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Incorporating Social Science into Criminal Defense Practice

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Incorporating Social Science into Criminal Defense Practice

In recent decades, social scientists have created a treasure trove of empirical and sociological data that defenders can and should use to help their clients. Evidence rules, criminal law, and criminal procedure are filled with concepts informed by social science. When is evidence likely to unfairly prejudice a defendant in the eyes of a jury? Do police interact differently with members of minority populations and how should that inform concepts of reasonableness? How easy or difficult is it for people to identify individuals they see during high-stress criminal episodes? How effective are police interrogation tactics at getting at the truth versus getting suspects to say whatever the interrogator wants to hear?

Courts have also shown more willingness in recent years to incorporate social science data into their decisionmaking on criminal justice issues. Perhaps the most prominent example is in juvenile adjudications. Studies on juvenile brain development were an integral part of the Supreme Court's decision in *Miller v. Alabama*¹ banning automatic life without parole for juveniles as cruel and unusual under the Eighth Amendment. Lower courts have also relied on social science data to inform the role that a suspect's race should play in Fourth Amendment

inquiries. For example, in *Commonwealth v. Warren*,² the Massachusetts high court relied on data about racial profiling in Boston to discount the relevance of a suspect's flight in the Fourth Amendment analysis of whether there was sufficient reasonable suspicion to stop. More recently, the Ninth Circuit Court of Appeals agreed that social science data about racial profiling in Seattle should similarly "inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise."³ And many lower courts have considered social science research when making decisions about whether to admit forensic science, eyewitness identifications, and confessions.

These are just a few of the many possible ways that defense attorneys can leverage social science to help their clients. So how does a defense attorney find and harness this data to help clients? And what are the evidentiary and legal tools that defense lawyers can use to incorporate social science into their practice? There are a number of ways to learn about relevant social science research. The National Academy of Sciences,⁴ Rand Corporation,⁵ Sentencing Project,⁶ and Pew Research Center⁷ have websites where they collect and publish reports relevant to criminal law and criminal justice. And many legal scholars are now writing law review articles, blogging, or posting social science research on social media. Just as defense attorneys search for precedent when thinking about how to craft their legal arguments, so too should they search for helpful social science.

Once relevant social science research is located, there are a number of possible ways that a defense attorney can incorporate that research into her criminal defense practice. They include motions in limine,

BY EVE BRENSIKE PRIMUS

motions to suppress, voir dire, requests for judicial notice, stipulations, expert witnesses, questioning of witnesses, arguments to the factfinder, requests for additional jury instructions, and sentencing advocacy/plea negotiations. Which vehicle is the most appropriate for bringing social science into the courtroom will depend on the issue, the client, the case strategy, and the court.

Motions in Limine

Defenders should use social science to support motions in limine to exclude evidence as unfairly prejudicial, to prohibit testimony that relies on impermissible character inferences or improper hearsay, and to exclude junk science.

A. Unfair Prejudice

Under Federal Rule of Evidence 403, relevant evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Defenders should use social science studies to inform courts about when a defendant is likely to be unfairly prejudiced by the admission of evidence and when a jury might be misled or confused by certain evidence.

For example, defenders should deploy the same research that led courts to discount flight by African Americans in the reasonable suspicion analysis to make arguments that evidence of flight is unfairly prejudicial if admitted to show consciousness of guilt. Jurors will assume that the defendant was fleeing because he is guilty when, in reality, members of racial minorities have other reasons why they might flee. Even if the judge does not preclude the evidence under 403, the judge might permit defense counsel to bring in social science evidence to rebut the argument that consciousness of guilt is the only reason for the flight or permit an additional jury instruction on the issue.

Creative defenders have relied on social science to try to prevent prosecutors from referring to a complaining witness as a “victim” or to prevent the phrase “domestic violence” from being said in front of the jury. When there is research that a certain word or phrase is likely to evoke an emotional response from jurors and make them stereotype the defendant or want to punish regardless of the defendant’s guilt, defenders should use that research to prevent the unfairly prejudicial terms from coming into their clients’ trials.

Social science research can also help defenders think about when limiting instructions are effective and when they do not work. This is particularly important for defense attorneys who are trying to exclude evidence as unfairly prejudicial. The ineffectiveness of limiting instructions is relevant when conducting the balancing required under Federal Rules of Evidence 403. In the Advisory Committee Note to Rule 403, the drafters emphasized that, “[i]n reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.”

There are social science studies demonstrating that limiting instructions are ineffective in a number of contexts. For example, in one study, participants admitted openly that they used a prior conviction of the defendant to determine his guilt even though they were specifically instructed to consider it only for determining his truthfulness.³ Defenders should use social science studies like these to buttress arguments to exclude such evidence as unfairly prejudicial.

