

B596 LAW & PSYCHOLOGY Prof. Alex Tanford

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## SYLLABUS

NOTE -- THIS COURSE IS TAUGHT IN A LAW SCHOOL TO LAW STUDENTS,

NOT IN A PSYCH DEPARTMENT

### 1. Required materials:

- a. Tanford, Law and Psychology (1997 ed., photocopied; available at White Rabbit)
- b. Low, Jeffries & Bonnie, The Trial of John W. Hinckley, Jr. (TIS)

### 2. Additional materials on law & psychology (on reserve):

- a. Law and Human Behavior (journal)
- b. I.A. Horowitz & T.E. Willging, The Psychology of Law
- c. S.M. Kassin & L. Wrightsman, The Psychology of Evidence and Trial
- d. N.L. Kerr & R.M. Bray, The Psychology of the Courtroom
- e. J. Marshall, Law and Psychology in Conflict
- f. J.P. Ogloff, Law and Psychology: the Broadening of the Discipline
- g. B.D. Sales, The Trial Process
- h. L.S. Wrightsman, Psychology and the Legal System

i. L.S. Wrightsman, C. Willis & S. Kassin, On the Witness Stand

## 1. INTRODUCTION

### A. PSYCHOLOGY AND THE SCIENTIFIC METHOD

Original text: Simple introduction to experimental method, validity, reliability etc.

### B. STATISTICS

1. Original text: statistical symbols, glossary of terms.
2. People v. Collins, 438 P.2d 33 (1968) (example of bad use of statistics)
3. Original text: discussion of statistics

## 2. PRETRIAL ISSUES

### A. ALLEGATIONS OF CHILD SEXUAL ABUSE

1. State v. Michaels, 642 A.2d 1372 (N.J. 1994)
2. Ronald Cohen & Mary Anne Harnick, The susceptibility of child witnesses to suggestion, 4 Law & Human Behavior 201 (1980)
3. Gail Goodman & Rebecca Reed, age differences in eyewitness testimony, 10 Law & Human Behavior 317 (1986)
4. PROBLEM 1 -- write guidelines for police on how to question child sex abuse victims

## B. HYPNOTICALLY RECOVERED MEMORIES

1. State v. Haislip, 701 P.2d 909 (Kan 1985)(hypnotized witness)
2. Lemmerman v. Fealk, 534 N.W.2d 695 (Mich. 1995) and Ault v. Jasko, 637 N.E.2d 870 (Ohio 1994) (recovered memories of childhood sexual abuse)
3. Summary of Gary M. Ernsdorff & Elizabeth F. Loftus, Let Sleeping Memories Lie? Words Of Caution About Tolling The Statute Of Limitations In Cases Of Memory Repression, 84 J. Crim. L. & Criminology 129 (1993).
4. PROBLEM 2 -- hypothetical case of 2 middle-aged sisters who recover memories of childhood sexual abuse from 40 years ago; student is judge and must decide whether to allow the case to proceed to trial.

## C. COMPETENCY TO STAND TRIAL

1. California Penal Code § 1368.
2. Missouri Statutes, § 552.020.

## D. INVOLUNTARY CIVIL COMMITMENT

1. Indiana Code § 12-26-1-1 et seq.
2. Problem 3 -- Students watch the movie "Nuts" with Barbra Streisand. Movie consists almost entirely of a hearing on whether the defendant is competent to stand trial on homicide charges. Students act as judge, must decide whether she is incompetent, and if so, whether she needs to be involuntarily committed.

