

Using Social  
Science on Appeal  
(or How to Bring  
the Court Back to  
Reality)

by: Joseph Doyle and Anna Stuart

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	2
Using Social Science On Appeal (Or How To Bring The Court Back To Reality) .....	4
I. The basics.....	5
II. What you can and can't do with social science .....	6
III. Eyewitness identifications.....	7
IV. The reasonable-person standard.....	11
V. Invoking <i>Miranda</i> .....	15
VI. False Confessions.....	18
VII. Racial Injustice in the Courtroom: A Violation of the Racial Justice Act of 2020? ....	20
A. Assembly Bill No. 2542: The Racial Justice Act of 2020 .....	20
B. Judicial Bias .....	22
C. Provocative act murder .....	22
D. Use of the phrase "Common Sense" .....	23
VIII. Developmental science and juveniles .....	24
A. Juveniles and <i>Miranda</i> Warnings.....	26
1. Proper advisement of a juveniles <i>Miranda</i> rights .....	26
2. A juvenile's knowing and intelligent waiver of their <i>Miranda</i> rights.....	27
3. Racial disparities and the valid <i>Miranda</i> waiver .....	27
4. Violation of the right to silence .....	27
B. Improper interrogation techniques involving juveniles .....	28
1. Using false information to elicit information from juveniles [e.g., use of the Reid Technique of interrogation] .....	28

**TABLE OF CONTENTS (CONTINUED)**

2. Juveniles and false confessions .....29

3. Juveniles and reckless indifference ..... 30

IX. Homelessness, self-defense, and imperfect self-defense in homicide cases .....30

X. Police use of force: how much is too much? .....31

XI. Dependency .....33

    A. Permanency .....33

    B. Sibling Relationship Exception.....33

    C. Impact of COVID-19.....34

XII. Sources for further research .....34

*Using Social Science on Appeal (or How to Bring the Court Back to Reality)*  
by Joseph Doyle and Anna Stuart

If you've been handling appeals for a while, you've probably lost cases where the court said something like, "Oh, a reasonable person would have felt free to leave"<sup>1</sup> or "The defendant's rap lyrics about 'makin' these scrapas bleed' was not unduly prejudicial"<sup>2</sup> or "We presume the jurors followed the court's limiting instructions with respect to the [super-prejudicial] character evidence."<sup>3</sup> And after banging your head on your keyboard for a while and complaining to friends, partners, colleagues, and anyone else who would listen, you may have blurted out something like, "*Says who?!*"

Well, that's what this article is about. It's about who says what's prejudicial. Who says how jurors behave. Who says what reasonable people think. In short, it's about who says what's true. Legal argument is in many ways merely armchair psychology. It's just proposition after proposition about what people think and how they behave. And all too often, courts—and we as practitioners—rely just on intuition or personal beliefs to say how some purportedly reasonable person would act or what a juror of average disposition would do in a given set of circumstances.

But why would our intuitions be correct? Because we went to law school? Shockingly enough, lawyers and judges are fallible, and our intuitions are often wildly off-base. Take, for example, the recently litigated issue in *People v. Lemcke* (2021) 11 Cal.5th 644: the probative value of an eyewitness's confidence statement (e.g., "I'm sure that's the shooter."). Intuitively, if someone says they are confident in their identification, then it would make sense that their identification is more likely to be accurate. But that intuition is way off: confidence statements have almost zero correlation to accuracy. (*Id.* at 665.) And while we may think ourselves better than most people at recognizing the fallibility of eyewitness testimony, in general, lawyers and judges are no better at evaluating eyewitness testimony than non-lawyers.<sup>4</sup>

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<sup>1</sup> *People v. Kopatz* (2015) 61 Cal.4th 62, 82 ("[I]t is clear that a reasonable person in defendant's situation would have believed he was free to leave at any time and to terminate the interview.").

<sup>2</sup> *People v. Zepeda* (2008) 167 Cal.App.4th 25, 34-35.

<sup>3</sup> *People v. Homick* (2012) 55 Cal.4th 816, 866-867 ("We presume that jurors comprehend and accept the court's directions. [Citation.] We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.").

<sup>4</sup> Leverick, *Jury Instructions on Eyewitness Identification Evidence: A Re-evaluation* (2016) 49 Creighton L. Rev. 555, 562, fn. 56, citing Wise & Safer, *What US Judges Know and Believe About Eyewitness Testimony* (2004) 18 Applied Cognitive Psychol. 427, 432; Magnussen et al., *What Judges Know About Eyewitness Testimony: A Comparison of Norwegian and US Judges* (2008) 14 Psychology, Crime & L. 177, 181; Wise et al., *A Comparison of Chinese Judges' and US Judges' Knowledge and Beliefs About Eyewitness Testimony* (2010) 16 Psychol., Crime & L. 695, 708; see also

The reality is that lots of arguments we make—and lots of the opinions that come out of the courts of appeal—rest on verifiable premises. Data can confirm or deny these premises, so what we hope to do with this article is to encourage the use of social science to do just that: to confirm or deny what the courts say everyday. And in so doing, we hope to highlight a few areas where the research is particularly helpful for our clients and where we may be able to get some good results.

In this article, we'll cover social science as it relates to eyewitness identifications; invocations under *Miranda v. Arizona* (1966) 384 U.S. 436; false confessions; racial justice; brain development and youth; homelessness and self-defense; police use of force; and dependency. But first, we'll explain how to incorporate social science into your briefs.

## I. The basics

Let's start with a little history lesson. Back in the early 20th century, Oregon capped the number of hours that women could work “in any mechanical establishment, or factory, or laundry” to ten hours per day. (*Muller v. Oregon* (1908) 208 U.S. 412, 416-417.) A gentleman named Curt Muller flouted this law by requiring the female employees at his laundromat to work longer than ten hours per day (a real hero, Mr. Muller). (*Ibid.*) As a result, Mr. Muller was charged and convicted of violating the Oregon law.<sup>5</sup> (*Ibid.*)

Well, Mr. Muller and his attorney did what any of us would have done had our client been charged with such a thing. He challenged the constitutionality of the law. And the case went all the way to the Supreme Court, where Mr. Muller argued, under *Lochner v. New York* (1905) 198 U.S. 45, that *no one* can tell anyone else how many hours a day they can work. (*Muller, supra*, 208 U.S. at pp. 418-419.)

On the other side of the issue was Louis Brandeis, who himself would later join the Supreme Court. Mr. Brandeis submitted a brief in which he argued not merely that the law was constitutional based on some legal principle contained in our founding documents. Rather, he submitted a lengthy brief containing, “extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization.”<sup>6</sup> (*Muller, supra*, 208 U.S. at p. 419, fn. 1.) The

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Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts* (2006) 20 Applied Cognitive Psychol. 115, 120.

<sup>5</sup> His penalty for running a laundromat on forced labor? A whopping \$10.

<sup>6</sup> It's tough to find someone to root for in this case.

court cited these documents as evidence that women were different than men and thus the legitimate subjects of state regulation.<sup>7</sup> (*Ibid.*)

We bring this case up not because we're impressed with the court's legal reasoning (we're not), but because this is the origin of the so-called Brandeis brief. Louis Brandeis's brief is the most famous example of a lawyer bringing social-scientific facts into an appellate brief and getting the court to rely on those facts in issuing its decision. One Court of Appeal noted almost fifty years ago that the Brandeis Brief, "which brings social statistics into the courtroom, has become a commonplace." (*Rivera v. Division of Industrial Welfare* (1968) 265 Cal. App. 2d 576, 589, fn. 20.)

But is that right? Is it all that common to bring social science into the courtroom? Well, yes and no. The *Rivera* court mentioned footnote 11 from *Brown v. Board of Education* (1954) 347 U.S. 483, 494 as just one example of courts relying on social science for certain propositions. And there definitely are areas of law where defense lawyers have made real headway with social science. We'll discuss those areas below and then get into some other areas where we might make further progress. But first let's talk about the mechanics of citing social science on appeal.

## II. What you can and can't do with social science

"[A]n appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) "It is settled that matters not presented to the trial court and hence not a proper part of the record on appeal will not be considered by an appellate court." (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 711.) Thus, a "defendant cannot challenge a lower court's ruling and then 'augment the record' with information not presented to (or withheld from) the lower court." (*People v. Brown* (1993) 6 Cal.4th 322, 332.)

Given these principles, you're probably thinking: Mr. Doyle and Ms. Stuart, that highly persuasive social science data is not in the appellate record and was not before the trial court – how on earth do we mention it in our briefing? Can we just throw it in there? Have you two heard of judicial notice?

To help answer those questions, and before you put finger to keyboard, we urge you to first consider this question: what do you want the Court of Appeal to do with the social science information? Do you want the court to use the information to **enhance the persuasiveness** of your argument or do you want it to take the information as a **supporting fact** to find in

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<sup>7</sup> This is a belief the majority of the Supreme Court sadly still seem to hold.

your client's favor? Because that's roughly the difference between what you can and can't use in your brief.<sup>8</sup>

For example, an argument we've all made before is "a reasonable person would not have felt free to terminate appellant's encounter with the police." That's a verifiable statement, or at least one subject to empirical study. And the results of those studies are not specific to your client. That is, to say "a reasonable person would not have felt free to leave" is not specific to your case. You're only talking about people generally, not your client in particular. That's fair game on appeal. If, on the other hand, you wanted to argue that your client in particular had a reason to behave as he did, that would be case specific, and you would need those facts (so far as they're relevant anyway) established in the trial court. But as is shown below, courts are very amenable to empirical research on how people in general behave, so you do not need those sorts of studies to have been introduced in the trial record.

