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COAXING AUTHORITARIANS OUT OF THE JURY POOL

DAVID FERGUSON AND LEN LECCI, PH.D.¹

THE AUTHORITARIAN JUROR PROBLEM

In 1968 the U.S. Supreme Court was asked to set aside both a defendant's conviction and death sentence.² The issue on appeal revolved around the jury selection in the case. Forty-seven members of the jury panel expressed reservation about imposing the death penalty. The court excused them all because, in the court's mind, only people who unhesitatingly supported the death penalty could sit on a death-qualified jury. The chosen jury convicted the defendant and, unsurprisingly, sentenced him to death.

On appeal, the defendant argued that a jury stacked with pro-death jurors is a jury that is more likely to convict a defendant in the first place, making the entire trial tainted because of a biased, pro-conviction jury. To support this claim the defendant produced research showing that a juror who unreservedly supports the death penalty "is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilt."³ The Supreme Court was unpersuaded. They reversed the death sentence because the jury had been clearly skewed toward a pro-death bias, but they affirmed the conviction. In upholding the conviction, the Court decided that the defendant's research was "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt."⁴

What the defendant's research hinted at in 1968 was later confirmed.⁵ And confirmed repeatedly.⁶ But more than that, over the next few decades

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² *Witherspoon v. State of Ill.*, 391 U.S. 510, 516–17 (1968).

³ *Id.*

⁴ *Id.* at 517.

⁵ Robert M. Bray and Audrey M. Noble, *Authoritarianism and Decisions of Mock Juries: Evidence of Jury Bias and Group Polarization*, 36 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 1424, 1429 (1978).

⁶ Douglas J. Narby, et. al., *A Meta-Analysis of the Association Between Authoritarianism and Juror's Perceptions of Defendant Culpability*, 78 JOURNAL OF APPLIED PSYCHOLOGY 34 (1993) (hereinafter *A Meta-Analysis*); Brooke Butler and Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venierpersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 25 BEHAVIORAL SCIENCES & THE LAW, 57 (2007).

researchers discovered that the sort of people who favor the death penalty hold similar feelings about criminal defendants charged with other crimes, including non-violent ones.⁷ Their biases lead to pro-conviction attitudes, making them more likely to convict while others would acquit.⁸ And they tend to believe that criminal defendants enjoy too many rights.⁹ The sort of people detected in these studies could be usefully and highly predictively bundled into one demographical designation: legal authoritarians.¹⁰

As studies fleshed out legal authoritarianism, other alarming facts surfaced. Legal authoritarians tend to think through evidence differently than others;¹¹ they selectively remember pro-prosecution facts¹² and are especially likely to believe false facts that favor prosecution.¹³ Legal authoritarians bring these attitudes and thought processes into jury service, proving that all else being equal, legal authoritarians vote guilty when others do not.¹⁴ Comparatively, no other demographic has proven to be as predictable in its decisions, as consistent across a spectrum of cases or scenarios, and as easy to identify by its adherence to a core set of values as legal authoritarians.¹⁵ Legal

⁷ *A Meta-Analysis*, *supra* note 6, at 40–41. Moreover, because the enforcement of “social conformity” is a large driver to authoritarianism, it is easy to theorize that authoritarianism influences verdicts in almost any circumstance where the criminal conduct falls out-of-bounds of expected social norms. See Stanley Feldman, *Enforcing Social Conformity: A Theory of Authoritarianism*, 24 *POLITICAL PSYCHOLOGY*, 41, 66–67 (2003).

⁸ *A Meta-Analysis*, *supra* note 6, at 40–41.

⁹ *Cf. The Impact of Death Qualification*, *supra* note 6, at 58–60; and Len Lecci and Bryan Myers, *Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire (PJAQ)*, 38 *JOURNAL OF APPLIED SOCIAL PSYCHOLOGY*, 2010, 2025 (2008) (hereinafter *Individual Differences in Attitudes Relevant to Juror Decision Making*).

¹⁰ *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 9, at 2024 (correlating a bundle of legal biases with legal authoritarianism).

¹¹ *A Meta-Analysis*, *supra* note 6, at 40.

¹² *Id.*

¹³ *Id.*

¹⁴ David A. Kravitz, et. al., *Reliability and Validity of the Original and Revised Legal Attitudes Questionnaire*, 17 *LAW AND HUMAN BEHAVIOR*, 661 (1993). And unlike legal authoritarians, no other oft-studied demographic shows clear and consistent biases in their verdicts: “As a whole, demographic factors such as race, gender, education, and socioeconomic status (SES) have received a great deal of attention from small-group researchers because these factors are readily observable and appear to play a large part in social cognition. It is therefore surprising that juror demographic characteristics have been only weakly and inconsistently related to juror verdict preferences.” Dennis J. Devine, et. al., *Jury Decision Making 45 Years of Empirical Research on Deliberating Groups*, 7 *PSYCHOLOGY, PUBLIC POLICY, AND LAW* 622, 673 (2001) (internal citations omitted).

¹⁵ Caroline B. Crocker and Margaret Bull Kovera, *Systematic Jury Selection* in *HANDBOOK OF TRIAL CONSULTING* (Richard L. Wiener and Brian H. Bornstein, eds.), 17 (2011).

authoritarianism may be the most easily identifiable danger to a defendant's right to an impartial jury.¹⁶

Still, getting legal authoritarians to open up and reveal themselves during jury selection is a challenge. Because traditional judge-led voir dire—the predominant method in most of Utah¹⁷—can be an intimidating process for prospective jurors, legal authoritarians (like others) tend to keep silent about their honest opinions when speaking to a judge.¹⁸ By comparison, legal authoritarians are much more likely to voice those honest opinions when speaking to an attorney.¹⁹ Similarly, they are remarkably open about their beliefs when answering carefully crafted questionnaires.²⁰ Meaning, while legal authoritarianism may jeopardize the right to an impartial jury, appropriate voir dire practices can lessen the risk of it making its way onto juries.

The purpose of this article is to encourage both Utah attorneys and judges to make voir dire more robust in identifying and excluding jurors who hold extreme views on legal authoritarianism. It begins with describing the problem of legal authoritarian jurors and concludes with a sample questionnaire to make identifying them easier.

Part I explores the background and beliefs of legal authoritarians. The section includes topics and questions that researchers use to get legal authoritarians to “out” themselves. Part II shows how traditional judge-led voir dire largely fails to identify legal authoritarianism, along with other prejudicial biases, in jurors. The section includes why attorney-led voir dire can be a more effective alternative, and why targeted questionnaires also can avoid the problems of judge-led voir dire. Finally, the Appendix offers a sample questionnaire that practitioners can use to target and reveal legal authoritarian biases. Ultimately, this article will help courts and attorneys follow the Utah Supreme Court's imperative of “ferreting out bias”²¹ in voir dire by helping them to better conceptualize and remove legal authoritarian jurors.

¹⁶ *Id.* at 17-18 (noting that the only better way of detecting juror bias is through examining case-specific biases).

¹⁷ Gregory E. Mize, et. al., *The-State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, 28 (April 2007), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>; On April 19, 2020, David Ferguson asked attorneys through the Utah Association of Criminal Defense Lawyers listserv how often they've seen judges permit attorney-led voir dire. Very few judges conduct it. Most attorneys, including seasoned advocates, have never done it.

¹⁸ *See infra*, Section II. A.

¹⁹ *Id.*

²⁰ *See infra*, Section I. B. i-ii.

²¹ *State v. Saunders*, 1999 UT 59, ¶ 34.

I. THE LEGAL AUTHORITARIAN JUROR

A. *Discovering Authoritarianism*

The study of authoritarianism stems from the rise of the Nazi party.²² Post-war researchers sought to “diagnose” how a nation of people could support the rise of a punitive, authoritarian regime.²³ Philosophers, historians, social scientists, and psychologists approached the question from different angles, many arriving at the same conclusion: authoritarian tendencies are surprisingly common in society, and a person can even have strong authoritarian tendencies while supporting conventional American morals.²⁴

Hannah Arendt referred to this phenomenon provocatively as “the banality of evil;” a conclusion she reached after observing Adolf Eichmann, a central cog in the Nazi regime, was no menacing villain as many had assumed, but just a dull, career bureaucrat doing a job he did well.²⁵ The educator Jane Elliot observed that an entire classroom of blue-eyed children could be conditioned to irrationally discriminate against their brown-eyed peers when repeatedly told to do so by an authority figure.²⁶ And another researcher, Stanley Milgram, conducted a series of simulated experiments confirming that most Americans, under the right circumstances, will passively acquiesce to authoritarian commands to ostensibly electrocute a total stranger.²⁷

These authoritarian tendencies have two features in common: (1) they involve support, or at least acquiescence, to an authority figure, and (2) they involve a willingness to use the power, or permission, of that authority to punish undesirable people.²⁸ And these tendencies are surprisingly common among Americans.²⁹

²² See Lambert Zuidervart, “Theodor W. Adorno,” *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Winter 2015) <https://plato.stanford.edu/entries/adorno/>. Adorno’s “F-Scale” (fascism scale), developed in 1950, became the pioneering work in the study of authoritarianism among social psychologists. See *A Meta-Analysis*, *supra* note 6, at 40–41.

²³ Malcom Harris, “The Psychology of Torture,” *Aeon* (October 7, 2014) <https://aeon.co/essays/is-it-time-to-stop-doing-any-more-milgram-experiments>.

²⁴ Richard Overy, “*Ordinary Men*,” *Extraordinary Circumstances: Historians, Social Psychology, and the Holocaust*, 70 *JOURNAL OF SOCIAL ISSUES* 515 (2014); John Duckitt, et. al., *A Tripartite Approach to Right-Wing Authoritarianism: The Authoritarianism-Conservatism-Traditionalism Model*, 31 *POLITICAL PSYCHOLOGY* 685 (2010).

