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Forensic Sociology and Psychology: New Tools for the Criminal Defense Attorney

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FORENSIC SOCIOLOGY AND PSYCHOLOGY: NEW TOOLS FOR THE CRIMINAL DEFENSE ATTORNEY

When a jury finds a person guilty of a criminal offense, numerous factors enter into that body's collective decision. The facts, evidence and law applicable to the case are not the only variables considered by a jury; extralegal variables are also present.[1] Voir dire of prospective jury members for bias, knowledge of the parties or of the case and other indicia of impartiality is evidence of these extralegal variables.

Other extralegal considerations, however, are also involved. Identifying and determining the significance of these variables should be as important to the defense counsel as the legally relevant factors are in preparation of the client's case. With the birth of "forensic sociology and psychology,"[2] the task of the criminal defense attorney may be facilitated in regard to these other factors.[3] However, with very few

1. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); Nagel, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 WASH. U.L.Q. 933.

2. The term forensic sociology and psychology is used to demarcate those areas of sociology and psychology which relate directly to the trial process and aid a trial advocate in his function within the adversarial system. While this definition does not make a clear distinction between sociology and psychology and their forensic counterparts, it does provide a nomenclatural foundation for what may be seen as a new field for the legal profession. Most of the research in this area can be traced back to the Chicago Jury Project and the treatise by the chief architects of the project, H. KALVEN & H. ZEISEL, THE AMERICAN JURY 56 (1966).

3. The field of forensic sociology and psychology should have special significance for the criminal defense attorney, especially in cases where costs must be kept to a minimum. In the last few years, two major trends have developed: (1) the state in the prosecution of criminal cases has increased its use of manpower and scientific analysis—the crime lab; and (2) the defense in major criminal cases has increased its use of outside experts, especially social scientists. When, however, the defense is hampered by insufficient funds, it should be remembered that the tools of forensic sociology and psychology are still available. The only other significant solution to the problem which has been offered in recent years is the extension of crime lab privileges to the defense by the state. *See Hartnett, Should the Defense Have Crime Lab Privileges?*, TRIAL, August, 1976, at 42.

exceptions,[4] legal literature has failed to inform the legal profession of the research in this area. This failure probably is due to the legal community's lack of knowledge about behavioral science publications and a general inability to analyze and interpret the statistical data of such research.

This article will examine research data and findings in two important areas within the control and manipulation of defense counsel: selection of jurors who are more inclined to acquit than convict and the presentation of the defendant to the jury in the most favorable perspective possible. A model of the adversary system as it relates to the decision-making process of a jury and the goals of both prosecution and defense attorneys will also be presented. From this model, the data, findings and implications in regard to the two variables under consideration can be analyzed from a defense counsel's perspective. This article will attempt to compile this research literature and condense it into a form usable by the trial advocate. Data will be analyzed from the perspective of defense counsel in a criminal trial.

An attorney who is not well-versed in research methods and statistics should forego analysis of statistics and research methodology, turning instead to the research findings or conclusions and studying them in light of prior personal experience.[5] For the older and experienced trial

4. *See, e.g.*, Broeder, *Plaintiff's Family Status as Affecting Juror Behavior: Some Tentative Insights*, 14 J. PUB. L. 131 (1965); Bullock, *Significance of The Racial Factor In The Length of Prison Sentences*, 52 J. CRIM. L.C. & P.S. 411 (1961); Cornish & Sealy, *Jurors and Their Verdicts*, 36 MOD. L. REV. 496 (1973); Katz, *The Twelve Man Jury*, TRIAL, December-January, 1968-69, at 39 [hereinafter cited as Katz]; Solender & Solender, *Minimizing the Effect of the Unattractive Client on the Jury: A Study of The Interaction of Physical Appearance With Assertions and Self-Experience References*, 5 HUMAN RIGHTS 201 (1976) [hereinafter cited as Solender]; Thibaut, Walker & Lind, *Adversary Presentation and Bias In Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972).

5. However, the attorney must be aware of the limitations and qualifications on the use of such research. First, the results of the research should not be over generalized. Every finding should be carefully analyzed in light of the many variables of each case, *e.g.*, the type of client, the type of opposing counsel, and the demography of the community, in order to determine whether a particular research principle applies to the case at bar. Second, the use of the proper research principle does not guarantee a favorable result in every trial. Statistical research is based on large population samples and therefore can only be generalized over a large group of people or cases. No amount of research can successfully predict a desired result one hundred percent of the time with human behavior as a variable. Third, the research has generally been conducted with the use of mock juries and fictional or semi-fictional defendants. *See, e.g.*, Landy & Aronson, *The Influence of the Character of the Criminal and His Victim on the Decision of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCH. 141 (1969) [hereinafter cited as Landy]. By the use of such research methods, the data may not be completely

attorney, the results will often be a scientific confirmation of principles learned from years of trial experience.[6] For the young and relatively inexperienced trial advocate, the research should provide him with skills which otherwise would have been acquired only after years of trial and error. From this new perspective, defense counsel should realize that by combining his personal experiences with the "experience" of sociologists and psychologists, he can achieve a level of litigation competence achieved in the past only through years of "trial-and-error" advocacy.