In this article, our focus will be on the persuasive force of social science data. Sometimes the line between case-specific facts and general facts will be blurry, and you'll need to get creative in order to avoid crossing the impermissible line into relying on such data as a fact. And in those cases, you may want to consider relying on judicial notice (though even that is tough).<sup>9</sup> But as a general matter, the courts are wide open to empirical research, and you should feel free to use it.

### III. Eyewitness identifications

The best place to start is with the one area of criminal law where the courts (and practitioners) have already found themselves amenable to scientific studies: eyewitness

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<sup>8</sup> This point is born out by how the courts use social science in their opinions and will be further demonstrated below. One can see the easily distinction at play, however, by comparing, for instance, *Lemcke, supra*, 11 Cal.5th 644, with its detailed discussions of social-science research about the general reliability of eyewitness testimony with *Wilkinson v. Bay Shore Lumber Co.* (1986) 182 Cal.App.3d 594, where the court "decline[d] to take judicial notice of the factual data on this issue presented in appellant's opening brief." (*Id.* at p. 598, fn. 3.) There, the issue was whether dry rot in wood could be cured by "proper cutting, curing, and storing." (*Ibid.*) No evidence was introduced at the trial level, but appellant apparently tried to sneak it in through the opening brief. The court "[did] not agree that the principles established in the 'Brandeis Brief' and accepted by the Supreme Court in *Muller v. Oregon* (1908) 208 U.S. 412" applied to appellant's case. (*Ibid.*)

<sup>9</sup> See Evid. Code, §§ 450-460. In general, a court can take judicial notice of the law. Thus, statutes, regulations, and cases law can be cited. Under this concept, a court can cite secondary legal material, such as treatises like Witkin or CEB books. Law review articles falls within this category. The court can take judicial notice of things that are common knowledge, easily verifiable, or not subject to reasonable dispute, such as the definitions of words, that Paris is in France, etc. In contrast, a court cannot take judicial notice of something that is not a law or an official act by a government body, or not common knowledge or undisputable facts. This prohibition includes newspaper articles (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1147, fn. 5), and information on the internet (*Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 279, fn. 12). Although it is becoming more commonplace to see an appellate court including such otherwise impermissible reference to bolster an opinion, it not proper for the parties to move to do this.

identifications. In the 1970s, scientific research into the problems with eyewitness identifications blossomed, and the courts noticed. In *People v. McDonald* (1984) 37 Cal.3d 351, 369, for instance, the Supreme Court noted the proliferation of “empirical studies of the psychological factors affecting eyewitness identification.” (*Id.* at p. 365.) The court even said that the idea that eyewitness testimony is unquestionably trustworthy is “at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable.” (*Ibid.*) And this empirical evidence led to the court permitting expert testimony on the fallibility of eyewitness identifications. (*Id.* at p. 369.)

Since then, the Court has continued to cite scientific studies in eyewitness-identification cases. In *People v. Sánchez* (2016) 63 Cal. 4th 411, for instance, Justice Liu wrote a concurrence discussing the problems with the eyewitness-certainty instruction. (*Id.* at p. 488.) He relied on an Oregon Supreme Court case that cited numerous scientific studies. (*Id.* at p. 496.) These studies established that:

- Eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification.<sup>10</sup>
- Jurors tend to be unaware of the generally weak relationship between confidence and accuracy and are also unaware of how susceptible witness certainty is to manipulation by suggestive procedures or confirming feedback.<sup>11</sup>
- Jurors consistently tend to overvalue the effect of the certainty variable in determining the accuracy of eyewitness identifications.<sup>12</sup>

Justice Liu’s concurrence is a perfect example of how courts and attorneys can use scientific research to get at the truth. Here, there was an intuitive proposition: someone who is confident is more likely right. The court—largely through the hard work of defense lawyers bringing these issues forward—saw that that intuitive proposition was demonstrably false. Defense attorneys throughout the country and at both the trial and appellate levels started raising these issues, and the courts slowly started listening. New Jersey, Connecticut, Oregon,

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<sup>10</sup> See, e.g., Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification* (1979) 64 J. Applied Psychol. 440, 446; Michael R. Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions* (2009) 33 Law & Hum. Behav. 194, 194 (summarizing prior research).

<sup>11</sup> See, e.g., Tanja R. Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts* (2006) 20 Applied Cognitive Psychol. 115, 120 (finding that only 38 percent of jurors surveyed correctly understood the relationship between accuracy and confidence and only 50 percent of jurors recognized that witnesses’ confidence can be manipulated).

<sup>12</sup> *State v. Lawson* (Or. 2012) 291 P.3d 673, 704–705; see *State v. Ledbetter* (Conn. 2005) 881 A.2d 290, 311–313] [reviewing research showing that “a weak correlation, at most, exists between the level of certainty demonstrated by the witness at the identification and the accuracy of that identification” and that “this factor seems to have a significant impact on the [jury’s] reliability analysis”].

and many other states were among those that started chipping away at the damaging procedural rules that were permitting bad identifications and ultimately false convictions.<sup>13</sup>

This litigation ultimately led to *Lemcke, supra*, 11 Cal.5th 644, where—while not necessarily a victory for the clients themselves—the Supreme Court recommended a revision to the certainty instruction specifically to reflect the scientific research showing that the instruction is misleading. (*Id.* at p. 669.) The Court also banned the use of the instruction until a new instruction has been crafted. (*Ibid.*)

So where do we go from here? There are a couple of options. First, when you’re talking prejudice and the court wants to say, “Well, counselor, the witnesses IDed your guy as the shooter, so your little evidentiary issue is harmless,” then point out all the things that make the identification unreliable:

- the passage of time between the witness’s exposure to the subject and the identification,<sup>14</sup>
- witness stress at the time of the exposure,<sup>15</sup>
- duration of the exposure,<sup>16</sup>
- distance from which the witness observed the suspect,<sup>17</sup>
- weapon focus,<sup>18</sup> and
- cross-racial bias.<sup>19</sup>

It’s intuitive that these factors can affect the reliability of an identification, and most of us are already making these arguments in our briefs. But these are areas where the science can strengthen our intuition: We know, for instance, that being further away from someone makes it harder to identify them. But Geoffrey Loftus and Erin Harley explain how that

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<sup>13</sup> *Lawson, supra*, 291 P.3d 673; *Ledbetter, supra*, 881 A.2d 290; *State v. Henderson* (2011) 27 A.3d 872, 889.

<sup>14</sup> See, e.g., Deffenbacher et al., *Forgetting the Once-Seen Face* (2008) 14 J. Experimental Psychol. 139, 147-148.

<sup>15</sup> Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory* (2004) 28 Law & Hum. Behav. 687, 694 (analyzing 27 studies).

<sup>16</sup> See Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence* (2003) 94 British J. Psychol. 339, 345 tbl. 1; see also Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies* (1986) 100 Psychol. Bull. 139, 140, 150 (conducting a meta-analysis of 128 existing studies involving nearly 17,000 subjects and finding a linear trend in the relationship between exposure duration and identification accuracy).

<sup>17</sup> See Loftus & Harley, *Why Is It Easier To Identify Someone Close Than Far Away?* (2005) 12 Psychonomic Bull. & Rev. 43, 63, cited in Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later* (2009) 33 Law & Hum. Behav. 1, 9-10; see also Meissner et al., *Person Descriptions as Eyewitness Evidence* (2007) 2 The Handbook of Eyewitness Psychology 1, 3.

<sup>18</sup> See Steblay, *A Meta-Analytic Review of the Weapon Focus Effect* (1992) 16 Law & Hum. Behav. 413, 420; O’Rourke et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations* (1989) 13 Law & Hum. Behav. 385, 392.

<sup>19</sup> See Meissner & Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces* (2001) 7 Psychol., Pub. Pol’y & L. 3, 15, 21.

works. In their article, the researchers dive into the brain research that shows how we perceive faces at a distance and why our perceptions after a certain point are not reliable. And perhaps most usefully for our purposes, they give visual examples we can incorporate into briefs. (Loftus & Harley, *supra*, 12 Psychonomic Bull. & Rev. 43 at p. \*3.)

For instance, they use pictures of Julia Roberts at various sizes to show how her face would be seen at various distances:

5.4 feet



43 feet



172 feet



This is how Julia Roberts would look at those distances if the page is viewed at a distance of twenty-two inches. So if the evidence against your client was an eyewitness who said he saw something from 172 feet, you can use this article to show the court what someone seen from that distance would actually look like. As in, “Sure, judge, you can try to discount my prejudice argument by relying on the eyewitness ID...but how probative is that ID when you consider what a witness can actually see at 172 feet?”

