stereotyped responding.

Given the lack of racial minorities as attorneys (Cassens Weiss, 2014) and judges (American Bar Association, 2014) in the legal system, the American Bar Association has a special Center for Racial and Ethnic Diversity (see http://www.americanbar.org/groups/diversity.html). The lack of opportunity to see minority figures in powerful roles may enhance an environment where race bias can flourish. The research of Richeson and Ambady (2003) addresses this issue. They were interested in implicit race stereotyping when the social power within an interpersonal relationship was varied. The social context was varied by informing some participants they were in a superior position (and evaluating a subordinate) and informing others they were assigned a subordinate role (and would be evaluated by the superior). They were led to believe the interaction partner was either Black or White, as well. Then, they were administered the implicit association test (IAT) for an index of automatic race stereotyping (see Greenwald (2014) for an explanation of IAT). Results indicated White participants assigned to the superior role who anticipated a Black interaction partner were more likely to show implicit race bias, compared to those assigned the subordinate role with a Black partner. There was little difference when the anticipated partners were White. "These results suggest that the role White participants anticipated that they would hold for a dyadic interaction with a Black individual influenced their degree of prejudice." (p. 5). Thus, the veracity of the transformative relationship between Sidney Poitier (a Black professional homicide detective) and Rod Steiger (a White southern sheriff) depicted in the 1967 film, *In the Heat of the Night*, is not without empirical evidence.

Taken together, these studies indicate that implicit forms of racially biased responding are amenable to modification and potentially elimination. Nevertheless, due to the automatic activation of negative stereotypes of minority groups and their members, implicit forms of bias remain an insidious source of discrimination. Several features of implicit bias signal that discrimination is still possible, even with attempts to reduce implicit stereotype use. Wittenbrink (2004) has suggested that implicit evaluations happen so quickly that people are not aware of biased stereotype usage and often do not have time to reflect on whether decisions or behavior are valid or biased. If this is accurate, then research should focus on best methods to interrupt the invocation of implicit bias, and this remains a task of not small import.

Conclusions

In 1973, Lawrence S. Wrightsman and John C. Brigham published *Contemporary Issues in Social Psychology*, one of the first treatments of modern problems through the lens of social psychological theories and a classic example of how scholarship can be used to understand and modify pressing social concerns. As part of an approach to scholarship that ensures a holistic conceptualization (person and the environment) of phenomena, but also a determined effort to ensure "action research"

in the Lewinian tradition, the research on how race continues to be embedded in law is a topic of profound significance.

Physical appearance remains the signature criteria for race categorization, and the effects of such categorization have real consequences for everyday life. Both explicit and implicit measurements of race bias produce predictive results for legal discrimination. Various methods have been examined to eliminate race discrimination. For reduction of explicit bias, education, vicarious experience, increased contact, social norms, and laws have been used. For implicit bias, modifications to the environment and inculcation of values and goals modify stereotype usage. Thus, proactive and reactive strategies can be used to reduce discrimination.

> Reactive strategies require being aware of stereotypes, yet stereotypes are hard to detect even when one is not motivated to deny they exist. They also require knowing how to eliminate bias and having the desire and ability to implement that strategy, with each of these components often lacking (Moskowitz & Li, 2011, p. 114).

Continued research on the means by which negative stereotypes interfere with equality and fair treatment remains a goal of social sciences and of law. New approaches are constantly being examined (i.e., brain morphology, brain activation, ideological propensities, socioeconomic factors) to determine the propensity for racism. It should be remembered, because of changes in law there are no longer members of society who grew up entirely under a system of legalized discrimination, and the social and psychological consequences of that fact are tremendous.

> Injustice anywhere is a threat to justice everywhere. Martin Luther King, Jr. (1963).

References

Aguirre, A. (2004). Profiling Mexican American identity. *American Behavioral Scientist, 47*, 928–942.

American Bar Association. (2014). *Judicial diversity in State Courts*. Retrieved from http://apps.americanbar.org/abanet/jd/display/national.cfm#3

Amnesty International. (2004). *Threat and humiliation: Racial profiling, domestic security, and human rights in the United States*. Retrieved June 1, 2006, from http://www.amnestyusa.org/racial_profiling/index.do

Apuzzo, M. (2014, January 15). *U.S. to expand rules limiting use of profiling by federal agents*. Retrieved from http://www.nytimes.com/2014/01/16/us/politics/us-to-expand-rules-limiting-use-of-profiling-by-federal-agents.html?_r=0

Associated Press. (2008, January 30). *Judge called black lawyers "the Supremes"*. Retrieved from http://www.msnbc.msn.com/id/22924814/

Baldus, D. C., Woodworth, G., & Pulaski, C. A. (1994). Reflections on the "inevitability" of racial discrimination in capital sentence and the "impossibility" of its prevention, detection, and correction. *Washington and Lee Law Review, 51*, 359–430.

Banks, R. R. (2003). Beyond profiling: Race, policing, and the drug war. *Stanford Law Review, 56*, 571–603.

Banks, R. R., & Eberhardt, J. L. (1998). Social psychological processes and the legal bases of racial categorization. In J. L. Eberhardt & S. T. Fiske (Eds.), *Confronting racism* (pp. 54–75). Thousand Oaks, CA: Sage.

Baron, A. S., & Banaji, M. R. (2006). The development of impact attitudes evidence of race evaluations from ages 6 and 10 and adulthood. *Developmental Psychology, 17*, 53–58.

Batson v. Kentucky. (1986). 476 U.S. 79.

Bornstein, B. H., & Greene, E. (2011). Jury decision making: Implications for and from psychology. *Current Directions in Psychological Science, 20*, 63–67. doi:10.1177/0963721410397282.

Brigham, J. C. (2007). The role of race and racial prejudice in recognizing other people. In C. Willis-Esqueda (Ed.), *Motivational aspects of prejudice and racism: Vol. 53. Nebraska Symposium on Motivation* (pp. 68–110). New York: Springer.

Brooks, J. F. (2002). *Captives and cousins: Slavery, kinship, and community in the Southwest Borderlands*. Chapel Hill, NC: University of North Carolina Press.

Bucolo, D. O., & Cohn, E. S. (2010). Playing the race card: Making race salient in defence opening and closing statements. *Legal and Criminological Psychology, 15*, 293–303.

Carlson, D. K. (2004, July 20). *Racial profiling seen as pervasive, unjust*. Retrieved January 2, 2013, from http://www.gallup.com/poll/12406/Racial-Profiling-Seen-Pervasive-Unjust.aspx

Cassens Weiss, D. (2011, January 7). Okla. Judge admits 'wetback' comment, but denies calling workers 'filthy animals'. *American Bar Association Journal*. Retrieved from http://www.abajournal.com/news/article/okla._judge_admits_wetback_comment_but_denies_calling_workers_filthy_animal/

Cassens Weiss, D. (2014, May 30). Only 3 percent of lawyers in BigLaw are black, and numbers are falling. *American Bar Association Journal*. Retrieved from http://www.abajournal.com/news/article/only_3_percent_of_lawyers_in_biglaw_are_black_which_firms_were_most_diverse/

Coates, R. D. (2003). Law and the cultural production of race and racialized systems of oppression: Early American court cases. *American Behavioral Scientist, 47*, 329–351. doi:10.1177/0002764203256190.

Cobb, T. R. R. (1969). *An historical sketch of slavery the earliest periods*. Miami, FL: Mnemosyne Publishing. (Original version from Philadelphia, PA: T. & J. W. Johnson 1858)

Cohen, G. B. (2012). McCleskey's omission: The racial geography of retribution. *Ohio State Journal of Criminal Law, 10*, 65–101.

Cohen, D. L., & Peterson, J. L. (1981). Bias in the courtroom: Race and sex effects of attorneys on juror verdicts. *Social Behavior and Personality, 9*, 81–87.

Cohn, E. S., Bucolo, D., Pride, M., & Sommers, S. R. (2009). Reducing White juror bias: The role of race salience and racial attitudes. *Journal of Applied Social Psychology, 39*, 1953–1973.

Czopp, A. M., Monteith, M. J., & Mark, A. Y. (2006). Standing up for a change: Reducing bias through interpersonal confrontation. *Journal of Personality and Social Psychology, 90*, 784–803. doi:10.1037/0022-3514.90.5.784.

Demuth, S., & Steffensmeier, D. (2004). Ethnicity effects on sentence outcomes in large urban courts: Comparisons among White, Black, and Hispanic defendants. *Social Science Quarterly, 85*, 994–1011.

Devos, T., & Banaji, M. R. (2005). American=White? *Journal of Personality and Social Psychology, 88*, 447–466. doi:10.1037/0022-3514.88.3.447.

Dixon, T. L., & Maddox, K. B. (2005). Skin tone, crime news, and social reality judgements: Priming the stereotype of the dark and dangerous Black criminal. Journal of Applied Social Psychology, 35, 1555–1570.

Dovidio, J. F., Smith, J. K., Gershenfeld Donnella, A., & Gaertner, S. L. (1997). Racial attitudes and the death penalty. *Journal of Applied Social Psychology, 27*, 1468–1487.

Eberhardt, J. L., Davies, P. G., Purdie-Vaughns, V., & Johnson, S. L. (2006). Looking deathworthy: Perceived stereotypicality of Black defendants predicts capital-sentencing outcomes. *Psychological Science, 17*, 383–386.

Eberhardt, J. L., Goff, P. A., Purdie, V. J., & Davies, P. G. (2004). Seeing Black: Race, crime, and visual processing. *Journal of Personality and Social Psychology, 87*, 876–893. doi:10.1037/0022-3514.87.6.876.

Espinoza, R. K. E., & Willis-Esqueda, C. (2008). Defendant and defense attorney characteristics and their effects on juror decision making and prejudice against Mexican Americans. *Cultural Diversity and Ethnic Minority Psychology, 14*, 364–371.

Espinoza, R. K. E., & Willis-Esqueda, C. (2013). The influence of a capital case defendant's mitigating information, race and SES on death penalty decisions by European American and Hispanic venire persons. *Cultural Diversity and Ethnic Minority Psychology*. In press.

Fairchild, H. H., & Gurin, P. (1978). Traditions in the social-psychological analysis on race relations. *American Behavioral Scientist, 21*, 757–778.

Finkelman, P. (2009). The American suppression of the African slave trade: Lessons on legal change, social policy, and legislation. *Akron Law Review, 42*, 431–467.

Foley, S., Kidder, D. L., & Powell, G. N. (2002). The perceived glass ceiling and justice perceptions: An investigation of Hispanic law associates. *Journal of Management, 28*, 471–496.

Foley, L. A., & Pigott, M. A. (2002). Race, self presentation and reverse discrimination. *American Journal of Forensic Psychology, 20*, 37–52.

Frank, R., Akresh, I. R., & Lu, B. (2010). Latino immigrants and the U.S. racial order: How and where do they fit in? *American Sociological Review, 75*, 378–401. doi:10.1177/0003122410372216.

Golub, M. (2005). Plessy as "passing": Judicial responses to ambiguously raced bodies in Plessy v. Ferguson. *Law & Society Review, 39*, 563–600.

Gould, S. J. (1994). The geometer of race. *Discover, 15*, 65–69.

Greenwald, A. G. (2014). *Anthony G. Greenwald, PhD*. Retrieved from http://faculty.washington.edu/agg/unpublished.htm

Gross, A. J. (1998). Litigating Whiteness: Trials of racial determination in the nineteenth-century South. Yale Law Review, 108, 109–188.

Gross, A. J. (2001). Beyond Black and White: Cultural approaches to race and slavery. Columbia Law Review, 101, 640–690.

Gross, A. J. (2006). "The Caucasian Cloak": Mexican Americans and the politics of Whiteness in the twentieth-century Southwest. *Georgetown Law Journal, 95*, 337–392.

Gross, A. J. (2008). *What blood won't tell: History of race on trial in America*. Cambridge, MA: Harvard University Press.

Gross, S. R., & Barnes, K. Y. (2002). Road work: Racial profiling and drug interdiction on the highway. Michigan Law Review, 101, 651-754.

Haney Lopez, I. F. (2000). Institutional racism: Judicial conduct and a new theory of racial discrimination. *The Yale Law Journal, 109*, 1717–1884.

Harcourt, B. E. (2009). Henry Louis Gates and racial profiling: What's the problem? *Public Law and Legal Theory Working Paper Series*. Retrieved from http://www.law.uchicago.edu/academics/publiclaw/index.html

Haslam, N. (2006). Dehumanization: An integrative review. *Personality and Social Psychology Review, 10*, 252–264.

Hernandez v. Texas. (1954). 347 U.S. 475.

Hernandez-Julian, R., & Tomlin, A. (2006). *How elected judges respond to the racial composition of their constituencies*. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890738

Hickman, C. B. (1997). The devil and the one drop rule: Racial categories, African Americans, and the U.S. census. *Michigan Law Review, 95*, 1161–1265.

Hickman, M. J. (2005). *Traffic stop data collection: Policies for state police, 2004*. Washington, DC: Department of Justice, NCJ 209156.

Hong, Y., Manchi Chao, M., & No, S. (2009). Dynamic interracial/intercultural processes: The role of lay theories of race. *Journal of Personality, 77*, 1283–1310.

Johnson, K. R. (2003). Open borders? *UCLA Law Review, 193*, 193–265.

Johnson, M. A. (2014, April 15). *Arpaio ready to accept racial profiling ruling: Documents*. Retrieved from http://www.nbcnews.com/news/us-news/arpaio-ready-accept-racial-profiling-ruling-documents-n80486

Johnson, K. R., & Fuentes-Rohwer, L. (2005). A principled approach to the quest for racial diversity on the judiciary. *Michigan Journal of Race & Law, 10*, 1–51.

Jolls, C., & Sunstein, C. R. (2006). The law of implicit bias. *California Law Review, 94*, 969–996.

Kang, J., Bennett, J. M., Carbado, D., Casey, P., Dasgupta, N., Faigman., ... Mnookin, J. (2012). Implicit bias in the courtroom. *UCLA Law Review, 59*, 1124–1186.

Katz, P. (2003). Racists or tolerant multiculturalists? How do they begin? American Psychologist, 58, 897-909. doi:10.1037/0003-066X.58.11.897

Keller, J. (2005). In genes we trust: The biological component of psychological essentialism and its relationship to mechanisms of motivated social cognition. *Journal of Personality and Social Psychology, 88*, 686–702. doi:10.1037/0022-3514.88.4.686.

King, M. L., Jr. (1963). *Letter from a Birmingham jail*. Retrieved from University of Pennsylvania http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html

Levin, B. (2002). From slavery to hate crime laws: The emergence of race and status-based protection in American criminal law. *Journal of Social Issues, 58*, 227–245.

Levinson, J. D. (2007). Forgotten racial equality: Implicit bias, decision making, and misremembering. *Duke Law Journal, 57*, 345–424.

Lyons, D. (2004). Unfinished business: Racial junctures in US history and their legacy. In L. H. Meyer (Ed.), *Justice in time: Responding to historical injustice* (pp. 271–298). Baden-Baden, Germany: Nomos.

Macartney, S., Bishaw, A., & Fontenot, K. (2013, February). *Poverty rates for selected detailed race and Hispanic groups by state and place: 2007–2011*. United States Census Bureau, American Community Survey Briefs. Retrieved from http://www.census.gov/prod/2013pubs/acsbr11-17.pdf

Maeder, E. M., & Burdett, J. (2013). The combined effect of defendant race and alleged gang affiliation on mock juror decision-making. *Psychiatry, Psychology and Law, 20*, 188–201. doi:10.1080/13218719.2011.633330.

Maillard, K. N. (2007). *The heir-cut of the slave: Miscegenation and disinheritance in antebellum South Carolina*. Social Science Research Network. Retrieved from http://www.ssrn.com/en/

Maillard, K. N. (2012). Slaves in the family: Testamentary freedom and interracial deviance. *College of Law Faculty Scholarship.* Paper 76. Retrieved from http://surface.syr.edu/lawpub/76

Maillard, K. N. (2013, July 23). *Racially profiled in Palm Beach*. Retrieved from http://www.theatlantic.com/national/archive/2013/07/racially-profiled-in-palm-beach/278047/

Martin, K. D, & Glaser, J. (2012). *Racial profiling*. Retrieved from http://gspp.berkeley.edu/assets/uploads/research/pdf/Martin_Glaser-_Racial_Profiling-Debates_Immigration_2012.pdf

Martinez, G. A. (1997). The legal construction of race: Mexican Americans and Whiteness. *Harvard Latino Law Review, 2*, 321–348.

McCleskey v. Kemp. (1987). 481 U.S. 279.

McDaniel, M., Simms, M., Monson, W., & Fortuny, K. (2013, August). *Imprisonment and disenfranchisement of disconnected low-income men*. U. S. Department of Health and Human Services, Urban Institute. Retrieved from http://www.urban.org/UploadedPDF/412986-Imprisonment-and-Disenfranchisement-of-Disconnected-Low-Income-Men.pdf

Mendoza, S. A., Gollwitzer, P. M., & Amodio, D. M. (2010). Reducing the expression of implicit stereotypes: Reflexive control through implementation intentions. *Personality and Social Psychology Bulletin, 36*, 512–523. doi:10.1177/0146167210362789.

Mitchell, T. L., Haw, R. M., Pfeifer, J. E., & Meissner, C. A. (2005). Racial bias in mock juror decision-making: A meta-analytic review of defendant treatment. *Law and Human Behavior, 29*, 621–637. doi:10.1007/s10979-005-8122-9.

Moskowitz, G. B., & Li, P. (2011). Egalitarian goals trigger stereotype inhibition: A proactive form of stereotype control. *Journal of Experimental Social Psychology, 47*, 103–116.

NAACP. (2014). *Criminal Justice Fact Sheet*. Retrieved from http://www.naacp.org/pages/criminal-justice-fact-sheet

National Institute of Justice. (2013, January 10). *Racial profiling*. Retrieved from http://www.nij.gov/topics/law-enforcement/legitimacy/Pages/racial-profiling.aspx

Pascoe, P. (1996). Miscegenation law, court cases, and ideologies of "race" in twentieth-century America. *The Journal of American History, 83*, 44–69.

Pearce, R. G. (2005). White lawyering: Rethinking race, lawyer identity, and rule of law. *Fordham Law Review, 73*, 2081–2099.

Perez, D. A., Hosch, H. M., Ponder, B., & Chanez Trejo, G. (1993). Ethnicity of jurors and defendants as influences on jury decisions. *Journal of Applied Social Psychology, 23*, 1249–1262.

Pettigrew, T. F., & Tropp, L. R. (2008). How does intergroup contact reduce prejudice? Meta-analytic tests of three mediators. *European Journal of Social Psychology, 38*, 922–934. doi:10.1002/ejsp.504.

Pizzi, W. T., Blair, I. V., & Judd, C. M. (2005). Discrimination in sentencing on the basis of Afrocentric features. *Michigan Journal of Race & Law, 10*, 327–353.

Plessy v. Ferguson. (1896). 163 U. S. 537.

Ramos, C. (2001). The educational legacy of racially restrictive covenants: Their long term impact on Mexican Americans. The Scholar, 4, 149–184.

Rice, S. K., Reitzel, J. D., & Piquero, A. R. (2005). Shades of brown: Perceptions of racial profiling and the intra-ethnic differential. *Journal of Ethnicity in Criminal Justice, 3*, 47–70.

Richeson, J. A., & Ambady, N. (2003). Effects of situational power on automatic racial prejudice. *Journal of Experimental Social Psychology, 39*, 177–183.

Rothbart, M., & John, O. P. (1985). Social categorization and behavioral episodes: A cognitive analysis of the effects of intergroup contact. *Journal of Social Issues, 41*, 81–104.

Sadler, M. S., Correll, J., Park, B., & Judd, C. M. (2012). The world is not Black and White: Racial bias in the decision to shoot in a multiethnic context. *Journal of Social Issues, 68*, 286–313.

Segal, C. M., & Stinebeck, D. C. (1977). *Puritans, Indians, and manifest destiny*. New York: G. P. Putnam.

Sellin, T. (1928). The Negro criminal. A statistical note. *Annals of the American Academy of Political and Social Science, 140*, 52–64.

Sentencing Project. (2014). *Hispanic prisoners in the United States*. Retrieved from http://www.prisonpolicy.org/scans/sp/1051.pdf

Sidanius, J., Levin, S., & Pratto, F. (1996). Consensual social dominance orientation and its correlates within the hierarchical structure of American society. *International Journal of Intercultural Relations, 20*, 385–408.

Sinclair, S., Lowery, B. S., Hardin, C. D., & Colangelo, A. (2005). Social tuning of automatic racial attitudes: The role of affiliative motivation. *Journal of Personality and Social Psychology, 89*, 583–592. doi:10.1037/0022-3514.89.4.583.

Sommers, S. (2006). On racial diversity and group decision making: Identifying multiple effects of racial composition on jury deliberations. *Journal of Personality and Social Psychology, 90*, 597–612. doi:10.1037/0022-3514.90.4.597.

Stangor, C., Sechrist, G. B., & Jost, J. T. (2001). Changing racial beliefs by providing consensus information. *Personality and Social Psychology Bulletin, 27*, 486–496.

State of Florida vs. Henry Alexander Davis. (2004, February 19). 872 So. 2d 250.

Steffensmeier, Darrell and Stephen Demuth. (2000). "Ethnicity and sentencing outcomes in U.S. Federal Courts: Who is punished more harshly?" American Sociological Review, 65, 705–729.

Steffensmeier, D., & Demuth, S. (2006). Ethnicity effects on sentence outcomes in large urban courts: Comparisons among White, Black, and Hispanic defendants. *Social Science Quarterly, 85*, 994–1011.

Swain v. Alabama. (1965). 380 US 202.

Takaki, R. (1992). *A different mirror: A history of multicultural America*. Boston: Little Brown.

Thomson, E. (1997). Discrimination and the death penalty in Arizona. *Criminal Justice Review, 22*, 65–76.

Tischauser, L. V. (2002). *The changing nature of racial and ethnic conflict in the United States: 1492 to the present*. New York: University Press of America.

Totman, M., & Steward, D. (2006, February). *Searching for consent: An analysis of racial profiling data in Texas*. Austin, TX: Texas Criminal Justice Coalition. Retrieved from www.criminaljusticecoalition.org

Traffic Stops Statistics Study Act. (2001). S. 19. Retrieved June 7, 2006, from http://www.thomas.loc.gov

Tyler, T. R. (2005). Policing in Black and White: Ethnic group differences in trust and confidence in the police. *Police Quarterly, 8*, 322–342.

United States Commission on Civil Rights. (1970). *Mexican Americans and the administration of justice in the southwest*. Washington, DC: U. S. Government Printing Office. Publication Number 365-265-0-70-8.

Williams, P. (2013, February 25). *Justices slap down federal prosecutor for 'deeply disappointing' race remark*. Retrieved from http://usnews.nbcnews.com/_news/2013/02/25/17088296-justices-slap-down-federal-prosecutor-for-deeply-disappointing-race-remark?lite

Willis-Esqueda, C. (2007). Racial profiling as a minority issue. In R. L. Wiener, B. H. Bornstein, R. Schopp, & S. L. Willborn (Eds.), *Social consciousness in legal decision making: Psychological perspectives* (pp. 75–87). New York: Springer.

Willis-Esqueda, C., Delgado, H., & Orozco Garcia, D. (2014, May 2). *Race based expectations for involvement with the criminal justice system*. Paper to be presented at meeting of Midwestern Psychological Association, Chicago, IL.

Willis-Esqueda, C., Espinoza, R. K. E., & Culhane, S. (2008). Effects of race, ses of defendant, and ses of crime on culpability decision making: A cross-cultural examination of European American and Mexican American mock jurors. *Hispanic Journal of Behavioral Sciences, 30*, 181–199.

Wittenbrink, B. (2004). Ordinary forms of prejudice. *Psychological Inquiry, 15*, 306–310.

