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Steven L. Willborn
Editors

Civil Juries and Civil Justice

Psychological & Legal Perspectives

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Preface

People suffer injuries all the time: at work, at home, at play, while driving downtown—the list of ways to hurt oneself is endless. For the vast majority of these injuries, one simply accepts responsibility, endures the pain—physical and/or psychological—seeks appropriate medical care, and moves on. Yet some of these injuries seem *unjust*, in the sense that they appear to be someone else's fault—because another person or entity (such as a business, product manufacturer, or the government) has allegedly caused the injury intentionally or through carelessness.[1] These are the injuries that may lead to involvement in the civil justice system, where the injured party seeks redress from the alleged injurer. The psychological principles that underlie this process are the focus of this book.

There are various forms of redress for an injury that has been caused by someone else, but perhaps the best known is a lawsuit for monetary damages (some of the other forms are discussed in Section IV of this book). The civil litigation process, especially when it involves juries, has been the source of much debate and has undergone significant reform in recent years (e.g., caps on punitive damages or pain and suffering awards; for more on reform efforts and their potentially inadvertent consequences, see the chapters by Bornstein and Robicheaux, and Sharkey). The debate is fueled by arguments that the U.S. civil justice system is the most expensive in the world, and it almost certainly processes the largest number of claims.

In the last decade of the 20th century and first decade of the 21st century, civil juries have been in the news more than ever before. Merely mentioning a well-known defendant's name conjures up images of lengthy trials, rampant publicity, and, in some cases, very large damage awards. An incomplete list includes such household names as McDonald's (hot coffee), Merck Pharmaceuticals (Vioxx), Ford/Firestone (rollovers and blowouts), BMW (bad paint job), State

[1] Under the doctrine of strict liability, one can also recover damages even when the alleged harmdoer (e.g., a product manufacturer) has acted without carelessness. Causes of action under strict liability are relatively rare and are often coupled with claims of negligence. The sections of the present volume that deal with torts (see especially Sections II and III) therefore do not consider strict liability.

Farm (insurance bad faith and fraud), and the major tobacco companies (cigarettes). These cases, as well as their seemingly outlandish and frivolous counterparts, garner considerable media attention. They have led many observers to conclude that there is a litigation crisis, that our civil justice system is in serious disrepair if not altogether broken, and that reform is necessary.

What is most lacking in the debate about the merits and shortcomings of the American civil justice system is data. Critics and defenders alike have a disturbing tendency to make claims without empirical support, and at times these ungrounded claims make their way into law or policy. This is where psycholegal research, which uses empirical methods to test the psychological assumptions underlying legal doctrines, helps to fill the void. The present volume takes this approach in addressing a number of controversial topics, such as the nature and causes of the perceived litigation crisis, in general, or of the medical malpractice crisis, in particular; the rationality of juries' damage awards; and non-litigation alternatives to civil dispute resolution. We are fortunate to have a team of contributors to this volume that not only represents individuals trained in law or psychology, but that consists of researchers who fully and successfully integrate both disciplines. By emphasizing empirical research on these and other topics, the editors and contributors to this volume hope to further the development of data-based policies regarding how individuals seek and obtain civil justice.

The book is divided into four sections, plus introductory and concluding chapters. Each section consists of two primary chapters, addressing the legal and psychological elements of a particular topic, followed by an analysis/synthesis chapter that integrates and extends the ideas raised in the previous two chapters. The analysis/synthesis chapters each provide a unique perspective, but they share a desire to advance our theoretical understanding while identifying inconsistencies and future research directions.

The Introductory chapter by Bornstein and Robicheaux lays out many of the book's major themes. In distinguishing between the rhetoric of the civil justice debate and empirical evidence on the topic, it explores why these two facets are often so divergent. Attempts to inform public policy through empirical research cannot proceed without a detailed examination of the methods used to generate the research findings. Section I, on "Approaches to Studying Civil Juries" (chapters by Hastie, Vidmar, and Wiener), raises a number of these methodological issues and provides important considerations to keep in mind while reading the empirical contributions that follow.

Section II, on "The Relationship between Compensatory and Punitive Damages" (chapters by Sharkey, Eisenberg et al., and Poser), includes examples of how empirical legal scholarship can be used to address contentious issues that are key to the tort reform debate. The focus of these chapters is the proper relationship between damages designed to provide restitution to the injured party (i.e., compensatory damages) and damages designed to punish the harmdoer (i.e., punitive damages), which typically arrive in the same package.

Section III, on “Medical Injuries and Medical Evidence” (chapters by Hans, Landsman, and Miller), focuses on one of the most contentious elements of the tort reform debate, namely, compensation for medical injuries. As the chapters in this section illustrate, there are many complex facets to this issue, ranging from how best to reduce medical error to how to preserve physicians’ autonomy to how to present evidence of medical injuries in court.

Although juries receive much, if not most, of the criticism for the alleged ills of the civil justice system, jury trials have always been relatively rare, and evidence exists that they are becoming rarer still (see Chapter 1). Thus, one could easily argue that the emphasis on juries (among both researchers and policy-makers) is misplaced, and that we need to consider civil justice and dispute resolution from a broader perspective. Section IV, on “Apologies and Civil Justice” (chapters by Robbennolt, Greene, and Tomkins and Applequist), explores some of these alternative mechanisms for obtaining civil justice. Finally, the concluding chapter (by Bornstein) summarizes the book’s major themes and speculates about the future of civil justice research.

Most of the chapters in this volume are based on papers presented at a conference on Civil Juries and Civil Justice, hosted by the Law-Psychology Program at the University of Nebraska-Lincoln, from May 15–18, 2006. The conference was funded by a UNL Program of Excellence award, which we gratefully acknowledge here. We also appreciate the support, financial and otherwise, of the Law College and Psychology Department at UNL. The conference papers and discussions they engendered did much to stimulate our and the contributors’ thinking about these issues, and I am very grateful to the contributors for their active, and often lively, participation in the conference. I also thank them for their responsiveness in turning oral papers into written book chapters. They have been a pleasure to work with.

Many people’s efforts are necessary for a conference to succeed and for a book thereon to be written. I was especially fortunate to have Evelyn Maeder as the graduate student assistant for the conference, who managed the myriad details of transportation, lodging, food, etc. without once losing her cheerful disposition. I also appreciate the conference contributions of Christie Emler and Craig Lawson, as well as the support and oversight of several individuals at Springer Publishing, especially Amanda Breccia, Sharon Panulla, and Anna Tobias. Finally, this project is the product of a team of editors who have worked diligently over a period of years, and I express my appreciation to my valued colleagues and co-editors (Rich Wiener, Bob Schopp, and Steve Willborn) for all of their efforts in helping to bring the project to fruition.

July, 2007 Brian H. Bornstein

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Crisis, What Crisis? Perception and Reality in Civil Justice

Brian H. Bornstein and Timothy R. Robicheaux

"Excessive litigation has created a crisis in America," according to an article on the Alexandria, Virginia-based Center for Individual Freedom's website (Marcus, 2004).

This article was the first of 63,100 links retrieved in a February 16, 2007 Google.com search for the words "litigation crisis," and a search for the word "tort reform" on the same day returned over a million results. Not every linked article was as bold about the current "litigation crisis" in the United States, and not every linked article promoted a need for tort reform, but the search demonstrates the current salience of these issues in the United States.

There is clearly a perception that the civil justice system is, if not broken, in a serious state of disrepair (for reviews, see Greene & Bornstein, 2003; Hans, 2006; Litan, 1993; Litan & Winston, 1988; Vidmar & Hans, in press); and although the jury is not painted as the sole culprit, it is portrayed as a leading one. The purpose of this introductory chapter is to provide an overview of some of the rhetoric about the civil jury system. As this chapter and the remainder of this book make clear, some of the rhetoric has a kernel of truth, but some of it is based on unvalidated assumptions and sensationalized sound-bytes that lack empirical justification.

Perceptions of the Jury: Diametrically Opposed Views

Much of the debate surrounding the civil justice system involves debates over the value and importance of civil juries in the United States. Two diametrically opposed views seem to exist concerning juries. One perspective is the "cup half-empty" view of juries. According to this perspective, held by many politicians, legislators, and professional/advocacy groups and fueled by

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media coverage, juries are incompetent, illogical, and irrational (for reviews, see Galanter, 1998; MacCoun, 2006; Marder, 2003, 2005; Robbennolt & Studebaker, 2003). While this perspective partly reflects sensationalism and the media's pandering to the public's seemingly endless appetite for stories of absurd, outrageous, and extreme lawsuits, it also partly reflects the operation of natural cognitive processes (e.g., the tendency for more salient, vivid information to capture the imagination and stand out in memory; see MacCoun, 2006, discussed below). The "cup half-empty" perspective has a symbiotic relationship with the tort reform and litigation crisis movements.

The opposing view, held by most (but certainly not all) social science researchers, is the "glass half-full" perspective. Those who hold this view agree that there is room for improvement in the United States' civil justice system, but that the errors are systematic and scientifically explainable. Unfortunately, these research findings often have little impact outside of academic circles.

However divergent these views may seem, there are reasons why people may subscribe to either perspective. Claims about the shortcomings of juries often result from ignorance, misrepresentation, or misunderstanding of the available data. Neither policymakers nor the media tend to be well trained in empirical methodology and statistical interpretation. On the other hand, those who do understand the methodology and interpretations—namely, the social scientists—are often poor at "selling" their research. Even when social scientists do disseminate and publicize their findings, empirical research on legal questions has significant limitations (e.g., questions about external and ecological validity, studies with conflicting results, etc.; see the chapter by Vidmar, this volume).

