Threats to Impartiality in Capital Jury Selection:

Addressing Dead-Serious Falsifications

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The American Bar Association (ABA) filed an amicus brief[1] in the Boston Marathon bombing case that took direct aim at current jury selection procedures within the context of highly publicized capital trials. It strongly recommended that knowledge about the case, including pretrial publicity, be carefully investigated. Moreover, the brief flatly stated that assertions of fairness and impartiality by venirepersons are "not reliable."[2] Is this true? What can social science tell us about the objectivity, truthfulness, and personal perspectives (e.g., biases or viewpoints) of potential jurors—in general, and on a case-by-case basis?

It would be impossible to overestimate the importance of the validity of the jury selection process—in capital cases, or in any others—for the proper functioning and public acceptance of the American criminal justice system. This process is not one that undergirds the pursuit of justice as much as it transcends it.[3] Whatever laypersons may make of the trappings and seemingly arcane rites of the legal profession, they cannot deny that the jury selection process functions as a literal reflection of the will of the people.[4] Invested professionals must do everything within our power to ensure its objectivity, as well as its real and perceived legitimacy.

Before delving into issues of impartiality, let us begin with a frank admission. Social science has sometimes been guilty of vastly overstating its research contributions to jury selection. More than a century ago, Hugo Münsterberg—often considered the father of forensic psychology—offered sweeping commentaries of juries and their selection.[5] Now considered antiquated, his methods of detecting dishonest jurors sparked controversy—even in his day—because their scientific basis was questionable and their conclusions were far over-reaching.[6]

Beginning in the 1970s, social scientists have claimed victory on behalf of jury selection in some highly controversial cases, such as that of the Harrisburg Seven.[7] Subsequently described as "scientific jury selection," its empirical contributions may have promised much more than it delivered.[8] Specifically, the results of "scientific jury selection" are highly variable and often modest,[9] with the effectiveness of its methods remaining inconclusive.[10] As a further complication, the "science" appears to have been downplayed as jury consultation became a financially driven, professional industry.[11] Recognizing such over-statements are unhelpful and even harmful, our goal for this article is strive for objectivity in addressing impartiality.[12]

Plainly speaking, what are the objective contributions of social science to the real-world jury selection process? On many issues, science may have little to contribute, and on those this article remains prudently silent. On others, science provides clearly stated knowledge based on field research and applied laboratory studies.[13]

The three focused goals of this article are straightforward. First, some cherished assumptions concerning the effectiveness of time-

Footnotes

1. Brief for American Bar Association as Amicus Curiae Supporting Neither Party, United States v. Tsarnaev, 142 S. Ct. 1024 (2022) (No. 20-443).
2. *Id*. at 5. In particular, the brief dismissed the all-too-common question used to elicit venirepersons' affirmation of impartiality with the following: "And a juror's positive response to the question—'can you be fair and impartial given what you have learned about this case?'—is not reliable."
3. *See* Brittany L. Deitch, *The Unconstitutionality of Criminal Jury Selection*. 26 Wm. & Mary Bill Rts. J. 1059 (2018).
4. Brian H. Bornstein & Edie Greene, The Jury Under Fire: Myth, Controversy, And Reform (2017).
5. Kenneth J. Weiss & Yan Xuan, *You Can't Do That! Hugo Münsterberg and Misapplied Psychology*, Intl J. L. & Psychiatry (2015). Münsterberg apparently believed that he could divine the truth about witnesses and suspects via word-association tests coupled with reaction times. His methodology and pronouncements were solidly rejected by the courts. Additionally, John Wigmore, Dean of Northwestern Law School, presented a cogent analysis that found Münsterberg's research claims to be unsubstantiated, untrue, and unsupported by the profession of psychology.
6. Brian H. Bornstein & Amy J. Kleynhans, *The Evolution of Jury Research Methods: From Hugo Münsterberg to the Modern Age*. 96 Denv. L. Rev. 813 (2019).
7. Interestingly, the initial findings were reported by involved social scientists in a popular magazine rather than in a scientific journal. Jay Schulman et al., *Recipe for a Jury*, Psychol. Today, May 1973, at 34.
8. Jeffrey T. Frederick, *Social Science Involvement in Voir Dire: Preliminary Data on the Effectiveness of "Scientific Jury Selection,"* 2 Behav. Sci. & L. 375 (1984).
9. Richard Seltzer, *Scientific Jury Selection: Does It Work?*, 36 J. Applied Soc. Psychol. 2417 (2006).
10. Joel D. Lieberman, *The Utility of Scientific Jury Selection: Still Murky After 30 Years*, 20 Current Directions In Psychol. Sci. 48 (2011).
11. Joel D. Lieberman & Bruce D. Sales, *History and Overview of the Scientific Jury Selection Process*, in Scientific Jury Selection 3 (2007).
12. Observant readers will easily recognize the unintended irony of addressing impartiality via a biased or partisan perspective.
13. This distinction needs to be clarified. *Field research* examines real-world data from actual cases and investigates what really happens. *Applied lab research* systematically addresses questions that often cannot be observed in field research. It is applied to approximate real-world applications (e.g., juror-eligible community participants rather than college students).