I. SYSTEMS MODEL

A recent study by Kaplan, Klein and Fried[7] provides an excellent working model from which to analyze the various behavioral research conclusions. The following chart depicts the four major analytical constructs for a jury trial and the goals within each construct from both

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transferable to the actual courtroom. As of yet, there has been no research to determine the transferability of this data. Fourth, most of the research that has been done has manipulated only a very few of the many variables present in a courtroom situation. *See, e.g.*, studies cited in this article *infra*. When the attorney uses the research principles to manipulate a trial situation, he is manipulating many variables at one time. As will later be seen, built-in tensions exist among many of the principles and, in those situations, the trial advocate should balance the research data with his personal experience to determine the application of the principles. With these caveats, one can approach the research principles as valuable tools in the defense of clients.

6. Irving Stone, in his biography of Clarence Darrow, makes mention of Darrow's own experiential principles:

> It was at this time that Darrow evolved his formula for jury picking that has served succeeding generations of lawyers. "Never take a German; they are bullheaded. Rarely take a Swede; they are stubborn. Always take an Irishman or a Jew; they are easiest to move to emotional sympathy. Old men are generally more charitable and kindly disposed than young men; they have seen more of the world and understand it.
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> . . . [O]ne should always choose a man who laughs, because a juror who laughs hates to find anyone guilty, . . . avoid wealthy men, because rich men will always convict—unless the defendant allegedly had violated the anti-trust law. . . . [M]ethodists [should] be accepted as jurymen because "their religious emotions can be transmuted into love and charity," but [Darrow] warned against taking Presbyterians because "they know right from wrong but seldom find anything right," and against Lutherans because "they were almost always sure to convict." After counseling that one should never accept a prohibitionist under any circumstance, he recommended that the best jurors for the defense were Catholics, Unitarians, Congregationalists, Universalists, Jews and agnostics.

I. STONE, CLARENCE DARROW FOR THE DEFENSE, 164-515 (1941). Although not all of Darrow's "common sense" principles have been statistically studied and proven, his reactions to certain characteristics have been studied and validated. *See, e.g.*, Tate, Hawrish & Clark, *Communication Variables in Jury Selection*, 24 J. COM. 130 (1974).

7. Kaplan, Klein & Fried, *General Aims of Prosecution Versus Defense in the Selection and Influence of Jurors in a Criminal Trial: A Brief Working Model*, 21 J. SOC. & BEHAV. SCI. 69 (1975) [hereinafter cited as Kaplan].

the prosecutorial and defense perspective. Each jury construct has an underlying assumption which inferentially leads to the goals of both adversaries.

ADVERSARY SYSTEMS MODEL[8]

JURY CONSTRUCTS	PROSECUTION	DEFENSE
Jury decision process	Encourage group conformity	Encourage individual dissent
Juror vantage point	Evoke identification with society as a whole	Evoke identification with the individual defendant
Juror criterion for guilt	Establish relaxed criterion; accepting of probabilistic evidence	Establish rigid criterion; demanding evidence beyond reasonable doubt
Juror cognitive set	Create a closed set; unwilling to consider conflicting evidence	Create an open set; willing to consider conflicting evidence

The Kaplan model is based on four underlying assumptions which validate it as representative of a real courtroom situation. First, it assumes that a hung jury is advantageous to the defense and harmful to the prosecution.[9] The logic of this assumption appears accurate, since the prosecution likely would have but two choices after a hung jury; either the defendant will be retried for a lesser offense, in hopes of a conviction, or the charges will be dropped. In either event, the defense benefits by the hung jury. Thus, it is to the prosecution's advantage to select a jury which is conformist in nature. Defense counsel, on the other hand, is looking for a jury of individualists willing to hold out and hang the jury if convinced of innocence.

The second jury construct assumes that the prosecution will be aided by a jury that judges the defendant from a societal vantage point.[10] From such a vantage point the jury is more likely to convict the defendant, because of a sense of duty to society and a fear of releasing the defendant on society and themselves. Defense counsel, however, will attempt to persuade the jury to perceive the defendant

8. *Id.* at 70.
9. *Id.*
10. *Id.* at 71.

from the accused's point of view "with the intention of avoiding at all costs the conviction of an innocent man."[11]

The third jury construct assumes that each adversary will be attempting to persuade the jury to adopt different views as the criteria for conviction.[12] The prosecutor, in his argument, will tend to relax the definition of "beyond a reasonable doubt" and ask the jury to convict upon the high probability of guilt.[13] The defense will attempt to compel the jury to follow the "beyond a reasonable doubt" standard closely and then point to areas of doubt in the prosecution's case.[14]

The fourth jury construct assumes that in the presentation of his case, the prosecutor will form a highly structured theory of guilt from the facts and attempt to convince the jury to adopt that view as their own. The defense will be seeking an open-minded jury that is willing to consider any inconsistent evidence, thereby adding to the jury's doubts and increasing the probability of a hung jury or acquittal.[15]

To the extent that the foregoing assumptions fit the actual workings of a trial setting, the Kaplan model accurately depicts the present adversary system and provides a useful tool in the analysis of that system. With a model established which provides for certain relevant and necessary assumptions and valid adversarial goals, the conclusions of the sociological and psychological research can be analyzed and placed in perspective.

