2019 Symposium Note: Panel 1

The *Denver Law Review*'s spring 2019 Symposium, titled *Driven by Data*, opened to a panel focused on research regarding jury instructions, individual juror decision-making, and methods of rooting out juror bias. The panel was moderated by Bernard Chao,[1] Professor of Law and director of the Sturm College of Law's intellectual property certificate program. The ensuing discussion involved topics such as the success rates of self-diagnosing biases, the justice system in New Zealand, and de-bunked assumptions about gender differences in jury decision-making.

Edie Greene, Professor of Psychology at the University of Colorado–Colorado Springs,[2] presented first. Her presentation, titled *Observations, Kiwis, & Question Trials*, focused on the New Zealand justice system's method of issuing jury instructions and how those procedures might lend themselves to empirical analysis in the United States. She described some of the ways in which legal scholars and social scientists have traditionally studied jury processes and decision-making, and lamented that these methods do not sufficiently allow for firsthand observation. Professor Greene spoke about her recent sabbatical to New Zealand, where judges allowed her to observe criminal trials. There, she noted that attorneys' civil attitudes toward opposing counsel—specifically, the invocation of the term "my learned friend"—and judge's summaries of the evidence to jurors might have impacted jurors' decisions and the resulting trial outcomes.

Professor Greene then discussed the importance of "question trails" in New Zealand's criminal proceedings. She defined question trails as sets of questions referring to the facts of the case, which include jury instructions embedded within. Professor Greene asserted that these questions—as opposed to generic verdict forms—help jurors properly organize the evidence and apply the law correctly. A sample question trail, Professor Greene stated, might include the factual disputes, the plaintiff's and defendant's arguments, and evidentiary directions on each of the factual issues. Professor Greene asserted that juries are able to render verdicts in a more logical fashion by linking the applicable facts to the legal issue at hand. Professor Greene cited to a 2018 simulation study of jury instructions and decision-making.[3] This study found that jurors who were issued question trails correctly applied the facts of the case to the specific instructions more often than those given standard, plain language instructions.

1. *Faculty Page of Bernard Chao*, U. Denv. Sturm C. L., https://www.law.du.edu/faculty-staff/bernard-chao (last visited Feb. 19, 2019).
2. *Faculty Page of Edie Greene*, U. Colo. at Colo. Springs, https://www.uccs.edu/egreene/biographical-sketch (last visited Feb. 19, 2019).
3. Jonathan Clough, et al., *The Judge as Cartographer and Guide: The Role of Fact-Based Directions and Improving Juror Comprehension*, 42 Crim. L. J. 278 (2018).

Professor Greene posited that if such a tool were introduced to courts in the United States, it would empower juries to more effectively apply the evidence to their verdicts, and would contribute to more rational trial outcomes.

Professor Bornstein, Professor of Psychology at the University of Nebraska–Lincoln,[4] presented next. His presentation was titled *Jury Research v. Juror Research: A Methodological Perspective and Historical Perspective*. Professor Bornstein echoed Professor Greene's thought that much of the jury research canon to date has focused on individual, non-deliberating jurors, with little focus on collective jury deliberation. Professor Bornstein reasoned that this problem is statistical in nature: if researchers evaluate multiple individual jurors, they are given multiple data points, while researchers evaluating jurors as a group are given only one data point. He also stated that evaluating individual jurors in terms of their deliberation and decision-making does not make sense because juries are considered legal groups. Additionally, research involving social influence and collaborative recall in juries is of major importance to courts.

Professor Bornstein discussed early research on juries, including a study conducted in 1914 by Hugo Münsterberg that required mock jurors to deliberate on a set of stimuli as a proxy for actual jury deliberations. Professor Bornstein clarified that even though Münsterberg's views that women should be disqualified from jury service were "appalling," the study was of particular importance because it elicited that deliberation did little to change individual jurors' pre-deliberation leanings. He compared that example to the types of studies that take place today, which often involve written, audio, or video trail and a mock juror deliberation. Finally, Professor Bornstein touched on new and emerging methods of studying juries, explaining how technology could aid researchers in this area. Professor Bornstein expressed a particular interest in computer-mediated deliberation studies and immersive roleplaying simulations. Professor Bornstein concluded that jury deliberations are a rich source of psychologically and legally rich data. Additional study in this area could have massive impacts on the legal system.

The panel's final presenter was cognitive psychologist David Yokam, who posed the question: "Why don't we just ask people about their own decision-making processes?" Yokam asserted that the instance in which this approach would likely be the most helpful is during voir dire. He stated that perhaps the most effective way to detect potential bias from a jury pool is to ask if the juror can set aside their own opinion and decide the case based on the evidence presented. Yokam discussed his own research in which he introduced biasing stimuli—including information about a defendant company's previous lawsuits and other procedurally

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4. *Faculty Page of Brian Bornstein*, U. Neb., https://psychology.unl.edu/brian-bornstein (last visited Feb. 19, 2019).

inadmissible content—to a group of mock jurors. The researchers then asked the study participants to self-diagnose their own biases, and if they were aware of any, to remove themselves from deliberations. Yokam found that even when mock jurors removed themselves from proceedings (leaving only those who believed they would not exercise their bias), the group was still more likely to rule against the party whose incriminating information they had been presented with. He noted that even when people removed themselves, the bias persisted.

To properly be "de-biased," Yokam argued that persons must first be aware that they are undergoing unwanted processing and be motivated to correct such bias. Further, people must be aware of the magnitude of their own bias and be able to adjust their responses accordingly. Yokam concluded that courts should no longer rely on the "magic question" that asks whether jurors can disregard certain biases. Instead, Yokam suggests that judges impose an impartiality standard. Rather than asking jurors whether they might be susceptible to bias themselves, Yokam suggests that judges ask whether jurors as a group might exercise bias. Yokam asserts that "just asking people" misses several key points, and that further research about juror decision-making will help empower the players in the court system.

While each panelist recognized that time constraints, resource limitations, and overloaded dockets might not always allow for effective jury research, they did express hope that continued study in the area of jury decision-making could contribute to a more efficient, equitable justice system.

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