## 3. JURY SELECTION

## A. PRETRIAL PUBLICITY

1. Powell v. Superior court (Rodney King case), 232 Cal.App.3d 785, 283 Cal.Rptr. 777 (1991)
2. Firestone V. Crown Center Redevelopment Corp. , 693 S.W.2d 99 (Mo. 1985) (collapse of Kansas City Hyatt skywalk)
3. State v. Weatherford, 416 N.W.2d 47 (S.D. 1987) ("ordinary" publicity case, sensational local crime)
4. Carroll, Kerr, Alfini etc, Free Press and Fair Trial: the Role of behavioral Research, 10 LHB (1986).
5. Fulero, The Role of behavioral Research in the Free Press/Fair Trial Controversy, 11 LHB (1987).
6. Kramer, Kerr & Carroll, Pretrial Publicity, Judicial Remedies and Jury Bias, 14 LHB (1990)
7. Ogloff & Vidmar, The Impact of Pretrial Publicity on Jurors, 18 LHB 507 (1994)
8. PROBLEM 4 -- hypothetical criminal case; pretrial hearing on amount of publicity including survey evidence from two psychologists, students are assigned to be lawyers on both sides and argue for and against a change of venue.

## B. "SCIENTIFIC" JURY SELECTION

1. Original text: basic jury selection procedure and traditional lawyer tactics.
2. Fulero & Penrod, The Myths & Realities of Attorney Jury Selection, 17 Ohio No. L Rev. 229 (1990)
3. Hubert Field, Juror background Characteristics and Attitudes toward Rape, 2 LHB \_\_\_\_

4. Kerr, Hymes etc, Defendant-Juror Similarity and Mock Juror Judgments, 19 LHB 545 (1995)
5. Sample Juror Questionnaire (from Ft. Wayne, Indiana)
6. PROBLEM 5 -- hypothetical date rape case, students play role of trial consultant and designs attitude questions for jurors; other students play role of lawyers and ask those questions along with any other questions they want, and then write down jurors they would have challenged. Jury pool reads transcript of case, votes on guilt of defendant (5 options 1st & 2nd degree rape, 1st & second degree sexual misconduct, not guilty); we then compare how jurors that lawyers would have excluded actually voted in case.

### C. DEATH-QUALIFICATION OF JURORS

1. Witherspoon v. Illinois, 391 U.S. 510 (1968)
2. Lockhart V. Mccree, Brief for Amicus Curiae American Psychological Association
3. Hovey v. Superior court , 28 Cal. 3d 1; 616 P.2d 1301 (1980)
4. Note on Moran & Comfort, Neither "Tentative" nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment, 71 J. Applied Psychol. (1986).
5. Note on ADP's -- Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983):
6. Lockhart v. Mccree, 476 U.S. 162 (1986) (Rehnquist opinion)
7. Lockhart; Marshall's dissenting opinion.
8. Haney, Hurtado & Vega, "Modern" Death Qualification, 18 LHB 619 (1994)

### 4. PSYCHOLOGICAL EVIDENCE

## A. EXPERT WITNESSES

1. The Federal Rules of Evidence 702-706
2. Original text: the Law & Ethics of Expert Witnesses
3. Original text: Summary of Trial Practice literature on selecting and examining expert witnesses

## B. Psychological Evaluations in Custody cases

1. Indiana Code 31-1-11.5-21 authorizing court to order parties in custody dispute to undergo psychological evaluation
2. Original text: Brief summary of MMPI testing (well, not actually written yet)
3. Problem 6 -- set of court documents, testimony and psychologist' report in child custody dispute. Two students act as lawyers and present final arguments; rest of class writes judicial opinion deciding custody)

## C THE LAW OF SCIENTIFIC EVIDENCE IN GENERAL

1. Federal Rule of Evidence 201 - judicial notice of undisputed science
2. Disputed scientific evidence
  - a. State v. Kelly, 478 A.2d 364 (N.J. 1984) (admissibility of battered woman syndrome)
  - b. Frye v. US (old general acceptance test)
  - c. Daubert V. Merrell Dow Pharmaceuticals, Inc, 113 S.Ct. 2786 (1993) (new "scientific reliability" test)

