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Stereotypes in the Courtroom

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Stereotypes have a functional, relatively automatic, and pervasive influence on how we form impressions of other people. As an extra-legal factor, stereotypes are an undesirable influence on decisions, but their use does not represent a failing on the part of jurors. This chapter explores how stereotypes influence jurors in a number of domains – expert testimony, sexual assault, and perceptions of dangerousness of criminal defendants. By understanding how and why jurors are influenced by stereotypes, we are better placed to identify strategies to reduce the effect of stereotypes on jurors' decisions. The possible avenues for law reform include changes to the way expert evidence is admitted, changes to how evidence is presented, changes to the design of the courtroom, and changes to how jurors are instructed by judges.

One useful way to think about a criminal trial is as a series of persuasive messages directed at the jury. The research on persuasion generally agrees that there are two ways in which persuasive messages can influence. These processes are described in the dual process models, specifically the heuristic systematic² and the elaboration likelihood³ models. According to these models there are two modes of thinking. The central or systematic

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2 Shelly Chaiken, 'Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion' (1980) 39(5) *Journal of Personality and Social Psychology* 752.

3 Richard E Petty and John T Cacioppo, 'The Elaboration Likelihood Model of Persuasion' (1986) 19 *Advances in Experimental Social Psychology* 123.

route involves more careful deliberative thought while the peripheral or heuristic route relies more on short cuts and pre-existing knowledge such as schemas and stereotypes. For example, if we are using the central route, we might think carefully about the prosecution's case against the defendant, weighing the strengths and weaknesses of the evidence. If we are using the peripheral route, we might decide that we do not like the look of the defendant, or decide that a witness seems credible because they have an honest face. While the central systematic route sounds like the best way of making decisions, perceivers can only engage in effortful thinking when they have the motivation and ability to do so. When information becomes too complex or ambiguous, it is not possible for perceivers to successfully evaluate a persuasive message using central or systematic processing.

I. Stereotypes and Expert Evidence

Research has shown, despite jurors' claims that they understand complex testimony,⁴ jurors are influenced by an expert's characteristics and behaviour in addition to what that expert says. A good illustration of this is in a study⁵ in which participants watched a video of a trial recreation. The plaintiff's expert was presented as having either weak or strong credentials, and gave evidence using either simple or complex language. Consistent with the dual process models of persuasion, the expert's credentials affected how much participants were influenced by the expert, but only when the testimony was complex and difficult to understand.

Some of our research suggests that there are similar effects for expert gender.⁶ In our research we presented participants with a price-fixing case involving either a male or female expert. The businesses alleged to have been price-fixing were either involved in a male-oriented business domain or a female-oriented domain. We found that participants were more

4 Brian H Bornstein and Edie Greene, 'Jury Decision Making: Implications for and from Psychology' (2011) 20(1) *Current Directions in Psychological Science* 63.

5 Joel Cooper, Elizabeth A Bennett, and Holly L Sukel, 'Complex Scientific Testimony: How Do Jurors Make Decisions?' (1996) 20(4) *Law & Human Behavior* 379.

6 Blake M McKimmie et al, 'Jurors' Responses to Expert Witness Testimony: The Effects of Gender Stereotypes' (2004) 7(2) *Group Processes and Intergroup Relations* 131; Regina A Schuller, Deborah J Terry, and Blake M McKimmie, 'The Impact of an Expert's Gender on Jurors' Decisions' (2001) 25 *Law and Psychology Review* 59; Regina A Schuller, Deborah J Terry, and Blake M McKimmie, 'The Impact of Expert Testimony on Jurors' Decisions: Gender of the Expert and Testimony Complexity' (2005) 35(6) *Journal of Applied Social Psychology* 1266.

influenced by the expert when the expert's gender matched the domain of the case, and that this effect was more pronounced when the expert's testimony was complex compared to simple. This latter finding suggests that expert gender is used as a heuristic cue.