II. RESEARCH ANALYSIS

1. The defense should attempt to impanel a jury which holds similar beliefs, attitudes and values as the defendant.

This research conclusion goes to the very crux of defense counsel's desire to have the jury identify with the defendant. The extent to which the jury identifies with the defendant determines the ease with which the defense attorney can persuade jury members to picture themselves in the defendant's place at the defense table with the state attempting to

11. *Id.*
12. *Id.*
13. *Id.* This is not to suggest that the prosecutor will resort to statistical presentations to persuade the jury; rather, he will try to minimize the state's burden of proof. There has been at least one instance, however, where a prosecutor has unsuccessfully attempted to use statistical probabilities to prove guilt. *See* People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968).
14. Kaplan, *supra* note 7, at 71.
15. *Id.* at 70-71.

impose sanctions upon them.[16] If defense counsel is able to accomplish this visualization his job of persuasion is made much easier, since the jury is placed in a sympathetic frame of reference toward the defendant.[17] The prospective juror who displays an incapacity to empathize with the defendant should be a prime candidate for peremptory challenge by defense counsel. In any event, defense counsel should keep in mind that the greater the identification between jury and defendant, the higher the probability of acquittal or shorter sentence should conviction result.[18]

2. The probability of conviction significantly decreases to the extent defense counsel can show that the defendant does not fit the public's general image of a criminal and to the extent this factor causes the jury to identify with the defendant.

One of the most effective defense techniques is to compel the jury to identify with the defendant;[19] a tactic more readily accomplished when the defendant does not conform to the jury's general image of a criminal. Therefore, defense counsel should be aware of the public's image of a criminal and present his client so that, to the optimum extent possible, he does not fit that image.[20] In a recent study, researchers constructed the general public image of a criminal from the responses of public school teachers, maintenance workers and farmers.[21] The study broke the criminal image down into biosocial characteristics and personality characteristics.[22] Biosocially, the criminal was described as male, uneducated, sloppy and dirty, and either a loner or a gang member.[23] The personality traits most often associated with a criminal image were frustration, insecurity, unhappiness, undesirability, loneliness, and emo-

16. *See, e.g.*, Schulman, Shaver, Colman, Emrich & Christie, *Recipe For A Jury*, PSYCH. TODAY, May 1973, at 37 [hereinafter cited as Schulman]; Rokeach & Vidmar, *Testimony Concerning Possible Jury Bias in a Blanch Panther Murder Trial*, 3 J. APPLIED SOC. PSYCH. 19 (1973) [hereinafter cited as Rokeach].

17. Identification is of even greater importance to defense counsel representing a defendant accused of a politically-motivated crime, *e.g.*, the draft resisters accused of destroying Selective Service records or the Black Panther accused of killing a policeman. *See* Schulman, *supra* note 16; Rokeach, *id.*

18. *See* Mitchell & Byrne, *The Defendant's Dilemma: Effects of Jurors' Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERS. & SOC. PSYCH. 123, 126 (1973) [hereinafter cited as Mitchell]; Rokeach, *supra* note 16, at 22-23.

19. *See* notes 16-18 *supra* and accompanying text.

20. A detailed discussion of the ethical issues presented by the use of some of these principles is beyond the scope of this article.

21. Reed & Reed, *Status, Images and Consequences: Once A Criminal Always A Criminal*, 57 SOC. & SOC. RESEARCH 460 (1973) [hereinafter cited as Reed].

22. Reed, *supra* note 21, at 463-65.

23. *Id.* at 464. In this study the following factors were defined as biosocial charac-

tional instability.[24] With such a negative image, it is easy to see why a jury of "reasonable men and women" would fail to identify with a criminal defendant. The extent to which defense counsel can overcome this image will determine the probability of favorable jury identification, decreasing the probability of conviction. It should therefore be the duty of defense counsel to insure that the defendant's clothing, grooming, and facial or body expressions present an acceptable image to the jury.

3. The defense should attempt to exclude from the jury those persons who are highly authoritarian and dogmatic.

As the Kaplan systems model points out, defense counsel should seek a jury which is open minded and willing to consider conflicting evidence.[25] This goal is easily frustrated by empaneling authoritarian and dogmatic jurors.[26] In the main, this type of juror tends to be prosecution and conviction oriented;[27] therefore, defense counsel should attempt to exclude such persons from jury service.[28] This is not to say that defense counsel should exclude strong minded persons from the jury, since if convinced of innocence, these people will hold to their views and hang the jury.

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teristics and the number of persons choosing a given trait was computed as a percentage.

Male	62.4	Husky	14.4
Gang member	59.9	Usual dress	13.9
Loner	56.4	White	12.4
Uneducated	53.5	Puny	6.9
Dirty	45.5	Married	4.0
Sloppy	35.6	Female	4.0
Stranger	23.8	Neat	3.5
Negro	21.3	Clean	3.5
Hippie dress	18.3	Acquaintance	3.5
Unmarried	14.9	Educated	2.5

24. *Id.* at 464-65. The following factors were defined as personality characteristics and the number of persons choosing a given trait was computed as a percentage.