Wooldredge, J. D. (1998). Analytical rigor in studies of disparities in criminal case processing. *Journal of Quantitative Criminology, 14*, 155–179.

Wrightsman, L. S., & Brigham, J. C. (1973). *Contemporary issues in social psychology*. Pacific Grove, CA: Brooks/Cole.

Wrightsman, L. S., Nietzel, M. T., & Fortune, W. H. (1994). *Psychology and the legal system*. Pacific Grove, CA: Brooks/Cole.

Zilbermints, R. (2014, June 16). *Police to review pastor's claim of race profiling*. Retrieved from http://www.desmoinesregister.com/story/news/2014/06/17/police-review-pastor-tony-suarez-claim-race-profiling/10653013/

Law and Social Science: How Interdisciplinary Is Interdisciplinary Enough?

Brian H. Bornstein

The field of law and social science (LSS) is, by definition, interdisciplinary. However, most work in the field consists of efforts to combine law and only a single social science. For example, law and psychology, law and sociology, and law and economics are all relatively discrete fields of inquiry. Several trends suggest that the integration of two disciplines is not sufficient. First, science as a whole is becoming exponentially interdisciplinary, with research teams crossing not only social science (e.g., psychology–political science) or natural science (e.g., chemistry–biology) boundaries, but also combining social and natural scientists (American Academy of Arts and Sciences, 2013; Committee on Facilitating Interdisciplinary Research, 2004). There are numerous methodological and conceptual advantages to interdisciplinary work, but there are challenges as well, in terms of methodology, language, and philosophy of science. Second, funding agencies increasingly reflect (and arguably drive) this interdisciplinarity, issuing requests for proposals that explicitly demand teams composed of researchers from diverse backgrounds and perspectives. Third, the burgeoning field of empirical legal studies is changing the complexion of legal academia, drawing on diverse social science disciplines (e.g., Eisenberg, 2011; Ho & Kramer, 2013). Fourth, law schools are becoming increasingly multi- and interdisciplinary, creating or expanding cross-cutting programs and hiring more social scientists. The message from these trends is clear: It is no longer enough to do "law-and-X" research; rather, it must be "law-and-X+Y (and possibly Z)."

The present chapter addresses the question, "How interdisciplinary is interdisciplinary enough?" Although (spoiler alert!) there is no clear or simple answer to this question, the tentative answer is "the more the better." Interdisciplinary research has challenges and potential pitfalls as well as benefits; yet on balance, the benefits outweigh the drawbacks. The chapter begins with a discussion of the pros and cons

B.H. Bornstein (✉)
Department of Psychology, University of Nebraska-Lincoln,
335 Burnett Hall, Lincoln, NE 68588-0308, USA
e-mail: bbornstein2@unl.edu

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_8

of interdisciplinary in general, followed by an application of these themes to research and training in LSS. The chapter next considers the illustrative example of research on judging, as exemplified by the scholarship of Lawrence S. Wrightsman. The chapter concludes with recommendations for increasing interdisciplinary research and training opportunities in LSS.

Interdisciplinary Training and Research

Concepts in Search of a Definition

In 2007, Wuchty, Jones, and Uzzi published an influential paper in *Science* documenting the proliferation of team-based (as opposed to solo) research. In their analysis of nearly 20 million published papers over five decades, they showed that the proportion of articles with multiple authors (i.e., teams) had increased across all fields: science and engineering, social sciences, and arts and humanities. Moreover, team-based research produced more frequently cited papers and research of exceptionally high impact. The movement toward greater team-based research reflects a larger movement among both universities and funding agencies—within the USA and globally—to promote interdisciplinarity (e.g., Brint, Marcey, & Shaw, 2009; Davies, Devlin, & Tight, 2010). Wuchty, Jones, and Uzzi (2007) did not identify the disciplinary backgrounds of team members, focusing simply on their number. However, it seems likely—indeed, virtually a mathematical certainty—that as team size increases, so too does the chance of team members having diverse backgrounds. Running through their analysis is the assumption that this very diversity is what causes the greater impact of research done in teams.

Wuchty et al.'s (2007) analysis begs the question of what, exactly, constitutes interdisciplinary research. *Interdisciplinary research* is a "mode of research by teams or individuals that integrates information, data, techniques, tools, perspectives, concepts, and/or theories from two or more disciplines or bodies of specialized knowledge to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a single discipline or area of research practice" (Committee on Facilitating Interdisciplinary Research, 2004, p. 2).

Interdisciplinary research is often contrasted with *multidisciplinary research*, which involves multiple disciplines in juxtaposition; unlike interdisciplinary scholarship, multidisciplinary research is additive, not interactive (Ellis, 2009). The goal of interdisciplinary research is "not to reach across the aisle, but rather to eliminate it" (Jaffe, 2009, p. 10). Because the term "interdisciplinary" nonetheless implies a space between disciplines, some commentators have recently called for *transdisciplinary research*, which would involve even deeper and more coordinated disciplinary integration and coordination (American Academy of Arts and Sciences, 2013).

As these definitions imply, there is more than one way to operationalize the terms. In particular, it is important to distinguish between interdisciplinarity as a collaborative research enterprise and as a component of students' training. Although

there is no clear boundary between the two, most writings on interdisciplinary *research* assume that independent researchers from multiple disciplinary backgrounds, each with his or her own area of expertise, come together to work on a research question in concert (e.g., Atkinson & Crowe, 2006; Jaffe, 2009). In some cases, of course, individual researchers with the requisite training in multiple disciplines—either through formal educational programs or informal "self-taught" methods—conduct interdisciplinary research on their own, but that is less common (Committee on Facilitating Interdisciplinary Research, 2004). No doubt there are advantages and disadvantages to both interdisciplinary teams and interdisciplinary persons, but an obvious advantage of the latter is that if one is fluent (or at least conversant) in the language of more than one discipline, then there is less need to seek the relevant expertise elsewhere (Chandramohan & Fallows, 2009).

A study conducted jointly by the National Academy of Sciences, National Academy of Engineering, and Institute of Medicine (Committee on Facilitating Interdisciplinary Research, 2004; see also Klein, 2010) found that the rapid proliferation of interdisciplinarity results from four "drivers": the inherent complexity of nature and society, the desire to explore problems and questions that span disciplines, the need to solve societal problems, and new technologies. The report is a self-described "'call to action' for all those who perform, administer, support, and organize interdisciplinary research and training" (p. xii). One of the Committee's specific recommendations is that graduate students "should explore ways to broaden their experience by gaining 'requisite' knowledge in one or more fields in addition to their primary field" (Committee on Facilitating Interdisciplinary Research, 2004, p. 4).

A more recent report by the American Academy of Arts and Sciences (2013) reached similar conclusions and made similar recommendations. Concluding that "[a] critical next step is to provide incentives and remove barriers so that the tools and expertise developed within discrete disciplines are shared and combined to enable a deep conceptual and functional integration across the disciplines" (p. 18), the report urges academic institutions to "[d]evelop new and support existing graduate and postdoctoral training programs that integrate concepts and technologies across [disciplines]" (p. 20).

Benefits and Challenges of Interdisciplinarity

As the research by Wuchty and colleagues (2007) suggests, there is some evidence that interdisciplinary research produces better science, in the sense of being more innovative and having a greater impact. Simply citing research outside one's own discipline leads to a paper's having more of an impact, at least using the conventional measure of how often that paper itself is cited (Shi, Adamic, Tseng, & Clarkson, 2009). Interdisciplinarity can also produce better practical applications. As Popper (1963, p. 88) observed, "We are not students of some subject matter, but students of problems. And problems may cut right across the borders of any subject

matter or discipline." This applies particularly well to research in LSS, where researchers are simultaneously advancing scientific theories and conceptual models while addressing important real-world behaviors (e.g., legal decision making, criminal offending and rehabilitation, and jurisprudence).

It is hard to measure the success of interdisciplinary training and research, due to the difficulty of choosing the appropriate metrics (Jacobs & Frickel, 2009; Jaffe, 2009). What measures do exist show that the effects are positive. As discussed earlier, there is evidence that collaborative research yields better science, in terms of having a higher impact and being more innovative (American Academy of Arts and Sciences, 2013; Wuchty et al., 2007; Yamamoto, 2013). Tangible professional outcomes from interdisciplinary research include awards and publications in top journals (Lattuca, 2001). Junior scholars who receive interdisciplinary funding have a high rate of obtaining independent research funding (Office of Research on Women's Health, 2008). On a more subjective level, scientists working on interdisciplinary projects feel that their work is more stimulating and constructively challenging than scientists conducting more traditional, monodisciplinary research (Schunn, Crowley, & Okada, 2005). Interdisciplinary work often has the effect of "expanding an individual's intellectual universe" (Lattuca, 2001, p. 216) and leading to more creative thinking (Paletz, Schunn, & Kim, 2013).

Most interdisciplinary researchers come to such collaborations after their careers are already underway. Little research exists on differences in the perspectives and experiences of interdisciplinary versus single-subject students (Harvey, 2009; Spelt, Biemans, Tobi, Luning, & Mulder, 2009). The findings from extant research, which focuses mainly on student satisfaction, are mixed, with interdisciplinary students more satisfied than traditional students in some respects, but less satisfied in others (Harvey, 2009). Notably, interdisciplinary students tend to be more satisfied with the development of their analytical and critical skills (Harvey, 2009). Importantly, students do not necessarily have to go through a full interdisciplinary program to reap the benefits; even "temporary forays into interdisciplinary work … may be valuable" (Haag, 2006, p. 267).

The challenges of interdisciplinary collaboration are far from trivial. Academic disciplines have been likened to ethnocentric "cultures" or "tribes" (Campbell, 2005; Grobstein, 2009; Reich & Reich, 2006); and when diverse cultures come together, they often clash (Paletz et al., 2013). Other challenges include adding to one's existing "disciplinary" workload; communication difficulties inherent in speaking different conceptual, methodological, and theoretical languages (or at least dialects); institutional barriers; staying abreast of multiple research literatures; and divergent reward matrices for tenure and promotion (e.g., Lattuca, 2001). For example, as hard as it is to stay abreast of research in a single research field, it is that much more difficult "to maintain a currency with multiple literatures such that an interdisciplinary scholar can contribute meaningfully to both disciplines" (Blumenthal, 2002, p. 37).

Another challenge of interdisciplinary research, and especially interdisciplinary training, has to do with its effects on one's career trajectory. In theory, the additional knowledge one gains from interdisciplinary training should confer a competitive

advantage for faculty and other research-oriented positions (Bornstein, Wiener, & Maeder, 2008; Tomkins & Ogloff, 1990). However, a criticism of this view is that interdisciplinary scholars may be perceived as hyperspecialized or spreading their expertise too thin. Although they might be well suited for positions in interdisciplinary programs, they could find themselves less competitive for the more numerous jobs in traditional academic departments. As Jaffe (2009, p. 13) aptly puts it, "the very interdisciplinary work that stands to help a developing science stands to harm the developing scientist."

Nevertheless, interdisciplinary training can help with graduate students' preparation for teaching in interdisciplinary programs (e.g., legal studies; law and society; public policy; social justice; and women and gender studies), where students have to become well versed in a variety of scholarly approaches (Wareing, 2009). Interdisciplinary teaching will continue to infiltrate the traditional disciplinary framework (American Academy of Arts and Sciences, 2013; Committee on Facilitating Interdisciplinary Research, 2004), especially at liberal arts institutions. For example, more than half of the members of the Association of American Colleges and Universities include interdisciplinary courses as part of their general education curriculum (Hart Research Associates, 2009). Interdisciplinary training will enable faculty to teach these general education courses, as well as to teach in the growing number of interdisciplinary programs. Of course, interdisciplinary training, by itself, is insufficient for "unleashing America's research and innovation enterprise" (American Academy of Arts and Sciences, 2013, p. 1); institutional, governmental, and private sector changes are needed as well. Nonetheless, the consensus is that the benefits of interdisciplinary research and training make the effort well worthwhile.

The Case of Law and Social Science in header (LSS)

Interdisciplinary Training and Research in LSS

By some accounts (e.g., Christakis, 2013), the social sciences have been slow to adopt interdisciplinarity; but a number of emerging interdisciplinary fields draw heavily on social science, such as neuroeconomics, political psychology, cognitive science, brain science, and evolutionary psychology (e.g., Beer & Ochsner, 2006; Campbell & Loving, 2012; Klein, Lax, & Gangi, 2010; Schmaling, Giardino, Korslund, Roberts, & Sweeny, 2002). LSS programs are, by definition, interdisciplinary, inasmuch as they involve training in both law and a social science. For the most part, formal programs training students in both law and a social science emerged in the late 1960s and early 1970s, accompanied by the founding of organizations such as the American Psychology-Law Society (AP-LS) and Law and Society Association and their flagship journals (see, e.g., Blumenthal, 2002; Grisso, 1991; Ogloff, Tomkins, & Bersoff, 1996). LSS programs have grown steadily since

that time; for example, there are now more than 50 graduate programs in law and psychology alone (Aderhold, Boulas, & Huss, 2010). Of these programs, over 40 offer a doctoral degree (www.ap-ls.org/education). The AP-LS Web site divides doctoral training programs into clinical ($n=26$) and nonclinical programs ($n=17$). Nine of the clinical programs offer only the Psy.D. degree, leaving 34 Ph.D. programs (17 clinical and 17 nonclinical) in law-psychology that, necessarily as Ph.D. programs, contain a strong research emphasis.[1] This large number of programs indicates that there would be a sizeable number of students who would benefit from broader interdisciplinary training (see also *Documenting a Need*, below).

As with any interdisciplinary training, training students in LSS has its challenges (e.g., Brown, 1997; Ellsworth & Mauro, 1998; Monahan & Walker, 2009), but cross-fertilization between the disciplines is increasing (Blumenthal, 2002; Monahan & Walker, 2009). There are many indications of this trend, such as courts' growing receptivity to empirical research on certain topics, such as eyewitness testimony (e.g., Benton, McDonnell, Ross, Thomas, & Bradshaw, 2007); the growing number of law faculty with joint degrees (Heise, 1999); and the emergence of empirical research within legal scholarship and increased offerings of empirical research courses in law school curricula (Ho & Kramer, 2013; Klick, 2011; Lawless, Robbennolt, & Ulen, 2010). The challenges of doing interdisciplinary work in law and one social science discipline are likely compounded by adding another social science discipline to the mix, as the various social sciences rely on substantially different theoretical and methodological underpinnings and tend to engage in different levels of analysis (Klein, 2010; Kroos, 2012). Thus, the challenges of broad interdisciplinary training in LSS should not be trivialized. Nonetheless, many of the differences are largely semantic, and some of the fundamental methodological and analytic skills transfer across domains (Haag, 2006).

The risks of scholars conducting parallel research within their own disciplinary tracks are substantial. First, it is inefficient; researchers who are unaware of relevant research being conducted in other disciplines run the risk of spending a lot of time and effort reinventing the wheel. Even more problematic, monodisciplinary research lacks the sort of extensive convergent validity that can be provided by cross-disciplinary replication. In that sense, then, the findings are potentially less robust. Finally, as discussed above, research that arises within a single disciplinary tradition is less innovative (Wuchty et al., 2007), has less of an impact (Shi et al., 2009), and is less capable of solving pressing real-world problems than interdisciplinary research (Brint et al., 2009; Committee on Facilitating Interdisciplinary Research, 2004). This is a crucial concern for LSS, which explicitly focuses on applying social scientific theories and methods to matters of law and public policy.

[1]Although clinical programs also contain a practice component, they require empirical research, and many clinical graduates embark on research-oriented careers in a variety of settings (psychology, law, medicine, public policy, corrections, law enforcement, etc.). A minority of the Ph.D. programs, both clinical and nonclinical, also include formal legal training leading to a law degree, usually the J.D.

Documenting a Need

Despite these efforts to broaden interdisciplinary training and scholarship, and occasional efforts to reach a truly broad audience (e.g., the *Annual Review of Law and Social Science*, published since 2005), the traditional disciplines that comprise the "law-and" universe are mostly insular (Eisenberg, 2011). The field of law and psychology is illustrative, as an analysis of leading law-psychology journals shows.[2] Despite attempts by psychology and law's leading organization (AP-LS, Division 41 of the American Psychological Association) and journals to be inclusive, the scholars who constitute their membership and the work they represent come predominantly from a psychological perspective. Consider, for example, *Psychology, Public Policy, & Law* and *Law & Human Behavior* (the official journal of AP-LS). Several years ago I conducted an analysis of all author affiliations for papers published in *PPP&L* over a 2-year period (2009–2010; Bornstein, unpublished data). Eighty-one percent were psychologists, an additional 9.5 % were psychiatrists, and 3.8 % came from law. Only 5.7 % came from all other disciplines (see Table 1).

The results of a comparable, more recent analysis for an 18-month period in *L&HB* (2011–June 2012; nine issues) showed more than twice as much involvement by nonpsychological social scientists (12.1 %), but authorship was still dominated by psychologists and related mental health scholars (see Table 1). These data are not intended as in indictment of the journals in question. It might be part of the journals' mission to publish work primarily by psychologists and related mental health professionals; and in all likelihood, they receive relatively few submissions from other disciplines.[3] Nonetheless, the figures document that the leading law-psychology journals are publishing little empirical work from other disciplines. Given the benefits of greater interdisciplinarity, this is a less than ideal situation.

Table 1 Author affiliations in select law-psychology journals (%)

Journal	Psychology/ mental health	Psychiatry	Law/policy	Other social science/police
PPP&L (2009–2010)	81.0	9.5	3.8	5.7
L&HB (2011–June 2012)	78.6	5.6	3.7	12.1

[2] I use law and psychology here because it is the field with which I am most familiar. I make no claims that other "law-and" disciplines have done a better or worse job of incorporating their sister social science disciplines.

[3] As an editorial board member of both *PPP&L* and *L&HB*, I know that a low submission rate at least partially explains the small number of authors from law colleges. Legal scholars typically structure their articles differently and use a different writing style guide, and they are generally encouraged and rewarded more for publishing in more traditional outlets (i.e., law reviews). It seems likely that the same factors would also deter nonpsychological social scientists from publishing in these journals. It is also possible that nonpsychologists are submitting to law-psychology journals but being rejected at a higher rate. I was unable to obtain data on this point, but again, my experience as an editorial board member suggests that the problem lies more with a low submission rate.

Table 2 Author affiliations in *Law & Society Review*, 2011–June 2012 (%)

Politics/government	25.3	Economics	4.0
Law	25.3	History	2.7
Sociology	20.0	Psychology	1.3
Criminology/CJ	10.7	Other	6.7
Anthropology	4.0		

For comparison purposes, I also analyzed authorship in *Law & Society Review*, the journal of the Law & Society Association, for 2011 and the first half of 2012 (six issues). As shown in Table 2, although there was more disciplinary diversity overall, the findings in one important respect were almost exactly the opposite of those for the law-psychology journals. Specifically, every social science discipline was better represented than psychology, which had only one author (out of 75 total) during the analysis period. A larger, earlier analysis of *Law & Society Review* found similar results, with psychologists as lead authors on only 3.3 % of articles published from 2004 to 2010 (Eisenberg, 2011). Comparable analyses of the *Journal of Empirical Legal Studies* show that psychologists rarely publish there either (Eisenberg, 2011; Suchman & Mertz, 2010). Thus, just as nonpsychologists rarely publish in the leading law-psychology journals, psychologists rarely publish in the leading law-and-social-science journals. These journals are explicitly multi- and interdisciplinary, are very selective, have high impact factors,[4] and publish cutting-edge research; yet without more diversity in who is publishing in them, the research is not reaching as large an audience as possible.

Interdisciplinary Research on Judging

As described in this volume's "Introduction", Lawrence Wrightsman's professional oeuvre has many remarkable qualities: breadth, readability, unusual combination of analysis and synthesis, and sheer volume. Not the least of these features, and one of the things that makes his work so impressive, is its interdisciplinary focus. His work contains many examples of an interdisciplinary approach, but perhaps the best example is his research on judges' decision making, especially at the appellate court level, which is the focus of three of his books (Wrightsman, 1999, 2006, 2008) and is touched on in several other of his writings.

Although Wrightsman's books on judging all have a strong psychological flavor—witness, e.g., the subtitle of the first one, "Is Psychology Relevant?"—the integration of research from other disciplines is striking. For example, *The Psychology of the Supreme Court* (2006) incorporates empirical and theoretical work published in an array of journals from the disciplines of law (e.g., law reviews,

[4]According to the journals' Web sites, the most recent (2011) impact factors are: *L&HB* 2.162, *PPP&L* 2.160, *L&SR* 1.434, *JELS* 1.067.

Judicature, *Jurimetrics Journal*), communications (e.g., *Communication Quarterly*, *Human Communications Research*), history (e.g., *Journal of Supreme Court History*, *Supreme Court Historical Society Quarterly*), political science (e.g., *American Journal of Political Science*, *American Political Science Review*), psychology (e.g., *Journal of Personality and Social Psychology*, *Psychological Bulletin*), and sociology (e.g., *American Sociological Review*, *Sociometry*). In addition, he draws on numerous books, court cases, mainstream media accounts, trade publications, and interdisciplinary academic journals (e.g., *Law & Human Behavior*, *Law & Society Review*, *Psychology, Public Policy & Law*, *Social Sciences Quarterly*). This breadth of sources shows that one simply cannot do an adequate treatment of judicial decision making by limiting oneself to a single disciplinary approach.

I learned this lesson the hard way several years ago, when I decided to include a chapter on judges in a book I was writing on religion's role at trial (Bornstein & Miller, 2009). Why study religion and judging? There are at least as many answers to this question as there are social scientific fields of inquiry. The psychological answer is that as with any other decision maker, a judge's individual differences and attitudes can influence his or her decisions (Greene & Wrightsman, 2003; Segal & Spaeth, 1993), and religious beliefs and values are an important determinant of those attitudes. The related legal answer is that a judge's reliance on religious beliefs introduces an extralegal factor that is potentially at odds with the legal evidence (Pinello, 2003; Sisk, Heise, & Morriss, 2004).

The historical answer to the question is that religion has long been a significant consideration in judicial elections and appointments (Perry, 1991). For example, for many years the Supreme Court was viewed as having a designated "Catholic seat" and "Jewish seat." Obviously that has changed: The current Court's composition, with six Catholics (Alito, Kennedy, Roberts, Scalia, Sotomayor, and Thomas) and three Jews (Breyer, Kagan, and Ginsburg), is unprecedented. It is the first time in history that no Protestants have been on the Court. The related sociological answer is that religion is a prominent feature of the American landscape, with the USA being arguably the most religious Western nation (Baylor Institute for Studies of Religion,2006; Pew Forum on Religion and Public Life, 2008).

Despite the occasional highly publicized case in which judges have explicitly invoked religion in reaching a decision—such as sentencing a criminal defendant to attend church or Alcoholics Anonymous meetings and invoking Scripture in a legal opinion (Mathis, 2004; Modak-Truran, 2004)—potential religious influences on judicial decision making are generally more subtle. Most studies simply examine the relationship between judges' own religious affiliation and their decisions; the results of those studies are somewhat mixed (Bornstein & Miller, 2009).[5] The studies are usually archival analyses of court outcomes as a function of various legal, social background/demographic, and attitudinal variables, including judges' religious affiliation, which is obtained either by questionnaires or from publicly

[5] Although it is tempting to ask whether judges' religion *influences* their decision making, with all the causal baggage that "influence" implies, the research is necessarily correlational, looking at the extent to which judges' religion predicts their decisions.

available directories. I review some of the major findings below; for a fuller discussion, see Bornstein and Miller (2009).