Would this be improper? No! You’re just doing what you would normally do, which is attacking the probative value of the state’s evidence. You might ordinarily say, “While the

eyewitness did identify appellant as the robber, the identification was from a hundred feet away and it was therefore not very probative.” Now you can add, “It was not very probative, because as the court can see, a face viewed from one hundred feet away is hardly visible to the naked eye.” You can take this approach with any of the articles cited in the footnotes here.<sup>20</sup>

The second thing we can do is to specifically attack in-court identifications. This will likely require objections from trial counsel, but multiple courts across the country have banned in-court identifications that were not preceded by a non-suggestive out-of-court identification.<sup>21</sup> Two of these courts relied on a law review article that used the scientific research on eyewitness identifications to show the inherent suggestiveness of in-court identifications. The courts (after the defense attorneys made the arguments) then found that in-court identifications, which are in fact inherently suggestive, violate due process if they have not been preceded by a non-suggestive out-of-court identification. This may be an area we could push in California. And in any case, eyewitness-identification litigation can provide a model for how to tackle other areas of the law using social science.

#### **IV. The reasonable-person standard**

One time, the Supreme Court was hearing argument in a Fourth Amendment case. The issue was how long the police could hold someone during a traffic stop while they waited for the drug dogs to arrive. And during argument, Chief Justice Roberts made a bit of a gaff by revealing that he himself had never been pulled over by the police. He said:

You may have answered this already, but I’m not sure. Can [the officer] ask for the registration? Usually, people have told me, when you’re stopped, the officer says, License and registration.<sup>22</sup>

Laughter ensued.<sup>23</sup>

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<sup>20</sup> The use of visual aids in appellate briefing is a fascinating topic. Courts occasionally use them. (See, e.g., *People v. Dominguez* (2021) 66 Cal.App.5th 163, 171-172; *Grayson v. Schuler* (7th Cir. 2012) 666 F.3d 450, 452.) Attorneys often advocate their use. (See, e.g., Dubose, *More Than Words Can Say: Using Visuals in Appellate Briefs* (2015) 53 Houston Lawyer 26.) And there was recently a great discussion of the topic on the CADC message board. There are a lot of reasons to use visuals, and some potential traps for the unwary (for instance, with the Julia Roberts example, you have to make sure the image size is correct so you don’t misrepresent the point). But unfortunately, all that is a bit outside the scope of this article.

<sup>21</sup> See, e.g., *State v. Dickson* (Conn. 2016) 141 A.3d 810, 822 (holding that courts must examine an identification’s accuracy before allowing a witness who has not previously identified the defendant to make an identification in court); *Commonwealth v. Crayton* (Mass. 2014) 21 N.E.3d 157 (holding that a first-time in-court identification is an “in-court showup” and may only be admitted with “good reason”); *City of Billings v. Nolan* (Mont. 2016) 383 P.3d 219 (holding a first-time in-court identification of a defendant was impermissibly suggestive).

<sup>22</sup> Transcript at oral argument, *Rodriguez v. United States* (2015) 575 U.S. 348.

*Har har, the Chief Justice has never had a bad interaction with the police! Classic!*

And sure, it's sort of funny. Until you realize that Fourth Amendment jurisprudence comes down to the hunches of a bunch of overeducated white guys, most of whom have federal law enforcement experience but few of whom have ever had to represent a client in court. Then you think, "Yeah, this explains a lot about the criminal justice system."

In any case, the Fourth Amendment and the reasonable-person standard in particular are areas ripe for arguments based on actual data. And courts have shown themselves to be at least somewhat amenable to hearing them. At the Supreme Court, for instance, in oral argument for *Brendlin v. California* (2007) 551 U.S. 249 in 2007, Justices Breyer and Scalia said the following:

Breyer: So what do we do if we don't know? I can follow my instinct. My instinct is he would feel he wasn't free because the red light's flashing. That's just one person's instinct. Or I could say, let's look for some studies. They could have asked people about this, and there are none . . . . What should I do? . . . Look for more studies?

...

Scalia: Maybe we can just pass until the studies are done?<sup>24</sup>

They didn't pass it until more studies were done (though they did come out the right way in *Brendlin*). But studies have now been done, and they show just what we as defense attorneys would expect: People often *don't* feel free to terminate a purportedly consensual encounter with the police.

Take a study published in the Yale Law Journal.<sup>25</sup> There the authors conducted an experiment with two sets of people. For one set (students who had volunteered to be part of a study but who did not know the nature of it), the researchers sat each participant down and said that they were about to begin but before they did, they just needed to look at the participant's phone. The researchers didn't say this was mandatory. They just said they needed the participant to unlock their phone and give it to them for a few minutes.

There were 103 participants. How many do you think handed over their phones? And before you skip ahead to find out, bear this in mind: that was the other part of the study. They asked another group of participants the following:

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<sup>23</sup> *Ibid.*

<sup>24</sup> Transcript of oral argument, *Brendlin*, *supra*, 551 U.S. 249.

<sup>25</sup> Sommers & Bohn, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance* (2019) 128 Yale L.J. 1962.

Imagine that you were seated in a psychology lab, similar to the one you are in now, and an experimenter came in and said to you: “Before we begin the study, can you please unlock your phone and hand it to me? I’ll just need to take your phone outside of the room for a moment to check for some things.”

The participants were then asked to judge how likely it was that a reasonable person would hand over their phone.

And you know what happened? Almost everyone who was asked to hand over their phone did it (100 out of 103).<sup>26</sup> But the people asked to predict whether a reasonable person would hand over their phone radically underestimated compliance (by as much as 83%<sup>27</sup>).

The reason for this is what the researchers call an empathy gap: People have a hard time envisioning themselves in the emotional state of the person being asked to hand over their phone. As you sit in your office or home reading this article, for instance, you are (hopefully) relaxed, calm, and in what the researchers would call a relatively “cool” emotional state. But if someone asks you, in public and without warning, to hand over your phone so they can inspect it, your emotional state will change. You’ll become stressed or anxious. You may sweat. Your blood pressure may rise. But right now, in your home, it may be hard to put yourself in that place mentally unless you really try to. That’s why it’s so hard to predict how you’ll behave under a different set of emotional circumstances.

So this study is helpful for two reasons: First, the sheer numbers show that as a matter of fact, most people will feel like they have to comply with requests from authority. The study demonstrates this by using both the experiment and actual statistics on police-civilian interactions in Los Angeles. This data—taken from one six-month period in 2006—showed that the Los Angeles Police Department asked more than 16,000 people for consent to search their car.<sup>28</sup> Ninety-nine percent agreed.

The second reason the study is helpful is to prime judges and research attorneys for their own biases. Even if the court is not going to be swayed by the fact that 99% of motorists will consent to a police search (I mean, 99%...that’s an astounding number), the court may be willing to check its own biases in considering your client’s case. That is, the justices may be more willing to imagine the stress of an unexpected police interaction than if they were unaware of these studies.

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<sup>26</sup> *Id.* at p. 1987.

<sup>27</sup> *Ibid.* Compliance predictions were done on a one through seven scale (one being total non-compliance, seven being total compliance, and the numbers in between being gradations of willingness). So the results were statistically a little more complicated than just saying, “How many people out of this group will comply.”

<sup>28</sup> *Id.* at p. 1988.

And indeed, courts are considering these studies. In *People v. Linn* (2015) 241 Cal. App. 4th 46, for instance, the First District Court of Appeal noted the “recent empirical research suggesting that a significant number of people do not feel free to leave when approached by police, and even less so when police assert even mild forms of authority.” (*Id.* at p. 68, fn. 10.) The studies the court referred to showed that in most cases, people just don’t feel free to leave when approached by the police.<sup>29</sup> You should cite these studies liberally.

A related example from a recent brief we’ve reviewed used extra-record information in a Fourth Amendment case where the People tried to justify the officer’s reasonable suspicion in part on the defendant’s stutter.

The facts: Defendant is approached by officers and appears nervous. Defendant is asked questions and stutters when responding. The trial court finds the subsequent personal search was constitutional because the nervousness provided the requisite reasonable suspicion. But should the nervousness and stuttering responses of the defendant be a factor at all? No.

Stuttering is a covered disability under The Americans with Disabilities Act of 1990. (See *Sterling v. McKesson Automation Inc.* (2006 U.S. Dist. LEXIS 69159); *Andresen v. Fuddrucker, Inc.* (2004 U.S. Dist. LEXIS 25373.)) Stuttering is not caused by “nervousness or stress,” but by myriad factors including physiological, neurological, and genetic issues. (See McCullough, Debra Cohen Ph.D., “When Police Encounter Persons Who Stutter.” The Stuttering Foundation, 2013 Newsletter.) Thus, a suspect’s stutter, quite possibly the result of a physical disability, should not be used to support reasonable suspicion of criminal activity.