B. Character Evidence

Social science evidence can also inform defense motions in limine to exclude problematic character evidence. Two researchers published the results of a study in 2009 in which they used data from over 300 criminal trials in three large counties (Los Angeles, Phoenix, and the Bronx) and Washington, D.C., to study the effect of the admission of a defendant’s criminal record on jury decisionmaking. They found that juror knowledge of a defendant’s prior criminal history is significantly associated with conviction in weak cases and not significantly associated with conviction in strong cases. In weak cases, the presence of a criminal record increases the probability of conviction from less than 20 percent to about 50 percent or greater based not on the evidence presented but on the inference of bad character from the admission of the prior convictions.⁴ Defenders should use this study to argue that the admission of a client’s prior criminal record is particularly likely to unfairly prejudice the factfinder in weak or circumstantial cases and should be excluded for that reason.

Whenever prior convictions of violence are offered against an African American male defendant, defense attorneys should cite social science about improper societal stereotypes

associating African American men with violence⁵ to argue that the unfair prejudice to an African American man is actually higher than it is for a similarly-situated white man and should be considered as part of the balancing under Federal Rule of Evidence 403.

More generally, there are a number of studies questioning the entire premise of the admission of character evidence — namely, the idea that people have certain “traits” that determine their behavior. Instead, research tends to show “that behavior is largely shaped by specific situational determinants that do not lend themselves easily to predictions about individual behavior.”¹¹ This research could supplement a motion to exclude a prior conviction or bad act that is older or happened under extenuating circumstances but is offered by the government for a permissible character purpose. In such situations, the research suggests that the person is not likely to repeat the behavior in a different situation and thus the probative value of the prior act is markedly lower. Alternatively, when such prior acts are admitted, defenders can try to bring up evidence about these developments in character theory to try and minimize the impact of the prior bad acts testimony.

More particularly, there is research suggesting that it is problematic to admit prior convictions solely to impeach a defendant’s credibility. According to one empirical study, using prior convictions to assess a defendant’s credibility does not work. “The defendant’s credibility is already so much lower than that of the other witnesses (because it obviously is in the defendant’s self-interest to give testimony which favors his or her position) that the admission of prior convictions does not reduce the credibility of the defendant further.”¹² Thus, the social science suggests that the probative value of this evidence as a tool for assessing credibility is quite low. At the same time, the same research reveals that the danger of unfair prejudice to the defense is incredibly high. Conviction rates varied as a function of the admission of the prior record and “the subjects were willing to state that the prior conviction evidence increased the likelihood of the defendant’s guilt and was the reason they found him guilty, even though they had been instructed not to use the information for that purpose.”¹³ Defenders can use studies like these in motions in limine to try to prevent the prosecution from using prior convictions for impeachment purposes or to try to get better jury instructions when prior convictions are admitted.

C. Hearsay Testimony

Social science evidence can also be used to challenge the admission of certain kinds of hearsay evidence by chipping away at the underlying premise behind certain hearsay exceptions that the statements given are reliable. Consider, for example, this excerpt from an article by Bryan Liang describing just how unreliable dying declarations are:

Epidemiologically, in the United States, penetrating trauma, such as [that] induced by gunshots and knives, is involved in greater than 80 percent of all homicides The primary cause of death when patients are injured by penetrating trauma is uncontrolled hemorrhage [U]ncontrolled hemorrhage results in a concomitant interruption of oxygen flow to neural tissues [and] will quickly lead to hypoxic or anoxic insult to the victim's brain....

One area that has been studied is the effect on cognition of experimentally induced hypoxia through acute simulated changes in altitude. In this context, there is overwhelming evidence that hypoxic changes significantly and negatively affect cognition. First, for healthy males aged 23 to 31 at simulated high altitudes ... and absent any other stresses ... mental functions ... degraded, particularly global functions [such as] intelligence, reasoning, and short-term memory. Others have reported that similarly induced hypoxia produces significant effects upon learning, vigilance, psychomotricity, and intellectual abilities....

In addition, hypoxic and anoxic states due to impaired blood flow or trauma can result in delirium Traditional features of delirium include significant global disorders of the patient's cognitive functions.... Delusions, usually persecutory, are often, but not invariably, present Memory is impaired in all its key aspects. ... [A]n extremely wide range of misperceptions of reality and de novo hallucinatory perceptions, including mistaken identity, can occur when an

individual is in a state of delirium secondary to hypoxia...."¹⁴

If defense counsel has a trial in which the prosecution's case depends on the admission of a dying declaration, this research might be useful in trying to keep out the hearsay statement as unfairly prejudicial and unreliable under Federal Rule of Evidence 403.

