

Chapter 2

Systematic Jury Selection

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Introduction

Jury selection takes place during voir dire, the pretrial proceeding during which the judge and attorneys question potential jurors with the aim of identifying venire members who are unfit for jury service. Jury “selection” is a bit of a misnomer as attorneys do not choose individuals to serve on the jury; instead jurors who are unable to remain impartial are deselected from jury service. Voir dire proceedings may take different forms depending on the jurisdiction. Many states have adopted very limited voir dire in which the judge poses questions to venire members. In extended voir dire, questioning is conducted by the judge and both attorneys (Jones, 1987). The judge holds discretion over the content and length of questioning. The manner of questioning during voir dire can also vary; although questioning is frequently conducted in open court, in some circumstances the judge may choose to question venirepersons individually (for a discussion of limited vs. extended voir dire, see Johnson & Haney, 1994).

There are two mechanisms by which attorneys may eliminate members of the venire panel, challenges for cause and peremptory challenges. A challenge for cause is the mechanism by which attorneys are able to eliminate jurors who do not meet statutory requirements and thus whose service on the jury would result in a constitutional violation (Annual Review of Criminal Procedure, 2004). As the Sixth Amendment provides defendants with the right to an impartial jury, venirepersons who express an inability to set aside bias or decide the case solely based upon the evidence may be excused from jury service through a challenge for cause. Challenges for cause are unlimited in number. The peremptory challenge is a tool that attorneys may use to excuse jurors for any other reason they see fit (with some restrictions that will be discussed later). The judge has the responsibility of granting or denying both types of challenges (Kovera, Dickinson, & Cutler, 2003).

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Prosecuting and defense attorneys are allowed a finite number of peremptory challenges; typically, the defense attorney is granted more peremptory challenges than the prosecution (Kovera et al.). The number of peremptory challenges granted to the parties varies across jurisdictions, and attorneys are usually afforded more peremptory challenges in high-profile cases or criminal cases in which the crime is severe (Kovera et al.).

Attorneys may use a peremptory challenge to eliminate a juror whom they expect to be unfavorable to their side, but who does not qualify for elimination under a challenge for cause. There are some limitations to the use of peremptory challenge, however. Attorneys may not exclude venire members specifically on the basis of their status as a member of a cognizable group, such as race (*Batson v. Kentucky*, 1986; *Miller-El v. Dretke*, 2005) or gender (*J.E.B. v. Alabama ex rel. T.B.*, 1994). Venire members are also protected under the law in some jurisdictions from exclusion based on socioeconomic status (*Thiel v. Southern Pacific Co.*, 1946), sexual orientation (*People v. Garcia*, 2000), or religion (*State v. Fulton*, 1992). Although attorneys may not make use of peremptory challenges to eliminate venire members on the basis of their membership in a cognizable group, it is widely acknowledged that these types of challenges do still occur (Kovera et al., 2003). Indeed, attorneys may simply invent a neutral reason for the challenge if the use of a peremptory challenge is questioned by the judge.

This chapter will begin by tracing the history of systematic jury selection (SJS). We will then investigate the relevant psychological research and outline the techniques employed by practitioners of SJS, including the community survey. We will explore whether SJS is effective by discussing what constitutes success in jury selection and presenting findings from experimental and field research. Finally, we will present critiques of SJS and identify future directions for research on jury selection.

The History of Systematic Jury Selection

SJS and traditional jury selection offer different strategies to develop profiles of favorable and unfavorable jurors. SJS is a process by which statistical analysis is used to test for relationships between juror characteristics and attitudes about the case. Traditional jury selection refers to the methods and theories that govern attorneys' implementation of peremptory challenges during voir dire; by definition, these methods do not employ scientific analysis. Attorneys typically rely on theories about jurors derived from stereotypes and intuition and may believe that years of experience in jury selection have sharpened their skill at selecting favorable jurors (Kressel & Kressel, 2002). Confidence in the efficacy of intuitive hunches to produce a favorable jury may result from lack of information to suggest otherwise. Indeed, as jury composition is only one of many variables that contributes to the outcome of a case, it is not possible for attorneys to receive feedback about the merit (or lack thereof) of their jury selection choices. The conviction with which attorneys often

hold intuitive theories about jurors is highlighted by an example of a disagreement between prosecutor Marcia Clark and prosecution trial consultant Don Vinson during the O.J. Simpson trial. When Vinson's recommendations based on his pretrial research conflicted with Clark's intuition about how certain jurors would decide the case, he was fired and the prosecution ignored his advice (Davis & Loftus, 2006).

Traditional jury selection techniques are based on commonsense or stereotypic notions about the associations between juror demographic characteristics and verdict behavior. Fulero and Penrod (1990) cataloged a multitude of conflicting and often amusing advice that jury selection guides provide to attorneys. Theories are offered about the influence of juror characteristics such as occupation, gender, race, demeanor, appearance, social status, religion, marital status, and age on jurors' tendencies to vote guilty (Fulero & Penrod). Examples of recommendations include advice to avoid jurors with crossed arms or "fidgety" mannerisms and to favor those who smile (Fulero & Penrod). Famed defense attorney Clarence Darrow argued that criminal defense attorneys should challenge women, Englishmen, and Germans, but keep Irishmen (Darrow, 1936). Others have argued that criminal defense attorneys should seek those jurors who are round-faced, jolly, and overweight rather than those who are thin and delicate (Bailey & Rothblatt, 1985). Those representing civil plaintiffs should look for those who are married (Belli, 1954), but avoid Scots, as "no McTavish was ever lavish" (Harrington & Dempsey, 1969, p. 175). Needless to say, these commonsense notions about jurors are, for the most part, unsupported by empirical research.

