

LEMMINGS OR LIONS: EMPIRICAL MEASURE OF JUROR INDEPENDENCE IN THE FACE OF BELIEF MIRRORING

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Required by the Sixth and Seventh Amendment to the United States Constitution, jury trials underpin the justice system. Whether a criminal defendant walks free or spends the rest of his life in jail turns on a jury vote. And so does whether a hundred-billion dollar, multinational corporation pays damages for alleged environmental contamination. But are jurors up to the task? Competing images in popular culture, in scholarly literature, and among practicing lawyers and judges paint jurors in diametrically different ways, as either lemmings or lions. These depictions are honest disputes created by literature and anecdotes that could support either narrative.

This study contributes to the ever-evolving understanding of which image of a juror is more accurate. Using a fully randomized experimental design, this study focuses on a single question: are jurors more likely to vote in favor of liability in a civil case if that case is framed in issues that align with their own beliefs? —a concept referred to in this article as “belief mirroring.” For example, will framing a case as a way to protect the underdog and stand-up to corporate greed cause more jurors who hold those values vote yes on liability? Conversely, will framing the case in conservative language that conflicts with the juror’s views turn those jurors off? The results evaluate the degree that the lens through which a case is presented can manipulate jurors and effect their decision, rather than the hard facts that actually define case.

The results suggest jurors are more lion than lemming. Jurors of all political orientations, ages, races, educations, and genders rejected belief mirroring and decided the cases on the facts. This has real world implications for the reliability of jurors, as it suggests that jurors cannot be manipulated by attorneys who try to frame cases in familiar language. It also has real implications for practicing attorneys, as it suggests they should spend most of their time developing the facts of

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their case, not in trying to frame those facts in language they believe will be familiar to the jury.

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INTRODUCTION

You think your average juror is King Solomon? No, he's a roofer with a mortgage. He wants to go home and sit in his Barcalounger and let the cable TV wash over him. And this man doesn't give a single, solitary droplet of shit about truth, justice or your American way.

Runaway Jury 2003¹

I consider [trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's [sic] constitution.

Thomas Jefferson²

A Dog of a Case

I had an experience early in practice that set me wondering about what really drives jurors. I share it briefly here. I admit it is a little embarrassing, but it was this practical experience that first suggested to me that jurors are more independent than some imagine.

As a young lawyer, I was hungry to get in the courtroom whenever I could. I hounded my boss for the chance to try cases to juries. And it worked—sort of. Sometimes I got really interesting cases, but sometimes I got the “dogs.” The first dog I ever tried was a case involving a plaintiff who asserted a car accident caused him to need back surgery. There was in fact a car accident, and he was hit from behind. But the case had a few, well, let's call them wrinkles. The client spoke only Spanish, the case was set in a rural county in Missouri that was over 95 percent white, the client had undergone three back surgeries, had medical records showing his back was hurt before the accident, was driving a large box truck when he was struck from behind, and days after the accident he went back to work loading fifty-pound boxes of tile. To this day, I do not know how this case made it to our office. Understandably, the defense never offered to pay anything of value to settle the case. So, when no one else would touch the

¹ RUNAWAY JURY (Regency Enterprises et al. 2003).

² Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), <https://founders.archives.gov/documents/Jefferson/01-15-02-0259> [<https://perma.cc/SLQ5-YQ8Q>].

case with a ten-foot pole, including the attorney responsible for it, I volunteered to step in and try the case.

I picked a jury and for three days I put on all the evidence I could about the accident: my client's medical history, his lost wages, and more. I was prepared, succinct, polite, and I had simple themes. I know these things are true because after the trial, the jurors told me that they enjoyed the case, appreciated my preparation, and clearly understood where I was going. They also shared, quietly, that none of them liked the other attorney. And that was not entirely surprising. He was scatterbrained at times, smug at others, and he often tried to stand close to the jury when asking questions, causing a few of them to look more than a little uncomfortable. Several times I saw the jurors actually lean away from him. And at one point the judge told him to stop "crowding the poor jurors."

I lost that case. The jury found for the defendant and gave my client no money. And I am glad they did because it was then and there that I really started to believe in juries. Those jurors looked past personality and preparation and decided the case on the facts as they saw them.

As a prologue, I dejectedly called back to the office and shared the results. After all, it hurts to lose a trial. I still remember my boss's words. He said, "Hell John, we all knew that was a suicide mission. Get back home and we'll find you something a little better to work on."

This study is born out of that trial in rural Missouri. From that day, I began to believe that jurors were far less susceptible to charming attorneys than some of those attorneys would like to believe. This study is an attempt to quantify whether it is true that jurors can resist attorneys who play to their beliefs. In short, it asks whether jurors are manipulated by what I call "belief mirroring"—the presentation of a case in terms and frames that mirror the beliefs of a juror. The answer is not entirely obvious. Among scholars, lawyers, and the public as a whole, opinions differ intensely regarding the reliability of jurors and juries. On the one hand, the Constitution ensures a right to trial by jury in criminal cases and in all civil cases over \$20.³ And the forefathers spoke of juries as a fundamental check on judicial overreach. Justice Byron White is famously quoted as saying, "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."⁴ Trial lawyers often proclaim that juries can be trusted, and many who have served on juries report the experience convinced them that jurors take the work

³ U.S. CONST. amends. VI, VII.

⁴ *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

seriously.⁵ Similarly, some of the most respected juror scholars have written in defense of juries.⁶

On the other hand, the popular media spent years reporting what it portrayed as outlandish jury verdicts, and the public often leveled the same criticisms.⁷ The McDonald's hot coffee case is known by most Americans.⁸ 87 percent of white Americans and 57 percent of black Americans now believe O.J. Simpson was guilty despite the fact that a jury acquitted him.⁹ Similar numbers apply to the Casey Anthony trial.¹⁰ Businesses avoid juries by using arbitration clauses, often justifying the decision by asserting that juries are unpredictable and prone to producing runaway verdicts.¹¹ These ideas have seeped even into Hollywood, where the tagline for the 2003 movie *Runaway Jury* was, "[t]rials are too important to be decided by juries."¹²

Even in the actual legal world, there is disagreement about juries' capacity to decide cases. Appellate rules largely defer to jury decision-making and refuse to review the jury's fact finding.¹³ But that is as far as the unanimity goes. Some courts allow specific types of damage arguments, arguing specifically that jurors are capable of considering, and when appropriate, rejecting argu-

⁵ For example, the American Board of Trial Advocates, which includes plaintiff and defense attorneys, advocates to "Save Our Juries." SAVE OUR JURIES, <http://saveourjuries.org> [<https://perma.cc/72E3-A7NS>] (last visited Sept. 20, 2018).

⁶ See, e.g., Shari Seidman Diamond & Mary R. Rose, *Real Juries*, 1 ANN. REV. L. & SOC. SCI. 255, 278 (2005) (noting that "[t]he picture of real juries that emerges from this review provides little evidence that the jury fails to live up to the trust placed in it.").

⁷ See, e.g., Bonnie Bertram, *Storm Still Brews Over Scalding Coffee*, N.Y. TIMES (Oct. 25, 2013), <https://www.nytimes.com/2013/10/28/booming/storm-still-brews-over-scalding-coffee.html> [<https://perma.cc/GFA2-NV97>] (chronicling the various reactions to the McDonald's case, including public response).

⁸ See *Liebeck v. McDonald's Rests.*, No. CV-93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994).

⁹ Carl Bialik, *Most Black People Now Think O.J. Was Guilty*, FIVETHIRTYEIGHT (June 9, 2016), <http://fivethirtyeight.com/features/most-black-people-now-think-oj-simpson-was-guilty/> [<https://perma.cc/BN5X-75RX>].

¹⁰ Lydia Saad, *Americans Express Mixed Confidence in Criminal Justice System*, GALLUP (July 11, 2011), <http://news.gallup.com/poll/148433/americans-express-mixed-confidence-criminal-justice-system.aspx> [<https://perma.cc/34SX-D8YC>].

¹¹ Robert Fojo, *12 Reasons Businesses Should Use Arbitration Agreements*, LAWGIVES (Apr. 1, 2015), <https://www.lawgives.com/guide/551c5a68777773fa5160200/12-Reasons-Businesses-Should-Use-Arbitration-Agreements> [<https://perma.cc/RG6B-C6UM>].

¹² RUNAWAY JURY, *supra* note 1.

¹³ Anthony Viorst, *Appellate Standards of Review*, 56 TRIAL TALK 19, 20 (2007).

ments.¹⁴ Other courts prohibit the exact same arguments, reasoning the arguments will confuse jurors.¹⁵

These differing views of jurors trickle down to how jurors are treated.

A Skeptical View of Jurors

Among those who believe jurors are impressionable, perhaps even unpredictable creatures, we see the effects in many places. For example, many rules of evidence are aimed at sheltering jurors from information that courts concluded would prejudice or confuse jurors. Here, for example, consider the exclusion of liability insurance,¹⁶ hearsay,¹⁷ the general right to exclude “prejudicial information,”¹⁸ and the practice in many courts of not telling jurors how punitive damages are allocated or whether or not there are damage caps in the state.¹⁹

Based on the belief that jurors are easily swayed, many trial advocacy classes focus on developing a theme, using a “phrase that pays,” and in general, being “on” for the jury.²⁰ It is not uncommon for a student enrolled in a trial advocacy course to tell me about the metaphor they have come up with that will sway the jurors, or how the confidence they project will earn the jury’s trust.

The crafters of rules of evidence and trial advocacy professors are not alone. In the day-to-day practice of law, there are trial lawyers who treat jurors more like lemmings than lions.²¹ Many lawyers advocate in seminars and write in articles that jurors are impressionable, prone to noticing things like what

¹⁴ John Campbell et al., *Time Is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 WASH. U. L. REV. 1, 7 (2017) (explaining that some courts allow per diem arguments, reasoning juries can parse them, while others prohibit them precisely because they argue those same jurors cannot work through the argument).

¹⁵ *Id.*

¹⁶ FED. R. EVID. 411.

¹⁷ FED. R. EVID. 801–03.

¹⁸ FED. R. EVID. 403.

¹⁹ Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1375–77 (2005).

²⁰ Charles H. Rose III, Professor at Stetson Univ. Coll. of L., Oxford Storytelling Lecture 5–6, (notes available at <https://www.stetson.edu/law/studyabroad/oxford/media/Oxford-Storytelling.pdf> [<https://perma.cc/7A8E-E7XA>]) (last visited Sept. 20, 2018).

²¹ See, e.g., Allison Leotta, *Your Body Language During Trial Can Be Just as Important as What You Say*, ABA J. (Dec. 2016), http://www.abajournal.com/magazine/article/motion_applied_body_language_trial/ [<https://perma.cc/6VLE-Q982>]; Philip N. Meyer, *How Social Emotions Can Influence Jury Deliberations*, ABA J. (Oct. 2015), http://www.abajournal.com/magazine/article/how_social_emotions_can_influence_jury_deliberations [<https://perma.cc/5JA7-JL7W>].

shoes an attorney wears or how the attorney treats the court staff.²² Others suggest that jurors make up their minds quickly in cases, despite instructions not to, and this means that the opening statement must win them over, lest the attorney lose the chance to win the case.²³ Indeed, I even knew a lawyer who had a tanning bed in his office because he said that jurors needed to see him as fit and active.