²⁵ Thomas White, “What Did Hannah Arendt Really Mean by the Banality of Evil?” *Aeon*, (April 23, 2018) <https://aeon.co/ideas/what-did-hannah-arendt-really-mean-by-the-banality-of-evil>.

²⁶ Stephen G. Bloom, “Lesson of a Lifetime,” *Smithsonian Magazine* (September 2005) <https://www.smithsonianmag.com/science-nature/lesson-of-a-lifetime-72754306/>.

²⁷ *The Psychology of Torture*, *supra* note 23.

²⁸ *Enforcing Social Conformity: A Theory of Authoritarianism*, *supra* note 7, at 50.

²⁹ For a more contemporary picture of the prevalence of authoritarianism see Amanda Taub, “The Rise of Authoritarianism,” *Vox* (March 1, 2016) <https://www.vox.com/2016/3/1/11127424/trump-authoritarianism>.

Research on authoritarianism took a different turn with the work of Theodore Adorno. Adorno sought to not only identify authoritarianism, but also to measure the degree to which a person held that disposition.³⁰ Adorno created a survey, asking participants to answer a series of questions that he believed would reveal the strength of a participant's authoritarian tendencies.³¹ For example, Adorno's survey asked participants to rate their agreement with questions like: "Obedience and respect for authority are the most important virtues children should learn," and "Homosexuals are hardly better than criminals and ought to be severely punished."³² Adorno's scale, with later modifications, proved to be an accurate tool allowing researchers to further investigate what beliefs are associated with authoritarian tendencies.³³

Researchers largely agreed that authoritarians are people "wishing to be part of an orderly, powerful society, with well-defined rules and authoritative leadership."³⁴ Authoritarians embrace "conventional moral authorities" and "follow conventional norms."³⁵ For example, research in 1981 showed that authoritarians held negative prejudices against "communists, sexual-offenders, [and] members of the women's movement" among other groups.³⁶ Later research added drug users, the homeless, and African Americans to that list.³⁷

That said, it would be a mistake to confuse authoritarianism with specific ideologies.³⁸ What makes authoritarianism such an identifiable demographic for research is its unique way of looking at things: authoritarians "submit to authority," "adhere to and enforce ingroup conventions," and support punishment against anyone they perceive to "challenge established authorities or ingroup conventions."³⁹ Authoritarians are more rigid in their beliefs than

³⁰ *A Meta-Analysis*, *supra* note 6, at 35.

³¹ *Id.*

³² See J.J. Ray, *A New Balanced F Scale, and Its Relation to Social Class*, 7 AUSTRALIAN PSYCHOLOGIST 155 (1972).

³³ *Id.*

³⁴ *A Meta-Analysis*, *supra* note 6, at 34.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Bill E. Peterson, et. al., *Authoritarianism and Attitudes Toward Contemporary Social Issues*, 19 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 174, 179 (1993).

³⁸ Markus Kemmelmeier, *Authoritarianism and Its Relationship with Intuitive-Experiential Cognitive Style and Heuristic Processing*, 48 PERSONALITY AND INDIVIDUAL DIFFERENCES 44, 44 (2010); *Enforcing Social Conformity: A Theory of Authoritarianism*, *supra* note 7, at 66; and for an example of authoritarianism that comes from a politically left source, see Christopher Wareham and James Vos, *Why Rape Cases Should Not be Subject to Reasonable Doubt*, AEON, <https://aeon.co/ideas/why-rape-cases-should-not-be-subject-to-reasonable-doubt> (December 16, 2016) (arguing that because sexual assault is difficult to prove in court, a lower evidentiary standard should apply to make conviction easier, even if the rate of innocent convictions increases).

³⁹ *Authoritarianism and Its Relationship with Intuitive-Experiential Cognitive Style and Heuristic Processing*, *supra* note 38, at 44.

other demographics.⁴⁰ They “tend to embrace simplistic stereotypes and prejudices, adopt extreme opinions and make extreme judgments.”⁴¹ They dislike both nuance and ambiguity,⁴² jumping to simple explanations over complex ones.⁴³

Authoritarians’ pro-conviction bias coupled with their willingness to overly simplify situations has been shown to affect their judgments in jury trials. Authoritarians selectively remember facts that favor conviction,⁴⁴ and they are especially likely to believe false facts that favor conviction.⁴⁵ When recalling facts from trial, authoritarians tend to remember characteristics about the defendant, while non-authoritarians tend to remember facts about the case.⁴⁶ When faced with uncomfortable evidence, such as in a rape trial, authoritarian jurors are more likely than non-authoritarians to joke about the evidence as a mechanism to relieve tension and avoid grappling with serious issues in the case.⁴⁷ When inadmissible *exonerating* evidence is introduced, authoritarians tend to *follow* a judge’s instruction to disregard it, but when inadmissible *incriminating* evidence is introduced, authoritarians tend to *ignore* a judge’s instructions to disregard it—suggesting an inclination to ignore jury instructions that would give a defendant a fair trial.⁴⁸ In other words, authoritarian jurors allow their extreme belief system to override proper, competent juror behavior.

To qualify the statements above, authoritarian-minded people fall along a spectrum.⁴⁹ Research on authoritarianism tends to contrast subjects who score high on authoritarianism scales from those who score low, and the conclusions that researchers draw about authoritarians are about those who score high.⁵⁰ Used here, authoritarians refers to those who score high on authoritarian scales. And to the extent that authoritarians tend to be rigid thinkers who dislike nuance and ambiguity, those statements should only be construed to apply to topics that relate to authoritarian biases—e.g., gangs, drugs, the

⁴⁰ *Id.*

⁴¹ *Id.* (internal citations omitted).

⁴² *Id.* at 45.

⁴³ *Id.* at 47.

⁴⁴ *A Meta-Analysis*, *supra* note 6, at 40.

⁴⁵ *Id.*

⁴⁶ M. Juliet Bonazzoli, *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, 18 QUINNIAC L. REV. 247, 289 (1998).

⁴⁷ Jacquelin Goldman, et. al., *Jury Emotional Response and Deliberation Style*, 11 JOURNAL OF PSYCHIATRY & LAW 319, 326 and 333 (1983).

⁴⁸ Carol M. Werner, et. al., *Conviction Proneness and the Authoritarian Juror: Inability to Disregard Information or Attitudinal Bias?*, 67 JOURNAL OF APPLIED PSYCHOLOGY 629, 633-34 (1982).

⁴⁹ *Id.* at 631.

⁵⁰ See e.g. *Reliability and Validity of the Original and Revised Legal Attitudes Questionnaire*, *supra* note 14, at 663; *Enforcing Social Conformity: A Theory of Authoritarianism*, *supra* note 7, at 64.

death penalty, homelessness.⁵¹ On topics that don't connect to authoritarian values, those same individuals may hold nuanced, well-developed ideas.⁵² What makes authoritarians a unique demographic is not that they are inflexible thinkers; rather, they are unique because no other demographic is as inflexible, and punitive, on issues of crime and justice.⁵³

B. *The Shift to Legal Authoritarian Studies*

Research on authoritarians as jurors began in the 1960s.⁵⁴ But it wasn't long until studies showed that some authoritarians would have stronger attitudes than others about the criminal justice system.⁵⁵ By focusing on law-related authoritarian biases, researchers began to make relevant authoritarian biases more easily identifiable.⁵⁶

1. Measuring Legal Authoritarianism

In 1968, Virginia Boehm conducted a landmark study on legal authoritarianism.⁵⁷ She produced a questionnaire, the Legal Attitudes Questionnaire ("LAQ") that sorted participants into one of three groups: legal authoritarian, anti-authoritarian, and equalitarian (i.e. people who tend to be more open-minded than the other two groups).⁵⁸ The LAQ asked participants to give a "+" or "-" to questions like:

- The failure of a defendant to testify in his own behalf should not be taken as an indication of guilt.
- The majority of persons arrested are innocent of any crime.
- Giving an obviously guilty criminal a long drawn-out trial is a waste of the taxpayer's money.⁵⁹

Undergraduate students answered these and similar questions and then read two murder fact patterns.⁶⁰ Those who scored high on authoritarianism

⁵¹ See notes 34-37, *supra*.

⁵² *Authoritarianism and Its Relationship with Intuitive-Experiential Cognitive Style and Heuristic Processing*, *supra* note 38, at 47.

⁵³ See note 14, *supra*.

⁵⁴ *A Meta-Analysis*, *supra* note 6, at 40.

⁵⁵ *Id.*

⁵⁶ *Reliability and Validity of the Original and Revised Legal Attitudes Questionnaire*, *supra* note 14, at 662.

⁵⁷ See *id.*

⁵⁸ *Id.* at 663.

⁵⁹ *Reliability and Validity of the Original and Revised Legal Attitudes Questionnaire*, *supra* note 14, at 662.