In contrast, scientific jury selection is the practice of implementing scientific techniques and systematic analysis to develop profiles of favorable and unfavorable jurors. The techniques rely upon the assumptions that individuals' attitudes and characteristics can predict how they will evaluate evidence and render a verdict and that traditional social science methods can uncover these relationships between juror characteristics and verdict tendencies (Kovera et al., 2003). Although trial consulting, including scientific jury selection, has grown into a very lucrative industry over the last 30 years (Strier, 1999), social scientists' early involvement in jury selection was politically motivated.

The dawn of scientific jury selection occurred during the 1971 Harrisburg Conspiracy Trial. Seven antiwar protesters, including Father Philip Berrigan and Sister Elizabeth McAllister, were charged with plotting to kidnap National Security Adviser Henry Kissinger, destroy draft records, and blow up heating tunnels in Washington, D.C. Sociologist Jay Schulman, social psychologist Richard Christie, and several other social scientists with experience in survey research techniques offered their services to the defense for the jury selection in this case (Frederick, 1984; Hastie, Penrod, & Pennington, 1983; Kassin & Wrightsman, 1988). These researchers conducted telephone surveys and interviews with community residents and gathered information on demographic characteristics, knowledge of case facts, religious and political affiliation, exposure to pretrial publicity about the case, case-specific attitudes, and attitudes toward the government (Hastie et al., 1983). These researchers used statistical analysis to determine if any demographic characteristics were significantly related to case-specific attitudes. The results

of the survey indicated that religious affiliation and education were significantly related to attitudes toward the case. The social scientists used these findings to provide the defense with profiles of desirable and undesirable jurors, which helped the defense utilize their peremptory challenges by challenging jurors who fit the undesirable profile (Hastie et al.). The jury hung, and the defendants were acquitted (Hastie et al.; Kressel & Kressel, 2002).

Social scientists have assisted the defense in other high-profile cases such as the Camden 28 trial, the Gainesville Eight trial, the Joan Little murder trial, the Angela Davis trial, and the trial of Mark David Chapman using similar survey techniques (Frederick, 1984). Recent cases that employed SJS techniques include the O.J. Simpson trial, the Martha Stewart trial, the William Kennedy Smith rape trial, and the Menendez brothers' trial (Seltzer, 2006). In a typical case, a social scientist hired to assist with jury selection will create a survey instrument containing demographic questions, questions about the respondents' knowledge of case facts, and case-relevant attitudinal questions. The survey will also include items which provide information about the respondents' verdict preference (Moran & Comfort, 1982). For example, these questions may ask respondents about their opinion of the defendant's responsibility for the crime or their opinion about whether it is appropriate to award damages to a plaintiff in a civil case. The survey is typically administered by telephone to a sample of several hundred jury-eligible members of the community from which the jury pool will be chosen. The respondents are chosen randomly; random digit dialing is a common random sampling technique. The purpose of the community survey is to measure community pretrial knowledge about the case and to determine which demographic or attitudinal characteristics are correlated with verdict preference. Typically, regression analysis is utilized to test for relationships between demographic or attitudinal characteristics and hypothetical verdict preference. Attorneys are then able to employ peremptory challenges to eliminate from the panel prospective jurors with characteristics that are associated with an undesirable verdict.

Psychological Research Applicable to SJS

There is a large body of experimental psychological research that is applicable to the field of jury selection. There are many important questions to be answered in this field. For example, does SJS work? Can trial consultants predict verdict preferences from demographic characteristics? Are there any juror characteristics that predict verdict across cases or are predictor variables necessarily case-specific? Much of the research in this area has attempted to disentangle the relationship between demographic and personality characteristics, general and case-specific attitudes, and verdict behavior. Researchers investigating issues related to SJS have approached the topic using a variety of methodologies and perspectives. The studies in this area include interviews with and questionnaire data from actual jurors and mock juror laboratory studies. Early research in this area focused on investigating

links between demographic and personality variables and verdict preferences. As the results from these studies were mixed and did not uncover any reliable predictors of verdict across cases, researchers turned their attention to the relationship between demographic characteristics and attitudes, and also to the link between attitudes and verdicts.

Personality and Demographic Variables as Predictors of Verdict

A direct link between juror demographic characteristics or personality variables and juror verdicts has proven difficult to establish; research in this area has failed to uncover many reliable relationships between demographic or personality variables and verdict (Kerr, Hymes, Anderson, & Weathers, 1995; Frederick, 1984; Kovera et al., 2003). However, one personality characteristic that research has identified as a predictor of verdict decisions is authoritarianism. Authoritarianism as a personality variable is characterized by conservativeness, rigidity, and a preference for conventional values (Bray & Noble, 1978). Traditional authoritarianism is characterized by support for governance by a strong authoritative leader and preference for order and discipline. People who are high in traditional authoritarianism advocate adherence to rules and laws and disapprove of those who do not follow societal norms and rules (Narby, Cutler, & Moran, 1993). A form of authoritarianism which is especially relevant to jury decision-making is legal authoritarianism (Kravitz, Cutler, & Brock, 1993). Legal authoritarianism is similar in character to traditional authoritarianism, but specifically represents the perceptions of and beliefs about the legal system. The two types of authoritarianism do overlap somewhat, but they are not identical constructs (Narby et al., 1993).

