

*Social Science
on Appeal:
The Sequel*

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Using Social Science on Appeal: The Sequel
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Last year, Anna Stuart and I wrote an article on using social science on appeal, and in writing this sequel, I was hoping to have dozens upon dozens of cases to talk about in which the court relied on social science to reach a just result. Alas, no. Courts are still occasionally citing social science, and criminal defendants are sometimes getting relief as a result. (See, e.g., *In re Gomez* (Jan. 6, 2022, H047413), 2022 Cal.App.Unpub. LEXIS 97, *19 [nonpub. opn.] [citing studies on eyewitness identification in finding prejudicial error].) But I didn't find the wealth of cases I was hoping.

I did, however, find one bright spot in the social-science-and-the-law landscape: the dissenting opinions of Justice Liu. Take, for example, Justice Liu's dissent on a *Batson* issue in *People v. Holmes, McClain and Newborn* (2022) 12 Cal.5th 719 ("*Holmes*"). There, the Court found no error when the prosecutor used 50% of his peremptory challenges on Black women when Black women represented only a quarter of the jurors in the venire. (*Id.* at pp. 759-761.) In other words, the prosecutor struck Black women from the jury at twice the rate at which they appeared. And the Supreme Court apparently had no problem with this. (*Ibid.*)

Justice Liu, however, did have a problem with it, and he made his case not just by arguing the law, but by arguing the facts of racial discrimination in jury selection. (See *Holmes*, *supra*, 12 Cal.5th at pp. 835-847.) Justice Liu noted, "Empirical studies demonstrate that Black women are the frequent target of prosecutors' peremptory challenges in capital cases and are struck disproportionately compared to other groups."¹ (*Id.* at p. 840.) Indeed, he said, this state of affairs is precisely why *Batson* exists. (*Id.* at p. 841.)

Justice Liu issued a similarly powerful dissent in *People v. Johnson* (2022) 12 Cal.5th 544, another capital affirmance. There, the court had overlooked five separate *Miranda* violations to affirm Mr. Johnson's conviction and death sentence. (*Id.* at p. 590.) That is, Mr. Johnson had invoked his right to remain silent not once, not twice, but five total times, and two of those times he also asked for an attorney. (See *id.* at pp. 568-576.) Yet those requests were completely ignored. (*Ibid.*) The police and the District Attorney's Office continued to

¹ The studies were: Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis* (2001) 3 U.Pa. J. Const. L. 3, 123 [young Black women experienced the highest strike rate by the prosecution followed by young Black men and Black middle-aged women]; Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue* (2018) 4 U.Ill. L.Rev. 1407, 1427 [prosecutors removed Black women at about double the rate they removed White prospective jurors]; Eisenberg et al., *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2014* (2017) 68 S.C. L.Rev. 373, 389 [same].

question him, even enlisting a psychiatrist under the guise of concern for Mr. Johnson’s well-being. (*Ibid.*)

The majority acknowledged the *Miranda* violations but stopped short of suppressing Mr. Johnson’s statements. (*Johnson, supra*, 12 Cal.5th at p. 590.) According to the majority, Mr. Johnson re-initiated the conversation with the police, so it was his own free will—and not the “concerning” tactics of law enforcement—that led him to confess. (*Ibid.*) Of course, the police were, at the time of Mr. Johnson’s supposed re-initiations, violating *Miranda* left and right, as Justice Liu pointed out, and in his dissent, he let the majority have it—again, with empirical research. (*Id.* at pp. 649-650.)

Justice Liu said the Court’s holding would encourage law enforcement to engage in subterfuge in the future. (*Johnson, supra*, 12 Cal.5th at p. 650.) On this point, he cited an article by Professor Charles Weisselberg of Berkeley Law. (*Ibid.*, citing Weisselberg, *Mourning Miranda* (2008) 96 Cal. L.Rev. 1519, 1522.) Professor Weisselberg had reviewed police training materials not available to the public, and using those materials, he showed that law enforcement is actually keenly aware of court opinions on *Miranda*. Law enforcement knows what courts will tolerate or, in other words, what they can get away with. (Weisselberg, *supra*, 96 Cal. L.Rev. at p. 1521-1522.) So, by not sanctioning true *Miranda* violations when they are found, the courts undermine *Miranda*’s protections. (*Johnson, supra*, 12 Cal.5th at p. 650.)

So, what’s the upshot of all this? Should we all try to be like Justice Liu and use social science to make our arguments?

Well, yes. And here’s why: Read those dissents. When Justice Liu is writing—and when he is citing facts about the world that are germane to the issue at hand—his arguments are compelling. They are persuasive, and they leave the reader (or at least this reader) convinced of the justness of his position. Justice Liu does not deal only with abstract legal principles—he grounds his arguments in the way the world actually operates. We should all aspire to do the same.

But there’s another reason we should use empirical research in our briefs, too. And that’s because the courts are in fact using empirical research already, and it’s not always to help our clients. In *People v. Salvador* (2022) 83 Cal.App.5th 57, for instance, our own Sixth District Court of Appeal approved a probation condition that required Mr. Salvador to make all of his electronic devices available for invasive probation searches, even though his underlying charge had little to no connection to internet use. (*Id.* at p. 64.) In so doing, however, the Court relied on statistics from the federal Department of Justice to say that “predators online commonly use social media to contact and groom minors.” (*Ibid.*) That fact appeared nowhere in the record, and Mr. Salvador did not in fact use social media to “contact and

groom minors.” (*Id.* at p. 63.) And indeed, “the trial court did not make any findings as to [Mr. Salvador’s] future criminality.” (*Id.* at p. 64.) But the court still used the DOJ statistics to justify the probation term. (*Ibid.*)

While I disagree with the Court’s reasoning, I’m not citing this opinion to criticize the Court’s use of statistical evidence. Quite the opposite, actually. As the Court used statistical evidence to justify the probation term here, this opinion underscores that using empirical research is proper. Statistics and surveys and social science generally are all appropriately discussed on appeal. They remain weapons in our arsenal, and we should not be afraid to use them.²

To that end, in this article, I’m going to focus on four areas. The first and broadest will be jury research: What do jurors care about? What evidence do they think is important? And how do they understand jury instructions (if at all)?