At the trial level, studies of sentencing disparity date back to the early 1900s (e.g., Everson, 1919). Although few of the early studies included judges' religion, they nonetheless suggest that a number of extralegal variables, such as judges' ideology and background, are associated with variability in sentencing. More recent studies, several of which have included judges' religious affiliation, have found little relationship between it and their decisions. There are a few exceptions, however. For example, Vines (1964) examined judges' decisions in race relations cases in the Southern U.S. in the wake of the Supreme Court's landmark desegregation ruling in *Brown v. Board of Education* (1954). Catholic federal district judges were more integrationist than judges of other religious backgrounds.

More empirical research has addressed the role of appellate court judges' religion, and it has generally found a somewhat stronger relationship. Overall, judges' attitudes matter more in some kinds of cases than others (e.g., Schubert, 1974; Wrightsman, 2006), and this is true for religion—a major source of attitudes, values, and beliefs—as well. For example, Catholic judges are relatively liberal for cases involving criminal matters, business regulations, and employee injury, in the sense of being more likely to favor criminal defendants, economic underdogs, and injured parties (Bornstein & Miller, 2009). In contrast, Catholic judges are comparatively conservative on gay rights, an issue on which Jewish judges are relatively liberal (Pinello, 2003). Jewish judges are similarly liberal in cases dealing with the death penalty, gender discrimination, and obscenity, issues on which evangelical Christian judges are comparatively conservative (i.e., voting more to uphold the death penalty, maintain the gender gap, and restrict free speech on grounds of obscenity; Songer & Tabrizi, 1999).

Songer and Tabrizi (1999) found that of all religious groups included in their sample, Catholic judges were the most variable, tending to be liberal on gender discrimination, moderate on the death penalty, and conservative on obscenity. Of course, it can be highly misleading to lump judges into a single category based on a shared characteristic like religion, which is extremely complex and replete with significant differences within as well as between religions. Nonetheless, the finding of variability among Catholic judges comports with analyses of Supreme Court justices, in which Catholics have run the gamut from very conservative (e.g., Samuel Alito, Antonin Scalia, Clarence Thomas) to very liberal (e.g., William Brennan, Frank Murphy).[6]

Not surprisingly, more studies have been conducted on U.S. Supreme Court justices, including their religious background, than on any other judicial tribunal

[6] I mentioned once to Larry Wrightsman that I found it curious that many of the most conservative Catholic justices, like Alito and Scalia, were of Italian descent, whereas those with the most liberal reputation—Brennan and Murphy—were Irish. I jokingly suggested that perhaps differences in national character, in particular Catholic observance in the two cultures, were responsible. He thought that the idea had promise, though obviously the sample size was too small to perform a meaningful analysis.

(e.g., Hitchcock, 2004). The sample is quite limited in terms of the number of individuals—to date, 112 persons in 225 years, with, until recently, remarkably little religious diversity—but it is substantial in terms of the number of observations (i.e., votes).[7] The findings are generally consistent with those from examinations of lower appellate courts, with the relationship between judges' religion and their decisions being issue dependent, but displaying a tendency for non-Protestant (i.e., Catholic and Jewish) justices to be more liberal. This general pattern has been observed on the Canadian as well as on the U.S. Supreme Court (Tate & Sittiwong, 1989). Overall, then, judges' decision making does appear to differ depending on their religion.

Recommendations

A key component of interdisciplinary research is, of course, funding to support it (Committee on Facilitating Interdisciplinary Research, 2004). The National Science Foundation (NSF) has articulated a clear desire to support translational, multidisciplinary research, as evidenced by numerous programs like Integrative Graduate Education and Research Traineeships (IGERTs) and targeted RFPs emphasizing interdisciplinary and translational research, such as the Interdisciplinary Behavioral and Social Sciences competition (see, e.g., http://www.nsf.gov/od/oia/additional_resources/interdisciplinary_research/). The very existence within NSF of a LSS program that includes multiple disciplines, whereas most funding programs are discipline specific, likewise demonstrates NSF's commitment to interdisciplinary research. Within LSS, specific examples such as the interdisciplinary postdoctoral fellowship grant program and memorandum of understanding with the National Institute of Justice for collaboration in the social, behavioral, and forensic sciences demonstrate this commitment as well. In addition, in recent years LSS has sponsored workshops specifically on the question of interdisciplinarity, in which leading scholars from diverse social science disciplines and law have discussed ways of supporting and conducting more integrative research that cuts across the social sciences. LSS has also funded a Law and Social Science Dissertation and Mentoring Fellowship program, administered by the American Bar Foundation and the Law and Society Association.

NIH supports interdisciplinary training as well. For example, the Office of Research on Women's Health launched a program in 1999 called Building Interdisciplinary Research Centers in Women's Health (BIRCHW; funding began in 2000; see, generally, Domino, Bodurtha, & Nagel, 2011; http://orwh.od.nih.gov/interdisciplinary/BIRCWH_updated.html). Since its inception, BIRCHW has provided funding to more than 450 junior faculty, pairing them with senior faculty mentors to further their interdisciplinary research efforts. The program has been successful in terms of enriching faculty members' experiences and helping the

[7] All of the non-Christian justices have been Jewish. There have been no Muslim, Buddhist, Hindu, or atheist justices.

junior scholars to achieve independent research funding (Office of Research on Women's Health, 2008). At present NIH has no formal program for interdisciplinary training or research in LSS.

These funding agency efforts reflect an awareness on the part of NSF and other funding agencies that interdisciplinary work can yield enormous scientific and practical benefits. This awareness is consistent with the National Academy of Sciences Committee's recommendation that funding organizations "should provide mechanisms that link interdisciplinary research and education and should provide opportunities for broadening training for researchers and faculty members (Committee on Facilitating Interdisciplinary Research, 2004, p. 6).

It is a truism that young scholars are more open to novel approaches, whereas more senior scholars often become set in their ways. Thus, the goal of fostering more interdisciplinary *scholarship* can best be accomplished by supporting interdisciplinary *training*. Individual courses on LSS, as well as full-blown interdisciplinary programs, exist at the undergraduate level at many institutions (Greene & Drew, 2008). These programs can be successful, but it is difficult for undergraduate students to integrate multiple disciplines fully, as they have so much fundamental knowledge to learn about each discipline, and their research skills are usually rudimentary (Wareing, 2009). Beginning graduate students are in a similar situation, spending much of their time acquiring fundamental skills and becoming acculturated into the discipline. Conversely, very senior graduate students and junior faculty have typically narrowed their research and teaching focus to such an extent that reaching out to other disciplines may not be practical.

Although any educational stage has pros and cons with respect to the optimal timing of interdisciplinary training, "mid-stage" graduate students in LSS are especially well suited to benefit from interdisciplinary training. Interdisciplinary LSS organizations, as well as individual training programs, should therefore encourage students to familiarize themselves with key theories and methods in their sister disciplines. This could often be accomplished at the students' own institutions but might be even more effective if they could visit other institutions, where specific scholars share their unique interests. Some sort of funding mechanism would likely be necessary to put such a system into effect, as well as the support of students' supervisory committees at their home institutions. This sort of cross-disciplinary exposure has the potential to enrich students' research and pedagogical training and nurture their professional development.

Providing graduate students in "law-and" fields with an opportunity to learn and conduct research in additional disciplines has several potential benefits. It will yield intellectual long-term benefits over the course of their careers, in terms of more integrative and higher impact research. The more that theoretical models and empirical methods are shared across disciplines, the more the individual disciplines, as well as the LSS enterprise as a whole, stand to benefit. More broadly trained scholars will also be better teachers, thereby communicating knowledge more effectively to future generations of students.

Researchers who have a broader and deeper understanding of issues at the heart of LSS will also be better able to investigate and solve real-world problems facing

the legal system. Exposing students to new research topics and techniques will help with their professional development by providing new networking opportunities, and the additional experience they gain will help them on the job market. Finally, more broadly trained researchers, especially junior ones, could help foster a more cohesive LSS community, as they seed theories and research tools across social science disciplines. Such cohesiveness will have direct effects on the day-to-day lives of the researchers themselves (e.g., making their work more satisfying), but it can also have indirect effects in facilitating higher quality research.

Conclusion

As the research on judging illustrates, far more research has addressed judicial decision making from a sociological or political science perspective than from a psychological one. This neglect is surprising, considering the prominence of both decision making and the relationship among attitudes, beliefs, and behavior in other areas of psychological inquiry, including psychology and law. Multidisciplinary research can be challenging, but its benefits outweigh those challenges. Interdisciplinary research can be even more challenging but can yield still greater benefits. Over the course of his long and distinguished career, Lawrence Wrightsman has provided a sterling example of how to integrate multiple disciplines in the pursuit of knowledge. The rest of us should follow his example and strive to turn “law-and-X” into “law-and-X+Y,” “law-and-X+Y+Z,” and beyond.

References

Aderhold, B., Boulas, J., & Huss, M. T. (2010). *Guide to graduate programs in forensic and legal psychology, 2010–2011*. Retrieved from http://www.ap-ls.org/education/EducationTraining.php

American Academy of Arts and Sciences. (2013). *ARISE II: Unleashing America’s research and innovation enterprise*. Cambridge, MA: American Academy of Arts and Sciences. Retrieved from http://www.amacad.org/arise2/.

Atkinson, J., & Crowe, M. (2006). *Interdisciplinary research: Diverse approaches in science, technology, health and society*. Chichester, England: Wiley.

Baylor Institute for Studies of Religion. (2006). *American piety in the 21st century: New insights to the depth and complexity of religion in the U.S.*. Waco, TX: Baylor Institute for Studies of Religion.

Beer, J. S., & Ochsner, K. N. (2006). Social cognition: A multi level analysis. *Brain Research, 1079*, 98–105.

Benton, T. R., McDonnell, S., Ross, D. F., Thomas, W. N., & Bradshaw, E. (2007). Has eyewitness research penetrated the American legal system? A synthesis of case history, juror knowledge, and expert testimony. In R. C. L. Lindsay, D. F. Ross, J. D. Read, & M. P. Toglia (Eds.), *Handbook of eyewitness psychology: Vol. 2. Memory for people* (pp. 453–500). Mahwah, NJ: Erlbaum.

Blumenthal, J. A. (2002). Law and social science in the twenty-first century. *Southern California Interdisciplinary Law Journal, 12*, 1–53.

Bornstein, B. H., & Miller, M. K. (2009). *God in the courtroom: Religion's role at trial*. New York: Oxford University Press.

Bornstein, B. H., Wiener, R. L., & Maeder, E. M. (2008). Pioneers in interdisciplinary legal education: A history of the UNL law-psychology program. In A. G. Gless (Ed.), *The history of Nebraska law* (pp. 174–194). Athens, OH: Ohio University Press.

Brint, M. E., Marcey, D. J., & Shaw, M. C. (2009). *Integrated science: New approaches to education*. New York: Springer.

Brown, M. (1997). Varieties of truth: Psychology-law discourse as a dispute over the forms and content of knowledge. *Legal and Criminological Psychology, 2*, 219–245.

Brown v. Board of Education. (1954). 347 U.S. 483.

Campbell, D. T. (2005). Ethnocentrism of disciplines and the fish-scale model of omniscience. In S. J. Derry, C. D. Schunn, & M. A. Gernsbacher (Eds.), *Interdisciplinary collaboration: An emerging cognitive science* (pp. 3–22). Mahwah, NJ: Lawrence Erlbaum Associates.

Campbell, L., & Loving, T. J. (2012). *Interdisciplinary research on close relationships: The case for integration*. Washington, DC: American Psychological Association.

Chandramohan, B., & Fallows, S. (2009). *Interdisciplinary learning and teaching in higher education: Theory and practice*. New York: Routledge.

Christakis, N. A. (2013, July 19). Let's shake up the social sciences. *New York Times*. Retrieved from http://www.nytimes.com/2013/07/21/opinion/sunday/lets-shake-up-the-social-sciences.html?emc=eta1&_r=1&

Committee on Facilitating Interdisciplinary Research, National Academy of Sciences, National Academy of Engineering, Institute of Medicine. (2004). *Facilitating interdisciplinary research*. Washington, DC: National Academies Press. Retrieved from http://www.nap.edu/catalog.php?record_id=11153

Davies, M., Devlin, M., & Tight, M. (2010). *Interdisciplinary higher education: Perspectives and practicalities: Vol. 5. International perspectives on higher education research*. Bingley, England: Emerald Group.

Domino, S. E., Bodurtha, J., & Nagel, J. D. (2011). Interdisciplinary research career development: Building interdisciplinary research careers in women's health program best practices. *Journal of Women's Health, 20*, 1587–1601.

Eisenberg, T. E. (2011). The origins, nature, and promise of empirical legal studies and a response to concerns. *University of Illinois Law Review, 2011*, 1713–1738.

Ellis, R. J. (2009). "Problems may cut right across the borders": Why we cannot do without interdisciplinarity. In B. Chandramohan & S. Fallows (Eds.), *Interdisciplinary learning and teaching in higher education: Theory and practice* (pp. 3–17). New York: Routledge.

Ellsworth, P. C., & Mauro, R. (1998). Psychology and law. In D. T. Gilbert, S. T. Fiske, & L. Gardner (Eds.), *Handbook of social psychology* (pp. 684–732). Boston: McGraw-Hill.

Everson, G. (1919). The human element in justice. *Journal of the American Institute of Criminal Law and Criminology, 10*, 90–94.

Greene, E., & Drew, E. (2008). *Resources for teaching undergraduate psychology and law courses*. Retrieved from http://www.ap-ls.org/education/EducationTraining.php

Greene, E., & Wrightsman, L. (2003). Decision making by juries and judges: International perspectives. In D. Carson & R. Bull (Eds.), *Handbook of psychology in legal contexts* (2nd ed., pp. 401–422). Chichester, England: Wiley.

Grisso, T. (1991). A developmental history of the American Psychology-Law Society. *Law and Human Behavior, 15*, 213–231.

Grobstein, P. (2009). The implications of interdisciplinary science on education and training. In M. E. Brint, D. J. Marcey, & M. C. Shaw (Eds.), *Integrated science: New approaches to education* (pp. 75–76). New York: Springer.

Haag, A. (2006). A testing experience. *Nature, 443*, 265–267.

Hart Research Associates. (2009). *Trends and emerging practices in general education*. Washington, DC: Hart Research Associates. Retrieved from http://www.aacu.org/membership/documents/2009MemberSurvey_Part2.pdf.

Harvey, L. (2009). Student feedback on interdisciplinary programs. In B. Chandramohan & S. Fallows (Eds.), *Interdisciplinary learning and teaching in higher education: Theory and practice* (pp. 91–102). New York: Routledge.

Heise, M. (1999). The importance of being empirical. *Pepperdine Law Review, 26*, 807–834.

Hitchcock, J. (2004). *The Supreme Court and religion in American life* (Vol. 1 & 2). Princeton, NJ: Princeton University Press.

Ho, D. E., & Kramer, L. (2013). The empirical revolution in law. *Stanford Law Review, 65*, 1195–1202.

Jacobs, J. A., & Frickel, S. (2009). Interdisciplinarity: A critical assessment. *Annual Review of Sociology, 35*, 43–65.

Jaffe, E. (2009). Crossing boundaries: The growing enterprise of interdisciplinary research. *APS Observer, 22*(5), 10–13.

Klein, J. T. (2010). *Creating interdisciplinary campus cultures: A model for strength and sustainability*. San Francisco: Jossey-Bass.

Klein, S. B., Lax, M. L., & Gangi, C. E. (2010). A call for an inclusive approach to the social cognitive neurosciences. *Social Cognition, 28*, 748–756.

Klick, J. (2011). *The empirical revolution in law and economics*. The Hague, Netherlands: Eleven International.

Kroos, K. (2012). Eclecticism as the foundation of meta-theoretical, mixed methods and interdisciplinary research in social sciences. *Integrative Psychological & Behavioral Science, 46*, 20–31.

Lattuca, L. (2001). *Creating interdisciplinarity: Interdisciplinary research and teaching among college and university faculty*. Nashville, TN: Vanderbilt University Press.

Lawless, R. M., Robbennolt, J. K., & Ulen, T. S. (2010). *Empirical methods in law*. New York: Aspen.

Mathis, A. B. (2004). Judges, thou shall not use thine own religion in thy opinions. *Mississippi College Law Review, 23*, 131–155.

Modak-Truran, M. C. (2004). Reenchanting the law: The religious dimension of judicial decision making. *Catholic University Law Review, 53*, 709–800.

Monahan, J., & Walker, W. L. (2009). *Social science in law: Cases and materials* (7th ed.). New York: Foundation Press.

Office of Research on Women's Health. (2008). *Interdisciplinary research and career development programs in women's health: Initiatives to promote sex and gender research and career development*. Washington, DC: Office of Research on Women's Health/NIH (Publication #08-6360). Retrieved from http://orwh.od.nih.gov/

Ogloff, J. R. P., Tomkins, A. J., & Bersoff, D. N. (1996). Education and training in psychology and law/criminal justice: Historical foundations, present structures, and future developments. *Criminal Justice and Behavior, 23*, 200–235.

Paletz, S. B. F., Schunn, C. D., & Kim, K. F. (2013). The interplay of conflict and analogy in multidisciplinary teams. *Cognition, 126*, 1–19.

Perry, B. A. (1991). *A "representative" Supreme Court? The impact of race, religion, and gender on appointments*. New York: Greenwood Press.

Pew Forum on Religion and Public Life. (2008). *U.S. religious landscape survey*. Retrieved from http://religions.pewforum.org/reports

Pinello, D. R. (2003). *Gay rights and American law*. Cambridge, England: Cambridge University Press.

Popper, K. R. (1963). *Conjectures and refutations: The growth of scientific knowledge*. New York: Routledge and Kegan Paul.

Reich, S. M., & Reich, S. A. (2006). Cultural competence in interdisciplinary collaborations: A method for respecting diversity in research partnerships. *American Journal of Community Psychology, 38*, 51–62.

Schmaling, K. B., Giardino, N. D., Korslund, K. E., Roberts, L. J., & Sweeny, S. (2002). The utility of interdisciplinary training and service: Psychology training on a psychiatry consultation-liaison service. *Professional Psychology: Research and Practice, 33*, 413–417.

Schubert, G. (1974). *The judicial mind revisited: Psychometric analysis of Supreme Court ideology*. New York: Oxford University Press.
Schunn, C. D., Crowley, K., & Okada, T. (2005). Cognitive science: Interdisciplinarity now and then. In S. J. Derry, C. D. Schunn, & M. A. Gernsbacher (Eds.), *Interdisciplinary collaboration: An emerging cognitive science* (pp. 287–316). Mahwah, NJ: Lawrence Erlbaum.
Segal, J. A., & Spaeth, H. J. (1993). *The Supreme Court and the attitudinal model*. Cambridge, England: Cambridge University Press.
Shi, X., Adamic, L. A., Tseng, B. L., & Clarkson, G. S. (2009). The impact of boundary spanning scholarly publications and patents. *PLoS One, 4*(8), e6547. doi:10.1371/journal.pone.0006547.
Sisk, G. C., Heise, M., & Morriss, A. P. (2004). Searching for the soul of judicial decisionmaking: An empirical study of religious freedom decisions. *Ohio State Law Journal, 65*, 491–594.
Songer, D. R., & Tabrizi, S. J. (1999). The religious right in court: The decision making of Christian evangelicals in state Supreme Courts. *Journal of Politics, 61*, 507–526.
Spelt, E. J. H., Biemans, H. J. A., Tobi, H., Luning, P. A., & Mulder, M. (2009). Teaching and learning in interdisciplinary higher education: A systematic review. *Educational Psychology Review, 21*, 365–378.
Suchman, M. C., & Mertz, E. (2010). Toward a new legal empiricism: Empirical legal studies and new legal realism. *Annual Review of Law and Social Science, 6*, 555–579.
Tate, C. N., & Sittiwong, P. (1989). Decision making in the Canadian Supreme Court: Extending the personal attributes model across nations. *Journal of Politics, 51*, 900–916.
Tomkins, A. J., & Ogloff, J. R. P. (1990). Training and career options in psychology and law. *Behavioral Sciences and the Law, 8*, 205–216.
Vines, K. (1964). Federal district judges and race relations cases in the South. *Journal of Politics, 26*, 337–357.
Wareing, S. (2009). Understanding "how students learn, both generally and in the subject.". In B. Chandramohan & S. Fallows (Eds.), *Interdisciplinary learning and teaching in higher education: Theory and practice* (pp. 58–65). New York: Routledge.
Wrightsman, L. S. (1999). *Judicial decision making: Is psychology relevant?* New York: Springer.
Wrightsman, L. S. (2006). *The psychology of the Supreme Court*. New York: Oxford University Press.
Wrightsman, L. S. (2008). *Oral arguments before the Supreme Court: An empirical approach*. New York: Oxford University Press.
Wuchty, S., Jones, B. F., & Uzzi, B. (2007). The increasing dominance of teams in production of knowledge. *Science, 316*, 1036–1039.
Yamamoto, K. R. (2013). Time to play ball. *Science, 340*, 1375.

From War Protestors to Corporate Litigants: The Evolution of the Profession of Trial Consulting

Amy J. Posey

Tribute to Larry Wrightsman

My first encounter with Lawrence Wrightsman occurred when I was a junior in college. I enrolled in a course in psychology and law, and Dr. Wrightsman's book, *Psychology and the Legal System* (in its first edition), was the required text. I was inspired. This was one of those rare textbooks that an undergraduate student loves to read. The course led to my decision to pursue graduate study with Dr. Wrightsman at the University of Kansas. On the advice of an undergraduate professor, I mustered the courage to call Dr. Wrightsman to determine whether he was accepting students. I have not forgotten that phone call, because it represents my first introduction to the man that I would come to know as "Larry." He was so gracious, spending nearly 45 minutes talking with me that afternoon.

There are two primary gifts that Larry's graduate students received from him. First, he modeled an incredible work ethic. He was always writing (always longhand, and usually on yellow legal notepads) and when he was not literally writing, he was mentally composing the next chapter, collecting relevant newspaper or magazine clippings from one of his many subscriptions, outlining the next book. Even retirement, for as long as he was able, Larry made it into the office most every day to write. There is much talk these days of lifelong learning—Larry personifies it.

Second, Larry was a mentor's mentor; he provided an exquisite model of approachability, encouragement, and constructive critical feedback that I have tried to emulate in my work with undergraduate students. As a graduate advisor, Larry was always happy to discuss an idea, collaborate on an attitude measure, or provide feedback on a draft. In the classroom, he succeeded in creating an atmosphere in which students were simultaneously at ease and excited. Larry always brought a

A.J. Posey (✉)
Department of Psychological Sciences, Benedictine College,
Cray Seaberg Hall, Room 208, Atchison, KS 66002, USA
e-mail: aposey@benedictine.edu

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_9

camera to class on the first day of the semester. He would photograph his students in groups of three, recording names as he went. Upon developing the photos, he wrote students' names on the back and then used them as flashcards, testing himself until he could identify each of his students by name.

As is often the case in his writing, Larry liked to introduce new topics using actual cases, usually presented to the class via videotape (Larry's collection of VHS recordings occupied an entire floor-to-ceiling bookshelf in his office). He was expert at leading discussions that demanded more from students than mere opinions and that captured for students the implications of psychology-relevant judicial and legislative decisions. All of those videos and discussions did not translate into an easy course, however; Larry's exams were rigorous and resulted in many hand cramps from all that writing.

Twenty years after earning my Ph.D., Larry remains a source to which I turn for guidance on professional matters as well as a source of friendship. He attended my wedding, celebrated the adoption of my daughter, and provided an understanding and sympathetic ear as I coped with my father's illness and eventual death from prostate cancer.

It was my pleasure to write *Trial Consulting*, published in 2005, with Larry. In this chapter, I will summarize some of the main points from that book and update with recent research findings and developments in the profession.