- d. Berger, Evidentiary Framework, Reference Manual on Scientific Evidence 37-117 (1994) (trying to explain Daubert to judges)
  - e. People v. Leahy, 8 Cal.4th 587, 882 P.2d 321 (1994) (California case choosing to ignore Daubert)
  - f. Original text -- why it's a mistake to continue to adhere to Frye test
3. Problem 7: Novel scientific evidence offered in Exxon Valdez case
- a. J. Alexander Tanford, David B. Pisoni and Keith Johnson, Novel Scientific Evidence of Intoxication: Acoustic Analysis of Voice Recordings from the Exxon Valdez, 82 J. Crim. L. & Crim. 579 (1992) (description of the novel evidence and its underlying theory)
  - b. Counter-evidence offered by Exxon attacking validity of Pisoni data.
  - c. Students represent Exxon and prepare motion to exclude Pisoni's evidence.
4. Battered Woman Syndrome
- a. Regina Schuller & Neil Vidmar, Battered Woman Syndrome Evidence in the Courtroom, 16 Law & Human Behavior 273 (1992)
  - b. Ibn-tamas V. United States, 407 A.2d 626 (D.C. App. 1979) (leading case)
  - c. Lenore Walker's introduction to The Battered Woman
  - d. State v. Kelly, 478 A.2d 364 (N.J. 1984) (admitting it)
  - e. Buhrle v. State, 627 P.2d 1374 (Wy. 1981) (rejecting it as evidence)
  - f. State v. Thomas, 423 N.E.2d 137 (Ohio 1981) (rejecting it)
  - g. David Faigman, The Battered Woman Syndrome And Self-defense: A Legal And Empirical Dissent, 72 Va. L. Rev. 619 (1986) (attack on Walker's methodology and bias)
  - h. Problem 8 -- hypothetical battered woman case in which victim recants accusation; state offers psychologist to say that recantation is product of battered woman syndrome; students play lawyer roles and argue pro and con the admissibility of this testimony)

5. Battered Child Syndrome -- State v. Janes, 822 P.2d 1238 (Wash. App. 1992)

## D/E. "SOCIAL FRAMEWORK" EVIDENCE AND RAPE TRAUMA SYNDROME

1. Walker & Monahan, Social Frameworks: A New Use of Social Science in Law, 73 Va. L. Rev. 559 (1987).

2. Frazier & Borgida, Rape Trauma Syndrome, 16 LHB 293 (1992)

3. State v. Marks, 647 P.2d 1292 (Kan. 1982) (evidence admitted)

4. State v. Saldana, 324 N.W.2d 227 (Minn. 1982) (evidence not admissible)

5. People v. Taylor, 552 N.E.2d 131 (N.Y. 1990) (evidence admissible for limited purposes only)

6. PROBLEM 9 -- hypothetical case; defense wants to prove behavior of victim inconsistent with RTS to negate rape charge; students acts as lawyers and argue pro and con admissibility.

## F. EYEWITNESS UNRELIABILITY

1. State v. Chapple, 660 P.2d 1208 (Az. 1983) (expert testimony admissible)

2. State v. Alger, 764 P.2d 119 (Id. App. 1988) (evidence admissible)

3. State v. Long, 721 P.2d 483 (Utah 1986)(summarizes Loftus' research; decides that cautionary instruction must be given; summarizes Telfaire and alternatives)

4. Utley v. State, 826 S.W.2d 268 (Ark.1992) (evidence not admissible)

5. Johnson,v. State, 438 So. 2d 774 (Fla. 1983) (expert not permitted)

6. Cutler, Penrod & Stuve, Juror Decision making in Eyewitness Identification

cases, 12 LHB 41 (1988).

7. Marin, Holmes, Guth & Kovac, The Potential of Children as Eyewitnesses, 3 LHB 295 (1980)

8. Fox & Walters, The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock Juror Judgment, 10 LHB 215 (1986)

9. PROBLEM 10 -- hypothetical eyewitness case and proposed expert testimony on eyewitness unreliability; students play judge and make 4-way choice -- allow expert testimony on all issues; limit expert to background information; give Telfaire instruction, or prohibit any information on eyewitness reliability.