Second, what is racial bias and how does it appear in court? This section will be focused on the Racial Justice Act, a watershed piece of legislation that will require appellate attorneys to become very familiar with racial dynamics in court.

Third, I’ll veer away from social science as such and try my hand at historical research, focusing on one area of Fourth Amendment jurisprudence that I hope will be open to challenge in light of the United State Supreme Court’s evident concern over the meaning of our constitutional rights at the time of our nation’s founding.

Finally, I’m going to touch on innocence. Innocence can be a bit of a dirty word among criminal-defense lawyers. Seldom are our clients *completely* innocent and even suggesting that your client is innocent can make you seem a bit, say, naïve. But innocent clients do exist, and research in the innocence sphere can add heft to our arguments, at least in the right cases.

I. Jury studies

As a preliminary matter, the behavior of juries has long been researched. Every lawyer wants to know what a jury is likely to do, and researchers have not been shy about investigating.

² Further, the *Salvador* court did strike down a separate probation condition that prohibited all internet use, subject to probation’s approval. (*Salvador, supra*, 83 Cal.App.5th at p. 67.) The Court said, “Many more people today use the Internet to work from home, follow the news, or conduct business and commercial transactions such as banking and paying bills. No valid purpose is served by preventing Salvador from engaging in the kinds of Internet access that have become common and ubiquitous—e.g., performing work-related tasks, accessing or commenting on news sites, or conducting commercial or business transactions in ways that require engaging in protected speech.” (*Ibid.*) So, the *Salvador* opinion was in fact quite helpful for Mr. Salvador and other probationers like who would have been prohibited from using the internet entirely.

Yet, these studies have often been criticized by the courts, and they seldom appear in legal opinions. Take one example.

In *Free v. Peters* (7th Cir. 1993) 12 F.3d 700, Mr. Free filed a federal habeas petition challenging his death sentence on the basis that the jury instructions were unconstitutionally confusing. (*Id.* at p. 702.) Mr. Free supported this argument with a study conducted by a renowned legal sociologist, Hans Zeisel. (*Ibid.*) Professor Zeisel selected people who had been called to jury duty in Cook County but not selected. (*Id.* at p. 705.) He gave them a factual summary similar to Mr. Free’s case, read them instructions similar to those given in Mr. Free’s case, and then asked them questions to test their understanding of the instructions. (*Ibid.*) “The test takers,” in the words of Judge Posner, who authored the opinion, “did not do well.” (*Ibid.*)

Judge Posner, however, was unimpressed with the findings of Professor Zeisel’s study. (*Free, supra*, 12 F.3d at pp. 705-706.) He claimed that the setup of the study was not similar enough to how actual jurors hear cases. In a trial, jurors are given instructions as a group. They sit in a courtroom. They hear evidence over days, weeks, or even months, and they then deliberate among themselves to reach a verdict. This is all a far cry from taking a multiple-choice test in isolation. So the fact that the mock jurors in Professor Zeisel’s study answered some questions wrong doesn’t mean that actual jurors in an actual trial would make the same mistakes. (*Ibid.*)

Personally, I disagree with Judge Posner’s attitude—I have little faith in jurors’ ability to understand complex instructions, as will be discussed below—but unfortunately, Judge Posner’s attitude typifies the approach many courts take. (See Cicchini and White, *Educating Judges and Lawyers in Behavioral Research: A Case Study* (2018) 53 Gonzaga L.Rev. 159, 180 [noting that many judges, like many people, suffer confirmation bias and use social science only when it confirms a desired ruling].)

Still, jury research is a fight worth fighting because, to my mind, the alternative is so bad. What courts typically do is just assume that jurors understand complicated, poorly worded instructions and otherwise give the evidence whatever weight the court thinks it should be given. In other words, courts assume that jurors, who likely have no legal training, understand jury instructions and assess evidence just as an appellate court would. (See, e.g., *People v. Guillen* (2014) 227 Cal.App.4th 934, 1016 [“We presume jurors are intelligent people capable of understanding instructions and applying them to the facts of the case.”].) That is an untenable position, and it is our job as advocates to push against it.

So, let’s get to it.

a. Character evidence

It should come as no shock that evidence of the defendant's *good* character is seldom as persuasive as evidence of the defendant's *bad* character. In any given trial, the defendant can line up all of his friends to testify that his reputation in the community is sound and that in their opinions, he is a good man who would never do something as heinous as the crime alleged. And that testimony will crumble in the face of just one instance of prior similar criminal conduct.