⁶⁰ *Id.* at 663.

turned out to be more likely to convict.⁶¹ Of course, undergraduate students don't necessarily represent the broader community of potential jurors, and reading fact patterns is not the same as watching an actual criminal case.⁶² Later studies on legal authoritarianism mitigated these issues by using a broader testing pool of eligible voters and pre-recorded actors performing actual court cases, including the jury instructions.⁶³ And interestingly, despite several studies measuring the LAQ's effectiveness, neither the two other attitude subscales—anti-authoritarian and equalitarian biases—proved to be reliable predictors of either conviction or acquittal.⁶⁴

By 1993, the Revised Legal Attitude Questionnaire ("RLAQ-23" – the 23 indicates 23 questions) replaced the LAQ.⁶⁵ Questions were scored on a 1-6 scale (strongly disagree to strongly agree).⁶⁶ Sample questions included:

- Too many obviously guilty persons escape punishment because of legal technicalities.
- Evidence illegally obtained should be admissible in court if such evidence is the only way of obtaining a conviction.
- Defendants in a criminal case should be required to take the witness stand.⁶⁷
- Accused persons should be required to take lie-detector tests.
- A lot of recent Supreme Court decisions sound suspiciously Communistic.⁶⁸

The LAQ had suffered from some significant design flaws, including the forced-choice "+" and "-" answers, a substantial number of confusing questions, and an error rate that made practical use unideal.⁶⁹ The RLAQ-23, while still far from perfect, greatly mitigated these flaws.⁷⁰ The RLAQ-23

⁶¹ *Id.*

⁶² Richard L. Wiener, *Mock Jury Research: Where Do We Go From Here?*, 29 BEHAVIORAL SCIENCE AND THE LAW 467, 471 (2011); Len Lecci and Bryan Myers, *Examining the Construct Validity of the Original and Revised JBS: A Cross-Validation of Sample and Method*, 26 LAW AND HUMAN BEHAVIOR 455, 456-457 (2002) (hereinafter *Examining the Construct Validity of the Original and Revised JBS*).

⁶³ See e.g. *id.* at 457.

⁶⁴ *Id.* at 664. If practitioners or courts are interested in a questionnaire that flags "defense friendly" jurors, the most statistically reliable source of questions comes from the social justice bias in another questionnaire, the PJAQ, discussed in Section II. B. ii., *infra*.

⁶⁵ See generally *Reliability and Validity of the Original and Revised Legal Attitudes Questionnaire*, *supra* note 14.

⁶⁶ *Id.* at 666.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 662, 668.

⁷⁰ *Id.* at 668.

proved that legal authoritarians could be objectively identified, that they would identify themselves when administered a carefully crafted questionnaire, and that they did, in fact, have a pro-conviction bias.⁷¹

2. Measuring the Bundle of Legal Authoritarian Biases

While the LAQ was still under review, in 1983 Saul Kassin and Lawrence Wrightsman created a different kind of questionnaire to get at juror bias.⁷² Their questionnaire led to modern successes in reliably detecting legal authoritarian attitudes. Instead of directly measuring legal authoritarianism, Kassin and Wrightsman measured specific legal biases: the degree to which a juror believes a defendant is probably guilty, compared with how much evidence she believes is necessary to reach “beyond a reasonable doubt.”⁷³ To do this, they devised the Juror Bias Scale (“JBS”).⁷⁴ Some of the questions that measured a participant’s belief that a defendant is probably guilty were:

- If a suspect runs from the police, then he probably committed the crime.
- In most cases where the accused presents a strong defense, it is only because of a good lawyer.
- Questions that measured a participant’s “beyond a reasonable doubt” threshold included:
- A defendant should be found guilty if 11 out of 12 jurors vote guilty.
- Too often jurors hesitate to convict someone who is guilty, out of pure sympathy.⁷⁵

As expected, people with a low “beyond a reasonable doubt” threshold favored conviction.⁷⁶ But the second component of the JBS—measuring a participant’s belief that the defendant was probably guilty—had problems. As it turned out, most survey participants thought that the defendant was probably guilty; all that really mattered in predicting their verdicts was whether their “beyond a reasonable doubt” threshold was high or low.⁷⁷

⁷¹ *Id.* at 676.

⁷² *Id.* at 664.

⁷³ *Examining the Construct Validity of the Original and Revised JBS*, *supra* note 62, at 455-56.

⁷⁴ *Id.*

⁷⁵ Bryan Myers and Len Lecci, *Revising the Factor Structure of the Juror Bias Scale: A Method for the Empirical Validation of Theoretical Constructs*, 22 *LAW AND HUMAN BEHAVIOR*, 239, 241 (1998).

⁷⁶ *Examining the Construct Validity of the Original and Revised JBS*, *supra* note 62, at 456-57.

⁷⁷ *Id.*

What the JBS failed to appreciate was that people had different reasons for thinking that the defendant was probably guilty.⁷⁸ For many people, the issue was the evidence presented in the case, not a specific bias informing their evaluation of the evidence. But others had a genuine pretrial bias that made them predisposed to believing criminal defendants were guilty.⁷⁹ Re-analysis of the JBS surfaced two such pretrial biases.

First, some people have a high degree of “system confidence.”⁸⁰ They tend to believe that the justice system gets things right: police arrest the right people and the right people get punished the way they deserve.⁸¹ On its face, “system confidence” doesn’t sound so bad. The justice system aspires to promote confidence.⁸² But what a “system confidence” bias actually measures is a predisposition to giving law enforcement the benefit of the doubt,⁸³ which leads to a pro-conviction bias.⁸⁴ In fact, a later study showed that “system confidence” correlates with explicit racial bias,⁸⁵ a connection that makes sense when considering the connection between race, mass incarceration, and the kinds of statements often made in support of policies that lead to disproportionate incarceration of minorities.⁸⁶

Second, some people are cynical of the defense.⁸⁷ People who are cynical of the defense are highly distrusting of defense lawyers and defendant testimony.⁸⁸ Where others might see a compelling defense argument, they see an agenda to avoid responsibility.⁸⁹ They tend to expect the defendant to prove his innocence,⁹⁰ and they tend to selectively remember pro-prosecution facts

⁷⁸ *Id.*

⁷⁹ *Id.* at 460-61.

⁸⁰ *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2019, 2037-38.

⁸¹ *Id.*

⁸² Such is the sentiment behind Justice Frankfurter’s famous line, “[J]ustice must satisfy the appearance of justice.” *Offit v. United States*, 348 U.S. 11, 14 (1954).

⁸³ *Revising the Factor Structure of the Juror Bias Scale: A Method for the Empirical Validation of Theoretical Constructs*, *supra* note 75, at 252.

⁸⁴ *Id.* at 250.

⁸⁵ *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2021.

⁸⁶ James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 34-36 (2012).

⁸⁷ *Revising the Factor Structure of the Juror Bias Scale: A Method for the Empirical Validation of Theoretical Constructs*, *supra* note 75, at 246-47.

⁸⁸ *Id.*

⁸⁹ *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2037-38.

⁹⁰ *Id.*

while forgetting defense-friendly facts.⁹¹ In essence, they are more likely to convict.⁹²

The JBS, with its revisions, displayed promise as a useful tool in measuring legal authoritarianism.⁹³ Unlike the LAQ or RLAQ-23, which measured general legal authoritarian attitudes, the JBS more clearly focused on discrete biases that matter most in criminal proceedings.⁹⁴

The JBS also showed that survey participants could be asked direct questions about their legal attitudes.⁹⁵ By implication, legal authoritarians, the group that typically holds these attitudes,⁹⁶ can be found by simply asking them about their views on the criminal justice system.⁹⁷ In spite of the JBS's usefulness, there were some reliability concerns (discussed further below).⁹⁸ This meant that the JBS alone underperformed at predicting verdicts as compared with the LAQ.⁹⁹

In 2008, Brian Myers and Len Lecci substantially revised the JBS into a new questionnaire that outperformed the combined predictive power of the JBS and RLAQ-23.¹⁰⁰ Its statistical performance made it highly reliable at assessing juror biases that affect verdicts.¹⁰¹

Their questionnaire, the Pretrial Juror Assessment Questionnaire ("PJAQ") measured five unique aspects of pro-conviction bias, two of which were discussed above, "system confidence," and "cynicism of the defense."¹⁰² The PJAQ changed the "beyond a reasonable doubt" threshold from the JBS to a "conviction proneness" measurement (i.e. a general willingness to

⁹¹ *Conviction Proneness and the Authoritarian Juror: Inability to Disregard Information or Attitudinal Bias?*, *supra* note 48, at 629, 633.

⁹² *Examining the Construct Validity of the Original and Revised JBS*, *supra* note 62, at 460.

⁹³ *Id.*

⁹⁴ *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2011-12.

⁹⁵ *Examining the Construct Validity of the Original and Revised JBS*, *supra* note 62, at 456.

⁹⁶ *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2024.

⁹⁷ *Examining the Construct Validity of the Original and Revised JBS*, *supra* note 62, at 456.

⁹⁸ *Id.*

⁹⁹ *Reliability and Validity of the Original and Revised Legal Attitudes Questionnaire*, *supra* note 14, at 664.

¹⁰⁰ Samantha Lundrigan, et. al., *Predicting Verdicts Using Pre-trial Attitudes and Standard of Proof*, 21 LEGAL AND CRIMINOLOGICAL PSYCHOLOGY 95, 98 (2013).

¹⁰¹ *Id.*

¹⁰² *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2018.

convict).¹⁰³ It added a bias of believing that some defendants have an “innate criminality.” Finally, it added an explicit racism bias.¹⁰⁴ A few examples:

System confidence:

- Generally, the police make an arrest only when they are sure about who committed the crime.
- A prior record of conviction is the best indicator of a person’s guilt in the present case.

Cynicism of the defense:

- Lawyers will do whatever it takes, even lie, to win a case.
- Defendants who change their story are almost always guilty.

Conviction proneness:

- Too often jurors hesitate to convict someone who is guilty out of pure sympathy.
- Criminals should be caught and convicted by “any means necessary.”

Innate criminality:

- Once a criminal, always a criminal.
- If a defendant is a member of a gang, he/she is definitely guilty of the crime.

Explicit racism:

- Minorities use the “race issue” only when they are guilty.
- The large number of African Americans currently in prison is an example of the innate criminality of that subgroup.¹⁰⁵

The PJAQ also added a measurement for pro-acquittal, a “social justice” bias, which had a modest pro-acquittal predictive power.¹⁰⁶ Each of the five PJAQ subscales correlate with legal authoritarian answers on the RLAQ-23, showing that the PJAQ subscales are useful measures of troubling

¹⁰³ *Id.* at 2019.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2037-38.