Frustrated	93.6	Emotionally-disturbed	83.7
Insecure	93.1	Evil	79.1
Unhappy	90.1	Aggressive	77.6
Dangerous	89.6	Lazy	72.8
Undesirable	88.6	Pleasure-seeking	60.7
Lonely	88.6	Intelligent	48.0
Mean	87.6	Ambitious	26.7
Irresponsible	85.1	Exciting	21.8

25. See notes 8-15 *supra* and accompanying text.

26. *See* Kaplan, *supra* note 7, at 72.

27. *See* Mitchell, *supra* note 18, at 126.

28. Two factors support the rejection of authoritarian jurors. First, with the rebirth of capital punishment, authoritarian jurors tend to be biased toward capital punishment and conviction-prone. Rokeach, *supra* note 16, at 23. Second, authoritarian jurors have a high recall level for information about the defendant's character, whereas nonauthoritarian jurors recall more situational evidence (the facts). Berg and Vidmar, *Authoritarianism and Recall of Evidence about Criminal Behavior*, 9 J. RESEARCH IN PERS. 147 (1975).

For the most part, authoritarian and dogmatic jurors possess the following characteristics: they favor capital punishment; they are politically and socially conservative; they care significantly for a sense of accomplishment, family security, and national security; they are highly ambitious; they feel they are logical and responsible; they care less for a world at peace, equality, true friendship; and they are less forgiving and loving.[29] Defense counsel should attempt to frame his voir dire questions in such a way as to elicit responses indicative of these characteristics and be very wary of allowing such persons to remain on the jury. If all other factors are equal, the presence of this type of juror increases the probability of conviction.

4. The national origin of jurors can affect the decision-making process of the jury.

In the most significant jury study to date, national origin, in some instances, was found to play a significant role in jury deliberations and decisions.[30] For instance, it was found that jurors with a German or British background were more likely to favor the government during jury deliberations.[31] Another study found that jurors of British and Scandinavian origin have a higher propensity to accept "not guilty by reason of insanity" pleas than all other groups except blacks.[32] Similarly, it has been found that blacks, Italians and Slavs are more likely to favor the defendant and support an acquittal.[33] This type of information should be easy to elicit during the voir dire and establishes a method for scoring each juror as to his or her acceptability.[34]

5. Extraneous factors of fairness to the defendant will significantly affect the jury's decision-making process.

Research has been directed to the discovery of extralegal factors of fairness and equity which enter into the jury's determination of guilt and the subsequent sanctions to be imposed.[35] It has been found that

29. Rokeach, *supra* note 16, at 23-24.

30. *See* Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 [hereinafter cited as Broeder].

31. *Id.* at 748.

32. R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 111, 118 (1967).

33. Broeder, *supra* note 30, at 748.

34. One suggested method of scoring jurors is briefly outlined in, Schulman, *supra* note 16, at 40-42.

35. *See, e.g.*, Brooks & Doob, *Justice and the Jury*, 31 J. SOC. ISSUES 171 (1975) [hereinafter cited as Brooks & Doob]; Jacobson & Berger, *Communication and Justice: Defendant Attributes and Their Effects on the Severity of His Sentence*, 41 SPEECH MONOGRAPHS 282 (1974).

introducing the defendant's prior criminal record into evidence significantly enhances the probability of conviction, regardless of an instruction from the trial court that the jury consider the defendant's record solely in evaluating his credibility as a witness.[36] Thus, while some jurisdictions allow the introduction of a defendant's criminal record for the limited purpose of impeachment,[37] it is clear that such evidence will likely be used by a jury to determine guilt as well. These findings could bolster a claim that the defendant has been denied his constitutional right to a fair trial and provide the impetus for a major change in the rules of evidence.

The suffering of a defendant is also a factor to be considered in a jury's weighing of guilt and innocence. To the extent that defense counsel can show the defendant has suffered significantly for his transgressions, the probability of an acquittal increases.[38] The probability of acquittal also increases where defense counsel can show either that the state does not deserve to "win," because of unfair police tactics, or that the defendant has been selectively singled out for prosecution while others, who appear equally guilty of the same offense, are not being prosecuted.[39] Zealous advocacy should demand strict evaluation of any similar factors which the jury might consider "relevant" to their deliberations.

6. The level of remorse exhibited by the defendant can influence the jury's decision of guilt or innocence and sentencing.

Research has shown that an equity theory is applied by a jury in reaching a collective decision, whereby the sanctions imposed and the actual determination of guilt are decreased to the extent there is a showing that the defendant has already suffered for his wrongs.[40] One variable studied in validating this theory was the defendant's outward showing of remorse for his wrongful acts.[41] It was found that a remorseful appearing defendant has a higher probability of receiving a shorter sentence.[42] Such a research result should give defense counsel a

36. Brooks & Doob, *supra* note 35, at 176-77.
37. *See, e.g.*, FED. R. EVID. 609; CAL. EVID. CODE § 788 (West 1966).
38. Brooks & Doob, *supra* note 35, at 178.
39. *Id.* at 178-79.
40. *Id.* at 178; Savitsky & Sim, *Trading Emotions: Equity Theory of Reward and Punishment*, 24 J. COM. 140 (1974). *See* note 38 *supra* and accompanying text.
41. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCH. 64 (1976).
42. *Id.* at 66-68.

useful tool in the defense of his client. Both facial and body gestures of the defendant should be examined for their potential to suggest remorse and repentance on the defendant's part. Other variables, such as vocal inflections and speech patterns, should be analyzed for their repentance content.