Reconciliation of these divergent viewpoints, if possible at all, will not happen overnight. Corporate profits, individual earnings (e.g., malpractice insurance and contingency fees), and well-heeled political lobbies provide financial hurdles to a successful reconciliation. Despite the uphill battle that social scientists are likely to face, there are reasons for optimism. The public, despite legislative and media complaints, does not exhibit a consistent pro-plaintiff bias but appears, rather, to have a surprisingly balanced perspective of the civil justice system (Feigenson, 2000; Hans; 2000). In addition, judges have an overwhelmingly positive view of the jury system (Galanter, 1990; Sentell, 1991), and there is a relatively low rate of judge and jury disagreement (Eisenberg et al., 2005; Kalven & Zeisel, 1966; Sentell, 1991). Longitudinal trends in the civil justice system also show little cause for alarm: There are fewer jury trials today than in the past (evidence against a supposed "litigation crisis"; see Galanter, 2004), with little-to-no increase in award sizes (e.g., Seabury, Pace, & Reville, 2004). By calling attention to data demonstrating juries as logical, rational, and competent, reform efforts can lead to the adoption of sound, empirically backed policies focusing on what really is broken, or performing at a sub-optimal level, and not on unfounded generalizations.

Torts Aren't Always Sweet: The Tort Reform Agenda

Torts are not criminal offenses, and they are distinct from other non-criminal disputes such as contracts and property civil actions. Tort actions are between a plaintiff and a defendant; the goal is to determine liability (roughly speaking, a legal term for non-criminal culpability, or responsibility), not guilt; and the remedies in tort cases are usually monetary. In 2002, approximately 20% of civil trials in the United States were tort trials, which made tort cases more common than contract cases (~18%) but less common than prisoner petitions (~30%) (Galanter, 2004). Additionally, the proportion of tort cases, and of all civil cases, is decreasing over time (Galanter, 2004). Even though tort cases make up only a fraction of United States civil trials, legislatures, politicians and professional groups (i.e., those most likely to oppose juries) devote a great amount of time and energy to reforming tort law.

The largest and most visible tort reform lobbying group in the United States is the American Tort Reform Association (ATRA).[1] ATRA, co-founded in 1986 by the American Medical Association and the Council of Engineering Companies, is "the only organization exclusively dedicated to repairing our civil justice system." Today, ATRA is "a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters."[2]

ATRA's principal goals are highly laudable. The nonpartisan group works "to bring greater fairness, predictability and efficiency to America's civil justice system." ATRA compiles data on reforms to the tort systems in all state and federal courts. For instance, ATRA notes that in 2003 Texas placed a $250,000 cap on noneconomic damages in medical malpractice cases and provided that defendants are no longer required to post a bond to appeal a punitive damages decision. A 2004 bill in Mississippi limited the liability of a seller of goods in a product liability case. Medical malpractice reform and product liability reform are frequent causes of ATRA, which is understandable considering that these are the types of cases most likely to affect the co-founding members (i.e., physicians and product manufacturers).

Many proponents of tort reform argue that the civil justice system in the United States is simply out of control, and that reform is the only sensible choice. According to ATRA, the United States spends $246 billion on the civil

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[1] ATRA is by no means the *only* organization promoting "tort reform." Many professional organizations and individuals also promote reform of the tort system. We focus here on ATRA because the organization is highly visible, its website provides a wealth of useful information, and it clearly articulates the most common themes espoused by the tort reform movement.

[2] The quotation is from ATRA's "About Us" page. Retrieved on April 2, 2007 from: http://www.atra.org/about/. Much of the information in the remainder of this section comes from multiple pages on the ATRA website. For brevity, we only cite the full web address for ATRA's "About Us" page, except for direct quotes. Readers are referred to the website for further information.

justice system, making it the most expensive civil justice system in the world. How this dollar figure was calculated remains unclear; yet whether or not the statement controls for other variables in the calculation (e.g., population size), it is certainly plausible. It is also likely true of the United States' justice system as a whole, especially the criminal justice system.[3]

Assuming that tort reform advocates are correct and that the system is truly "out of control," who is to blame for this fact? ATRA blames both lawyers and the media. The million-plus lawyers in the United States (Galanter, 2004) are partially to blame for the out of control system, according to ATRA. As the number of lawyers per capita has more than doubled in the last 35 years (Galanter, 2004), personal injury lawyers are forced to "target certain professions, industries, and individual companies as profit centers."[4] Tort reform advocates blame lawyers for luring clients, some of whom have never suffered an actual injury, with promises of large awards. In addition, the lawyers "effectively tap the media to rally sentiments for multi-million dollar punitive damage awards."[5]

To achieve tort reform, ATRA lists several issues that they support:

- Health care liability reform
- Class action reform
- Promotion of jury service
- Abolition of the rule of joint and several liability
- Abolition of the collateral source rule
- Limits on punitive damages
- Limits on noneconomic damages
- Product liability reform
- Appeal bond reform
- Sound science in the courtroom
- Stopping regulation through litigation[6]

Most Americans would probably agree that many of these goals are socially desirable. For instance, the right to a trial by jury is a right that all Americans should appreciate, and promotion of jury service is quite desirable, for a number of reasons (Boatright, 2001; Diamond & Bina, 2004). Social scientists who study legal issues would all agree with the need for sound science in the courtroom (e.g., Faigman, 1999; Monahan & Walker, 2005; Faigman, Kaye, Saks, & Sanders, 2002). On the other hand, while there are clear benefits to making the class action system more efficient, certain

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[3] Of course, an expensive system is not necessarily an out-of-control system. One could argue that "you get what you pay for," that significant amounts of money must be spent to achieve justice, and that inefficiencies are inevitable in any large bureaucracy. Nonetheless, there is always room for improvement.

[4] ATRA's "About Us" page. Retrieved April 2, 2007 from: http://www.atra.org/about/.

[5] *Id.*

[6] *Id.*

elements of class action reform could exclude some plaintiffs with legitimate causes of action. Also, limiting punitive or noneconomic damages serves defendants but could produce inadequate compensation to plaintiffs (*Petrucelli v. Wisconsin Patients Compensation Fund*, 2005; Sharkey, 2005) or inadequate punishment and deterrence to defendants and others (Galanter & Luban, 1993; Sharkey, this volume).

Tort Reform: The Efforts, the Consequences, and Jury Blame

Jury trials are one vehicle for obtaining civil justice, but they are not the only vehicle. Some plaintiffs may obtain civil justice through mediation, arbitration, restorative justice schemes, or other means. However, many people seem to fear juries as irrational entities. Such "juryphobia" draws attention away from larger problems, such as medical and product errors, that professional organizations must address (Marder, 2005; see also chapters by Landsman and Miller, this volume). Most examples from ATRA's agenda are broad *tort* reforms that do not specifically target the jury. Some proposals implicate the jury without specifically targeting it, such as caps on damage awards (i.e., this particular reform is motivated at least partially by the perception that jury awards are excessive and irrational).

However, the "promotion of jury service" is one of ATRA's specific goals, suggesting a need for actual *jury* reform. Discussions of tort reform lay much of the blame for our allegedly dysfunctional civil justice system at the feet of juries, and the examples that the tort reform movement invariably trots out to demonstrate the need for reform (e.g., the McDonald's hot coffee case) center on juries. The "common wisdom" surrounding many of these purportedly outlandish and outrageous cases, such as the McDonald's coffee case, is often distorted or inaccurate (see, e.g., Galanter, 1998; Vidmar & Hans, in press; we discuss several of these cases below).

Moreover, ATRA identifies several jurisdictions as "judicial hellholes," which are "places that have a disproportionately harmful impact on civil litigation. Litigation tourists, guided by their personal injury lawyers seek out these places because they know they will produce a positive outcome."[7] One of the most salient cases of 2006 occurred in an area of Texas, the Rio Grande Valley and Gulf Coast area, named by ATRA as a judicial hellhole in both 2005 and in 2006. On April 21, 2006 a jury awarded a plaintiff $32 million (capped at $7.75 million) against Merck & Company because a 71-year-old family member died after taking the pain reliever Vioxx (CNN Wire, 2006). While ATRA refers to this locale as "an area where extremely weak evidence can net multimillion dollar awards," and where "jurors have relationships with the

[7] ATRA's Judicial Hellhole's page. Retrieved on April 2, 2007, from: http://www.atra.org/reports/hellholes/2005/.

litigants in their cases,"[8] the jury in this case arguably showed a fair amount of restraint, considering that the plaintiffs requested over a billion dollars. Interestingly, jurors appear to have shown restraint in several cases against Merck over Vioxx, as the company has won seven Vioxx cases and lost only four cases as of December of 2006 (Vioxx Trial Scorecard, 2006).

West Virginia, South Florida, and three counties in Illinois also hold the dishonor of "judicial hellholes," but ATRA also identifies "points of light." These points of lights are places where voters, trial courts, or the legislature have instituted measures to reform the civil justice system. One "point of light" in 2006 was the Florida legislature, which limited class action lawsuits to plaintiffs from Florida (with some exceptions) and made it easier to appeal civil judgments.

While certain areas may be notorious for being overly plaintiff-friendly, ATRA also points out that some lawsuits are absolutely "looney." These cases are meant to illustrate how the justice system has spun out of control. For instance, a couple sued American Airlines because they did not have enough legroom, a student sued his school over summer homework, and a viewer of NBC's *Fear Factor* sued NBC for $2.5 million claiming nausea caused from a rat-eating episode of the show caused him to run into a door (ATRA, 2006). To add to the outrage over such lawsuits, ATRA mentions two good Samaritan teenagers who were sued after surprising neighbors with cookies (by ringing the doorbell and running away), which allegedly caused one neighbor to have a panic attack.

Perhaps the most famous example of an "outrageous" lawsuit that has become the stuff of legend is the McDonald's coffee spill case (Galanter, 1998). A woman sued McDonald's after she spilled hot coffee on her lap and suffered third degree burns on her groin and leg, necessitating skin grafts. McDonald's kept its coffee 20 degrees hotter than the industry standard, and this was one of approximately 700 previous claims concerning coffee burns. The woman asked for $11,000 to pay for her medical bills; McDonald's countered with an offer of $800, so she sued. The media reports discussed the large ($2.7 million) punitive damage award against McDonald's, but the award was reduced to $480,000 (Galanter, 1998). Other salient cases include the Firestone tire and tobacco litigation, and most recently lawsuits against Merck over the drug Vioxx.