¹⁰⁶ *Id.* at 2019. For more on implementing social justice questions, see some of the questions in the PJAQ at *id.* at 2037-38.

authoritarian biases.¹⁰⁷ But by focusing on the biases themselves, rather than the general legal authoritarian attitude, the PJAQ proved to be a more reliable tool at predicting biased verdicts.¹⁰⁸

The PJAQ's high reliability offered a turning point in detecting legal authoritarians during jury selection. Many of its questions, such as the examples above, reveal predispositions on assessing credibility, assigning burden, and weighing evidence,¹⁰⁹ all of which are highly relevant to a defendant's right to a fair trial.¹¹⁰ The PJAQ also showed that legal authoritarians will "out" their pro-conviction biases in surveys, which suggests a highly practical application for voir dire.¹¹¹

Readers will find a short sample questionnaire derived from the PJAQ in the Appendix of this article. The sample questionnaire can help courts and attorneys implement the practical benefits of the PJAQ in identifying legal authoritarian jurors because it's based on the same validated conceptual categories. The sample questionnaire's abbreviated format makes it an ideal voir dire tool for both multi-day and single-day trials.

3. Exceptions to the Rule: Pro-Acquittal Bias

While legal authoritarians generally have a pro-conviction bias,¹¹² there are two notable exceptions. Legal authoritarians downplay criminal responsibility when the defendant is a police officer.¹¹³ This holds true regardless of whether the officer was acting in the course of his duty—for example, by allegedly using excessive force against protesters—or acting wholly outside of that duty—for example, by allegedly shoplifting or committing an act of domestic violence.¹¹⁴ These examples illustrate that legal authoritarianism is

¹⁰⁷ *Id.* at 2024.

¹⁰⁸ *Predicting Verdicts Using Pre-trial Attitudes and Standard of Proof*, *supra* note 100, at 98.

¹⁰⁹ Notably, these are all topics covered in the Model Utah Jury Instructions. https://www.utcourts.gov/resources/muji/inc_index.asp?id=30 (accessed June 12, 2020).

¹¹⁰ See *State v. Saunders*, 1999 UT 59, ¶ 33 ("[A]n impartial jury is as essential to a fair trial as is an impartial judge. Indeed, the damaging effect of juror bias may be even more insidious than judicial bias because once biased jurors are seated, the effect of their bias is essentially undiscoverable and unremediable.").

¹¹¹ *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2029.

¹¹² *A Meta-Analysis*, *supra* note 6, at 34.

¹¹³ N. T. Feather, *Reactions to Penalties for Offenses Committed by the Police and Public Citizens: Testing a Social-Cognitive Process Model of Retributive Justice*, 75 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 528 (1998); N. T. Feather, *Reactions to Penalties for an Offense in Relation to Authoritarianism, Values, Perceived Responsibility, Perceived Seriousness, and Deservingness*, 71 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 571 (1996).

¹¹⁴ *Id.*

not merely a reasoned decision to support a safe society; it's a bias that tends to side with authority figures, whether those figures are right or wrong.¹¹⁵

The second exception, albeit with some caveats, is sexual assault.¹¹⁶ Research on legal authoritarian biases shows mixed results in predicting pro-conviction bias in rape cases.¹¹⁷ Other studies suggest exactly the opposite, a pro-acquittal bias.¹¹⁸ The pro-acquittal bias likely comes up in situations where the victim is perceived to have dressed provocatively or is otherwise seen as the “instigator.”¹¹⁹ Authoritarians tend to have a higher “rape myth acceptance” than other groups, which can lead to a “victim blaming attitude” tied to a disposition to acquit where others would convict.¹²⁰ But even under circumstances where “pro-defense” jurors convict on rape cases, authoritarians likely convict for different reasons (and potentially, highly troubling reasons).¹²¹ For example, authoritarians may be especially likely to convict in a child sex case where an adult male is alleged to have raped a teenage boy simply because the evidence points to negative homosexual stereotypes.¹²² These findings generally suggest that authoritarians tend to convict in sexual assault cases due to authoritarian biases, unless there are factors that support “victim blaming” stereotypes—in which case, they are more likely to acquit than others, also due to authoritarian biases.¹²³

Both exceptions underscore the rule. Legal authoritarianism directly challenges the core value of an impartial jury. All participants in the criminal

¹¹⁵ *Reactions to Penalties for Offenses Committed by the Police and Public Citizens: Testing a Social-Cognitive Process Model of Retributive Justice*, *supra* note 113, at 575.

¹¹⁶ *A Meta-Analysis*, *supra* note 6, at 39 (finding that rape had the weakest correlation with pro-conviction guilty verdicts among authoritarians).

¹¹⁷ *Examining the Construct Validity of the Original and Revised JBS*, *supra* note 62, at 456, 460.

¹¹⁸ *See Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, *supra* note 46, at 292-293. The research ties a separate attitude, “belief in a just world,” (BJW) to a rape acquittal bias, since people who score high in BJW tend to think that victims get what they deserve. *Id.* Although it was developed as a separate attitudinal measurement, BJW is strongly correlated with legal authoritarian attitudes. *See* Brooke Butler and Gary Moran, *The Impact of Death Qualification*, *supra*, at 60.

¹¹⁹ Federica Spaccatini, et. al. *Sexualized Victims of Stranger Harassment and Victim Blaming: The Moderating Role of Right-Wing Authoritarianism*, 23 *SEXUALITY AND CULTURE*, 811 820 (2019).

¹²⁰ Bob Altemeyer, *The Other “Authoritarian Personality”*, 30 *ADVANCES IN EXPERIMENTAL PSYCHOLOGY* 47, 70 (1998).

¹²¹ *Revising the Factor Structure of the Juror Bias Scale: A Method for the Empirical Validation of Theoretical Constructs*, *supra* note 75, at 251.

¹²² Robert J. Cramer, et. al., *Jury Selection in Child Sex Abuse Trials: A Case Analysis*, 18 *JOURNAL OF CHILD SEXUAL ABUSE* 190, 193 (2009).

¹²³ *Cf. The Other “Authoritarian Personality”*, *supra* note 120, at 30, and Katherine B. Anderson, et. al., *Individual Differences and Attitudes Toward Rape: A Meta-Analytic Review*, 23 *PSPB* 295 (1997).

justice system: defense attorneys, judges, and prosecutors, should be vigilant against legal authoritarianism making its way into the jury box.

C. The Imperative to Finding Legal Authoritarian Jurors

The Utah Supreme Court has emphasized that “an impartial jury is as essential to a fair trial as is an impartial judge.”¹²⁴ The Court has urged lower courts and attorneys to be skeptical of a juror’s claims to impartiality:

It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hands in court and declare themselves biased.¹²⁵

Despite the Supreme Court’s emphasis, attorneys—for all their legal education—do not tend to be very good at figuring out whether a juror is biased: “[A]ttorneys tend to select the same jurors as do untrained individuals and, in either case, the resulting jury is rarely less biased than a group of randomly selected jurors.”¹²⁶ Attorneys often rely on myths about juror occupation,¹²⁷ education,¹²⁸ body language,¹²⁹ gender,¹³⁰ wealth,¹³¹ even race,¹³² as guidance for peremptory strikes. They often engage in “idiosyncratic and unsystematic” jury selection techniques.¹³³

While any number of biases may affect the outcome of a trial,¹³⁴ prosecutors and defense attorneys will generally be doing their best work by identifying legal authoritarian attitudes among their top priority in order to make

¹²⁴ *State v. Saunders*, 1999 UT 59, ¶ 33.

¹²⁵ *State v. Ball*, 685 P.2d 1055, 1058 (Utah 1984).

¹²⁶ Len Lecci, et. al., *Using Social Science Research to Inform and Evaluate the Contributions of Trial Consultants in the Voir Dire*, 4 JOURNAL OF FORENSIC PSYCHOLOGY PRACTICE 68, 71 (2004).

¹²⁷ *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, *supra* note 46, at 278.

¹²⁸ *Id.* at 284-85

¹²⁹ Margaret Bull Kovera, et. al., *Voir Dire and Jury Selection*, 166 in HANDBOOK OF PSYCHOLOGY VOL. 11 FORENSIC PSYCHOLOGY (Alan M. Goldstein, 2003).

¹³⁰ *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, *supra* note 46, at 255-259.

¹³¹ *Voir Dire and Jury Selection*, *supra* note 129, at 165.

¹³² *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, *supra* note 46, at 263-268; *Voir Dire and Jury Selection*, *supra* note 129, at 168.

¹³³ *A Meta-Analysis*, *supra* note 6, at 40.

¹³⁴ See Cathy E. Bennett Robert B. Hirschhorn Heather R. Epstein, *How to Conduct A Meaningful & Effective Voir Dire in Criminal Cases*, 46 SMU L. Rev. 659, 692 (1992); *Systematic Jury Selection*, *supra* note 15, at 22.

trial outcomes fair.¹³⁵ Legal authoritarians tend to convict (or in limited circumstances acquit) due to their prejudices rather than the facts,¹³⁶ undercutting a defense attorney's role in zealous advocacy, and a prosecutor's role in ensuring that justice is done.

Because traditional judge-led voir dire poorly unearths these jurors,¹³⁷ judges can help defense and prosecution by using their discretion to allow wide latitude during voir dire to identifying legal authoritarians. Although, as discussed above, attorneys often rely on "idiosyncratic" and unreliable indicators of bias, attorneys are more likely to make better juror selection choices when they have more information. That may come in the form of attorney-led voir dire and/or through the implementation of a carefully crafted questionnaire. Surveys have made great progress in identifying legal authoritarian jurors,¹³⁸ making questionnaires, such as the sample questionnaire in this article's Appendix, an ideal starting point for legal practitioners to jointly engage in identifying legal authoritarian jurors.