The View of Jurors as Diligent and Reliable

Among those who trust jurors and think they are relatively diligent and careful, a different view prevails. Academics advocate for jury reform that gives jurors more information, lets them ask questions of witnesses, and allows them to deliberate as the trial progresses.²⁴ These academics suggest that tort reform is not needed to reign in runaway jurors and that many of the criticisms are unfounded.²⁵ They argue that jurors are at least as good as judges at deciding what is fair.²⁶ In one example, Diamond & Rose concluded, “The picture of real juries that emerges from this review provides little evidence that the jury fails to live up to the trust placed in it. Juries make mistakes and they display evidence of bias, but there is no convincing evidence that another decision maker would do better.”²⁷

Professors who view jurors as largely reliable teach classes on discovery or evidence organization based on the belief that facts are what win cases, not charisma. They teach young lawyers to avoid trying to manipulate jurors, arguing that jurors will sense it and reject it. Diamond states that despite common perception, juries do not start out deliberations favoring one side over the other.²⁸ Diamond cautions lawyers, however, stating that although juries do not begin deliberations in favor of one side, juries do react to lawyers.²⁹ Diamond warns attorneys, stating, “Don’t ever let the jurors think that you’re talking down to them.”³⁰

Trial lawyers who trust jurors take an entirely different approach to cases. They spend more time working to make sure their presentations are organized, accurate, and succinct, rather than on whether their presentation will be atten-

²² See, e.g., Ann Farmer, *Order in the Closet: Why Attire for Women Lawyers Is Still an Issue*, PERSPS., Fall 2010, at 5 (advocating that an attorney should wear clothes that will “not be noticed”).

²³ See Hans Zeisel, *A Jury Hoax: The Superpower of the Opening Statement*, LITIG., Summer 1988, at 17, 18 (explaining how this belief may have come into existence and how pervasive this “truth” became).

²⁴ William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 143–44.

²⁵ Diamond & Rose, *supra* note 6, at 262.

²⁶ *Id.* at 263.

²⁷ *Id.* at 278.

²⁸ Terry Carter, *A Peek into the Jury Room*, ABA J. (Mar. 2007), http://www.abajournal.com/magazine/article/a_peek_into_the_jury_room/ [<https://perma.cc/664U-SSTP>].

²⁹ *Id.*

³⁰ *Id.*

tion grabbing.³¹ They often tell jurors that rather than try to spin the facts; they will merely present them for consideration.³² And these attorneys do not spend much time picking out their outfits for court.

So, who is right? And if it is those who believe that jurors consider facts carefully, pay attention, and try to follow jury instructions, what accounts for the fact that jurors can see the same case and reach differing conclusions?

Measuring whether Jurors Are Manipulated by Case Framing that Aligns with Personal Views

This study provides insight into juror decision making by examining whether they can be swayed by: (1) arguments that intentionally frame cases in a way that lines up with the jurors self-reported views (belief mirroring), and (2) whether introducing the manipulative frame before or after the evidence matters (primacy and recency effects). To achieve this, jurors read case facts plucked from real-life cases. They were randomly assigned to see those facts along with: (1) a progressive argument in favor of the plaintiff, (2) a conservative argument, (3) a blended argument in which conservative and progressive ideas were mentioned, or (4) no argument at all—only the case facts. We also manipulated whether jurors read one of the three frames before or after they read the facts.

An example helps make the study design clear. Consider a juror who, based on her answers to study questions, rates bullying as a serious problem, believes society must stand up for the marginalized, and states that companies put profits over people. If this juror is presented with a case that alleges gender discrimination, is she more likely to find that a company discriminated against women if she hears an opening statement that frames the case in terms of standing up to a bully, protecting a woman, and keeping the company from putting profits over people? Or is she more likely to find liability when she hears the case framed as a conservative one in which the woman was fired because the company did not value her work ethic, or the woman was disloyal, and was “too PC” about her decisions?

Perhaps even some who see jurors as reliable would nonetheless predict that juries would respond best to arguments that align with their views and that they might chafe against arguments that use ideas and phrases they do not agree with. These predictions would be consistent with literature on confirmation bias, halo effects, and cultural cognition generally.³³ Similarly, it would be reasonable to predict that presenting the arguments before the facts are read would

³¹ Michael H. Simon, *Things That I Learned During My First Year on the Bench That I Wish I Had Known as a Trial Lawyer*, 24 STAN. L. & POL’Y REV. 345, 348–49 (2013).

³² *Id.* at 348.

³³ DANIEL KAHNEMAN, THINKING, FAST AND SLOW 81–82 (2011).

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color how jurors receive those facts, consistent with cognitive science literature on priming and primacy.³⁴

As this article will show, the answer is that neither scenario changes the juror's vote. Surprisingly, jurors did not find liability more often when they read arguments that tied the cases to ideas they support. Nor did they find against liability when they read arguments that framed the case in terms with which they disagree. Instead, jurors cast aside the frames and decided the cases on the facts. This outcome was true whether they were presented with the argument before or after they read the case facts.

The implications are encouraging. Jurors are not sheep. And they can look past arguments they like, and those they do not, and decide based on the merits.

I. BACKGROUND

This section discusses some of the existing literature relevant to the four hypotheses addressed by this paper.

A. Hypothesis 1: Some juror characteristics and beliefs will correlate with liability rates that deviate from the mean.

To put a slightly finer point on this hypothesis, the prediction was that at least some characteristics of jurors (gained through voir dire-like questions at the beginning of the study) would have a statistically significant relationship to liability determination. It is important to note, however, that I did not predict that basic demographic information like age, race, gender, education, and income would correlate to liability determinations. Although those factors might matter in an individual case, in my experience studying dozens of individual cases, I have seen few, if any, universal truths that apply across cases. Here, we suspected that only a few, if any, traits would predict outcomes across three distinct sets of case facts, and we predicted that those would be a combination of traits, not simple demographic markers.

Scholars have studied the question of whether juror demographics influence jury verdicts for decades. The studies attempt to answer a basic question. If all jurors see the same case, "What, then, accounts for variation among jurors in response to the same case? One possibility is that there are powerful, but as of yet unmeasured, individual differences that could be identified in advance and used to inform choices during jury selection."³⁵

The answers to this question depend on whom you ask. Many trial lawyers believed for years that certain jurors were pro-plaintiff while others were pro-

³⁴ Hyatt Browning Shirkey, Note, *Last Attorney to the Jury Box Is a Rotten Egg: Overcoming Psychological Hurdles in the Order of Presentation at Trial*, 8 OHIO ST. J. CRIM. L. 581, 582–83 (2011).

³⁵ Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 738 (2006).

defendant. Myths like “black jurors vote for plaintiffs” led to peremptory strikes by defendants. And the belief that business owners were bad for plaintiffs did the same. But there was very little empirical evidence to support these conclusions.

As researchers have noted for some time, basic demographics may matter in some cases, but that neither indicates they matter in all cases, nor does it suggest that directionality is the same in all cases. Indeed, in my own private work studying cases for lawyers, I have found that it is highly case specific. For example, gender may or may not matter, and even when it does, it can cut either way. A plaintiff should sometimes favor men while other times she should favor women. Due to the inherent complexity in cases, there are few, if any, generalizable rules as to whether demographics can be predictive. After all, a case about a Ford Explorer that rolled over might on its face turn on whether the vehicle was “crashworthy.”³⁶ But that does not mean that it is irrelevant whether the driver was a single mom on her way home from working her second job, or a male, wealthy CEO driving home from a strip club. One could imagine that gender, marital status, parental status, or a variety of other factors might matter in those cases, and in different ways. The same could be said of two slip-and-fall cases, one involving an hourly Hispanic worker and one involving a white neurosurgeon who fell at the hospital.

This likely explains why the research on whether demographics matter is so mixed. Two questions are sometimes conflated: (1) Can basic demographics or voir dire answers predict which jurors will favor plaintiffs, defendants, the prosecution, or the defense in general, and (2) Can basic demographics or voir dire answers predict how jurors will vote in a particular case? The answers are, in order, largely no, and yes.³⁷

The research largely seems to support these conclusions.³⁸ A variety of studies look at a single case or a small subset of cases and find some difference in demographics. For example, in a car accident case involving clear liability, white women awarded lower damages to the plaintiff.³⁹ But the case was not tested with different plaintiffs or defendants.⁴⁰ Other reviews of jury studies cite a number of different studies suggesting that race impacts verdicts, and how it impacts verdicts depends on a variety of factors, including the race of the defendant in criminal trials.⁴¹ And Golding and co-authors show gender

³⁶ See, e.g., *Ford Motor Co. v. Moore*, 905 N.E.2d 418, 423 (Ind. Ct. App. 2009), vacated by *TRW Vehicle Safety Sys., Inc. v. Moore*, 936 N.E.2d 201 (Ind. 2010).

³⁷ See *infra* Part II.

³⁸ See *infra* Part III.

³⁹ James H. Underwood III et al., *Demographics in Civil Trials: Biases and Implications*, 7 J. BUS. & ECON. RES. 33, 38–39 (2009).

⁴⁰ *Id.* at 33.

⁴¹ Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 81 (1993).

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composition affects deliberations and may affect jury level decision making processes in child abuse cases and that gender affects perceptions of elder abuse.⁴²

Studies that look at a broader set of cases tend to find that demographics are not particularly predictive. For example, Bornstein & Rajki found that behavior attitudes are better predictors than demographics.⁴³ And in medical malpractice and product liability verdicts, Rose and Vidmar found no difference in awards associated with juror demographics.⁴⁴

So, the takeaway from the literature is that demographics and beliefs might matter in individual cases but predicting how they will matter is difficult. And it is dangerous and likely wrong to conclude that because a particular trait is predictive in one case, it will be in others.

Based on the literature, it was unlikely that general demographics would be predictive across all three cases in this study. It was possible, however, that a combination of beliefs might be.

B. Hypothesis 2: Belief mirroring will impact jurors. Jurors exposed to case frames that align with their self-reported beliefs will vote for liability more often than those who do not, despite holding case facts constant.

Although I believe in jurors and juries, my working hypothesis was that belief mirroring would make at least some difference in verdict rates. I hypothesized that framing the argument in language familiar to the jury and that aligned closely to juror beliefs would influence liability rates, though I expected the effect would be relatively small.

However, as described below, there is not accord among scholars or attorneys.

1. Jurors as Lemmings

Although the overall conclusion of this paper and the overall view of this author is that juries do careful work and can be trusted, I must confess that even my own work and the work of my co-authors has shown that jurors are susceptible to cognitive biases.⁴⁵ In “Countering the Plaintiff’s Anchor” we demon-

⁴² Jonathan M. Golding et al., *The Effect of Gender in the Perception of Elder Physical Abuse in Court*, 29 LAW & HUM. BEHAV. 605, 612 (2005); Jonathan M. Golding et al., *The Impact of Mock Jury Gender Composition on Deliberations and Conviction Rates in a Child Sexual Assault Trial*, 12 CHILD MALTREATMENT 182, 182 (2007).