An early study investigating authoritarianism and verdict preference found that mock jurors possessing high levels of authoritarianism were more likely to vote guilty and impose longer sentences on defendants than those with low levels of authoritarianism (Bray & Noble, 1978). This effect held for both individual juror and jury verdicts. A meta-analysis examining the relationship between the authoritarian personality and juror verdicts provided additional support for the relationship between authoritarianism and verdict; individuals high in authoritarianism are more likely to render a guilty verdict than are those who are low in authoritarianism. In addition, legal authoritarianism has a stronger relationship with verdict than does traditional authoritarianism (Narby et al., 1993). These findings may be especially relevant for capital cases, in which death qualification is likely to result in juries with several high authoritarian members (Bray & Noble, 1978). Indeed, research on juror judgments in capital cases has found that mock jurors who scored high on legal authoritarianism were more likely to endorse aggravating factors and recommend a death sentence than those who scored low on legal authoritarianism (Butler & Moran, 2007).

Aside from legal authoritarianism, research suggests that the relationships between juror characteristics and verdict that do exist are case-specific and do not generalize across different situations (Kovera et al., 2003). For example, research

has demonstrated clear gender differences in verdict preference in rape, child sexual abuse, and sexual harassment cases (Kovera, Gresham, Borgida, Gray, & Regan, 1997; Brekke & Borgida, 1988; Kovera, McAuliff, & Hebert, 1999; Kovera et al., 2003), with women displaying greater punitiveness toward defendants in these types of cases. However, this gender difference does not hold across a broader spectrum of case types (Kovera et al., 2003). Similarly, other research has found modest relationships between juror demographics and personality traits and verdict behavior, although these associations were relatively small and are not consistent across different types of cases (Penrod, 1990). Indeed, in a recent study on juror decision-making in high-profile civil litigation cases, the relationship between juror characteristics and juror judgments were not consistent across cases. For example, belief in a litigation crisis was a significant predictor of verdict in a tobacco and a pharmaceutical case, but was unrelated to verdict in an insurance case; age was associated with verdicts in favor of the plaintiff for the pharmaceutical case, but was unrelated to verdicts in the other civil cases (Vinson, Costanzo, & Berger, 2008).

In one of the most comprehensive studies of the association between demographic characteristics and personality traits of empanelled jurors and verdict preference, Moran and Comfort (1982) collected questionnaire data from real jurors who had served on felony trials in the Miami area during the years 1975 and 1976. Jurors provided information about demographic characteristics such as gender, age, socioeconomic status, number of children, and religious affiliation and completed a variety of personality measures such as social desirability, belief in a just world, empathy, and authoritarianism. Jurors were also asked to indicate both their predeliberation verdict and their jury's verdict for the case on which they served. The authors attempted to determine which, if any, demographic or personality variables were significant predictors of jurors' actual verdicts. Socioeconomic status emerged as a significant predictor of verdicts for men; men with a high income were more likely than men with a low income to acquit. Men who voted guilty were more likely to score high on authoritarianism, have more children, refrain from answering questions in a socially desirable manner, and have a lower income level than those who voted not guilty. Women who voted guilty were more likely to score high on a measure of belief in a just world and exhibit anticivil libertarian attitudes than women who voted not guilty (Moran & Comfort, 1982).

The results of the abovementioned study revealed relationships between demographic and personality variables and verdict that had not been found in previous research. There are several plausible reasons for this discrepancy. Compared to the research by Moran and Comfort (1982), many prior studies analyzed data from a single jury, had small samples, and included fewer demographic and personality measures. Moran and Comfort examined the relationship between 22 predictor variables and five dependent measures using stepwise regression, whereas earlier research attempted to identify relationships between individual juror characteristics and verdict behavior. However, as predictor variables are correlated, multivariate analysis is more appropriate (Moran & Comfort). In addition, the study by Moran and Comfort investigated undifferentiated felony cases, whereas other research has examined juror behavior for

specific types of cases (Moran & Comfort). It is possible that discrepancies in the results of this research and other research on actual jurors are attributable to age and racial differences among the samples (Moran & Comfort).

Juror Demographics and Case-Relevant Attitudes

Because demographic information about potential jurors is easily obtained during voir dire, research on the link between demographic characteristics and juror attitudes is relevant to the field of jury selection. One field study investigating the relationship between demographic characteristics and attitudes analyzed data from interviews with jury-eligible community members and found racism to be more prevalent in older and less-educated respondents (Hepburn, 1980). Results also indicated that younger respondents who were educated and were at a higher income level were more likely to have politically conservative attitudes (Hepburn). According to Hepburn, there were no demographic characteristics that were predictive of verdict or case-relevant attitudes across all types of trials. However, research does support a reliable link between demographic predictors and case-relevant attitudes in specific types of cases, such as sexual harassment and death penalty cases.