To find out whether jurors are aware of the influence of these factors, my colleagues and I surveyed jurors, judges, lawyers, and experts about expert testimony in 55 criminal trials in Queensland, New South Wales, and Victoria.⁷ We found that while the vast majority of jurors thought that they understood the expert testimony, participants still identified a number of barriers to their complete comprehension of that testimony. These barriers were: overuse of technical language; the complexity of DNA evidence; the presentation style of the expert; and presentations of evidence that were too lengthy. Jurors in this study were still influenced by a range of features associated with the expert testimony beyond the content of that testimony. The results even suggested that jurors were using the complexity of the testimony as a cue to its correctness, even though complexity was seen as a barrier to comprehension. This may have occurred because expert testimony is stereotypically expected to be complex (this is, after all, the definition of expert testimony).

II. Stereotypes and Sexual Assault

Another area in which stereotypes influence jurors is in relation to victim blaming in cases of sexual assault. Reporting, prosecution and conviction rates for sexual assault remain disproportionately low in Australia,⁸ and around the world.⁹ Convictions for sexual assault are often dependent on circumstantial evidence, as there is typically little corroborating evidence.¹⁰

7 Ian Freckelton, Jane Delahunty, Jacqueline Horan, and Blake M McKimmie, *Expert Evidence and Criminal Jury Trials* (Oxford University Press, 2016).

8 Australian Bureau of Statistics (ABS), 2005.

9 Kathleen Daly and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39 *Crime and Justice* 565.

10 Mark R Kebbell and Nina J Westera, 'Promoting Pre-recorded Complainant Evidence in Rape Trials: Psychology and Practice Perspectives' (2011) 35 *Criminal Law Journal* 376.

Because of this, jurors in rape or sexual assault cases are likely to draw on their existing knowledge or cognitive schemas and stereotypes to interpret what happened and how blame should be apportioned.¹¹

Our research suggests that if an assault is judged as stereotypical (for example, when the perpetrator and victim are strangers to each other), then perceivers are more likely to believe the victim, blame her less, and convict the defendant. When the offence is not stereotypical, however, perceivers turn to other stereotypes to give meaning to the events presented to them.¹² In particular, perceivers are influenced by whether the victim appears to act in ways that are inconsistent with the consent script. For example, does she physically and verbally resist the assault? Or, does she behave in ways that are stereotypically consistent with being a genuine victim, such as being emotional? If she does, then again she is seen as more credible and less to blame for the assault, and consequently the defendant is seen as being more likely to be guilty.

Our most recent data indicates that there are a small number of central cues that are seen as prototypical of consent, and which allow perceivers to infer the presence of a range of other features associated with sexual assault. Typically, events preceding an acquaintance assault (the most common type of sexual assault) match the consent script reasonably well as they often involve a certain degree of social interaction between the victim and the alleged perpetrator. If, however, the victim's account begins with the assault itself, there is little opportunity for jurors to form a story about the events based on the consent script, and so they appear more likely to interpret events as being sexual assault.

11 Louise Ellison and Vanessa E Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 781; Nancy Pennington and Reid Hastie, 'Explaining the Evidence: Tests of the Story Model for Juror Decision Making' (1992) 62(2) *Journal of Personality and Social Psychology* 189.

12 Blake M McKimmie, Barbara M Masser and Renata Bongiorno, 'What Counts as Rape? The Effect of Offence Prototypes, Victim Stereotypes and Participant Gender on How the Complainant and Defendant Are Perceived' (2014) 29(1) *Journal of Interpersonal Violence* 2273.