⁴³ Brian H. Bornstein & Michelle Rajki, *Extra-Legal Factors and Product Liability: The Influence of Mock Jurors’ Demographic Characteristics and Intuitions About the Cause of an Injury*, 12 BEHAV. SCI. & L. 127, 130 (1994).

⁴⁴ Mary R. Rose & Neil Vidmar, *The Bronx “Bronx Jury”: A Profile of Civil Jury Awards in New York Counties*, 80 TEX. L. REV. 1889, 1897 (2002).

⁴⁵ See *supra* Abstract.

strated that, among other things, anchors are irresistible.⁴⁶ Others have shown that jurors struggle to separate liability facts from damage facts.⁴⁷ Jessica Salerno has hypothesized that juror emotions influence decision-making in negative ways.⁴⁸ Salerno has analyzed studies demonstrating that showing jurors bloody photos, even when those photos do not relate to the case, causes jurors to convict criminal defendants more often.⁴⁹ Even more troubling, studies show that jurors who saw the bloody photos in color showed signs of anger and issued more punitive sentences than jurors shown the exact same photos in black and white.⁵⁰

Beyond jury studies, there is also ample social science research suggesting that people are, as one book called it, “Predictably Irrational.”⁵¹ Daniel Kahneman, perhaps the leading cognitive scientist of the last forty years, provides a list of some of these cognitive fallacies in *Thinking, Fast and Slow*.⁵² I have selected some of those cognitive fallacies that would suggest jurors are subject to manipulation, including the manipulations tested in this study.

One such cognitive bias is confirmation bias—a phenomenon in which people seek out information that supports their views.⁵³ And, even more generally, a process in which jurors are predisposed to find information consistent with the premise of questions and presentations.⁵⁴ Kahneman provides an example, noting that if someone is asked, “Is Sam friendly?” it will produce different response than, “Is Sam unfriendly?”—this is an effect of associate memory.⁵⁵ The question predisposes the person to find certain facts in their mind.⁵⁶

⁴⁶ John Campbell et al., *Countering the Plaintiff’s Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 IOWA L. REV. 543, 546 (2016).

⁴⁷ See, e.g., Reid Hastie et al., *Juror Judgments in Civil Cases: Hindsight Effects on Judgments of Liability for Punitive Damages*, 23 LAW & HUM. BEHAV. 597, 603–04 (1999) (noting that participants were told liability and compensatory damages of over \$24,000,000 had been awarded before being asked to award punitive damages); Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask for: The Effect of Anchors on Personal-Injury Damages Awards*, 6 J. EXPERIMENTAL PSYCHOL. 91, 94 (2000) (noting that participants were told that liability was already determined in the plaintiff’s favor and that all damages besides pain and suffering had already been awarded).

⁴⁸ Jessica M. Salerno & Bette L. Bottoms, *Emotional Evidence and Jurors’ Judgments: The Promise of Neuroscience for Informing Psychology and Law*, 27 BEHAV. SCI. & L. 273, 274 (2009).

⁴⁹ *Id.* at 277.

⁵⁰ *Id.*

⁵¹ See generally DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008).

⁵² KAHNEMAN, *supra* note 33, at 158, 199, 250, 345.

⁵³ *Id.* at 81.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

Kahneman also chronicles the process of substituting questions.⁵⁷ Put simply, when people are faced with complex questions, they often answer an easier one.⁵⁸ The target question is the assessment the person intends to produce.⁵⁹ The heuristic question is the question the person answers instead.⁶⁰ For example, when asked to pick a president, rather than spend dozens of hours reviewing candidates, many will answer an easier question such as “which candidate belongs to my party,” or “who are my friends voting for,” or “who seems like someone I’d enjoy having over for dinner?”⁶¹

Other cognitive fallacies that could suggest jurors will be manipulated in the current study include the halo effect.⁶² This occurs when, a person knows one good thing about someone and assumes other good things about them.⁶³ A related phenomenon, relevant to the study, would be to assume if someone expresses ideas similar to yours, they should be trusted, and their client should win.⁶⁴

One final bias worth mentioning is the “affect heuristic.” This heuristic suggests that “[y]our political preference determines the arguments that you find compelling.”⁶⁵

Putting these various heuristics together, a fair reading of Kahneman is that facts are malleable. Indeed, he even provides an example of this.⁶⁶ Kahneman suggests that if you tell people that the counties with the lowest per capita incidence of kidney cancer are rural and found in historically Republican states found in the Midwest, South, and West, people will often assume they know why.⁶⁷ They will conclude that clean living is the likely explanation.⁶⁸ But if you tell someone that the counties with the highest per capita incidence of kidney cancer are rural counties in historically Republican states found in the Midwest, South, and West, people will assume it is because of smoking, poor health care services, and fatty diets.⁶⁹ Both explanations cannot be true. But

⁵⁷ *Id.* at 97.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See id.* at 98.

⁶² *Id.* at 82.

⁶³ *Id.*

⁶⁴ *See id.*

⁶⁵ *Id.* at 103. *See generally* Paul Slovic et al., *The Affect Heuristic*, 177 EUR. J. OPERATIONAL RES. 1333, 1333 (2007).

⁶⁶ KAHNEMAN, *supra* note 33, at 109.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 109–10.

people's need to produce cohesive stories and explanations will fill in the gaps.⁷⁰

Juror scholars have echoed this, anticipating that jurors can be swayed, for example, by opening statements precisely because those statements can exploit cognitive biases.⁷¹ Diamond wrote, "Both lawyer lore and social science theory anticipate an influential role for opening statements."⁷² She suggested "Opening statements can create thematic frameworks, or schemata, that guide jurors during the trial and deliberations in their observation, organization, and retrieval of evidence."⁷³

The view that jurors can be swayed by cognitive biases has been flamed by media reports and the Chamber of Commerce's efforts to demonize lawsuits.⁷⁴ The Chamber of Commerce's Institute for Legal Reform claims that excessive litigation costs the American economy billions of dollars per year.⁷⁵ In 2017 alone, the Chamber of Commerce's Institute for Legal Reform spent \$22.7 million lobbying the federal government.⁷⁶ The American Association of Justice has countered the Institute for Legal Reform, stating that the organization is exploiting this information solely to restrict individual access to the legal system.⁷⁷

The famous McDonald's hot coffee case is often considered to be the beginning of an era where "frivolous lawsuits" began to gain popularity in the United States.⁷⁸ However, the documentary "Hot Coffee" discredits this conception.⁷⁹ The documentary explores the damage and suffering that the plaintiff

⁷⁰ Kahneman actually shares this story to discuss the rule of small numbers. Namely, the reason both statements can be true is because rural counties have small sample sizes, allowing a few cases to skew the percentages. But the story neatly demonstrates how cognitive biases can cause individuals to jump to conclusions. *Id.* at 110–11.

⁷¹ Diamond, *supra* note 35, at 742.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See, e.g., U.S. Chamber Staff, *Coffee, Lip Balm, and Cycling Make the List of the 10 Most Ridiculous Lawsuits of 2016*, U.S. CHAMBER COM. (Dec. 29, 2016, 3:30 PM), <https://www.uschamber.com/series/above-the-fold/coffee-lip-balm-and-cycling-make-the-list-the-10-most-ridiculous-lawsuits-2016> [<https://perma.cc/5BRS-WZDG>] (The Chamber has regularly promoted the idea that ridiculous lawsuits are common, when in fact there is no evidence to suggest this is true).

⁷⁵ *Lawsuit Abuse Impact*, U.S. CHAMBER INST. FOR LEGAL REFORM, <https://www.instituteforlegalreform.com/issues/lawsuit-abuse-impact> [<https://perma.cc/S6BM-HU5E>] (last visited Sept. 17, 2018).

⁷⁶ *U.S. Chamber of Commerce Client Profile: Summary, 2017*, OPENSECRETS.ORG: CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/lobby/clientsum.php?id=D000019798&year=2017> [<https://perma.cc/GRY7-8E44>] (last visited Sept. 20, 2018).

⁷⁷ AM. ASS'N FOR JUST., DO AS I SAY, NOT AS I SUE: EXPOSING THE LAWSUIT-HAPPY HYPOCRITES OF U.S. CHAMBER'S INSTITUTE FOR LEGAL REFORM 15 (2011).

⁷⁸ HOT COFFEE (HBO 2011).

⁷⁹ *Id.*

endured after being severely burned by hot coffee served by McDonald's.⁸⁰ "Hot Coffee" exposed that the litigation was not a scheme for lawyers to get rich, but was a vehicle to compensate the plaintiff for the medical expenses she accumulated as a result of her injuries.⁸¹

2. *Jurors as Lions*

Some of the leading researchers on jurors—true giants of the field—conclude that overall, jurors are pretty good at what they do.⁸²

Valerie Hans is a prolific studier of juries. She has investigated the claim that juries produce arbitrary damage awards.⁸³ And although she concedes the numbers awarded are not perfectly consistent across cases, she argues that they are nonetheless coherent.⁸⁴ "Hans-Reyna model suggests that there is an underlying coherence in people's judgments about the severity of plaintiffs' damages and liability of defendants; at the level of the gist, award judgments make sense."⁸⁵

Hans also weighs in more generally on juries in other articles, noting "if one views all of the evidence gathered through diverse methodologies collectively, the scholarly work shows that juries, in general, and civil juries, in particular, perform reasonably well in understanding trial evidence, and in using it to reach their verdicts."⁸⁶

Others agree. "Analyzing the factors that contribute to jury verdicts, researchers have discovered that evidentiary strength, whether it is rated by judges or by jurors, is by far the most important factor explaining the trial's outcome."⁸⁷ Others note that much of the to do about runaway juries is not supported at all.⁸⁸

And Shari Diamond notes that throughout her work on the Arizona Jury Project, it became clear that juries pay a great deal of attention to the jury in-

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Diamond & Rose, *supra* note 6, at 278.

⁸³ Valerie P. Hans, *What's It Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 963 (2014).

⁸⁴ Valerie F. Reyna et al., *The Gist of Juries: Testing a Model of Damage Award Decision Making*, 21 PSYCHOL. PUB. POL'Y. & L., 280, 282–83 (2015).

⁸⁵ *Id.* at 291.

⁸⁶ Valerie P. Hans, *Empowering the Active Jury: A Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 39, 42 (2008).