Research has demonstrated that certain demographic characteristics are correlated with attitudes toward the death penalty. African-American and women jurors are more likely to be opposed to the death penalty than Whites and men, respectively (Fitzgerald & Ellsworth, 1984). Support for the death penalty is higher among Whites, men, Republicans, people who are married, and people of a higher income level (Fitzgerald & Ellsworth; Luginbuhl & Middendorf, 1988; O'Neil, Patry, & Penrod, 2004). In addition, research suggests that religion and education level are associated with attitudes toward the death penalty. Catholics and Protestants are more likely to support the death penalty than atheists, agnostics, and Jews (Fitzgerald & Ellsworth, 1984). Research has shown that people with fewer years of education are more likely to support the death penalty than those with a higher level of education (Fitzgerald & Ellsworth; Luginbuhl & Middendorf, 1988).

One particular demographic variable, gender, is associated with sexist attitudes. Glick and Fiske (1996) developed the Ambivalent Sexism Inventory to measure sexist attitudes toward women. Sexism is an ambivalent attitude, composed of two seemingly opposing perceptions of women. The two types of sexism are hostile sexism, which is characterized by negative feelings toward women, and benevolent sexism, which refers to positive feelings about women but is also characterized by viewing women stereotypically and in restricted roles (Glick & Fiske). Men have a higher mean score (indicating more sexist attitudes) on both subscales than do women, and this difference is particularly pronounced for the hostile sexism subscale (Glick & Fiske). The relationship between gender and sexist attitudes, specifically that men are more likely to hold sexist attitudes (especially hostile attitudes) than women, is likely to be relevant for cases in which gender is an issue at trial, such as in a sexual harassment case.

Juror similarity to the defendant: It is not simply the demographic profile of the venire members that is relevant to jury selection strategies; attorneys and trial consultants are also concerned with similarities and differences between the demographic characteristics of the venire members and the defendant. Conventional wisdom and traditional jury selection strategies suggest that it could be advantageous for defense attorneys to deselect jurors who are dissimilar from the defendant, as jurors may be sympathetic toward defendants with whom they share demographic characteristics (Kerr et al., 1995; Van Wallendael & Cutler, 2004; Blue, 2001; Kovera et al., 2003). The wisdom of utilizing jury selection strategies that assume the reliability of the similarity-leniency effect is an issue that is particularly relevant in cases in which differences between jurors and the defendant, such as race, are visible or salient.

The exclusion of venire members who are dissimilar from the defendant may reflect attorneys' concerns about prejudice or out-group punitiveness. Research on intergroup dynamics, specifically Social Identity Theory, suggests that people tend to rate in-group members more positively than out-group members. According to SIT, people derive self-esteem from group membership and thus are motivated to view in-group members in a positive light (Taylor & Hosch, 2004). Individuals engage in social comparisons and are motivated to view themselves positively. Because group membership is important for one's positive self-image, this can result in social judgments that are characterized by leniency toward members of the in-group and harshness toward members of an out-group (Taylor & Hosch).

However, research suggests that under some circumstances, in-group members do not enjoy preferential evaluations. For example, Social Identity Theory also suggests that when an in-group member is unlikeable or engages in unacceptable behavior, that in-group member will reflect negatively on the in-group, and thus will be judged harshly. This finding, known as the *black sheep effect*, suggests that unlikeable in-group members will be evaluated more harshly than unlikeable out-group members (Marques & Yzerbyt, 1988). Research has investigated the influence of the status (in-group vs. out-group member) of the defendant on juror judgments. Mock jurors display in-group favorability in their verdict judgments when there is weak or moderately strong evidence against the defendant. However, when evidence against the defendant is very strong, results are consistent with a black sheep effect; mock jurors judge in-group members as more guilty than out-group members (Kerr et al., 1995). These findings, however, do need to be interpreted with caution, as other research investigating similarity-leniency, out-group-punitiveness, and a black sheep effect in actual felony cases in Texas was unable to find evidence of these effects (Taylor & Hosch, 2004).

A recent meta-analysis on the prevalence of racial bias against a defendant in mock jury studies provides support for an out-group punitiveness effect in jury decision-making. Findings reveal a small but reliable effect for racial bias against an out-group defendant. This effect was stronger for Black participants than for White participants (Mitchell, Haw, Pfeifer, & Meissner, 2005). However, research on juror verdict preferences in racially charged trials does not simply reflect the operation of similarity-leniency/out-group punitiveness. Research on White juror

bias has demonstrated that White jurors are most likely to exhibit prejudice against a Black defendant in cases in which race is not a salient issue at trial. Sommers and Ellsworth (2001) note that changing societal norms have made outward expressions of prejudice unacceptable, and as a result of the changing face of racism, Whites do not wish to appear prejudiced. In addition, not all interracial interactions are racially salient due to increased interracial contact (Sommers & Ellsworth). The results of mock jury studies indicate that in a case in which race is a salient issue, White jurors' verdicts do not show bias against Black defendants. Prejudice does emerge in verdict preferences, however, when race is not a salient issue at trial (Sommers & Ellsworth).

These studies indicate that jury selection based on similarity to the defendant is not a wise choice under all circumstances. In a case in which the defendant has behaved in a particularly heinous manner or in a racially charged trial with a Black defendant, research shows that the strategy of selecting jurors who are similar to the defendant may backfire.