The ATRA is not the only professional organization to cite frivolous cases to further its cause, and it remains unclear how such suits demonstrate a broken system. They do demonstrate how partisan groups naturally are selective in adducing evidence to support a particular agenda. The "looney lawsuit" headlines do not indicate, for example, that the couple who sued American Airlines did so only after the airline advertised more legroom on their flights; or that a judge threw out the *Fear Factor* suit in March of 2005, and warned the (pro-se)

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[8] *Id.*

plaintiff not to appeal the decision in the "frivolous" lawsuit (Associated Press, 2005). If anything, one could argue that these cases illustrate a justice system gone *right*. Cases that seem groundless at first blush can turn out, on closer inspection, to have some degree of legitimacy, and frivolous cases usually are dismissed.[9]

The American Medical Association and Medical Malpractice Reform

Other groups, in addition to the American Tort Reform Association, present their own records of a justice system gone bad. Physicians in at least twelve states have rallied against rising malpractice insurance rates by arguing for a need for tort reform (Denicola, n.d.). However, it is not at all clear that malpractice settlements are the primary determinant of malpractice premiums; other factors, such as market forces and increased attention to medical errors, play large roles as well (see, e.g., Black, Silver, Hyman, & Sage, 2005; Greve, 2002). The American Medical Association (AMA) has a color-coded map that purports to demonstrate states in a "medical crisis" (see Fig. 1).[10] According to the map, there are seventeen states currently in "crisis," where the AMA warns that patients will lose access to "high-risk" medical procedures and medical specialists (AMA Crisis Map, n.d.). The AMA vigorously promotes medical malpractice reform.

Because of the crisis warnings, most states have enacted some form of medical malpractice reform along with their other tort reform measures (Halton & McCann, 2004). The effectiveness of these reforms remains unclear, specifically in the medical "crisis" area. The Government Accounting Office surveyed five states with potential problems in medical care access. Rather than reflecting a malpractice crisis, shortages in emergency surgery and newborn delivery were in rural areas where "providers identified other long-standing factors that affect the availability of service" (Congressional Budget Office (CBO), 2004). The GAO could not substantiate reductions in physicians, and they found no widespread lack of access to medical care (CBO, 2004).

Is the focus on the civil justice system and out-of-control juries warranted as an explanation for rising malpractice insurance premiums? Recent data suggest not. In 2003, the Missouri Department of Insurance released a statement reporting that medical malpractice claims both filed and paid in 2003 fell to

[9] Many states have, in recent years, cracked down on frivolous lawsuits by increasing penalties for litigants and lawyers who file them (e.g., http://www.usatoday.com/news/nation/2005-08-16-lawsuit-penalty_x.htm). This trend is one of the clear successes of the tort reform movement.

[10] The AMA updates the map regularly. Figure 1 was current as of May 16, 2007: for current status, see http://www.ama-assn.org/ama/noindex/category/1187.html.

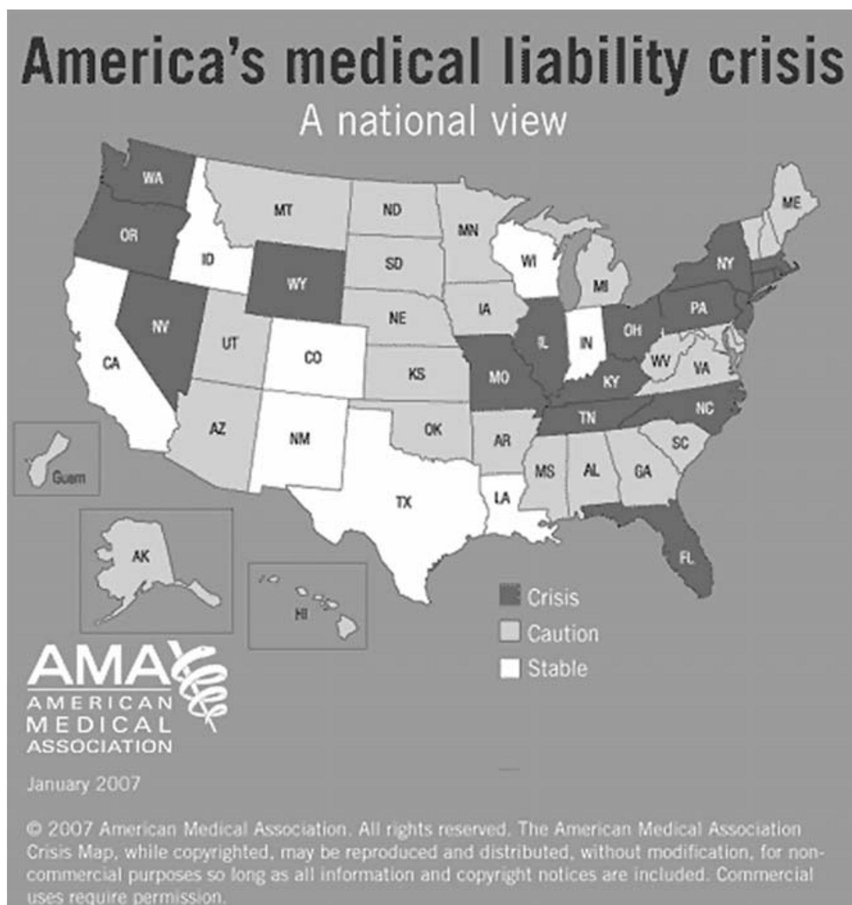

Fig. 1 AMA crisis map

all-time lows (VandeWater, 2004), while medical malpractice companies increased premiums (Americans for Insurance Reform, 2004). A newspaper in New Jersey reported that medical malpractice payouts fell 21% from 2001 to 2003, yet malpractice premiums increased over the same time-period (Herbert, 2004).[11] In perhaps the most comprehensive study of medical malpractice claims outcomes to date, Black et al. (2005) analyzed closed claims in Texas from 1988 to 2002. They found that, controlling for population growth, the number of paid claims did not increase (and actually decreased for claims less than $25,000); payouts per large paid claim ($25,000) increased trivially, no

[11] Interestingly, the American Medical Association is not part of the Americans for Insurance Reform Coalition (http://www.insurance-reform.org/list.html) and remains focused on tort reform instead.

more than 0.5% per year; and although jury awards did increase approximately 3% per year, the actual payouts in tried cases did not increase over time.[12]

The Consequences of Reform

If tort reform efforts are accurately pinpointing the cause of the problem (if, indeed, there is a problem), then one would expect to see benefits in states that have initiated tort reforms. According to ATRA, there have been increasing business investments and job growth since the passage of tort reform. The AMA recently dropped Texas from its list of states in crisis after Texas capped noneconomic damages. There is evidence that malpractice claims and insurance rates have, in fact, decreased recently in Texas; however, the decrease began before Texas approved the cap (Black et al., 2005). Others have reported an increase in the supply of physicians following the passage of medical malpractice reform laws (Kessler, Sage, & Becker, 2005).

It is exceedingly difficult to document the effects of reform efforts. Numerous factors can explain pre- versus post-reform differences, mostly related to the simple passage of time (e.g., changes in demographic patterns or economic indicators), and cross-sectional comparisons of states with and without various reform measures suffer from similar problems.[13] The claims by ATRA and the AMA seem to argue causality in the face of clearly correlational data. The price of oil has increased since Texas capped noneconomic damages, but it is unlikely that ATRA would blame tort reform efforts for this change. Systematic studies of the issues purport to find both positive change (e.g., lower awards, fewer claims) and no changes at all, depending on the type of tort reform under investigation (see, e.g., Waters, Budetti, Claxton, & Lundy, 2007).

In an attempt to overcome the difficulties inherent in analyzing the effects of reforms, some researchers have turned to conducting controlled experimental studies. An experimental approach allows for a systematic exploration of mock jury awards in cases where, for example, punitive damage awards are or are not capped (e.g., Greene, Coon, & Bornstein, 2001; Robbennolt & Studebaker, 1999; see generally Greene & Bornstein, 2003). Although this approach to doing psycholegal research is associated with its own problems and limitations (see chapter by Vidmar, this volume), the research is generally consistent with archival analyses of actual jury verdicts and demonstrates inconsistent, and

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[12] The figures reported here summarize across a number of analyses conducted by Black et al. (2005) using different data sets but capture the overall tenor of the results. The absence of an increase over time in actual payouts, despite the slight increase in jury award size, reflects the fact that most jury awards in medical malpractice cases receive post-verdict “haircuts” (Hyman, Black, Zeiler, Silver, & Sage, 2007).

[13] It is possible to control for many of these extraneous variables through sophisticated statistical techniques; see, e.g., the chapters by Sharkey and Eisenberg, Hans, and Wells, this volume.

sometimes unintended, effects of proposed legal reforms (e.g., capping damages; see Greene & Bornstein, 2003; Sharkey, 2005).

Another problem the tort reform lobbyists face is the legality of their reforms. The Wisconsin Supreme Court recently held that a medical malpractice cap of $350,000 on noneconomic damages was a violation of the plaintiff's equal protection right (*Petrucelli v. Wisconsin Patients Compensation Fund,* 2005). On a rational basis review (i.e., in applying a level of scrutiny that is relatively lax and generally favors the state), they held that the cap statute was not rationally related to a number of legitimate legislative objectives, such as compensating victims fairly, lowering medical malpractice insurance premiums, or lowering overall healthcare costs.

Tempest in a Teapot?