A Brief History

The profession of trial consulting has its beginnings in the early 1970s. A group of Catholic priests and nuns were being tried in Harrisburg, Pennsylvania, on charges of conspiracy in connection with their actions in protest of US involvement in the Vietnam War. The defendants became known as the "Harrisburg Seven," and a small group of social scientists offered their services *pro bono* to assist in their defense. Their specific activities centered on jury selection (Schulman, Shaver, Colman, Emrich, & Christie, 1987). The jury convicted two of the defendants on a minor charge and deadlocked on the most serious charges. The judge declared a mistrial, and the prosecutor decided not to retry the defendants. Throughout the 1970s, social scientists were subsequently called upon to assist in other anti-war cases and then forayed into mostly high-profile civil rights and criminal defense cases (Kressel & Kressel, 2002).

The first meeting of the American Society of Trial Consultants (ASTC; originally called the Association of Trial Behavior Consultants) was in 1982 in Phoenix, Arizona, and was attended by a couple of dozen members (Matlon, 1998), mostly social scientists. The profession has grown considerably in the 30 years since. Today, ASTC membership approaches 500, maintains headquarters in Maryland, meets annually, and is guided by a set of ethical guidelines. In addition, the society maintains a public Web site, a members-only listserve, two blogs, and two online publications (*Court Call*, for members only, and *The Jury Expert*, targeted at a legal

audience and available to the public). Considering that there are many additional trial consultants who are not members of ASTC, it is clear that the profession has "arrived," as declared by ASTC past-president Ann Harriet Cole (1999, p. 10).

Aside from growth and organization, the profession has changed in other ways. Most notable is the fact that the typical clientele are no longer indigent criminal defendants; instead, most clients are civil litigants, many of whom are involved in cases with potentially high dollar settlements or jury awards (Posey & Wrightsman, 2004). Furthermore, the profession now draws from a more diverse range of educational backgrounds and skill sets. To be sure, the majority of trial consultants have been trained as social scientists, but they also come from backgrounds such as law, theater, and graphic design. There is no required educational degree, just as there are no licensure requirements, so the field is technically open to all comers.

Activities of Trial Consultants

The growth in numbers and background diversity among trial consultants has been accompanied by growth in the kinds of activities in which trial consultants engage. Although they continue to assist with jury selection, consultants are more likely to be engaged in pretrial small-group research (SGR) such as focus groups and mock trials (Posey & Wrightsman, 2004). They also conduct change-of-venue surveys, prepare witnesses, and educate attorneys about the art of persuasion.

In the absence of licensure requirements, and in the presence of such diversity of training, the membership of the ASTC deemed it necessary to establish professional guidelines for the activities in which consultants are likely to engage. In 1998, work began to establish such guidelines for conducting change-of-venue surveys. Last updated in 2008, *The Professional Code of the American Society of Trial Consultants* now also includes standards and guidelines for SGR, witness preparation, jury selection, and conducting posttrial interviews with jurors. In the Preamble to the ASTC Code of Professional Standards, a distinction is made between professional standards, which are enforceable by the Society, and practice guidelines, which are suggested business practices that "should be considered by trial consultants in choosing courses of action" (American Society of Trial Consultants, 2008, p. 1).

Small-Group Research

The most common activity in which trial consultants engage is SGR, which includes conducting focus groups and mock trials (Posey & Wrightsman, 2004). The distinction between these two methods is sometimes fuzzy, with the difference being primarily one of format. With a focus group, anywhere from 6 to 12 (Millward, 2000), people are engaged in a "focused" discussion, led by the moderator. In the trial consulting domain, the discussion generally focuses on key case issues, with the

objective of gauging focus group members' general responses to those issues. The groups do not deliberate and members do not reach a verdict. The typical trial consulting focus group lasts 2–3 hours. Focus groups are especially useful for identifying case themes, guiding the process of discovery, and testing responses to specific aspects of a case (Posey & Wrightsman, 2004).

By contrast, a mock trial lasts all day, and may run into multiple days. The trial consultant recruits enough participants to make up several juries, who hear an abbreviated presentation of arguments and evidence for both sides, with opposing counsel portrayed by members of the firm that is representing the client in the case. The mock trial might include opening statements, show clips of deposition testimony, demonstrative evidence, and even employ actors to portray witnesses. Following closing arguments, participants are divided into mock juries, which deliberate to a verdict. Unlike focus group discussions, which are directed by a consultant who is present in the room with participants, mock jury deliberations are conducted outside of the presence of the consultant, who is usually watching and listening from another room, via closed-circuit television. Mock trials are useful for getting a sense of the monetary value of the case, jurors' reactions to witnesses and case themes, and identifying points of confusion that will need greater clarification should the case go to trial. They also provide the trial attorneys an opportunity to rehearse the presentation of their case and to gain insight into the way in which they are perceived by jurors (Posey & Wrightsman, 2004).

The two key methodological issues associated with conducting SGR in the context of trial consulting pertain to generalizability. First, can what is learned in the context of SGR be generalized to actual trial situations? This is a question of ecological validity. Actual trials involve live witnesses, go on for days, and involve opposing counsel who are much better prepared to make a compelling case for their side in the conflict. Mock trials, and especially focus groups, involve, at best, videotaped exposure to witnesses, are relatively brief, and tend to present a less-informed and less-motivated version of the opponent's case. There is actually very little that trial consultants can do to combat these shortcomings, aside from educating the attorneys about the importance of objectivity.

The second key methodological issue pertains to representativeness: do the impressions of SGR participants generalize to impressions that are likely to be formed by actual jurors? At the very least, all participants in litigation-related SGR should be jury eligible, and enough groups should be conducted to "saturate the topic," which occurs when groups begin to yield redundant information (Krueger, 1998). Trial consultants Prosise and New (2007) have observed that sample size in mock trials is especially important when evaluating damage awards and assignment of liability, as these tend to be the least reliable types of data. In practice, most consultants use random digit dialing and recruit only jury-eligible participants; those recruiting for mock trials also frequently screen out prospective participants who would likely be removed for cause for that particular case, (Posey & Wrightsman, 2004).

In *Trial Consulting*, we described two recent trends in SGR (Posey & Wrightsman, 2005). One development is that attorneys are beginning to conduct

their own SGR, especially for smaller (i.e., lower financial stakes) cases, and several attorneys have published how-to articles on the subject (e.g., Barnett, 1999; Mullins, 2000; Twiggs, 1994). Although trial consultants have not unequivocally dismissed attorneys' abilities to conduct their own SGR, they have expressed concerns that, because they are not trained as social scientists, attorneys will be ignorant about important methodological issues (Grant, 1993; Koch, 2001; Singer, 1996) and are especially likely to do a poor job presenting both sides of the case objectively (Koch, 2001).

Another recent trend is to conduct SGR online, for which participants are recruited and screened (ideally), log on at the same time, and engage in focused discussion in a sort of virtual chat room, moderated by the trial consultant (Greenbaum, 1998; Hoeschen, 2001; Hsieh, 2001; Sweet, 2000). The benefit of conducting the groups online is that it is not as costly, as there are no venue or refreshment costs, and a transcript of the discussion can be downloaded and content analyzed. However, online groups fall short when it comes to ecological validity. The discussions lack elements that are present in the kind of face-to-face discussions that occur during jury deliberations and in-person focus groups, including peer pressure and nonverbal interaction among participants (Greenbaum, 1998; Hoeschen, 2001; Hsieh, 2001). In addition, there is no way to ensure the security of the information (e.g., someone may be looking over the shoulder of the participant at trial materials), raising attorney work-product concerns (Greenbaum, 1998). These considerations notwithstanding, online SGR may represent a way to level the playing field between those with greater financial resources and those who have less.

Witness Preparation

Very often, trial witnesses are not well versed in persuasive speaking techniques; even those who are highly competent in their field of expertise might do a poor job testifying, due to nervousness associated with public speaking or lack of practice conveying information to a lay audience. Add to that the formality of the courtroom, presence of the authoritative judge, and prospect of cross-examination by a hostile attorney set on undermining one's credibility, and it is understandable that many people do not perform well under such pressure. Trial consultants can be useful at providing insight as to how jurors will view the witness, as well as the dynamic between the witness and the attorney.

To prepare witnesses to testify, trial consultants will observe them answering a series of questions, noting issues associated with eye contact, posture, voice tone, emotional expression, signs of nervousness, or hostility. They can work with nervous witnesses to overcome their fears associated with testifying, which is important, because a nervous witness is usually a less-credible witness (Bothwell & Jalil, 1992). It is especially useful to observe and videotape witnesses during a mock cross-examination. Then, discuss with the witness-specific things that he or she

might do to increase credibility in the eyes of the jury. Repeated practice can be utilized to increase the witness's testifying self-efficacy, as can positive feedback from observers (Cramer, Neal, & Brodsky, 2009; Jones, n.d.).

A trial consultant might teach the witness to use more powerful speech (Jones, n.d.), characterized by a lack of hesitation and qualifiers. Witnesses who use a powerless speaking style appear not only less convincing and less believable (O'Barr, 1982) but are also seen as less competent, trustworthy, and intelligent. These findings are present regardless of whether the mode of communication is audiotaped testimony (Johnson & Vinson, 1987), videotaped testimony (Lisko, 1992), or a written trial transcript (Bradac, Hemphill, & Tardy, 1981).

Boccaccini, Gordon, and Brodsky (2005) provided witness preparation to actual criminal defendants. Specifically, they instructed the defendants about effective communication, evaluated videotaped practice sessions, and engaged the defendants in role-playing exercises. The training resulted in improved posture, decreased use of powerless speech, and increased eye contact with the attorney, but also reduced expressiveness (e.g., gestures to convey meaning, facial and vocal emotional expression). Most important is the fact that witnesses who had been prepared were perceived as less guilty than their unprepared counterparts.

Some have criticized witness preparation by trial consultants, characterizing it as an artificial portrayal of witness demeanor, and arguing that jurors have a right to view witnesses in their "natural" form, unaltered by witness preparation strategies (see New, Schwartz, & Giewat, 2006, p. 22). The ASTC's professional code provides professional standards for witness preparation, including that the consultant advocate that a witness tell the truth, be familiar with applicable laws and rules that apply to witness preparation services, clarify with the client the goals for the witness preparation, and treat witnesses with respect and consideration. The practice guidelines add the more specific admonition that consultants not "script specific answers or censor appropriate and relevant answers based solely on the expected harmful effect on case outcome" (p. 32). Taking issue with what they perceive to be the vagueness of the ASTC's guidelines for witness preparation, LeGrande and Mierau (2004) argue for the establishment *by lawyers* of enforceable standards for witness preparation to which lawyers and trial consultants would be mutually bound.

In response to the criticism, New et al. (2006), themselves trial consultants, point out that consultants do not engage in witness preparation activities that would be unethical if performed by lawyers; in fact, any lawyer with a background in communication would be capable of using the same techniques as those employed by trial consultants. Furthermore, they point to evidence that jurors really do not take issue with witness preparation strategies to the extent suggested by lawyers and legal scholars who are critical of the practice. Specifically, in a study of 500 jury-eligible respondents, 73 % believed that it is a good idea to prepare a witness to testify at trial, 66 % believed that it is appropriate for witnesses to get some practice, and fewer than 15 % indicated suspicion of witnesses who needed to practice before testifying (New, Schwartz, & Giewat, 2005).

Trial Strategy

Witnesses are not the only trial participants who might benefit from consultant expertise. Linz, Penrod, and McDonald (1986) conducted posttrial research in which attorneys rated their own performance on the variables of articulateness, friendliness, enthusiasm, formality, humorousness, nervousness, and arrogance. In addition, jurors were asked to evaluate the attorneys on those same variables.

When compared with ratings made by actual jurors, defense attorneys consistently rated their overall performance more favorably than did the jurors. Furthermore, self-perceptions of defense attorneys with the most trial experience were the most discrepant from jurors' assessments, especially regarding the stylistic qualities of articulateness, enthusiasm, friendliness, likableness, and arrogance. Defense attorneys overrated their own performance on all variables except arrogance, which they underestimated. Prosecutors' self-ratings, on the other hand, did not differ from those made by jurors. Therefore, defense attorneys, at least, might benefit from frank feedback from a trial consultant regarding both the content of their opening statements and their demeanor in the courtroom.

In those instances in which a case does proceed to trial, trial consultants often assist attorneys with preparation of opening statements, closing arguments, and evidence presentation, including direct- and cross-examination of witnesses. In their books and articles, consultants share a variety of recommendations, some of which are supported by empirical research evidence, and others that are more anecdotal, emerging from the professional experiences of the consultants.

As we discussed in *Trial Consulting* (Posey & Wrightsman, 2005), especially regarding opening statements and closing arguments, trial consultants have focused on stylistic aspects of attorney presentation. It seems that most consultants who write on the subject of attorney style have backgrounds in communications and theater, and the theater metaphor is used often in their writings about courtroom persuasion. Genard (2001a) compares trial participants and evidence to the actors, audience, and props used in a dramatic play, and consultants Lisa DeCaro and Leonard Matheo (both also professional actors) encourage attorneys to do the kind of things that actors do "day in and day out" (Matheo & DeCaro, 2001, p. 59). Advice typically focuses on conveying a sense of competence (Crawford, 1989; Genard, 2001a), strategic use of voice inflection (Crawford, 1989; Genard, 2001b; James, 2002; Matheo & DeCaro, 2001), and nonverbal behavior strategies (Crawford, 1989; James, 2002; Matheo & DeCaro, 2001).

Much of what the consultants recommend is consistent with empirical research on persuasion. For example, we know that competence conveys credibility (Hass, 1981), and that a credible source is persuasive (Chaiken & Maheswaran, 1994), and that people often attend to nonverbal cues to determine trustworthiness (Sporer & Schwandt, 2007; Vrij, 2008). However, some recommendations contradict the research. When Matheo and DeCaro (2001) advise that attorneys memorize the opening statement to the point that they do not have to think about it as they deliver it, they add that it will be relatively easy to make changes to it as needed.

Whether it is a good idea to memorize the opening statement is debatable, but research on interference effects in memory clearly suggests that making changes later will be difficult, as the originally memorized text is likely to interfere with recall of the edited version (Carroll et al., 2010; Underwood, 1957).

Trial consultants have also offered strategic recommendations regarding the organization and content of opening statements. Drawing on memory theory, some consultants recommend that attorneys be mindful of the sequencing of arguments presented within the narrative of the opening statement (Ball, 2002; Crawford, 1989). There are also recommendations regarding causal focus (Ball, 2002), stealing thunder (Crawford, 1989), and providing jurors with a credible story that they can use as a framework for organizing and recalling the evidence (Ball, 2002; Crawford, 1989; Matheo & DeCaro, 2001; Matlon, 1988).

Once again, organizational recommendations by trial consultants are generally supported by empirical research. For example, memory research supports the recommendation that attorneys take advantage of the primacy effect by disclosing the strongest aspects of their case as they begin their opening statement (Asch, 1946; Bower, 1976; Brewer & Nakamura, 1984; Langer & Abelson, 1974; Linz & Penrod, 1984; Taylor & Crocker, 1981), and research supports the notion that one should reveal weaknesses in one's own case before one's opponent has the opportunity to reveal them (i.e., steal their thunder; Dolnik, Case, & Williams, 2003; Williams, Bourgeois, & Croyle, 1993). More recent research has demonstrated that it is also advisable to steal an opponent's sunshine by acknowledging the strengths of the opponent's case before the opponent has a chance to reveal them (Perry & Weimann-Saks, 2011).

The presentation of evidence occurs through witness testimony. Some of the concerns that are relevant to opening statements are relevant here, as well, such as sequencing of information and stealing thunder. Regardless of chronology, it is critical under most circumstances that attorneys allow witnesses under direct examination to provide responses that are detailed and tell the witness's whole story. This is best achieved through the use of open-ended questions (Klein & Kochman, 1998).

Because evidence is drawn from witnesses through attorney questioning, the attorney's behavior toward the witness during questioning has strategic implications. For example, research tells us that we are more persuaded by people who are well liked (Mackie, Worth, & Asuncion, 1990), and trial consultants advise that attorneys convey a sense of liking for even their most unsavory witnesses by maintaining frequent eye contact and by allowing all of their witnesses to make eye contact with jurors by positioning themselves in a way that does not obstruct jurors' view of the witness (Klein, 1993; Klein & Kochman, 1998).

Cross-examination is a different ball game. Trial consultants advise their clients to keep the examination brief and highly focused, designed specifically to discredit some aspect of the opponent's case (Matlon, 1988). Trial consultant Crawford (1989) goes so far as to suggest that attorneys think of the cross-examination as a speech consisting of a series of leading questions. In this model, the witness is rendered nearly irrelevant, being restricted to a series of yes-or-no responses to questions that are designed to make a point. Rather than convey a sense of liking,

attorneys are advised to stand near the witness to convey intimidation and power, and to occlude the jury's view of the witness (Klein, 1993; Klein & Kochman, 1998; Peskin, 1980). Research suggests that attorneys do, in fact, stand closer to witnesses during cross—than during direct—examination (Brodsky, Hooper, Tipper, & Yates, 1999); however, the research stops short of demonstrating the effects of such proxemic strategies on jurors' perceptions of witness credibility.

The final attempt to persuade jurors comes during the closing arguments. Like opening statements, these are not evidence; however, unlike opening statements, they are allowed to be argumentative. Plenty of advice is available to attorneys regarding construction and delivery of the closing argument, and several of the assumptions conveyed in that advice have been the subject of empirical scrutiny. For example, some legal scholars recommend that attorneys remind jurors of the main points from the trial, but allow jurors to use those points to reach their own conclusions (McElhaney, 2000; Schuetz & Snedaker, 1988). At least one trial consultant also advocates this strategy (Ball, 2002), reasoning that it provides longer-lasting attitude change and greater ownership of the verdict decision on the part of jurors. However, empirical research suggests that the strategy is too risky, as jurors cannot be counted on to draw the conclusion that the attorney prefers (Linz & Penrod, 1984); therefore, drawing an explicit conclusion is best.

Another common recommendation is that the attorney essentially retells in the closing argument the story that was first presented during the opening statement, this time explicitly reminding jurors of evidence that was presented in support of story elements (Rieke & Stutman, 1990). An opposing view is that attorneys should take an expository approach, delineating each legal element that must be proven, and then reminding jurors of evidence that either met, or failed to meet, that element, depending on the side for which one is arguing. Research suggests that the expository approach is more effective, possibly because it is more closely aligned with the jury's task as it heads off to deliberate (McCullough, 1994; Spiecker & Worthington, 2003), and because it provides ammunition to jurors who are allied with the attorney's side going into deliberations (Wrightsman, 2001).

Overall, the trial strategy recommendations made by trial consultants are supported by research findings. This is especially true for organization of opening statements and direct examination, and less so for stylistic suggestions. Where there is not empirical support for the recommendations, it is more often due to an absence of any research on the recommended strategy than it is a direct contradiction with research findings. More research is needed in the areas of cross-examination and attorney style. There are many recommendations having to do with such stylistic factors as attorneys' body language during trial and the amount of interpersonal space an attorney should allow between him or herself and a witness or the jury; however, there is very little in the way of empirical research to allow for an analysis of the validity of those recommendations.

As for ethical concerns, there is nothing in the ASTC Professional Code that addresses trial consultants' role in assisting with trial strategy. Although some may take issue with, for example, consultants with a background in theater working with trial lawyers to improve their "stage presence" in the courtroom, such criticisms are

unconvincing. The fact is that jurors are influenced by extralegal factors throughout the trial, and those factors will have an influence even when the lawyers, witnesses, and judge are not aware of them and are therefore doing nothing to control them. Opening statements that told a story were more compelling than those that did not before any social scientist conducted research to determine that that was the case. There is no reason to conclude that a jury's decision will be less just when the attorneys for one or both sides in the case have been educated about these extralegal issues. It is equally plausible that jurors would reach an unjust conclusion in the absence of a well-constructed opening statement, for example, because they might erroneously recall certain important facts or focus their attention on matters of little relevance.

Jury Selection

Writing on jury selection, Harrison (2011), a civil defense lawyer in Texas, stated:

> You can often tell whether someone is liberal or conservative, educated or uneducated, rich or poor, a leader or a follower, analytical or emotional, and many other things simply by looking at them and listening to them. Hone and trust your gut instincts. What is their body type? It has been said that heavier people make better plaintiff's jurors and thinner people make better defense jurors, but this is certainly not a rule of thumb. It is often the case, however, that persons who are overweight tend to be followers in a jury setting. What are they reading? A person reading the Wall Street Journal will probably make a better defense juror than one reading a romance novel, Readers Digest, or National Enquirer (p. 36).

As noted at the start of this chapter, the profession of trial consulting began when a group of social scientists assisted the defense in jury selection for the Harrisburg Seven criminal trial. Although jury selection is not the primary activity of trial consultants today, it is arguable the activity for which the profession is best known. Furthermore, the continued presence of *voir dire* strategy advice such as that provided by Harrison (2011), relying on stereotypes and gut feelings, suggests that consultants' services are still needed. Recommendations from trial consultants are available in the public domain through the ASTC online publication *Jury Expert*; recent offerings include advice to get jurors talking (Frederick, 2011); strategies to outsmart opposing counsel during *voir dire* (Futterman, 2011); and techniques for tapping into the belief systems of prospective jurors (Ferrara, 2010).

Not everyone is accepting of trial consultants' involvement in jury selection. In their somewhat harsh evaluation of the role of trial consultants in jury selection, Lecci, Snowden, and Morris (2008) state that trial consultants must begin to use empirical data to support their "otherwise unfounded claims" regarding their effectiveness at choosing juries, and to "provide both credibility and quality control to the field" (p. 76). Exactly how effective are trial consultants, or trial attorneys for that matter, at identifying prospective jurors who would do the most damage to their side? This is an empirical question that is difficult to answer, because it is hard to say whether any given verdict would have been different had a different group of

people decided the case. As noted by Leiberman (2011), defining "effectiveness" in this context is tricky.

One attempt at answering the question about attorney effectiveness involved administering the Legal Attitudes Questionnaire (Boehm, 1968), which measures a juror's general prosecution or defense leaning, to prospective jurors in four felony trials (Johnson & Haney, 1994). After comparing the attitude scores of those who were retained as jurors with those who were dismissed, the researchers found that prospective jurors who had been dismissed by the prosecution were more defense leaning than those who were dismissed by the defense, and prospective jurors who had been dismissed by the defense were more prosecution leaning than those who were dismissed by the prosecution. However, they also found that seated jurors were not attitudinally different from the first 12 jurors questioned or from a group of prospective jurors sampled at random. Although the more recently developed Pretrial Juror Attitudes Questionnaire shows promise for detecting juror bias to a greater degree than similar existing scales (Lecci & Myers, 2009), it is unlikely that judges would allow all items on any of these scales to be administered to prospective jurors in actual cases (Leiberman, 2011).

A number of studies have been conducted that examined the effectiveness of scientific jury selection, which relies on the use of empirical methods, such as validated attitude measures and background characteristics gleaned from supplemental juror questionnaires, to predict jurors' decisions. (When trial consultants assist with jury selection, they often rely on empirical methods, as opposed to the more intuitive strategies generally employed by attorneys.) Data from those studies suggest that measured attitudes and background characteristics tend to account for about 11 % of the variance in verdicts, with percentages ranging from a low of around 5 % to a high of about 30 % (Hastie, Penrod, & Pennington, 1983; Moran, Cutler, & DeLisa, 1994; Saks, 1977). Moran and his colleagues (1994) observed that attitudes and background characteristics are most predictive in actual cases, as opposed to jury simulation studies.

The use of supplemental juror questionnaires for purposes of scientific jury selection is increasingly preceded by community surveys, focus groups, or mock trials (Seltzer, 2006). This allows trial consultants and attorneys to develop case themes and then to develop profiles of jurors who are likely to accept or reject those themes. Seltzer (2006) analyzed data from telephone pretrial community surveys that he conducted for 17 cases (one-third of them civil). The focus of his analysis was the predictive validity of demographic variables, with the dependent variable being an additive combination of case-relevant attitudes. In 30 % of the cases analyzed, demographic variables accounted for at least 30 % of the variance in the case-relevant attitudes, allowing for a reasonable degree of predictability in those cases.