There are two reasons for this. First, jurors attribute more importance to negative facts than positive facts. (Hunt, *The Cost of Character* (2017) 28 U. Fla. J.L. & Pub. Pol'y 241, 255-256.) And second, good character evidence only ever comes in the form of opinion or reputation evidence. (*Ibid.*) It is too general to be of any value. Bad character evidence, however, often comes in the form of uncharged acts (be it under Evidence Code sections 1101, 1108, or 1109). And the specific will always beat the general. (*Ibid.*)

Multiple studies bear this out. In one, for example, mock jurors were given a summary of a trial involving either an assault or a burglary. One group of jurors received evidence of the defendant's good character in the form of general testimony from the defendant's boss. Another group of jurors heard about specific instances of the defendant's good conduct. The character evidence was then either not rebutted by the prosecution, rebutted with cross-examination that included specific examples of the defendant's negative actions, or rebutted with a contrary character witness who gave general testimony that the defendant had negative qualities (e.g., was untrustworthy). The control group received no character testimony. (Hunt, *supra*, 28 U. Fla. J.L. & Pub. Pol'y at p. 259.)

The results showed that the general character evidence was essentially meaningless. (Hunt, *supra*, 28 U. Fla. J.L. & Pub. Pol'y at pp. 259-260.) While specific instances of the defendant's good character increased jurors' perceptions of the defendant's trustworthiness or warmth, they did not affect conviction ratings. (*Ibid.*) What did affect conviction rates, however, was specific instances of bad conduct. (*Ibid.*) The jurors really cared about the defendant's prior criminal behavior, and when shown specific examples of the defendant's prior bad acts, the jurors convicted at a much higher rate. (*Ibid.*) Multiple other studies reached the same result. (*Id.* at pp. 259-262.)

A similar study was done by Michael Cicchini, a criminal-defense lawyer in Kenosha, Wisconsin, along with Professor Lawrence White of Beloit College. (Cicchini and White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence* (2018) 70 Fla. L. Rev. 347. In this study, the crime involved an alleged sexual assault, and there were two possible defenses—identity or that the crime never happened. (*Id.* at pp. 357-364.) The participants

were put into two groups. (*Ibid.*) In Group A, the mock jurors received a stipulation as to identity—that is, the parties stipulated that if a crime was committed, it was the defendant who did it. These jurors convicted at a rate of 33%. (*Id.* at p. 359-363.)

In Group B, however, the mock jurors received no stipulation as to identity. Instead, they were told only that the defendant had committed a similar crime in the past, though they were also instructed to use the prior only on the issue of identity. (Cicchini and White, *Convictions, supra*, 70 Fla. L.Rev. at pp. 359-363.) These jurors convicted at a rate of 48%, much higher than the other group. (*Id.* at p. 363.) In other words, these jurors were given less evidence as to identity, but they convicted at a much higher rate. The conclusion was obvious: Even with a cautionary instruction, jurors used the priors in an impermissible way to convict. (*Id.* at pp. 363-365.)

So, what do you do with this information? Well, use it! We deal with prior bad acts all the time. These studies show that what we are typically arguing is correct: Prior bad acts are incredibly prejudicial. So, these studies will fit nicely in either an argument that the court erred under Evidence Code section 352 or in a prejudice section where prior bad acts evidence was improperly introduced.

Further, while Judge Posner had some concerns about Professor Zeisel's lone study about jury instructions, we're not dealing here with an isolated study. There are tons. (See Patterson, *OEC 404(4): Your Past Will Come Back to Haunt You* (2016) 52 Willamette L.Rev. 291, 316-320 [summarizing further studies on prejudicial effect of prior bad acts].) That prior-bad-acts evidence is prejudicial should not be up for debate at this point.

b. How do jurors reach their verdicts?

The way jurors use (and misuse) character evidence may be grounded in how they decide cases generally. Courts often seem to assume that jurors assess evidence like they are calculating an equation of guilt or innocence, as in, "Motive plus opportunity plus lying to the police equals guilty" or "shaky identification plus convincing denial equals innocent."

But jurors seldom view cases like that. Instead of "considering and weighing each relevant piece of evidence in turn," jurors construct "competing narratives and then decid[e] which story is more persuasive." (Griffin, *Narrative, Truth, and Trial* (2013) 101 Geo. L.J. 281, 285.) In other words, jurors do not neutrally assess the evidence, add up points in favor of guilt, and arrive at a verdict as one would a mathematical equation. They try to fit the evidence into a story—one of guilt or innocence—and decide based on which narrative is most compelling. (*Ibid.*) This is the "story model of adjudication," and multiple studies show that this is how jurors decide cases. (*Id.* at pp. 327-328, 331-332.)

So, is it a problem that jurors use the stories to decide cases? Unfortunately, it can be. As one scholar puts it, “narrative power stems from formal authenticity rather than substantive accuracy.” (Griffin, *supra*, 101 Geo. L.J. at p. 302.) As in, just because the DA had a compelling story, doesn’t mean your guy actually did it. Further, trials are only ever snapshots, and the way evidence is presented in court is not intended to tell a compelling story (or else a lot more evidence would be admitted). (*Id.* at pp. 303-313.) And worse, many intuitively plausible stories (e.g., “I never forget a face”) do not withstand evidence-based testing. (*Id.* at p. 313.)

So, what do you do with all this? Professor Griffin makes a few suggestions—attorneys can push for expanded *Brady* disclosure in the trial courts or a more favorable reasonable-doubt instruction. (Griffin, *supra*, 101 Geo. L.J. at pp. 315-317.) And of course, we’d all love to see those. But the most direct way for appellate practitioners to use the story model of adjudication is in arguing prejudice. Attorneys can focus their prejudice analysis on how an improperly admitted piece of evidence fit into the state’s narrative of guilt, not just how the evidence added or subtracted a point in the equation guilt. (*Id.* at pp. 317-319.)