The Utah Supreme Court has particularly urged trial courts to "liberally exercise[] their discretion in favor of allowing counsel to elicit information from prospective jurors,"¹³⁹ noting that their discretion to exclude questions may be limited when "proposed voir dire questions go directly to the existence of an actual bias."¹⁴⁰ Because a biased juror poses such a great risk to a fair trial, the Utah Supreme Court has advised trials courts to apply for-cause strikes when "legitimate questions" are raised about a venire-member's bias "even where it would not be legally erroneous" to pass the juror for-cause.¹⁴¹ When doubts are raised about a juror's impartiality, the juror must be excluded "unless the judge is convinced the juror can and will act impartially and fairly."¹⁴²

Courts should be wary of even a slight legal authoritarian bias since that bias may significantly alter the outcome of the case.¹⁴³ For example, legal authoritarians are less likely than others to follow a judge's instructions when doing so would lead to an acquittal.¹⁴⁴ That knowledge alone should give courts pause when noting the existence of such a bias, given a foundational

¹³⁵ *Systematic Jury Selection*, *supra* note 15, at 17 ("Aside from legal authoritarianism, research suggests that the relationships between juror characteristics and verdict that do exist are case-specific and do not generalize across different situations.").

¹³⁶ See Section I. A., *supra*.

¹³⁷ See Section II. A., *infra*.

¹³⁸ See note 100, *supra*.

¹³⁹ *State v. Worthen*, 765 P.2d 839, 845 (Utah 1988) (internal citation omitted),

¹⁴⁰ *State v. Saunders*, 1999 UT 59, ¶ 43.

¹⁴¹ *State v. Carter*, 888 P.2d 629, 650 (Utah 1995).

¹⁴² Utah R. Crim. P 18(e)(14).

¹⁴³ See Section I., *supra*.

¹⁴⁴ *Id.*

principle of the integrity of jury trials and due process of law is: that jurors will follow legal instructions.

Again, while legal authoritarianism is not the only bias that may affect the outcome of a trial,¹⁴⁵ it should be among the most concerning given its prevalence, consistency, and the reliability at detecting it through proven methods.¹⁴⁶ Those proven methods come in two forms: attorney-led voir dire, and carefully crafted questionnaires.¹⁴⁷ The Utah Court of Appeals has recently urged Utah courts to permit both:

In Utah's trial courts, the days of perfunctory—and often insufficient—judge-only-conducted juror examination are gone. Indeed, our rules now expressly provide for attorney-conducted juror examination . . . and many judges and attorneys wisely embrace the conscientious use of a well-drafted questionnaire.¹⁴⁸

As discussed in the next section, both attorney-led voir dire and evidence-based questionnaires reveal more information than judge-led voir dire can do on its own.

II. THE PRESSURE TO GIVE THE JUDGE “THE RIGHT ANSWER” IN VOIR DIRE

In 1989, polls predicted that Douglas Wilder, a Black candidate for governor in Virginia, would beat his White opponent by a landslide.¹⁴⁹ But actual votes showed that Wilder scraped out a win by only a few thousand votes.¹⁵⁰ The difference between the polls and the outcome was troubling. Why would so many people give pollsters one answer but then vote the other way? Psychologists dubbed the phenomenon the “Wilder effect,” and it seemed to have one major cause.¹⁵¹ When people talked to pollsters, they wanted to be seen as supporting the Black candidate when in fact they did not.¹⁵²

¹⁴⁵ See generally *Systematic Jury Selection*, *supra* note 15.

¹⁴⁶ *Id.* at 17.

¹⁴⁷ See Section II., *infra*.

¹⁴⁸ *State v. Williams*, 2018 UT App 96, ¶ 37, n. 14 (citing Utah R. Crim. P. 18(b)).

¹⁴⁹ Daniel J. Hopkins, *No More Wilder Effect, Never a Whitman Effect: When and Why Polls Mislead about Black and Female Candidates*, 71 THE JOURNAL OF POLITICS 769, 769 (2009).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* (finding that the “Wilder effect” on Black candidates in elections has since decreased).

The “Wilder effect” turned out to have far reaching effects on information gathering. One study compared how people’s opinions about Jews changed depending on whether the interviewer was Jewish or non-Jewish.¹⁵³ Unsurprisingly, people with anti-Semitic beliefs were more likely to express those beliefs to the non-Jewish interviewer.¹⁵⁴ A later study showed the same effect on opinions about Black people when the interviewer was not Black.¹⁵⁵ The “Wilder effect” revealed an important part about human psychology, an effect called Social Desirability Bias.¹⁵⁶ People hide their biases when they worry what others will think about them.¹⁵⁷ And while there are a number of contributing factors that make people reluctant to admit their biases to others, two reasons stand out as being particularly problematic: who is asking the questions, and how the questions are worded.¹⁵⁸ Even though the “Wilder effect” was coined after Douglas Wilder’s election in 1989, two years earlier, one researcher had already shown that prospective jurors give different answers when interviewed by a judge as opposed to an attorney.¹⁵⁹

A. When Judges Ask Questions vs. When Attorneys Ask Questions

In 1987, Susan Jones set up an experiment to figure out which is better, judge-led voir dire or attorney-led voir dire.¹⁶⁰ Before Jones’s study, some researchers theorized (without evidence) that the “formality and gravity” of the judge’s presence in the courtroom would motivate jurors to give honest answers about their bias.¹⁶¹ But there was good reason to suspect that theory was wrong. For example, other studies had shown that people are more likely to self-disclose to people they feel comfortable with than people who are stand-offish.¹⁶² They’re also more willing to self-disclose to interviewers who seem to share “equal status” with the interviewee (i.e. employees share more with fellow employees than with bosses).¹⁶³ When an interviewer is less personable

¹⁵³ Penny S. Visser, et. al., *Survey Research* in HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY, 245 (Harry T. Reis and Charles M. Judd, eds., 2000).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (on who is asking the questions); Jon A. Krosnick and Stanley Presser, *Question and Questionnaire Design*, 277 in HANDBOOK OF SURVEY RESEARCH 2ND ED (James D. Wright and Peter V. Marsden, eds., 2010) (on how the questions are worded can create a problem of “acquiescence”).

¹⁵⁹ Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire An Empirical Investigation of Juror Candor*, 11 LAW AND HUMAN BEHAVIOR 131 (1987).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 132.

¹⁶² *Id.* at 133.

¹⁶³ *Id.* at 133-34.

and less relatable, people become conscious of their public image and give dishonest answers to avoid embarrassment.¹⁶⁴

Jones theorized that jurors would be more honest with attorneys than judges.¹⁶⁵ Judges sit in black robes above jurors, they command respect and are referred to as “your Honor.”¹⁶⁶ Attorneys have strong incentives to make voir dire a comfortable experience and make themselves relatable.¹⁶⁷ And it turns out, those distinctions make a difference.

To test these distinctions, Jones set up eight mock voir dires.¹⁶⁸ Four of those voir dires were judge-led, and four were attorney-led. Jones then broke the study down even further. For the judge-led voir dire, two of them would be conducted by a friendly, personable judge while the other two would be conducted by a highly formal, aloof judge. The same breakdown went for the attorney-led voir dire. The questions were uniform across the eight trials.¹⁶⁹ The jurors knew the case was a mock trial, but they were led to believe that the judges and attorneys were real.¹⁷⁰

Jurors were twice as honest with attorneys than they were with judges.¹⁷¹ In fact, jurors were more honest with the non-personable attorneys than they were with the personable judge.¹⁷² The jurors’ answers suggested that they gave judges the answers that they thought judges wanted to hear.¹⁷³ Jurors identify judges as fulfilling a certain role and are uncomfortable with self-disclosing information that they fear might disappoint someone in that role.¹⁷⁴

Jones’s research has received repeated support.¹⁷⁵ Attorney-led voir dire leads to significantly more for-cause challenges than judge-led voir dire.¹⁷⁶ Related research suggests that attorney-led voir dire may be nearly four times as accurate at finding pro-conviction jurors as judge-led voir dire.¹⁷⁷ Observational studies of 12 real trials have also confirmed the judge-led voir dire results in poor information gathering.¹⁷⁸ For example, as shown in post-voir

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 131.

¹⁶⁶ *Id.* at 132-33.

¹⁶⁷ *Id.* at 133-34.

¹⁶⁸ *Id.* at 137-38.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 138.

¹⁷¹ *Id.* at 143.

¹⁷² *Id.* at 143-44.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Voir Dire and Jury Selection*, *supra* note 128, at 166.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Richard Seltzer, et. al. *Juror Honesty During the Voir Dire*, *Journal of Criminal Justice* 451, 453 (1991).

dire surveys, nearly 50% of the prospective jurors felt that a defendant should have to prove his or her innocence if he or she takes the stand, but hardly anyone discloses that information when asked by a judge.¹⁷⁹ It should be noted that survey-respondents admitted to these biases post-voir dire, indicating that judicial instructions did not change their attitudes.¹⁸⁰ Based on the collected information, researchers surmised that between 5-8 of those 12 trials could have resulted in different verdicts had attorneys been able to use voir dire more effectively.¹⁸¹

These findings largely confirm the “Wilder effect,” where the identity of the questioner affects how people respond.¹⁸²

Another study isolated two reasons why jurors tend to be dishonest with judges.¹⁸³ First, jurors face significant “evaluation anxiety” from a judge.¹⁸⁴ Jurors fear that admitting to a bias will embarrass them, making lying an easier way to move through voir dire.¹⁸⁵ Second, jurors are clued into an “expectancy effect,” where they tailor their answers according to what they think the judge expects from them.¹⁸⁶ Jurors will look to subtle and non-verbal cues from a judge, such as the judge’s impatience, as a sign that they should keep quiet about any biases.¹⁸⁷ And, in fact, judges may communicate an expectancy effect unconsciously and unintentionally.¹⁸⁸

Even before Jones’s study was published, the Utah Supreme Court noted that expecting jurors to raise their hands to reveal their biases is, for the most part, “an unwarranted naivety regarding human nature” because few jurors “have the personal insight, candor and openness to raise their hands in court and declare themselves biased.”¹⁸⁹ Nevertheless, as Jones’s research shows, judges have only a limited ability to solve this problem through judge-led voir dire.¹⁹⁰ The problem isn’t *how* the judge conducts the voir dire that affects juror honesty; it’s simply the fact that the judge is the one conducting the voir dire that makes people less open.¹⁹¹

¹⁷⁹ *Id.* at 457-58.