In one study that pitted attorney-conducted jury selection against scientific jury selection, Nietzel and Dillehay (1986) examined the impact of the use of trial consultants by the defense in death penalty trials. Out of 31 total cases, they found that juries recommended the death penalty in 33 % of those in which a trial consultant was used, compared with 61 % of cases in which a trial consultant was not used.

Although these results certainly reflect favorably on the use of trial consultants for jury selection, it is important to keep in mind that in virtually all cases in which trial consultants assist with jury selection, there is much at stake. Hence, these cases are also likely to be tried by the most experienced litigants, to have been preceded by small-group pretrial research, and to use highly paid, seasoned expert witnesses (Leiberman, 2011). Isolating the effects of scientific jury selection is extremely difficult when so many confounding variables exist.

Strategic objectives related to the *voir dire* process are not limited to weeding out prospective jurors who are hostile to one's position; trial lawyers might also want to use *voir dire* as a means of educating jurors about relevant legal issues or even to ingratiate themselves to those jurors who eventually will hear the case. Therefore, trial consultants often advise lawyers on *voir dire* technique; however, there is limited empirical research on the effectiveness of these kinds of *voir dire* strategies. In one study, Brodsky and Cannon (2006) manipulated the number of ingratiating statements made by attorneys to prospective jurors during *voir dire*. Examples include acknowledging the disruption to jurors' lives that are created by jury service and noting the bravery exhibited by a specific juror for being the first to speak his or her mind. They found that the effects of ingratiation strategies by attorneys during *voir dire* varied as a function of participant gender and amount of ingratiation. When the attorney used a moderate ingratiation strategy during *voir dire*, female participants liked him more than when he used no ingratiation or a high amount of ingratiation; male participants' liking for the attorney was not influenced by ingratiation technique. Importantly, ingratiation strategy during *voir dire did not* have an effect on verdicts.

Finally, an emerging trend in jury selection strategies involves utilizing information about prospective jurors that is available through the Internet. According to trial consultant Ken Broda-Bahm (2011), it is common practice for trial consultants and trial attorneys to seek out online information about prospective jurors. Early versions of this were limited primarily to broad queries on search engines such as Google, but more recently this information is also gathered through social media sites such as Facebook. Although Broda-Bahm acknowledges that many view this kind of beyond-the-courtroom investigation of prospective jurors as intrusive, his position is that the practice is perfectly legitimate, and even recommended, given that the information is publicly available. Broda-Bahm (2011) also describes a relatively new service provided by consulting firms, called a "social media analysis," which entails conducting a search of all publicly available information regarding prospective jurors, and which might also entail monitoring seated jurors' social media cites during the trial to be sure that they are not violating confidentiality requirements.

Change of Venue

On February 26, 2012, 17-year-old Trayvon Martin was shot and killed by neighborhood watch volunteer George Zimmerman in Sanford, Florida. Zimmerman, who maintained that he shot Martin in self-defense, was charged with second-degree

murder on April 11, 2012 (CBS News, 2012). In the time between the shooting and filing of charges, the case received intense media attention that was punctuated with emotional discussions about racism, gun control, and controversial "Stand Your Ground" laws. A Google search conducted June 4, 2012, using the search term "Zimmerman shooting," yielded nearly 73 million results.

In highly publicized cases such as this, it becomes important to determine whether prospective jurors have retained the ability to reach a verdict that is not biased as a consequence of pretrial publicity. The question of pretrial bias is relevant for both criminal and civil cases, although criminal cases typically receive much more media coverage than do civil cases. It is also important to note that pretrial bias results not only from exposure to media coverage but also word of mouth, Internet sites, and, increasingly, exchange of information via social media.

Most of the research on the effects of pretrial publicity on juror decision making has involved criminal cases, and the research findings are convincingly consistent: pretrial publicity does influence judgments of guilt (e.g., Devine, Buddenbaum, Houp, Studebaker, & Stolle, 2009; Hope, Memon, & McGeorge, 2004; Steblay, Besirevic, Fulero, & Jimenez-Lorente, 1999). And because most of the information provided to the press prior to the trial comes from the prosecution (Imrich, Mullin, & Linz, 1995), the effect of pretrial publicity is almost always to increase perceptions that the defendant is guilty (Costantini & King, 1980; Moran & Cutler, 1991; Steblay et al., 1999). One possible contributing factor is the source misattribution effect; recent research by Ruva and McEvoy (2008) revealed that jurors remember information that they obtained through pretrial publicity as if it had been presented as evidence during the trial.

The most effective remedy for pretrial publicity effects is to change the venue of the trial; that is, to move the trial to another jurisdiction, ideally one in which there has been minimal exposure to pretrial information about the case. In support of the motion to change venue, the side bringing the motion presents evidence regarding the extent of pretrial exposure to information regarding the case, the prejudicial nature of that information, and the effects of exposure on jurors' pretrial attitudes surrounding the case. The role of the trial consultant, then, is to conduct a thorough analysis of pretrial exposure and to assess pretrial attitudes of prospective jurors in the originating venue, as well as in other venues for purposes of comparison. The consultant is ultimately likely to be called to testify about survey design, administration, and analyses at a hearing on the motion to change venue.

The change-of-venue survey was the first practice area for which the ASTC adopted professional standards and guidelines, perhaps because there was already an established protocol for survey administration in the research community. In addition to specific guidelines regarding questionnaire design, survey procedure, and data analysis, the guidelines also include a summary of items that should be included in a report presenting survey results to the court (ASTC, 2008). The venue survey task force members had extensive experience in venue work, and the guidelines are consistent with those published elsewhere (e.g., Diamond, 1995; Krauss & Bonora, 1983; Morgan, 1990; Nietzel & Dillehay, 1983).

As discussed in *Trial Consulting* (Posey & Wrightsman, 2005), trial consultants who conduct change-of-venue surveys encounter several unique challenges. First, in spite of the fact that they are hired by one side in the case (most often the defense), the trial consultant's role is more that of expert witness who must construct the survey instrument and present the findings objectively. Often, consultants need to educate the attorney about the necessity for such objectivity, and possibly limit the role played by the attorney in constructing the survey instrument (Posey & Dahl, 2002).

Another hurdle is that, in the process of determining what case-relevant information prospective jurors know, the consultant might inadvertently introduce them to information that they did not know, thereby tainting the jury pool. Assessing degree of knowledge about the case generally is done through a series of items that ask about exposure to specific information (e.g., "Have you read, seen, or heard information about a polygraph exam related to this case?") (Moran & Cutler, 1991; Nietzel & Dillehay, 1983; Posey & Dahl, 2002). This line of questioning has the potential to introduce prospective jurors to information that they did not know about prior to their participation in the survey (Posey & Dahl, 2002), and among the general professional standards established by the ASTC is the requirement that "[t]rial consultants provide all services in a manner that will protect the integrity of the jury pool" (ASTC, 2008, p. 7). One can decrease the likelihood of tainting the jurors by leading with items that screen for basic familiarity with the case; surveys of prospective jurors who have never heard anything about the case are then terminated before items assessing more specific knowledge have been introduced (Posey & Dahl, 2002).

Finally, there are hurdles associated with conducting change-of-venue surveys in small communities in which "everybody knows everybody." Of course, interviewees' names are not associated with their responses, but sometimes the content of those responses provides clues to identity. Respondents often reveal their connections to people involved in the case (e.g., "The sheriff is my cousin," or "my daughter is a good friend of the victim"), and those connections might provide clues to their identity. Should the survey comments become part of the court record in the venue motion, members of the local community could potentially identify respondents based on the information provided. Given the ethical requirement that survey responses remain confidential, must the consultant delete the identifying information from the file? The dilemma pits research ethics against the court's need to be educated about the true extent of prospective jurors' knowledge and involvement with the case. ASTC guidelines emphasize the importance of maintaining confidentiality (ASTC, 2008, p. 14) but do not specifically address this dilemma.

Over the years, trial consultants have conducted many change-of-venue surveys, some of them in high-profile cases such as the Timothy McVeigh (Oklahoma bombing) case. Collectively, they have access to data from thousands of jury-eligible respondents, representing rates of case recognition, prejudgment of guilt, and awareness of information likely to be ruled inadmissible at trial. In addition, accompanying most of those data sets are judicial decisions on motions to change venue. As will be discussed in the next section, these data represent an opportunity for trial consultants to assist judges in making pretrial venue decisions, as well as to inform the research community about predictors of judicial decisions in such cases.

Global Issues

As discussed above, there are ethical issues and criticisms specific to virtually all practice areas in which trial consultants are involved. But there are also some more global concerns; this is an enterprise that, according to some, should not exist. Two of the issues that we discussed in *Trial Consulting* (Posey & Wrightsman, 2005) are paramount: the fact that any advantages gained through the use of trial consultants will be more accessible to those with greater financial resources and the fact that the trial consulting profession remains largely unregulated.

Trial Consulting Benefits the Wealthy

As noted by Hans and Vidmar (1986), the "major ethical problem with social science in the courtroom" (p. 94) is that fact that it serves to increase the inequity between the haves and the have-nots. This common criticism of trial consulting is not entirely fair. Although it is true that trial consultants' services are generally quite expensive, they do work at much reduced rates in some cases. Change-of-venue surveys are very often conducted in cases involving indigent defendants, and when trial consultants assist in the jury selection for death penalty trials, defendants are likely to be indigent, as well. It is worth noting that jury selection in death penalty cases can go on for months, which means that the consultant is not only working at a reduced rate for an extended period of time but also necessarily passing on more lucrative work during that time. And while it is true that a survey of ASTC members revealed that the median percentage of respondents' practice that was dedicated to criminal work was just 5 %, for 16 % of respondents, criminal work made up 50 % of their practice (Posey & Wrightsman, 2004).

In addition, many trial consultants engage in *pro bono* work. In an article written for the ASTC publication *Court Call*, consultant Andy Sheldon (2004) describe the *pro bono* contributions made by members of his firm, and encouraged his colleagues to engage in more *pro bono* work, noting that it actually had paid off for his firm by creating connections that led to more paid work.

Another way that trial consultants are "giving back" is by periodically combining and publishing their research findings in ways that are informative to the legal and scholarly communities (Posey & Wrightsman, 2005). Giewat (2011) did just that when he combined data from several consulting projects relevant to civil litigation. For those projects, his firm, American Jury Centers, inserted three items from the Psychological Entitlement Scale (Campbell, Bonacci, Shelton, Exline, & Bushman, 2004) into their standard civil juror questionnaire. Participants who scored highest in entitlement tended to award the highest damage awards; results were published in the ASTC online journal, *The Jury Expert*, which is available to the public.

A similar data-combining strategy could be applied to provide benchmarks or baselines for relevant legal issues. Using the change-of-venue example noted above,

judges do not have much to guide them in deciding whether to grant motions to change venue (Shahani, 2005). Even when survey data are presented, there is no existing standard that indicates how much prejudice is too much. Nietzel and Dillehay (1983) recommended that surveys be conducted even when a change of venue is not being sought, which would allow judges to compare the degree of prejudice in a contested case to that in the majority of other cases.

Even in the absence of such a database, consultants who have conducted change-of-venue surveys are collectively in a position to contribute to the scientific study of judicial decision making in change-of-venue cases. By combining findings from their surveys, they could provide insight regarding judicial decisions, answering such questions as: Is there a threshold level of case recognition that reliably predicts a decision to change venue, or do judges require that a certain percentage of respondents believe that the defendant is guilty before they will change venue? Are there other predictors, such as jurisdiction size or whether the judge is elected versus appointed?

Similar collaborative efforts might be used to contribute to research findings concerning jury selection in specific types of cases (as suggested by Lecci et al., 2008), or the circumstances under which a particular trial strategy is likely to be successful. In *Trial Consulting*, we described an initiative of ASTC's Research Committee, entitled *The Piggy Back Research Project* (Giewat, 2004). The project was a collaborative effort to gather data on important research questions, such as jurors' attitudes relevant to tort reform, and to share those data with the ASTC membership, clients, and the media. From 2003 to 2007, there were three *Piggy Back* projects (G. Giewat, personal communication, November 8, 2011), two involving consultants from multiple firms and one with consultants from just two firms. In one project, trial consultants from 12 firms embedded five items measuring tort reform attitudes in questionnaires for mock trials and focus groups (ASTC Research Committee, 2004). Combining forces allowed for a participant pool of nearly 1400 people from 27 states. Data analyses focused on demographic correlates of responses; results were shared with all ASTC members at the annual conference, and the complete data set was made available to participating firms.

An Unregulated Profession

Another important issue facing the trial consulting profession stems from the fact that there are no licensing, certification, or training requirements; virtually anyone can work as a trial consultant. As we discussed in *Trial Consulting*, the possible creation of certification requirements has been hashed and rehashed by the membership, always ending with the conclusion that such requirements are all but impossible to create for a group with such a diversity of background, training, and professional activities (Posey & Wrightsman, 2005). Is it reasonable to expect that the graphics expert obtain a social science Ph.D. or that the social scientist receive theatrical training? To require certification is to necessarily exclude some from

membership and to place limits on allowable practices. The profession has repeatedly concluded that it is prepared to do neither. As a consequence, however, the profession is left to struggle somewhat with its identity.

The Professional Code

One attempt to reduce the variance has been the development of the aforementioned *ASTC Professional Code* (ASTC, 2008). Justification for the existence of a set of guiding standards is provided by trial consultant Andrew Sheldon (2000), who describes the code as a means of defining the field, thus legitimizing trial consultants as professionals who deserve equal footing with those in other professions that are also regulated by ethical codes. As stated above, practice areas for which standards and guidelines currently exist include change-of-venue surveys, small group research (i.e., focus groups and mock trials), witness preparation, jury selection, and posttrial juror interviews. Identification of practice areas for which guidelines should be created is probably not based as much on the frequency with which members engage in the practice (most trial consultants do not conduct change-of-venue surveys) as on the ease with which guidelines can be developed for it. Therefore, practice guidelines will become increasingly difficult to develop as the practice areas become less clearly defined or even begin to defy acceptable standards. For example, one practice area listed in the ASTC Membership Directory is variously referred to as "attorney persuasiveness," "presentation strategy," and "communication strategy." Assuming that these refer roughly to the same activity, it may prove difficult for the membership to agree on the specific behaviors that consultants engage in while working with attorneys to increase persuasiveness, making the creation of guidelines an arduous task.

A more significant problem, however, is that the guidelines have no teeth. The organization's Board has made available on the ASTC Web site the procedure for filing a grievance against another member and the due process granted to the member who is the subject of the complaint (ASTC, 2013). In the end, the Grievance Committee has the authority to apply sanctions ranging from written admonishment to suspension or expulsion from ASTC. However, a member who is expelled from the organization can continue to practice as a trial consultant, along with the many trial consultants who have chosen not to join ASTC and who have never been bound by the organization's standards and guidelines. In short, there are currently no substantial professional costs associated with a violation of the code.

The Certification Question

At its June 2004 conference, the members of ASTC planned once again for possible debate on the merits of certification for trial consultants. Among the arguments in favor of certification are that it has the potential to increase the credibility of the profession and would prevent outside entities, such as state legislatures, from

attempting to regulate the profession by establishing their own guidelines for trial consultants (Lisko & Barker, 2004). Furthermore, a requirement of continuing education would allow for a clearer distinction between trial consultants who are and are not certified, and provide a concrete reason why clients should prefer to use consultants who are ASTC members (and therefore required to be certified). The primary arguments against certification are that any meaningful criteria would likely exclude some ASTC members, the debate regarding certification criteria would create a rift in the profession, and certification would be essentially meaningless in the absence of state licensure requirements (Feldhake & Keele, 2004).

In the end, the certification issue never made it out of the Certification Task Force Committee and was therefore not put to a vote of all ASTC members at the 2004 meeting. Even in the absence of certification, there seems to be no reason why the ASTC cannot include a minimum amount of continuing education as a criterion for membership, thus elevating what it means to be an ASTC member. The ASTC could then make it a priority to educate current and prospective clients about its code and continuing education requirements and to promote the value of membership status as an important credential.

Future Directions and Conclusions

This chapter has provided an overview of the field of trial consulting, with a specific examination of its most common practice areas. However, this is an evolving profession, and emerging practice areas include mock bench trials and arbitration panels, and the use of mock appellate judges for clients who are preparing to argue before an appeals court (K. Lisko, personal communication, October 13, 2003).

In addition to adding to the arsenal of consulting activities, the new generation of trial consultants is changing the way they do things. For example, the longstanding tendency for consultants to protect their personal trade secrets appears to be changing, as evidenced by the aforementioned *Piggy Back Research* initiative, through which consultants shared their research findings on similar topics. In addition, the trial consulting firm Jury Research Institute provides a link on its Web site to articles and publications on topics pertaining to pretrial preparation, the use of jury questionnaires, voir dire, and witness preparation. Most of these are written with civil defense lawyers as their intended audience, but their advice could also be used by other trial consultants who work on similar kinds of cases (Jury Research Institute, n.d.).

Perhaps the increased collaboration among trial consultants is due to the increased success of the field. Many consultants at least occasionally must turn away work, referring jobs to their colleagues, and often consultants in the smaller firms will invite a colleague to collaborate on a sizeable project. Increased availability of work renders less important the guarding of trade secrets, and increased collaboration renders it nearly impossible. This is ultimately a good thing; establishing best practices necessitates knowledge of the universe of practice options, and whenever a consultant learns a better way of doing something, the profession benefits from an improved reputation.

Another emerging trend is that consultants are becoming more specialized in their work (K. Lisko, personal communication, October 13, 2003). Although many consultants still advertise by practice area (e.g., indicating that they conduct mock trials, witness preparation, and jury selection), some are focusing their advertisements on case type. For example, on its Web site, the trial consulting firm R&D Strategic Solutions (n.d.) declares that it is “the only Trial Consultant group with a division specifically devoted to Medical Malpractice,” and a perusal of the content of the site reveals that the firm works primarily for the defense in such cases. Of course, such specialization allows consultants to develop expertise that sets them apart from those knowledgeable about civil litigation more generally.

In its 40 years of existence, the trial consulting profession has experienced enormous growth and change. It has evolved from a handful of social scientists doing mostly criminal defense work to an occupation claiming a diverse membership numbering in the hundreds and working primarily in the civil arena. Its members have been forced to cope with the growing pains that inevitably accompany such change, and the membership of the ASTC is to be commended for its conscientious efforts to provide guidance, innovation, and quality control through online publications, a listserve, annual conferences, and standards of professional conduct. There is great potential for trial consulting to make positive contributions to the legal system. Practice methods that are consistent with empirical research findings can be used to increase the credibility of an honest witness, improve information processing by jurors, and reduce the likelihood that juries will be selected on the basis of stereotyped beliefs. Continued and more regular information sharing among consultants, with judges and attorneys, and with the broader scientific community can lead to better practices and more just decisions. In short, if the profession focuses its efforts on cultivating practices with the greatest potential to promote justice, as well as on educating its members and its clients about those practices, it will achieve an identity in which its diverse membership will thrive.

References

American Society of Trial Consultants. (2008). *The professional code of the American Society of Trial Consultants.* Retrieved from http://www.astcweb.org/userfiles/file/Compiled%20Code%2010-08.pdf

American Society of Trial Consultants Research Committee. (2004, June). *ASTC Research Committee “Piggyback Project”: Part I.* Paper presented at the meeting of the American Society of Trial Consultants, Memphis, TN.

Asch, S. E. (1946). Forming impressions of personality. *Journal of Abnormal and Social Psychology, 41*, 258–290. doi:10.1037/h0055756.

Ball, D. (2002, June). *Story and structure for plaintiffs*. Paper presented at the meeting of the American Society of Trial Consultants, Westminster, CO.

Barnett, K. E. (1999). Letting focus groups work for you. *Trial, 35*, 74–75.

Boccaccini, G. T., Gordon, T., & Brodsky, S. L. (2005). Witness preparation training with real and simulated criminal defendants. *Behavioral Sciences & the Law, 23*, 659–687. doi:10.1002/bsl.655.

Boehm, V. (1968). Mr. Prejudice, Miss Sympathy, and the authoritarian personality: An application of psychological measuring techniques to the problem of jury bias. *Wisconsin Law Review, 1968*, 734–750.

Bothwell, R. K., & Jalil, M. (1992). The credibility of nervous witnesses. *Journal of Social Behavior & Personality, 7*, 581–586.

Bower, G. H. (1976). Experiments on story understanding and recall. *Quarterly Journal of Experimental Psychology, 28*, 511–534. doi:10.1080/14640747608400579.

Bradac, J. J., Hemphill, M. R., & Tardy, C. H. (1981). Language style on trial: Effects of "powerful" and "powerless" speech upon judgments of victims and villains. *Western Journal of Speech Communication, 45*, 327–341.

Brewer, W. F., & Nakamura, G. V. (1984). The nature and function of schema. In R. S. Wyer Jr. & T. K. Srull (Eds.), *Handbook of social cognition* (Vol. 1, pp. 119–160). Hillsdale, NJ: Erlbaum.

Broda-Bahm, K. (2011). Conduct a social media analysis on your potential jurors (but beware of false expectations of privacy). *Persuasive Litigator*. Retrieved from http://www.persuasivelitigator.com/2011/02/social-media-analysis.html

Brodsky, S. L., & Cannon, D. E. (2006). Ingratiation in the courtroom and in the voir dire process: When more is not better. *Law & Psychology Review, 30*, 103–118.

Brodsky, S. L., Hooper, N. E., Tipper, D. G., & Yates, S. B. (1999). Attorney invasion of witness space. *Law & Psychology Review, 23*, 49–68.

Campbell, W. K., Bonacci, A. M., Shelton, J., Exline, J. J., & Bushman, B. J. (2004). Psychological entitlement: Interpersonal consequences and validation of a self-report measure. *Journal of Personality Assessment, 83*, 29–45. doi:10.1207/s15327752jpa8301_04.

Carroll, L. M., Jalbert, A., Penney, A. M., Neath, I., Surprenant, A. M., & Tehan, G. (2010). Evidence for proactive interference in the focus of attention of working memory. *Canadian Journal of Experimental Psychology, 64*, 208–214. doi:10.1037/a0021011.

CBS News. (2012, April 11). Zimmerman is charged. *Timeline of Events.* Retrieved from http://www.cbsnews.com/8301-201_162-57446374/trayvon-martin-case-george-zimmerman-quiet-and-cooperative-back-in-fla-jail/

Chaiken, S., & Maheswaran, D. (1994). Heuristic processing can bias systematic processing: Effects of source credibility, argument ambiguity, and task importance on attitude judgment. *Journal of Personality and Social Psychology, 66*, 460–473. doi:10.1037/0022-3514.66.3.460.

Cole, A. H. (1999). From the president. *Court Call, 15*(2), 10.

Costantini, E., & King, J. (1980). The partial juror: Correlates and causes of prejudgment. *Law and Society Review, 15*, 9–40.

Cramer, R. J., Neal, T. S., & Brodsky, S. L. (2009). Self-efficacy and confidence: Theoretical distinctions and implications for trial consultation. *Consulting Psychology Journal: Practice and Research, 61*, 319–334. doi:10.1037/a0017310.

Crawford, R. J. (1989). *The persuasion edge*. Eau Claire, WI: Professional Education Systems.

Devine, D. J., Buddenbaum, J., Houp, S., Studebaker, N., & Stolle, D. P. (2009). Strength of evidence, extraevidentiary influence, and the liberation hypothesis: Data from the field. *Law and Human Behavior, 33*, 136–148. doi:10.1007/s10979-008-9144-x.

Diamond, S. S. (1995). Reference guide on survey research. In J. M. McLaughlin (Ed.), *Weinstein's evidence special supplement 1995: Reference manual on scientific evidence* (pp. 221–272). New York: Matthew and Bender.