Juror Attitudes and Juror Verdict Decisions

As noted previously, the research on juror demographics and verdict behavior shows a weak link at best. Hepburn (1980) conducted a study of jury-eligible community members and assessed information and attitudes on a number of dimensions, with the goal of measuring the predictive strength of demographics and attitudes for verdict decisions. Respondents were interviewed and provided information regarding demographics, case-relevant attitudes, verdict for a hypothetical case, and perceptions of evidence strength. Case-relevant attitudes, such as attitudes toward the police and attitudes toward punishment, did not have a direct impact on verdict; attitudes did, however, impact verdicts indirectly, through perceptions of the strength of the evidence in the case. Research has demonstrated that evidence strength accounts for the greatest variance in juror verdicts. Indeed, in one study of real jurors who served in sexual assault trials, evidentiary factors such as physical evidence and witness testimony explained 34% of the variance in jurors' verdict decisions (Visher, 1987).

Although evidence strength accounts for the largest percentage of variance in jurors' verdicts, juror attitudes seem to provide a stronger link to verdict behavior than demographic characteristics alone. To measure jurors' general propensity to render a particular verdict, Kassin and Wrightsman (1983) developed the Juror Bias Scale (JBS). The JBS was designed to measure whether a juror is generally conviction- or acquittal-prone (Kassin & Wrightsman; Lecci & Myers, 2002). The original scale is composed of two subscales. The probability of commission subscale measures beliefs about the likelihood that a defendant is guilty given different factors (e.g., "If a suspect runs from police, then he probably committed the crime"). The reasonable doubt subscale measures the level of certainty needed to render a guilty verdict (e.g., "For serious crimes like murder,

a defendant should be found guilty so long as there is a 90% chance he committed the crime”). Kassir and Wrightsman reported modest correlations for the JBS with juror verdicts.

The JBS was revised by Lecci and Myers and the revised scale was validated with a large sample of community member participants. Scale revision involved the elimination of several items and the division of the probability of commission subscale into two scales measuring confidence in and cynicism towards the criminal justice system (Lecci & Myers, 2002; Myers & Lecci, 1998). Results indicated that the revised scale was able to predict verdicts as well as the original scale, although the proportion of variance in verdicts explained (approximately 2–4%) was still relatively low (Lecci & Myers, 2002; Lieberman & Sales, 2007; Myers & Lecci, 1998). Recently, Lecci & Myers (2008) developed the Pretrial Juror Attitudes Questionnaire (PJAQ), which is composed of six subscales: conviction proneness, system confidence, cynicism toward the defense, social justice, racial bias, and innate criminality. In a study establishing the predictive validity of the PJAQ, Lecci & Myers found that the PJAQ, although closely related to the JBS, accounted for almost 3% of additional variance in verdicts after controlling for jurors’ scores on the JBS and the R-LAQ-23, a similar scale that measures legal attitudes (Lecci & Myers).

Research indicates that case-relevant attitudes are much better predictors of verdict than general attitudes or demographic characteristics (Narby & Cutler, 1994). There is evidence supporting the link between verdicts and some case-relevant attitudes such as attitudes toward tort reform (Moran, Cutler, & De Lisa, 1994) and attitudes toward drugs (Moran, Cutler, & Loftus, 1990). However, an attempt to establish a correlation between attitudes toward eyewitnesses and ratings of defendant culpability was unsuccessful, suggesting that there are limits to the ability of case-relevant attitudes to predict verdicts in all cases (Narby & Cutler, 1994). However, research has provided support for the link between several case-specific attitudes and verdict decisions in certain types of cases.

Death penalty attitudes: One well-documented association between jurors’ attitudes and verdict behavior can be found in the literature on juror decisions in death penalty cases. In capital cases, jurors who are unequivocally opposed to the death penalty are ineligible to serve on the jury (*Witherspoon v. Illinois*, 1968). The Supreme Court has ruled that capital jurors may be struck for cause if their attitudes for or against the death penalty are held with such conviction that it would “prevent or substantially impair the performance of their duties as a juror” (*Wainwright v. Witt*, 1985, p. 424). To determine their eligibility to serve on a capital jury, jurors are asked about their attitudes toward the death penalty during voir dire, for example, “Is your attitude toward the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?” (Cowan, Thompson, & Ellsworth, 1984). Research findings on the relationship between death penalty attitudes (DPA) and verdict demonstrate that jurors who are in favor of the death penalty are more likely than those who oppose the death penalty to convict a criminal

defendant (Cowan et al.; O'Neil et al., 2004). O'Neil et al. developed the DPA scale, a 15-item scale assessing attitudes toward the death penalty, and found that attitude toward the death penalty was a strong predictor of sentencing decisions. Similar results have been found in samples of deliberating mock jurors and in survey data from actual jurors (Cowan et al., 1984; Moran & Comfort, 1986). Similarly, compared to those who oppose the death penalty, death-qualified respondents strongly disagree that the worst defendants should be considered for mercy, and they favor harsh punishment as a means of reducing crime (Fitzgerald & Ellsworth, 1984). In addition, death-qualified respondents are more likely to endorse aggravating factors in a capital case than excludable jurors (Butler & Moran, 2007).