D. Junk Science

Social science research also should inform motions to exclude junk science under *Daubert* or its state counterpart.¹⁵ Even when the court is not inclined to exclude the evidence altogether, defenders should use social science to limit the damaging impact of forensic testimony. For example, scholars have argued and some courts have agreed that experts' testimony should be limited so they do not testify in the language of absolute certainty.¹⁶ Additionally, some courts have been receptive to defense arguments that it would unfairly prejudice the defense if government witnesses who testify to forensic conclusions were called "experts" because cloaking them as experts can unfairly sway the jury.¹⁷ In fact, in its Note to the 2000 Amendment to Federal Rule of Evidence 702, the Advisory Committee wrote that "there is much to be said for a practice that prohibits the use of the term 'expert' by both the parties and the court at trial. Such a practice 'ensures that trial courts do not inadvertently put their stamp of authority' on a witness's opinion and protects against the jury's being 'overwhelmed by the so-called 'experts.'"¹⁸

Motions to Suppress

Social science should also inform motions to suppress eyewitness identifications, confessions, and evidence obtained as a result of impermissible searches and seizures under the Fourth Amendment.

A. Eyewitness Identifications

Social science research has identified two categories of variables that contribute to the well-recognized problem of mistaken identifications — estimator variables and system variables.¹⁹ Estimator variables are factors over which the legal system has no control and include the characteristics of the witness, the characteristics of the perpetrator, and the circumstances of the witnessed event. Some people are better at being witnesses than others. Young children and the elderly are less able to make

accurate identifications than young adults, and sober individuals are better at making accurate identifications than those who are intoxicated. The characteristics of the suspect can also affect the reliability of an identification. Research reveals that the use of disguises — including hats, sunglasses, masks, and wigs — severely inhibits witnesses' abilities to later identify someone. There is also robust research documenting problems with cross-racial identifications. People have a much harder time identifying the facial features and distinguishing among people of a different race.

The circumstances surrounding an event can also affect the reliability of an identification. A brief or fleeting exposure to a suspect is less likely to produce an accurate identification than a prolonged one. An identification made at a great distance or in bad lighting conditions is more likely to be inaccurate than one made up close with good lighting. Research has shown that witnesses are particularly bad at identifying suspects who have used weapons to commit their crimes due to a phenomenon known as "weapon focus." Witnesses focus on the weapon itself rather than focusing on the person holding it. And studies reveal that high levels of stress can diminish an eyewitness's ability to recall details and make an accurate identification later.

System variables are factors — like identification procedures — that are within the legal system's control. Witnesses are very susceptible to suggestion. A police officer's subtle comment or action can affect a witness's selections, and police comments made after an identification praising or congratulating the witness can improperly reinforce a shaky identification and engender a false sense of confidence.

The composition of the lineup or photo array can also be suggestive. Sometimes, if a witness does not select the suspect out of a photo array, the police will then conduct a live lineup in order to get the witness to make an identification. Research on the "mugshot exposure effect" reveals that presenting a suspect to the witness multiple times increases the likelihood that the witness's later identification of the suspect is based on her memory of having seen the earlier photograph rather than her memory of the crime itself. Witnesses are often anxious to make an identification and naturally believe that the culprit is in the lineup or photo-spread. As a result, they will frequently

identify the person who most resembles the witnesses' memory *relative* to other people in the lineup or photospread. If the suspect is the only person in the lineup or photospread that fits the general description of the perpetrator, witnesses will pick the suspect because they want to be helpful and he looks *most* like their memory of the perpetrator. Moreover, once the witness makes a selection, she becomes committed to the identification and will psychologically reinforce her choice.

Under the Fourteenth Amendment Due Process Clause, an out-of-court eyewitness identification must be excluded if the police-orchestrated eyewitness identification procedures used to obtain the identification were unnecessarily suggestive and create a serious risk of a mistaken identification. Police failure to abide by best practices often leads to suggestive identification procedures, and all of this social science informs the ultimate reliability (or lack thereof) of a resulting identification.²⁰

Defenders should also use this social science data to argue for greater protections under state law. Some states rely on evidence rules to circumscribe the admissibility of unreliable identifications.²¹ Still others have adopted requirements that more severely restrict the admissibility of one-person show up identification procedures.²² The Connecticut Supreme Court relied on social science data about the problems

now know relied on false confessions to identify a number of interrogation techniques that are significantly correlated with false confessions. These tactics include lengthy interrogations,²⁴ feeding the suspect key details that only the perpetrator could have known and then relying on those details when they are incorporated into the later contaminated confession to demonstrate the confession's reliability,²⁵ direct promises of lenient treatment if the suspect confesses,²⁶ indirect promises of lenient treatment through minimization techniques,²⁷ threats of harsh consequences if the suspect refuses to confess,²⁸ false evidence ploys that make it appear that the police can already conclusively establish the suspect's guilt,²⁹ and leading or suggestive questioning of vulnerable populations (juveniles, mentally disabled people, and the mentally ill).³⁰ When police use these tactics, criminal defense attorneys should rely on social science in their motions to suppress the resulting confessions as involuntary and in their motions to exclude the confessions as unreliable under evidence principles.³¹

C. Fourth Amendment Challenges

For decades, scholars have been arguing that the dynamics surrounding an encounter between a police officer and a Black male are different from those surrounding an encounter between an officer and the so-called rea-

Amendment case collecting social science data to argue that race should be considered when determining whether it was reasonable to think that a person could disregard the police and end an encounter.³³ Defenders should rely on the national data in this motion, as well as social science data specific to their respective jurisdictions, to argue for individualization of the reasonable person standard to consider race in Fourth Amendment inquiries.