Although juries, or at least jury trials, get much of the attention from tort reform advocates, only a very small percentage of cases actually go to trial (e.g., Ostrom, Rottman, & Goerdt, 1996), and going to trial does not guarantee that the case will be tried by a jury. Considering data on win-rates for different types of cases, the most controversial areas of law seem especially poor candidates for reform efforts. Overall, plaintiffs win cases about 50% of the time, but only 40% of the time in products liability cases and 30% of the time in medical malpractice cases (Ostrom et al., 1996). This means that for a contingency-paid lawyer to take such cases to court, he or she probably has a strong case, one worth a lot of money if the plaintiff wins, or both. Punitive damages, another area of focus by reform advocates, are awarded in only 3–5% of tort cases where the plaintiff wins (Eisenberg, Goerdt, Ostrom, Rottman, & Wells, 1997, Eisenberg, LaFountain, Ostrom, Rottman, & Wells, 2002; Ostrom et al., 1996; Rustad, 1998).

Nonetheless, juries do matter. Jury verdicts have an impact on both business (e.g., Garber & Adams, 1998) and individual behaviors (e.g., Sloan, Reilly, & Schenzler, 1995). Although variations in awards and verdicts make settlement decisions and negotiations more difficult (Galanter, 1990), these stages of the dispute resolution process nonetheless occur in "the jury's shadow" (Galanter, 2004; Metzloff, 1991). Despite their relative rarity and declining frequency, juries still try tort cases more often than other types of civil cases, such as contract or property disputes (Galanter, 1990, 2004). Thus, the jury system may, in some ways, be imperfect, inefficient, and expensive; yet trials, and especially jury trials, have a central and influential role in the American civil justice system whose importance it would be hard to overstate (Burns, 2003; Landsman, 2004). According to Burns (2003, p. 1319), "the American jury trial, as we have developed it, is one of the greatest achievements of American public culture." Many others—legal scholars, politicians, and laypeople—would undoubtedly agree with this sentiment.

Tort reform proponents often argue that jury decisions have changed, and awards have increased, over time, causing the system to spiral out of control. Available data, however, do not demonstrate major changes in the last 40 years. Seabury and colleagues (2004) studied 40 years of civil jury verdicts (1960–1999) in San Francisco (California) and Cook (Illinois) Counties. The mean awards increased dramatically over this time, but median awards remained the same (Seabury et al., 2004). The mean awards, which are affected more by outliers, demonstrate the presence of more large awards in recent times. These large awards were still very rare. Moreover, most of the growth in awards could be credited to increased medical losses and not to pain and suffering claims. In other words, medical costs and awards increased together. Similar analyses of punitive damage awards indicate that they have not increased disproportionately over time either (Eisenberg, et al., 2002, 2006; this volume).

Juries and the Goldilocks Conundrum

A civil jury has a difficult job; like Goldilocks tasting the bears' porridge, jurors seek to award an amount that is not too high, is not too low, but is just right. A group of individuals lacking specialized knowledge must hear a case, determine complicated issues of liability (e.g., causation, negligence), and decide how much money is adequate to cover an injury. Not only must jurors worry about *past* medical bills and other costs, but they also must consider *future* losses and calculate a dollar amount for pain and suffering. Regarding future losses (e.g., medical bills, loss of work, etc.), jurors must weigh testimony that includes speculative projections and technical calculations. Even economic experts would have trouble making such calculations; yet throughout this process, jurors receive little guidance (Greene & Bornstein, 2000).

Reform advocates accuse juries of offering excessive damage awards. This argument is interesting to social scientists because it encompasses many types of court cases, and it is directly relevant to several reform measures (e.g., caps). There is no clear definition of what makes a jury award "too large." Indeed, some data show that plaintiffs are more likely to be *under*compensated than overcompensated. For example, Sloan and van Wert (1991) studied awards and medical costs for medical malpractice claimants. For birth-related injuries and emergency room injuries, plaintiffs received 57% and 80% of their estimated costs, respectively (Sloan & van Wert, 1991; see also Sloan & Hsieh, 1990). The disparity was greatest for plaintiffs who died due to their injuries.

As the law dictates, injury severity remains the single best predictor of compensatory damages (Bovbjerg, Sloan, Dor, & Hsieh, 1991; Sharkey, 2005; Vidmar, 1998; Vidmar, Gross, & Rose, 1998), and large pain and suffering awards may be justified. In many cases, for example, a limited pain and suffering award would be inadequate to compensate someone who faces decades of

paralysis and disfigurement.[14] Punitive damages also must be large enough to serve their purpose—to punish a defendant and deter others. A small punitive damage award probably would not dissuade or alter the behavior of a billion dollar company.

Despite overall trends, tort reform advocates often bring up "blockbuster" awards—that is, awards that seem abnormally high. For instance, Viscusi (2004; see also Hersch & Viscusi, 2004) identified 64 punitive damage awards since 1985 that were greater than $100 million. Sixty-one of the 64 cases were tried by a jury, which suggested to the authors that juries are excessive and irrational in awarding punitive damages. In considering these blockbuster cases, there are a number of important considerations: first, the sheer magnitude of the awards cannot indicate whether or not they are excessive (i.e., an extremely large award might be necessary to achieve punishment/deterrence, especially when the defendant's actions were unusually reprehensible or committed by a multinational conglomerate). Second, other analyses of punitive damage awards suggest, counter to the claim of Hersch and Viscusi, that punitive damage awards are predictable and systematic (e.g., Eisenberg et al., 2002, 2006; see Eisenberg et al., this volume, for such an analysis that incorporates the cases summarized by Hersch and Viscusi). Third, appeals courts later reduced many of these very high awards (Baldus, MacQueen, & Woodworth, 1995; Vidmar, Gross, & Rose, 1998).[15] Fourth, these large awards may be salient, but in the course of almost 20 years, there were very few blockbuster punitive cases. Fifth, judges and juries tend to award punitive damages similarly (Eisenberg et al., 2002, 2006; Robbennolt, 2002, 2005).

Despite the occasional blockbuster award (e.g., a $253.4 million award in a recent Vioxx trial, expected to be reduced to approximately $26 million; see Hays & Agovino, 2005; Vioxx Trial Scorecard, 2006), jury awards tend to be quite modest. For example, Ostrom et al. (1996) analyzed a large number of state court trials and obtained a median award of approximately $52,000. Only 8% of cases were above $1 million, although the rate of million dollar cases varied by case type (e.g., 17% of medical malpractice cases were above $1 million). Although award size has increased for some types of cases (e.g., medical malpractice), much of the increase can be explained by increasing medical costs (Seabury et al., 2004; Vidmar, 1998; Vidmar et al., 1998); and awards in the most common kind of case—automobile negligence—have not increased over time (Seabury et al., 2004). Thus, the data seem to support a

[14] It is for this reason that the Wisconsin Supreme Court struck down that state's pain-and-suffering damages cap in the *Petrucelli* case discussed above.

[15] Other sources of post-verdict "haircuts," such as a post-verdict settlement for insurance policy limits, are a more common cause of award reduction than remittitur (Hyman et al., 2007). Note that, in and of itself, the post-verdict reduction of apparently excessive awards (by remittitur or any other reason) does not indicate that juries are behaving rationally; but it does indicate that the civil justice system on the whole is functioning more as it is meant to function.

conclusion that juries are not out of control, and that blockbuster awards by "runaway juries" are the exception, not the norm.

Tort Reform and the Media: Is the Tort Reform Movement Shooting Itself in the Foot?

Despite the fact that most data support juror/jury rationality and a system not in crisis, tort reform advocates continue to believe that changes in the jury system are necessary. Why does belief in a civil justice crisis persist, and what does the public believe? One explanation is that blockbuster awards are prominent in the media (Bailis & MacCoun, 1996; Robbennolt & Studebaker, 2003). For example, MacCoun (2006, p. 541) argues that "media distortion may be parsimoniously explained by...skewed outcome distribution combined with human brains that [attend] selectively." In other words, people are especially attuned to, and interested in, abnormal or "outlier" data.

Bailis and MacCoun (1996) analyzed 246 articles on tort litigation from 1980 to 1990 in *Time*, *Newsweek*, *Fortune*, *Forbes*, and *Business Week*. A person could conclude, after reading these articles, that plaintiffs have higher win-rates and receive more damages than actual data demonstrate, as articles overrepresented both issues. The magazines also overrepresented articles on controversial forms of litigation, such as products and medical liability cases. For instance, automobile cases comprise 60% of tort filings and 42% of tort trials, but only 2% of legal articles in the magazines concerned automobile negligence trials (Bailis & MacCoun, 1996). Products liability cases, comprising 4% of trials, received 49% of the attention in the articles, and medical malpractice cases were overrepresented as well (7% actual rate; 25% coverage rate) (Bailis & MacCoun, 1996).

At least three of the magazines surveyed focus exclusively on business, so the emphasis on business-related cases is understandable. The casual reader, however, might utilize the media reports to form opinions of the state of the civil justice system as a whole, especially if journalists report on interesting cases without focusing on their representativeness (MacCoun, 2006). MacCoun also argues that human evolution leads the public to give higher weight to abnormal stimuli, and damage awards are skewed in such a way that the only abnormal stimuli will be on the unbounded, high side. MacCoun posits that journalists will seek cases with large awards, which are more common in products liability, medical malpractice, and class action cases, and are only possible if the plaintiff wins the case. Thus, it is understandable that journalists allow extreme cases to be overrepresented—that is, after all, what sells.

In support of this argument, MacCoun (2006) observes that journalists commonly report outliers in a number of different domains. In addition to abnormal jury awards, journalists report "world's oldest human" stories, lottery winnings, record temperatures, and swings in stock prices (MacCoun,

2006). It is likely that journalists' story choices have little, if anything, to do with a tort reform agenda. Instead, they cater to public demand, as the public processes information in a certain way. The media alone, without the efforts of a tort reform group, seemingly distort certain case types and outcomes in the same way that tort reformers focus on "judicial hellholes" and "looney lawsuits."