Many of us do this already. But in the right case, by citing articles like Professor Griffin’s, you may get the court to see that the court is viewing the case in a more rationalistic way than most jurors. That is, in any particular case, the court might see excluded defense evidence as merely “cumulative or impeaching” and thus may find that its exclusion was not prejudicial. But if you could get the court to view the case from a narrative perspective, the court might see that that piece of evidence would have allowed the defense to tell a vastly different story of the case—indeed, a more persuasive story—than they were allowed to without the evidence.

c. Does prosecutorial misconduct in closing argument matter?

Changing gears, a thorn in the side of most criminal appellate practitioners is prosecutorial misconduct in closing argument. Prosecutorial misconduct has been criticized in Supreme Court cases going back 85 years (See, e.g., *Berger v. United States* (1935) 295 U.S. 78, 84-85 [“The prosecuting attorney’s argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.”]), and it has been the focus of scholarly attention since at least the early 1970s. (See, e.g., Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges* (1972) 50 Tex. L.Rev. 629.) Prosecutorial misconduct has been found to have been a contributing factor in as many as 43% of wrongful convictions (Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity* (2011) 80 Fordham L.Rev. 509, 519, citing *Panelists Examine Why Prosecutors Are Largely Ignored by Disciplinary Officials* (Mar. 7, 2006) 74 U.S.L.W. 2526, 2526), and the Innocence Project has cited prosecutorial misconduct as a leading factor in DNA-

exoneration cases. (See West, *Innocence Project: Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases* (2010), available at https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf (last visited October 31, 2022).)

Sadly, misconduct in closing argument persists, and no one reading this article needed the references cited above to tell them that. But does misconduct in argument *matter*? Does it affect outcomes? In short, yes.

To start, closing arguments are “the most important part of the trial, providing the attorneys with their last opportunity to convince the jury of the defendant’s guilt or innocence.” (Lyon, *Avoiding the Woodshed: The Third Circuit Examines Prosecutorial Misconduct in Closing Argument* in *United States v. Wood* (2008) 53 Vill. L.Rev. 689, citing Frost, *Ethos, Pathos & Legal Audience* (1994) 99 Dick. L. Rev. 85, 113.) The closing argument allows the attorneys “to sum up the evidence within a narrative framework to help the jury understand and interpret the evidence.” (Bowman, *Mitigating Foul Blows* (2015) 49 Ga. L.Rev. 309, 320.) And while “argument does not constitute evidence and the jury is instructed not to consider it as such, the use of dramatic, compelling, or even inflammatory argument reflects a perception that argument is a valuable ingredient of the deliberative process. . . .” (Sullivan, *Prosecutor Misconduct in Closing Argument in Arkansas Criminal Trials* (1998) 20 U. Ark. Little Rock L.J. 213, 219.)

Studies confirm the weight jurors give to a prosecutor’s closing argument: “Empirical research on the ‘recency effect’ suggests that people tend to remember best and be influenced by the latest event in a sequence more than by earlier events.” (*Mitigating Foul Blows*, *supra*, 49 Ga. L.Rev. at p. 344, citing Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury* (2006) 59 Okla. L.Rev. 479, 518.) Indeed, studies confirm that closing argument, while not always determinative, is important. For example, in a large ethnographic study of 223 jurors who sat through actual trials, 88% said closing argument was important. (Mitchell, *Why Should the Prosecutor Get the Last Word* (2000) 27 Am. J. Crim. L. 139, 152-153.) And in this same study, 14% of jurors reported that their opinions changed during the prosecutor’s closing and 10% in the defense closing (another study had the numbers at 7% and 5% during prosecution and defense closing respectively). (*Id.* at p. 155.)

While those numbers may seem small, think about a criminal jury: Based on those numbers, of the 12 jurors, somewhere between one and three jurors changed their minds during closing argument. So, while the numbers seem small, error in closing should almost always result in prejudice. It takes only one juror to hang a jury and a hung jury is a more favorable

outcome than a conviction. On average, one to three jurors changed their minds as the prosecutor was making his or her improper arguments. That sounds like prejudice to me.

d. Do jurors understand the instructions?

Now let me ask a general question: Do jurors typically understand jury instructions? Or, put another way, are jury instructions written in such a way as to be understood by the lay person? Most of us would probably say no. Indeed, I find that most appellate practitioners—at least those representing criminal defendants—have long discarded any hope that jurors really understand the law. And that's not necessarily the fault of the jurors. Instructions are often confusing and poorly worded. And courts typically decline to provide additional instructions in areas where jurors are legitimately confused. So, it would be no surprise to find that most jurors are hopelessly confused about what the courts are asking them to do.

Yet, do our Courts of Appeal feel the same way? Unfortunately, no. Indeed—to invoke an incantation we are all familiar with—courts presume jurors are intelligent people capable of understanding the jury instructions. (*Guillen, supra*, 227 Cal.App.4th at p. 1016.)

This is the presumption we should attack. Jurors often do *not* understand the instructions, and while Judge Posner was unimpressed with Professor Zeisel's work, that work has only found support over the years through numerous subsequent studies.

Let's start with a few of the early ones. Since at least the 1970s, researchers have studied how well jurors understand jury instructions. (Marder, *Bringing Jury Instructions Into the Twenty-First Century* (2006), 81 Notre Dame L.Rev 449, 451.) Generally, the answer is: not very well. (*Ibid.*) Pattern instructions usually use legal jargon, ambiguous language, and awkward grammar, all of which make them confusing to jurors. (*Id.* at p. 454.) Further, jury instructions are often organized in ways that are difficult to discern, and pattern instructions in particular are written in such general terms that it is often difficult for jurors to apply them to the case at hand. (*Id.* at pp. 451-454.)