Similarly, defenders should rely on research about implicit biases to argue that officers are more likely to code minority community members as "dangerous," "aggressive," "violent," and "criminal."³⁴ If courts are going to look at officer behavior through a lens of deference to officer experience,³⁵ perhaps those same courts should look at officer behavior involving interactions with minority community members through a lens that considers how police officers' implicit biases may have affected their actions. For example, when searches and seizures are supported by ambiguous suspect behaviors like nervousness or furtive movements, defenders should ask courts to consider whether implicit biases may have affected the officers' perceptions such that those factors should be discounted in the reasonable suspicion or probable cause analyses in the same way that flight by African American men is now discounted in the reasonable suspicion analyses in Boston and Seattle.

Voir Dire

Before voir dire begins, defense attorneys should consult social science to craft effective questions for juror questionnaires. Individuals are often more willing to disclose personal information and experiences in written form than orally in a public courtroom. Social science can inform defense lawyers about how to write questions that will effectively encourage potential jurors to reveal implicit biases and attitudes.

The jury selection process itself then gives defense counsel a wonderful opportunity to educate prospective jurors about social science concepts that are important to the theory of defense. For example, some judges have been willing to play a video to prospective jurors showing stark differences in how a Black man, a white man, and an attractive white female are treated when passersby see them attempting to steal a bicycle in broad daylight in a park.³⁶ The video is then

When is evidence likely to prejudice a defendant in the eyes of a jury? Do police interact differently with members of different populations? How difficult is it for people to identify individuals they see during high-criminal episodes? These questions are all informed by social science concepts.

with suggestive identification procedures to hold that first-time, in-court identifications are not admissible in cases when identity is an issue.²³ Defenders can build on this precedent and use social science to exclude problematic eyewitness identifications under both federal or state law.

B. Confessions

In the last 20 years, empiricists, criminologists, and psychologists have studied wrongful convictions that we

sonable person.³² Whether a person is stopped versus merely accosted under the Fourth Amendment turns on the question of whether a reasonable person in the individual's shoes would feel free to disregard the police and leave or end the encounter. But whether a reasonable person feels free to leave an inquiring police officer is about power dynamics, and those dynamics are different for racial minorities in this country. The ACLU of New Hampshire filed an amicus brief in 2019 in a Fourth

used as a springboard for voir dire questioning about implicit biases.

Defenders could use other videos like the invisible gorilla study³⁷ to introduce prospective jurors to the problems of selective attention in eyewitness identifications. In the invisible gorilla video, viewers are told to count how many times people wearing white shirts pass a basketball back and forth. There are also people wearing black shirts who are passing another ball on the screen at the same time, but viewers are told not to count those passes. In the middle of the video, a person in a black gorilla suit walks through, pounds his chest, and walks off. The gorilla is present on the screen for nine seconds before leaving, but 50 percent of the people who watch this video do not notice the gorilla because their attention is focused elsewhere. This counterintuitive example of how people often do not see seemingly important and salient things when they are focused on other things is a great starting point for a broader discussion about the problems with eyewitness identification testimony.

Even without videos, defenders may want to introduce social science research at the voir dire stage and use it to discuss important concepts with prospective jurors, both to sensitize prospective jurors to the ideas before the evidence is presented and to figure out which jurors are not receptive to important components of the defense theory of the case.

Judicial Notice

Judicial notice is an underused defense tool. Federal Rule of Evidence 201 permits a court to take judicial notice of facts that are not subject to reasonable dispute either because they are generally known within the territorial jurisdiction of the trial court or because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Defense attorneys should ask courts to take judicial notice of relevant statistics and social science research.

Requests for judicial notice can be made at any point in the proceedings. This means that a defense attorney who is cross-examining a police officer about a stop that the officer made could pause and ask the court to take judicial notice of statistics about the rate at which African American men are stopped as compared to white men in that jurisdiction. Once defense counsel requests judicial notice, Federal Rule of

Evidence 201(c) requires the court to take judicial notice of the requested fact(s) if the court is supplied with the necessary information to support the request. Even better, Federal Rule of Evidence 201(f) requires the court to inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. Defense counsel can then incorporate the judicially-noticed fact(s) into her questioning and arguments to the factfinder.