¹⁸⁰ *Id.* at 453-54.

¹⁸¹ *Id.* at 453.

¹⁸² See notes 149-52, *supra*.

¹⁸³ *Voir Dire and Jury Selection*, *supra* note 128, at 165.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *State v. Ball*, 685 P.2d 1055, 1058 (Utah 1984).

¹⁹⁰ See note 172, *supra*.

¹⁹¹ See note 171, *supra*.

B. *How Asking the Right Question the Wrong Way Affects Honesty*

In addition to the interviewer problem discussed above, people are much more likely to misstate their true beliefs depending on the way a question is formulated.¹⁹² Subtle variations in question form may profoundly impact the answer.¹⁹³ For example, “[w]hen asked how fast a car was going when it ‘smashed’ into another car, witnesses estimate a speed of 10 miles an hour faster than when they are asked how fast the car was going when it ‘ran into’ the other car.”¹⁹⁴ A colorful verb may lead people to exaggerate, but something close to the opposite effect can occur in judge-led voir dire. When questions get bogged down with complicated language, people tend to fall into question “acquiescence.”¹⁹⁵ They endorse “an assertion made in a question, regardless of the assertion’s content.”¹⁹⁶ In this context, jurors may signal that they can be impartial decisionmakers to questions about bias simply by the way the question is worded.¹⁹⁷

Take the following question that judges typically ask as a follow-up when a juror mentions having a close friend or family member in law enforcement:

Is there anything about your relationship with that individual that would *prevent* you from being *fair* and *impartial* in this case?¹⁹⁸

The question appears to offer an equal choice of “yes” or “no.” But that’s misleading. As shown below, the question has several semantically complicated parts to it, and those complications tend to influence people to pick one answer over the other one, in this case saying “no.”

Complicated questions put a toll on people’s cognitive processes by forcing them to think hard to understand what is asked.¹⁹⁹ When confronted with a complicated question, many people opt for an easy answer over spending time to make sure they fully understand the question.²⁰⁰ Questions get

¹⁹² Roger W. Shuy, *How a Judge’s Voir Dire can Teach a Jury What to Say*, 6 DISCOURSE & SOCIETY, 207 (1995).

¹⁹³ *Question and Questionnaire Design*, *supra* note 158, at 265-66.

¹⁹⁴ *How a Judge’s Voir Dire can Teach a Jury What to Say*, *supra* note 192, at 208-209.

¹⁹⁵ *Question and Questionnaire Design*, *supra* note 158, at 275.

¹⁹⁶ *Id.*

¹⁹⁷ *How a Judge’s Voir Dire can Teach a Jury What to Say*, *supra* note 192, at 207.

¹⁹⁸ This example comes verbatim from a recent case.

¹⁹⁹ *Id.* at 265-66.

²⁰⁰ *Id.* noting that the term for when a person chooses an easier answer to avoid cognitive load is called satisficing. Satisficing is a significant problem in survey research, and there is every reason to believe that people in jury pools engage in satisficing when surveyed about their biases, making question optimization as important in jury selection as it is in public surveys

complicated when they use words that aren't ordinarily used in conversation.²⁰¹ When a "yes/no" question uses ordinary words for one option, but not the other, people tend to pick the answer that is explained with ordinary words.²⁰² They also tend to believe that the easier-to-understand option is the one that the questioner wants them to pick.²⁰³ This is particularly problematic when considering legal authoritarians, who are predisposed to aligning their values with authority figures.²⁰⁴ If the form of the question gives legal authoritarians a sense that there is a "right answer" to the question, they are more likely to give that answer when the asker is an authority figure, such as a judge.²⁰⁵ Using the question above illustrates how a semantically complicated question can incentivize a particular answer.

The question above ties *prevent*, *fair*, and *impartial*, to the answer "no"—that is, the juror's relationship with a law enforcement officer would *not prevent* the juror from being *fair* and *impartial*. For the juror to instead answer "yes" and admit bias, the juror has to first consider the opposite word choices to *prevent*, *fair*, and *impartial* in order to understand the implications of what a "yes" answer means.²⁰⁶ This is where the question gets semantically complicated. The opposites to *prevent*, *fair*, and *impartial* aren't in the question; the juror has to think up those opposites in the moment. And as it turns out, none of those opposites naturally flow with the question, forcing the juror to think even harder before being sure that answering "yes" actually makes sense. All of this makes an answer of "no" much simpler. It's easiest to see this problem by working through the opposites that the juror would have to consider.

Starting with *prevent*, what's the opposite of *prevent* in this question? *Allow*? Simply exchanging *prevent* with *allow* in the question doesn't make sense. The question immediately becomes confusing. Already, the juror must seriously reinterpret the question to make sure that answering "yes" means what the juror thinks it's supposed to mean.

Next, *fair*. The most obvious opposite of *fair* is *unfair*. That's certainly easier to quickly adapt into the question. But while *unfair* is the logical opposite of *fair*, *unfair* is what linguists call a "semantically colored" opposite,

(and perhaps more important when considering the ramifications for defendants, as well as victims, of a biased jury).

²⁰¹ Josh Pasek and Jon A. Krosnick, *Optimizing Survey Questionnaire Design in Political Science: Insights from Psychology*, 32-33 in *THE OXFORD HANDBOOK OF AMERICAN ELECTIONS AND POLITICAL BEHAVIOR* (Jan E. Leighley, ed. 2010).

²⁰² *How a Judge's Voir Dire can Teach a Jury What to Say*, *supra* note 192, at 208-09.

²⁰³ *Id.*

²⁰⁴ *Authoritarianism and Its Relationship with Intuitive-Experiential Cognitive Style and Heuristic Processing*, *supra* note 38, at 44.

²⁰⁵ See generally Section II. A., *supra*.

²⁰⁶ See Section II. A., *supra*.

because it uses the base word *fair* and merely adds the *un-* prefix to it.²⁰⁷ Semantically colored questions present a unique problem. When asked a question that uses two options, one semantically colored by the other, people tend to pick the option that uses the base word because it's linguistically more appealing.²⁰⁸ In this case, that would mean that jurors would tend to indicate that they can be *fair* rather than *unfair*. As an aside, it's also hard to imagine many people willing to declare themselves *unfair* to a group of strangers.²⁰⁹

Finally, *impartial*. Based on the two previous words, *impartial* may be the most confusing of the three. *Impartial* is semantically colored by its base word *partial*, drawing the mind to consider *partial* when contemplating a "yes" answer to the question. But *partial* doesn't fit in this context. While *fair* and *unfair* are direct opposites, *partial* is not the normal word to use when describing someone who is the opposite of *impartial*.²¹⁰ Trying to fit *partial* into the question doesn't make sense, and it's difficult to easily imagine an alternative word that fits. The juror may be left with something as complicated as *not impartial*, which doesn't help him or her adequately consider the significance of answering "yes" in the moment.

When questions require significant cognitive load to interpret, people tend to take mental shortcuts to picking the easiest available answer.²¹¹ It's possible that most people are unaffected by law enforcement relationships. But the form of the question may hinder honest self-reporting, a significant concern to social science literature on self-reporting.²¹² The best solution is to craft a simpler question that gets at the same sort of bias.²¹³ For example, the judge could ask prospective jurors whether they agree with the following statement:

- When it is the suspect's word against a police officer's, I believe the police.²¹⁴

This question is much simpler, avoiding the form problem of the previous question.

Of course, question-form problems aren't exclusive to judge-led voir dire, since attorneys may just as easily ask overly complicated questions. But

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See note 125, *supra*.

²¹⁰ Partial seems to more typically mean something like "markedly fond of someone or something." "Partial." *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/partial> (accessed June 9, 2020).

²¹¹ See note 201, *supra*.

²¹² Jon A. Krosnick, et. al., *The Measurement of Attitudes*, 50-52 in *HANDBOOK OF ATTITUDES AND ATTITUDE CHANGE* (Dolores Albarracin, et. al., eds. 2005).

²¹³ *Question and Questionnaire Design*, *supra* note 158, at 264.

²¹⁴ See Appendix, *infra* (the sample questionnaire with accompanying explanation).

greater latitude for attorney-led voir dire and attorney questionnaires may indirectly lead to greater bias detection through simpler questions. While judges are often torn between ensuring a meaningful voir dire with efficient use of time,²¹⁵ attorneys have a strong incentive to make voir dire as impactful as possible and with greater latitude may generally be able to spend more pre-trial time preparing impactfully-formed questions than judges can.

It should be noted that Utah caselaw shows a number of instances where judges either altered a question that one party submitted or chose to ask different ones related to the topic.²¹⁶ The decision to permit a question in a particular form is largely discretionary. Typically, the court's alterations of a party's voir dire question survive appeal, but only when the judge's question adequately addresses the same topic that the submitted question seeks to address.²¹⁷ In any event, the number of cases on this issue illustrate that judges and attorneys don't always agree on the form of the question.²¹⁸ Suggesting that attorneys with latitude ask different questions than judges might ask which, as the research indicates, may result in significantly different responses from the jury pool.

