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## Chapter 9

# Inherent Prejudice in Joined Trials

**Cort Heroy**

Client Management and Trial Strategies

101 E 14th Ave

Eugene, Oregon 97401

(541) 513-8427

[cort@heroy.com](mailto:cort@heroy.com)

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# FIGHTING INHERENT JUROR PREJUDICE IN JOINED TRIALS

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# WHY ARE CASES JOINED?



- Courts see joinder as vital due to increased efficiency and reduced economic impact.
  - Joinder saves time and money for both parties, witnesses, jurors, judges, etc.
    - Actual savings amounts tend to be less than is estimated by judges and prosecutors.
  - Because of believed savings, cases often joined liberally.
- Joinder exists in roughly 60% of criminal cases, 26% have joinder of charges and parties.
  - Bias toward joinder.
- For 2018, roughly 40,000 Federal cases involved joinder.

# GENERAL PREJUDICIAL CONSIDERATIONS



- Simply joining cases makes conviction more likely, regardless of similarity.
  - Increases have been found between 10% - 27%
- Likelihood of conviction increases if offenses are similar
  - Guilt found on one charge increases likelihood of guilt in others.
    - Some placement effects, though results are mixed.
  - Same effect as allowing in previous bad acts.
- *US v. Foutz, 1976* (4<sup>th</sup> Circuit Court of Appeals)
  - Noted concerns regarding prejudice related confusion of evidence, accumulation of evidence, criminal inference, and possession of criminal character.

# MEMORY AND COGNITIVE LOAD



## Information Input

- Evidence
- Testimony
- Judicial instructions
- Non-verbal communications from:
  - Attorneys, judge, defendant

## Working Memory

- Processing space for information
- Where decisions are made
- Limited capacity
  - Available capacity used as input increases.
  - When overloaded, shortcuts are taken or input is ignored.

## Long Term Memory

- Memory of decision to use in deliberation later.

Cognitive Load = input:capacity



# ELABORATION LIKELIHOOD MODEL



## CENTRAL PROCESSING

- Thoughtful consideration of information.
- Listener is an active participant.
- Requires both motivation and ability.
  - If either motivation or ability are lacking, for whatever reason, listener reverts to peripheral processing.

## PERIPHERAL PROCESSING

- Decision making choices requiring fewer resources.
- Decisions made based upon something other than strength of argument/information.
- Decisions based upon non-pertinent evidence (attractiveness of defendant/attorney/witness) or heuristic beliefs (where there's smoke there's fire)

# PREJUDICE AND COGNITIVE LOAD



- Load increases in complex systems with complex decisions
  - As load increases use of heuristics and peripheral processing increases.
- Jurors resort to stereotypes and heuristic processing to manage cognitive overload.
  - Time pressures of being on jury exacerbates load increases.
- Determining guilt vs. innocence is more taxing than most other common decisions.
  - Problem is compounded by joinder.
- Increased cognitive load leads to reduced evidence individuation.
  - Categories of evidence are made increasingly broad commensurate with load.
  - Redundant/identical information or categories are discounted.
- Rape victim perceived credibility increases with load.

# PREJUDICE DUE TO ACCUMULATION AND CONFUSION OF EVIDENCE



- Evidence accumulation has a negative impact on perceived strength of defense evidence and a positive impact on perceived strength of prosecution evidence.
- Evidence presented for one case serves to reinforce evidence in the others.
  - Evidence for stronger case bolsters weaker ones.
  - Unaffected by judicial instruction.
- Learning information from multiple sources related to multiple charges simultaneously causes both retrograde and anterograde interference.
  - Source confusion.
  - Evidence considered *in toto* rather than parsed into clean considerations for each case.
- Confusion of evidence source and target, both prompted and free-recall, increases with similarity of charges/victim/source.
  - Problems become more significant in deliberation.

# PREJUDICE DUE TO CRIMINAL INFERENCE



- Evidence of prior criminal record makes conviction more likely.
  - To be convicted in one case serves as prior criminal record to other cases.
- Multiple charges leads to negative inference about defendant.
  - Innocent people are unlikely to have **THAT** many charges against them.
- The more inferences that can be made from a piece of information (evidence, ruling, or charge), the more difficult it is to negate that information.
- Inferences about a person are made prior to judgments about an event.
  - Jurors decide if the defendant is a “bad person” based on ALL of the information offered to them, and THEN they will decide if the “bad person” committed the crimes alleged.
  - Ex. Defendant believed to be a rapist based on all evidence. Did the rapist commit charge #2, Rape in the 1<sup>st</sup> Degree? It would seem likely that a rapist would do exactly that sort of thing.