⁸⁷ *Id.*

⁸⁸ Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y. & L. 788, 789 (2000) (Arguing generally that juries have always been questioned but that civil verdicts, awards, and the award of punitive damages have been relatively consistent).

structions, that they carefully work through the evidence, and that they typically correct errors in recall during deliberation.⁸⁹

Perhaps Eddie Greene, who has studied juries for decades and contributed mightily to the literature, put it best: “[T]he intellectual incompetence of the civil jury has been vastly exaggerated.”⁹⁰

Many trial lawyers seem to agree, in particular, with the idea that jurors decide cases based on facts, not personality or through cognitive bias. For example, Randi McGinn is the former president of the Inner Circle—the most elite group of plaintiff trial lawyers in the country. She wrote a book on how to try cases, which relates what she learned from trying cases.⁹¹ “There was no magic oratory, special power suit, or precise hand gestures that would make me a great trial lawyer. It was all in how I prepared my cases.”⁹²

She also notes important advice handed down to her, and many other lawyers.⁹³ “You make more money from the cases you turn down than the cases that you take.”⁹⁴ Implicit in this advice is the idea that lawyers cannot make bad cases good, no matter how talented they may be.⁹⁵ Jurors care about facts.⁹⁶

Even in popular culture there has been a pushback against the narrative of runaway juries. The documentary “Hot Coffee” explores whether lawsuits are really get rich quick schemes.⁹⁷ It dives into the facts of the McDonald’s hot coffee case, revealing the plaintiff underwent multiple surgeries, she had third degree burns on her genitals, she originally asked McDonald’s only to pay for her medical bills (but they refused), the coffee was far hotter than industry standards, and McDonald’s knew its coffee caused severe burns but did nothing about it.⁹⁸

In sum, the literature, lawyers, and cultural perceptions of jurors are mixed. There are solid arguments for why belief mirroring could influence jurors, and there is some evidence that it may be trumped by the evidence itself. On net, I predicted at the outset that belief mirroring would move jurors, but the effects would be small.

⁸⁹ Shari Diamond, *The Deliberations of Real Juries*, Presentation at the Denver Empirical Justice Institute Spring 2017 Speaker Series (Apr. 20, 2017).

⁹⁰ Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 *LAW & CONTEMP. PROBS.* 225, 228 (1989).

⁹¹ See RANDI MCGINN, *CHANGING LAWS, SAVING LIVES: HOW TO TAKE ON CORPORATE GIANTS AND WIN* (2014).

⁹² *Id.* at 44.

⁹³ See generally *id.* at 8.

⁹⁴ *Id.*

⁹⁵ See *id.*

⁹⁶ See *id.* at 6–8.

⁹⁷ *HOT COFFEE*, *supra* note 78.

⁹⁸ *Id.*

C. *Hypothesis 3: Jurors will respond best when the frame is introduced prior to reading the evidence.*

Literature on primacy dates back to at least 1925, when Lund noted that ideas introduced first are more likely to be believed than those introduced later.⁹⁹ At its core, primacy is really about memory.¹⁰⁰ “The primacy effect is the tendency for individuals without neurological impairment to show enhanced memory for items presented at the beginning of a list relative to items presented in the middle of the list.”¹⁰¹ However, because memory and attention shape perception, the primacy effect often means that information presented early is more powerful than information presented later.¹⁰²

However, in trial settings there is another effect that can matter, and that is recency.¹⁰³ Recency suggests that the last thing a person hears will stick with them, making it more salient.¹⁰⁴ In a study of criminal trials, Engel and his co-authors concluded that recency effects dominated.¹⁰⁵ This notion was so true that the authors suggest that letting the prosecution have the last word in criminal trials prejudices criminal defendants.¹⁰⁶

Among scholars, trial lawyers and jury consultants, there is no shortage of opinions on these issues. Diamond wrote, “Both lawyer lore and social science theory anticipate an influential role for opening statements.”¹⁰⁷ She suggested, “Opening statements may create thematic frameworks, or schemata, that guide jurors during the trial and deliberations in their observation, organization and retrieval of evidence.”¹⁰⁸

A jury consultant argues that “because jurors begin to assign blame early in a trial, defense attorneys need to pay close attention to how information is ordered in opening statements and during the direct examination.”¹⁰⁹

⁹⁹ Mark T. Gerard, *Primacy and Recency Effects in Trial*, LITIG. GROUP, <https://www.litigatigroup.com/2015/03/01/winter-2015/> [<https://perma.cc/MZ65-SF52>] (last visited Sept. 21, 2018).

¹⁰⁰ SAUL KASSIN ET AL., *SOCIAL PSYCHOLOGY* 137, 227–28 (9th ed. 2014).

¹⁰¹ Angela K. Troyer, *Primacy Effect*, in *ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY* (Jeffrey Kreutzer et al. eds., 2017).

¹⁰² KASSIN, *supra* note 100, at 137, 227–28.

¹⁰³ TOM RILEY & PETER C. RILEY, *CIVIL LITIGATION HANDBOOK* § 64:7 (2018).

¹⁰⁴ *Id.*

¹⁰⁵ Christoph Engel et al., *Defendant Should Have the Last Word: Experimentally Manipulating Order and Provisional Assessment of the Facts in Criminal Procedure*, MAX PLANCK INST., Nov. 2017., at 11, <https://ssrn.com/abstract=3077855> [<https://perma.cc/CFT5-LG9V>].

¹⁰⁶ *Id.* at 2.

¹⁰⁷ Shari Seidman Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM. L. & CRIMINOLOGY 17, 26 (1996).

¹⁰⁸ *Id.* at 27.

¹⁰⁹ Bill Kanasky, *The Primacy and Recency Effects: The Secret Weapons of Opening Statements*, 2014 TRIAL ADVOC. Q. at 26.

He advocates for opening statements that work more like Hollywood movies, noting that many movies start with brutal murders, war scenes, or other attention grabbing devices.¹¹⁰

And some scholars, without empirical evidence, have even called for completely reworking civil jury trials to keep plaintiffs from going first because it prejudices the case against the defendant.¹¹¹ “[O]nce a fact-finder starts to form a working hypothesis to explain the facts of the case, they will be biased towards interpreting new facts in a way that confirms that theory.”¹¹² Spottswood argues for a third party who would determine the order of evidence to avoid “[o]rder[ing] effects” that “are not easily eliminated.”¹¹³

D. Hypothesis 4: Jurors will respond similarly to belief mirroring cross political orientations

Almost all social scientists agree that humans engage in motivated reasoning, resulting in judgments that are not fully consistent with facts.¹¹⁴ But, as discussed in this section, there is a persistent and growing debate among social scientists about how this happens. Motivated reasoning can be defined as a situation in which people “conform assessments of information to some goal or end [that is] extrinsic to accuracy.”¹¹⁵

Some scholars believe in the Bounded Rationality Thesis (BRT).¹¹⁶ At its core, this theory posits that people engage in motivated reasoning because they fail to engage in System 2 thinking (active, critical thinking), instead relying on System 1 (quick, intuition based decisions).¹¹⁷ The reason, according to BRT, that people get things wrong is because they are failing to rigorously examine them.¹¹⁸ Implicit in BRT is the idea that more System 2 thinking would reduce confirmation biases and motivated reasoning.¹¹⁹

¹¹⁰ *Id.* at 27.

¹¹¹ See Mark Spottswood, *Ordering Proof: Beyond Adversarial and Inquisitorial Trial Structures*, 83 TENN. L. REV. 291, 291 (2015).

¹¹² *Id.*

¹¹³ *Id.* at 324.

¹¹⁴ Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection 2–3* n.1 (Cultural Cognition Project, Working Paper No. 107, 2013), <https://poseidon01.ssrn.com/delivery.php?ID=583078083024092002122120098097110124033019081079037056018099096075098019014084088087062026096028010010047023006105025097105066033073037085088106076016127123105033018062005011122118097125000089087069019095112005089073115025023087095080092106106087&EXT=pdf> [<https://perma.cc/5KGV-HEQX>].

¹¹⁵ Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407, 408 (2013).

¹¹⁶ Kahan, *supra* note 114, at 4.

¹¹⁷ Kahan, *supra* note 115, at 409.

¹¹⁸ *Id.*

¹¹⁹ Kahan, *supra* note 114, at 4.

A second theory, which has gained some popularity in recent years, is the Neo-authoritarian Personality Thesis (NPT), which suggests that “the personality correlates of right-wing ideology”—dogmatism, need for closure, aversion to complexity, and the like—produce an overreliance on System 1 thinking.¹²⁰ Thus, NPT predicts that conservatives are disproportionately affected by motivated reasoning and the like because they are not open minded and do not self-reflect.¹²¹ NPT is, by definition, a subspecies of BRT, as it suggests that an absence of System 2 thinking is the culprit, but it predicts that the effects will be most pronounced in certain conservatives.¹²² And it argues that the lack of System 2 thinking is due to particular traits and beliefs.¹²³

There have been some studies that support this view.¹²⁴ But others have suggested instead that anyone who is dogmatically political is more close-minded.¹²⁵

The final theory that attempts to explain motivated reasoning is the Expressive Rationality Thesis (ERT).¹²⁶ This theory proposes that motivated reasoning is not limited to those who are close-minded or do not like complexity.¹²⁷ Rather, most people will tend to hold beliefs that foster their connection to “identity-defining groups”; it suggests that “individuals who are disposed and equipped to use high-level, conscious information processing can be expected to make the effort to do so more readily in defense of, than in opposition to, beliefs that predominate in their groups.”¹²⁸ Put even more simply, ERT suggests that most people, conservative or not, will rationalize beliefs that benefit them by keeping them aligned with their identity groups.¹²⁹ System 2 thinking will not save them.¹³⁰ And this is not because they are close-minded or afraid of complexity.¹³¹ It is driven instead by a normal tendency to promote rather than frustrate their individual ends.¹³²

“Whereas BRT views ideological polarization as evidence of a deficit in System 2 reasoning capacities, ERT predicts that the reliable employment of

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See generally Ravi Iyer et al., *Understanding Libertarian Morality: The Psychological Dispositions of Self-Identified Libertarians*, PLOS ONE, Aug. 2012, at 1.

¹²⁵ See generally Alan S. Gerber et al., *Personality and the Strength and Direction of Partisan Identification*, 34 POL. BEHAV. 653, 653 (2012).

¹²⁶ Kahan, *supra* note 114, at 5.

¹²⁷ See *id.* at 6.

¹²⁸ *Id.*

¹²⁹ *Id.* at 5–6.

¹³⁰ *Id.*

¹³¹ *Id.* at 6.

¹³² *Id.*

more effortful, conscious information processing will *magnify* the polarizing effects of identity-protective cognition.”¹³³

In a recent study, Kahan of the Cultural Cognition Project, made significant progress in proving ERT.¹³⁴ He conducted an experiment that measured whether individuals were reflective and self-critical.¹³⁵ He then measured how those participants responded to information that aligned with their political views.¹³⁶ BRT predicts that self-critical people will be manipulated less by information that confirms their views because they will filter it through System 2.¹³⁷ NPT suggests that conservatives will be most impacted by the information (and that conservatives will score lower on the reflective tests).¹³⁸ ERT suggests that as people become more reflective, they will be more susceptible to information that confirms their beliefs.¹³⁹ The study, in sum, supported ERT.¹⁴⁰ Higher scores of reflection correlated to more motivated reasoning, and conservatives did not score lower than others on reflection.¹⁴¹

Kahan’s work on ERT suggests that jurors across the spectrum of political affiliation will respond similarly to belief mirroring.¹⁴² It was beyond the objectives of the current study to measure whether jurors are more or less reflective.¹⁴³

II. EXPERIMENTAL DESIGN

A. Hypotheses

1. Juror responses to questions that measure views on various issues and place jurors on scale measuring political orientation will predict juror outcomes.
2. Jurors will respond better to cases framed in language that mirrors their characteristics and reported beliefs.
3. Jurors will respond best when the frame is introduced first, as opposed to when framing occurs only in closing argument.
4. Conservative and progressive jurors will show similar levels of motivated reasoning and cultural cognition, consistent with ERT theory.