honored methods of jury selection deserve close reexamination. Second, the forthrightness of venirepersons cannot universally be assumed. Like criminal attorneys on both sides of the bar, venirepersons have their own personal attitudes and viewpoints that shape their public presentations. Third, the nature of the inquiry (e.g., the type of questions asked) regarding juror eligibility may have profound effects on the degree of candor. Here, the good news is that questions about personal matters may be posed in written form, stressing differing points of view that are worded non-judgmentally and focused on the positive.

SIX QUESTIONS TO CONSIDER

The article is structured as a series of six probing questions about jury selection, which when feasible are addressed within the context of capital cases. For interested readers, several key studies by the current authors and others are readily available and provide much more in-depth knowledge.[14]

ARE CURRENT METHODS OF JURY SELECTION (VOIR DIRE AND JUROR QUESTIONNAIRES) EFFECTIVE AT UNCOVERING BIASES THAT THREATEN IMPARTIALITY?

Field research has convincingly demonstrated the ineffectiveness of voir dire at assessing attitudes, including deeply held biases. The elegant simplicity of these studies is that they obtain actual voir dire transcripts and analyze them directly. In one classic study,[15] over 2,000 questions and the concomitant responses from 10 trials were exhaustively reviewed. With only two exceptions, 99.9% of the questions evoked the expected, socially desirable response. In most instances, an affirmative "yes" was all that was required. Several studies have confirmed these results.[16] Further, simply emphasizing the need to be "fair and impartial" during voir dire does very little to facilitate honest self-disclosure among prospective jurors.[17]

In an example of highly relevant field research, Son[18] examined the types of voir-dire questions used in 12 capital cases. The questions were not designed to elicit biases. Instead, the large majority of inquiries related to the death penalty were constructed to elicit affirmative responses, by asking leading questions or by offering only the desired response, while omitting other alternatives. Although this was likely unintentional, prospective jurors were essentially being shoe-horned into supplying the desired answer. Commonsensically, biases cannot be ascertained when venirepersons are indirectly encouraged to reply with socially desirable responses.

Rogers and his colleagues[19] were able to test systematically the effectiveness of death-penalty questions at truthfully eliciting attitudes and biases. As applied lab research, two important steps were taken to increase its direct relevance to capital jury selection. First, the pertinent questions were adapted from capital jury questionnaires that had been used in 10 actual death-penalty cases. Second, participants were screened for their eligibility using federal juror eligibility guidelines.[20] With complete anonymity,[21] these potential jurors not only provided their own candid responses but also disclosed their willingness to falsify their responses if asked during voir dire, either to hide the truth or just outright lie.[22]

Box 1 helps to illustrate truth and lies to a real-world capital juror questionnaire.[23] Here are the responses to the sample item, "The death penalty is not used enough." Almost 80% of Support-Death participants are willing to hide the truth or lie, in stark comparison to Support-Life at 35%. It might be tempting to

BOX 1

Lie or Tell the Truth? Differences between Support-Death and Support-Life Participants

Sample Item: "The death penalty is not used enough."