Law enforcement and thus district attorneys state-wide have a proven tendency to use the same justifications over and over as the basis for a reasonable suspicion or probable cause argument. As can be seen with the above example, it may be worthwhile to research whether the justifications used in a given case actually has a basis in reality. For example, does the failure to make eye-contact support the conclusion someone is lying or is there a cultural dimension to consider? Can running away from officers be fairly used to demonstrate guilt or is it more likely that the individual has a legitimate reason to fear police

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<sup>29</sup> See Note, *Casual or Coercive? Retention of Identification in Police-Citizen Encounters* (2013) 113 Colum. L.Rev. 1283, 1313 [noting studies such as one in which half the respondents indicated that they would feel either not free to leave or less than somewhat free to leave in a mere conversation with police on a sidewalk and concluding, “[t]hus, it appears that any interaction with a police officer, even at the lowest level of intrusiveness, makes most citizens feel that they are not free to leave”]; Smith et al., *Testing Judicial Assumptions of the “Consensual” Encounter: An Experimental Study* (2013) 14 Fla. Coastal L.Rev. 285, 319–320 [noting that while nearly three-quarters of the sample used in the study perceived the encounters with sworn, armed security as consensual, 45 percent also believed they had no right to walk away or ignore the security officers’ requests]; see also Ross, *Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment* (2012) 18 Wash. & Lee J. Civil Rts. & Soc. Just. 315, 331–339 [discussing empirical studies].

contact? You are encouraged you to research the first question, but case authority likely helps provide one answer to the second.<sup>30</sup> As can be seen, therefore, Fourth Amendment issues are ripe for the use of social science data.

## V. Invoking *Miranda*

How many times have you had a *Miranda* issue where the client, after an initial *Miranda* waiver, tries to invoke, but the cops just plow on through and get a confession? And when you argued that your client made a valid invocation that the police should have honored, the court shot you down by saying, “Well, it was ambiguous.”

Happens all the time. So let’s talk about *Davis v. United States* (1994) 512 U.S. 452, which is a leading case on ambiguous invocations. There, Mr. Davis had been playing pool on a Navy base. He bet thirty dollars on a game against a fellow sailor named Shackleton and won, but Shackleton refused to pay. Davis beat him to death with a pool cue.<sup>31</sup>

When he was being interviewed by the police about the murder, Mr. Davis at one point said, “Maybe I should talk to a lawyer.” One might think this would constitute an invocation of his right to counsel. The Supreme Court, however, disagreed. They said, “Although a suspect need not speak with the discrimination of an Oxford don . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” (*Davis, supra*, 512 U.S. at p. 459.) The court found that, “Maybe I should talk to a lawyer” did not meet that standard.

Now, in all fairness to the court, the agents interviewing Mr. Davis asked him immediately if he was requesting a lawyer, and they said they would stop if he wanted one. He said he didn’t want a lawyer and then continued with the interview. So Mr. Davis wasn’t exactly diligent about pursuing his right to an attorney. But unfortunately, this case has spawned many others in which seemingly clear requests for an attorney have been glossed over.

Let’s take a somewhat recent example: *People v. Shamblin* (2015) 236 Cal.App.4th 1. There, Mr. Shamblin was being questioned about a decades-old murder, and during the interview, he said, “I think I probably should change my mind about the lawyer now. I, I need advice here. Don’t you guys think I need some advice here? I think I need some advice here.” The

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<sup>30</sup> See e.g., *United States v. Brown* (9th Cir. 2019) 925 F.3d 1150 at page 1156, referencing Justice Stevens concurring and dissenting opinion in *Illinois v. Wardlow* (2000) 528 U.S. 119, and noting how the recent increase in data on police practices can “inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise.”

<sup>31</sup> And the Supreme Court had the nerve to begin the opinion with: “Pool brought trouble -- not to River City, but to the Charleston Naval Base.” Can we at least act like we’re taking this seriously, guys?

Fourth District Court of Appeal found that this was an ambiguous request for counsel. Why was it ambiguous? Because Mr. Shamblin used “language that is conditional (‘should’) and equivocal (‘I think’ and ‘probably’).” (*Id.* at p. 20.)

The reason this opinion probably bothers you so much is that it conflicts both with our everyday experience as speakers of the English language and with *Davis*. The standard under *Davis* is whether “a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” (*Davis, supra*, 512 U.S. at p. 459.) So the way the courts are meant to measure ambiguity is by considering how a reasonable police officer would understand the request. I don’t see how a reasonable police officer would necessarily differ from a reasonable person, so essentially this is a reasonable-person test. How would a reasonable person understand the suspect’s statements? And this is where the social science comes in.

There is a lot of research out there about how people use language. Take the following example: You go to a restaurant. The server asks what you would like to order, and you reply with one of the following:

- “Can I have the salad?”
- “I think I’ll go with the salad.”
- “I should have the salad.”

If, after a half hour or so, you flagged down the server because you had not gotten your salad and the server replied, “Oh, did you want to *order* the salad? Your statement was ambiguous,” you’d probably tell the server where to go and how to get there.

And you would be right! It would be preposterous to call those ambiguous requests for salad. To claim not to understand those statements is to be obtuse in the extreme. But because the courts occasionally lean that way, let’s dive into why.

In linguistics and the philosophy of language, there is a difference between direct and indirect speech acts. (Note, *Linguistic Estoppel: A Custodial Interrogation Subject’s Reliance on Traditional Language Customs when Facing Unknown Expectations for Legally Efficacious Speech* (2021) 46 B.Y.U.L. Rev. 1675.) A direct speech act is what it sounds like: a direct request for something (i.e., “Bring me the salad”). An indirect speech act is an unambiguous request accomplished through an indirect statement (i.e., “Can I have the salad?”). Also relevant here are performative speech acts, speech acts that by their very nature accomplish an often legal task (i.e., “I hereby order the salad”). There are obviously differences among the three, but they are all entirely valid ways of communicating, and none is necessarily ambiguous. Deciphering the meaning of an indirect speech act may require understanding the

“conversational implicature, the reading into spoken discourse of a meaning beyond the literal meaning of the words used in the utterance.” (*Id.* at 1684, citing Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation* (1993) 103 Yale L.J. 259, 267-68.) But that’s not an altogether difficult thing to do: you just need to consider the context the speaker is using.

The problem the law presents here is that interpreting “conversational implicature” requires the cooperation of the parties to the conversation. Basically, if I’m speaking to someone who comes from a different area of the country than I do, we may have different ways of speaking, but we’ll be able to understand each other if we want to and if we make a little effort. You just have to be a cooperative speech partner (i.e., be open to the idea that sometimes people use indirect speech acts). The law here, however, is not a cooperative speech partner, so courts will at times take unambiguous requests and call them ambiguous, not because they are in fact ambiguous, but merely because they are indirect. So as advocates, we need to use this research to remind the courts that there are all sorts of ways of talking, and being indirect is not necessarily the same thing as being ambiguous.

A good wrinkle with this argument was introduced in an article by Janet Ainsworth: Professor Ainsworth is one of the best researchers on applying linguistics to the law, though her work is seldom cited in California.<sup>32</sup> In her article, she talks about how people from various backgrounds talk to authority figures. (Ainsworth, *supra*, 103 Yale L.J. 259.) Women, people of color, and those from socio-economically disadvantaged backgrounds, in particular, at times use what Ainsworth calls the “female register,” a pattern of speaking that is not exclusively used by females, but one that reflects a less empowered approach to discourse. Ainsworth is clear that not all women use it, and men sometimes use it, too. But it is a way of speaking that reflects a power imbalance.

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<sup>32</sup> While seldom cited in California, at least one state court has used Professor Ainsworth’s research to interpret a police officer’s statements to an in-custody defendant. In *State v. Brown* (Kan. 2021) 486 P.3d 624, 657, the defendant was in custody, though he had not been read *Miranda*. (*Ibid.*) The officer told the defendant not to talk to him about the incident but also said, “I’m assuming you know what this is about” and “I’m assuming you were expecting us.” (*Ibid.*) And when the defendant answered, “No,” the officer said, “Okay.” (*Ibid.*)

The Kansas Supreme Court reviewed the body-cam footage and, using Professor Ainsworth’s article, noted how the officer’s intonation revealed he was actually interrogating the defendant. (*Id.* at p. 658.) The officer’s tone of voice showed that he was not merely making a declarative statement, as the prosecution had argued, but was rather asking a question. (*Ibid.*) His use of “okay” after the defendant’s answer was similarly meant to encourage the defendant to keep talking. (*Id.* at pp. 658-659.) The Court held that the statements therefore constituted custodial interrogation. (*Id.* at p. 660.) So while Professor Ainsworth has seldom been cited by California courts, her research provides fertile ground for arguments involving *Miranda* issues.

The female register is characterized by five ways of speaking: hedges (like “maybe” or “I think”); tag questions (“right?” or “do you think?”); modal verb usage (“could be,” “might be,” or “may be”); the absence of imperatives (“Could you call my lawyer” versus “Call my lawyer”); and rising intonation (“I need a lawyer” as a declarative versus “I need a lawyer?” with an uptick at the end to indicate a question). Professor Ainsworth shows that power imbalances affect the way people speak, so people who are not in positions of power (such as suspects being interviewed by the police) are more likely to adopt the indirect speech patterns of the female register.