Multiple studies over the past several decades have confirmed the difficulty that jurors have in understanding jury instructions. (Marder, *supra*, 81 Notre Dame L.Rev at pp. 454-455, citing Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?* (1977) 1 Law & Hum. Behav. 163.) For instance, in one study conducted by the National Science Foundation, mock jurors were assigned to one of three groups—a group receiving no jury instructions, a group receiving pattern jury instructions, and a group receiving jury instructions rewritten to increase comprehension. (*Id.* at p. 455.) The jurors then watched a videotaped trial using actors and were given a questionnaire designed to test comprehension. (*Ibid.*)

The study found that the pattern jury instructions were no more effective at conveying the relevant legal principles than no instructions at all. (Marder, *supra*, 81 Notre Dame L.Rev at p. 455.) That is, while the rewritten instructions were helpful at increasing comprehension for the group that received those, the comprehension errors were the same for the group that received the pattern instructions as it was for the group that received no jury instructions at all. (*Ibid.*)

Other studies have confirmed this finding and have shown that comprehension does not meaningfully increase when mock jurors are given a chance to deliberate before answering questions or even when people who actually served as jurors are surveyed. (Marder, *supra*, 81 Notre Dame L.Rev at pp. 455-458.) Indeed, one survey of former jurors found that they understood the jury instructions less than half the time. (*Id.* at p. 457, citing Reifman et al., *Real Jurors' Understanding of the Law in Real Cases* (1992) 16 Law & Hum. Behav. 539, 550.) So, with all due respect to Judge Posner, he was way off in his assessment of Professor Zeisel's work.

On a personal note, I was fortunate enough to be able to try the same thing that counsel for Mr. Free did: assist in research on certain of the CALCRIM instructions. After the presentation on this topic last year, panel attorney William Safford—whose passion for social science in the law exceeds even my own—introduced me to Dr. Beth Redbird, a professor at Northwestern University, who explained to me how easy empirical research has become with the advent of programs like Amazon's Mechanical Turk. Mechanical Turk is an online survey platform in which users can get paid small sums for taking brief surveys, making empirical research both easy and cheap.

Dr. Redbird graciously volunteered to conduct a study of the CALCRIM instructions for voluntary manslaughter. My theory (with tremendous assistance from Bill Robinson) was that the instructions misstated the burden of proof for heat of passion, and Dr. Redbird said she could run a survey to test that hypothesis.³

For the survey, Dr. Redbird provided participants (found through Mechanical Turk) with a brief factual scenario involving a killing between two coworkers. (Redbird, *The Impact of Jury Instructions on Heat of Passion Manslaughter Determinations* (2022) Northwestern Inst. for Policy Research, at p. 2, available at <https://www.ipr.northwestern.edu/documents/working-papers/2022/wp-22-08.pdf>, last visited October 31, 2022.) The killing was possibly the

³ For more information on the instructional issue, see Bill's article, *Turning Murder into Manslaughter*, available on the SDAP website. Also, because the survey related to an actual case I was working on, I had no role in the survey results. I only provided Dr. Redbird the inputs (i.e., the factual summary and the instructions), and she ran the survey from there. I had no control over the results, and Dr. Redbird's decision to publish the study—whether it was good or bad for my case—was completely out of my hands.

result of verbal provocation. (*Ibid.*) Dr. Redbird then had the survey participants watch a video of someone reading the CALCRIM instructions and then answer a series of questions to test their comprehension. (*Id.* at p. 1-2.) The survey group included 897 participants recruited via Amazon’s Mechanical Turk program, “an online platform where individuals may opt to take surveys for payment.” (*Id.* at p. 1.) Most of the participants had at least some level of college education, which meant that the survey participants were, on the whole, more educated than the general population. (*Id.* at p. 2)

Nevertheless, when asked six true-or-false questions about the jury instructions, only 5.2 percent of participants were able to answer all of them correctly. (Redbird, *supra*, Inst. for Policy Research at p. 3.) For example, 62 percent thought that, for the defendant to be convicted a manslaughter, the burden was on the defense to prove the defendant was acting rashly or emotionally. (*Id.* at p. 5.) Seventy percent thought the defense had to prove that a reasonable person would have killed under similar circumstances. (*Ibid.*) Fifty percent thought the defense had to prove both, and 80 percent thought that the prosecution could carry their burden on murder by showing that a reasonable person would not have killed under similar circumstances. (*Ibid.*)

These are all incorrect statements. The defense has no burden to prove manslaughter, and the prosecution must show that a reasonable person would not have acted rashly, not that a reasonable person would not have killed. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704; *People v. Rios* (2000) 23 Cal.4th 450, 462.) Further, when asked directly who had the burden of proof, more than half of the participants believed that the defense had some or all of the burden of proving heat of passion. (Redbird, *supra*, Inst. for Policy Research at p. 5.) Moreover, this incorrect belief increased the likelihood of a guilty verdict on murder, even when those same participants believed the defendant was telling the truth about the provocation and even found his anger reasonable. (*Id.* at p. 6.) So, in sum, the jurors simply did not understand the burden of proof for voluntary manslaughter.