Support-Death Participants
- 21% Tell the truth
- 41% Hide the truth (say something neutral)
- 38% Lie (say something misleading)

Support-Life Participants
- 65% Tell the truth
- 17% Hide the truth (say something neutral)
- 18% Lie (say something misleading)

14. *See, e.g.*, Richard Rogers et al., *Capital Juror Questionnaires from Death Penalty Cases: A Study of Attitudes, Denials, and Deceptions*, 38 BEHAV. SCI. & L. 12 (2020); Richard Rogers et al., Perspectives of Juror-Eligible Adults: Validation of Juror Questionnaire of Values and Viewpoints (JQVV) for Capital Cases (2021) (unpublished manuscript) (on file with author).
15. Robert W. Balch et al., *The Socialization of Jurors: The Voir Dire as a Rite of Passage,* 4 J. CRIM. JUST. 271 (1976).
16. See, e.g., Gary Robert Giewat, Juror Honesty and Candor During Voir Dire Questioning: The Influence of Impression Management (May 2001) (Ph.D. dissertation, University of Nevada) (ProQuest); Roger W. Shuy, *How a Judge's Voir Dire Can Teach a Jury What to Say,* 6 DISCOURSE & SOC'Y 207 (1995).
17. *See, e.g.,* Gary Robert Giewat, Juror Honesty and Candor During Voir Dire Questioning: The Influence of Impression Management (May 2001) (Ph.D. dissertation, University of Nevada) (ProQuest); Roger W. Shuy, *How a Judge's Voir Dire Can Teach a Jury What to Say, 6* DISCOURSE *&* SOC'Y *207 (1995).*
18. Steven J. Son, Adequacy of Voir Dire Questioning for Selecting an Impartial Jury (May 2004) (Ph.D. dissertation, University of Nevada) (ProQuest).
19. Rogers et al., *Capital Juror Questionnaires, supra* note 14; Rogers et al., Perspectives of Juror-Eligible Adults, *supra* note 14.
20. Federal guidelines for juror eligibility, 28 U.S.C. § 1865, were implemented with inclusions (e.g., age, citizenship, and fluency) and exclusions (e.g., felony conviction and disqualifying physical or mental condition).
21. M-Turk studies are designed so that researchers have no identifying information, and subject payment is accomplished indirectly via a completely separate MTurk user account.
22. In social science research, two terms are applied: *denial* is defined as the masking of true attitudes with neutral responses, whereas *deception* represents the false presentation of attitudes often adopting an opposite viewpoint (e.g., favoring death over life).
23. Rogers et al., *Capital Juror Questionnaires, supra* note 14.

jump to the conclusion that Support-Death persons just tend to lie more frequently regardless of the circumstances. That would be highly prejudicial and simply untrue. From a more nuanced perspective, Support-Death persons chose not to self-disclose when asked bluntly direct and likely stigmatizing questions. As we shall see later, however, Support-Death persons may evidence considerable candor when questions are sensitively presented.

The bottom line is that relevant death-penalty items[24] on actual capital juror questionnaires are conclusively ineffective. The results are strongly consistent when looking across three entirely separate samples of juror-eligible participants.[25] In general, these death-penalty questions failed to elicit the truth, at disheartening rates of about 75% to 80%. What about those with mixed views of the death penalty? Without adhering to a particular viewpoint (i.e., Support-Death and Support-Life), would they be more forthcoming? Quite to the contrary, their marked ambivalence had the opposite effect, resulting in the highest level of falsification.

DOES THE SOLEMNITY OF THE LEGAL SETTING ENSURE CANDOR IN JURY SELECTION?

"High-stakes settings" are situations that typically involved the use of impression management to achieve a desired outcome. Similar to field research on job applicants, a frequently analyzed population for impression management,[26] attorneys involved in jury selection often respond to this particular high-stakes situation with efforts at ingratiation rather than candor.[27] As discussed by Rogers and his colleagues,[28] Fahringer[29] provided astute insights more than four decades ago concerning the notion that "jury selection involves some guile on the part of lawyers." Attorneys model deception for venirepersons: "We lie to them and they in turn to us; this is a bad beginning for a project designed to discover the truth."[30]

Field research—on criminal matters but not death penalty per se—has convincingly demonstrated that the procedures associated with jury selection in criminal courts provide no assurances regarding the candor of prospective jurors. In reviewing 31 criminal trials, researchers[31] found that non-capital voir dire was typically a rushed affair mostly lasting less than two hours, with limited input by counsel. Responses to common voir-dire questions often involved false denials. This point is clearly illustrated in Box 2.

BOX 2

Two Examples of False Denials during Voir Dire by Impaneled Jurors

1. Have you or any of your close family members or friends ever been a victim of a crime?
   a. Results: 27.8% more false denials than honest admissions.
2. Have you or any of your close family members or friends ever been employed in law enforcement?
   a. Results: 23.6% more false denials than honest admissions.