¹³³ *Id.* at 7.

¹³⁴ *Id.* at 5–7.

¹³⁵ *Id.* at 8.

¹³⁶ *Id.*

¹³⁷ *Id.* at 21.

¹³⁸ *Id.* at 14.

¹³⁹ *Id.* at 15.

¹⁴⁰ *Id.* at 25.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

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B. Stimulus

Jurors were randomly assigned to one of three factual scenarios. Those factual scenarios presented three different civil cases. This was done to mitigate any risk that framing is more effective in specific case types. Case 1 was an employment discrimination case. Case 2 was a personal injury case. Case 3 presented a dispute about whether an insurer complied with its fiduciary duties to an insured.

Each case was based on a real case that occurred in the last ten years, to ensure realism. The case facts were also crafted using summaries created by the attorneys who handled the cases. The cases were from three different attorneys. These summaries were abbreviated versions of presentations used in private mock jury studies on the cases. This ensured a factual richness in the cases and eliminated the risk that the researcher would create cases different from those actually litigated. The cases were chosen because they were expected to produce win rates that approached 50/50, making manipulation of jurors more likely to occur and be detected.

The effort to produce reasonably close cases was largely successful. The three cases produced win rates of 59.1 percent, 58.2 percent, and 63.1 percent.

Based on an expected average reading speed of 150 words, scripts were designed to be within two minutes of the same length when compared to one another.

Basic summaries of the cases follow. The complete case scripts are included in the appendix.

1. Base Cases

Case 1—Employment Discrimination—Plaintiff (Ellen) was the store manager of a grocery store. She suffered a poor health inspection. She contacted a friend who was a state representative, asking that he call the health inspector and get him back out to re-inspect since the infractions were repaired. The grocery store fired Ellen, asserting she violated internal policies and embarrassed the store by contacting a state representative. Ellen asserted that she was previously harassed by her male regional manager, that she suspected they were trying to get rid of her, and that this caused her to want an immediate re-inspection. She asserted she violated no rules. She also offered evidence that men in the organization engaged in similar behavior but were not fired.

The facts presented to mock jurors in this case were 425 words long. The win rate for this case was 59.1 percent.

Case 2—Personal Injury—The plaintiff in this case was the spouse of Mr. Flores. He worked on a barge loading giant steel coils that weighed roughly 68,000 pounds each. Mr. Flores helped provide guidance to the crane operator, who sat the coils onto wood saddles that held the coils in place. The barge began to rock on the day of the accident, the coils broke loose, and they crushed Mr. Flores foot, causing him to lose it. Mr. Flores argued that the manufacturer

of the saddles was liable because they used an inferior wood and constructed defective saddles that they knew or should have known could crush and allow the coils to move. He offered expert evidence. The manufacturer asserted that Mr. Flores was required to nail down the saddles as they were installed. They asserted that his failure to do so let the saddles shift, causing the coils to roll.

The facts presented in this case were 750 words long. The win rate for this case 58.2 percent.

Case 3—Insurance Dispute—Susan Sikes went to her insurance agent to obtain basic automobile coverage, homeowner coverage, and extra coverage called excess coverage. She recently inherited money and wanted it protected in case of an accident. Years earlier she had a friend who was in an accident, did not have enough coverage, and paid out of her own pocket. She explained this to the agent. According to Ms. Sikes she asked for extra insurance that would “kick in if either her or her husband were hurt or if they hurt someone else.” Ms. Sikes was later in a car accident. When she filed for excess coverage, it did not exist. The policy she signed each year did not contain it. She argued the insurer breached its fiduciary duty to sell her the coverage she requested. The insurer asserted that Ms. Sikes signed the policy each year and should have known that it did not contain such coverage.

The facts presented in this case were 504 words long. The win rate for this case 63.1 percent.

2. *Belief Mirroring and Primacy/Recency*

In addition to being randomly assigned to one of the three base cases, jurors were also randomized in two other ways. First, they were randomly assigned to read either an opening statement, a closing argument, or no statement at all. Second, if they were assigned to an opening statement or closing argument, they saw one of three types: a progressive spin on the case, a conservative spin on the case, or a blended spin on the case. These “frames” for the case were vetted by practicing attorneys and created by the author, an experienced trial attorney. They were designed to mirror the beliefs of some jurors, therefore making them more appealing. Examples of the closing arguments, for Case 1 (the employment discrimination case) follows.

a. *Conservative Belief Mirroring*

Let me talk to you about this case.

You have heard the facts. As a juror, as our founding fathers envisioned, you now get to decide what happens. You, and only you, have that power. No matter how dysfunctional anything else is in our country, the jury system continues. It gives each of you the power to enforce the rule of law. That is exactly how our Constitution envisioned it.

Ellen is tough, hardworking, and loyal. She worked for the same company for fifteen years. That is so rare these days, in a time when many people think

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they have an absolute right to a promotion at a company, and if they do not get it, they leave or complain.

Ellen is not a whiner either. And she does not expect that the workplace will be “politically correct.” During her time at the company, there were men who said things she did not like. But that was okay. She put her head down and worked harder. She trusted that merit matters, and loyalty is rewarded.

But the company was not loyal. It did not follow the rule of law and it was not just or fair. It fired Ellen for showing initiative. She contacted a politician to get help showing she fixed a problem. What is wrong with that? The company is acting like it does not know that in the real world, you have to have some grit. You have to work for what you want. Ellen did not lie. She did not hide anything. She just worked to fix it. And the company pounced, using it as an excuse to fire her. People have to be personally accountable. So do companies. And this company messed up.

What it did is illegal. And as a jury, Ellen asks you to do your duty, enforce the law, and find the company liable.

Length: 307 words

b. Liberal Belief Mirroring

Let’s talk together about this case.

Juries exist in part so that minority groups and those in protected classes cannot be abused. It is the role of the jury to stand up for the least among us. And in cases like this, it is the role of the jury to say that equality matters, and that companies cannot bully their employees, just because of their gender.

Ellen is a victim of a large corporation that thinks it is above the law and acts like it is still the 1950s. Ellen was an honest, caring, kind employee who worked hard for her company. She sacrificed time away from her children. She worked through stress and hard times. She endured a pattern of discrimination. She faced the same struggle so many do. She was called “moody” and her manager assumed she could not make “tough decisions.”

Then, when she was decisive, working to get her store in order, she was fired for it. She was fired for taking initiative, but men who did the same were not. The corporation did not think about how firing Ellen would risk her home, or perhaps move her kids to a new school. It thought only about advancing employees who were in the good old boy system, whether they deserved it or not.

That violates the law. And just as importantly, it violates our common belief that all people should be treated equally. Please stand up for Ellen, as only you can. Find the company liable.

Length: 248 words

c. Blended Belief Mirroring

Let me talk to you about this case.

You have heard the facts. As a juror, as our founding fathers envisioned, you now get to decide what happens. You, and only you, have that power. No matter how dysfunctional anything else is in our country, the jury system continues. It gives each of you the power to enforce the rule of law. That is exactly how our Constitution envisioned it.

That power exists in part so that minority groups and those in protected classes cannot be abused. It is the role of the jury to stand up for the least among us. And in cases like this it is the role of the jury to say that equality matters, and that companies cannot bully their employees, just because of their gender.

Ellen is tough, hardworking, and loyal. She worked for the same company for fifteen years. That is so rare these days, in a time when many people think they have an absolute right to a promotion at a company, and if they do not get it, they leave or complain.

And what did Ellen get for her hard work? She got treated like it was still the 1950s. She was an honest, kind, caring employee who sacrificed time away from her family, especially her children, to get ahead. Despite the sacrifices, when she acted decisively, instead of being rewarded like the men were, she was fired. She was a victim of the good old boy system that labels women “moody” and believes they cannot make “tough decisions.”

This whole decision got approved by some bureaucrat who never worked in the real world and did not understand that it takes grit and toughness to succeed in a company. Instead of rewarding Ellen for being personally accountable and working hard, she was punished by a PC culture.

What the company did violated the law. It is your right and responsibility to enforce the rule of law in order to protect those trampled by greedy companies and affected by discrimination. Please find the company liable.

Length: 341 words

3. *Defense Response*

The defense response was held static. Each is available in the appendix.

4. *Overview of Experimental Conditions*

The result of the various manipulations produced the following 21 conditions:

Conservative Opening Case 1	Conservative Opening Case 2	Conservative Opening Case 3
Progressive Opening Case 1	Progressive Opening Case 2	Progressive Opening Case 3
Blended Opening Case 1	Blended Opening Case 2	Blended Opening Case 3
Conservative Close Case 1	Conservative Close Case 2	Conservative Close Case 3
Progressive Close Case 1	Progressive Close Case 2	Progressive Close Case 3
Blended Close Case 1	Blended Close Case 2	Blended Close Case 3
No Statement Case 1	No Statement Case 2	No Statement Case 3

5. *Voir Dire and Liability*

a. *Voir Dire and Demographic Questions*

Jurors were asked to answer a variety of voir dire questions, included in the appendix. Some were basic Likert scales, typically used to allow people to self-rank themselves on a conservative to progressive scale. Others were questions that are sometimes asked in voir dire. Others asked the jurors' opinion on themes that appeared in the script, such as bullying, political correctness, protection of marginalized groups, hard work, and personal accountability. Basic demographic information was also collected.

b. *Liability*

Liability was reduced to a very simple instruction to avoid unnecessary complexity. The liability questions are included below:

Case 1—You must decide if the company is liable for discrimination.

In doing so, consider this instruction.

If gender played a substantial role in the decision to terminate an employee, then the company discriminated. If gender did not play a substantial role, the company did not discriminate.

Do you find the company liable for discrimination?

Case 2—You must decide if the company that provided the saddles was negligent.

Negligence is defined as failing to exercise the same level of care that an ordinary person would, in the same or similar circumstances.

Was the company negligent?

Case 3—You must decide if the company that sold Ms. Sikes the insurance breached its duty of care.

The duty of care in this case was to put Ms. Sikes's interests above the companies. That is a fiduciary duty. And more generally, the company had a duty to act in a reasonably careful way to provide her coverage.

Did the company breach its duty of care?

6. Respondents

One thousand thirty-six jurors were recruited on Amazon Turk (mTurk), using TurkPrime as an interface and Qualtrics as the survey platform. Mturk has become a large and robust platform for social science research, with proven reliability through the replication of many known results.¹⁴⁴ However, the platform requires great care to ensure meaningful results. Randomization was successful, with no significant variations across conditions. We screened for participants that were "jury eligible," meaning residents of the United States over age eighteen who could read, write, and speak English. For quality control, we also screen for respondents who had previously been approved for payment in previous studies, and therefore had reasonably high approval ratings on the platform. Subjects were paid four dollars to complete the experiment online. All subjects consented in accordance with Institutional Review Board requirements.