Dolnik, L., Case, T. I., & Williams, K. D. (2003). Stealing thunder as a courtroom tactic revisited: Processes and boundaries. *Law and Human Behavior, 27*, 267–287. doi:10.1023/A:1023431823661.

Feldhake, R. J., & Keele, L. M. (2004). Or not to certify: Avoiding a distinction without a difference and a raft of practical problems. *Court Call, 20*.

Ferrara, M. L. (2010). The psychology of voir dire. *The Jury Expert, 22*(6), 32–41.

Frederick, J. T. (2011). Ten dynamite tips to improve your results from group voir dire. *The Jury Expert, 23*(2), 24–29.

Futterman, R. (2011). Playing the other side's hand: Strategic voir dire technique. *The Jury Expert, 23*(2), 29–32.

Genard, G. (2001a). How to create a powerful presence in the courtroom. *Court Call, 17*, 14–15.

Genard, G. (2001b). Speaking smart: Harnessing the power of your voice to convince others. *Court Call, 17*, 10.

Giewat, G. (2004). Research notes: See poster on Piggy Back Research at Memphis convention. *Court Call, 20*.

Giewat, G. (2011). Damage awards: Jurors' sense of entitlement as a predictor. *The Jury Expert, 23*(3), 24–26.

Grant, B. C. (1993). Focus groups versus mock trials: Which should you use? *Trial Diplomacy Journal, 16*, 15–22.

Greenbaum, T. L. (1998). *The handbook for focus group research* (2nd ed.). Thousand Oaks, CA: Sage.

Hans, V. P., & Vidmar, N. (1986). *Judging the jury*. New York: Plenum.

Harrison, C. (2011). Ten rules for great jury selection: With some lessons from Texas case law. *Defense Counsel Journal, 78*, 29–53.

Hass, R. G. (1981). Effects of source characteristics on the cognitive processing of persuasive messages and attitude change. In R. Petty, T. Ostrom, & T. Brock (Eds.), *Cognitive responses in persuasion* (pp. 141–172). Hillsdale, NJ: Erlbaum.

Hastie, R., Penrod, S. D., & Pennington, N. (1983). *Inside the jury*. Cambridge, MA: Harvard University Press.

Hoeschen, B. L. F. (2001). The e-alternative: Online mock juries offer cheap and fast opinions. *ABA Journal, 87*, 26.

Hope, L., Memon, A., & McGeorge, P. (2004). Understanding pretrial publicity: Predecisional distortion of evidence by mock jurors. *Journal of Experimental Psychology: Applied, 10*, 111–119. doi:10.1037/1076-898X.10.2.111.

Hsieh, S. (2001, February 5). Trial lawyers are cutting cost of focus groups via the Internet. *Lawyers Weekly USA*. Retrieved from http://www.lawyersweeklyusa.com

Imrich, D., Mullin, C., & Linz, D. (1995). Measuring the extent of pretrial publicity in major American newspapers: A content analysis. *Journal of Communication, 45*, 94–117. doi:10.1111/j.1460-2466.1995.tb00745.x.

James, K. (2002). The making of *What Can Lawyers Learn from Actors*: The journey from live workshop to video tape. *Court Call, 18*, 8–10.

Johnson, C., & Haney, C. (1994). Felony voir dire: An explanatory study of its content and effect. *Law and Human Behavior, 18*, 487–506. doi:10.1007/BF01499170.

Johnson, C., & Vinson, L. (1987). Damned if you do, damned if you don't: Status, powerful speech, and evaluations of female witnesses. *Women's Studies in Communication, 10*, 31–44.

Jones, S. E. (n.d.). *Witness preparation: Teaching lay witnesses to [sic] how to master the challenges of testifying in court.* Retrieved from http://www.juryresearchinstitute.com/articles/finalwitnessprep/page-2.php

Jury Research Institute. (n.d.). Retrieved from http://www.juryresearchinstitute.com/articles/articlesandpublications/

Klein, R. B. (1993). Winning cases with body language. *Trial, 29*, 56–60.

Klein, S. R., & Kochman, R. W. (1998). How to prepare for and conduct an effective direct examination. *New Jersey Lawyer, 194*, 24–27.

Koch, C. S. (2001). Improving the odds: Using mock trials to hone strategies. *The Trial Lawyer, 24*, 116–122.

Krauss, E., & Bonora, B. (Eds.). (1983). *Jurywork: Systematic techniques* (2nd ed.). St. Paul, MN: West.

Kressel, N. J., & Kressel, D. F. (2002). *Stack and sway*. Boulder, CO: Westview Press.

Krueger, R. A. (1998). *Analyzing and reporting focus group results*. Thousand Oaks, CA: Sage.

Langer, E. J., & Abelson, R. P. (1974). A patient by any other name…: Clinical group differences in labeling bias. *Journal of Consulting and Clinical Psychology, 42*, 4–9. doi:10.1037/h0036054.

Lecci, L. B., & Myers, B. (2009). Predicting guilt judgments and verdict change using a measure of pretrial bias in a videotaped mock trial with deliberating jurors. *Psychology, Crime & Law, 15*, 619–634. doi:10.1080/10683160802477757.

Lecci, L., Snowden, J., & Morris, D. (2008). Using social science research to inform and evaluate the contributions of trial consultants in the voir dire. *The Journal of Forensic Psychology Practice, 4*, 67–78.
LeGrande, N., & Mierau, K. E. (2004). Witness preparation and the trial consulting industry. *Georgetown Journal of Legal Ethics, 17*, 947–960.
Leiberman, J. D. (2011). The utility of scientific jury selection: Still murky after 30 years. *Current Directions in Psychological Science, 20*, 48–52. doi:10.1177/0963721410396628.
Linz, D. G., & Penrod, S. (1984). Increasing attorney persuasiveness in the courtroom. *Law and Psychology Review, 8*, 1–47.
Linz, D., Penrod, S., & McDonald, E. (1986). Attorney communication and impression making in the courtroom: Views from the bench. *Law and Human Behavior, 10*, 281–302. doi:10.1007/BF01047342.
Lisko, K. O. (1992). *Juror perceptions of witness credibility as a function of linguistic and nonverbal power*. Unpublished doctoral dissertation, Department of Communication Studies, University of Kansas, Lawrence, KS.
Lisko, K., & Barker, S. (2004). To certify: Increasing trial consultant competency and enhancing professional credibility. *Court Call, 20*.
Mackie, D. M., Worth, L. T., & Asuncion, A. G. (1990). Processing of persuasive in-group messages. *Journal of Personality and Social Psychology, 58*, 812–822. doi:10.1037/0022-3514.58.5.812.
Matheo, L., & DeCaro, L. L. (2001). 11 ways to improve courtroom performance. *The Brief, 31*, 58–66.
Matlon, R. J. (1988). *Communication in the legal process*. New York: Holt, Rinehart, & Winston.
Matlon, R. J. (1998). The history of the American Society of Trial Consultants: A personal look. *Court Call, 14*(1), 1–4.
McCullough, G. W. (1994, March). *Juror decisions as a function of linguistic structure of the opening statement and closing argument*. Paper presented at the meeting of the American Psychology-Law Society, Santa Fe, NM.
McElhaney, J. W. (2000). From start to finish. *ABA Journal, 86*, 50–56.
Millward, L. J. (2000). Focus groups. In G. M. Breakwell, S. Hammond, & C. Fife-Shaw (Eds.), *Research methods in psychology* (2nd ed., pp. 303–324). London: Sage.
Moran, G., & Cutler, B. L. (1991). The prejudicial impact of pretrial publicity. *Journal of Applied Social Psychology, 21*, 345–367. doi:10.1111/j.1559-1816.1991.tb00524.x.
Moran, G., Cutler, B. L., & DeLisa, A. (1994). Attitudes toward tort reform, scientific jury selection, and juror bias: Verdict inclination in criminal and civil trials. *Law and Psychology Review, 18*, 309–328.
Morgan, F. W. (1990). Judicial standards for survey research: An update and guidelines. *Journal of Marketing, 54*, 59–70. doi:10.2307/1252173.
Mullins, S. D. (2000). Focus groups for small cases. *The Trial Lawyer, 23*, 433–436.
New, C., Schwartz, S., & Giewat, G. (2005, June). *Lay perceptions of witness preparation*. Presentation at the Annual Conference of the American Society of Trial Consultants, Philadelphia, PA.
New, C. C., Schwartz, S., & Giewat, G. (2006). Witness preparation by trial consultants: Competitive advantage or invitation to discoverability. *Washington State Bar Association, 60*(5), 22–25.
Nietzel, M. T., & Dillehay, R. C. (1983). Psychologists as consultants for changes of venue: The use of public opinion surveys. *Law and Human Behavior, 7*, 309–335. doi:10.1007/BF01044735.
Nietzel, M. T., & Dillehay, R. C. (1986). *Psychological consultation in the courtroom*. New York: Pergamon Press.
O'Barr, W. M. (1982). *Linguistic evidence: Language, power, and strategy in the courtroom*. San Diego, CA: Academic.
Perry, R., & Weimann-Saks, D. (2011). Stealing sunshine. *Law and Contemporary Problems, 74*(2), 33–46.
Peskin, S. H. (1980). Nonverbal communication in the courtroom. *Trial Diplomacy Journal, 3*, 4–5.

Posey, A. J., & Dahl, L. M. (2002). Beyond pretrial publicity: Legal and ethical issues associated with change of venue surveys. *Law and Human Behavior, 26*, 107–125. doi:10.1023/A:1013833325829.

Posey, A. J., & Wrightsman, L. S. (2004). Objectives of focus groups versus mock trials: Is there consensus? Does it matter? *Court Call, 20*.

Posey, A. J., & Wrightsman, L. S. (2005). *Trial consulting*. New York: Oxford University Press.

Prosise, T. O., & New, C. C. (2007). Ten key questions: Evaluating the quality of mock trial research. *For the Defense, 49*(8)*,* 10–13, 82.

R&D Strategic Solutions. (n.d.). *Trial consulting services: Medical malpractice trial consulting*. Retrieved from http://www.rd-ss.com/rd_services_medical.html

Rieke, R. D., & Stutman, R. K. (1990). *Communication in legal advocacy*. Columbia, SC: University of South Carolina Press.

Ruva, C. L., & McEvoy, C. (2008). Negative and positive pretrial publicity affect juror memory and decision making. *Journal of Experimental Psychology: Applied, 14*, 226–235. doi:10.1037/1076-898X.14.3.226.

Saks, M. J. (1977). *Jury verdicts: The role of group size and social decision rule*. Lexington, MA: Lexington Books.

Schuetz, J., & Snedaker, K. H. (1988). *Communication and litigation: Case studies of famous trials*. Carbondale, IL: Southern Illinois University Press.

Schulman, J., Shaver, P., Colman, R., Emrich, B., & Christie, R. (1987). Recipe for a jury. In L. S. Wrightsman, S. M. Kassin, & C. Willis (Eds.), *In the jury box: Controversies in the courtroom* (pp. 13–47). Newbury Park, CA: Sage.

Seltzer, R. (2006). Scientific jury selection: Does it work? *Journal of Applied Social Psychology, 36*, 2417–2435. doi:10.1111/j.0021-9029.2006.00110.x.

Shahani, V. R. (2005). Change the motion, not the venue: A critical look at the change of venue motion. *American Criminal Law Review, 42*, 93–120.

Sheldon, A. M. (2000). Standards make a profession. *Court Call, 3*.

Sheldon, A. (2004). Give it away! *Court Call, 20*.

Singer, A. (1996). Focusing on jury focus groups. *Trial Diplomacy Journal, 19*, 321–330.

Spiecker, S. C., & Worthington, D. L. (2003). The influence of opening statement/closing argument organizational strategy on juror verdict and damage awards. *Law and Human Behavior, 27*, 437–456. doi:10.1023/A:1024041201605.

Sporer, S. L., & Schwandt, B. (2007). Moderators of nonverbal indicators of deception: A meta-analytic synthesis. *Psychology, Public Policy, and Law, 13*, 1–34. doi:10.1037/1076-8971.13.1.1.

Steblay, N. M., Besirevic, J., Fulero, S. M., & Jimenez-Lorente, B. (1999). The effects of pretrial publicity on juror verdicts: A meta-analytic review. *Law and Human Behavior, 23*, 219–235. doi:10.1023/A:1022325019080.

Sweet, C. (2000). Anatomy of an online focus group. *Court Call, 1–2*, 4–5.

Taylor, S. E., & Crocker, J. (1981). Schematic bases of social information processing. In E. T. Higgins, C. P. Herman, & M. P. Zanna (Eds.), *Social cognition: The Ontario Symposium* (Vol. 1, pp. 89–134). Hillsdale, NJ: Erlbaum.

Twiggs, H. F. (1994). Do-it-yourself focus groups: Big benefits, modest cost. *Trial, 30*, 42–47.

Underwood, B. J. (1957). Interference and forgetting. *Psychological Review, 64*, 49–60. doi:10.1037/h0044616.

Vrij, A. (2008). Nonverbal dominance versus verbal accuracy in lie detection: A plea to change police practice. *Criminal Justice and Behavior, 35*, 1323–1336. doi:10.1177/0093854808321530.

Williams, K. D., Bourgeois, M. J., & Croyle, R. T. (1993). The effects of stealing thunder in criminal and civil trials. *Law and Human Behavior, 17*, 597–609. doi:10.1007/BF01044684.

Wrightsman, L. S. (2001). *Forensic psychology*. Belmont, CA: Wadsworth.

Undergraduate Education in Law and Psychology

Edie Greene and Kirk Heilbrun

In 1981, Larry Wrightsman received a grant from the Exxon Foundation that relieved him of his teaching and administrative responsibilities for a year and enabled him to do two things that shaped undergraduate education in law and psychology. He developed a new undergraduate course in that field and sat in on classes at the University of Kansas Law School. Undoubtedly, the latter informed the former, and these two experiences jointly contributed to the first edition of Wrightsman's seminal textbook, *Psychology and the Legal System*, published in 1987.

Wrightsman was not the first to author a textbook in psychology and law. That distinction belongs to Katherine Ellison and Robert Buckhout, coauthors of *Psychology and Criminal Justice*, published in 1981. Nor is he the only person to write a well-received textbook in this field. Other praiseworthy examples are *Psychology and Law* by Curt Bartol and Anne Bartol (third edition, 2003); *Forensic and Legal Psychology* by Mark Costanzo and Daniel Krauss (2012); *Forensic Psychologyand* Law by Ronald Roesch, Patricia Zapf, and Stephen Hart (2010); and Wrightsman's text with coauthor Sol Fulero, entitled *Forensic Psychology* (third edition, 2009). But *Psychology and the Legal System* is the longest lived, best-selling, and arguably most influential text read by students in law and psychology courses across the country. We have coauthored recent editions of the textbook; the eighth edition was published in 2014.

We use this chapter to consider Larry Wrightsman's considerable contributions to undergraduate education in law and psychology. We trace growth in the field that has occurred contemporaneously with subsequent editions of Wrightsman's text.

E. Greene (✉)
Department of Psychology, University of Colorado Colorado Springs,
Colorado Springs, CO, USA
e-mail: egreene@uccs.edu

K. Heilbrun
Drexel University, Philadelphia, PA, USA

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_10

We then describe the important organizing framework featured in every edition of *Psychology and the Legal System*, namely the broad psychological and philosophical issues that Wrightsman termed "dilemmas" at the intersection of the two fields—and we drill down on two of them: rights of individuals versus the common good, and equality versus discretion. We illustrate the evolution of these two themes and provide exemplars from various editions of the textbook. In particular, we comment on the psychological science, case law, and legal policies relevant to those issues. One of our objectives is to use Wrightsman's significant contribution as a vehicle for examining ongoing and vibrant debates in the field of psychology and law. Another is to illustrate how the two disciplines have independently and jointly examined topics of broad societal concern and provided complementary perspectives on their resolution.

Growth of a Discipline

In 1988, Murray Levine, a contemporary of Wrightsman's and prominent figure in the nascent field of psychology and law, reviewed the first edition of *Psychology and the Legal System* (Levine, 1988). He stated that a discipline comes of age when textbooks that convey the field's collected wisdom become available, and he correctly forecast that publication of Wrightsman's text would stimulate more courses in psychology and law at the undergraduate level. Indeed, *Psychology and the Legal System* has played an integral part in the discipline's development by providing undergraduate students, some of whom go on to be productive and prominent scholars and practitioners, with their first exposure to the field. Not only has the textbook been sustained through eight editions but sales have increased with each subsequent edition. Though we lack data on the number of undergraduate offerings and textbook adoptions in the early years of the field's development, we know that by the mid-1990s, more than 200 colleges and universities were offering courses in legal psychology for which Wrightsman's text had been adopted (Fulero et al., 1999). A decade later, the sixth edition of *Psychology and the Legal System*, published in 2007, sold more than 13,000 copies. As textbook publishing moves into the digital marketplace, traditional sales will be displaced by digital books and individual chapter downloads from publishers' Web sites, and interactive course Web sites into which textbooks will be fully integrated. The textbook, now entitled "*Wrightsman's Psychology and the Legal System*," will continue its position of prominence and appear on such a platform (http://www.cengagesites.com/academic/?site=5232) in 2014 (Tim Matray, personal communication, November 5, 2012).

Looking beyond Wrightsman's text, another way to track the growth of the field is to ask whether an undergraduate survey course is being offered in the top universities and colleges in the country. In 1999, Fulero et al. determined that among universities whose psychology departments had a doctoral program ranked among the top 25 in the USA, 60 % listed at least one formal undergraduate course in psychology and law and 16 % offered more than one such course. Almost all of these

departments also offered other courses that touched on legal issues, including those that focused on crime, law, legal policy, equity, or dispute resolution. At the time, there were fewer offerings in psychology and law at highly ranked liberal arts colleges across the country (i.e., only 2 of the 10 schools ranked highest by *U.S. News and World Report* included a course in the undergraduate curriculum), perhaps because no one among the faculty at these schools was qualified or available to teach such a course.

We recently updated these figures and determined that 52 % of the 25 highest ranked departments for graduate study in psychology currently offer an undergraduate course in psychology and law and 25 % offer at least two courses. (Harvard University takes top honors in offering several, including, in addition to "Law and Psychology": "Free will, responsibility and law"; "The insanity defense"; "Censorship of obscene, blasphemous, incendiary materials: Legal, ethical, and policy issues"; and "Psychopaths and psychopathology: Legal and psychological issues.") Course offerings at the ten highest ranked liberal arts colleges are still few and far between, although undergraduates at Claremont McKenna College are able to take both "Psychology and law" and "Social psychology and the legal system."

We suspect that even in the absence of dedicated courses, large numbers of undergraduates are exposed to topics in psychology and law through other psychology courses. As an example, social psychology courses often include coverage of aggression and violence, prejudice and stereotyping that can lead to hate crimes, deception detection, and juror and jury decision making. The topics of eyewitness and false memory are common ingredients of coursework in cognitive psychology. It is routine to teach developmental and clinical material that is important in various kinds of forensic evaluation. For example, courses on psychological assessment may include topics such as malingering and defensiveness. Other questions such as why defendants waive *Miranda* rights or provide false confessions are among those that may be covered in psychology courses which include some focus on criminal behavior.

Another measure of the state of undergraduate education in psychology and law comes indirectly from the burgeoning numbers of students pursuing graduate study in the field. The Web site of the American Psychology-Law Society (www.ap-ls.org) lists 20 universities that offer Ph.D.s in psychology and law, 6 that offer Psy.D. degrees, 10 that feature joint J.D./Ph.D. programs, and 19 that offer M.A. degrees. The typical applicant to these programs has been exposed to some coursework in psychology and law at the undergraduate level, has gleaned hands-on experience by working as an undergraduate research assistant, and may have volunteered in a community setting with a connection to the legal system (e.g., a residential treatment facility, court-annexed program, or domestic violence shelter). The American Psychology-Law Society now sponsors an award for the best undergraduate paper in psychology and law, and its Web site describes resources and techniques for teaching undergraduates—both indicia of the important role of undergraduate education in the discipline. Some portion of this vitality stems from the fact that instructors have had access to Wrightsman's trusted and balanced texts for 25 years and have used them to introduce thousands of undergraduate students to the discipline.

Wrightsman's Dilemmas Serve as an Organizing Framework

Professor Wrightsman's distinctive organizing framework appeared in the first edition of *Psychology and the Legal System* and has survived through the seven editions that followed. Included in the framework are four psychological and philosophical themes that arise at the intersection of the two fields. These themes unify many of the research findings, policy decisions, and judicial holdings that are detailed in the texts. Wrightsman termed them "dilemmas." They include (1) discovering the truth versus resolving conflicts; (2) science versus the law as a source of decisions; (3) the rights of individuals versus the common good; and (4) equality versus discretion. According to Kipling Williams, who reviewed the second edition of *Psychology and the Legal System* (published in 1991), "[t]he dilemmas are thorny and intriguing and, as a group, offer a coherent theme that nicely envelopes many issues throughout the text" (Williams, 1992, p. 302). We explore these four dilemmas in this chapter, including both the psychological and legal issues they raise. This exploration provides the occasional opportunity to consider how the evidence and thinking regarding these dilemmas has changed over the course of 25 years and eight editions of the text.

Discovering the Truth Versus Resolving Conflicts

Why do individuals, institutions, and organizations rely on a legal system to handle disagreements and disputes they cannot resolve for themselves? What are their goals and objectives? And what principle should direct those resolutions: a search for the truth or an attempt to resolve irreconcilable differences? Naïve observers of the legal system may assume that its purpose is to determine the truth underlying a factual or philosophical dispute. But as Wrightsman and subsequent authors have pointed out, the truth is subjective and elusive, and subjectivity and ambiguity are likely to be a cause of the dispute in the first place. Had the parties been able to reconcile themselves to one version of the "truth," there would have been no dispute. More seasoned observers of the legal process understand that an important objective is to provide social stability by resolving conflicts. This perspective is embodied in the words of Supreme Court Justice Louis Brandeis, who once wrote that "it is more important that the applicable rule of law be settled than [that] it be settled right" (*Burnet v. Coronado Oil and Gas Co*, 1932, p. 447).

Discussion in *Psychology and the Legal System* of the preference for dispute resolution at the sake of discerning an illusory truth leads directly to coverage of the adversary system and the associated incentives for advocates to uncover and present all information favorable to their side of a dispute. It provides an opportunity to consider notions of, and psychological research findings related to, both procedural justice and restorative justice, a novel perspective on dispute resolution. It explains why plea bargaining and settlement negotiations are mainstays of our legal system.

Coverage of these issues allows an assessment of bargaining strategies, satisficing, the role of remorse, efficiency concerns, and the social science findings relevant to those topics.

Science Versus the Law as a Source of Decisions

Turning to another dilemma, one can ask whether scientific research findings or legal precedents provide the more satisfying and defensible source of knowledge for making decisions about important societal concerns. In reality, the options should not be drawn quite that starkly because legislators, policy makers, and judges sometimes—though less often than psychologists might wish—consider findings and recommendations of psychological scientists and practitioners in formulating their decisions. But the options associated with this dilemma present a number of sharp contrasts between the two disciplines. Wrightsman and the authors of more recent editions of *Psychology and the Legal System* outline these contrasts in the introductory chapter of the text and refer to them again at various points in the books.

One obvious distinction is that psychology, as an empirical science based on experimentation and observation, deals in probabilistic information whereas the law, reliant upon the principle of *stare decisis* and analyses of how prior judgments inform later decisions, uses absolutes. As a result of these different emphases, the law sometimes asks questions of psychologists that they are ill equipped to answer. For example, in cases where there is concern about a defendant's future risk of harming others, lawyers, judges, probation officers, or parole boards may need to make an either/or determination on some aspect of this issue that will inform decisions about treatment, incarceration, and release. Not infrequently, psychologists are asked to weigh in on these choices. But the need for an absolute, either/or response makes many psychologists uncomfortable, and some are adamant that their skills do not permit such a conclusion. Psychologists prefer to deal in likelihoods and probabilities. When students understand these differences, they are better able to evaluate the contributions and limitations of psychologists who conduct assessments in forensic settings and who share their findings with courts and boards.