Professor Ainsworth (who, incidentally, was writing before *Davis* came out) suggests a revision to *Miranda* that explicitly recognizes that different people speak differently and that incorporates these different registers. While that would be ideal (and perhaps it’s something we should argue in the right case), the law already allows us to use her research to argue for suppressing statements after what might otherwise appear to have been an ambiguous invocation. The law, after all, doesn’t say the suspect must communicate his or her invocation in the register of the officers conducting the interview. While that is essentially the assumption the courts use (i.e., that the suspect must invoke as would a white male in a position of dominance), it’s not the law. And we can use research like Professor Ainsworth’s to show the courts that people use indirect words to make unambiguous requests. Ultimately, that will make it easier for us to argue that an objectively reasonable police officer would understand that a suspect who says, “I think I should talk to a lawyer?” means, “Get me a lawyer now.”

There is more on *Miranda* and invocations in the section on juveniles below.

## **VI. False Confessions**

A confession can be the most devastating piece of evidence against a criminal defendant. Surveillance videos are often grainy. DNA can occasionally be explained by transference. But a confession is bulletproof: Who in their right mind would confess to something they didn’t do?

Well, lots of people it turns out. Of the Innocence Project’s 364 documented DNA exonerations, 28% confessed to the crime.<sup>33</sup> That is, more than a quarter of the people later exonerated by DNA evidence confessed to something they demonstrably, unequivocally did not do. And those are just the ones we know about.

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<sup>33</sup> Note, *Promise-Induced False Confessions: Lessons from Promises in Another Context* (2019) 60 B.C. L.Rev. 1641, 1643, fn. 12.

There is a lot of science surrounding false confessions and why they happen, and to challenge the admissibility of a confession on appeal, you obviously need an objection below. But a confession is normally going to sink just about any prejudice argument you have, so if there is a confession and it looks shaky, point that out to the court. The following factors heighten the risk of a false confession:

- Threats or use of force;
- The anxiety attendant to physical confinement;
- Psychologically coercive tools of the police like interrupting the accused, ignoring the suspect's objections to the police narrative, and making up evidence;
- The promises of leniency coupled with threats.<sup>34</sup>

False confessions in fact are grouped into four different categories that explain why an innocent person would confess: stress-compliant; coerced compliant; non-coerced persuaded; and coerced-persuaded.<sup>35</sup>

In stress-compliant false confessions, the suspect has been under the physical and emotional stress of interrogation and comes to believe the only way to escape the uncomfortable position is to confess. The rationale behind confessing is to get out of the physical and emotional discomfort. In coerced-compliant false confessions, the suspect responds to promises of leniency or threats of harm by confessing. While these are not always (or even often) explicit these days, a common example would be where the interrogator says he would accept a version of the crime that was mitigated (an involuntary manslaughter for what was in actuality a premeditated murder). The suspect then rationally chooses to mitigate the future harm he believes is coming by choosing the lesser alternative.

A persuaded false confession is one where the interrogator has undermined the suspect's confidence in his own memory and has convinced the suspect that he is actually guilty. There can be further coercion (threats, promises, etc.), which would make the confession coerced-persuaded, or not. But in either case, the choice to confess is in some ways rational given that the suspect no longer believes in his own true memories of, for example, being somewhere else at the time of the crime.<sup>36</sup>

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<sup>34</sup> Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action* (1997) 74 Denv. U. L.Rev. 979.

<sup>35</sup> *Id.* at pp. 997-1001.

<sup>36</sup> Ofshe and Leo provide examples of false confessions where the accused was later exonerated. (Ofshe & Leo, *supra*, 74 Denv. U. L.Rev. at pp. 994-997.) A more recent real-world example can be found in *Promise-Induced False Confessions: Lessons from Promises in Another Context*, *supra*. 60 B.C. L.Rev. at pp. 1641-1642. *In re Elias V.* (2015) 237 Cal.App.4th 568, is a great case on involuntary confessions discussed more below.

Again, intuitively, all of these factors would make it more likely that someone would confess to something they did not do, and our intuitions here are right. We can use this research to show the court that what appeared to be a rock-solid confession actually wasn't, or to articulate why the confession was false. Essentially, as advocates, we can up our game in arguing prejudice by not just attacking the confession as false but by articulating how it came about and what sort of false confession it was. Moreover, these factors don't apply just to entirely false confessions but also to the persuasiveness of a confession generally.

## **VII. Racial Injustice in the Courtroom: A Violation of the Racial Justice Act of 2020?**

On June 8, 2020, following the murder of George Floyd, California Chief Justice Tani G. Cantil-Sakauye issued the following statement:

“I am deeply disturbed by the tragic deaths of George Floyd and others, as well as the action and inaction that led to these deaths. Justice is the first need addressed by the People in the preamble of our nation’s Constitution. As public servants, judicial officers swear an oath to protect and defend the Constitution. We must continue to remove barriers to access and fairness, to address conscious and unconscious bias—and yes, racism. All of us, regardless of gender, race, creed, color, sexual orientation or identity, deserve justice. Our civil and constitutional rights are more than a promise, a pledge, or an oath—we must enforce these rights equally. Being heard is only the first step to action as we continue to strive to build a fairer, more equal and accessible justice system for all.”

<<https://newsroom.courts.ca.gov/news/california-chief-justice-speaks-out-addressing-racism-and-bias>>

A significant area of potential when it comes to incorporating social science data into your arguments are issues of racial bias and racial injustice. One of our jobs as advocates is to give voice to those who would otherwise be silent – to ensure that all of us have the opportunity to be heard. It is, admittedly, hard to conceive of all the ways we might use social science data to spotlight racial issues in our cases including the prejudicial impact of that bias whether it is directly expressed or implicit. Accordingly, what follows are just some areas to consider from my initial foray into the research and law.

### **A. Assembly Bill No. 2542: The Racial Justice Act of 2020**

Applicable to cases in which judgment was entered since January 1, 2021, this law prohibits the state from seeking a criminal conviction or sentence on the basis of race, ethnicity, or national origin. It allows habeas petitions to be prosecuted on the basis of that prohibition,

authorizes a court that finds a violation of that prohibition to impose a remedy, and applies to adult and delinquency proceedings.

One way to perhaps heed our Chief Justice's call is to include more social science data on the impact of race in our criminal justice system, including arguments to allege violation of the Racial Justice Act.

It is hopefully not going out on a limb to suggest that racial bias in the judicial system exists. In our research, we came upon Andrew E. Taslitz's 2006 "informal essay" entitled "Wrongly Accused: Is Race a Factor in Convicting the Innocent?"<sup>37</sup> In it, Taslitz argues the following points supported by research:

- subconscious racial biases lead decision makers at various key points in the processing of a criminal case to view racial minorities, especially African-Americans, as more dangerous and less credible than whites;
- Police use more intense - and riskier - investigative techniques when having contact with black suspects;
- Those non-white suspects are more likely than white suspects to react to such pressure defensively;
- The defensive reaction leads the officers to be still more suspicious of their subject, leading them in turn to still more aggressive policing tactics;
- This escalating cycle of aggression continues until a mistaken eyewitness identification, false confession, or similar source of error results;
- Fact-finders, in turn, are more likely to conclude that such flawed evidence is in fact credible;
- "racial features trigger an unconscious process of stereotyping and selective inattention, a process rooted in racial stigma and a corresponding presumption of black criminality. This presumption is not simply that a black suspect committed a particular crime, but rather that black character is paradigmatically criminal and deceptive."

(Taslitz, *supra*, at pp. 121-133.)

Possible uses for the science:

- Fourth amendment search or seizure issues;
- Prejudice arguments: Eyewitness testimony; false confessions; *Miranda* warnings, etc.

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<sup>37</sup> Comment, *Wrongly Accused: is Race a Factor in Convicting the Innocence* (2006) 4 Ohio St. J. Crim. L. 121.

On prejudice, it is highly recommended that you review and reference this article to help persuade a reviewing court that the likelihood of a fair prosecution for a non-white defendant is demonstrably lower than for a white defendant -- because of pervasive implicit bias. I would argue that this inherently unfair process is the lens through which any prejudice discussion must be viewed. In other words, even if the trial court and counsel did everything according to the law, the defendant was still at a fundamental disadvantage based on the color of their skin. If this is true for a case where no legal error occurred, when legal error is demonstrated, the prejudicial effect may be catastrophic.<sup>38</sup>

## **B. Judicial Bias**

Do you have an argument that the judge harbored implicit or express bias during the lower court proceedings? See NOTE: *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials* (1985) 38 Stan. L. Rev. 89 [this note empirically investigates how trial judges' expectations for trial outcome might predict both (a) the judges' unintended verbal and nonverbal behavior, and (b) the verdicts returned by juries raising the question of whether there was a fair and impartial trial.]

## **C. Provocative act murder**

In Katherine N. Hallinan's "*A Deadly Response: Unconscious Racism and California's Provocative Act Doctrine*," Hallinan discusses the racial bias that surrounds the provocative act murder doctrine. With reference to multiple studies, Hallinan suggests that "the very elements of the [provocative act] doctrine lead to the conviction of minorities for provocative act murder under circumstances where similarly situated white persons would likely not be charged." (See Katherine N. Hallinan, *A Deadly Response: Unconscious Racism and California's Provocative Act Doctrine* (2010) 7 Hastings Race & Poverty L.J. 71.)