Ironically, the media and tort reform groups might unwittingly be fanning the flames that the tort reform effort is trying to extinguish. If people make judgments based on media information, then potential or actual plaintiffs should be *more* likely to file suits and *less* likely to settle than they would be otherwise, because they will expect high win-rates and large awards. Jurors, who are themselves members of the public, will also expect high awards to be "normal" and will reach verdicts accordingly. On the other side, potential defendants, such as inventors and producers, who follow media reports closely, should be too scared to produce things for fear of being sued; after all, if these reports are to be believed, blockbuster awards and high plaintiff win-rates are the norm. Thus, by bundling calls for reform with evidence of extreme verdicts, the tort reform movement may be shooting itself in the foot.

The Pervasiveness of the Tort Reform Debate

ATRA, and other like-minded organizations, keep tort reform issues at the center of legislative and public policy debates. For instance, the Vioxx litigation was co-opted by the tort reform movement almost immediately. Stories on tort reform are also common in the media. According to news archive searches on the *New York Times* and *Los Angeles Times* websites, "tort reform" is a somewhat common topic (mentioned approximately 35 times in 2005 by both papers; it is likely that these numbers are smaller than the actual values, given the probable existence of additional articles using different terminology). As shown in Fig. 2, the frequency of tort reform articles is somewhat variable yet relatively steady over time.[16]

Tort reform also appears to be an important issue in popular culture, as evidenced by a search of Google.com for the phrase "tort reform." A search on February 18, 2007 yielded over a million links for the phrase "tort reform." Searching for " 'tort reform' bad" yielded about 539,000 links, while " 'tort reform' good" yielded about 845,000. Of course, this is a crude search of the prevalence and opinions on the issue (e.g., a link may have said "It is bad not to have tort reform" or "It's a good thing tort reform efforts are being stifled"), but tort reform is obviously a prominent issue that is not going to go away any time soon.

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[16] We could not determine a reason for the spike in 1995.

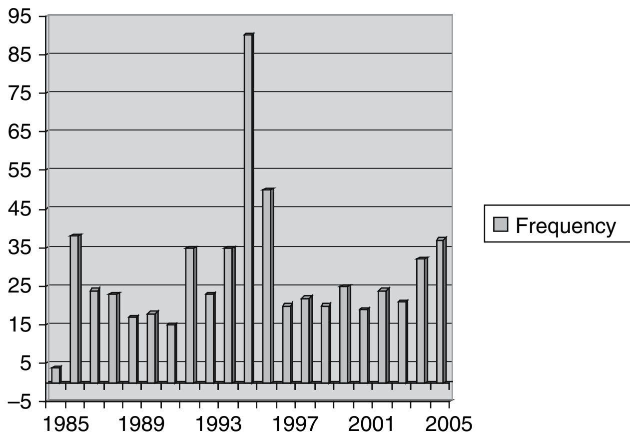

Fig. 2 Frequency of phrase "tort reform"
Source: Based on web search of *L.A. Times* archives

Recommendations: Where Do We Go From Here?

The rhetoric of the tort reform and jury reform movements waxes and wanes, but it is likely here to stay. Reformist organizations, which often represent special interest and/or professional groups (e.g., physicians and product manufacturers), have invested large amounts of money into reform movements and have evidence that their efforts are protecting the interests of members. Some of this evidence is correct, some of it is merely correlational but taken to have causal implications, and some of it is erroneous. Unfortunately, it is unclear that all reform goals are socially desirable (e.g., caps on pain and suffering could potentially limit compensation to the most severely injured plaintiffs).

The blame may be misplaced (e.g., on juries instead of insurance companies), but tort reform advocates could benefit the civil justice system as a whole by focusing on less controversial reforms that are either absent from the agenda or less publicized. Several states have recently taken steps to help jurors to do their job properly by improving jury instructions, increasing juror compensation, and producing juror education/orientation videos with information relevant to rational decision-making (Greene & Bornstein, 2000; Marder, 2006; Miller & Bornstein, 2004). Legislatures and reform advocates could also benefit the system by allowing note-taking and question-asking during complicated trials (see, e.g., ForsterLee, Horowitz & Bourgeois, 1994; Heuer & Penrod, 1994; Mott, 2003).

One of the most difficult tasks for civil jurors is quantifying the exact amount of damages (Kalven, 1958; Greene & Bornstein, 2000, 2003). In addition to simply clarifying the standard instructions, some reform measures advocate providing jurors with "benchmark" data from similar trials so that they have a

frame of reference in deciding how much to award in damages (Bovbjerg, Sloan & Blumstein, 1989; Dann, 2003). Although there are complexities in determining exactly which data to use for this purpose (Bovbjerg et al., 1989), there seems little doubt that having such information would make civil jury verdicts more equitable, in the sense of awarding similar amounts to similarly situated plaintiffs.

Most importantly, the tort reform movement demonstrates a heightened need for good jury research. Policy formulation in the absence of reliable data is empty and potentially harmful (Saks, 1989, 1992). Calls for reform are more data-driven than in the past, but data are still lacking or inconclusive on many questions relevant to juries. A valuable contribution of the chapters that follow is that their largely empirical approach can add to the kind of thoughtful, balanced discussion of the civil justice system that is essential to any debate about the merits and limitations of the American civil justice system.

References

American Medical Association Crisis Map. (n.d.). Retrieved on April 2, 2007 from: http://www.ama-assn.org/ama/noindex/category/11871.html.

The American Tort Reform Association. "About Us" page. Retrieved on April 2, 2007 from: http://www.atra.org/about/. (Homepage: http://www.atra.org).

Americans for Insurance Reform. (2004). Subject: Urgent action required by insurance commissioners to end price-gouging. Retrieved on April 2, 2007 from: http://www.centerjd.org/air/AIR_Ins_Comm_04.pdf.

Associated Press. (2005). Judge nixes viewer's "Fear Factor" lawsuit. Retrieved on April 2, 2007 from: http://www.foxnews.com/story/0,2933,150034,00.html.

Bailis, D.S., & MacCoun, R.J. (1996). Estimating liability risks with the media as your guide: A content analysis of media coverage of tort litigation. *Law and Human Behavior, 20,* 419–429.

Baldus, D., MacQueen, J.C., & Woodworth, G. (1995). Improving judicial oversight of jury damage assessments: A proposal for the comparative additur/remitittitur of awards for nonpecuniary harms and punitive damages. *Iowa Law Review, 80,* 1009–1267.

Black, B., Silver, C., Hyman, D.A., & Sage, W.M. (2005). Stability, not crisis: Medical malpractice claim outcomes in Texas, 1988–2002. *Journal of Empirical Legal Studies, 2,* 207–259.

Boatright, R.G. (2001). Generational and age-based differences in attitudes towards jury service. *Behavioral Sciences and the Law, 19,* 285–304.

Bovbjerg, R.R., Sloan, F.A., & Blumstein, J.F. (1989). Valuing life and limb in torts: Scheduling "pain and suffering." *Northwestern University Law Review, 83,* 908–976.

Bovbjerg, R.R., Sloan, F.A., Dor, A., & Hsieh, C.R. (1991). Juries and justice: Are malpractice and other personal injuries created equal? *Law and Contemporary Problems, 54,* 5–42.

Burns, R.P. (2003). A conservative perspective on the future of the American jury trial. *Chicago-Kent Law Review, 78,* 1319–1357.

Congressional Budget Office. (2004). Limiting tort liability for medical malpractice. Retrieved on April 2, 2007, from: http://www.cbo.gov/showdoc.cfm?index = 4968.

CNN Wire. (2006). Friday, April 26 (Merck found liable in latest Vioxx verdict). Retrieved on April 2, 2007, from: http://www.cnn.com/2006/WORLD/europe/04/21/friday/index.html.

Dann, B.M. (2003). Jurors and the future of "tort reform." *Chicago-Kent Law Review, 78,* 1127–1142.

Denicola, L. (n.d.). Physicians protest cost of malpractice insurance: Rising fees have doctors calling for legislative reforms. Retrieved on April 2, 2007 from: http://nbs.gmnews.com/News/2002/1114/Front_Page/006.html.

Diamond, S.S., & Bina, J. (2004). Puzzles about supply-side explanations for vanishing trials: A new look at fundamentals. *Journal of Empirical Legal Studies, 1,* 637–658.

Eisenberg, T., Goerdt, J., Ostrom, B., Rottman, D., & Wells, M.T. (1997). The predictability of punitive damages. *Journal of Legal Studies, 26,* 623–660.

Eisenberg, T., LaFountain, N., Ostrom, B., Rottman, D., & Wells, M.T. (2002). Judges, juries, and punitive damages: An empirical study. *Cornell Law Review, 87,* 743–780.

Eisenberg, T., Hannaford-Agor, P.L., Hans, V.P., Waters, N.L., Munsterman, G.T., Schwab, S.J., & Wells, M.T. (2005). Judge-jury agreement in criminal cases: A partial replication of Kalven and Zeisel's *The American Jury*. *Journal of Empirical Legal Studies, 2,* 171–206.

Eisenberg, T., Hannaford-Agor, P.L., Heise, M., LaFountain, N., Munsterman, G.T., Ostrom, B., & Wells, M.T. (2006). Juries, judges, and punitive damages: Empirical analyses using the civil justice survey of state courts 1992, 1996, and 2001 data. *Journal of Empirical Legal Studies, 3,* 263–295.

Faigman, D.L. (1999). *Legal alchemy: The use and misuse of science in the law*. New York: W.H.Freeman.

Faigman, D.L., Kaye, D.H., Saks, M.J., & Sanders, J. (2002). *Science in the law: Social and behavioral science issues*. St. Paul, MN: West Group.

Feigenson, N. (2000). *Legal blame: How jurors think and talk about accidents*. Washington, DC: American Psychological Association.

ForsterLee, L., Horowitz, I.A., & Bourgeois, M. (1994). Effects of notetaking on verdicts and evidence processing in a civil trial. *Law and Human Behavior, 18,* 567–578.

Galanter, M. (1990). The civil jury as regulator of the litigation process. *University of Chicago Legal Forum,* 201–271.