C. Using a Questionnaire

The Utah Supreme Court has pointed out that the "most characteristic feature of prejudice is its inability to recognize itself."²¹⁹ And, "[i]t is not uncommon for people to believe that their 'biases' are in fact nonbiased objective judgments that are true and correct."²²⁰ While these psychological issues present problems in judge-led voir dire,²²¹ a carefully crafted questionnaire can incentivize jurors to honestly report their biases while under the impression

²¹⁵ David Suggs and Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L. J. 245, 252 (1980) (noting that, particularly in questions that relate to peremptory strikes, a judge's interest in efficient voir dire may make him or her less motivated than attorneys to find biases); see also *United States v. Ible*, 630 F.2d 389, 395 (5th Cir. 1980) ("[The] practice of almost exclusive voir dire examination by the court does not take into account the fact that it is the parties, rather than the court, who have a full grasp of the nuances and the strength and weaknesses of the case.").

²¹⁶ *State v. Ball*, 685 P.2d 1055, 1056-57 (Utah 1984); *Hornsby v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 758 P.2d 929, 933 (Utah Ct. App. 1988); *State v. James*, 819 P.2d 781, 798 (Utah 1991); *Barrett v. Peterson*, 868 P.2d 96, 102 (Utah Ct. App. 1993); *State v. Piansiakson*, 954 P.2d 861, 868 (Utah 1998); *State v. Reed*, 2000 UT 68, ¶ 12; *State v. Mead*, 2001 UT 58, ¶ 31; *Depew v. Sullivan*, 2003 UT App 152, ¶¶ 24-26; *Alcazar v. Univ. of Utah Hosps. & Clinics*, 2008 UT App 222, ¶ 12. This list doesn't include cases where the judge simply refused to permit a question on a topic.

²¹⁷ Reversals were made in *Ball*, at 1056-57; *Hornsby*, at 993; *Barrett*, at 102; and *Depew*, at ¶¶ 24-26.

²¹⁸ See note 216, *supra*.

²¹⁹ *State v. Ball*, 685 P.2d 1055, 1058 (Utah 1984).

²²⁰ *State v. Saunders*, 1999 UT 59, ¶ 35.

²²¹ See Section II. A., *supra*.

that these biases are reasonable judgments.²²² In fact, the survey research on legal authoritarianism has repeatedly demonstrated that legal authoritarians will “out” themselves when asked non-threatening survey questions.²²³ Questionnaires also eliminate the interviewer effect discussed above—where the survey-taker changes his or her answer depending on who is asking the question.²²⁴

Utah’s appellate courts have repeatedly highlighted the benefits of questionnaires. Juror questionnaires reside among other “procedural safeguards” to ensure a “fair and impartial trial.”²²⁵ They are “useful in obtaining a great deal of information about prospective jurors, including sources of possible bias, with only a small investment of the trial court’s time.”²²⁶

The Appendix to this article includes a sample questionnaire specifically designed to get at the kinds of biases that legal authoritarians embrace. It’s brief and intuitive, and fits on a single page, making it particularly ideal for trials where the jury receives the questionnaire in the morning while attorneys and judges make last minute trial preparations before the voir dire.

CONCLUSION

Over three decades ago, the Utah Supreme Court warned against making voir dire a “stark little exercise”: a task of going through the motions of voir dire without making meaningful efforts to coax out juror bias.²²⁷ A thorough focus on legal authoritarianism will substantially help courts and attorneys avoid the dangers of a *pro-forma*, or mostly *pro-forma*, voir dire process. Decades of research on legal authoritarianism give one ample reason to be concerned about legal authoritarian jurors being put in the position of deciding a defendant’s guilt.²²⁸ There are well-developed tools to expose it in voir dire, including the sample questionnaire in this article’s appendix.²²⁹ There is no better time for courts, prosecutors, and defense attorneys to work together to use evidence-based voir dire to more confidently seat impartial juries in Utah.

²²² See Section I. B. ii., *supra*.

²²³ *Id.*

²²⁴ *The Measurement of Attitudes*, *supra* note 212, at 52.

²²⁵ *State v. Greenwood*, 2012 UT 48, ¶ 23; see also *State v. Williams*, 2018 UT App 96, ¶ 37, n. 14 (“... many judges and attorneys wisely embrace the conscientious use of a well-drafted questionnaire”).

²²⁶ *Claypoole v. Winward Electric, Inc.*, 2010 UT App 77.

²²⁷ *State v. Worthen*, 765 P.2d 839, 845 (Utah 1988).

²²⁸ *Cf. A Meta-Analysis*, *supra* note 6.

²²⁹ See Section II., discussing attorney-led voir dire and questionnaires as both useful tools to detecting juror bias.

APPENDIX - A SHORT QUESTIONNAIRE FOR LEGAL AUTHORITARIAN
BIASES

The sample questionnaire, given below, is designed to make detecting legal authoritarians easier. Some background may help show how it can be useful.

Discussed in Section II, above, Brian Myers and Len Lecci designed the Pretrial Juror Assessment Questionnaire (“PJAQ”) to identify five categories of bias that directly connect to a juror’s willingness to convict. Unlike generalized (and less helpful) questionnaires used to identify a legal authoritarian mindset, the PJAQ can reliably get legal authoritarians to “out” themselves through focused questions on the categories of bias associated with those types of jurors.²³⁰ The PJAQ’s categories are:²³¹

- *System Confidence* – Measures the belief that police are unlikely to arrest someone unless that person is guilty.
- *Conviction Proneness* – Measures a general propensity to convict.
- *Cynicism towards the Defense* – Measures the belief that the defense (both defendants and defense attorneys) get in the way of justice.
- *Innate Criminality* – Measures the belief that some people are predisposed to being criminals.
- *Racial Bias* – Measures explicit racism.

One can easily imagine how these biases may affect a defendant’s right to a fair trial. A juror with a high degree of system confidence will likely give the testimony of a law enforcement officer more weight than other witnesses.²³² Related studies suggest that people high in conviction proneness tend to have low thresholds for what “beyond a reasonable doubt” means, even when instructed, as they are in Utah, that they must be “firmly convinced” of the prosecution’s case to convict the defendant.²³³ Cynicism towards the

²³⁰ See note 111, *supra*.

²³¹ *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2018.

²³² *Id.* at 2019.

²³³ Conviction proneness is linked to a low beyond a reasonable doubt threshold. *Predicting Verdicts Using Pre-trial Attitudes and Standard of Proof*, *supra* note 100, at 95, 105. And when compared with no definition for “beyond a reasonable doubt,” an instruction that defines it as being “firmly convinced” did not lead people to weight the standard any differently than no definition at all. Katrin Mueller-Johnson, et. al. *Effects of Judicial Instructions and Juror Characteristics on Interpretations of Beyond a Reasonable Doubt*, 24 *PSYCHOLOGY, CRIME & LAW*, 117 (2018). Notably, a definition that defined beyond a reasonable doubt as being “sure” of the evidence slightly reduced variability among people, making interpretations slightly more consistent. *Id.*

defense and innate criminality both suggest antagonistic biases. Finally, racial bias has some interesting connections to pro-conviction leanings. Obviously, racial bias leads people to convict minorities.²³⁴ But it tends to demonstrate a pro-conviction leaning in other situations as well: the PJAQ was first tested under circumstances where the defendant's race would not have been known to survey-participants; nevertheless, racial bias correlated with conviction.²³⁵ In fact, racial bias is shown to correlate specifically with one other measure, system confidence (i.e. a belief that police typically get things right in investigations and arrests), a thought that deserves some pause for consideration.²³⁶ But where a defendant is white, there's reason to assume that racial bias would have an opposite effect—manifesting itself in a pro-majority bias favoring acquittal.²³⁷ Thus, even in cases where both the defendant and all witnesses are white, there may be some usefulness to inquiring about it. And, perhaps surprisingly, a meaningful number of survey-respondents to the PJAQ admitted to explicitly racist attitudes on their survey.²³⁸ To the extent that courts and practitioners may be reluctant to include it on cases where there is not a minority defendant, parties should consider trying it out and seeing how revealing it just may be.

The sample questionnaire used below leans heavily on the PJAQ.²³⁹ However, it's shorter. It fits on a single 8½ x 11" page.²⁴⁰ Because it's shorter

²³⁴ *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2019.

²³⁵ *Id.* at 2029-31.

²³⁶ *Id.* at 2021.

²³⁷ *Id.* at 2020.

²³⁸ *Id.* at 2021.

²³⁹ *See id.* at 2037-38. This sample questionnaire is recommended over the full PJAQ for a couple reasons. First, it's short, making it very easy to give to juries in one-day trials where voir dire is expected to be over before lunch. Second, the PJAQ has a few questions that might be too specific to a given case. For example, one question asks, "If a defendant is a member of a gang, he/she is definitely guilty of the crime." In a gang-related case, this question might be too close to an improper "stakeout" question where the question serves to predict a juror's verdict just as much (if not more) than it predicts an attitudinal bias. *See State v. Williams*, 2018 UT App 96, ¶ 31 (holding that "stakeout" questions are properly excluded in Utah voir dire). There are a few other examples of "stakeout" questions in the PJAQ that might make courts reluctant to use it. The reader may also note that the sample questionnaire slightly changes some of the wording of the PJAQ. Changes in wording do not necessarily weaken the validity of a survey question. The question is whether the changes alter the substance of the question. *See generally* Hamed Taherdoost, *Validity and Reliability of the Research Instrument; How to Test the Validation of a Questionnaire/Survey in a Research*, 5 INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN MANAGEMENT 28, 29 (2016).