The Rights of Individuals Versus the Common Good

Identifying this first of the two major dilemmas, Wrightsman wrote in his first edition that the USA is one of the most individualistic societies in the world. Liberty is identified as a core value in the Declaration of Independence, and embedded in the Constitution and Bill of Rights. At the same time, however, citizens value public safety. In addition, there is a cost to society that would result from allowing people unlimited freedom to engage in risky behavior. Whether the harm would result to other citizens or to the risk takers who might harm themselves, the consequences to

society could be both frightening and unaffordable. So the conflict between the rights of the individual to behave as he or she chooses versus the needs of our citizens to be safe and free from unnecessary costs constitutes a difficult and ongoing tension.

Wrightsman cited several examples of regulations or policy decisions that illustrate this conflict. Why do we require the use of seat belts for those who drive cars? Why do a number of states prohibit first cousins from marrying? Why would a school prohibit a student whose sister was diagnosed with the AIDS virus from attending school? These three questions were used in the first edition of *Psychology and the Legal System* to illustrate the core conflict between individual rights versus the common good.

An analysis of each example begins with the individual rights that are involved. The right to choose how to behave may seem straightforward when it does not involve the potential to harm others. So the example of seat belts, for instance, is less complex than the question of whether first cousins should be allowed to marry. In the latter instance, there is a risk of having children who would be affected by a genetic disorder resulting from two recessive parental genes, which related individuals are more likely to share. It is also less complex than the question of whether a child who may transmit a life-threatening virus should be allowed to attend school with other children and potentially place them at risk. (Knowledge about how AIDS is transmitted, as well as how to intervene effectively in order to contain the virus, has increased considerably since the first edition was published in 1987.)

But the example of seat belts contains the risk of potential harm to self. Those who do not use seat belts when driving are at greater risk for death or serious injury in an accident. Costs to society from such accidents can include lost wages, higher insurance premiums, and disability payments to the injured individual or that person's dependents. The good of the larger society, in other words, can be adversely affected even by behavior that risks harming the individual actor but no other citizens.

U.S. Supreme Court Decisions Concerning Individual Rights and the Common Good

The emphasis on the rights of individuals versus the common good may be seen in two broad themes characterizing the decisions of the United States Supreme Court in the area of criminal justice. During the tenure of Earl Warren as Chief Justice (1953–1969), the Court's decision making had a noteworthy "due process" flavor; the rights of the accused were, in many respects, valued more than the enforcement of laws with flawed due process. For example, the Court held in *Gideon v. Wainwright* (1963) that states must provide indigent defendants with a defense attorney at state expense. This decision meant that no criminal defendants would lack an attorney to represent them. In one of the most famous cases in American criminal jurisprudence, the Court also held, in *Miranda v. Arizona* (1966), that defendants in custody must be informed of their Fifth and Sixth Amendment rights before police can question them and use their responses as incriminating evidence.

Following the retirement of Chief Justice Warren in 1969, President Nixon nominated Warren Burger as the next Chief Justice. This began an era in which, as Wrightsman described in his first edition, the priority on individual rights was superseded by an emphasis on the rights of victims, which he termed "crime control." In retrospect, from our current perspective in 2015, it is probably more accurate to say that the Burger Court shifted from a clear emphasis on individual rights under Warren to a greater balance between individual rights and crime control. Certainly many of the Burger Court's decisions reflected conclusions that seem more consistent with crime control. Requiring drivers at an accident scene to provide personal information did not violate the Fifth Amendment right to avoid self incrimination (*California v. Byers*, 1971), nor did evidence that an individual refused a field sobriety test (*South Dakota v. Neville*, 1983). Unanimity was not required for a state jury to convict (*Apodaca v. Oregon*, 1972). States could ban sexual images of minors even when they did not meet obscenity standards (*New York v. Ferber*, 1982). Government agent involvement in a criminal conspiracy did not constitute entrapment (*U.S. v. Russell*, 1973). Prosecutors could threaten criminal defendants with even more serious charges in the attempt to persuade them to plead guilty (*Borderkircher v. Hayes*, 1978). A verdict of Not Guilty by Reason of Insanity created a rebuttable presumption of ongoing dangerousness sufficient to justify continued involuntary hospitalization (*Jones v. United States*, 1983). Capital punishment was constitutional if the sentencing decision was made in consideration of evidence about the specific defendant, rather than automatically assigned based upon conviction for a certain kind of offense (*Gregg v. Georgia*, 1976; *Woodson v. North Carolina*, 1976). Each of these decisions could be fairly described as prioritizing public safety, victims' rights, and crime control over the rights of individual defendants. Each of them was also made prior to the publication of the first edition of *Psychology and the Legal System*, allowing Wrightsman to describe them in detail as representative of the era in which public safety and victims' rights were prioritized.

Other decisions made by the United States Supreme Court during the Burger era, however, demonstrated that Wrightsman's hypothesized conflict between crime control and individual rights had not shifted entirely toward the former. Capital punishment was deemed cruel and unusual when administered as an automatic sentence associated with a given kind of offense (*Furman v. Georgia*, 1972); it was another 4 years before the Court held (under *Gregg* and *Woodson*) that capital punishment assigned through an individualized consideration of the convicted defendant did pass Constitutional muster. In a subsequent series of decisions, the Court further narrowed the applicability of the death penalty. Capital punishment for the offense of rape was deemed excessive and, hence, cruel and unusual (*Coker v. Georgia*, 1977). The Eighth Amendment requires that applicable mitigating evidence be presented at capital sentencing (*Lockett v. Ohio*, 1978). Information obtained for another purpose (in this case, an evaluation of the defendant's competence to stand trial), for which notification of Fifth and Sixth Amendment protections had not been provided to the defendant, was deemed inadmissible at capital sentencing (*Estelle v. Smith*, 1981). It is noteworthy that each of these decisions

was associated with capital punishment. One might wonder whether this kind of sentence constituted the exception to Wrightsman's broader hypothesis that the Court, and our larger society, was more public safety-oriented during this period.

The Court did issue some other decisions that were more consistent with a defendant rights perspective. Juveniles charged with adult offenses could be convicted only if each element of the offense was proven beyond a reasonable doubt (*In re Winship*, 1970). Defendants could not be confined indefinitely as incompetent to stand trial (*Jackson v. Indiana*, 1972), and were also entitled to wear street clothing rather than jail garb during a trial (*Doyle v. Ohio*, 1976), have access to counsel during police interrogation after indictment (*Brewer v. Williams*, 1977) and at a lineup after indictment (*Moore v. Illinois*, 1977), and remain silent following the administration of *Miranda* warnings and not have this silence used as evidence against them (*Doyle v. Ohio*, 1976). Prosecutors could not use peremptory challenges to exclude potential jurors based on race (*Batson v. Kentucky*, 1986). However, these may be seen as nuances within the broader trend that Wrightsman outlined in the first edition. The prevailing emphasis during the Warren years was defendant rights; this shifted significantly during the Burger years. But this reminds us that Wrightsman's identification of these broad trends was done with full awareness that there were exceptions to the trends even within those eras.

The trend in the direction of greater emphasis on crime control continued in the Supreme Court decisions following the 1986 appointment of William Rehnquist as Chief Justice, a position he kept until his death in 2005. As states such as California passed sentencing laws mandating life incarceration for the third felony conviction ("three strikes" laws), the Rehnquist Court upheld the constitutional basis of such laws (*Ewing v. California*, 2003; *Lockyer v. Andrade*, 2003). The Court also restricted the appellate rights of death-sentenced individuals who exhausted their appeals and then subsequently produced new evidence (*Herrera v. Collins*, 1993), and more generally upheld the constitutionality of the death penalty (*McCleskey v. Kemp*, 1987), discussed in the second and third editions of *Psychology and the Legal System*. The Rehnquist Court did have the opportunity to limit the *Miranda* rights notification process, but instead held that the current process was appropriate (*Dickerson v. United States*, 2000).

It might be assumed that the Supreme Court, under Chief Justice Roberts (2005-present), might continue the trend of emphasizing crime control over the rights of individual defendants. The reality, as judged by the Court's decisions during the last 10 years, has been somewhat more complex—just as we saw exceptions to the broad distinction Wrightsman identified in his first edition between defendant rights and public safety, there continue to be decisions which remind us that such an observation should be used in combination with a nuanced approach to legal decision making. To be sure, the Court has decided the occasional case in a direction that clearly prioritizes crime control. For example, in *Leal Garcia v. Texas* (2011), the Court held that a stay of execution need not be issued in the case of a Mexican citizen convicted of a capital offense in the USA when that citizen was never advised of his Vienna Convention right to contact his consulate. The International Court of Justice had found that the USA had violated this right by failing to inform Mr. Garcia that he could, under international law, contact his consulate.

However, the Court also issued a series of decisions about adolescent offenders holding that they may not, due to developmental immaturity, receive the same criminal sanctions as adults even when committing comparable offenses. In *Roper v. Simmons* (2005), the Court held that adolescents younger than 18 who commit capital offenses are not eligible for the death penalty. In the case of *Graham v. Florida* (2010), the court extended the Roper decision to indicate that adolescents who committed non-homicide offenses could not receive a sentence of life incarceration without the possibility of parole. Finally, the Court addressed the question of whether adolescents who commit homicide offenses could receive an automatic sentence of life without parole upon conviction, deciding in *Miller v. Alabama* (2012; described in the eighth edition of the text) that such a sentence could not be assigned automatically for a homicide conviction and must (if assigned) be based on an individualized determination of the youth's culpability and other considerations. Each of these decisions was substantially influenced by the growing body of scientific evidence documenting the differences between adolescence and adulthood in relevant areas such as impulse control, peer influence, perspective-taking, and sense of time (Scott & Steinberg, 2008; Steinberg, 2009). Wrightsman's emphasis on scientific evidence as an important contributor to legal decision making, clearly visible throughout all five editions of *Psychology and the Legal System* which he wrote, was quite apparent in the Court's decisions in these cases involving adolescence.

Identifying the conflict between individual rights and crime control provided a useful lens through which to consider the law and our larger society. We now turn to the second major conflict identified by Wrightsman: equality versus discretion.

Equality Versus Discretion

Balancing the desire for equal treatment under the law and acknowledgment that every case presents unique circumstances relevant to fair disposition creates tension and conflicts. These two priorities—equality and discretion—are both desirable and often mutually exclusive. They form the core concern of the second of Wrightsman's major dilemmas: since one cannot simultaneously maximize both equal treatment and individualized justice, which should prevail and when? What are the broader consequences, in terms of fairness and *perceptions of* fairness, for preferring one priority over the other?

The first edition of *Psychology and the Legal System* described situations in which equality has prevailed—when rich and powerful people are treated harshly by the legal system despite their obvious resources, for example. It detailed the cases of Patty Hearst, heiress to a publishing fortune, who was convicted and imprisoned for armed robbery of a bank, and Vice-President Spiro Agnew, who was forced to resign after pleading no contest to a charge of tax fraud. Since publication of the first edition, many governmental and corporate bigwigs have been caught up in scandals of their own making and in the resultant legal consequences, providing an ongoing source of examples for the textbook. These cases show that regardless of

status, wealth, or standing, all people are expected to abide by the same laws and, if they violate those laws, be subjected to the same penalties and loss of freedoms as the average citizen.

To illustrate the importance of discretion, the first edition of the text asked students to consider two seemingly similar cases that involved murders of husbands at the hands of their wives. In both instances, the women had been long-suffering victims of domestic violence who had sustained injuries serious enough to require hospitalizations. They both killed their husbands as they slept. Both women claimed self-defense. (In cases involving domestic violence, the requirement that the act of self-defense must be proportionate to an immediate threat has occasionally been modified to encompass a victim's subjective belief that she was in imminent danger of death or great bodily harm [Slobogin, 2010].) But here the stories diverge. Joan Hodges, a 51-year-old mother and grandmother who shot her husband of 33 years as he lay sleeping, was convicted of voluntary manslaughter. By contrast, Francine Hughes, a 30-year old mother of three, who doused her husband's bed with gasoline and ignited it, killing him and burning down her house, and who drove to the county jail to turn herself in, was acquitted. (The latter formed the background for the movie *The Burning Bed*, starring Farrah Fawcett as Francine Hughes.)

Wrightsman used these examples to underscore the fact that two equally desirable values—equality and discretion—invite comparisons and contrasts and reveal contradictions and inconsistencies. The domestic violence cases which seem similar on the surface may have had distinctive circumstances that allowed jurors, in their discretion, to reach different verdicts. Wrightsman suggested that one may have been a desperate response to 20 years of physical abuse while the other may have been an impulsive quest for freedom from a contractual obligation. Regardless of the *precise* reasons for the apparently disparate verdicts, they illustrate how the circumstances of each case can call for particularized justice and how, in this equation, equality as a priority is given less attention.

In addition to their discussion of jurors' discretion, the texts ponder the value of discretion manifest in the actions of other legal players. Discretion is vested in police officers deciding who to stop, frisk, and arrest, and in prosecutors opting to charge some arrestees and not others, choosing which charges to file against those who are indicted, and also deciding which charges to dismiss. Prison officials have discretionary authority to award or deny "good time," grant furloughs, and move prisoners into and out of treatment programs. Probation officers make discretionary sentencing recommendations in presentence investigative reports and decisions concerning probationers' actions, and parole boards decide which inmates to release and under what conditions. Governors are granted discretion in the decision whether to commute a death sentence to a life term.

The impact of discretionary judgment is perhaps most apparent in the sentences imposed by judges on convicted offenders, and the topic of sentencing disparity has occupied a central focus in coverage of the equality/discretion dilemma through subsequent editions of *Psychology and the Legal System*. In part, this choice reflects the availability of social science data: because this process is highly visible and results are recorded in accessible ways, researchers have examined sentencing

patterns over time and across jurisdiction to determine what factors—legal, psychological, and philosophical—drive judges' choices.

Sentencing options include probation, fines, suspended sentences, restitution, community service, and incarceration, and the harshness of those sentences has varied among locations, over time, and across different judges. Because the majority of crimes are adjudicated in state courts, sentencing options are typically determined by state legislatures and arguably reflect the sentiment of the populace. As a result, offenders sentenced in a part of the country with more lax ideologies will receive milder sanctions than offenders who commit the identical crime but are sentenced in states and regions with stricter laws.

The first edition of *Psychology and the Legal System* illustrated this disparity in the sentences imposed on Vietnam War protestors who resisted the draft in the late 1960s and early 1970s. Penalties at the time included prison time and probation. In Oregon, of 33 convicted draft evaders, more than half were put on probation and none received a prison sentence of more than 3 years. By contrast, in the southern district of Texas, "a region that bristled with strong patriotic sentiments" (p. 16), none of 16 convicted draft evaders were given probation and 14 received the maximum sentence allowed by law, 5 years imprisonment. In the same part of the country and during the same period, all convicted draft dodgers in Mississippi were given the maximum of 5 years.

Disparity in judicial sentencing has also waxed and waned over time, reflecting changing societal preferences for treating criminals who committed similar crimes in equivalent ways and, alternatively, for recognizing the impact of individual and group characteristics and the need for personalized sanctions. As priorities have changed, sentencing schemes have also changed and now many variants in sentencing laws exist in this country. But that has not always been the case.

When Rehabilitation Was Paramount: Indeterminate Sentencing

Between the mid-nineteenth and mid-twentieth centuries, both the states and the federal government embraced indeterminate sentencing policies based on fundamental ideals of individualization and rehabilitative potential. The Model Penal Code, developed in the 1950s, listed these three goals as essential considerations in sentencing: "to prevent the commission of offenses; to promote the correction and rehabilitation of offenders; to safeguard offenders against excessive, disproportionate or arbitrary punishment."

Indeterminate sentencing plans allowed for tailored dispositions depending on the nature of the crime, impact on the victim, and characteristics of the offender. At every stage in the process—from legislatures setting maximum sentences through parole boards determining release dates—officials were granted broad authority to consider the treatment needs of offenders and the risks to public safety these offenders posed. In addition to prioritizing rehabilitation and public safety, these laws put decision-making authority in the hands of authorities who were closest to the

offender and had the best knowledge of his or her circumstances (Tonry, 1996). Such sentencing schemes were influenced in part by psychological explanations of criminality, including the mental health problems experienced by offenders.

Under indeterminate sentencing laws, offenders were subject to an extensive range of potential punishments and imprisonment possibilities with actual release date to be determined at a later time. Against this backdrop of broadly defined statutory limits, judges were granted significant authority to impose sentences that they deemed appropriate to the offender and the crime, and these outcomes were largely unreviewable. But by the early 1970s, after decades of relatively unfettered discretion, critics alleged that uncertainty and disparity in sentence severity had resulted and that limitations in judges' discretion were long overdue (Frankel, 1972).

When Punishment Was Paramount: Determinate Sentencing

Sentencing priorities began to shift in the mid-1970s as public confidence in the criminal justice system began to wane and these disparities in outcomes collided with rapidly rising crime rates and questions about the effectiveness of rehabilitation. Some of the disparities resulted from differences in the attitudes and values of judges and parole boards and were linked to extralegal factors such as defendants' gender, race/ethnicity, and socioeconomic status (Peterson & Hagan, 1982; Wheeler, Weisburd, & Bode, 1982). Rising crime rates and the resultant "tough on crime" rhetoric adopted by many legislators refocused public attention on the need to punish criminals at levels commensurate with the perceived severity of their offenses. Concerns about treatment effectiveness, characterized at their most extreme by the widely held perception that imprisonment does nothing to rehabilitate inmates (von Hirsch & Hanrahan, 1981), further diminished preferences for indeterminate sentencing.

Reacting to increasingly vocal calls for incapacitation and "just deserts" punishment, ten states adopted determinate sentencing laws between 1976 and 1984 and all abolished parole (Marvell & Moody, 2002). Under these laws, which granted judges only very limited discretion, offenders were sentenced to a set term of imprisonment rather than to a range of years, and there was no opportunity for early release by a parole board. Other states followed, and by the mid-1980s, every state in the USA except one had enacted at least one mandatory penalty law (Shane-Dubow, Brown, & Olsen, 1985), though these laws differed in important ways. As a result, there was a veritable patchwork of sentencing laws in place across the country during the last quarter of the twentieth century, though most were intended to ensure predictability in sentencing, eliminate disparities, and provide certain and "just" punishments.

The federal government also transitioned to a determinate sentencing system when Congress passed the Sentencing Reform Act of 1984. The Act created the U.S. Sentencing Commission (first described in the third edition of *Psychology and the Legal System*, published in 1994), an independent expert panel responsible for

devising a new sentencing scheme. The objectives of the Commission were decidedly different from those of the American Law Institute's Model Penal Code of the 1950s. The first three goals were: (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct; and (c) to protect the public from further crimes of the defendant. The so-called Federal Sentencing Guidelines, which went into effect in November of 1987, allowed judges to take into account the nature of the offense and the offender's criminal record, and required them to impose a sentence within a range in which minimums and maximums were predetermined. For example, the sentencing range for a convicted armed bank robber with no prior convictions was 46–57 months.

But many judges balked at the rigidity of these requirements, complaining that the Guidelines restricted their ability to attend to the particular characteristics of a defendant and his or her situation, and to determine a sentence that took those features into account. As a result, deviations from the Guidelines were not uncommon. But the opportunity to deviate led predictably to unequal dispositions. Thus, although an objective of the Guidelines was to reduce unwarranted disparities based on offenders' extralegal characteristics, evaluations of sentencing data demonstrate that such disparities continued into the 1990s. For example, Mustard (2001) examined the sentences imposed on more than 77,000 federal offenders between 1991 and 1994 and found disparities involving race, gender, and ethnicity. After controlling for a large number of other variables, Mustard determined that the average sentence for a White defendant was 32.1 months, whereas Hispanics were sentenced, on average, to 54.1 months, and African American defendants received sentences that averaged 64.1 months. Black defendants were more likely than others to receive a harsher penalty than specified by the Guidelines.

In the mid-1980s, in response to public outcry over the crack epidemic and fear of AIDS being spread by illegal drug use, Congress also passed a series of laws requiring mandatory minimum sentences for the distribution or import of crack, powder cocaine, and other abused substances based on the quantity of drugs involved, rather than the offenders' level of culpable involvement. This action was mirrored in state laws, which also have mandatory punishments for drug possession. In fact, most mandatory penalty laws enacted in the 1980s and 1990s concerned drug crimes and these laws are responsible for incarcerating hundreds of thousands of low-level, nonviolent drug offenders who are now serving lengthy prison sentences with no possibility of parole (Mascharka, 2001), although President Obama in 2015 called for leniency for these offenders.

Some states have embraced these harsh drug sentencing schemes more fervently than others. The federal government and the states of California, New York, and Michigan have been singled out for their particularly harsh sentencing structures. The third edition of *Psychology and the Legal System* described a prototypical case from Michigan. The case involved Ronald Harmelin, who appealed his sentence of life without parole handed down as part of Michigan's tough antidrug laws, to the United States Supreme Court (*Harmelin v. Michigan*, 1991). Harmelin argued that as a first time offender selling only small amounts of cocaine to friends, his life

sentence was significantly disproportionate to the severity of his offense. He argued further that mandatory sentencing statutes deny judges any ability to consider mitigating factors, so his sanction constituted cruel and unusual punishment under the Eighth Amendment. But by a 5-4 vote, the Court turned aside Harmelin's appeal. Writing for the majority, Justice Anthony Kennedy underscored that states have discretion to impose whatever prison terms they believe are legitimate, regardless of whether state-to-state variations will result and offenders be treated differently in different jurisdictions. According to Justice Kennedy, only at the extremes (for example, a life sentence for shoplifting), are severe mandatory punishments unconstitutional. Importantly, Justice Kennedy factored social science data on drug-related arrest rates into his decision. These data showed that in Detroit in 1988, 51 % of male arrestees and 71 % of female arrestees tested positive for cocaine. Recognizing a connection between cocaine use and crime, Justice Kennedy determined that Michigan's harsh antidrug law that made no allowance for mitigating factors was rational and constitutional.

Mandatory sentencing laws take other forms as well. Some impose incremental penalties on convicted offenders who meet certain criteria such as using a firearm in the commission of a felony. Others mandate significant penalty enhancements for offenders with prior convictions. The first "three strikes" law was passed in Washington State in 1993, and California's infamous statute was enacted by referendum in 1994. By 1996, approximately half of the states and the federal government had some version of a three-strikes law (Chen, 2008). These laws, described in the fourth edition of *Psychology and the Legal System* published in 1998, typically impose life sentences or allow for parole only after a specified, lengthy term of incarceration for offenders convicted of a third felony and whose first and second felonies had been serious. Proponents claim that these laws reduce crime rates because they deter or incapacitate the most dangerous felons and ensure that recidivists actually serve out their terms. Importantly, they also claim that three-strikes laws reduce judicial discretion and limit the probability that parole boards release violent offenders back into the community (Kovandzic, Sloan, & Vieraitis, 2004).

But empirical analyses of the impact of California's three-strikes law reveal no appreciable drop in crime rates, nor enhancement in public safety (Kovandzic et al., 2004; Tonry, 2009). Why? Criminals rarely contemplate the possibility that they will be caught, and the law targets offenders who are past the peak age of offending and are committing fewer crimes. (It takes some time to amass the first two strikes.) Similar conclusions have been reached concerning the deterrent effects of mandatory sanctions in drug crimes (Blumstein, 1994; Tonry, 2009). Drug offenders are particularly insensitive to the deterrent possibility of mandatory sanctions and will risk arrest, imprisonment, injury, and even death to reap the economic gains of drug trafficking.