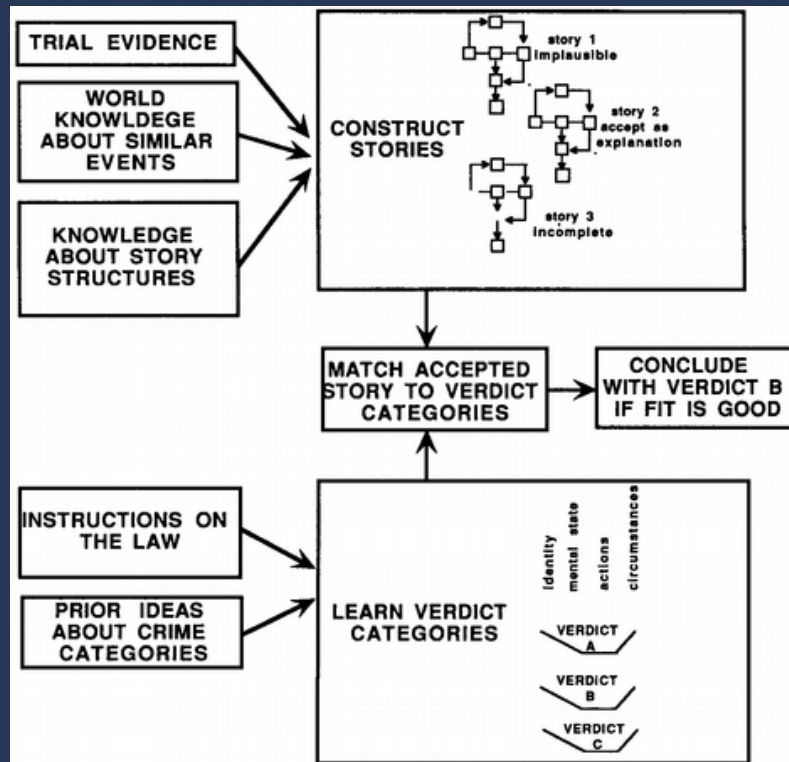
# STORY MODEL OF JUROR DECISION MAKING & PREJUDICE



- Jurors use **ALL** information provided in trial (evidence, testimony, and non-verbal) to create a story of what happened.
  - Story is linear and temporal.
  - One story to account for all charges.
  - Determinations related to criminality made later in the timeline are retroactively applied to earlier events.
- Multiple stories are made and checked as information is added.
  - Stories rejected or accepted according to information.
- Story creation completed prior to guilt determination.
  - Must understand what happened before deciding if it was illegal.

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# STORY MODEL, CONT.



Judicial Instructions



Verdict Reached



# POTENTIAL REMEDIES



- The Motivation Juror
  - Motivated jurors will be able to focus on individual cases.
  - Motivated people in high load situations are more likely to use heuristic processing.
- The Miracle Juror
  - Studies were not performed on persons from [insert county name], therefore conclusions cannot be made about jurors from [insert county name].
  - Jurors from [insert county name] will be able to avoid the aforementioned biases.
  - Research performed all over the country, sufficient external validity
- The Real Juror
  - Real jurors in [insert county name] will perform better than mock jurors
    - Despite the lack of realism, mock juries have been found to be decent analogs of real juries.
- Judicial instruction

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# JUDICIAL INSTRUCTION



- Limiting instructions in general are particularly difficult for jurors to follow/understand.
  - When asked to explain how limited information should be used, 74% of jurors given no instructions misunderstood how to apply evidence and 50% of instructed jurors misunderstood.
- Judicial instruction has been found insufficient to get juries to:
  - Ignore previous convictions or other joined convictions.
  - Overcome perceived non-verbal cues of the judge related to guilt.
  - Ignore hearsay evidence.
    - Backfire effect occurred wherein the more strongly the judge urged the jury to ignore, the more weight they gave to the evidence.



# JUDICIAL INSTRUCTION, CONT.



- In a 2006 meta-analysis of 48 studies covering 175 hypotheses and including 8,474 participants, it was found that in general, jurors are either unable or unwilling to apply judicial instruction as stated to evidence. More specifically, judicial instruction was found to be insufficient to get jurors to filter out information that they found to be probative; i.e. once jurors create a story of what happened, they are unlikely to change it due to judicial instructions.

# WHAT I DO



- Meet with the attorney to discuss the vagaries of the case, discovery, and the essentials of the defense being established.
- Review discovery to establish extent to which cognitive and behavioral economic limitations will have an impact on jurors.
- Create strategy for explaining prejudice based upon cognition and behavioral economics that connects the research to the specific facts of the case.
- Meet with the attorney to discuss the findings and application of the research. Discuss testimony and how best to get facts before the judge.
- Testify as expert witness.
- **APPROVED FOR FUNDING THROUGH OPDS**

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## STAY CONNECTED

EMAIL: [cort@heroy.com](mailto:cort@heroy.com)

PHONE: 800-757-0941

WEBSITE: [www.heroy.com](http://www.heroy.com)

LINKEDIN: [www.linkedin.com/in/cortlandtheroy](http://www.linkedin.com/in/cortlandtheroy)