Another factor which has not been adequately explored is the use of colors as an expression of mood. One study has found that brown and black are consistently linked with an impression of a despondent, dejected or unhappy mood.[43] The correlation between colors and moods may give defense counsel another remorse variable to work with—the defendant's clothing color. However, more research into this area must be done before any clear decision may be reached as to its effectiveness.[44]

7. The attractiveness of the victim's character and the defendant's character is a variable in the decision-making process of the jury.

Two of the terms within this principle are in need of further definition. Attractiveness in this context refers to the ability of a particular trait to elicit a favorable response from another person.[45] Character refers to external traits such as job, marital, and family status.[46] In a criminal trial, the character attractiveness of both the victim and defendant are in front of the jury and are considered in the jury's equation of guilt or innocence. Defense counsel is therefore presented with two options: he can either build up the defendant's character attractiveness or assail the character attractiveness of the victim. The first option would be readily accessible to defense counsel, through the use of character witnesses known to the defendant, and is probably expected by the jury; however, its effectiveness may be limited by its self serving nature. The second option has been successfully used by Percy Foreman in many of his defenses.[47] In one case, Foreman put the character of a murder victim before the jury through psychoanalysis

43. Wexner, *The Degree To Which Colors (Hues) Are Associated With Mood-Tones*, 38 J. APPLIED PSYCH. 432 (1954).

44. The problem of varying the dress of a jailed defendant was solved by the Supreme Court's holding in Estelle v. Williams, 425 U.S. 501 (1976) that the "fair trial" rationale of the Fourteenth Amendment granted a defendant the waivable right not to be tried in jail clothing.

45. *See* Landy, *supra* note 5, at 142.

46. *Id.* at 145.

47. *See* M. DORMAN, KING OF THE COURTROOM: PERCY FORMAN FOR THE DEFENSE (Dell ed. 1969).

of a letter written by the victim many years before his death.[48] The principle underlying this tactic is: "You should never allow the defendant to be tried. Try someone else—the husband, the lover, the police or, if the case has social implications, society generally. But never the defendant."[49]

This tactic becomes even more significant when defense counsel is saddled with an unattractive client with whom the jury cannot identify and who fits the public's general image of a criminal.[50] In these circumstances, it is imperative to draw attention away from the defendant and to place it upon someone else. Research tends to show that where the defendant's character attractiveness is neutral, or unattractive and the victim is also unattractive, the probability for a shorter sentence upon conviction increases.[51] Conversely, where the victim is seen as more attractive than the defendant, the greater the probability for a longer sentence upon conviction.[52]

8. To the extent that a defendant is physically unattractive, defense counsel should attempt to draw attention away from the defendant by the use of nonpersonal words rather than personal pronouns.

While physically unattractive defendants are more likely to be found guilty, research indicates that this effect can be minimized at trial by the introduction of other variables by both the defendant and his counsel.[53] The most recent study in this area determined that when a physically unattractive defendant is able to shift attention directly away from himself through the use of nonpersonal words, the adverse effect of his physical unatractiveness is minimized.[54] "[B]y eliminating self-experience references it is possible to mitigate the negative effect of physical unattractiveness. The jury will not feel compelled to identify with an ugly individual and should be able to view the situation with some neutrality."[55]

Physical unattractiveness encompasses not only facial appearance but also vocal patterns, physical mannerisms and other external factors which may be offensive to a jury.[56] In order to combat the negative

48. *Id.* at 1, 19-22.
49. *Id.* at 1.
50. See notes 19-24 *supra* and accompanying text.
51. *See* Landy, *supra* note 5, at 148-51.
52. *Id.*
53. *See, e.g.*, Solender, *supra* note 4.
54. Solender, *supra* note 4, at 213-14.
55. *Id.* at 213.
56. *Id.* at 213-14.

bias occasioned by physical unattractiveness, defense counsel should caution the accused against the frequent use of personal pronouns, such as "I" or "me," relying instead on nonpersonal references to "people" or "everyone."[57]

9. The defendant's character will affect the jury regardless of the level of incrimination of the evidence.[58]

"[A] negatively evaluated defendant biases judgments against himself whether the evidence is incriminating or exonerating. . . . The reverse holds true for positively evaluated defendants."[59] Defense counsel, regardless of the favorability of the evidence, should always be wary of the defendant's image before the jury, and, if possible, manipulate that image into as favorable a light as possible. Defense counsel would be wise, in developing a rating scale, to be scored by an objective third party in order to determine the attractiveness of a defendant. Evaluations of this type would provide defense counsel with sufficient information to intelligently decide whether to exploit the defendant's attractiveness or shadow his unattractiveness.