I cited this study in one of my cases (*People v. Hlebo*, H047358), though I can’t say how the court will receive it (oral argument is scheduled for December). But if you have a voluntary manslaughter issue in your case, I would strongly encourage you to cite Dr. Redbird’s article. It is a juror study like any other, published in a legitimate scholarly journal. And even if your issue is not voluntary manslaughter specifically but is instead burden shifting in another context or even just any other instructional error, this study confirms what all the other studies show: Jurors, whether intelligent or not, do not necessarily understand standard jury instructions. So, when counsel can demonstrate instructional error, the courts should not be so quick to brush it aside by saying, “Oh, we assume they figured it out.”

e. A couple of other jury studies

Before I turn away from juror studies, I wanted to flag two more. The first involves the use of the term “victim” versus “complaining witness.” This kind of thing comes up periodically but seldom goes anywhere. “Victim,” depending on the type of case, assumes the fact the prosecution must prove—i.e., that your guy was the perpetrator. And while we as advocates may complain about it, the courts do not seem receptive to the argument. (See, e.g., *People v. Hernandez* (August 29, 2022, F081225) 2022 Cal.App.Unpub. LEXIS 5337, *12 [“Regardless, defendant has pointed us to no authority, and our own research has revealed none, to convince us that it is error for a prosecutor to refer to the complaining witness as the ‘victim.’”].) But perhaps they should be.

In one study, mock jurors were given a case summary involving an alleged assault. (Conklin, *Victim or Complaining Witness: The Difference Between Guilty and Not Guilty* (2020) 57 San Diego L.Rev. 423, 429.) Different sets of jurors were presented with four variations on the facts: the victim was either male or female and was referred to as either a “victim” or a “complaining witness.” (*Ibid.*) The jurors were then asked to rate whether they thought the defendant was guilty on a scale of 0-100. (*Ibid.*)

When the accuser was female and referred to as a victim, the probability of guilt was rated at 68.2 percent. (Conklin, *supra*, 57 San Diego L.Rev. at p. 429.) But when the female accuser was called only a “complaining witness,” the probability of guilt was rated only 61.9%, a not insignificant difference. (*Ibid.*)

Oddly, the opposite happened when the accuser was male: “Complaining witness” resulted in a higher probability of guilt (63.7%) than “victim” (54.6%). (Conklin, *supra*, 57 San Diego L.Rev. at p. 429.) The study author suggested this was because the gender of the perpetrator was also flipped—so when the male was the accuser, it was a female who allegedly committed the act. The author suspects gender stereotypes led mock jurors to react hostilely to the male accuser being called a “victim.” (*Id.* at p. 430.)

So, I don’t know this study is going to win any reversals, but it may be worth mentioning if the complaining witness in your case is being referred to as the “victim.”

The last juror study I wanted to address relates to juror candor during voir dire. Are jurors candid during voir dire? Intuitively, most of us would say no. No one likes talking in a big group. We all sat through the first year of law school, and every single one of us at one time or another averted our eyes when the professor’s gaze came our way. Well, jurors aren’t any different, and one article explains why.

The article summarizes studies showing that (gaspl!) jurors are not always open and honest with the court. (Glewat, *Systematic Jury Selection and the Supplemental Juror Questionnaire as a Means for Maximizing Voir Dire Effectiveness* (2007) 34 Westchester B.J. 49, 50-52.) One study, for instance, looked at jurors who had served on 23 juries in federal court in the Midwest, and these interviews “contained numerous instances of conscious concealment and lack of candor.” (*Ibid.*) These findings have been supported by others, including one that found that “voir dire questioning serves more of a socialization role than an examination of jurors for bias.” (*Ibid.*) In other words, the attorneys’ questions weren’t really even designed to elicit bias. Other studies found that near a quarter of questioned jurors did not reveal that they or a family member had been the victim of a crime. (*Ibid.*) Thirty percent did not divulge that they had relatives in law enforcement. (*Ibid.*)

We don’t often get non-*Batson* arguments arising out of jury selection, but these studies could support an argument that the court should conduct a more thorough voir dire or consider jury questionnaires rather than questioning jurors in groups (granted, these would likely need to have been raised in the trial court first). For example, I’ll be citing this article in a Covid-19 case where the court specifically denied counsel’s request to ask the jurors, returning after three months due to the pandemic, questions individually or to use a questionnaire. I’m lucky enough to have a solid record on the issue, which may not come up often. But in the right case, this article could help.

II. Studies on racial bias in court

As noted above, the Racial Justice Act is a landmark piece of legislation, one that will doubtless have ramifications for years to come. All of us will be handling these issues at some time or another, so it is important that we as advocates understand racial bias and how it appears in court.

Briefly, the Racial Justice Act enacted Penal Code section 745, which outlaws racial bias in court. Section 745 prohibits judges, jurors, law enforcement, expert witnesses, and attorneys from exhibiting “racial bias or animus toward the defendant because of the defendant’s race, ethnicity, or national origin” at any point during a criminal case or otherwise using “racially discriminatory language” during trial proceedings. (Pen. Code § 745, subs. (a)(1) and (a)(2).) “Racially discriminatory language” means

language that, to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant’s physical appearance, culture, ethnicity, or national origin. Evidence that particular words or images are used exclusively or disproportionately in cases where the

defendant is of a specific race, ethnicity, or national origin is relevant to determining whether language is discriminatory.

(Pen. Code § 745, subd. (h)(4).)

So, when looking for potential issues involving racial bias, we need to know what racial bias looks like. And luckily, this is an area where there is a lot of literature available.

To start, books like *The New Jim Crow* by Michelle Alexander, *Dog-Whistle Politics* by Ian Haney López, and *Biased* by Jennifer Eberhardt are excellent resources. Spend some time with those books, and you will begin to sharpen your ear for the biased language that infects our trial courts.