Research has demonstrated a large direct effect of attitudes toward the death penalty on verdicts in capital cases (O'Neil et al., 2004). Attitudes toward the death penalty influenced the interpretation of some mitigating and aggravating factors (supporters of the death penalty were more likely to perceive the defendant to be dangerous and less likely to perceive the defendant as mentally ill); however, the correlation between DPA and verdict was consistently stronger than the relationship between death penalty attitudes and ratings of defendant dangerousness or mental illness (O'Neil et al.).

Juvenile waiver attitudes: In juvenile waiver cases, cases in which juvenile defendants are adjudicated in adult court, a juror qualification process similar to death qualification occurs during voir dire. Venire members who report negative attitudes toward juvenile waiver and those who express concern that their deliberations would be affected by the knowledge that a juvenile may be sentenced to adult prison if convicted are likely to be excluded from the jury (Danielsen, Levett, & Kovera, 2004). Levett, Danielsen, and Kovera (2003) developed the Juvenile Waiver Scale to measure jurors' attitudes toward juveniles, such as beliefs about juveniles' dangerousness and sophistication, and general attitudes toward juvenile waiver. Mock jury research demonstrated that favorable attitudes toward juvenile waiver and a belief that juveniles are dangerous significantly predicted guilty verdicts (Crocker, Levett, & Kovera, 2006).

Insanity defense attitudes: Research on the insanity defense has demonstrated that there are common misperceptions about how frequently defendants put forth insanity defenses and the nature of a defendant's confinement subsequent to a not guilty by reason of insanity (NGRI) verdict (Skeem, Louden, & Evans, 2004). General attitudes toward the insanity defense have been shown to be largely negative (Skeem et al.). Skeem et al. developed the Insanity Defense Attitudes-Revised (IDA-R) scale to measure attitudes toward the defense. Research investigating the predictive validity of the IDA-R has found that mock jurors' scores on the IDA-R are predictive of case judgments in insanity cases (Skeem et al.). Other research has also demonstrated that attitudes towards psychiatrists and the insanity defense generally are predictive of verdicts in insanity cases (Cutler, Moran, & Narby, 1992).

Techniques used in Systematic Jury Selection

Community Survey

The most common technique employed in SJS is the community survey. Typically, this technique involves creating a survey instrument which is distributed to a representative cross-section of jury-eligible community members from the same jurisdiction in which the case will be held. The goal of the community survey is to develop profiles of both favorable and unfavorable jurors (Frederick, 1984). Survey instruments typically assess attitudes, knowledge about case-specific issues, and characteristics of the respondent (Frederick; Seltzer, 2006). Attitude questions include questions about general attitudes (e.g., presumption of guilt, attitudes about crime, attitudes toward the government), case-relevant attitudes, opinions about case-relevant issues, and perceptions about the litigants (Frederick, 1984; Seltzer, 2006). Knowledge questions typically assess memory for facts of the case, exposure to pretrial publicity, and opinions about these case facts. Finally, respondents are asked to provide demographic information such as age, gender, SES, reading and television habits, and religious and political affiliation (Frederick, 1984). The survey instrument is designed to identify variables that predict verdict and that are public information or easily assessed during voir dire (Hepburn, 1980; Seltzer, 2006).

Hastie, Penrod, and Pennington (1983) outlined three vital aspects of the community survey: sample representativeness, design of the survey instrument, and data analysis. In order to generalize the results of the community survey to the venirepersons for a particular case, it is essential that the community survey sample mimics the jury pool in terms of demographic characteristics and jurisdiction (Penrod, 1990). Hastie and colleagues also note the importance of the choice of a variable to measure the respondent's verdict preference. As respondents have not heard any evidence, they will not be able to provide hypothetical verdicts. Therefore, the questionnaire must include multiple questions to represent the respondent's probable verdict preference. The authors recognize the difficulty associated with identifying questions that will tap into verdict preference with accuracy (Hastie et al., 1983). For this reason, the authors recommend factor analysis as the most appropriate statistical tool for determining which variables are appropriate approximations of verdict preference (Hastie et al.). To analyze community survey data, Seltzer (2006) recommends utilizing stepwise regression techniques to determine which variables are significant predictors of the dependent measures. Similarly, Hastie et al. (1983) recommend multiple regression analysis for determining significant predictor variables. Regression analysis is used to formulate a model of predictor variables which explains the greatest percentage of variance in the dependent (verdict) measure. Attorneys can then utilize the significant predictor variables to develop profiles of desirable and undesirable jurors to guide their use of peremptory challenges during voir dire.

Does Systematic Jury Selection Work?

Much effort has been expended to test the efficacy of SJS. However, it is difficult to define what constitutes success in this realm. Indeed, a “successful” jury selection may be construed by attorneys as the elimination of jurors biased against their party instead of the elimination of jurors who are unable to weigh the evidence fairly (Wallendael & Cutler, 2004). To justify the additional expense of SJS over traditional attorney jury selection, SJS must prove to be more successful than the strategies that attorneys are using already (Fulero & Penrod, 1990). However, it is uncertain what kinds of traditional techniques attorneys typically employ (Wallendael & Cutler, 2004). Trial technique handbooks do provide insight into the recommendations that attorneys provide to other attorneys regarding jury selection; however, little research has systematically studied attorneys’ strategies across cases. Most likely, the degree of advantage provided to attorneys by SJS methods over traditional techniques will vary across situations. Voir dire procedure varies across jurisdiction, and some states allow for more involvement and questioning by attorneys than others. Similarly, judges differ in the nature and number of questions they will permit during voir dire. The efficacy of SJS will depend at least in part on the voir dire procedure and the extent of attorneys’ ability to question the panel (Wallendael & Cutler, 2004). According to Seltzer, SJS strategies will add the greatest value in cases in which little attitudinal information can be gleaned during voir dire (Seltzer).