Galanter, M. (1998). An oil strike in hell: Contemporary legends about the civil justice system. *Arizona Law Review, 40,* 717–752.

Galanter, M. (2004). The vanishing trial: An examination of trials and related matters in federal and state courts. *Journal of Empirical Legal Studies, 1,* 459–570.

Galanter, M., & Luban, D. (1993). Poetic justice: Punitive damages and legal pluralism. *American University Law Review, 42,* 1393–1463.

Garber, S., & Adams, J. (1998). Product and stock market responses to automotive product liability verdicts. *Brookings Papers on Economic Activity. Microeconomics,* 1–44.

Greene, E., & Bornstein, B.H. (2000). Precious little guidance: Jury instruction on damage awards. *Psychology, public policy, and law, 6,* 743–768.

Greene, E., & Bornstein, B.H. (2003). *Determining damages: The psychology of jury awards*. Washington, DC: American Psychological Association.

Greene, E., Coon, D., & Bornstein, B.H. (2001). The effects of limiting punitive damage awards. *Law and Human Behavior, 25,* 217–234.

Greve Jr., P.A. (2002). Anticipating and controlling rising malpractice insurance costs. *Healthcare Financial Management, 56,* 50–55.

Halton, W., & McCann, M. (2004). *Distorting the law: Politics, media, and the litigation crisis*. Chicago: University of Chicago Press.

Hans, V.P. (2000). *Business on trial: The civil jury and corporate responsibility*. New Haven, CT: Yale University Press.

Hans, V.P. (Ed.) (2006). *The jury system: Contemporary scholarship*. Hampshire: Ashgate Publishing.

Hays, K., & Agovino, T. (2005). Jury awards widow $253.4M in Vioxx Trial. Retrievedon June 19, 2007 from: http://www.breitbart.com/article.php?id = D8C362V00&show_article = 1.

Herbert, B. (2004). Medical malpractice lawsuits: Do we have a crisis or insurance industry sham? Originally published in the *New York Times* (2004, June 25). Retrieved on April 2, 2007 from: http://reclaimdemocracy.org/articles_2004/malpractice_crisis_or_sham.html.
Hersch, J., & Viscusi, W.K. (2004). Punitive damages: How judges and juries perform. *Journal of Legal Studies, 33,* 1–35.
Heuer, L., & Penrod, S. (1994). Juror notetaking and question asking during trials: A national field experiment. *Law and Human Behavior, 18,* 121–150.
Hyman, D.A., Black, B., Zeiler, K., Silver, C., & Sage, W.M. (2007). Do defendants pay what juries award? Post-verdict haircuts in Texas medical malpractice cases, 1988–2003. *Journal of Empirical Legal Studies, 4,* 3–68.
Kalven, H. (1958). The jury, the law, and the personal injury damage award. *Ohio State Law Journal, 19,* 158–178.
Kalven, H., & Zeisel, H. (1966). *The American Jury*. Boston: Little, Brown.
Kessler, D.P., Sage, W.M., & Becker, D.J. (2005). Impact of malpractice reforms on the supply of physician services. *Journal of the American Medical Association, 293,* 2618–2625.
Landsman, S. (2004). So what? Possible implications of the vanishing trial phenomenon. *Journal of Empirical Legal Studies, 1,* 973–984.
Litan, R.E. (Ed.) (1993). *Verdict: Assessing the civil jury system*. Washington, DC: The Brookings Institution.
Litan, R.E., & Winston, C. (Eds.) (1988). *Liability: Perspectives and policy*. Washington, DC: The Brookings Institution.
MacCoun, R.J. (2006). Media reporting of jury verdicts: Is the tail (of the distribution) wagging the dog? *DePaul University Law Review, 55,* 539–562.
Marcus, B. (2004). America's litigation crisis. Retrieved April 2, 2007, from Center for Individual Freedom Web site: http://www.cfif.org/htdocs/freedomline/current/guest_commentary/american_litigation_crisis.htm.
Marder, N. (2003). Introduction to The Jury at a crossroad: The American experience. *Chicago-Kent Law Review, 78,* 909–933.
Marder, N. (2005). The medical malpractice debate: The jury as scapegoat. *Loyola of Los Angeles Law Review, 38,* 1267–1296.
Marder, N. (2006). Bringing jury instructions into the twenty-first century. *Notre Dame Law Review, 81,* 449–511.
Metzloff, T.B. (1991). Resolving malpractice disputes: Imaging the jury's shadow. *Law and Contemporary Problems, 54,* 43–129.
Miller, M.K., & Bornstein, B.H. (2004). Juror stress: Causes and interventions. *Thurgood Marshall Law Review, 30,* 237–269.
Monahan, J., & Walker, L. (2005). *Social Science in Law* (6th ed.). New York: Foundation Press.
Mott, N.L. (2003). The current debate on juror questions: "To ask or not to ask, that is the question." *Chicago-Kent Law Review, 78,* 1099–1125.
Ostrom, B.J., Rottman, D.B., & Goerdt, J.A. (1996). A step above anecdote: A profile of the civil jury in the 1990s. *Judicature, 79,* 233–241.
Petrucelli v. Wisconsin Patients Compensation Fund, 701 N.W. 2d 440 (Wisc. 2005).
Robbennolt, J.K. (2002). Punitive damage decision making: The decisions of citizens and trial court judges. *Law and Human Behavior, 26,* 315–341.
Robbennolt, J.K. (2005). Evaluating juries by comparison to judges: A benchmark for judging? *Florida State University Law Review, 32,* 469–509.
Robbennolt, J.K., & Studebaker, C.A. (1999). Anchoring in the courtroom: The effects of caps on punitive damages. *Law and Human Behavior, 23,* 353–373.
Robbennolt, J.K., & Studebaker, C.A. (2003). News media reporting on civil litigation and its influence on civil justice decision making. *Law and Human Behavior, 27,* 5–27.
Rustad, M.L. (1998). Unraveling punitive damages: Current data and further inquiry. *Wisconsin Law Review,* 15–69.

Saks, M.J. (1989). Legal policy analysis and evaluation. *American Psychologist, 44,* 1110–1117.

Saks, M.J. (1992). Do we really know anything about the behavior of the tort litigation system—and why not? *University of Pennsylvania Law Review, 140,* 1147–1292.

Seabury, S.A., Pace, N.M., & Reville, R.T. (2004). Forty years of civil jury verdicts. *Journal of Empirical Legal Studies, 1,* 1–25.

Sentell, R.P. (1991). The Georgia jury and negligence: The view from the bench. *Georgia Law Review, 26,* 85–178.

Sharkey, C.M. (2005). Unintended consequences of medical malpractice damages caps. *New York University Law Review, 80,* 391–512.

Sloan, F.A., & Hsieh, C.R. (1990). Variability if medical malpractice payments: Is the compensation fair? *Law and Society Review, 24,* 997–1039.

Sloan, F.A., Reilly, B.A., & Schenzler, C. (1995). Effects of tort liability and insurance on heavy drinking and driving and driving. *Journal of Law and Economics, 38,* 49–77.

Sloan, F.A., & van Wert, S.S. (1991). Cost and compensation of injuries in medical malpractice. *Law and Contemporary Problems, 54,* 131–168.

VandeWater, J. (2004). Missouri insurance department says malpractice claims hit new lows in 2003. *St. Louis Post-Dispatch* (April 17, 2004). Retrieved on April 2, 2007 from: http://www.accessmylibrary.com/coms2/summary_0286-7640872_ITM.

Vidmar, N. (1998). The performance of the American civil jury: An empirical perspective. *Arizona Law Review, 40,* 849–899.

Vidmar, N., Gross, F., & Rose, M. (1998). Jury awards for medical malpractice and post-verdict adjustments of those awards. *DePaul Law Review, 48,* 265–299.

Vidmar, N., & Hans, V.P. (in press). *American juries: The verdict*. New York: Prometheus Books.

Viscusi, W.K. (2004). The blockbuster punitive damages awards. *Emory Law Journal, 53,* 1405–1455.

Vioxx Trial Scorecard. (2006). Retrieved on April 2, 2007 from: http://www.virsci.com/VioxxTrialScorecard.pdf.

Waters, T.M., Budetti, P.P., Claxton, G., & Lundy J.P. (2007). Impact of state tort reforms on physician malpractice payments. *Health Affairs, 26,* 500–509.

Section I
Approaches to Studying Civil Juries

What's the story?

Explanations and Narratives in Civil Jury Decisions

Reid Hastie

The Role of Stories in Jurors' Decisions

How do ordinary people make judicial decisions? The answer is sure to be complex: The human mind is a very flexible mechanism, and combined with the complex "cognitive environment" of legal cases, the result is a great diversity of cognitive strategies. Further uncertainty is introduced by the diversity of scientists' opinions about what kind of a descriptive theory would be most useful. Even within psychology (which is only one of the behavioral sciences that aspires to answer the question), there are at least three different approaches to a theory of juror decision making: simple catalogues of general behavioral facts, algebraic process models, and cognitive information-processing models (Pennington & Hastie, 1981). We will focus on the third approach, an application of a cognitive "explanation-based approach" (Hastie & Pennington, 2000).

We call our theory the "Story Model" because we claim the central cognitive process in juror decision making is *story construction*—the creation of a narrative summary of the events under dispute. We call the general approach "explanation-based," because the juror's story is created to summarize and explain the diverse items of evidence that the juror has accepted as credible and relevant to make a judgment on the case. The first application of the Story Model to *criminal* case judgments identified three component processes: (1) evidence evaluation through story construction, (2) representation of the decision alternatives (verdicts) by learning their attributes or elements, and (3) reaching a decision through the classification of the story into the best fitting verdict category (Pennington & Hastie, 1991).