Judicial notice is an opportunity for defenders to incorporate well-known statistics and social science principles into a trial or hearing without having to call expert witnesses. There are, of course, times when calling the expert is advisable either because the court will not take judicial notice of the requested fact(s) or because an expert would be helpful to explain their significance. But judicial notice, when used effectively, can infuse the defense attorney's questioning and arguments with expertise and scientific support in ways that resonate with judges and juries.

Stipulations

Sometimes defense counsel can get a prosecutor to stipulate to statistics or social science results that will be useful in later arguments (either to the court or to the jury). This may occur rarely, but is very useful when it happens.

Experts

In some circumstances, defense counsel may want to present a defense expert to explain important social science concepts to the judge or jury. Experts are often necessary when defenders file pretrial motions in limine to exclude junk science. But experts can also be helpful at other points. For example, the National Academy of Sciences recommends that judges allow social science experts to testify at trials involving eyewitness identifications to explain the frailty and fallibility of eyewitness testimony.³⁸ And defense attorneys have used experts to discuss how certain interrogation tactics can lead to false confessions as part of motions to suppress statements.

Defense counsel should also consider using social science to make the case for state-funded expert assistance. In some jurisdictions, the defense has to make a showing that denial of expert assistance would result in a fundamentally unfair trial in order to get a court-funded expert.³⁹ To the extent that there is social science indicating how persuasive certain expert evidence is to jurors,

the argument that denial of such assistance to the defense would result in a fundamentally unfair trial is stronger.

Cross-Examination and Arguments to the Factfinder

Defense attorneys should also think about incorporating social science into their cross-examinations and arguments to the factfinder. For example, if the prosecution offers evidence of flight by an African American male suspect, defense counsel can craft a cross-examination highlighting the research documenting innocent reasons African American men might flee from police and pointing out that the client is an African American man. When the court admits junk science, defense counsel can cross-examine the prosecution's expert witnesses using social science data to probe all of the flaws in that science. During cross-examination of someone who made an eyewitness identification, defense counsel can highlight each estimator and system variable that might suggest a wrongful identification. And if a confession is being offered against the defendant and there are interrogation tactics that the officer used that are correlated with false confessions, defense counsel can cross-examine the officer about them.

Sometimes incorporating social science studies into cross-examination means finding studies in learned treatises that defense counsel can admit under a hearsay exception; sometimes it means using the studies to impeach an expert or officer's credibility; and sometimes it means asking the court to take judicial notice of the social science first and then asking a witness about it. Defenders should use the research that they bring out during questioning when making arguments to the factfinder later about how much weight to give the testimony or evidence.

Jury Instructions

Far too often attorneys take pattern criminal jury instructions as gospel. They are the only instructions these attorneys ask for and they do not argue that the words in the pattern instructions should be modified. This is a mistake. Social science research can inform when jury instructions are necessary and how they should be phrased.

For example, a number of states have pattern jury instructions on eyewitness identification procedures that do not adequately educate jurors about the potential reliability problems associated with eyewitness identification practices. Courts in some states have been receptive

to defense requests for enhanced jury instructions to help jurors accurately assess the reliability of eyewitness identifications.⁴⁰ If the prosecution is offering an eyewitness identification procedure that was compromised by a problematic system or estimator variable or involves a cross-racial identification, defense counsel should ask the court for a specific, tailored jury instruction explaining the social science problem and telling the jurors that they may consider that problem when considering how much weight to give the identification testimony. The same is true when the police use problematic interrogation tactics to elicit confessions or when they question juveniles, mentally disabled suspects, or those who are mentally ill. And if the prosecution is permitted to admit forensic evidence that has known error rates, defense counsel should ask the judge to instruct the jurors on those error rates or, at the very least, to tell the jurors that there have been errors and that they may consider that when they consider whether the evidence is credible.

Defense counsel should also ask for jury instructions that punish the government for its failures. If the police have a policy that they are supposed to videotape or record interrogations and they fail to do so, defense counsel should try to suppress the confession. If the judge decides to admit it, the defense should still ask the judge to give the jury an instruction indicating that there is a policy in place requiring the police to record interrogations, that the government failed to make or preserve a recording, and that the government's failure to produce that recording means that the jury may infer that something unfavorable to the prosecution occurred. In effect, defense counsel should ask for a form of a missing witness instruction. Defense counsel should also ask for these kinds of instructions when the police fail to abide by department policy regarding how to conduct eyewitness identifications and when they fail to turn on their body cameras during a police-suspect interaction when department policy requires recording.