## 5. TRIAL TACTICS AND ADVOCACY

1. Original Text: The psychology of Persuasion and Advocacy

2. Saul Kassin, Lorri Williams & Courtney Saunders, Dirty Tricks of Cross-examination, 14 Law & Human Behavior 373 (1990)

3. Victor Gold, Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom, 65 N.C. L. Rev. 481 (1987).

4. Tanford & Tanford, Better Trials Through Science, 66 N.C. L. Rev. 741 (1988). (response to Gold)

5. Problem 11 -- students write rejoinder trying to reach some middle ground between Gold & the Tanfords.

## 6. JURY INSTRUCTIONS

### A. ADMONITIONS

1. *Montgomery v. State*, 760 S.W.2d 323 (Tex. 1988) (admonition used and

approved)

2. United states v. Leviton, 193 F.2d 848 (2d Cir, 1951) (court says admonitions are effective)
3. People v. Schiers, 324 P.2d 981 (Cal. App. 1958) (jurors presumed to follow instructions)
4. Tanford, Thinking About Elephants: Admonitions, Empirical Research, and Legal Policy, 60 U.M.K.C.L. Rev. 645 (1992)
5. Wissler & Saks, On the Inefficacy of Limiting Instructions, 9 LHB 37 (1985)
6. Green & Loftus, When Crimes are Joined at Trial, 9 LHB \_\_\_\_ (1985)
7. PROBLEM 12 -- Hypothetical court of appeals decision based on People v. Allen, 420 N.W.2d 499 (Mich. 1988) limiting admissibility of prior crimes evidence because of futility of limiting its use (with thoughtful dissenting opinion); students are asked to write a brief to the supreme court on either side of the issue.

## B. CHARGING INSTRUCTIONS

1. J. Alexander Tanford, the Law and Psychology of Jury Instructions, 69 Neb. L. Rev. 71 (1990) (summarizing empirical research on comprehension)
2. PROBLEM 13 -- students rewrite sections of the jury instructions from US v. Hinckley (included in the book The Trial of John W Hinckly).

## 7. JURY DELIBERATIONS

### A. JURY SIZE

1. Williams v. Florida, 399 U.S. 78 (1970)
2. Colgrove v. Battin, 413 U.S. 149 (1973)

3. Original text: brief summary of empirical research
4. *Ballew v. Georgia*, 435 U.S. 223 (1978)
5. Problem 14: Write memorandum to Indiana Rules of procedure Committee advising them on what size the jury should be in civil and criminal cases.

## B. THE INSANITY DEFENSE

1. *Durham V. United States*, 214 F.2d 862, 869-73 (D.C. Cir. 1954)
2. Statutes -- ALI Model Penal Code §4.01; US Code Title 18, § 17
3. Guilty but mentally ill statute -- Indiana Code 35-36-2-2
4. Federal Rule of Evidence 704(b) restriction on expert opinions
5. Problem 15 -- Read *The Trial of John W. Hinkley, Jr: A case Study in the Insanity Defense* (1986), -- in class, students divide up into juries and deliberate to a verdict -- was John Hinckley guilty or not guilty by reason of insanity?

## 8. VERDICTS & SENTENCING

### A. JURY SENTENCING DECISIONS AND PREDICTIONS OF FUTURE VIOLENCE

1. *Barefoot v. Estelle*, US Supreme Court (1983) Amicus Curiae Brief for the American Psychiatric Association.
2. *Barefoot v. Estelle*, 463 U.S. 880 (1983) (opinion of court essentially ignoring everything APA said).
3. *Barefoot v. estelle*, dissent by Blackmun.

4. PROBLEM 17 -- Hypothetical state court capital case; students act as judge and must decide whether to admit Dr. Grigson's testimony on future dangerousness.