These findings from real-world criminal trials are disturbing for at least three distinct reasons. First, more than double the number of actual jurors opted for false denials over the truth during voir dire.[32] Second, their false denials appeared to be undeterred by the possibility of being "found out" via police reports or employment records.[33] Third, these intentional deceptions went completely undetected during voir dire.[34]

False denials represent only one variation of response styles that are commonly referred to as "impression management."[35] This term is often conceptualized generally as an intentional effort to achieve a desired objective within a particular context, such as found with jury selection. Impression management appears to be a key factor in venirepersons' decisions to withhold information during voir dire. Clearly, the use of personally intrusive questions (e.g., past suicide attempts) may substantially contribute to impression management.[36]

Impression management during voir dire may also be motivated by "evaluation anxiety." Venirepersons may be motivated to provide deceptive responses because they fear negative judgment by others.[37] Evaluation anxiety (i.e., fears of appearing unworthy) can be contrasted with "social desirability" (i.e., a general

24. For systematic comparisons across items, questions were converted to statements that preserved the original content.
25. Rogers et al., *Capital Juror Questionnaires, supra* note 14; Rogers et al., Perspectives of Juror-Eligible Adults, *supra* note 14.
26. For a synthesis of field research, see Jing Hu & Brian S. Connelly, *Faking by Actual Applicants on Personality Tests: A Meta Analysis of Within Subjects Studies,* 29 Int'l J. Selection and Assessment 412 (2021).
27. Stanley L. Brodsky & David E. Cannon, *Ingratiation in the Courtroom and in the Voir Dire Process: When More is Not Better,* 30 L. & Psych. Rev. 103 (2006).
28. Rogers et al., *Capital Juror Questionnaires, supra* note 14.
29. Herald P. Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case,* 43 L. and Contemp. Probs. 116, 117 (1980).
30. *Id.*
31. Richard Seltzer, Mark A. Venuti, & Grace M. Lopes, *Juror Honesty During the Voir Dire*, 19 J. Crim. Just. 451 (1991).
32. *Id.*
33. This follow-up research was conducted about two months after trial. Due to a design flaw, former jurors were asked about their overall history of victimization. Thus, it is conceivable that a very small percentage were self-disclosing at the time of voir dire but then victimized in the intervening two months. Commonsensically, it appears highly improbable that anyone in the venirepersons' close circle of families and friends would have started their law enforcement careers during this brief period.
34. Further to this point, a small number even denied their own past careers in law enforcement, which is a matter that could easily be checked.
35. An important distinction should be drawn: "Impression management is often construed as more situationally driven than social desirability. It can often involve a specific set of circumstances . . . ." Richard Rogers, *An Introduction to Response Styles,* in Clinical Assessment of Malingering and Deceptions 3 (Richard Rogers & Scott D. Bender eds., 4th ed. 2018).
36. Rogers et al., *Capital Juror Questionnaires, supra* note 14.
37. *See* Linda L. Marshall, Juror, Judge, and Counsel Perceptions of Voir Dire (1983) (Ph.D. dissertation, Boston University) (ProQuest); Linda L. Marshall & Althea Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire,* 120 J. Psychol.: Interdisc. & Applied 205 (1986).

desire to appear more favorable than warranted).

It might be tempting to find fault with prospective jurors for engaging in impression management. As already noted, however, attorneys actively engage in impression management and model this behavior during jury selection.[38] What is their motivation? In part, attorneys engage in a type of impression management, specifically "ingratiation," which is often used to praise the efforts of venirepersons, individually or collectively.[39] This tenuous premise suggests that the likeability of the attorney, as an extra-legal factor, may favorably influence jury decision making. Ingratiation may be experienced as excessive courtesy or feigned concern about venirepersons' welfare.[40] However, too much ingratiation is likely to backfire.[41] Perhaps the most important lesson is that credibility matters,[42] and that efforts to falsely influence may seriously put this in jeopardy.

CAN JURORS SET ASIDE THEIR BELIEFS AND VIEWPOINTS?