Using participants' unique identifiers, we excluded anyone who participated in previous studies that use the same video. We paid at a rate near the minimum wage and sufficient to recruit enough workers to complete data collection in a matter of hours, minimizing any risk that workers could communicate with one another on chat boards, thereby "unblinding" the experiment.

Attention checks were embedded in the survey. For example, in a list of questions asking people to select from a Likert Scale, a question was included instructing participants to select "strongly agree."

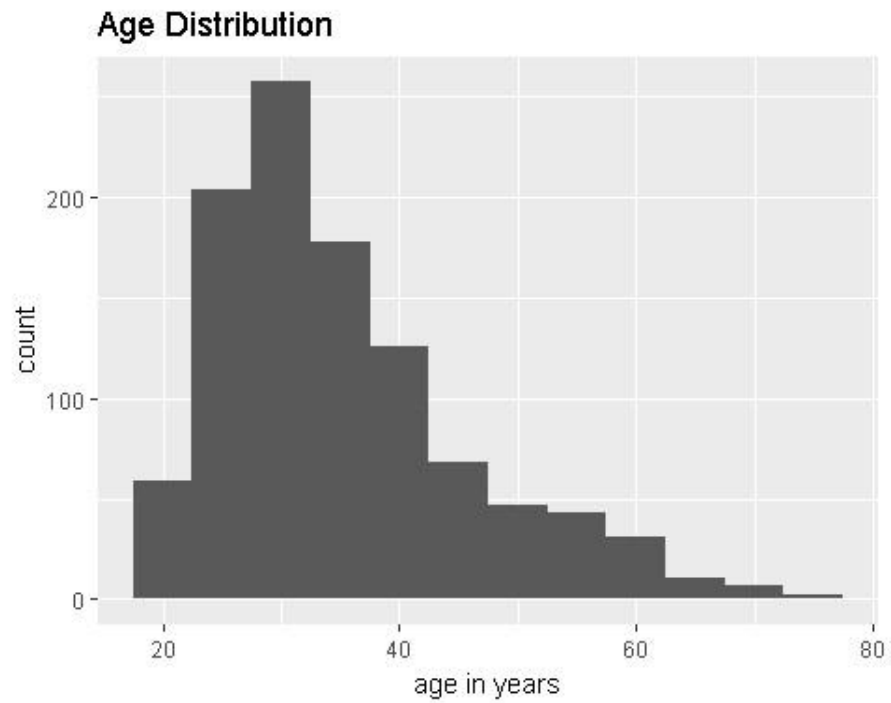
¹⁴⁴ See AMAZON MECHANICAL TURK, <https://www.mturk.com> [<https://perma.cc/4DK8-7ZJR>] (last visited Sept. 21, 2018).

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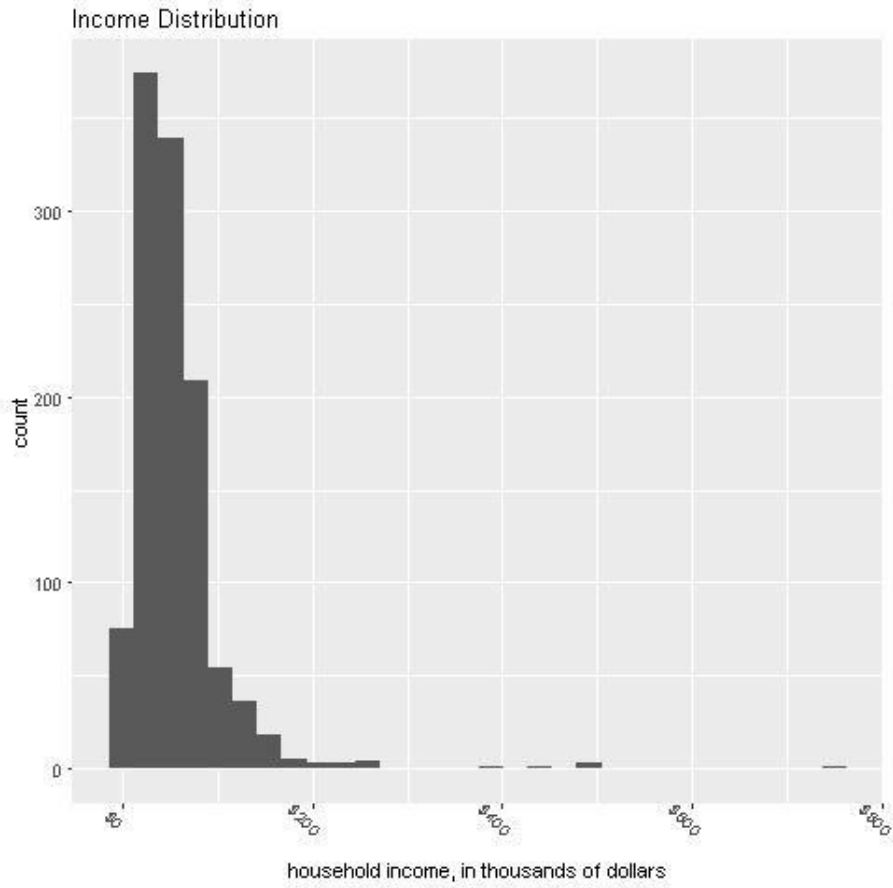
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The basic breakdown of the jury by demographics showed a jury that was relatively similar to the national population. The charts below show some of the basic characteristics.



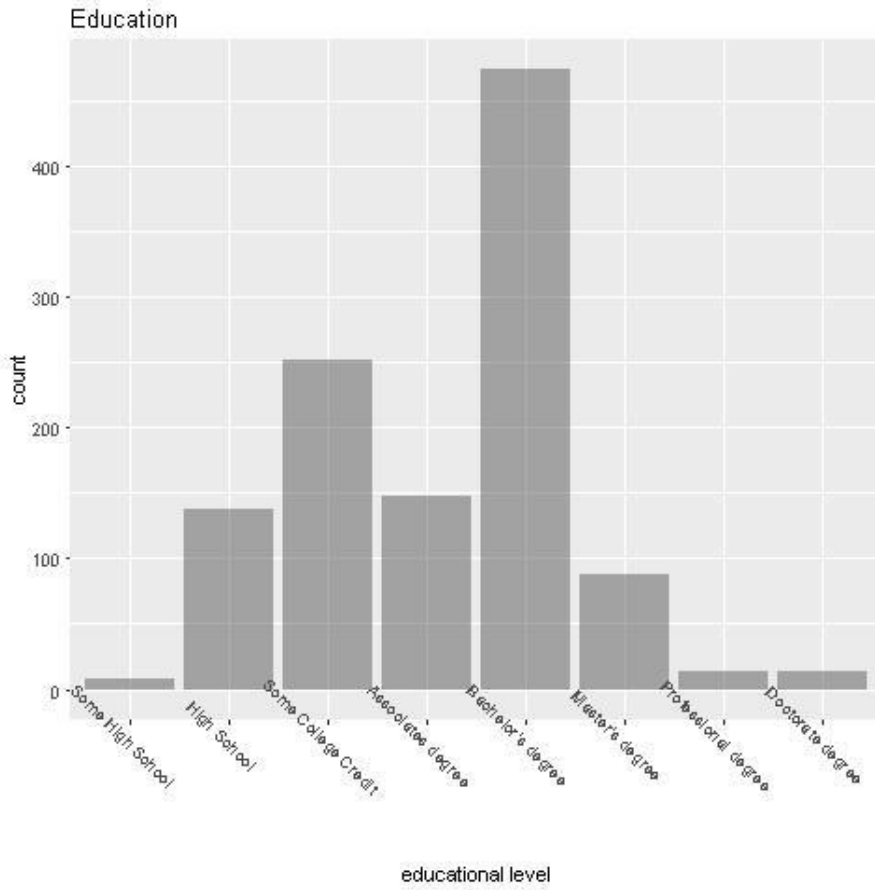
The mean age was thirty-five, with a minimum age of eighteen, and a maximum of seventy-four.