10. When the evidence against the defendant is weak, defense counsel should carefully guard against the jury hearing inadmissible evidence.

Many judicial remedies after a jury has heard inadmissible evidence are viewed by practicing attorneys as having little effect on the wrongs they are intended to correct. The remedy generally assumed to have the least effect is an admonition to members of the jury to disregard something they have already heard. Usually, this instruction only ingrains the impermissible statement into the memory of the jury. Research shows that where evidence against the defendant is strong and highly incriminating, if inadmissible evidence is heard by the jury it does not affect the verdict.[60] However, in cases where the evidence against the defendant is weak, permitting the jury to hear inadmissible and incriminating evidence significantly increases the probability of conviction.[61]

57. *Id.* at 214.
58. Kaplan & Kemmerick, *Juror Judgment As Information Integration: Combining Evidential and Nonevidential Information*, 30 J. PERS. & SOC. PSYCH. 493 (1974).
59. *Id.* at 498.
60. Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCH. 345, 351 (1973).
61. *Id.*

An admonition by the judge to the jury to disregard the inadmissible evidence has been found to be totally ineffective.[62] Therefore, the defense attorney should be quick to object to any question calling for inadmissible testimony, since there appears to be no effective remedy at trial once the wrong occurs. This research also gives additional force to the argument that inadmissible evidence heard by the jury is harmful error and requires reversal.

11. The probability of an acquittal increases when the jury is not instructed as to lesser-included offenses but is left to choose between severe punishment and acquittal; therefore, in some instances, it would be in the best interests of the defendant not to request jury instructions as to lesser included offenses. Caveat—The significance of this principle increases as the severity of the punishment increases.

Fortunately for defense counsel, the jury is a gestalt being, subject to the collective compassion of its members. At times, this compassion may, however, result in conviction of the defendant. When a jury is faced with numerous sentencing options, the probability of a conviction increases as the severity of the punishment decreases.[63] Since the decision is partially influenced by "personal standards of appropriate retribution,"[64] convictions based on such reasoning often occur only to the extent that the jury is presented with sentencing alternatives in the form of instructions as to lesser-included offenses. In some circumstances, therefore, it could work to the defendant's advantage not to have the jury instructed as to lesser offenses. "[U]nder conditions of restricted decision alternatives, the more severe the degree of built [*sic*] associated with the least severe guilt alternative, the greater the chances of obtaining a not guilty verdict."[65] One research study, focusing on sentencing alternatives in a murder context, found that when a jury is faced with all possible included offenses attached to a criminal act, the probability of acquittal is only 8%; however, when the jury is confronted with only a first degree murder conviction or an acquittal, the percentage of acquittals increases to 54%.[66] As the sen-

62. *Id.*

63. Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERS. & SOC. PSYCH. 211 (1972) [hereinafter cited as Vidmar]; Kaplan & Simon, *Latitude and Severity of Sentencing Options, Race of the Victim and Decisions of Simulated Jurors: Some Issues Arising From the "Algiers Motel" Trial*, 7 LAW & SOCIETY REV. 87 (1972).

64. Vidmar, *supra* note 63, at 217.

65. *Id.* at 215.

66. *Id.*

tencing alternatives are varied between these two extremes, the principle continues to prove valid.[67] This research should play an important role in defense counsel's decision to request jury instructions as to lesser-included offenses.

Clearly, such a decision creates a dilemma for counsel; if the jury is leaning toward acquittal such instructions should not be requested. If, however, the jury is leaning toward conviction at the severe punishment level, an instruction as to lesser-included offenses should be requested, thereby increasing the probability of a shorter sentence. This dilemma forces defense counsel to accurately read the mood of the jury toward the defendant in order to make an informed and correct decision.

12. Where the jury is instructed about its duty to be impartial and this factor is constantly stressed, the attractive defendant faces a greater likelihood of conviction and harsher punishment.

The defendant's attractiveness, both physically and characteristically, will have a significant impact upon the jury's decision as to guilt and sentencing.[68] This factor may be affected when the jury is not only instructed by the court about its duty of impartiality, but impartiality is stressed by defense counsel as well.[69] When impartiality is not stressed, the attractive defendant is not as likely to be found guilty or, if convicted, generally receives a shorter sentence than the unattractive defendant.[70] When impartiality is repeatedly stressed, the unattractive defendant is more likely to receive an acquittal or a shorter sentence.[71] The

67. Vidmar, *supra* note 63, at 215. The data can best be presented by the following chart:

Decision Alternatives And Frequency of Verdicts								
Alternative	Condition							
	1	2	3	4	5	6	7	8
First degree	46%	——	——	8%	29%	——	8%	——
Second degree	——	84%	——	92%	——	46%	63%	——
Manslaughter	——	——	92%	——	67%	54%	21%	——
Not guilty	54%	17%	8%	0%	4%	0%	8%	——

In the first condition, only first degree and not guilty were allowable choices. In the second condition, only second degree and not guilty were allowed. In the third condition, only manslaughter and not guilty were allowed. In the fourth, fifth and sixth conditions, various combinations of the charges were allowed. In the seventh condition, all choices were allowed. The eighth condition was a no-choice social perception question used as a control. *Id.* at 212-13, 15.