As noted earlier, the seminal work of Seltzer and his colleagues on thirty-one real-world criminal trials speaks to enduring beliefs that directly threaten foundational principles of justice.[43] As good news, however, most jurors were knowledgeable regarding the burden of proof and presumption of innocence (see Box 3). For inaccuracies, however, Box 3 paints a very dismal picture. Because voir dire spectacularly failed (0% success), these jurors—ignorant of bedrock principles of justice—obviously lacked the requisite impartiality. It is deeply troubling that one-third, or about four jurors in most felony criminal trials, wrongly believed that criminal defendants must prove their own innocence. Other field research found an even higher percentage may suffer from this profound misconception.[44]

Do we have any direct evidence that these fundamental errors affect juror decision making? Here, the data are limited, but clearly suggest the affirmative.[45] In cases where the criminal defendant did not testify, nearly a third (31%) admitted it had an effect or at least some effect on their verdict.[46]

Venirepersons are not expected to be completely devoid of biases or other personal viewpoints, but they are called upon to ignore these and thus to function impartially. In *Lockhart v. McCree*,[47] it was noted that each juror is expected to "lay aside his . . . opinion and render a verdict based on the evidence presented in court." Rogers and his colleagues[48] utilized the analogy of a toggle switch when addressing the facile notion that jurors could simply "neutralize emotionally bound beliefs with a mere click to the 'off' position." It is simply not true. Biases, related to race[49] and other issues, affect the memory and weight of evidence, especially as the trial continues to increase each juror's "cognitive load."[50] Are only jurors affected? In an applied laboratory study that involved sentencing, actual judges also tended to misremember false evidence as true.[51]

BOX 3

Beliefs of Actual Jurors about Burden of Proof and Presumption of Innocence

Burden of proof
1. 65% correct
2. 35% incorrect
3. 0% success of voir dire at identifying wrong beliefs

Presumption of innocence
1. 77% correct
2. 17% incorrect (i.e., presumed guilty at 50%)
3. 0% success of voir dire at identifying wrong beliefs

Would instructions from judges help to rehabilitate jurors who hold biases and other preconceived viewpoints? Investigators using mock jurors found clear evidence of unintended consequences.[52] While such instructions were minimally effective, biased jurors did feel pressured by the judge regarding the verdict. Even worse, *unbiased* jurors were negatively influenced and inadvertently *biased* by these instructions.[53]

CAN QUESTIONS BE ASKED MORE SENSITIVELY TO ELICIT MORE CANDID RESPONSES?

Blunt, excessively direct questions have consistently proven to be ineffective, as amply demonstrated (see Box 1). Instead, questions are needed that more tactfully ask about views of the death penalty and that can be answered easily in an affirmative

38. David Suggs & Bruce D. Sales, *The Art and Science of Conducting the Voir Dire,* 9 PRO. PSYCHOL. 367 (1978).
39. Brodsky & Cannon, *supra* note 27.
40. Suggs & Sales, *supra* note 38.
41. Brodsky & Cannon, *supra* note 27.
42. Field research as part of the Capital Jury Project consisted of interviewing jurors on capital trials, and found that *unfavorable* impressions (e.g., an alcoholic defense counsel) could play a decisive role in jury decision making. *See* Adam Trahan & Daniel M. Stewart, *Examining Capital Jurors' Impressions of Attorneys' Personal Characteristics and Their Impact on Sentencing Outcomes,* 7 APPLIED PSYCHOL. IN CRIM. JUST. 93 (2011).
43. Seltzer, Venuti, & Lopes, *supra* note 31.
44. The number may be as high as 50% for jurors in criminal cases, meaning that their biases were presumably undetected through voir dire. *See* ELISSA KRAUSS & BETH BONORA, JURY WORK: SYSTEMATIC TECHNIQUES (1999).
45. Seltzer, Venuti, & Lopes, *supra* note 31.
46. For typically two of the twelve jurors, even knowledge of a defendant's prior conviction negatively impacted their views of the case.
47. Lockhart v. McCree, 476 U.S. 162, 177 (1986) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).
48. Rogers et al., Perspectives of Juror-Eligible Adults, *supra* note 14.
49. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making, and Misremembering,* 57 DUKE L. J. 345 (2007).
50. Heather M. Kleider et al., *Deciding the Fate of Others: The Cognitive Underpinnings of Racially Biased Juror Decision Making,* 139 J. GEN. PSYCHOL. 175 (2012).
51. Myrto Pantazi, Oliver Klein, & Mikhail Kissine, *Is Justice Blind or Myopic? An Examination of the Effects of Meta-cognitive Myopia and Truth Bias on Mock Jurors and Judges,* 15 JUDGMENT & DECISION MAKING 214 (2020).
52. Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making,* 34 LAW AND HUM. BEHAV. 212 (2010).
53. Margaret Bull Kovera, *Voir Dire and Jury Selection,* in 11 HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 630 (Randy K. Otto & Irving B. Weiner eds., 2d ed. 2013).

manner.[54] Here are two straightforward examples for Support-Death and Support-Life perspectives:

[Support-Death] The death penalty helps reduce the long-term suffering for families whose loved ones were victims of violent crimes.