These latter processes are likely to vary with the demands of different decision tasks. Some tasks involve a classification response, some an estimate

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or judgment of a magnitude, and some a projection to future events. For example, the shift from criminal judgments, where categorical verdicts play a prominent role in the final stage of the decision, to civil judgments, where degrees of responsibility play the analogous role, has important effects on the entire sequence of judgment processes. However, our fundamental assumption, supported by the results of many behavioral studies, is that most legal decisions begin with the story construction process. Thus, the central claim of the model is that the story the juror constructs determines the juror's verdict. More generally we claim that causal "situation models" play a central role in many explanation-based decisions in legal, medical, engineering, financial, and everyday circumstances.

Thus, we propose the decision process is divided into three stages: construction of a summary explanation, determination of decision alternatives, and mapping the explanation onto a best-fitting decision alternative. (This subtask framework contrasts with the continuous on-line updating computation hypothesized by the algebraic model approaches.) Furthermore, we diverge sharply from other theoretical approaches in our emphasis on the structure of memory representations as the key determinant of decisions. We also depart from the common assumption that, when causal reasoning is involved in judgment, it can be described by algebraic, stochastic, or logical computations that lead directly to a decision. In our model, causal reasoning plays a subordinate but critical role by guiding inferences in evidence evaluation and construction of the intermediate story or explanation (Pennington & Hastie, 1993).

An illustration of our focus on the role of (narrative) evidence summaries is provided by an interpretation of the dramatic differences between European-American and African-American citizens' reactions to the verdict in the O.J. Simpson murder trial (there even appeared to be racial differences on the jury and within the defense team). We hypothesized that race made a difference in the construction and acceptance of the "defense story" in which a racist police detective (Mark Fuhrman) planted incriminating evidence (Hastie & Pennington, 19xx). African-Americans, compared to European-Americans, have much more beliefs and experiences that support the plausibility of stories of police misconduct and police bigotry (Gates, 1995). Most African-Americans or members of their immediate families have had negative, and possibly racist, encounters with justice system authorities. African-Americans know of many more stories (some apocryphal, some veridical) of police racism and police brutality directed against members of their race, than do European-Americans. This background of experience, beliefs, and relevant stories made it easy for African-Americans to construct a story in which police officers manufactured and planted key incriminating evidence and made the constructed story more plausible to African-American compared to a European-American jurors and citizens (Mixon, Foley, & Orme, 1995; Toobin, 1995).

Review of Behavioral Studies of Juror Decision Processes

Like most research on the psychology of juror decision making, our research on the "Story Model" has focused on mock-jurors' decisions in criminal cases. Our initial research elicited descriptions of mental representations of evidence and verdict information after mock-jurors had heard the evidence and judge's instructions. First, we established that evidence summaries constructed by jurors had a narrative story structure (and not other plausible structures, such as a pro versus con argument structure). And, jurors who had rendered different verdicts had constructed different stories (Pennington & Hastie, 1986).

Second, we established that mock-jurors spontaneously constructed causal accounts of the evidence when rendering verdicts in criminal cases. In this study, mock-jurors' responses to sentences presented in a recognition memory task were used to infer how the mock-jurors' had represented the trial evidence. Mock-jurors were more likely to "recognize" as having been presented at trial, sentences from the story associated with their verdict than sentences from stories associated with other (rejected) verdicts. Furthermore, centrality in the relevant story and "connectedness" to other evidence items predicted more variance in reaction times and rated importance (Pennington & Hastie, 1988).

A third experiment was conducted to study the effects of variations in the order of evidence presentation on judgments. We predicted stories would be easy to construct when the evidence was presented in a temporal sequence that matched the occurrence of the original events (Story Order); and stories would be difficult to construct when the presentation order did *not* match the sequence of the events in the story. (We created a non-story order based on the sequence of evidence presented by witnesses in the original trial that was the basis of our "stimulus case materials" [Witness Order].) Consistent with our hypothesis, mock-jurors were reliably likelier to convict the defendant when the prosecution evidence was presented in Story Order and the defense evidence was presented in Witness Order and they were least likely to convict when the prosecution evidence was in Witness Order and defense was in Story Order (Pennington & Hastie, 1992).

Subsequent research has addressed some practical questions from the legal trial domain. For example, many criminal cases involve the presentation of only one story, by the prosecution, while the defense tactic is to "raise reasonable doubts" by attacking the plausibility of that story. In these one-sided cases, jurors construct only one story, and confidence in the verdict is determined by coherence and fit of the single story to the verdict category. In this situation, a weak defense story is worse than no story at all; in fact, a weak prosecution story is bolstered and more guilty verdicts are rendered when a weak defense story is presented versus when no defense story is presented (McKenzie, Lee, & Chen, 2002). Another observation that reinforces tactical advice from skilled attorneys is that foreshadowing the story in the opening statement is an effective tactic. The likelihood of obtaining

a verdict consistent with a story is increased when the story is "primed" in the opening statement, all other factors remaining equal.

Recent Behavioral Studies of Civil Juror Decision Making

We have also extended the research program to include civil cases, specifically an application of the explanation-based model to jurors' reasoning about liability for compensatory and punitive damages (Hastie, Schkade, & Payne, 1998). We presented mock-jurors (citizens sampled from the Denver area) with four experimental cases, each based on an actual case in which the plaintiff sought punitive damages. The cases included fact situations involving four boaters who were drowned after an inadequate recall of the boat model by the manufacturer, an injured seaman who was denied maintenance pay after hiring a lawyer, an employee who was abducted and assaulted in a poorly guarded shopping mall, and thirty-nine seamen who died when molten sulfur carrier sank. The defendants were all large corporations and the plaintiffs were all private citizens. We employed a typical set of instructions on liability for punitive damages:

> You may award punitive damages only if you find that the defendant's conduct
>
> (1) was malicious; or
> (2) manifested reckless or callous disregard for the rights of others.
>
> Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another.
>
> In order for conduct to be in reckless or callous disregard of the rights of others, four factors must be present. First, a defendant must be subjectively conscious of a particular grave danger or risk of harm, and the danger or risk must be a foreseeable and probable effect of the conduct. Second, the particular danger or risk of which the defendant was subjectively conscious must in fact have eventuated. Third, a defendant must have disregarded the risk in deciding how to act. Fourth, a defendant's conduct in ignoring the danger or risk must have involved a gross deviation from the level of care which an ordinary person would use, having due regard to all the circumstances.
>
> Reckless conduct is not the same as negligence. Negligence is the failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. Reckless conduct differs from negligence in that it requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

Based on these mock-jurors' written justifications for their verdicts, reinforced by an extensive sample of jurors' discussion during their deliberations, we developed an interpretation of the jurors' thought processes in making liability judgments. We present a summary of the form of the most conscientious decision process, but, as our results consistently demonstrated, most mock-jurors did not approach the full level of thoroughness prescribed by this

model. However, when jurors did address one of the stages in this "fully conscientious model," their reasoning usually took the form we outline below.

In the most general terms, the following stages or events occurred in a modal individual decision process on the issue of liability for punitive damages. First, the mock-juror constructed a summary model of the events described in the case materials in the form of a chronological, causally connected narrative. Since no summary story was presented in the experimental evidence, arguments, or instructions, the story construction process is inference-rich and cognitively demanding. Second, most of the mock-jurors assessed the strength of the causal relationship between the defendant's actions and the injury claimed by the plaintiff. Third, several of the elements of "callous or reckless conduct" were considered to determine whether the defendant did or did not make a conscious choice of action with knowledge or foresight of a serious danger to other persons. Finally, the elements of "gross deviation from an ordinary level of care" and malice were considered. With our case materials, most of these further considerations took stylized forms, revealing substantial between-juror convergence on a few common reasoning strategies.

A follow-up study in which college student mock-jurors were asked to "think aloud" about their verdicts provides additional information about some of these reasoning habits. We asked twenty college students to make the punitive damages liability judgment. Each mock-juror read one case with instructions to "Make a legal decision just like the ones that jurors make in legal trials ... [to] follow the trial judge's instructions to decide on a verdict." After reading the case materials they were asked to "Think aloud as you make your decision." They were then asked to respond to specific questions about each of the legal elements mentioned in the judge's instructions. The contents of the open-ended oral reports were scored to assess the extent to which the student mock-jurors considered each of the five elements and the nature of the reasoning that they applied to evaluate the elements that they did consider. Three research assistants coded the contents of the tape-recorded verbal protocols. Reliability was high, with the coders agreeing on the exact code for over 90% of the coded responses. Disagreements between the coders were resolved by accepting the majority (two out of three) interpretation.

As in previous studies, we found that the mock-juror's first step was to construct a narrative summary of the evidence. This summary included the major events from evidence that the juror believed occurred, reported in a temporal sequence. This narrative included causal linkages, many of them inferred, that served as the "glue" holding the story of the credible evidence together. Content analyses showed that, for these cases, the explanations usually took the form of inferences about the defendants' motives. Since the defendants were all corporations, "corporate greed" was the most common motivational ingredient in the explanations for, "Yes, liable for punitive damages," decisions. We asked research assistants to classify the global "think aloud" protocol into one of three decision making strategy categories: (1) Did the mock-juror rely heavily on a chronological, narrative summary of the

evidence? (2) Or did he or she rely on a pro-versus-con argument summary? (3) Or did he or she organize their thinking in terms of the legal elements of the liability decision? (4) Or something else? Fifteen out of the twenty (75%) student mock-jurors were rated as relying primarily on narrative evidence summaries in their verbal "think aloud" reports; three (15%) responded in terms of the legal elements (the mock-jurors had a copy of the judge's instructions available when they rendered their verdicts, but not when they answered the open-ended question about their decision process); and two (10%) were not classifiable in terms of three expected strategies.