68. See notes 45-59 *supra* and accompanying text.

69. Friend & Vinson, *Leaning Over Backwards: Jurors' Responses to Defendants' Attractiveness*, 24 J. COM. 124 (1974).

70. *Id.* at 127-29.

71. *Id.*

use of this "leaning over backwards to be impartial" principle in conjunction with the attractiveness principles greatly enhances defense counsel's litigation role. If the defendant is viewed as attractive, defense counsel should not stress impartiality upon the jury, but should rely on the attractiveness of the defendant. If, however, the defendant is perceived as unattractive, defense counsel should stress impartiality, thereby taking advantage of the reversal of the attractiveness principles. It must be remembered that attractiveness is a subjective quality and must be analyzed from the jury's perspective.

13. Where the defendant has suffered possible prejudice as a result of pretrial publicity involving a crime of a heinous nature, defense counsel should attempt to exclude females from the jury.

Although it has long been assumed that pretrial publicity is inherently prejudicial,[72] its actual effect on a jury has been neglected, for the most part, by published statistical research. However, one study investigating this area has uncovered some interesting effects.[73] The study separated pretrail publicity into two categories: (1) that which differs in its level of description of the heinous details of the crime; and (2) that which differs in its level of prejudgment of the defendant.[74] It was discovered that the more heinous the description of the crime, or the greater the prejudgment of the defendant's guilt, the greater the probability of conviction by women jurors.[75] Females' suspectibility to both forms of publicity was found to increase with a decrease in I.Q.[76] Where a defendant has been subjected to highly gruesome or condemnatory pretrial publicity, defense counsel should be extremely wary of female jurors, especially those with below average I.Q.'s.

14. When faced with the defense of a female defendant, counsel should be extremely cautious of the makeup of the jury.

An attorney defending a female is faced with major problems from the outset, probably stemming from a "masculine theory" of crime.[77]

72. *See, e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961).

73. Hoiberg & Stires, *The Effect of Several Types of Pretrial Publicity on the Guilt Attributions of Simulated Jurors*, 3 J. APPLIED SOC. PSYCH. 267 (1973).

74. *Id.* at 268-69.

75. *Id.* at 272.

76. *Id.* at 271-72.

77. Use of the term "masculine theory" of crime is intended to portray the present general image of a criminal held by the public. Some 62.4% of the general public view the typical criminal as male, while only 4.0% of the public see the typical criminal as female. See Reed, *supra* note 21, at 464.

Since the general public image of a criminal is male,[78] the female defendant is an anomaly within the criminal justice system. One major opinion study made some interesting findings with regard to the attitudes of different groups toward female defendants.[79] Among those findings are: (1) women are more punitive toward other women than are men; (2) salesmen and office workers are less punitive toward women than are other occupational groups; (3) people in lower income groups, making less than $5,000, tend to be more punitive toward women than other income groups; and (4) People of upper middle class income, making between $10,000 and $15,000, are more likely to be punitive toward an unmarried defendant than other income groups.[80] Defense counsel could easily elicit this type of information during voir dire and rank prospective jurors accordingly.

15. If the defendant is black, defense counsel should attempt to impanel a jury which is generally young, above-average occupational status, above-average income, well educated, politically liberal, not identified with organized religion or regular church attendance, and single.

These characteristics have been linked with a greater likelihood to acquit black defendants or convict them of lesser offenses.[81] The age factor possibly stems from the fact that young white jurors have grown up in an era clamoring for racial equality and are generally more favorable because of their lack of prejudice ingrained from years of societal influences.[82] Similarly, jurors of higher occupational status may not feel threatened by job competition from blacks and, therefore, are more inclined to sympathize with a black defendant. Research also shows that women tend to be more favorable to black defendants than men.[83] All of these factors should be considered by defense counsel and each non-black juror should be evaluated on these characteristics.[84]

16. When the defendant is poor, defense counsel should follow the same principles as when the defendant is black, except that persons of

78. *Id.*
79. Katz, *supra* note 4.
80. *Id.* at 39.
81. Rokeach, *supra* note 16, at 21-22.
82. Since the Supreme Court's decision in Brown v. Board of Educ., 349 U.S. 294 (1955), the struggle for racial equality has been open and vociferous. Arguably, those who have grown up since that landmark decision have been influenced by the civil rights movement of the sixties and the busing movement of the seventies and should therefore be better able to relate to and empathize with the black defendant.
83. Katz, *supra* note 4, at 39.
84. *See, e.g.*, Schulman, *supra* note 16, at 40-42.

high income and education should be excluded from the jury.