[Support-Life] Many defendants whose death sentences were overturned later became model inmates for the rest of their lives.

Rather than being asked simplistically for the bottom line, venirepersons can express their levels of agreement with differing viewpoints. Clearly, answers in the affirmative to *these* questions are unlikely to be viewed as overtly stigmatizing.

For criminal cases more generally, questions can also be asked that balance different viewpoints. Venirepersons may be highly critical of attorneys' roles (prosecution or defense) in the criminal justice system. Here are two prime examples:

[Prosecution] Prosecutors hold back information that possibly could clear the defendant.

[Defense] Defense lawyers give in on one criminal case to get a better deal on another.

These examples indicate explicit dissatisfaction with attorney conduct, which can be revealing. Attorneys and their consultants may wish to examine venirepersons' relative levels of dissatisfaction. For example, a particular venireperson may strongly question the motivation and actions of defense attorneys far more than his or her prosecutorial counterparts.

Researchers have developed[55] and validated[56] the Juror Questionnaire of Values and Viewpoints (JQVV) for use in criminal trials. As just illustrated, it measures prosecution-related and defense-related cynicism. Predictably, Support-Death persons were much more cynical about defense counsel, but surprisingly both groups were similarly cynical of prosecutors. Furthermore, Support-Death persons understandably had much more positive views about the fairness and accuracy of the criminal justice system and were far more willing to hold offenders responsible for their actions.

Such results demonstrate a far-reaching paradox about death-penalty views and the willingness to deceive.[57] When asked very direct questions, Support-Death persons were far more likely to engage denial and deception with about half were willing to lie the clear majority of the time. When asked more nuanced questions from the JQVV, generally opposite results emerged. Support-Death persons showed only small to very small differences even when trying to make a good impression. In contrast, Support-Life persons evidenced less of a propensity to lie on direct questions but would be prepared to do so to make a positive impression.

WHAT DO WE KNOW ABOUT VENIREPERSONS WHO POSE A HEIGHTENED RISK OF DENIALS AND DECEPTIONS?

Researchers have confirmed the commonsensical notion that some persons are generally concerned about making a good impression in most social settings.[58] What has not been known is whether persons generally high in positive impression management would be likely to deny and deceive on juror questionnaires. For the purposes of this article, a supplementary analysis was conducted on past research.[59] However, the results failed decisively to make that case. Instead, the willingness to lie when questioned in jury selection mostly appears to be situationally specific and not a stable attribute of certain persons.

Support-Life persons, when responding on the JQVV with complete anonymity, revealed very strong and affirming reasons in opting for life over death for capital sentencing. When focused on making a good impression, however, the picture changed drastically with Support-Life persons even pretending to favor death slightly more than life. Prosecutors will justly be concerned about these deceptive practices by Support-Life persons that mask true views while faking their support for death.[60]

Are there any indicators that can assist in potentially identifying venirepersons attempting to make a good impression via denials and deceptions? Attorneys need to be cautioned that only one study has directly tackled this crucial issue. Rogers and his colleagues[61] found the juror-eligible persons often pretended to have overly positive views of prosecutors[62] when trying to make a good impression on juror questionnaires. When responding candidly, almost all persons—whether Support-Death or Support-Life—expressed major reservations about prosecutorial conduct. Box 4 provides three examples of cynicism about the prosecution.

In general, the public varies substantially in whether they agree or disagree with these statements. In creating a good impression, however, about half of persons will falsely paint an overly positive view of prosecutors as faithfully serving justice without any personal motivations. In addition, Support-Life persons seeking to make a good impression are apt to falsely express a high level of confidence in the judicial system (e.g., praising the accuracy of its verdicts across criminal cases).

These patterns should be considered only initial indicators of when more focused questioning might be considered on voir dire. Nonetheless, such guidance should not be discarded lightly, given the critical importance of the process and the very real potential for life-altering consequences.