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<sup>38</sup> See also *Symposium, Wrongful Conviction: Cause and Cure: Panel Three: Race, Informant, and False Confession: Wrongly Accused Redux: How Race Contributes to Convicting the Innocent* (2008) 37 Sw. L. Rev. 1091, 1091-1092 [Talitz's 2008 review of the numerous empirical studies that show inherent and pervasive racial bias at all stages of a criminal prosecution]; see also Article, *Implicit Bias in the Courtroom* (2012) 59 UCLA L. Rev. 1124, 1135.

#### D. Use of the phrase “Common Sense”

How often have you seen a prosecutor argue in closing that all the jury need do is rely on their “common sense” to reach the guilty verdict? The research for this article included review of “*Is Color Blind Justice Also Culturally Blind? The Cultural Blindness in Justice*” (2012) 14 Berkeley J. Afr.-Am. L. & Pol’y 23. On the topic of what constitutes “common sense” this author makes a fascinating point that made me rethink my own understanding of the phrase. When used to argue to a jury, the prosecutor is effectively asking them to find against a defendant on the basis of their race.

The article demonstrates why the concept of “common sense” is inextricably linked with racism. Simply put, “common sense” is an acronym for generally accepted societal norms. The problem is that the generally accepted societal norm does not reflect societies’ racial and cultural diversity. Instead, “common sense” is a euphemism for the dominant white perspective. In turn, the “common sense” to which a prosecutor is urging the jury to rely is the white dominant norm, and so a jury using their common sense could be a jury demonstrating implicit bias in its decision making against a non-white defendant.

“When judges claim that race and culture are not relevant in a courtroom involving a minority, they are being either naive or dishonest. Judges and juries come to court with their life experiences, biases, prejudices, and stereotypes. These simply are not dropped at the courthouse door. [For example, w]hen they are led to believe by the news media that African Americans commit all the crimes, this is what they are going to see when an African American is a defendant in a criminal trial. Race and culture are always relevant and extant when middle- or upper-class white persons are defendants in a courtroom.” (Article, *Is Color Blind Justice Also Culturally Blind? The Cultural Blindness in Justice*, 14 Berkeley J. Afr.-Am. L. & Pol’y at p. 35, quoting Rudolph Alexander, Jr., *Trials and Tribulations of African Americans in the Courtroom*, in *Race, Culture, Psychology & Law* 88 (Kimberly H. Barrett & William H. George, eds. 2005).)

“[W]hile individuals may have prejudices outside of the jury box, the system hopes they will temporarily set aside such prejudices when formally participating in fact-finding and deliberations regarding the civil liberties of another person from a different culture. The system also relies on the notion that the wealthy patron will leave the mall, go to the courthouse, swear in front of a judge, and set aside biased feelings about the homeless if given a set of objective facts involving the homeless defendant. The defendant may ask the patron and jurors to use common sense during the trial and to recognize that the stereotype of being homeless does not mean he is a criminal; when in fact this notion of common sense itself is shaped by stereotypes.” (Article, *Is Color Blind Justice Also Culturally Blind? The Cultural Blindness in Justice*, 14 Berkeley J. Afr.-Am. L. & Pol’y at pp. 36-37, internal citations omitted.)

To summarize this section, the potential use for social science in our claims of racial injustice is immeasurable, but it may not be easy to do and is somewhat an uncharted territory. One suggestion is to consider the extent to which your client was subject to racial bias *in every case* whether directly or as a consequence of implicit bias. With this insight, consider using the social science to help further your claims of not just prejudice but also legal error (e.g., a Fourth Amendment claim, the erroneous admission or exclusion of evidence, prosecutorial misconduct, or instructional error).

### VIII. Developmental science and juveniles

At both the state and national level, there is increasing recognition that humans under the age of about 25 are not as responsible for their conduct as their adult peers. (See e.g., *Miller v. Alabama* (2012) 567 U.S. 460, 472-473 [prohibiting the mandatory imposition of the sentence of LWOP on a juvenile convicted of homicide]; *Roper v. Simmons* (2005) 543 U.S. 551, 569-570 [Court rejected the imposition of the death penalty for a crime committed by a juvenile]; *Graham v. Florida* (2010) 560 U.S. 48, 73-74 [holding that no minor could be sentenced to LWOP for a nonhomicide offense].)<sup>39</sup> In all three decisions, the U.S. Supreme Court referenced social science to support its claims.

To summarize the cases' collective point: "In short, the science is clear that 'adolescents are different from adults' and should be treated as such by the courts." (See John F. Stinneford, *Children are Different*": *Constitutional Values and Justice Policy*, 11 Ohio St. J. Crim. L. 71, 96.)

Here are some useful quotes:

- "[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because '[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult.' (*Miller, supra*, 567 U.S. at pp. 472-473, citing *Graham, supra*, 560 U.S. at p. 71, and *Roper, supra*, 543 U.S. at p. 571.)
- "[A]s any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of

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<sup>39</sup> Let's take a moment to reflect on Justice Kavanaugh's more recent opinion in *Jones v. Mississippi* (2021) \_\_\_ U.S. \_\_\_ [141 S.Ct. 1307, 1328], which held that only mandatory LWOP sentences were precluded under the Eight Amendment, that discretionary LWOP sentences were permitted for murders committed by those under 18, and that no express finding of permanent incorrigibility was required before imposing LWOP. The words disappointing and frustrating spring to mind. Notwithstanding this opinion, do not be deterred from arguing the science. Justice Kavanaugh himself did so. (See *id.* at p. 1322.) Although the opinion may have somewhat gutted the *Miller* holding (see Justice Kagan's dissent in *Jones*), it should not deter us from advocating for our juvenile clients. The science continues to show they have less responsibility and should be sentenced with this in mind.

responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.’ ” (Citation omitted.) (*Roper, supra*, 543 U.S. at pp. 569-570.)

- “Adolescents are overrepresented statistically in virtually every category of reckless behavior.” Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Review* 339 (1992). (See *Roper, supra*, 543 U.S. at pp. 569-570.)
- “[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. (Citation) This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.” (*Roper, supra*, 543 U.S. at pp. 569-570, citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003) [“as legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting”]; see also *Eddings v. Okla.* (1982) 455 U.S. 104, 115-116 [“But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly ‘during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment’ expected of adults”].)

To summarize the critical role of social science in the juvenile analysis, let’s turn to the words of Justice Kagan in *Miller, supra*, 567 U.S. at pages 471-472:

Our decisions rested not only on common sense --on what “any parent knows”--but on science and social science as well . . . In *Roper*, we cited studies showing that “[o]nly a relatively small proportion of adolescents’ ” who engage in illegal activity “develop entrenched patterns of problem behavior.’ (Citation) And in *Graham*, we noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”--for example, in “parts of the brain involved in behavior control.” (Citation) We reasoned that those findings--of transient rashness, proclivity for risk, and inability to assess consequences--both lessened a child's “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his “deficiencies will be reformed.”<sup>40</sup>

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<sup>40</sup> The U.S. Supreme Court’s opinions included reference to: (1) quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death*

For appellate practitioners out there, let's get specific:

### **A. Juveniles and *Miranda* Warnings**

As is well established, an appellate court's review of the validity of a waiver of a juvenile's *Miranda* rights must consider the juvenile's age, experience with police, education, intelligence, and race in determining whether they validly waived their rights under *Miranda*, and whether they understood the consequences of waiving those rights. (See *People v. Lessie* (2010) 47 Cal.4th 1152, 1169.)

The critical case to review in this context is *In re Elias V.* (2015) 237 Cal.App.4th 568. In *Elias V.*, two police detectives went to 13-year-old Elias' school to question him about a sexual assault. (*Id.* at p. 574.) Elias had no prior contacts with police. (*Ibid.*) The interrogation lasted less than 30 minutes. (*Ibid.*) During the interrogation, the detective repeatedly accused Elias of sexual assault, and Elias repeatedly denied it. (*Id.* at pp. 574-575.) Finally, Elias admitted to touching the victim out of curiosity. (*Id.* at p. 575.) Based primarily on the interrogation techniques employed by the detective, the appellate court held that the confession was involuntary under the Fourteenth Amendment. (*Elias V.*, *supra*, 237 Cal.App.4th at pp. 581-597, 600.) The *Elias V.* court incorporated developmental research into its conclusions.

#### **1. Proper advisement of a juveniles *Miranda* rights**

Juveniles are much more vulnerable in dealings with police officers than adults. (*Elias V.*, *supra*, 237 Cal.App.4th at p. 588.) Thus, police officers must take special caution to ensure that a juvenile suspect clearly understands each of their rights under *Miranda*. (See generally *In re Gault* (1967) 387 U.S. 1, 45.) Indeed, taking the time to make sure that the juvenile understood their rights is an established factor in the voluntariness analysis. (See *Lessie*, *supra*, 47 Cal.4th at p. 1169 [interrogating officer took care to advise the juvenile of each of their *Miranda* rights specifically ascertained that the juvenile understood those rights]; *Michael C.*, *supra*, 442 U.S. at p. 726 [same].)

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Penalty, 58 Am. Psychologist 1009, 1014 (2003)). It is also interesting to note the United States Supreme Court's reference to "common sense."