But beyond that, I recommend looking at *Bias on Trial*, an article by Professor Mikah K. Thompson. (Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom* (2018) 2018 Mich. St. L.Rev. 1243.) In this article, Professor Thompson walks the reader through the ways race permeates criminal courts. First, Professor Thompson provides empirical support for the notion that jurors—like all people—harbor racial bias. One study, for example, which summarized two decades of juror research, found that many white jurors harbored some level of racial bias against Black defendants and that that bias impacted verdicts and sentencing recommendations. (*Id.* at p. 1246.) Even non-white jurors exhibited racial bias, and the bias effects were exacerbated when the charged crime conformed to existing racial stereotypes (i.e., against Black defendants charged with violent crimes). (*Ibid.*)

Further, Professor Thompson identifies several existing racial stereotypes that play out in American society. In her words:

We tend to associate people of color with “undesirable personal qualities such as laziness, incompetence, and hostility, as well as disfavored political viewpoints such as lack of patriotism or disloyalty to the United States.” Researchers have found that biased individuals rely upon two types of stereotypes: “They believe the out-group is dirty, lazy, oversexed, and without control of their instincts (a typical accusation against blacks), or they believe the out-group is pushy, ambitious, conniving, and in control of business, money, and industry (a typical accusation against Jews).”

(Thompson, *supra*, 2018 Mich. St. L.Rev. at pp. 1249-1250.) Black men in particular are often viewed as “bestial,” or “animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape.” (*Id.* at p. 1250.) Black women are viewed as the “Mammy,” the “Matriarch,” or the “Welfare Queen.” (*Id.* at p. 1251.) Stereotypes about Asian-American and Latinx people include:

(1) Asian as model minority stereotype, (2) Asian as foreigner stereotype, (3) Asian as martial artist stereotype, (4) Latino as foreigner stereotype, and (5) Latino as criminal stereotype. Lee notes that while the Asian as model minority stereotype may be beneficial to Asians, “the positive attributes of the model minority stereotype (e.g., intelligent, hardworking, law-abiding) are linked with corresponding negative attributes (e.g., lacking personality, unfairly competitive, clannish, unwilling to assimilate, rigidly rule-bound).”

(*Id.* at pp. 1251-1252.)

The reason I cite these stereotypes is that—as the Legislature said in enacting the RJA—prosecutors have been getting away with using them for years. (2020 Cal. Stats ch. 317, § 2, subd. (b).) And the prosecutor’s statements are not always explicitly racist. Indeed, that is the problem with implicit bias: it is difficult to identify. But Professor Thompson’s article shows exactly how some prosecutors use coded language to evoke racial bias.

Further, while the RJA has no prejudice component for cases where judgment was imposed after January 1, 2021—that is, if the court finds a violation, it’s an automatic reversal—there is a prejudice component under *Chapman*⁴ for cases decided before 2021. (Pen. Code § 745, subds. (e), (k).) So, in those cases, we’ll need to show the courts how racial bias affects trials. Again, Professor Thompson comes to the rescue.

First, race has a tremendous effect on character assessments. “Social science research has revealed that even the most basic racial cues during trial can trigger the application of stereotypes and impact how jurors assess the evidence before them.” (Thompson, *supra*, 2018 Mich. St. L.Rev. at p. 1257.) Thus, using animal imagery to refer to the defendant, for example, can affect a juror’s assessment of the defendant’s character. (*Ibid.*)

Second, racial bias affects credibility assessments. As a preliminary matter, jurors are not that good at assessing credibility generally. (Thompson, *supra*, 2018 Mich. St. L.Rev. at pp. 1258-1259.) According to one scholar, “most observers in controlled studies detect deception about as well as a flipped coin, because they focus on ‘cues’ to deception derived from folklore and common sense--such as the speaker’s inability to maintain a steady gaze--that are often more a sign of discomfort than deception.” (*Id.* at p. 1259, quoting Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury* (2000) 33 Conn. L.Rev. 1, 3.) But beyond that, there is a “demeanor gap” between jurors of different races—that is, it is difficult for jurors of one race to assess the demeanor of witnesses of another. (*Ibid.*)

⁴ *Chapman v. California* (1967) 386 U.S. 18, 24.

More importantly, research confirms that stereotypes about Black witnesses—that they are less intelligent or honest—impact how jurors view their testimony. (Thompson, *supra*, 2018 Mich. St. L.Rev. at pp. 1261-1262.) White jurors begin credibility assessments with “innate suspicion” of Black witnesses. (*Id.* at p. 1262.) Prosecutors often exploit this bias by “othering” the witness—making the witness appear different than the jurors. (*Id.* at pp. 1263-1264.) As Professor Thompson describes, “When individuals engage in ‘othering,’ they determine that certain people are not us, and that determination functions to create . . . a devalued and dehumanized Other, and a distancing of the other from ourselves.” (*Id.* at p. 1263.) Race is one of the keys ways prosecutors “other” Black witnesses to make them less credible in the eyes of the jury. (*Id.* at p. 1264.)

Finally, racial bias affects jurors’ fact interpretation and recall. Studies show that people will interpret ambiguous fact patterns in line with racial stereotypes if primed with those stereotypes. (Thompson, *supra*, 2018 Mich. St. L.Rev. at pp. 1267-1275.) For instance, participants in one study were presented an ambiguous set of facts and then primed with stereotypes about Black people. (*Id.* at pp. 1267-1268.) The participants were asked to make judgments about the Black person in the story. (*Ibid.*) The researchers found that the priming had a direct impact on how the participants judged the person’s behavior. (*Ibid.*) Indeed, other studies have shown that the “Blacks-as-criminals stereotype caused study participants to see weapons where none actually existed and to classify identical facial expressions as more hostile or threatening on Black faces as compared to White faces.” (*Id.* at p. 1268.)