²⁴⁰ The author is more than happy to email an editable copy to anyone who is interested. Please feel free to email him at davidalexferg@gmail.com for a copy. To replicate the grey shading, use the Shading tool in Microsoft Word (the icon that looks like a paint can spilling over). Highlight the area to be shaded, click on the downward facing arrow next to the Shading tool, and select the desired color. This sample questionnaire uses "Light Gray, Background 2."

it may not carry the same statistical validity.²⁴¹ But the goals of judges and attorneys in voir dire aren't necessarily the same as researchers; legal practitioners are primarily interested in flagging individual jurors for concerning answers.²⁴² Practitioners should feel free to adapt the questionnaire to suit their interests (but see below for some "rules" on questionnaire design).

The one-page questionnaire can be easily printed out and distributed to a jury pool as late as the morning of trial, allowing them to fill it out while the court and attorneys handle last minute motions in limine and review jury instructions. Its brevity allows for quick scoring, making it useful even in quick-paced justice court cases. That said, use of the questionnaire will undoubtedly add some time to voir dire when compared with standard judge-led voir dire, due to the higher likelihood that jurors will engage with the questionnaire more openly than they do when asked questions from the bench.

Courts have discretion on the use and content of a questionnaire.²⁴³ Abuses of discretion may occur when a court permits a questionnaire but alters submitted questions so significantly that the modified question no longer adequately reveals important information about a juror's potential bias. The issue is usefully illustrated in a Utah case, *Barrett v. Peterson*.²⁴⁴ William Barrett sued on a medical malpractice claim. Before trial, he submitted a jury questionnaire asking jurors about their exposure to public tort-reform campaigns on topics such as "medical negligence" from newspapers, magazines, radio, or television. The court declined to permit those questions and instead asked the jurors:

general questions regarding whether they would be willing to give a large award if it was supported by evidence, whether they felt it appropriate to resolve disputes in court, whether any of them were involved in the writing of insurance, and whether any of them were in an unfair frame of mind.²⁴⁵

The trial was reversed because the court's declination to permit the plaintiff's proposed questions "substantially impaired" the "informed exercise" of his peremptory challenges on a legitimate area of concern—a standard which replaces "harmless error" given the appellate court's inability to assess harm from the seating of a biased jury.²⁴⁶

²⁴¹ That said, Myers and Lecci have cautioned about using PJAQ scores as a predictor of how jurors will act in any particular case. See *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2030.

²⁴² *Id.*

²⁴³ *Barrett v. Peterson*, 868 P.2d 96 (Utah Ct. App. 1993).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 102.

²⁴⁶ *Id.* at 103.

Courts will find that the topics in the sample questionnaire on legal authoritarianism are generically addressed in standard judge-led voir dire. But in light of the robust research discussed in the article, judges, prosecutors, and defense attorneys should consider trying it out to see just how differently people answer the questionnaire than when they answer the standard court questions. The answers to the questions will likely be surprising when contrasted with the typical show of hands given to the court's questions, and the result is likely to be a much fairer jury trial.

Questions 1, 3, 8, and 10 indicate aspects of system confidence.²⁴⁷ Questions 2, 11, 12, and 13 indicate aspects of conviction proneness.²⁴⁸ Questions 5, 7, and 9 indicate aspects of cynicism towards the defense.²⁴⁹ Questions 4, 6, and 10 indicate aspects of innate criminality.²⁵⁰ (Question 10 indicates both system confidence and innate criminality).²⁵¹ And question 14 indicates

²⁴⁷ These correspond to PJAQ questions 1, 8, 18, and 22. *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2037-39. Mock questions 1, 3, and 8 correspond to the juror's disposition to weighing law enforcement testimony more favorably than other testimony. Jurors who score 4-5 on these questions may have a for-cause bias as suggested by the Model Utah Jury Instruction (MUJI) CR407 admonishing jurors to give no special weight to law enforcement testimony. https://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=32#407 (accessed June, 13, 2020).

²⁴⁸ These correspond to PJAQ questions 2, 3, and 17. *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2037-38. They also correspond to MUJI prohibitions in CR216 on a juror voting with whatever the majority wants, and the requirement to impartially consider reasonable inferences that favor acquittal. MUJI CR206, CR212. Mock question 13 addresses the possibility that a juror has impermissibly "formed or expressed an unqualified opinion or belief as to whether the defendant is guilty. . . ." Utah R. Crim. P. 18(e)(13). In relation with this concern, the physical appearance of a defendant has been found to correlate with juror verdicts. Stephen Porter, et. al., *Dangerous Decisions: The Impact of First Impressions of Trustworthiness on the Evaluation of Legal Evidence and Defendant Culpability*, PSYCHOLOGY, CRIME & LAW 1 (2010).

²⁴⁹ These correspond to PJAQ questions 4, 7, 13, and 16. *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2037-38. They also correspond to MUJI instructions not to consider whether the defendant should testify, CR211A-B and what evidence a juror is willing to consider when assessing the defendant's credibility, *see* CR207 ("Witness credibility"). This is particularly important considering the alarming number of people willing to hold it against a defendant who chooses not to testify, even after being instructed that the defendant has no obligation to testify. *See n.* 179.

²⁵⁰ These correspond to PJAQ questions 15 and 18. *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2037-38. They also suggest that a juror may improperly consider propensity evidence, *see* MUJI CR411 (instructing jurors on how to consider 404(b) evidence) and a general disfavor of the presumption of innocence. MUJI CR208.

²⁵¹ This corresponds to PJAQ question 18, which similarly assesses innate criminality and system confidence. *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2038.

Coaxing Authoritarians Out of the Jury Pool

racial bias.²⁵² The questions are all positively scored, meaning answers of “4” or “5” on any of them indicates a problematic pro-conviction bias.

Juror #: _____

Directions: Please rate your agreement with the following items using the 5-point scale below. Please try to make a clear choice for each item. Only pick the middle option if you have absolutely no opinion one way or the other. Please make your answer by circling the number that best matches your belief. Pick only one option for each item. Please read each item carefully and be as honest as possible. *Write your juror number at the top of the page before you begin.*

**1 = strongly disagree (SD) 2 = disagree 3 = neither agree nor disagree
4 = agree 5 = strongly agree (SA)**

	SD		SA
1. Police only arrest people who have committed a crime.	1	2 3 4 5	
2. If lots of other people agree that a person is guilty, that person is probably guilty.		1 2 3 4 5	
3. People who are disrespectful to police officers deserve what they get.	1	2 3 4 5	
4. People with criminal histories will lie about anything to get out of trouble.		1 2 3 4 5	
5. Defendants in a criminal case should be required to take the witness stand.	1	2 3 4 5	
6. Once a criminal, always a criminal.		1 2 3 4 5	
7. Defendants who change their story are almost always guilty.	1	2 3 4 5	
8. When it is the suspect’s word against the police officer’s, I believe the police.		1 2 3 4 5	
9. Lawyers will do whatever it takes, even lie, to win a case.	1	2 3 4 5	
10. The best way to know if someone is guilty is to look at their criminal record.		1 2 3 4 5	
11. Too often jurors hesitate to convict someone who is guilty out of pure sympathy.	1	2 3 4 5	
12. Criminals should be caught and convicted by “any means necessary.”		1 2 3 4 5	

²⁵² This corresponds to PJAQ question 24, *Individual Differences in Attitudes Relevant to Juror Decision Making*, *supra* note 8, at 2038, along with the presumption of innocence. See MUJI CR208.

13. You can often tell someone is a criminal just by looking at their face.

1 2 3 4 5

14. The large number of Black men currently in prison is because of the criminal mentality of their culture.

1 2 3 4 5

*****Do not forget to write your juror # at the top of the page*****

Where parties decide to follow up with jurors, they should consider following a script such as: "I want to ask you about an answer you gave on the questionnaire and why you chose that answer. Let me read it to you again. [Read question]. You circled [i.e. strongly agree]. Why did you pick that answer?" Following the Utah Rules of Criminal Procedure Advisory Committee's guidance, courts and practitioners should not try to "rehabilitate" an answer that reveals a bias.²⁵³

Courts and attorneys should consider modifying or expanding the questionnaire, particularly in light of the unique features of a given case. Note, however, several evidence-based "rules" that apply when developing a questionnaire: Questions should be simple and short, with minimal jargon.²⁵⁴ Questions should be written to avoid suggesting a socially desirable answer.²⁵⁵ Avoid negatives, "un"-prefixes, and words open to various interpretations.²⁵⁶ Questions that address controversial, or sensitive topics, should typically go at the end of the questionnaire while questions that are easiest to answer should be at the start.²⁵⁷ Survey-creators should be cautious to ensure that a question actually measures what it is intended to measure.²⁵⁸ At the very least, a survey-creator should examine "whether the items in the instrument appear to be relevant, reasonable, unambiguous and clear."²⁵⁹

²⁵³ Advisory Committee Notes, Utah R. Crim. P. 18 ("Although thorough questioning of a juror to determine the existence, nature and extent of a bias is appropriate, it is not the judge's duty to extract the 'right' answer from or to 'rehabilitate' a juror").

²⁵⁴ *Question and Questionnaire Design*, *supra* note 158, at 264.

²⁵⁵ *Id.*

²⁵⁶ *Id.* and *How a Judge's Voir Dire can Teach a Jury What to Say*, *supra* note 192, at 208-09.

²⁵⁷ *Question and Questionnaire Design*, *supra* note 158, at 264.

²⁵⁸ Hamed Taherdoost, *Validity and Reliability of the Research Instrument; How to Test the Validation of a Questionnaire/Survey in a Research*, 5 INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN MANAGEMENT 28 (2016).

²⁵⁹ *Id.* at 29.