54. Rogers et al., Perspectives of Juror-Eligible Adults, *supra* note 14.
55. Richard Rogers & Sara E. Hartigan, Juror Questionnaire of Values and Viewpoints (JQVV) (2000) (unpublished test) (on file with author).
56. Rogers et al., Perspectives of Juror-Eligible Adults, *supra* note 14.
57. *Id.*
58. Delroy L. Paulhus, Paulhus Deception Scales (PDS): The Balanced Inventory Of Desirable Responding-7: User's Manual (1998).
59. Rogers et al., *Capital Juror Questionnaires, supra* note 14.
60. In creating a good impression, Support-Life falsely hid their negative views of the death penalty by more than 70%.
61. Rogers et al., Perspectives of Juror-Eligible Adults, *supra* note 14.
62. The pattern was much less pronounced regarding cynicism toward defense attorneys.

BOX 4

Cynicism about the Prosecution

1. Winning at all costs (e.g., fighting any admission of DNA evidence)
2. Using their position to further their career (e.g., exploiting high-publicity cases for reelection)
3. Engaging in selective prosecution (e.g., being reluctant to pursue domestic violence)

LOOKING FORWARD, WHAT RECOMMENDATIONS CAN BE MADE FOR IMPROVING CRIMINAL JURY SELECTION?

Implement Juror Questionnaires on Polarizing or Disturbing Issues. Criminal courts may be reluctant to use valuable time on extended voir dire.[63] Nonetheless, judges are likely to see the merits of juror questionnaires as a time-efficient method for addressing attitudes and biases that may seriously threaten the jury impartiality during the trial. Some issues are potentially polarizing, such as cases involving hate crimes[64] or the legitimacy of police conduct.[65] In addition, other issues may also be deeply disturbing to many venirepersons such as matters involving sexual violence against children.[66] In these cases, the use of standardized juror questionnaires can provide attorneys with valuable information to help guide their follow-up questions in a sensitive way that reduces the "demand characteristics"[67] (i.e., implicit expectations influencing behavior) placed on jurors in voir dire.[68]

When juror questionnaires reveal potential issues, effective voir dire becomes the focused objective. It is recommended that open-ended questions be used (e.g., "Tell me more about …") to help to illuminate a particular venireperson's perspective. With reduced demand characteristics, questions during voir dire that encourage longer responses provide more insights into the venireperson's thinking and emotions.[69] When queried openly and non-judgmentally, other venirepersons—yet to be questioned—may become more reflective in their own thinking and subsequent responses.

Taking the Challenge. This article began with a frank admission about the overreach of social science in its purported contributions to jury selection. Our goal is to encourage healthy skepticism, but that is not enough. What truly is needed is constructive change.

The proposal, "Taking the Challenge," simply consists of two parts. Part 1 involves the administration of a juror questionnaire that asks about the specific case at issue. To identify potentially problematic jurors, two types of general questions are recommended to identify possible deceptions. First, background questions should be asked about several items that are very susceptible to false denials when asked during voir dire[70] (see Questions #1 to #4 in Box 5). An example would be the following: "Have you ever been the victim of a crime?" (Question #2) Second, venirepersons may have undisclosed biases that seriously threaten their impartiality as jurors.[71] Questions based on field research are presented (see Questions #5 to #8 in Box 5). For example, consider the following: "If the defendant does not testify, can that be seen as evidence to convict?"

For Part 2 of "Taking the Challenge," put aside the juror questionnaires for a short time. Next, follow the usual protocol, such as asking group questions to the assembled venire. Record how many venirepersons step forward during this process either because of their backgrounds or their biases.

What happens next is easy to anticipate. Responses to voir dire will then be compared to answers on juror questionnaires. Based on past field research with actual jurors,[72] the large majority will falsely deny.[73] As already discussed, these venirepersons should not be blamed; they are responding to the strong demand characteristics in a very unfamiliar setting, where they are formally asked to expose personal matters, such as their past victimization or their private (yet deeply held) biases.

What does "Taking the Challenge" accomplish? In the imme-

BOX 5

Embedded Questions to Cross-Check the Candor of Venirepersons

A. Background
   1. Has someone close to you been the victim of a crime?
   2. Have you ever been the victim of a crime?
   3. Has someone close to you ever worked in law enforcement?
   4. Have you ever worked in law enforcement?