III. Stereotypes and Defendants

There is a reasonable amount of evidence that jurors are often influenced by the characteristics of defendants, such as their attractiveness,¹³ race,¹⁴ and socioeconomic status.¹⁵ Defendants are seen as being more likely to be guilty when they come from social categories that are stereotypically linked to the features of the particular crime they are alleged to have committed.¹⁶

However, are stereotypes just a decision cue? One assumption is that perceivers use the least mental effort possible and so use stereotypes to reduce the amount of effort required.¹⁷ However, there is some evidence that perceivers think more carefully about unexpected, or stereotype inconsistent, information.¹⁸ Our research¹⁹ suggests that stereotypes can be used to maximise the amount of information that can be evaluated under taxing conditions. Stereotypes help us encode some of the information in an efficient manner, thus freeing up our capacity to attend to other parts of the evidence to extract the maximum amount of information.²⁰

In one study, participants read a 12-page summary describing an armed robbery case. In this summary, the defendant was either a man or a woman, and the strength of the forensic evidence against the defendant was either weak or strong. Consistent with a cognitive optimiser perspective, the

13 R L Micheline and S R Snodgrass, 'Defendant Characteristics and Juridic Decisions' (1980) 14(3) *Journal of Research in Personality* 340.

14 R Mazzella and A Feingold, 'The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis' (1994) 24(15) *Journal of Applied Social Psychology* 1315.

15 C W Esqueda, R K E Espinoza and S E Culhane, 'The Effects of Ethnicity, SES, and Crime Status on Juror Decision Making: A Cross-Cultural Examination of European American and Mexican American Mock Jurors' (2008) 30(2) *Hispanic Journal of Behavioral Sciences* 181.

16 R A Gordon et al, 'Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions' (1988) 128(2) *The Journal of Social Psychology* 191.

17 S T Fiske and S E Taylor, *Social Cognition: Topics in Social Psychology* (New York: Random House, 1984); D T Gilbert, and J G Hixon, 'The Trouble of Thinking: Activation and Application of Stereotypic Beliefs' (1991) 60(4) *Journal of Personality and Social Psychology* 509.

18 L D Stern et al, 'Processing Time and the Recall of Inconsistent and Consistent Behaviors of Individuals and Groups' (1984) 47(2) *Journal of Personality and Social Psychology* 253.

19 Blake M McKimmie et al, 'Stereotypical and Counterstereotypical Defendants: Who Is He and What Was the Case Against Her?' (2013) 19(3) *Psychology, Public Policy and Law* 343.

20 C N Macrae, A B Milne, and G V Bodenhausen, 'Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox' (1994) 66(1) *Journal of Personality and Social Psychology* 37; J W Sherman, F R Conroy, and C J Groom, 'Encoding Flexibility Revisited: Evidence for Enhanced Encoding of Stereotype-Inconsistent Information Under Cognitive Load' (2004) 22(2) *Social Cognition* 214.

strength of the evidence only influenced mock jurors' verdicts when the defendant was male and therefore consistent with the stereotypical offender for this type of offence. When the defendant was a woman, the verdicts returned did not differ as a function of the strength of the case presented.

A second study, this time using a summary of a case involving the murder of a child, showed that participants remembered more of the case-related evidence when the defendant was male compared to female. However, participants were more accurate in identifying who the defendant was when the defendant was female compared to male. Both of these findings are consistent with the idea that a stereotypical defendant frees up the perceivers' attention to allow more thorough encoding of the evidence (at the expense of the defendant's characteristics), whereas a counter-stereotypical defendant is attention-grabbing and so the evidence is not processed as thoroughly.

IV. Stereotypes and Courtroom Design

In contrast to person-centred stereotypes that are associated with the attributes and behaviours of those people and are therefore less open to direct manipulation, one cue that is relatively easily changeable and appears to have an effect on how jurors rely on stereotypes is the design of the courtroom. My colleagues and I²¹ have conducted a series of studies on how courtroom design influences jurors.

Our initial study²² asked 275 community members to look at one of four images featuring a defendant in a criminal trial sitting at the bar table, in an open dock, in an open dock with a correctional officer nearby, or in a glass dock. These latter three images are more representative of courtrooms in Australia. We found that participants were more likely to say the defendant had committed a crime involving violence when the defendant was depicted as sitting inside a glass dock compared to the other courtroom configurations.

