QUESTIONING THE DECLARATION OF A JURY'S INDEPENDENCE

I love teaching Barristers' Orientation. The only reason I can think that other faculty don't volunteer for this job is that they just want to squeeze the last possible drops out of their summer before they have to appear at the office for the start of the school year. I love teaching it because I love the newness of discovery in the eyes of the students. They're never more eager in the fall than they are in orientation and the first week or two. The law is so new and mysterious to them and they run after its riches. In our orientation, we do mock classes and teach them reading and case briefing by studying a few intentional torts. Offensive-contact battery always opens a few eyes. I'll ask them, "Why isn't the test for whether the contact is offensive a subjective one?" There are often a few quizzical looks as some students try to work out the meaning of "subjective." The ones who look a bit more assured in their knowledge of that word often start scratching their heads when I ask whether this certain contact we're reading about is "objectively" offensive. I might hear something like, "Well, I think it's offensive and I think I'm pretty reasonable." Who, after all, really ***is*** this objective, reasonable person if it's not the plaintiff or the student who is studying her case? With that, we often have our first sticking point. I assure them that the questions only get harder as we go.

So, here's a question I've been pondering for a while and which is wending its way towards a law review article. Before I get to the question, however, I need to dig out some dirt and clear off the bedrock. One need not conduct a month's worth of research on juror independence to uncover a basic truth in the case law: Jurors must be objective to in order to serve and lawyers cannot destroy that objectivity if the case is to make it through deliberations to a verdict.[1] The prospective juror discovered to have some partisan bent may be struck peremptorily or with cause. An entire trial can be for naught if an attorney makes an impermissible "golden rule" argument; effectively turning the jurors' collective thoughts toward her client's partisan, subjective view. We hold these truths be self-evident, right? Yet we know jurors are virtual constellations of personal preferences and biases. Knowing this, we persist in the idea that jurors must not only look at the evidence objectively, but this is something that they actually *can* do.

Boy, I don't know about that one.

Perhaps what we really are shooting for are jurors that can be just objective *enough*. But our brains are funny. Often times, our brains are funny without us evening knowing how funny they are. Take, for instance, a 2013 study showing that a brightly lit room could unconsciously increase the amount of coffee a person would drink.[2] The same study found that dimmer rooms tended to prevent strong affective responses to certain stimuli—which suggests, in turn, that bright lights tends to make us less objective and prone to taking a polarized view.[3] As if the brightness in the jury deliberation room wasn't enough to worry about, there are a

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[1] Were this a law review, this footnote would consist of a massive string-cite. I will offer only short, representative cases here instead. On objectivity as a qualification to serve: "…the law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality." *People v. Wheeler*, 22 Cal. 3d 258, 275 (1978). On objectivity as a prerequisite for and a requirement of jury deliberation: See, *Russell v. Chicago, R.I. & P.R. Co.* 249 Iowa 664, 672-673 (1957).

[2] Alison J. Xu & Aparna A. Labroo, *Incandescent affect: Turning on the hot emotional system with bright light*, 24 JOURNAL OF CONSUMER PSYCHOLOGY, no 2, 2014, 207-216 at 208.

[3] *Id.* at 212.

host of inherent and unconscious biases to contend with and Jules in particular has written about them frequently in this space.[4] Some of them are downright ugly.

But I said I was pondering a question and I have come to the part where I will invite you to ponder it with me. If we can prove that jurors can't ever look at evidence in a truly objective manner—whether due to biases we suspect or biases science shows are beyond suspicion—what should that mean for the juror selection and juror deliberation processes? And what about other cognitive biases that lawyers permissibly exploit, yet have an unconscious effect of ruining objectivity? Take, for instance, the anchoring bias. A favorite of every plaintiff's lawyer everywhere. When we are given numbers, we anchor near those numbers as reference points and our ability to think toward some other number is now encumbered by this unconscious numerical bias. One might respond by arguing that ***both*** sides get to leverage that cognitive bias—which seems like the courtroom equivalent of offsetting penalties. Fair enough. So why don't we do that with golden rule arguments and let both sides make their subjective pleas for empathy? After all, we've already permitted much stealthier assaults on objectivity! I know the various answers to this question, certainly. But I still like to think about it.

The idea of bias in a courtroom is a practical minefield and a philosophical wonderland. Just think about all that subjectivity lurking in the hearts and minds of all the players present. Even the bailiff is suspect. It's a wonder that we as lawyers use the words "objective" and "objectively" as much as we do. However, I worry that one day, by the march of cognitive science, we might come to think of them as remnants of some romantic ideal from a by-gone era of trial practice. We are, after all, often subjectively biased to the new and modern.

[4] Here is a link to the archive of Brain Lessons blogs. https://law.temple.edu/aer/category/brain-lessons/