It was one of the most surreal accident photographs I have ever seen, defying easy explanation. The lower half of a leg. Sturdy. The foot, bare. The toenails painted recently, but not so recently to be free of wear and blemish. The skin was clean with just a hint of mottling nearest to the site of the injury. But then there was the brake pedal. Somehow, in some physics-defying way, while the car was somersaulting from the road into a corn field, the pedal for the parking brake had snapped off and was now tumbling around in the lower compartment of the driver's side. The crescent shape of the pedal's attachment bar and the sharpened, angular tip at its end made it look like the gleaming black sword of some ancient sultan. The long section of the attachment bar that remained was pierced cleanly and entirely *through* the calf. One half on one side of the calf and the sharpened end on the other. It vaguely resembled some perverse version of the funny hat that positions the front half of an arrow on one side of the head while holding the back half on the opposite side. The absence of blood was startling.

Knowing what you know so far, is there any doubt that the freak injury occurred during the destructive chaos of the car's barrel rolls? Certainly not. It's beyond a doubt that her morning routine did not include, among the act of inserting small metal crescents in her earlobes, the adorning of her calf with the fractured arm of a parking brake. The evidence of that direct cause of injury is clear. However, what if she and the driver of the other vehicle each blamed the other for crossing the sacred barrier of the double-yellow line—and the only witnesses to call were a handful of nearby cattle, lazily grazing before the tumult began? If we had to answer the question of who crossed, is our brain's default to comb the scant pieces of conflicting *external* evidence or to look *inward* for our own answers? A rather large study of real-world jurors suggests an answer.[1]

The focus of this study was on how jurors reacted to the relative strength of evidence offered in a criminal case. The goals, reach, and methods of the study were many, so for this space I will considerably narrow the discussion to the question of how real world juries in the study dealt with strong and weak evidence for guilt. The study was exclusively in the realm of the criminal courts, but studies with actual juries are rare enough that they all merit a look regardless of their scope. In addition to thoroughly probing juries on their decision making, the study also surveyed the judges and attorneys for the nearly 200 trials reviewed. All parties involved weighed in on the relative strengths of the various evidence offered and those results were tallied for categorizing consensus on strength of evidence.[2]

In addition to measuring all participants' views on the strength of the evidence, the study also indexed the various kinds of evidence the state offered, the severity of the charges, the complexity of the case, the extent and knowledge of any pretrial publicity, jury demographics, foreperson race and gender, defendant's characteristics, and perceptions of attorney competence, among other additional measures.[3] You are starting to get a sense of the scope here, I'm sure.

One of the authors' goals that I wish to discuss more here was to test a hypothesis offered by a study of criminal juries in the 1960's.[4] This hypothesis will seem intuitive to us as trial

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[1] Dennis J. Devine et al., Strength of evidence, evidentiary influence, and the liberation hypothesis: data from the field, 33 LAW AND HUMAN BEHAVIOR, June, 2008, at 136-148, doi: 10.1007/s10979-008-9144-x

[2] *Id.* at 139-141.

[3] *Id.*

[4] *Id.* at 136. Internal citation omitted.

lawyers, but as educators it strikes me as one we ought to know and teach as a term of art. Termed by the original authors as the "liberation hypothesis" it proposes that "[w]hen the evidence presented at trial points clearly to a particular verdict, the jury will usually choose that verdict; when the evidence is more equivocal, the jury's decision will be more likely to reflect the influences of other normatively undesirable variables."[5]

With some admittedly broad strokes, I wish to lay out some of the conclusions of this more recent study testing the liberation hypothesis and then we can reflect a bit on them below. First, "…guilty verdicts were more likely when: (a) the defendant was faced with a more serious charge, (b) substantial pretrial publicity was reported by the judge, and/or (c) the trial was rated as more complex by the legal professionals in terms of the evidence and relevant law."[6] Second, the more varied the *kinds* of evidence the prosecution presented, the more likely the evidence was to produce a guilty verdict. Surprisingly, this was true regardless of the perceived strengths of the varied evidence presented.[7] Variety mattered more than strength. Finally, "Consistent with the [liberation] hypothesis, several correlations between potential sources of extraevidentiary influence were strong and significant for cases classified as ambiguous that featured moderate prosecution [strength of evidence]."[8]

Perhaps these conclusions above call out for us the need for greater emphasis upon a key principle we already teach our students: we have to think more like jurors and less like attorneys working the case in a vacuum. I have to imagine we all see students doing the same things with case facts and jury instructions in their trial preparations. They see *everything* through the carefully polished lens of facts and elements—because we have trained them in the first two years of case briefing to do that. In so doing, we mislead them into thinking that *all* reasoning about difficult questions of law and fact is conducted at all times and by all people through the eye of this polished lens. We then have to learn the hard way that jurors will grasp for explanations where none are immediately evident and will often then fall into heuristic shortcuts, such as believing a defendant is likely guilty due to the severity of the charge. "*If they accused you of <u>that</u> you must have done something bad!"* Or, *"The different kinds of evidence I saw indicates to me that the prosecution has the better case here."*

I can only imagine the seasoned lawyer on the other side of this car accident case looking at the photos we sent over with the damages packet. I can only imagine them working through the math of how that photo would land on a jury. It's been so long that, frankly, I can't recall precisely how they had contested liability in the case. It's not the law of the case that has stuck with me these 20-plus years later. It's the brake pedal through the calf. It's the philosophically pleasurable and, yet, practically terrifying thought that some juror somewhere could feel an unconscious pull toward a finding of negligence *just because* of this most-improbable sight. It is this endless fascination with human thought and reason that moves Jules and me to write for you every month.

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[5] *Id.* at 138.
[6] *Id.* at 142.
[7] *Id.* at 143.
[8] *Id.* at 144.