Social science arguments may support requests to change or supplement existing pattern instructions. Consider, for example, Michigan Criminal Jury Instruction 4.4 on flight. That instruction tells jurors that some evidence of flight has been admitted and instructs them that "[t]his evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake,

or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and, if true, whether it shows that the defendant had a guilty state of mind." When flight is offered into evidence against an African American man in a community where African American men have been racially profiled and subjected to excessive force, defense counsel should ask the judge to add to that jury instruction. The instruction should inform jurors that they have also heard testimony that the suspect is an African American male and that there are reports documenting ways in which African American men have been subjected to racial profiling and excessive force in the jurisdiction such that African American men may have an additional innocent reason for running or hiding from the police that they can consider.

Social science research also informs when special jury instructions are necessary. According to researchers, too many defense attorneys "blindfold" jurors by withholding information and leaving them to fall back on their preconceived stereotypes and beliefs about important issues.⁴¹ Blindfolding occurs when lawyers try to withhold certain evidence from the jury altogether. They never discuss it, enter it, or give instructions on it. If the jurors have no reason to make assumptions or speculate about an issue, blindfolding can work. But research shows that when the jurors have pretrial experiences, attitudes, or beliefs that provide them with a foundation of potentially relevant information that makes the forbidden topic likely to come to mind, blindfolding will fail. Those are situations in which defense counsel should address the forbidden topic through instructions (and maybe questioning at trial or expert witnesses if necessary).

Consider, for example, the defendant's right to remain silent. Every jurisdiction has a jury instruction informing jurors that defendants have a constitutional right to remain silent and that their silence should not be used against them. Jurisdictions use this instruction because it is common knowledge that jurors will assume that a defendant who does not testify is guilty. The instruction is there because blindfolding and saying nothing will adversely affect defendants who assert their constitutional rights. But this instruction might not go far enough. It fails to address the underlying social science problem — namely, that jurors think innocent people will say that they are innocent. Perhaps the

instructions should tell jurors that there are a number of reasons why a defendant might choose not to testify that have nothing to do with whether the defendant is guilty or innocent of the charges in this case (similar to the flight instruction discussed above). The instruction could even say that defense attorneys may make recommendations to their clients about whether to testify based on legal principles and rules of evidence that have nothing to do with a defendant's guilt or innocence on the current charges. Rather than blindfolding the jury as to the reasons a person might choose not to testify, it might be helpful to offer a few reasons why innocent people might not testify.

Similarly, a defense attorney who is arguing that her client gave a false confession should not remain blind to the social science research that people think an innocent person would never confess to a crime that he did not commit. Gather the social science and try to get an instruction from the judge that educates jurors by telling them that false confessions happen and that explains how and why they happen. Ignoring the jurors' pretrial attitudes and beliefs will only work to the client's detriment.

Sentencing Advocacy/ Plea Negotiations

Whether a client's sentence is being determined by a judge exercising discretion during a sentencing hearing or a prosecutor exercising discretion during plea negotiations, defenders should rely on social science to discount potential aggravating factors and buttress their case for mitigation. For example, research suggests that prior contacts with the police that did not result in convictions should not be considered (or at the very least should be significantly discounted) at sentencing for racial minorities due to implicit bias. In *United States v. Mateo-Medina*,⁴² the Third Circuit held that a federal district court had erred in considering the defendant's bare record of prior arrests that did not lead to conviction when imposing a sentence. That court relied on a Sentencing Project Report and an empirical study analyzing 13 years' worth of data on race, socioeconomic factors, drug use, and drug arrests to conclude that (a) socioeconomic factors influenced disparities in arrest rates; (b) police are more likely to stop and arrest people of color due to implicit bias; and (c) even though African Americans, Hispanics, and whites used drugs in roughly the same percentages and in

roughly the same ways, African Americans at age 22 had 83 percent greater odds of a drug arrest than whites (and at age 27 this disparity was 235 percent) and socioeconomic factors such as residing in an inner-city neighborhood accounted for much of the disparity in drug arrest rates with respect to Hispanics. Defenders should rely on this case and the studies that it cites to argue that prior police contact does not merit a higher sentence for minority community members.

Defenders can also rely on social science data to mitigate their clients' actions at sentencing and argue for shorter prison sentences or non-jail sentences. For example, research on brain development may be helpful when arguing that a juvenile offender is capable of being rehabilitated. Defenders may cite studies about the costs of incarceration, coupled with information about how people often "age out" of committing certain kinds of crime, to argue that longer sentences do not serve the public interest.⁴³ And social science research on the criminogenic effects of incarceration supports non-jail sentences for minor offenders.

These are just some of the many ways that defenders can make effective and creative use of social science research to help their clients. Social science is an important and currently underused tool in many defenders' arsenal. It is time for that to change.

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Notes

1. 567 U.S. 460 (2012).

2. 58 N.E.3d 333 (Mass. 2016).

3. *United States v. Brown*, 925 F.3d 1150 (9th Cir. 2019).

4. <https://www.nap.edu/author/DBASE/division-of-behavioral-and-social-sciences-and-education>.