## 2. A juvenile’s knowing and intelligent waiver of their *Miranda* rights

Multiple courts have relied on developmental science to support their decisions on the validity of a juvenile’s waiver under *Miranda*. The difference between adults and juveniles is again central to the analysis.

“It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 264-265.) A child’s age “generates commonsense conclusions about behavior and perception.”<sup>41</sup> (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 674.) Children as a class “lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” (*Bellotti v. Baird* (1979) 443 U.S. 622, 635) and “are more vulnerable or susceptible to . . . outside pressures” than adults. (*Roper, supra*, 543 U.S. at p. 569.) Moreover, “juveniles aged fifteen and younger have deficits in their legal understanding, knowledge, and decision-making capabilities.” (*Elias V., supra*, 237 Cal.App.4th at p. 578.)

## 3. Racial disparities and the valid *Miranda* waiver

Studies have shown that black juveniles with low IQs have greater difficulty understanding their *Miranda* rights than white juveniles with the same IQ. (See Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis* (1980) 68 Cal. L.Rev. 1134, 1156 [studies “suggest that black juveniles with low IQ scores experience greater difficulty in comprehending *Miranda* warnings than do whites with similarly low IQ’s.”].) Accordingly, the ethnicity of the defendant and (I would argue) the interrogator should be considered. (See e.g. *In re Anthony J.* (1980) 107 Cal.App.3d 967, 972 [race considered when assessing whether a waiver was made].)

As Supreme Court Justice Sonia Sotomayor has noted, “For generations, black and brown parents have given their children ‘the talk’— instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. [Citations.]” (*Utah v. Strieff* (2016) 136 S. Ct. 2056, 2070 (dis. opn. of Sotomayor, J.).)

## 4. Violation of the right to silence

The youth factor is relevant here too. For example, the court in *People v. Villasenor* (2015) 242 Cal.App.4th 42 at page 66, found that a reasonable officer would understand that when a

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<sup>41</sup> Common sense is everywhere, it seems.

minor says three times that he wanted to go home, he was invoking his right to silence, i.e., his right to end the interrogation.<sup>42</sup>

## **B. Improper interrogation techniques involving juveniles**

Involuntary confessions violate the Fourteenth Amendment. (*Arizona v. Fulminate* (1991) 499 U.S. 279; see also *People v. McCurdy* (2014) 59 Cal.4th 1063, 1086 [the use of an involuntary confession for any purpose in a juvenile proceeding violates the juvenile’s constitutional rights under the Fourteenth Amendment].) While a finding that a confession was involuntary requires police coercion, any exertion of improper influence by the police would suffice. (*Hutto v. Ross* (1976) 429 U.S. 28, 30.)

False confessions are the leading cause of error in wrongful convictions; more than one third of those cases involved a suspect under the age of 18. (*Elias V.*, *supra*, 237 Cal.App.4th at p. 578.) Because juveniles are more suggestible than adults, they are more likely to falsely confess as a result of leading, suggestive, and repetitive questions. (*Ibid.*) Indeed, the Supreme Court acknowledged that the danger of false confessions is more troubling and more acute in cases involving the police interrogation of juveniles. (*J.D.B. v. North Carolina*, *supra*, 564 U.S. at p. 269.)

### **1. Using false information to elicit information from juveniles [e.g., use of the Reid Technique of interrogation]**

Be on the lookout for how officers approached the interrogation, which yielded incriminatory statements. One example of a particular type of interrogation is known as the “Reid technique,” which is a method of interrogation pioneered by John E. Reid and Associates, aimed at extracting confessions and evaluating suspect credibility. (*United States v. Jacques* (1st Cir. 2014) 744 F.3d 804, 808, fn. 1.) It is still in use by law enforcement today. Behavioral scientists who study interrogation techniques and their effects have concisely described the Reid Technique as follows: “First, investigators are advised to isolate the suspect in a small private room, which increases his or her anxiety and incentive to escape. A nine-step process then ensues in which an interrogator employs both negative and positive incentives. On one hand, the interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials. On the other hand, the interrogator offers sympathy and moral justification, introducing ‘themes’ that minimize the crime and lead suspects to see confession as an expedient means of escape.” (In re *Elias V.* (2015) 237 Cal.App.4th 568, 579-580, citing Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations* (2010) 34 *Law & Hum. Behav.* 3, 7.)

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<sup>42</sup> Okay, so maybe the courts aren’t as bad on conversational implicature as we made out.

Even the Reid Technique, which is quoted extensively in the *Miranda* opinion, warns against the dangers of deception and use of false information to elicit information from juveniles. Such a “technique should be avoided when interrogating a youthful suspect with low social maturity . . .” because such suspects “may not have the fortitude or confidence to challenge such evidence and depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they committed the crime. Factors such as the adolescent's level of social responsibility and general maturity should be considered before fictitious evidence is introduced.” (*Elias V.*, *supra*, 237 Cal.App.4th at p. 588, citing Inbau and Reid, *Criminal Interrogation and Confessions* (5th ed. 2013), at p. 255.)

## 2. Juveniles and false confessions

It has been estimated that about two-thirds of police executives in this nation have had training in the “Reid Technique.” (Zalman & Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies* (2007) 97 J. Crim. L. & Criminology 873, 920.) (*Elias V.*, *supra*, 237 Cal.App.4th at p. 579.)<sup>43</sup>

“Estimates of false confessions as the leading cause of error in wrongful convictions range from 14 to 25 percent, and . . . a disproportionate number of false confession cases involve juveniles. Recent research has shown that more than one-third (35 percent) of proven false confessions were obtained from suspects under the age of 18.” (*Elias V.*, *supra*, 237 Cal.App.4th at p. 578, citing Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* (2004) 82 N.C. L.Rev. 891, 902, 944–945, fn. 5.)

“A convincing body of evidence demonstrates that implicit promises can put vulnerable innocents at risk to confess by encouraging them to think that the only way to lessen or escape punishment is compliance with the interrogator's demand for confession, especially when minimization is used on suspects who are also led to believe that their continued denial is futile and prosecution inevitable.” (*Elias V.*, *supra*, 237 Cal.App.4th at p. 583, citing Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action* (1997) 74 Denv. U. L.Rev. 979, 981–982; Kassin & Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues* (Nov. 2004) 5 Psychol. Sci. Pub. Int. 33; Kassin & McCall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication* (1991) 15 Law & Hum. Behav. 233; Kassin & Keichel, *The Social Psychology of False Confessions; Compliance, Internalization, and Confabulation* (1996) 7 Psychol. Sci. 125; Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations* (2010) 34 Law & Hum. Behav. 3, 12.)

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<sup>43</sup> Senate Bill No. 494, on the Governor's desk as of September 14, 2021, abrogates police use of the Reid Technique. The bill's text makes some researched statements on the ineffectiveness and dangers of such harsh interrogation techniques.

“The developing consensus about the dangers of interrogation has resulted from the growing number of studies showing that the risk interrogation will produce a false confession is significantly greater for juveniles than for adults; indeed, juveniles usually account for one-third of proven false confession cases. (See, e.g., Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas* (2010) 62 Rutgers L.Rev. 943, 952; Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice* (2006) 97 J. Crim. L. & Criminology 219; *False Confessions*, *supra*, 82 N.C. L.Rev. at p. 944; Gross et al., *Exonerations in the United States 1989 through 2003* (2005) 95 J. Crim. L. & Criminology 523, 545; Redlich & Kassin, *Police Interrogation and False Confessions: The Inherent Risk of Youth in Children as Victims, Witnesses, and Offenders: Psychological Science and the Law* (Bottoms et al., eds., 2009) pp. 275–276).” (*Elias V.*, *supra*, 237 Cal.App.4th at p. 583.)

The big takeaway from the data is clear: juveniles are particularly susceptible to manipulative interrogation techniques that are more likely to yield a false confession than the truth. Not only is this contrary to the purported purpose of the interrogation – to elicit the truth – it means that any incriminatory statements made by a juvenile offender in an interrogation situation are entirely suspect. Heavy use of this material is encouraged whenever your client’s interrogation-elicited statements are trying to be used against them.

### **3. Juveniles and reckless indifference**

The very recent case of *In re Moore* 2021 Cal.App.LEXIS 721, holds that age is a factor when determining whether a defendant acted with reckless indifference under *Banks/Clark*. This is very useful authority with Senate Bill No. 1437 and the numerous Penal Code section 1170.95 appeals out there.

## **IX. Homelessness, self-defense, and imperfect self-defense in homicide cases**

For an interesting perspective on the reasonableness of an actor’s belief in the need for self-defense when the actor is considered homeless, review the case of *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, and the social science data employed in the decision.

Consider the following situation: There are two individuals in a camp outside Santa Cruz where unhoused persons typically reside. One night, these two individuals start arguing. The argument turns physical and one of the two loses their life. The other is charged with first degree murder. The defense at trial was self-defense or imperfect self-defense but the trial court excluded defense expert testimony on the realities of a homeless life and the associated heightened tendency to feel the need to defend oneself with lethal force.