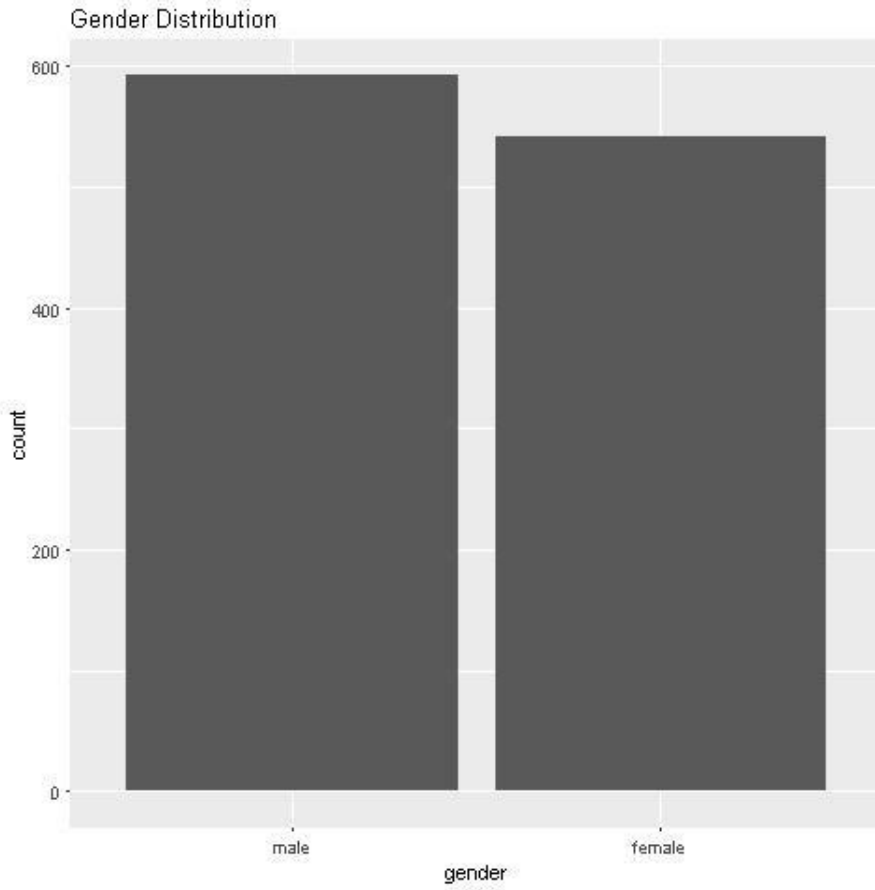


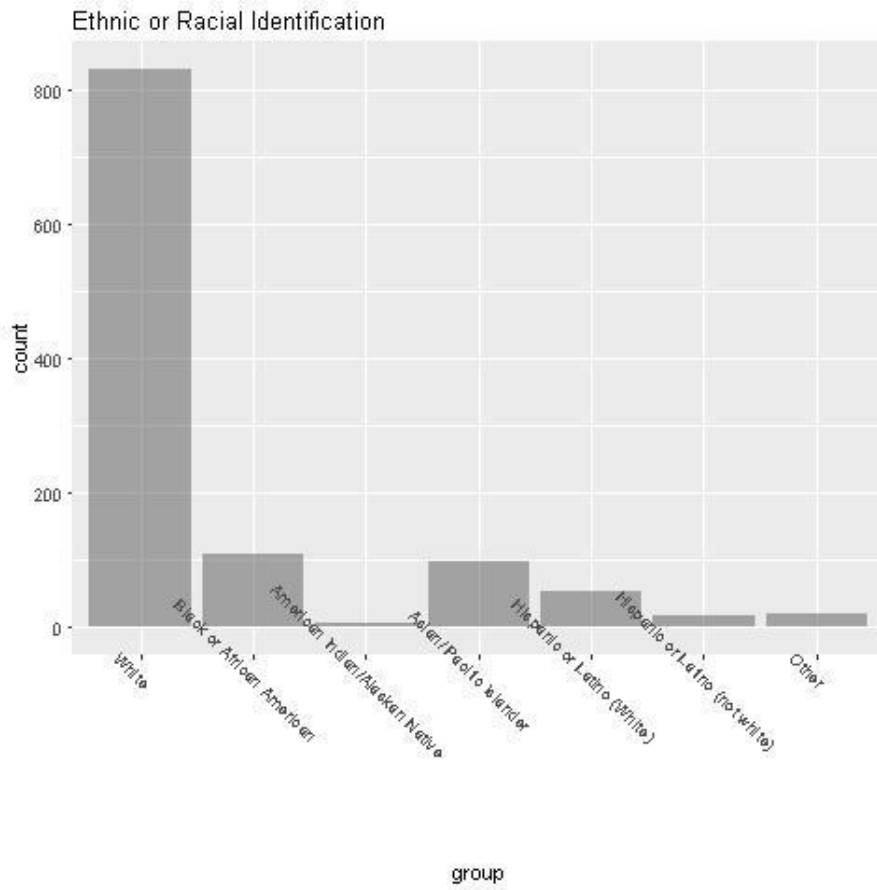
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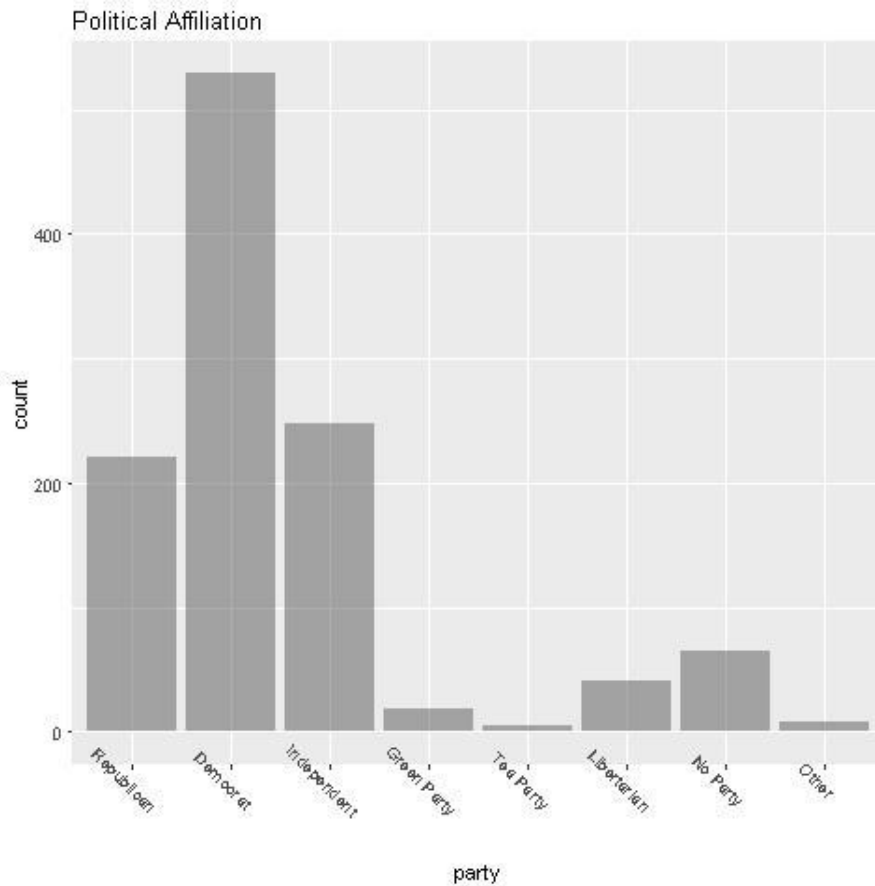
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III. RESULTS

We piloted the study by recruiting one hundred people. This ensured effective randomization and that there were no obvious problems with design. It also allowed us to make sure cases were producing results near 50/50.

Finally, it allowed us to begin to see whether framing effects, ordering effects, and outcomes predicted by characteristics of the jurors were emerging. To check for these effects, we:

Modeled the finding of liability on case and response to each attitude question.

Fit a factor model to estimate underlying characteristics that accounted for the attitude responses. Then we modeled the finding of liability on case and each factor.

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Modeled the finding of liability on case and response to each attitude question interacted with each frame type in order to identify the effect of framing on respondents reporting different levels of support for each attitude.

Modeled the finding of liability on case and each factor interacted with each frame type in order to identify the effect of framing on respondents having different levels of each factor.¹⁴⁵

This was done to narrow research questions and to conform to best practices of crafting clear research questions prior to the study. By identifying the trait combinations and the basic demographic characteristics we would observe and measure, we avoided p-hacking—the search for results that appear statistically significant on their face but are not—and reduced the risk of multiple testing error.

After the pilot, we ran the full study. There were 1,036 valid responses. Tests of associations found in the pilot study were run on these data. The data were combined to identify associations that the small pilot study lacked power to detect.

A. *Result for Hypothesis 1*

The first hypothesis was that juror responses to questions that measure views on various issues and place jurors on scale measuring political orientation will predict juror outcomes.

We checked several jury types and answers to specific individual questions that our pilot suggested may be predictive.

The responses of primary interest are the ones that were statistically significant or borderline significant in the pilot without multiple test correction.¹⁴⁶ These were tested on the study data by applying likelihood ratio tests to the model with liability dependent on case to each model of liability depending on case and a response from the list.

¹⁴⁵ For those who are not statistically trained, in essence, we did the following. First, we ran a test with 100 people. We wanted to make sure the survey worked and that the cases were producing liability rates close to 50/50. If all jurors voted the same way, we could analyze whether our arguments changed the votes. Then, we ran some initial statistical models on the pilot to look for ways that attitudes, or combinations of attitudes, were predicting results. We “interacted” attitudes with the frames—meaning we checked various attitudes of jurors against our conservative, liberal, or blended frames to see if patterns were emerging in how frames impacted specific juror attitudes. All of this let us narrow what we looked for in the final data. This is a best practice. Otherwise, with enough data, you can always find some effect to result. We wanted to make sure we were honestly and fairly looking for effects.

¹⁴⁶ The abbreviated names for these were “political_social,” “political_fiscal,” “conservative,” “gender,” “constit_good,” “faith_over_fact,” “victim_whiny_bad,” “compassion_for_diff_good,” “need_more_respect_for_bluecollar,” “too_pc.”

Those that remained significant at the $p < .05$ level after Holm-Bonferroni correction are listed below.¹⁴⁷ Then, a chart is included that shows how these traits or responses to questions influenced outcomes.

We found that the following traits (or ratings on a scale of traits) were predictive:

1. Political views on social issues (1 is conservative and 5 is liberal);
2. Political Views on fiscal issues (1 is conservative and 5 is liberal);
3. Self-identifying as Conservative (Yes/No);
4. Disagreement/Agreement with statement the world has become too whiny (5 point Likert);
5. Disagreement/Agreement with statement that compassion for people different from oneself is good. (5 point Likert);
6. Disagreement/Agreement with statement the world had become Too Politically Correct (PC);
7. Disagreement/Agreement with statement the USA is the greatest country;
8. Republican (out of choice of parties);
9. Disagreement/Agreement with statement that there are too many frivolous lawsuits.

The chart below includes the following information, from left to right:

Case type (employment discrimination = discrim, personal injury = injury, and insurance = insure).

The trait/rating that was predictive was abbreviated as needed.

The last three columns show the maximum and minimum predicted probability of finding liability over the full range of the explanatory variable, followed by the average change in probability for a one point increase in the Likert or binary explanatory variable.

To make sure this is clear, consider what the first row tells us:

It addresses the employment discrimination case. It covers how jurors rated themselves when asked how they viewed themselves politically, in relation to social issues. And it shows the maximum and minimum predicted liability findings on that case are as high as 65.4 percent and as low as 46 percent. For each point on the scale (moving from 1 = conservative to 5 = liberal), we see a 4.8 percent increase in liability.

¹⁴⁷ This correction is designed to make sure that false positives are less likely to be reported. It is considered a rigorous statistical test that avoids reporting results that appear meaningful but are not. For a more detailed, but still simplified explanation, see *Holm-Bonferroni Method: Step by Step*, STATISTICS HOW TO, <http://www.statisticshowto.com/holm-bonferroni-method/> [https://perma.cc/GN89-48FC] (last visited Sept. 21, 2018).

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HYPOTHESIS 1 RESULTS

Case	Variable	Max.	Min.	Avg.
discrim	political_social	0.654	0.460	0.048
injury	political_social	0.642	0.447	0.049
insure	political_social	0.697	0.509	0.047
discrim	political_fiscal	0.707	0.422	0.071
injury	political_fiscal	0.690	0.403	0.072
insure	political_fiscal	0.746	0.470	0.069
discrim	Conservative	0.681	0.442	-0.024
injury	Conservative	0.662	0.420	-0.024
insure	Conservative	0.720	0.487	-0.023
discrim	victim_whiny_bad	0.681	0.495	-0.031
injury	victim_whiny_bad	0.660	0.471	-0.032
insure	victim_whiny_bad	0.718	0.538	-0.030
discrim	compassion_for_diff_good	0.644	0.396	0.041
injury	compassion_for_diff_good	0.625	0.376	0.041
insure	compassion_for_diff_good	0.691	0.447	0.041
discrim	too_pc	0.705	0.502	-0.034
injury	too_pc	0.687	0.481	-0.034
insure	too_pc	0.745	0.552	-0.032
discrim	Republican	0.614	0.479	-0.135
injury	Republican	0.594	0.458	-0.136
insure	Republican	0.657	0.525	-0.132
discrim	usa_greatest	0.655	0.518	-0.023
injury	usa_greatest	0.635	0.497	-0.023
insure	usa_greatest	0.692	0.560	-0.022
discrim	too_many_frivol	0.748	0.515	-0.039
injury	too_many_frivol	0.729	0.491	-0.040
insure	too_many_frivol	0.782	0.563	-0.037

Looking at the chart as a whole, we see that some individual traits proved predictive, and that they could produce reasonably large differences in results.