5. <https://www.rand.org/topics/law-and-business.html?content-type=research&tag=Criminal+Law>.

6. <https://www.sentencingproject.org/>.

7. <https://www.pewresearch.org/topics/criminaljustice/>.

8. See Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAVIOR 37 (1985).

9. See Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353 (2009).

10. See, e.g., The Sentencing Project, *Report of The Sentencing Project to the United Nations Human Rights Committee*

Regarding Racial Disparities in the United States Criminal Justice System (August 2013), available at <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCP.pdf> [hereinafter *Sentencing Project*].

11. See Miguel A. Mendez, *Character Evidence Reconsidered: "People Do Not Seem to Be Predictable Characters"*, 49 HASTINGS L.J. 871 (1998); Edward J. Imwinkelreid, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741 (2008) (noting that empirical and behavioral studies "consistently yielded the finding that predictions [of behavior] based on interactions are more accurate than predictions based solely on either trait or situation"); Lee Ross & Donna Shestowsky, *Two Social Psychologists' Reflections on Situationism and the Criminal Justice System in IDEOLOGY, PSYCHOLOGY, AND LAW* (Jon Hanson ed. 2012) (noting that "laboratory and field studies have demonstrated ... [that] seemingly small and subtle manipulations of the social situation often have much larger effects on behavior than most lay observers would predict" — effects that "are likely to 'swamp' the impact of ... individual differences in personality, values, or temperament").

12. See Wissler & Saks, *supra* note 8.

13. *Id.*

14. Bryan A. Liang, *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229 (1998).

15. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). For summaries of the scientific problems with a host of forensic tests, see President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf; National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

16. See Jennifer L. Mnookin, *The Validity of Latent Fingerprint Identification: Confessions of a Fingerprinting Moderate*, 7 LAW, PROBABILITY & RISK 127 (2008); *United States v. Rose*, 672 F. Supp. 2d 723, 726 (D. Md. 2009) (noting that a fingerprint analyst cannot claim a zero error rate); *United States v. Taylor*, 663 F. Supp. 2d 1170 (D.N.M. 2009) (noting that the expert can give the jury his opinion that there is a match but he can't say that he can reach that conclusion as a matter of scientific certainty).

17. See *United States v. Gutierrez-Castro*, 805 F. Supp. 2d 1218, 1235 (D.N.M. 2011) (holding that the United States may not offer its fingerprint examiner as an expert witness in the jury's presence and the judge won't call him an expert).

18. American Bar Association Criminal Justice Section Report No. 101C (Feb. 5, 2012) urges judges and advocates "to consider ... [w]hether the court should prohibit the parties from tendering witnesses as experts and should refrain from declaring witnesses to be experts in the presence of the jury."

19. For a summary of the social science research on mistaken eyewitness identifications, see Nat'l Acad. of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* (Oct. 2, 2014), available at <http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification> [hereinafter *NAS Report*]. For a more detailed discussion of how that research has informed legal developments, see YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS* 707-12 (15th ed. 2019).

20. See, e.g., *State v. Henderson*, 27 A.3d 872, 919-20 (N.J. 2011) (allowing all relevant system and estimator variables to be explored and weighed at pretrial hearings once suggestiveness is shown); *State v. Hunt*, 69 P.3d 571, 576 (Kan. 2003) (expanding on the due process analysis's reliability factors and requiring cautionary instructions); *State v. Ramirez*, 817 P.2d 774, 780-81 (Utah 1991) (same).

21. See, e.g., *State v. Lawson*, 291 P.3d 673 (Or. 2012) (using rules about personal knowledge, lay opinion testimony, and relevance to address eyewitness identification problems).

22. See, e.g., *State v. Dubose*, 699 N.W.2d 582, 584-85 (Wis. 2005) (adopting a per se exclusionary rule for evidence about pretrial show ups unless they are necessary); *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1261 (Mass. 1995) (same); *People v. Adams*, 440 N.Y.S.2d 902, 423 N.E.2d 379, 384 (N.Y. Ct. App. 1981) (same).

23. See *State v. Dickson*, 141 A.3d 810 (Conn. 2016).

24. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 948 (2004) ("More than 80 percent of the false confessors were interrogated for more than six hours, and 50 percent [were] interrogated for more than 12 hours. The average length of interrogation was 16.3 hours, and the median length of interrogation was twelve hours. These figures are especially striking when they are compared to studies of routine police interrogations in America, which suggest

that more than 90 percent of normal interrogations last less than two hours. These figures support the observations of many researchers that interrogation-induced false confessions tend to be correlated with lengthy interrogations in which the innocent suspect's resistance is worn down, coercive techniques are used, and the suspect is made to feel helpless, regardless of his innocence.”)