21 David Tait et al, *Towards a Distributed Courtroom* (Western Sydney University, 2015).

22 Blake M McKimmie, Jillian M Hays and David Tait, 'Just Spaces: Does Courtroom Design Affect How the Defendant is Perceived?' (2016) *Psychiatry, Psychology and Law*, dx.doi.org/10.1080/13218719.2016.1174054.

Another as yet unpublished study involved 215 community members in a series of trial recreations held in an active courtroom with professional actors. The trial involved allegations that the defendant was involved in a plot to commit a terrorist act. For some of the recreations, the defendant sat at the bar table with his lawyer; in others he sat either in an open dock or a glass dock at the side of the courtroom. Participants then deliberated as a group to arrive at a verdict. The initial findings of this study suggest that there was no difference in verdicts for both of the dock conditions, but that participants were more likely to acquit in the bar table condition compared to the two dock conditions.

V. Conclusions

The research reviewed highlights a variety of ways that stereotypes influence how jurors make decisions. However, we have not argued that jurors are inherently biased and should be replaced with another fact finder. Attempting to replace jurors with another fact finder serves only to displace the challenge posed by stereotypes, and research suggests that even highly trained legal decision-makers, such as judges, are just as vulnerable to the effects of stereotypes.²³

So if we accept that stereotypes exert a pervasive influence on fact finders, what changes can we make to reduce the negative effects of stereotypes? One possibility is to set up the juror's task so that they have less need to rely on stereotypes in their role. As we have seen, two of the factors that increase the use of stereotypes by jurors are ambiguity and complexity. If the juror's task is changed from a single decision about guilt or innocence into a series of discrete factual questions about the events at issue, then jurors will be more able to think carefully about each smaller decision. This is the approach of using question trails to instruct jurors rather than traditional verbal instructions²⁴ and it has the potential to reduce the use of stereotypes by jurors. However, more research is needed to establish whether this is in fact the case.

23 A J Wistrich, C Guthrie, and J J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153(4) *University of Pennsylvania Law Review* 1251; J J Rachlinski et al, 'Does Unconscious Racial Bias Affect Trial Judges?' (2008) 84 *Notre Dame Law Review* 1195.

24 J Clough, 'The Role of Question Trails in Assisting Juror Comprehension' (Presentation at the 10th Annual Jury Research and Practice Conference, The Australian National University, 8 February 2013).

Another possible avenue for intervention is to redesign courtrooms to minimise jurors' awareness of negative stereotypes about the defendant. While having the defendant seated at the bar table is common in some jurisdictions, there may be security concerns with this configuration. An alternative is to use technology to reconfigure the courtroom, a possibility recently piloted by David Tait and his colleagues.²⁵

In terms of stereotypes that influence how expert testimony is perceived, one possibility is to ensure that the task of evaluating the quality of the expert's evidence is carried out before the evidence is admitted. For example, decisions about admissibility could be based more clearly on the underlying scientific merit or accuracy of that type of testimony in general, rather than this specific expert's credentials or evidence.²⁶

Finally, advocates can alter the order in which they present the evidence to reduce the negative effect of stereotypes about victims. For example, in a case involving allegations of sexual assault, rather than starting with a chronological presentation of evidence, it might be more effective for the prosecution to start with the victim's retelling of the assault itself, before moving to the context around the assault. This may help to reduce the ambiguity in how the events are defined in jurors' minds.

By understanding when and how stereotypes influence fact finders, we are able to suggest a number of different ways in which the effect of stereotypes can be reduced. Some of these strategies can be used without any changes to existing practices. Although there is good empirical evidence for many of these suggestions, more research is needed to fully test their effectiveness. Using empirical behavioural science research to inform law reform increases the chances that any particular reform will improve the fairness of the criminal justice system.

25 See above n 21.

26 See above n 6.

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