Racial priming also affects fact recall, and studies have shown that, where study participants have forgotten parts of a story they were told, they will fill in the gaps with facts consistent with the racial stereotypes they had been primed with. (*Id.* at pp. 1271-1275.)

In short, we will all have to make arguments about how bias affects trials, and articles like Professor Thompson’s can be our roadmap going forward.

III. Historical research

One of the great joys of being a staff attorney at an appellate project is writing these articles since I am often given relatively free reign in writing them (though we’ll see if this comment makes it through the editing stage). So, as I’ve been researching for this article, I’ve been chewing over the many disappointments to come out of our United States Supreme Court lately. I’m sure I’m not alone in my dismay over how the conservative majority has decided recent cases like *Dobbs v. Jackson Women’s Health Organization* (2022) 597 U.S. ___ and *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 597 U.S. ___. But, mercenary for the criminally accused that I am, I have also wondered, like many others, how we can use these otherwise depressing decisions for our client’s benefit. *Bruen* has obvious application for our

clients charged with gun crimes, but can we mine these opinions for help in other areas? I hope so.

Take *Bruen*, for example. There, the Court said that, to regulate gun possession, “the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’” (*Bruen*, *supra*, 597 U.S. at *8.)

I won’t detail for you my particular qualms with this statement from a jurisprudential perspective or my concerns about the Court’s rightward lurch generally. I will instead, however, say only that this statement—what with its focus on “this Nation’s historical tradition”—reminded me of something the late Justice Scalia in *Minnesota v. Dickerson* (1993) 508 U.S. 366. There, addressing *Terry* frisks in a concurring opinion, Justice Scalia said, “I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity.” (*Id.* at p. 381.) In other words, Justice Scalia did not believe our “Nation’s historical tradition” could support a *Terry* frisk, and now might be a good time to see if he was right.

And he might have been!. Justice Scalia found support for *Terry* stops, if not *Terry* frisks, in the framing-era “night-walker statutes.” (*Dickerson*, *supra*, 508 U.S. at pp. 380-381.) Those statutes permitted the overnight arrest—and search—of “suspicious nightwalkers” until the suspect “give a good account of himself.” (*Ibid.*) But the standard for suspicion here was similar to that of a full-blown arrest, and—forgive me for stating the obvious—the nightwalker statutes applied only at night. (See Rosenthal, *What Value(s) Does the Fourth Amendment Serve?: Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio* (2010) 43 Tex. Tech L.Rev. 299, 330-337.) So, it doesn’t appear that there is a framing-era antecedent to stopping and frisking people—particularly during the day—on any less than probable cause.

Does this mean *Terry* is unconstitutional? I don’t know. Probably not. The wording of the Fourth Amendment is different than that of the Second Amendment, and at least one scholar has argued that all framing-era searches were subject to a “reasonableness” test. (See Rosenthal, *supra*, 43 Tex. Tech. L.Rev. at pp. 336-337, citing Amar, *Terry and Fourth Amendment First Principles* (1998) 72 St. John’s L.Rev. 1097, 1106-1126, but noting Professor Amar’s position is contested.) Further, we can’t guarantee that the exclusionary rule itself will survive under the current Supreme Court. But it does seem like *Terry* frisks are ripe for challenge since they are not found in our “Nation’s historical tradition.”

IV. Innocence

Innocence is a difficult word in our profession. While we have all at one time or another likely represented someone who was largely innocent, no one seems to believe us when we do. And to claim innocence can sometimes make us seem, perhaps, a bit gullible. Yet it does happen. We do have clients who are innocent, and when those cases come, it is helpful for us to remind the courts that legal errors do sometimes lead to false convictions.

The Innocence Project has identified various causes of false convictions, causes which are also examined in Professor Brandon Garrett's book *Convicting the Innocent*. These causes include bad eyewitness identifications, false confessions, prosecutorial misconduct, and jailhouse informants. (See Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011).) So, when you have those issues—a bad ID or an improperly admitted confession—you should remind the court that these are the errors that send innocent people to prison. These errors cause false convictions. And even if you aren't getting on your soap box and arguing that your client didn't do it, it can still help to show that court that legal errors do have consequences—innocent people get hurt when the courts don't do their jobs.

Highlighting innocence can also help when dealing with claims under the Racial Justice Act. The University of Michigan's National Registry of Exonerations just issued a report called *Race and Wrongful Convictions in the United States*. (Gross et al., *Race and Wrongful Convictions in the United States* (2022) National Registry of Exonerations, available at <https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf>, last visited October 31, 2022.) In short, the report finds that people of color are incarcerated far more than white people even when innocent. (*Id.* at pp. iii-v.) Black people, for example, are 13.6% of the American population but 53% of the exonerations listed on the National Registry of Exonerations. (*Ibid.*) Rates are similar for other crime: murder, rape, and drugs. (*Ibid.*)

Again, innocent clients don't come along every day, and I don't know that you're going to be able to form a claim based solely on statistics about false convictions. But when that client comes to you—when you have someone who might not have done the thing that he was convicted of having done—you can remind the court that these numbers are real. The system does make mistakes. And when courts try to paper over legal errors, innocent people pay the price.