## 9. PSYCHOLOGY IN APPELLATE ADVOCACY

### A. CONSTITUTIONAL POLICY CASES

#### 1. The effects of racial segregation

A. *Brown V. Board of Education*, Social Science Appendix to Appellants' Brief

B. *Brown V. Board of Education*, 347 U.S. 483 (1954) (including famous footnote 11)

#### 2. The effects of single-sex education

a. *Mississippi University for Women V Hogan* U.s. Supreme Court, 1981; Brief for Respondent

b. *Mississippi University for Women V. Hogan*, 458 U.S. 718 (1982).

c. *Rhode, Association and Assimilation*, 81 Nw. U. L. Rev. 106, 139-42 (1986)

d. *United States V. Commonwealth of Virginia and Virginia Military Institute*, 976 F.2d 890 (4th Cir. 1992)

e. *United States V. Commonwealth of Virginia and Virginia Military Institute*, in the U.S. Supreme Court, 1995 Term, Brief for the Commonwealth of Virginia

f. same; Brief Amici Curiae ... by the American Association of University Professors; the Center for Women Policy Studies; the Program on Gender, Science and Law; and 25 social scientists.

- g. United states v. Virginia et al., 116 S.Ct. 2264 (1996) (majority and dissent)
- h. PROBLEM 18 -- problem asking students to argue a hypothetical situation in which Virginia in good faith does create a separate but equal program for women.

### 3. JURY SIZE

- a. Reread materials previously presented
- b. PROBLEM 19 -- Hypothetical based on Armstrong V. Lake, 667 N.E.2d 1153 (Ind. App. 1997), in which 6-person jury in civil case tinged with racial issues results in all-white jury; students prepare brief arguing for or against 6-person jury.

### 4. EFFECT OF CONFRONTATION IN CHILD SEX ABUSE CASES

- a. Maryland v. Craig, in the U. S. Supreme Court - 1989; Brief for Amicus Curiae American Psychological Association
- b. MARYLAND v. CRAIG, 497 U.S. 836 (1990)
- c. David Ross, Steve Hopkins, Elaine Hanson, R.C.L. Lindsay, Kirk Hagen & Tammie Eslinger, the Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse, 18 Law & Human Behavior 553 (1994)
- d. Problem 20 -- students write a concurring or dissenting opinion explaining how they would vote in Maryland v. Craig if it were decided today.

### 4. EFFECT OF DEATH-QUALIFYING JURORS

- a. Review previous materials
- b. Joseph B. Kadane, after Hovey, 8 Law & Human Behavior 115 (1984)

- c. Cox & Tanford, An Alternative Method of capital Jury Selection, 13 LHB 167 (1989)
- d. Indiana's statutes on capital jury selection & sentencing, 35-37-1-5; 35-50-2-9.
- e. PROBLEM 21 -- students argue either side of constitutional challenge under state law to Indiana's jury selection procedure.

## 5. DETERRENT EFFECT OF THE DEATH PENALTY

- a. Furman V. Georgia, 408 U.S. 238 (1972) (majority, dissent, and Marshall's empirical concurrence)
- b. Note on Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (June 1975).
- c. GREGG v. GEORGIA, 428 U.S. 153 (1976)
- d. William C. Bailey, Imprisonment V. The Death Penalty as a Deterrent to Murder, 1 Law & Human Behavior 239 (1977).
- e. People V. John Wayne Gacy, 468 N.E.2d 1171 (Ill. 1984)
- e. PROBLEM 22 -- students write the argument section of an appellate brief addressing the deterrent effect of the death penalty; I have also used this problem to make students a legislative committee considering a bill to improve the deterrent effect of the death penalty by making it more certain and faster.

## B. WHY AREN'T THE APPELLATE COURTS MORE RECEPTIVE TO PSYCHOLOGY?

- J. Alexander Tanford, the Limits of a Scientific Jurisprudence: the Supreme Court and Psychology, 66 Indiana Law Journal 137 (1990)

## EPILOGUE

Elizabeth Loftus, Brian L. Grant, Gary M. Franklin, Loni Parr and Rachel Brown, Washington Crime Victims Study: Crime Victims' Compensation and Repressed Memory

Revised Version (5-1-96)