Researchers have investigated the efficacy of SJS in both mock jury studies and in actual trial settings, and estimates of the variance in verdict decisions accounted for by SJS techniques range from 5 to 15% (Van Wallendael & Cutler, 2004; Fulero & Penrod, 1990). However, these estimates merely compare SJS against random jury selection. As attorneys do not utilize peremptory challenges in a random manner, the utility of this comparison is unclear (Van Wallendael & Cutler, 2004). In addition, it is difficult to draw definitive conclusions from the existing literature because of inherent problems of both mock jury and field research in this area. For example, field research often suffers from small sample sizes and tends to be limited with respect to case type and jurisdiction, making it difficult to generalize results to jury pools in other jurisdictions or types of cases (Van Wallendael & Cutler). Although laboratory studies of jury selection typically employ adequate sample sizes, representative attorney samples are difficult to recruit and study protocol may not accurately reflect real courtroom procedures (Van Wallendael & Cutler). In addition, although archival research has compared outcomes of cases that employed systematic vs. traditional methods of jury selection, there are likely to be preexisting differences between real cases that employ trial consultants and those that do not (Van Wallendael & Cutler).

One example of field research in this area was conducted in the context of consulting efforts in the highly publicized Joan Little trial. In 1974, Joan Little, a young Black female inmate at Beaufort County Jail in North Carolina, was charged with first-degree murder for killing a White prison guard. According to the defense, the jailor, a White man, had raped Ms. Little and she stabbed him in self-defense (Kressel & Kressel, 2002). Social scientists assisted the defense with jury selection

for the case. Relying on data they collected using a community survey, the social scientists developed profiles of favorable and unfavorable jurors and determined that the venire was unsympathetic to the defense's case overall (Frederick, 1984). The social scientists also rated the nonverbal behavior of venirepersons and assessed jurors' authoritarianism (i.e., the judge allowed one or two F scale questions) during voir dire (Frederick). Analysis indicated that jury selection in this case resulted in a more favorable jury for the defense. Jurors who were excluded during jury selection scored higher on measures of authoritarianism, were more likely to have prosecution attitudes on the survey instrument, and were more likely to have "unfavorable" ratings on the in-court assessment of nonverbal behavior than jurors who were seated in the trial (Frederick). At trial, the jury voted in favor of the acquittal of Joan Little.

Similar preliminary support for SJS techniques comes from an analysis of the methods used in preparation for jury selection for a civil suit for breach of contract brought against Newport News Shipbuilding by Shell Oil Company. Shell Oil claimed that a shipment of large oil tankers had been delivered by Newport News more than 2 years late, costing Shell 100 million dollars. Newport News claimed that the delay in shipment did not violate the contract between the two companies and hired consultants to assist with jury selection (Frederick, 1984). Social scientists administered a community survey to jury-eligible participants that asked participants to make verdict and compensation decisions about a hypothetical case similar to the Shell Oil case. Factor analysis of attitudinal questionnaire items yielded a verdict preference score. This score was then used as a dependent measure for regression analysis, which identified race of the respondent, prior military service, education level, and beliefs about the responsibility of the manufacturer for delays as significant predictor variables (Frederick). Although this case settled prior to trial, this research does suggest that SJS techniques have the potential to change the attitudinal composition of the jury. However, it is important to interpret these results cautiously as they represent findings from single cases and the studies do not allow for a comparison of SJS techniques with more traditional methods of jury selection. Although field research of this kind is clearly important, it is necessary to compare traditional and SJS techniques across a variety of cases.

Horowitz (1980) conducted mock jury research to attempt to compare the efficacy of systematic vs. traditional jury selection methods. He compared the results of jury selection across four trial types: murder, drug, court martial, and drunk driving. Law students were trained to employ either traditional or systematic methods in a mock voir dire. Law students also provided predictions about jurors' verdict choices. Results were not straightforward; SJS methods improved law students' ability to predict jurors' verdict behavior, but for only two of the four types of trials (Horowitz).

There are many factors that make research comparing traditional and SJS difficult. Although research on individual cases is interesting and informative, data concerning the efficacy of SJS for a single case will not generalize to other case types, and a case study does not provide the opportunity to compare the two methods of jury selection. Although it is difficult to conduct research using actual deliberating juries,

more studies of this kind are needed. In addition, the efficacy of both traditional and SJS will depend upon the procedural characteristics of the voir dire. Finally, it is necessary to determine under which circumstances, extended or limited voir dire, SJS is most useful.