Nor have mandatory sentencing laws reduced disparities in outcomes of comparable cases, because restricting judicial discretion has simply broadened prosecutors' discretion. Some prosecutors, believing that mandatory penalties are too severe in certain cases, either agree to dismiss charges subject to the penalty or not file those charges in the first instance. Other prosecutors make different choices. The

fourth edition of *Psychology and the Legal System* acknowledged this reality in quoting prominent law professor Susan Estrich: “Discretion in the criminal justice system is like toothpaste in the tube. Squeeze it at one end and you end up with more somewhere else. Take away judges’ discretion and prosecutors get more” (p. 16).

Finally, mandatory penalty laws have had a number of unintended consequences. As described in the fourth edition, more than half of third strikes have fallen on offenders who commit, as their third-strike crime, a nonviolent offense such as marijuana possession or petty theft (Legislative Analyst’s Office, 2005). The text describes the cases of two California men with multiple prior convictions, one of whom was sentenced in 1995 to 25 years to life in prison for stealing a piece of pizza and the other who received the same sentence for shoplifting two packs of cigarettes. According to Professor Franklin Zimring of the University of California at Berkeley, “We’re worried about Willie Horton, and we lock up the Three Stooges” (Butterfield, 1996, p. A8). In 2012, Californians voted overwhelmingly in favor of a ballot measure to revise the three-strikes law and require that a third strike be imposed only for a serious or violent felony.

Other societal costs associated with mandatory sentencing laws include both direct and indirect fiscal impacts on state and local governments. The Legislative Analyst’s Office estimates that additional operating costs resulting from California’s three-strikes laws total $500 million annually. A significant contributor is the growing and aging prison population—and costs are expected to increase as the “three-strikes” population continues to age. In addition, some data suggest that three-strikes laws are applied in a racially discriminatory fashion (Legislative Analyst’s Office, 2005).

Recent Reforms in Sentencing Policies

There have been significant reforms of mandatory sentencing policies in recent years, particularly for drug crimes and in states that had some of the harshest penalties (Mauer, 2011). New York has scaled back the so-called Rockefeller Drug Laws, originally adopted in 1973, that served as a blueprint for other severe penalties for drug offenses. Michigan reformed its “650 Lifer” law that mandated a life sentence for anyone, including a first time offender, convicted of selling 650 g of cocaine or heroin. Californians voted in 2000 to endorse treatment as an alternative to incarceration for low-level drug offenders. Consistent with these decisions and as noted previously, appellate courts have deemed as unconstitutional state laws that mandate life sentences without parole for juvenile offenders (e.g., *Miller v. Alabama*, 2012). In recent years, federal sentencing policies have become somewhat less punitive as well.

Two landmark U.S. Supreme Court decisions of the mid-2000s, introduced in the sixth edition, significantly altered the landscape regarding mandatory sentencing schemes in this country. In *Blakely v. Washington* (2004), the majority held that any fact that increases the penalty beyond the maximum prescribed by Washington State’s sentencing guidelines must be determined by a jury. Dissenters forecast the

diminution in legislators' ability to establish uniform sentencing guidelines and the eventual demise of determinate sentencing schemes (Berman & Chanenson, 2006). But the furor surrounding this case was quickly overshadowed by the Court's consideration in the following term of how *Blakely* applied to the U.S. Sentencing Guidelines. In *U.S. v. Booker* (2005), the Court applied the *Blakely* requirement that a jury must determine any fact that increases a defendant's penalty beyond the statutory maximum and ruled that the guidelines were thus not binding on judges, but merely advisory. According to the majority, district court judges are required to "impose a sentence sufficient, but not greater than necessary, to accomplish the goals of sentencing." The decision explicitly directs judges to consider "the nature and circumstances of the offense, the history and characteristics of the defendant, the sentencing range established by the Guidelines, and the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

To the extent that judges believed that previously mandated sentences for a particular combination of offense seriousness and offender criminal history were excessively punitive, their sentences post-*Booker* should show downward departures from the sentencing guidelines. In fact, downward deviations doubled between 2003 (2 years prior to the *Booker* decision in which downward departures occurred in 7.5 % of cases) and 2009 (4 years post-*Booker* in which 15.9 % of cases had downward deviations (Berman & Hofer, 2009).

Has the opportunity for judges to exercise broader discretion resulted in an increase in "unwarranted sentence disparities" among similarly situated defendants? Using data from the U.S. Sentencing Commission and examining trends over four periods since 2002, Ulmer, Light, and Kramer (2011) found that although there are substantial interdistrict variations in sentencing patterns and in the frequency of Guideline deviations, those disparities have not increased in the wake of *Booker*. Nor has there been any increase in disparities based on extralegal factors such as gender, race, and ethnicity since judges have been granted more discretion. In fact, differential sentencing as a function of gender and race decreased slightly between 2002–2003 and 2005–2008. Another consistent finding is that judges are sentencing drug offenders to shorter prison terms than prior to *Booker*, a reflection of their belief that Guideline sentences for drug crimes were overly harsh. Finally, it is worth noting that since they have been untethered from mandated guidelines, judges have been able to use a variety of rationally based indicators to inform their sentencing decisions. So, for example, an offender's employment status, family and community ties, drug and alcohol dependence, and mental and emotional wellbeing are mentioned in a larger proportion of cases post-*Booker* than prior to *Booker* (Hofer, 2007).

Conclusion

Sentencing priorities and practices have vacillated over the past 25 years as societal concerns about crime and public safety and beliefs about the effectiveness of treatment and punishment options have waxed and waned. Other criminal justice

policies and legal decisions have also changed in important ways over the last two decades. Those who read any particular edition of Wrightsman's textbook will learn about these changing patterns and about the nature of sentencing laws in effect at the time of publication. But a 28-year, 8-edition overview reveals that in his initial formulation of core dilemmas, Wrightsman established a durable and compelling framework that is useful in raising critical questions, encouraging analytic thinking, and demonstrating the value of empirical research to address complex legal issues.

References

Apodaca v. Oregon. (1972). 406 U.S. 404.

Batson v. Kentucky. (1986). 476 U.S. 79.

Berman, D., & Chanenson, S. (2006). The real (sentencing) world: State sentencing in the post-Blakely era. *Ohio State Journal of Criminal Law, 4*, 27–35.

Berman, D., & Hofer, P. (2009). A look at *Booker* at five. *Federal Sentencing Reporter, 22*, 77–80.

Blakely v. Washington. (2004). 542 U.S. 296.

Blumstein, A. (1994). Prisons. In J. Wilson & J. Petersilia (Eds.), *Crime*. San Francisco: Institute for Contemporary Studies.

Borderkircher v. Hayes. (1978). 434 U.S. 357.

Brewer v. Williams. (1977). 430 U.S. 651.

Burnet v. Coronado Oil and Gas Co. (1932). 52 S.Ct. 443.

Butterfield, F. (1996, March 8). Tough law on sentences is criticized. *New York Times,* p. A8.

California v. Byers. (1971). 402 U.S. 424.

Chen, E. (2008). Impacts of "three strikes and you're out" on crime trends in California and throughout the United States. *Journal of Contemporary Criminal Justice, 24*, 345–370.

Coker v. Georgia. (1977). 433 U.S. 584.

Costanzo, M., & Krauss, D. (2012). Forensic and legal psychology. New York: Worth. Dickerson v. United States. (2000). 530 U.S. 428.

Doyle v. Ohio. (1976). 426 U.S. 610.

Estelle v. Smith. (1981). 451 U.S. 454.

Ewing v. California. (2003). 538 U.S. 11.

Frankel, M. (1972). *Criminal sentences: Law without order*. New York: Hill and Wang.

Fulero, S., Greene, E., Hans, V., Nietzel, M., Small, M., & Wrightsman, L. (1999). Undergraduate education in legal psychology. *Law and Human Behavior, 23*, 137–153.

Furman v. Georgia. (1972). 408 U.S. 238. *Gideon v. Wainwright. (*1963). 372 U.S. 336.

Graham v. Florida. (2010). 560 U.S. ____. Gregg v. Georgia. (1976). 428 U.S. 153.

Harmelin v. Michigan. (1991). 501 U.S. 957.

Herrera v. Collins. (1993). 506 U.S. 390.

Hofer, P. J. (2007). *United States v. Booker* as a natural experiment: Using empirical research to inform the federal sentencing policy debate. *Criminology and Public Policy, 6*, 433–460.

In re Winship. (1970). 397 U.S. 358.

Jackson v. Indiana. (1972). 406 U.S. 715.

Jones v. United States. (1983). 463 U.S. 354.

Kovandzic, T., Sloan, J., & Vieraitis, L. (2004). "Striking out" as crime reduction policy: The impact of "three strikes" laws on crime rates in U.S. cities. *Justice Quarterly, 21*, 207–236.

Leal Garcia v. Texas. (2011). 564 U.S. ____. Legislative Analyst's Office. (2005). *A primer: Three strikes—The impact after more than a decade*. Retrieved November 8, 2012, from http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm

Levine, M. (1988). You've come a long way, baby. Review of *Psychology and the Legal System. Contemporary Psychology, 33*, 426–428.

Lockett v. Ohio. (1978). 438 U.S. 586.
Lockyer v. Andrade. (2003). 538 U.S. 63.
Marvell, T., & Moody, C. (2002). *Impact of determinate sentencing laws on delay, trial rates, and plea rates in seven states*. Document 192517, National Criminal Justice Reference Service. Washington, DC: Department of Justice.
Mascharka, C. (2001). Mandatory minimum sentences: Exemplifying the law of unintended consequences. *Florida State University Law Review, 28*, 935–975.
Mauer, M. (2011). Sentencing reform. Amid mass incarcerations—Guarded optimism. *Criminal Justice, 26*, 27–36.
McCleskey v. Kemp. (1987). 481 U.S. 279.
Miller v. Alabama. (2012). No. 10–9646, U.S. Supreme Court. *Miranda v. Arizona.* (1966). 384 U.S. 436.
Moore v. Illinois. (1977). 434 U.S. 220.
Mustard, D. B. (2001). Racial, ethnic, and gender disparities in sentencing: Evidence from the U.S. federal courts. *Journal of Law and Economics, 44*, 285–314.
New York v. Ferber. (1982). 458 U.S. 747.
Peterson, R., & Hagan, J. (1982). Changing conceptions of race: Towards an account of anomalous findings of sentencing research. *American Sociological Review, 49*, 56–70.
Roesch, R., Zapf, P., & Hart, S. (2010). *Forensic psychology and law.* New York: WileyScott, E., & Steinberg, L. (2008). *Rethinking juvenile justice*. Cambridge, MA: Harvard University Press.
Roper v. Simmons. (2005). 543 U.S. 551.
Shane-Dubow, S., Brown, A., & Olsen, E. (1985). *Sentencing reform in the United States: History, content, and effect*. Washington, DC: U.S. Government Printing Office.
Slobogin, C. (2010). Psychological syndromes and criminal responsibility. *Annual Review of Law and Social Science, 6*, 109–127.
South Dakota v. Neville. (1983). 459 U.S. 553.
Steinberg, L. (2009). Adolescent development and juvenile justice. *Annual Review of Clinical Psychology, 5*, 459–485.
Tonry, M. (1996). *Sentencing matters*. New York: Oxford University Press.
Tonry, M. (2009). The mostly unintended effects of mandatory penalties: Two centuries of consistent findings. *Crime and Justice, 38*, 65–114.
U.S. v. Booker. (2005). 543 U.S. 220.
U.S. v. Russell. (1973). 411 U.S. 423.
Ulmer, J., Light, M., & Kramer, J. (2011). The "liberation" of federal judges' discretion in the wake of the *Booker/Fanfan* decision: Is there increased disparity and divergence between courts? *Justice Quarterly, 28*, 799–837.
von Hirsch, A., & Hanrahan, K. (1981). Determinate penalty systems in America: An overview. *Crime & Delinquency, 27*, 289–316.
Wheeler, S., Weisburd, D., & Bode, N. (1982). Sentencing the white-collar offender: Rhetoric and reality. *American Sociological Review, 47*, 641–659.
Williams, K. (1992). Presumed excellent. Review of *Psychology and the Legal System* (2nd edition). *Contemporary Psychology, 37*, 302–303.
Woodson v. North Carolina. (1976). 428 U.S. 280.

Reflections on Psychology and Law

Lawrence S. Wrightsman

The chapters in this book demonstrate how broad and versatile the field of psychology can be, in applying its concepts and methods to the study of the legal system, and especially to the role of the expert witness. It has been my honor to be associated with each of the authors as a colleague or mentor, and especially as a friend.

Being the beneficiary of a festschrift is something like attending your own funeral while you are still alive. The accolades are appreciated and you are reminded of events that you have not contemplated for years or have forgotten completely. All in all, it is an occasion that one savors for the rest of his or her life, whether that is brief or prolonged. The idea for a festschrift in my honor came from Monica Biernat, and I am indebted to her forever for it. She and her colleagues and doctoral students in the graduate program in social psychology at the University of Kansas spent countless hours in planning, scheduling, arranging for the transportation and housing of speakers, and numerous other efforts that made the festschrift succeed. I am especially indebted to the fabulous photographer Pat Hawley for preserving the events in an album. When it came to making the festschrift into a book, Cynthia Willis-Esqueda and Brian Bornstein persisted in producing what you now have before you. The occasion has caused me to look back on my professional life and seek to answer why I was the beneficiary of this honor. One conclusion is that I was the right person at the right time, or, I should say, at the right times. In the late 1960s, when I began contemplating the writing of a textbook in social psychology, much was being written about "the crisis in social psychology" and the field was in a struggle for self-identity. Should it seek to further its image as a scientific field, with the development of theory, or should it seek to apply its concepts to the solution of world problems? I was able to cobble together a textbook (originally titled *Social Psychology in the Seventies*) that covered the theory-related topics in the field

L.S. Wrightsman (✉)
Emeriti Professor, Department of Psychology, University of Kansas,
3000 Trail Rd., Lawrence, KS 66044, USA
e-mail: wrights@ku.edu

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8_11

but also applied social-psychological concepts to real-world issues, including racial discrimination, sexual identification, and drug usage. When, in the mid-1970s I had something of a midlife crisis, the field of social psychology began to concentrate its efforts at application to the field of law, and I was able to produce one of the first (but not the first) textbooks in the field of psychology and the law. I am proud that the book is now in its seventh edition, with Edie Greene and Kirk Heilbrun doing a magnificent job at its authors. Similarly, when I began to be deluged, around 1980, by undergraduates wanting to become "forensic psychologists"—especially wanting to emulate Clarice Starling—I was able to offer a Forensic Psychology course and develop one of the first textbooks for that field. My more recent interest in the Supreme Court took a longer time to emerge. For a long time I have been frustrated by judges' frequent failure to be influenced by our psychological research findings. So I sought to try to understand why. My first effort, *Judicial Decision Making: Is Psychology Relevant?*, examined the American Psychological Association's efforts, through its *amicus curiae* briefs, to influence Supreme Court decisions. (The track record is mixed.) This led to my full engagement in the search for an understanding of judicial behavior, especially the behavior of the Supreme Court justices, and for the last 15 years the Court has been my main professional preoccupation. I have been disappointed in the lack of interest by psychologists in the workings of the Supreme Court, because I believe the justices represent a real-life group and their actions exemplify the kinds of variables we choose to study, including the effects of attitudes on behavior, persuasion, conformity processes, and leadership. What's more, as I demonstrated in my book, *Oral Arguments before the Supreme Court*, the behavior of the justices can be studied empirically.

I realize that "being at the right place at the right time" is not a sufficient explanation for why I have been accorded the recognition of a festschrift. What qualities do I believe I possess that contribute to my efforts? My greatest pleasure in writing is the process of organizing material—to outline a chapter, to see how topics relate to each other, to revise and elaborate an outline, so that the writing almost becomes an act of "simply" filling in the blanks. To do such an outline requires the accumulation and mastery of a large amount of material. I peruse four newspapers every day; I subscribe to a dozen weekly or monthly magazines, and I consult various blogs and Web sites. But beyond exploiting such sources, I believe it is important to activate a detailed filing system so that such materials are readily available when it comes time to write. I consider it important to make my writing interesting; I search for that tidbit, maybe a triviality that personalizes the discussion. My favorite example of this is a squib—barely a paragraph in length—that I found (in only one newspaper) involving Justice Stephen Breyer. During a break in Supreme Court activity several years ago he was called for jury duty in his hometown of Cambridge, Massachusetts. When he showed up, no one noticed him, not even the presiding judge. Only when his name was called for him to come to the jury box, was he recognized. This anecdote reflects both Justice Breyer's basic modesty and the lack of awareness by the public of those who serve as one of the three branches of the federal government.

While much of my work has been improved by the participation of coauthors, my writing has often reflected a necessarily solitary activity. I wonder what I have

sacrificed or lost as a result of countless hours being alone, or as Stephen Sondheim wrote about Georges Seurat in *Sunday in the Park with George*, “watching the world through a window.” Seeing this book and all the significant products of its contributors is a balm as well as a satisfaction. I did not just gaze at the world, after all. I may have connected with others who can contribute their own work to improve our understanding of psychology and law.

Index

A
Alibi witnesses, 2
Afrocentric features, 101, 102, 104
Answer bias, 85
Assertive replies, 46
Attitudes
  attitude-behavior relationship, 5, 82
  change, 11, 90, 105, 137
  legal, 12, 78, 139
  racial, 11
  toward death penalty, 81, 86, 88
  toward insanity, 81, 84
Attribution, 54
Attribution theory. *See* Attribution
Authoritarianism, 43, 78–80, 86
Authoritativeness, 44
Aversive racism, 103

B
Behavioral confirmation, 83, 87–90
Black Sheep hypothesis, 77
Bluff technique, 66
Bornstein, B.H., 5
Brigham, J.C., 2
Brodsky, S., 3
Brown v. Board of Education, 1, 13, 122

C
Capital punishment, 159, 160
Case conceptualization, 42
Change-of-venue surveys, 131, 141–143, 145
Child witnesses, 3, 13
Cognitive association, 100
Cognitive dissonance, 89, 90
Cognitive processes, 43, 98
Colorism, 5, 97
Common good, 157–161
Confessions, 54, 56, 57, 59, 61–69
Cooperative learning, 11
Credibility. *See* Witness credibility
Crime control, 159–161
Criminal psychology. *See* Forensic psychology
Cross-examination, 20, 30, 45–47, 133, 135–137

D
Death penalty attitudes questionnaire. *See* Attitudes toward Death Penalty
Defensive replies, 46
Determinate sentencing, 164–167
Discretion, 161–168
Discrimination, 2, 98, 104, 106, 107, 122, 172
Dispositional risk factors, 63
Dispute resolution, 155, 156
DNA exonerations, 3, 4, 53, 55, 60, 68, 69

E
Equality, 161–168
Expert testimony/witnesses, 2, 3, 36, 37, 41, 43–46, 48, 50, 140, 142, 171
Expert witness credibility, 44
Explicit race bias, 98
Expository approach, 137

© Springer Science+Business Media New York 2016

C. Willis-Esqueda, B.H. Bornstein (eds.), *The Witness Stand and Lawrence S. Wrightsman, Jr.*, DOI 10.1007/978-1-4939-2077-8

Eyewitness memory/eyewitness testimony
accuracy, 1, 29
certainty/confidence, 29
identification, 20

F
False convictions, 3
False evidence, 58, 65, 70
Focus groups, 131–133, 139, 144, 145
Forensic assessment and treatment, 2
Forensic psychology, 153, 172

G
Greathouse, S.M., 3
Gudjonsson Suggestibility Scale (GSS), 59

H
Hate crimes, 2, 155
Hypnosis, 1, 54
Hypothesis bias, 85

I
Identification accuracy. *See* Eyewitness identification
Implicit association test (IAT), 106
Implicit race bias, 98, 106
Indeterminate sentencing, 163–164
Individual differences, 43, 59, 77, 78, 83, 121
Individual rights, 158–161
Informants and snitches, 2, 69
Innocence project, 31, 55, 59–61, 68–70
Insanity defense attitudes-revised scale. *See* Attitudes toward Insanity
Interdisciplinary research, 113–115, 117, 118, 120–124
Interdisciplinary training, 114–118
Interracial contact, 11
Interrogations, 54, 56–59, 62
Intrusive questions, 45–46

J
Jigsaw groups, 11
Judicial decision making, 2, 13, 121, 125, 144, 172
Juror/jury decision making
bias, 4, 76–78, 81, 84, 85, 88, 91
rehabilitation, 83, 84, 90
selection, 76–77, 81–90, 130, 131, 138–140, 143

K
Kassin, S., 4
Kovera, M.B., 5

L
Legal attitudes questionnaire. *See* Attitudes, legal
Legal decision making, 100–102

M
Mandatory sentencing, 166, 167
Manson v. Braithwaite, 17, 18
Memory distrust syndrome, 59
Mentally Ill offenders, 2
Minimization tactics, 57, 65, 66, 70
Miranda rights, 55–56, 66, 67, 155, 160
Misattribution effect, 141
Mistaken identification, 17, 18, 26, 28–33
Mock trials, 131, 132, 139, 144, 145, 147
Moderator, 83–84
Multidisciplinary research, 114, 123, 125
Münsterberg, H., 1, 3–5

N
Neil v. Biggers, 19, 27
Neuroscience, 47–50
Newirth, K.A., 3
Nonintrusive questions, 45

P
Paradoxical hypothesis, 66
Per se exclusion rule, 19–21, 30, 31
Peremptory challenges, 5, 76, 82, 160
Persuasive witness, 42
Phenotype, 97
Pivovarova, E., 3
Pleading effect, 32–33
Plessy v. Ferguson, 97
Posey, A., 5
Post-identification feedback, 26, 29, 30
Positive coercion bias, 55
Prejudice, 10, 11, 36, 48, 49, 68, 75, 80, 84, 98, 100, 103–106, 141, 144, 155
Pretrial bias, 80, 141
Pretrial Juror Attitudes Questionnaire (PJAQ), 80, 81, 139
Pretrial publicity, 84, 141
Priming, 100
Public policy makers, 2

Q

Question bias, 85

R

Race
    bias, 5, 97, 98, 100, 101, 103–107
    racial attitudes (*see* Attitudes, racial)
    racial disparities, 95, 99, 102, 104
    racial issues, 5, 10, 98, 100
    racial minorities, 99, 100, 106
    racial profiling, 5, 96–100
    racism, 11, 96, 103, 104, 107
Railroad game, 10, 11
Rape, 13, 22, 31, 60, 61, 79, 159
Reid technique, 54, 57–59, 62, 63
Reliability approach, 19, 20, 30, 31, 33
Religion, 121
Research-based recommendations, 2

S

Self-reports, 25
Sentencing, 5, 101–103, 163, 164, 167–168
Similarity-leniency hypothesis, 77
Situational risk factors, 64–66
Smalarz, L., 3
Small-group research (SGR), 131–133, 145
Social construction, 96
Social problems, 9, 10
Source credibility, 42–44
Stereotypes, 98
Suggestive procedures, 3, 17–23, 26, 27, 29, 31, 33–36
Suggestiveness augmentation effect, 26, 27
Supreme Court of U.S., 3, 13, 17–37, 54, 55, 98, 122, 123, 158–161, 165, 167

T

Team-based research, 114
Technical Working Group on Eyewitness Evidence, 2
Three-strikes laws, 160, 166, 167
Transdisciplinary research, 114
Trial Consulting, 5, 6, 13, 42, 81, 129–147
Trial strategy, 135–138, 144

U

Unreliable Identifications, 21–27
Untrue Confessions, 53, 70

V

Venirepersons, 76, 83, 88
Verdict preference, 77–79, 81, 82
Voir dire, 84–90

W

Wells, G.L., 3
Willis-Esqueda, C., 5
Witness characteristics, 3
Witness credibility, 42–44
Witness credibility scale, 44
Witness preparation, 42, 131, 133–134, 145–147
Wrightsman, L., 6
Wrongful convictions, 4, 17, 18, 23, 28, 30–32, 35, 53, 59–61, 63, 67, 68, 70