This was essentially the *Sotelo-Urena* case where the appellate court found trial court error and the deprivation of the defendant’s constitutional right to present a complete defense by

excluding such expert testimony concerning chronic homelessness. (*Sotelo-Urena, supra*, 4 Cal.App.5th at p. 741.) The defendant was on trial for first degree murder where both he and the victim were homeless. (*Id.* at p. 736.) The trial court excluded expert testimony for the defense that individuals who are chronically homeless, like defendant, are subjected to a high rate of violence by both housed and homeless individuals, and that the experience of living for years on the streets instills a perpetual fear of violence that would have affected the defendant’s belief in the need to defend himself with lethal force. (*Id.* at p. 742.) The reviewing court disagreed and reversed. (*Id.* at p. 758.)

In finding trial court error, the *Sotelo-Urena* court found that the expert testimony was relevant since it “would have helped the jury understand the situation from defendant’s perspective, that is, from the perspective of a chronically homeless man who had recently been violently assaulted and was aggressively approached by someone he believed to be the assailant. It would have explained his heightened sensitivity to aggression and why he was inclined to react more acutely to the perceived threat.” (*Sotelo-Urena, supra*, 4 Cal.App.5th at p. 746.) The court described how “[s]tudies on chronic homelessness demonstrate that . . . homeless individuals are victims of violent crime at a much higher rate than the general population. (See, e.g., *In re Eichborn* (1998) 69 Cal.App.4th 382, 386 [“Homeless individuals were 10 times as likely to be victimized by crime than the average population.”].)” (*Id.* at p. 747.) In its opinion, the court referenced the National Coalition for the Homeless (NCH) annual report (Vulnerable to Hate A Survey of Hate Crimes & Violence Committed Against Homeless People in 2013), to provide statistics and also referenced a 2010 sociology review article on the nature of homelessness, victimization, and crime. (*Id.* at p. 748, citing Lee et al., *The New Homelessness Revisited* (2010) 36 Ann. Rev. Sociology, pp. 506–507.)

Of course, information of this sort can be used in assault-type cases involving unhoused individuals, but perhaps that is not all. If an unhoused person’s general environment can be shown to impact their sense of danger, surely similar conclusions may have been reached regarding other populations of our society. For example, what about individuals incarcerated in prison – how may their sense of potential threat and thus the necessary level of response differ from the reasonable person standard? Your further research is encouraged.

## **X. Police use of force: how much is too much?**

Whether it is resisting arrest case or a Fourth Amendment unreasonable seizure case, social science data, as well as police procedural information, could help sway your justices.

Let's look at a panel attorney's recent resisting arrest case where they argued the evidence was insufficient to prove that the police officers' use of force was reasonable.<sup>44</sup> The brief used Department of Justice publications to argue that officers used excessive force when arresting their client. In that case officers displayed handguns, shot the defendant multiple times with a Taser, used a canine, and then wrestled the defendant to the ground.

The test for determining whether an officer used unreasonable or excessive force in making an arrest "is whether the amount of force the officers used in making the arrest was objectively unreasonable given the circumstances they faced." (*Allgoewer v. City of Tracy* (2012) 207 Cal.App.4th 755, 763.) "An officer's use of force is unreasonable if, judging from the totality of the circumstances at the time of the arrest, the officer uses greater force than was reasonably necessary to effectuate the arrest." (*Phillips v. Cmty. Ins. Corp.* (7th Cir. 2012) 678 F.3d 513, 519.) Three primary factors are considered in determining the objective reasonableness of force: (1) the immediacy of the threat that the suspect posed to the officer; (2) the severity of the offense for which the suspect was arrested; and (3) whether the suspect was fleeing or actively resisting. (*Graham v. Connor* (1989) 490 U.S. 386, 396.) At the outset, it is helpful to identify the level of force used by the police at the time of the incident underlying your case.

Under the relevant *Graham* factors the argument that the police used excessive force was framed with reference to the Department of Justice's own procedures. Here is the summary:

The Department of Justice has ranked 46 different uses of police force from the lowest level of force to the highest. (Garner, J, and Maxwell, C. Measuring the Amount of Force Used by and Against the Police in Six Jurisdictions. Washington, DC: Department of Justice, p. 42.) The lowest level of force is "Police Speak in Conversational Tone," and the highest level of force is "Police Use Handgun." (*Ibid.*) Each of the officers' choice of force in this case ranks at the far end of the level of force spectrum. Most severe was the officers' display of handguns, which is a more severe use of force than 40 other types of force. (*Ibid.*) In fact, the only uses of force more severe than displaying a handgun is employing a carotid hold and shooting the suspect with a gun. (*Ibid.*) The officers' use of the Taser and ballistic projectile is a more severe use of force than 39 other types of force. (*Ibid.*) The officers' use of the canine is more severe use of force than 36 other types of force. (*Ibid.*) Thus, the record plainly shows that the officers here used multiple types of force that the Department of Justice considers among the most severe types of force police officers are permitted to use. Furthermore, the level of force used in this example was

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<sup>44</sup> With thanks to Michael C. Sampson for his contribution to this article.

amplified by the fact that a dozen police officers simultaneously used various methods of force against the defendant.

The Department of Justice posited that a police officer might reasonably display a handgun or use a weapon against a suspect where the suspect acted with “violent or explosive resistance.” (Alpert, G. and Dunham, R. *The Force Factor: Measuring and Assessing Police Use of Force and Suspect Resistance*, Washington, DC: Department of Justice, p. 55.) In a case where the defendant did not act with “violent or explosive resistance” prior to the officers’ use of force, therefore, the officers’ use of handguns, other weapons, and canines was unreasonable and excessive. (Alpert, G. and Dunham, R. *The Force Factor: Measuring and Assessing Police Use of Force and Suspect Resistance*, Washington, DC: Department of Justice, p. 55.)

Obviously, the facts are case-specific, but hopefully the example shows how extra-record citable information can be rather persuasive.

## **XI. Dependency**

There is a wealth of information available to enhance dependency briefing for many aspects of child dependency proceedings whether you are representing parents or minors. The problem or advantage (depending on your perspective) of the dependency scheme is its purely statutory roots. The benefit of this is that the laws may change as the science evolves. The downside of this is the time it may take for the law to catch up to the science. Accordingly, consider including reference to current research in your briefing.

### **A. Permanency**

For example, in Josh Gupta-Kagan’s 2015 article, “The New Permanency” he advocates for a redefinition of what constitutes legally permanent caregivers to show that the termination of parental rights and adoption should not be the default when reunification has not been achieved. Gupta-Kagan’s research-based study shows how long-term legal guardianships and other non-termination-of-rights options are as lasting for families as adoptions. (See Article, *The New Permanency* (2015) 19 UC Davis J. Juv. L. & Pol’y 1, 5.)

### **B. Sibling Relationship Exception**

In the article *Dependency Hearings: California's Current Inability To Preserve The Bond Between Siblings* (2012) 12 Whittier J. Child & Fam. Advoc. 129, the authors give renewed vitality to the strength of sibling relationship, and could be referenced throughout a dependency proceeding from disposition (where despite sibling relationships, return was not ordered), the reunification period, and of course the sibling-child-relationship exception to the

termination of parental rights. The article provides hard data to explain the importance of a dependent child's continued relationship with a sibling.

### **C. Impact of COVID-19**

For some research-based arguments on the negative impact of the COVID19 pandemic on dependency proceedings and thus its dependent families, see Kristen Pisani-Jacques' *Special Issue: Dependency Court: A Crisis For A System In Crisis: Forecasting From The Short- And Long-Term Impacts Of Covid-19 On The Child Welfare System* (2020) 58 Fam. Ct. Rev. 955. This article provides insight both for trial counsel and appellate practitioners to harness the studied impacts of the pandemic that created negative dependency outcomes due to limited visitation, the reasonableness of services, and its related consequences.

## **XII. Sources for further research**

In researching this article, we've considered coining The Doyle-Stuart Hypothesis: Whatever a criminal-defense attorney wants to say in a brief, a professor somewhere has already said it in a law review article. To test this, take any statement you want to make about the law or how probative a piece of evidence was or how jurors were likely to take it. Throw it into Lexis or Westlaw and check secondary sources. Often, you're going to find heaps of articles backing you up. So to start, you can always use your normal research tools to find these articles. There's plenty of research out there that can help.

You can also use Google Scholar, the [Sentencing Law and Policy Blog](#), the [Sentencing Project](#), and the [Pew Research Center](#). We highly recommend an article that was incredibly helpful for us: *Incorporating Social Science into Criminal Defense Practice* by Professor Eve Brensike Primus at the University of Michigan (who is across the board a fantastic legal scholar on criminal-defense issues).<sup>45</sup> It covers introducing matters a trial as well as on appeal, but it covers several evidentiary issues we haven't touched on.

Finally, in the wake of the tremendous legislation that has been enacted over the past several years, many organizations are conducting research or compiling statistics on criminal-justice issues, in particular relating to race and youth. People are working hard on these novel issues. Listservs abound. And as always, please feel free to contact us at SDAP if you're looking for something in particular. We love this stuff.

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<sup>45</sup> Brensike Primus, *Incorporating Social Science into Criminal Defense Practice*, *The Champion*, p. 40 (November 2020).