Critiques of Systematic Jury Selection

The field of SJS has endured controversy and criticism (Lane, 1999; Seltzer, 2006; Strier, 1999). The major critiques of SJS are that it undermines the justice system, that it is ineffective, and that it suffers from lack of regulation (Seltzer). Although SJS was first employed by social scientists offering assistance to the defense in politically charged cases with indigent defendants, the field has developed into a multimillion dollar industry which is most accessible to the wealthy (Lane, 1999; Strier, 1999). Typical fees for consultants have been estimated at \$250 per hour (Lane, 1999), and these fees have been estimated to range as high as \$375 per hour (Strier, 1999). One major criticism of SJS is that it creates an imbalance in the justice system because these methods are more readily available to wealthy defendants (Seltzer, 2006; Lane, 1999). A second concern for many is the appearance of unfairness. Fairness is an underlying principle of the justice system, thus the appearance of and the actual existence of legitimacy are arguably equally important (Strier, 1999). During jury selection, trial consultants' services do not allow an attorney to "pick" a jury. The information gleaned from community surveys and in-court observation of venire members helps attorneys to make use of their peremptory challenges. However, critics note that even the appearance or popular belief that SJS assists attorneys in hand selecting jury members is problematic (Seltzer, 2006; Strier, 1999).

The practice of SJS is criticized by others for its lack of regulation (Seltzer, 2006; Stinson & Cutler, 2011; Strier, 1999; Lane, 1999). The trial consulting industry does not have guidelines or rules governing its practice or the advertisement of services (Lane). Although trial consultants are typically psychologists, and many possess a Ph.D. or Master's degree, the field does not have a licensure or degree requirement. Indeed, any person can call him- or herself a trial consultant (Strier, 1999). That said, a recent survey of members of the American Society of Trial Consultants indicated that over half of the 377 consultants had obtained a Ph.D. and 92% had obtained an advanced degree of some sort (Strier). Nevertheless, there exists the potential for unqualified, incompetent, or unethical individuals to advertise trial consulting skills (Strier). In addition, the field lacks a governing body to instill accountability and the field has not published appropriate ethical guidelines; the Code of Professional Standards put forth by the ASTC has lenient standards compared to other professional psychological and legal organizations (Stinson & Cutler, 2011; Strier). Moreover, the American Bar Association Model Rules of Professional Conduct does not regulate or limit attorneys' use of trial consultants (Lane, 1999).

Some critics of SJS claim that the practice eliminates intelligent venire members from the panel (Seltzer, 2006; Levin & Emerson, 2006). However, at least one

research study comparing the education level of selected and excused jurors in real cases did not find any difference between the groups, indicating that at least in some jurisdictions, selected jurors do not have a lower education level than excluded jurors (Levin & Emerson).

Another argument against SJS is that it has the potential to infringe upon defendants' constitutional rights by producing a jury that is not impartial or one that is inconsistent with the Constitution's representativeness requirement (Strier, 1999). In addition, others have argued that SJS appears inconsistent with the holding in *Batson v. Kentucky* (1986). The community survey functions by attempting to find relationships between demographic characteristics, such as race or gender, and case-specific attitudes and verdict. Although jurors who are eliminated because they fit an "unfavorable juror profile," are not technically excused on the basis of race, it may seem this way in the eyes of the court.

A final critique of SJS concerns its efficacy. As the strength of the evidence accounts for more of the variance in jury verdicts than do juror attitudes, critics argue that SJS is costly and unnecessary. The empirical findings regarding the effectiveness of SJS techniques for predicting jurors' verdicts are inconclusive, such that it remains unclear which types of cases and situations will benefit most from SJS techniques (Strier, 1999). In addition, although parties who hire trial consultants often obtain desired verdicts, there are numerous factors that contribute to the outcome of a trial; it is difficult to accurately isolate the contribution of SJS to a favorable verdict (Kovera et al., 2003). As noted by Strier (1999), parties who can afford the cost of jury consultants are also likely to possess the resources to hire talented attorneys and expert witnesses (Strier).

Future Directions

Research on and analysis of the field of SJS suggest that the methodology and goals of the field have changed over time and will continue to change. Although trial consultants may have purported to predict jury verdicts in the past, many trial consultants today declare no such talent (Seltzer, 2006). As research suggests that the majority of the variance in jury verdicts is accounted for by the strength of the evidence, and trial verdicts result from the contributions of myriad factors, it seems wise for trial consultants to avoid claiming the ability to deliver or predict verdicts. In addition, trial consultants today are adopting strategies that supplement the community survey with focus groups and shadow juries (Seltzer, 2006). Rather than focusing solely on jury selection, trial consultants are assisting clients with the development of overarching trial strategies and themes (Seltzer).

There is a great deal of evidence to suggest that the field of trial consulting is expanding and that attorneys' interest in SJS techniques will continue to rise (Lane, 1999; Strier, 1999). Because of this, additional research is needed on the efficacy of SJS techniques. Research must focus on the comparison between traditional and

SJS techniques and attempt to determine in what types of trials and under what circumstances SJS is more advantageous than traditional methods. It is likely that SJS methods will tend to be more beneficial in cases that involve issues toward which people hold strong personal attitudes, such as death penalty cases, child abuse case, and insanity cases. In addition, as evidence strength tends to be the strongest driver of juror verdicts, SJS techniques should be more advantageous when the evidence is ambiguous. Advances in this type of research will certainly lead to improvements in trial consulting practice.

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