25. See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 18-19 (2011).

26. See, e.g., RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 230 & 309 (2008).

27. See, e.g., Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 12, 18-19 (2010).

28. See, e.g., *id.*

29. See, e.g., *id.* at 16-18 (noting that the use of false evidence ploys in laboratory studies nearly doubled the incidence of false confessions); see also Richard A. Leo, *Interrogation and Confessions in 21st Century America*, 25 CRIMINAL JUSTICE 255 (Erik Luna ed. 2017) (“Experimental research indicates that false-evidence ploys are far more likely to elicit false confessions than true confessions, and archival/documentary research indicates that false-evidence ploys are present in virtually all police interrogations leading to proven false confessions.”).

30. See, e.g., Kassin, *supra* note 27, at 19-22; Leo, *supra* note 29, at 248-49; Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL’Y 395, 429-30 (2013); Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002).

31. See Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1 (2015) (explaining how reliability concerns can inform a voluntariness challenge).

32. See, e.g., Tracy Maclin, *Black and Blue Encounters’ — Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VALPARAISO U.L. REV. 243 (1991).

33. See Brief for the American Civil Liberties Union of New Hampshire as Amicus Curiae supporting Defendant, *State of New Hampshire v. Ernest Jones*, Case No. 2019-0057, available at https://www.courts.state.nh.us/supreme/ebriefs/2019/20190057_acluamicusbrief.pdf.

34. See Sentencing Project, *supra* note 10.

35. See *United States v. Cortez*, 449 U.S. 411, 418 (1981) (“[T]he evidence thus collected must be seen and weighed not in

terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”).

36. See Juval O. Scott, *Writing to Maximize Voir Dire Effectiveness: Using Questionnaires, Motions, and Carefully Crafted Written Questions to Learn About Prospective Jurors in NACDL, VOIR DIRE: EFFECTIVE APPROACHES FOR PICKING THE PERFECT JURY* (2017) (documenting the practices in these two courts). There are many versions of this “What Would You Do” video. Here is one example: <https://www.youtube.com/watch?v=8ABRIWyb8qM&t=313s>.

37. <http://www.theinvisiblegorilla.com/videos.html>.

38. See NAS Report, *supra* note 19.

39. See, e.g., *People v. Kennedy*, 502 Mich. 206 (2018) (noting that “a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial” in order to get a court-funded expert).

40. See, e.g., New Jersey Criminal Model Jury Instructions, *Identification* (July 19, 2012), available at <https://www.innocenceproject.org/wp-content/uploads/2017/06/NJ-Jury-Instruction.pdf>; see also *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005) (requiring instruction that failure to give pre-identification instructions can affect reliability).

41. See Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).

42. 845 F.3d 546 (3d Cir. 2017).

43. See, e.g., Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113 (2018).

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dissenting in part)).

103. *Id.*

104. *Id.* at 1234 (citing *Riley v. California*, 573 U.S. 373, 393-94 (2014)) (“[T]he search of a cellphone risks a significant intrusion on privacy.”).

105. *Id.* (quoting *United States v. Vergara*, 884 F.3d 1309, 1312 (11th Cir. 2018)).

106. *Id.* (quoting *Riley*, 573 U.S. at 386).

107. *Id.* (quoting *Riley*, 573 U.S. at 386).

108. *Id.*

109. *Id.*

110. See *id.*

111. *Id.* at 1236.

112. *Id.* at 1229, 1236.

113. *Riley v. California*, 573 U.S. 373, 381 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

114. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

115. *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) (citations omitted).

116. For example, *Flores-Montano* noted in dicta that reasonable suspicion might be required if the search of property at the border would destroy the property. *Flores-Montano*, at 155-56. As for the type of property, *Riley* determined that some property contains such private information that the kind of object can change the degree of suspicion required to search the object. *Riley*, 573 U.S. at 393-97.

117. *Riley*, 573 U.S. at 393-97; see also *Cano*, 934 F.3d at 1015; *Kolsuz*, 890 F.3d at 144.

118. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

119. *Id.* at 2220 (quoting *Riley*, 573 U.S. at 385).

120. *Riley*, 573 U.S. at 385.

121. *United States v. Touset*, 890 F.3d 1227, 1234 (11th Cir. 2018).

122. *Cano*, 934 F.3d at 1007.

123. *United States v. Williams*, 553 U.S. 285, 307 (2008).

124. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

125. *Williams*, 553 U.S. at 307.

126. *Flores-Montano*, 541 U.S. at 154.

127. *Id.*

128. *United States v. Touset*, 890 F.3d 1227, 1236 (2018).

129. *Id.* at 957.

130. *On the Internet, FBI*, <https://www.fbi.gov/scams-and-safety/on-the-internet> (last visited June 19, 2020).

131. *Countries for Torrenting*, LIMEVPN, <https://www.limevpn.com/what-countries-are-the-safest-for-torrenting-the-ultimate-truth/> (last updated Feb. 2019).