For example:

- Republicans found liability 13 percent less often than an average juror.
- As people moved from “strongly disagree to strongly agree” on a Likert scale measuring whether jurors agreed that the “USA is the greatest country,” jurors got about 2 percent worse on liability for every step. Suggesting that avidly pro-American jurors are bad for plaintiffs.
- The more a person believes that “there are too many frivolous lawsuits,” the less likely they are to find liability. Each step on the Likert scale decreased the likelihood by a little less than 4 percent.

- Being fiscally liberal makes a bigger difference in liability (per step on a five points scale) than being socially liberal. Each step towards being fiscally liberal is worth about a 7 percent increase in win rate, whereas being socially liberal amounts to a little less than a 5 percent increase.

In net, these results paint a picture consistent with conventional wisdom regarding conservative jurors. Conservative people (fiscally and socially) are less likely to find for plaintiffs. So are Republicans. This is also true for people who score high on nationalism (USA is the greatest country), people who reject PC culture, people who believe there are too many lawsuits, and people who think the world has become too whiny.

Interestingly, the results were not statistically significant for people's views on religion, gender, age, race, income, education, or many of the other demographic characteristics we so often used to segment society.

1. Juror Types

The data was also analyzed to see whether certain combinations of answers to questions were predictive. These jury types were identified using factor analysis. In the pilot study, this analysis showed that eight underlying factors were adequate to model the results. However, the full data required thirteen factors. After multiple test correction, none of these factors was significantly predictive of liability at the $p < .05$ level.

This largely confirmed our first hypothesis. Some answers to voir dire questions were predictive, while basic demographic traits were not predictive. Surprisingly, combinations of answers identified through factor analysis were not predictive.

B. Results for Hypothesis 2—Jurors will respond better to cases framed in language that mirrors their characteristics and reported beliefs.

As an initial note, I concede that the “frames” provided for the cases—conservative, progressive, or blended—were lengthy in comparison to the overall case facts. Some were as much as 75 percent of the length of the total case. It is a fair criticism that they were likely longer in relation to the facts than any opening statement or closing argument would be in relation to a real case. This suggested that any framing effects identified might be overstated compared to the real world.

Based on this reality, the results were even more surprising. No frame made any statistically significant difference. Neither jurors who tended to align with the frames nor jurors who tended to express opposite values were impacted.

To test for effects of interactions of attitude with frame, we applied likelihood ratio tests to a model with liability dependent on case, frame, and the significant attitudes found above, together with each response to a model with lia-

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bility dependent on case, frame, and the significant attitudes found above, together with the interaction of the corresponding response and frame. None of the interaction models were a significant improvement on the corresponding model without interaction at the $p < .05$ level with Holm-Bonferroni correction. Some individual models showed were modestly statistically significant with p -values in the range (0.02, 0.05), if multiple test correction was (incorrectly) omitted. The same result was observed for the thirteen factors.

This defies conventional wisdom.

Given these findings, we also tested to see whether seeing a frame, versus seeing no frame, produced any measurable effect. We wondered if jurors in general responded positively or negatively to frames. We found no meaningful effects here, either.

At a very real level, this suggests that having people read an attorney's frame of the case, even when that frame contained ideas the jurors openly agreed with, made no difference. The jurors disregarded the statements.

C. Jurors will respond best when the frame is introduced first, as opposed to when framing occurs only in closing argument.

The models of interactions of frame and response above, run separately on frames presented first, then on frames presented in closing argument, also failed to improve on the models without interaction.

Put simply, framing had no effect, whether it was introduced first or last. This defies the predictions of some scholars and of many studies on primacy.

D. Conservative and progressive jurors will show similar levels of motivated reasoning and cultural cognition, consistent with ERT theory.

As discussed in the background section, NPT would predict that conservatives, would be more likely to be impacted by motivated reasoning. NPT hypothesizes that, particularly, conservatives who are not open-minded and who are resistant to facts would likely be more impacted by familiar language.

Instead, this study suggests that jurors across the spectrum resisted belief mirroring at similar levels. Splitting the interaction of response with frame into interaction of high responses with frames, and the interaction of low responses with frames, did not produce statistically significantly stronger models than the combined interaction. The absence of statistical significance of the interaction of response with frame was not due to the presence of a diverse structure of reactions to frames by jurors at each end of the response spectrum.

IV. LIMITATIONS

Limitation 1: The script presented to jurors was written. Cases are not. It is conceivable that a live person who delivers a message to jurors using words and ideas familiar to them might more quickly be viewed as a member of their

social group. This could trigger more intense motivated reasoning, halo effects, and the like.

Limitation 2: Trial attorneys often try to build their frame into their entire case. They encourage experts to repeat it. They say it in opening and closing argument. Here, the frame was introduced only once. However, it was probably still a larger percentage of the total case presentation than it would be in trial. So, its failure to impact jurors cannot be fully explained by the fact it was repeated only once.

Limitation 3: The framing statements were aggressively worded. They directly stated the views of the attorney. This may have caused jurors to push back. Some very experienced attorneys assert that trying to persuade too directly or too early can isolate jurors. For example, Rick Friedman, one of the best known trial attorneys in the country, wrote: “We want the jurors to discover these deeper currents of the case for themselves, which they will resist if we are fairly obvious.”¹⁴⁸ He warned, “Remember, premature advocacy can be a credibility turnoff to skeptical jurors. You want to win them over with the facts.”¹⁴⁹

These observations may be true. But they cannot fully explain the null result, as we also checked to see if including frames generally reduced liability. Put another way, we checked to see if frames might turn off jurors and did not find evidence of this either. Instead, it was as if the frames were invisible. Jurors decided the case on the facts, as viewed through their lenses, formed through life experience.

It is also worth noting that although the frames in this study were aggressive, these frames may not be far from reality. Many attorneys make inflammatory opening statements, indeed some advocate for cinema like opening statements.¹⁵⁰ So, these openings were not outside the realm of normal statements given in court.

Limitation 4: A final limitation may be that the frames were only introduced in the plaintiff’s case. The court process is adversarial. However, we did produce a robust defense statement in each case.

V. IMPLICATIONS

Implication 1: As Hans, Diamond, and other have argued, jurors are not sheep, and juries are not as easily manipulated as some reports might sug-

¹⁴⁸ RICK FRIEDMAN & PATRICK MALONE, RULES OF THE ROAD: A PLAINTIFF LAWYER’S GUIDE TO PROVING LIABILITY 117 (2d ed. 2010).

¹⁴⁹ *Id.* at 152.

¹⁵⁰ For example, see this article by a trial attorney at a large firm, Kirkland and Ellis, arguing in favor of titles for opening statements, comparing these to movie titles, and in general, asserting the key is to capture the jury’s attention. Michael D. Jones, *The Opening Statement: Coming Soon to a Theatre Near You*, KIRKLAND & ELLIS LLP (Oct. 1, 2004), <https://www.kirkland.com/sitecontent.cfm?contentID=223&itemID=2383> [<https://perma.cc/Q6KZ-Z5DS>].

gest.¹⁵¹ Jurors are not overly prone to substitution, halo effects, or motivated reasoning. Although these effects and other cognitive biases certainly exist in jurors, they are not as easily manipulated as some suggest. Even when jurors who firmly agree that the world has become “too PC” and that hard work should be rewarded, they still did not respond positively to arguments that used those identical terms and related the facts of the case to those themes in plausible ways. Instead, jurors looked past the frames and decided the case on the facts. This is an encouraging fact for those who believe in juries.

Implication 2: Opening statements may not serve as a lens or “schemata” to shape juror perception.¹⁵² Jurors may resist the spin of opening statements and wait until they are presented with the facts.

Implication 3: Based on this study and previous research, there is good reason to believe jurors do not make up their minds during the opening statement. Given that the frames did not alter outcomes, even when presented first, a fair conclusion is that jurors waited until reading the facts to make up their minds. Other studies conducted by this author and his co-authors support similar conclusions. For example, in one study, a ten-second manipulation occurred in the last minute of a forty-minute video.¹⁵³ That brief manipulation dramatically altered outcomes, suggesting jurors were still deciding the case.¹⁵⁴

Implication 4: Although jurors may not be as susceptible to spin as some believe, it is true that some combinations of personality traits correlate with how jurors will vote. This suggests that voir dire shapes juror outcomes in significant ways. This includes situations in which voir dire is allowed, and attorneys may root out characteristics that matter for their case. And it also applies in courts that limit or almost completely eliminate voir dire, so that the jury is a random sample that could be, for a variety of reasons, a group that is prone to decide the case on preformed beliefs.

Implication 5: Facts are king. Although many studies focus on extrajudicial influences on juries, there is reason to believe the strength of the evidence is the chief predictor of case outcome;¹⁵⁵ the findings here suggests the same. At a very practical level, this suggests that attorneys like McGinn and Simon who believe you win cases through careful case selection, discovery, and spending time preparing outside the courtroom are likely right. As McGinn wrote, “There [is] no magic oratory, special power suit, or precise hand gestures that . . . make[s] me a great trial lawyer. It [is] all in how I prepared my cases.”¹⁵⁶

¹⁵¹ Diamond & Rose, *supra* note 6, at 278; Hans, *supra* note 86, at 41.

¹⁵² Diamond, *supra* note 35, at 742–43.

¹⁵³ Campbell et al., *supra* note 14, at 24.

¹⁵⁴ *See id.*

¹⁵⁵ Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1, 13 (1987).

¹⁵⁶ MCGINN, *supra* note 91, at 44.

Spend one-hundred hours in investigation and development for every hour in court.¹⁵⁷

Implication 6: Relatedly, if facts matter that means discovery matters. And it matters more than spin at trial. Attorneys win cases by building up the factual story. They cannot turn a poor case into a good one with eloquence or belief mirroring.

Implication 7: Attorneys should be particularly careful when relying on demographic information, or even on answers to voir dire questions. The pre-conceived belief that conservative jurors are bad for plaintiffs was not borne out, nor was the view that language and pandering would easily sway those that reject science and value faith over facts. In general, predictions about what characteristics will matter in a case must be done on a case by case basis. There were only a few traits that were predictive across cases, and the size of those effects was minimal.

CONCLUSION

Jurors are more lion than lemming. Framing a case so that it mirrors a juror's personal views does not ensure that the juror will agree with the party who presented the frame. Similarly, jurors can look past case framing that conflicts with their own beliefs and decide a case on the facts. Likewise, jurors do not make up their minds when they are presented an opening statement that mirrors their beliefs. Instead, they have the ability to review facts presented after the opening statement and decide the case on those facts. Although belief mirroring will not manipulate jurors, there is evidence that some beliefs held by jurors can be predictive of how they will vote in cases. In particular, conventional wisdoms that conservative jurors are less likely to find liability found robust support in this study. Voir dire presents opportunities for attorneys to exploit this information. It also presents opportunities for courts to ensure impartial juries. Finally, if facts are king, then attorneys should spend the majority of their time building the best factual case they can. Eloquence and belief mirroring will not redeem a factually deficient case.

¹⁵⁷ *Id.* at 43.