The same equality-oriented value structure which has been found favorable to black defendants has also been found favorable to defendants of low economic status.[85] While age, marital status and frequency of church attendance are not significant, persons with high levels of income and education, particularly males, show a negative reference to the poor defendant and should be excluded from the jury.[86] This factor may become even more crucial when the defendant is indigent and represented by a public defender. To the extent that the jury has knowledge of the defendant's indigency, it is incumbent upon the public defender to combat any negative image by impaneling a jury that conforms to the favorable characteristics above. The public defender should also consider using this research as grounds for a mistrial on the basis of prejudice if the prosecutor comments on the defendant's indigency and his representation by the public defender. The statistics could be used to show an appellate court the inherent prejudicial effect such a comment has on a jury composed of people of a high socioeconomic background.[87]

17. Defense counsel should be acutely aware of the body movements of each juror during both the voir dire and the trial.

In the past few years, the significance of body language in human communication has been explored.[88] Much can be learned about each juror simply by observing and correctly interpreting their body reactions during their voir dire and the trial. The key to the principles of body language is close observation of each juror and an ability to discern slight changes in a juror's body alignment.[89] Most human emotions can

85. *See* Rokeach, *supra* note 16, at 22.

86. *Id.*

87. In Griffin v. California, 380 U.S. 609 (1965) the Court held that the prosecutor's comment upon the defendant's failure to take the witness stand was a violation of his Fifth Amendment rights and reversible error. It can be argued that under these circumstances a violation of the defendant's rights also occurs when the prosecutor comments on either the defendant's economic status or the fact that he is represented by the public defender.

88. *See, e.g.*, J. FAST, BODY LANGUAGE (1970); M. KNAPP, NONVERBAL COMMUNICATION IN HUMAN INTERACTION (1972).

89. For instance, after a number of years as a trial attorney working with psychologists in the courtroom, Louis S. Katz has observed:

> 1. If the juror's feet are crossed, he is not accepting what you say.
> 2. The same would apply if his arms are crossed or if his fists are closed, *specifically clenched.* (You may note that some of the jurors sit in the box with their *arms crossed all of the time.* This is not a concern, but if the juror has his arms crossed when you are talking and spreads his hands out

be read by external body motions; the ability to read emotional changes in the jury will enable defense counsel to know when, for example, he should change the presentation of his defense, an attack on a witness, or his statements to the jury. Allowing such emotional changes to go unnoticed may cause defense counsel untold grief in the form of unnecessary convictions and unduly harsh sentencing.

III. CONCLUSION

Psychological and sociological research should not be considered

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when the other attorney is talking, watch out.)

3. It seems to be accepted that open hands are receiving or accepting.

4. If you see a juror with his hands closed or his fists clenched and no matter what you say, he won't open them, hand him something. Open hands, open mind. (Watch the technique of the salesman—he puts something in your hand while he is talking so that your hands and your mind don't close up.)

5. A fidgety juror probably resents your questions.

6. The juror with poor posture is thinking off balance.

7. If he cocks his head to one side as he is listening, the psychologist might form the impression that he is not too intelligent.

8. Even though the juror smiles with his eyes and his mouth, his body may be reacting just the opposite.

9. Watch out for the man who has his hands in his pockets; if he is jingling money, he is showing concern about money; if he is fiddling with his car keys, he is concerned about losing the car; the man or woman who twirls a wedding ring or takes it on and off probably is having some marital problems or thoughts of infidelity.

10. Crossed legs alone are not signs of hostility, but a foot kicking as the juror crosses his legs, is a sign of hostility.

11. Watch for the juror who talks through his teeth. This also indicates hostility.

12. Hands or fists in the form of a claw indicate rejection or hostility; when the fingers are opened the juror is receiving.

13. The juror who puts his hands on his hips is rejecting you and your ideas.

14. If he puts his hands behind him, he might also be rejecting you. Of course, they could be open, but you don't know.

15. The juror who is drumming on the table with his fingers, or even drumming on his leg, is expressing inner tensions and probably not listening to you.

16. The man who is touching his nose is doubting what you are saying while he is listening.

17. When you ask a question of the man who has his hands over his mouth, he is probably saying to himself, "This is a subject I don't want to talk about."

18. When you ask a question of a juror and he points his hands away or pushes his hands or arms away, again, this indicates a subject he does not want to talk about. (If you have a case involving rape or a sex offense and you ask questions of the jurors about their objectivity, the juror who sits there with legs crossed or held tightly together, of course, is protecting something. The juror whose legs are spread wide may be interested in the subject and is willing to accept your point of view.)

19. The man who is cracking his knuckles or wringing his hands is probably prosecution minded and a capital punishment man.

Katz, *supra* note 4, at 40, 42 (emphasis in original).

an escape from thorough trial preparation but an adjunct to it. The field is not one of guarantees but of probabilities based upon generalities of human behavior. Psychologists can forecast the likely cause of human behavior under certain circumstances; sociologists can forecast what certain groups of people are like and how they are likely to react as a group. But no science or art yet devised is able to predict exactly what any individual or group will do in a given situation.

The principles drawn from the research are not invariable laws, but must be considered in light of each new trial situation. Blind adherence to these principles without an in-depth analysis of the defendant, defense counsel and the facts may well spell disaster. The principle may be valid, and yet the desired result may not be attained simply because defense counsel has failed to apply it properly or has applied it to the wrong case. Unclouded analysis and application of these principles should, however, enable counsel to better fulfill his duty of competent and zealous representation of his client[90] and also provide a partial counterbalance to the investigative manpower and ultra-modern crime laboratories of the state.

Thomas E. Salisbury

90. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS 6-7.