B. Biased beliefs
   1. As the trial starts, should I assume that there is a 50-50 chance the defendant is guilty?
   2. If the defendant does not testify, can that be used as evidence to convict?
   3. If the defense does not call even on a single witness, can that be used as evidence of guilt?

63. Seltzer, Venuti, & Lopes, *supra* note 31.
64. Robert J. Cramer et al., *A Mock Juror Investigation of Blame Attribution in the Punishment of Hate Crime Perpetrators,* 37 Int'l J. L. & Psychiatry 551 (2014).
65. This matter has been addressed more generally but not in the specific context of jury selection. *See* Lorraine Mazerolle et al., *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice,* 51 Criminology 33 (2013).
66. Robert J. Cramer, Desiree D. Adams, & Stanley L. Brodsky, *Jury Selection in Child Sex Abuse Trials: A Case Analysis,* 18 J. Child Sexual Abuse 190 (2009).
67. Marshall & Smith, *supra* note 37.
68. Kovera, *supra* note 53.
69. Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations,* 16 J. Empirical Legal Stud. 515 (2019).
70. Seltzer, *supra* note 9.
71. *Id.*
72. *Id.*
73. *See Id*. As summarized in Box 3, not a single biased juror was identified during the customary voir dires.

diate term, jury selection will be improved for this particular case. Venirepersons can be probed gently about their inconsistencies. In the long term, officers of the court may gain insights regarding the pervasive weaknesses of using highly abbreviated selection methods for attempting to ensure impartiality. Box 5 provides eight sample questions to be embedded in juror questionnaires. As noted, variations of these questions have been used in actual juror selection.[74] Instead of asking compound questions, these examples are simple and focused to provide clear, potentially verifiable responses.

Consultations on Real-World Considerations. As acknowledged from the outset, basic laboratory research does not always transfer easily to a particular case and its singular complexities. Instead, goals for consultation should be narrow in scope and reflect pragmatically achievable objectives. In a capital case, for instance, the removal of even a single juror with strong but undisclosed biases may be the key objective.[75]

With completed juror questionnaires in hand for a pending case, a consultant may prove valuable in systematically evaluating patterns of responses than can reveal the particular viewpoints of prospective jurors.[76] On this point, the JQVV has two scales to examine proneness to convict and acquit. Although the review of individual items may be informative, it is likely that the relative weight given for the proneness to acquit or convict will be the most useful. For example, defense attorney prosecutors may be reasonably concerned about a venireperson strongly predisposed to convict. As a result, the JQVV can provide a valuable but preliminary "snapshot" of individual venirepersons, yielding data that can be explored further during voir dire.[77] From the prosecutor's perspective, much higher ratings for acquit than convict will justifiably raise concerns about impartiality going against the prosecution's case.[78] The polar opposite may be true for the defense.

The targeted focus of the current article differs fundamentally from the more general use of juror consultants with a partisan and private search for favorably disposed jurors. This traditional approach is sometimes marketed under the questionable rubric of "scientific jury selection." Instead, the narrowly focused application described here emphasizes an open inquiry into juror responses that are equally available to both sides of the bar. With shared data, all involved professionals have an opportunity to evaluate venirepersons' viewpoints, with or without consultants.

CONCLUDING THOUGHTS

Non-capital jury selection is typically characterized by its undue brevity and seeming lip service to constitutionally required impartiality. Current methods[79] for detecting deceptive venirepersons have not been empirically tested and do not even address juror impartiality. This article focuses on small but achievable goals in attempting to elicit rather than suppress enduring biases so that counsel may make informed decisions during the jury-selection process. Such incremental steps—although clearly imperfect—encourage and respect candor by venirepersons in seeking impartiality and fundamental fairness.

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74. Seltzer, *supra* note 9.
75. The Capital Jury Project analyzed more than 300 actual death penalty cases. When the initial vote on sentencing was not lopsided, it was determined that the biased views of a single juror might make a 10 to 15% difference in whether the death sentence was imposed.
76. Juror questionnaires are simply the beginning of the process. See Len Lecci & Bryan Myers, *Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire* (PJAQ), 38 J. OF APPLIED SOC. PSYCHOL. 2010 (2008).
77. *Id.*
78. Support-Life, as previously discussed, evidenced a strong propensity to mask their true views against the death penalty when attempting to make a positive impression.
79. Anthony L. DeWitt, *Detecting Deception During Voir Dire,* 39 AM. J. TRIAL ADVOC. 25 (2015).