After constructing an explanatory story, the jurors focused on key actions of the defendant, the actions that were alleged to be the causes of the plaintiffs' injuries. Although an explicit judgment of causation was not mentioned in the judge's instructions, twelve mock-jurors (60%) explicitly addressed the issue of the causal contribution of the defendant's actions. Consistent with the relevant legal conceptions, this assessment of causal importance emphasized the "necessity" of the defendant's alleged causal action; seven out of the twelve (58%) respondents who considered the issue clearly performed a rough and ready "necessity test" (Hart & Honore, 1959; Spellman, 1997). These mock-jurors "mutated" the candidate causal event and then "counterfactually" inferred the probability that the harmful effect would still have occurred, *if the causal event (defendant's action) had not occurred* (Roese & Olson, 1995). If there had been additional guards in a shopping mall, would the assault on the plaintiff/victim, have occurred? If there had been an effective product recall program, would the boat have sunk? When the mock-jurors judged there was a large difference in the probability of the effect, as a function of mutating the cause, then they concluded the candidate cause was truly a cause of the effect. This observation is especially interesting because the mock-jurors were relying completely on their personal notions of what form of "causal test" was appropriate. They were not given instructions on necessity or "but for" causal relationships in this study, yet they spontaneously adopted this test when assessing causation.

Most jurors attempted to apply the judge's instructions on some of the elements of recklessness. We asked the participants to indicate for each of the major elements of the verdict (from the judge's instructions) if they had thoroughly considered the issue and what aspects of the evidence were most informative on each issue. As in our high-fidelity mock-jury study with citizen participants, our student mock-jurors rarely covered all of the legal elements on which they were instructed. We suspect that the rates at which mock-jurors claimed they had considered legal elements were inflated by our procedure of directly asking them about each element separately. However, the responses are informative about the relative rates at which the elements were considered and do provide qualitative information about the nature of the jurors' evaluations.

Was the defendant conscious of a foreseeable, probable danger before deciding to act in a manner that resulted in injury to the plaintiff/victims? Eleven

mock-jurors (55%) said they considered this issue. They attended to evidence that there were tangible "warnings" that the situation was risky: Had there been other violent crimes at the mall where an assault occurred? Had other similar boats had problems with seaworthiness?

Almost all of the mock-jurors (84% or seventeen out of twenty) said that they considered the issue of whether, "the particular danger or risk of which the defendant was subjectively conscious" had in fact occurred ("eventuated"). The others acknowledged that they had not considered the issue thoroughly, but they had assumed that the defendant's action (and the subsequent dangerous event) was the cause of the plaintiff's injury.

Did the defendant disregard the risk when deciding to take the action that caused the plaintiff's injury? Eleven mock-jurors (55%) said this element played a significant role in their considerations. They looked for evidence that an explicit choice (an "act of commission") had been made by the defendant: A security company requested the defendant to hire additional guards. The defendant made a choice between a boat recall campaign or a warning campaign.

Did the defendant's action exhibit a gross deviation from ordinary care or reasonable conduct? Here the few jurors (30% or six out of twenty) who considered the issue, often reasoned by (counterfactually) imagining themselves in the relevant situation and then inferring what they personally might have done. When their post-diction of their own behavior was highly discrepant from the defendant's action, they were likely to conclude the defendant's action was a "gross deviation."

Mock-jurors in the original study and in the college student sample often "imported" personal beliefs and criteria to justify their judgment that the defendant's action was reckless (e.g., "The company was greedy; cutting-corners, that's 'reckless' "; "They weren't thinking ahead, anyone would've known the ship was going to sink"; "Everyone knew it was a dangerous, but they didn't take proper care, that's 'callous disregard' ").

In a few cases, mock-jurors asked themselves if malice was an aspect of the defendant's conduct (six out of twenty, 30%, said this issue played a role in their decision process). Here, since there was no explicit evidence relevant to "ill will or spite" in any of the stimulus case materials, mock-jurors relied on inferences about the defendant's intent. We could not discern a systematic pattern of reasoning in their responses.

The contents of the mock-jurors' responses to both the open-ended and element-specific questions were consistent with our summary of the modal decision strategy outlined above. However, only one of the twenty individual mock-jurors fully considered all of the legal elements that were presented, in the judge's instructions, as necessary conditions to conclude that the defendant was liable for punitive damages. Thus, the model should be viewed as a framework, with typical jurors instantiating some, but not all of its components in their individual decision processes.

Applying the Story Model to Attorney Trial Tactics?

One of the most frequent questions we are asked when we present our research is, "How can the Story Model be used to win at trial?" Here is our best advice on how to apply insights from the Story Model to trial tactics. (Disclaimer: The author has never had the opportunity to consult with a client and to apply the Story Model approach throughout an entire trial, although he has made several piecemeal contributions to clients trying different cases. Therefore, the following commentary must be labeled an untested conjecture based on the theoretical principles outlined in the first half of this paper.)

We'll consider a hypothetical civil law suit: Mostly-Super-Drugs (MSD) has been marketing a pain-killer for five years, Mercox, that was withdrawn from the market after several clinical studies demonstrated that it increased the rates of adverse cardiac events in customers who used the drug for several months. Now comes a suit brought by the family of a man who died after taking Mercox for six months. What would a Story Model consultant advise the plaintiff and defendant in such a case?

Obviously, the most powerful applications of the Story Model will result from studying the specific stories that jurors are likely to construct when judging a particular trial. Of course, any advice must be qualified by considering the elements that must be proved to satisfy the legal conditions for an award. In this illustration, on the compensatory side, elements might include: (i) Did MSD fail to warn physicians and users of Mercox's adverse side effects? (ii) Was Mercox a defective product that could have been better designed? (iii) Was MSD's negligence responsible for the plaintiff/victim's death? On the punitive side, the question in such a case is likely to be: Did MSD sell Mercox with conscious disregard of the substantial known risks of adverse consequences?

Let's begin with the plaintiff. First, the attorney should decide which elements would be the focus of persuasion. Let us imagine in this case that "failure to warn" and "Mercox caused the death" are the key elements. Second, the attorney needs to make a first assessment of the types and formats of evidence that will be adduced to prove or persuade on each element. At the same time the attorney needs to construct arguments relating testimony and evidence sources to conclusions (and ultimately to the elements; in many cases diagrammatic methods are useful for this task, Anderson & Twining, 1991). Third, a skeletal presentation of the plaintiff's case should be constructed and presented to citizens like those who will be impaneled on the jury. Three methodologies should be used (ideally based on oral reports from mock-jurors). First, the attorney or trial consultant should ask mock-jurors to think-aloud as they hear the evidence to report their thoughts following each witness or substantial component of the evidence. Second, after hearing all the evidence, mock-jurors should be asked to provide global ratings on the legal elements and then asked to summarize their

reasons for each rating. Finally, if "stories" have not clearly emerged in the first two data sets, mock-jurors should be asked to summarize all the evidence as best they can recall it.

At this point the attorney would mine these data sets and attempt to construct the major narratives that appear in the self-reports. It is important to keep in mind that a well-formed, memorable, persuasive narrative is usually composed of stylized components and organized according to an almost universal schema. Thus, the extracted narratives should be represented as completely as possible in terms of the general narrative schema. Briefly, a well-formed narrative begins with a setting (protagonist and other actors, physical conditions, knowledge states, etc.) and a problem event; followed by a reaction from the protagonist (that includes emotional states, intentions, and goals); followed by plans to achieve the goals; followed by actions aimed to execute the plans; followed by consequences; concluding with a reaction to those consequences. Note, that narratives may be embedded within narratives, so for example, goals may lead to sub-goals which produce sub-plans and so on. Furthermore, the actions taken to execute a plan may create one or more embedded narratives on their own. For example, the endeavor of securing FDA approval to market the drug might be an embedded narrative with a full narrative schematic structure of its own.

In one narrative, the plaintiff's protagonist would be MSD and the story would begin ten years prior to the trial, when MSD is competing with another major drug company to be the first to market with a painkiller ("problem"). In one likely narrative, MSD's "reaction" is intense motivation to market a drug with ("plans" and "actions") to push Mercox through FDA approval and onto the market. Sub-goals involve securing FDA approval for Mercox, the actions in that sub-plan involve applications for approval and various activities of MSD's scientists and executives to secure approval (such as rushing the requisite clinical trials tests of Mercox). Another sub-goal is, following FDA approval, to distribute the drug and aggressively to persuade physicians to recommend it to patients. The "outcome" is a poorly tested, improperly labeled drug, being prescribed by ill-informed physicians. The "consequences" are deaths of patients, due to the cardiac side-effects of Mercox. The fate of the victim in the instant case would be a narrative embedded in the "outcome" component of the overarching story of corporate greed.

The plaintiff is likely to present several "embedded narratives" within the larger story of corporate greed, desperation, and misconduct. For example, there might be an embedded story about MSD's efforts to respond to the "problem" of a negative study result, perhaps by suppressing publicity, attempting to mislead physicians about the implications of the study, and obscuring warnings to patients.

Now, consider the defendant. One observation, from years of study of stories at trial, is that the defense perspective is more complicated and usually involves at least two stories: The story of the defendant's activities and a second story to

account for the events that led to the lawsuit (usually claimed to not involve the defendant). For example, in the highly-publicized O.J. Simpson trial, the prosecution told one story about the defendant's activities leading to the death of his ex-wife (Hastie & Pennington, 1986). While the defense told (or alluded to) at least three stories: The story of the defendant's actions on day in question; the story of bigoted police officers framing the defendant; and the story of the actual murder of the ex-wife (by drug dealers). (Of course, in the modal criminal trial, the defense devotes most of its energies to attacking the prosecution story; partly because of lack of evidence and partly because of the asymmetric "beyond reasonable doubt" standard of proof. Civil trials are more likely to involve competing stories.)

In one defense narrative, MSD is again the protagonist but now the "problem" is defined as patients' needs for effective drug therapies. Thus, MSD's goal is to produce useful drugs, while balancing the benefits and costs of any artificial therapy, and behaving in a fiscally responsible manner to preserve reasonable shareholder profits. It would probably be wise to note that profitability means not introducing new drugs heedless of adverse consequences for users, as this destroys profits and the company's ability to make profits. Then, with the focus on the goal of responsible production, plans and actions to produce effective drugs are described in the case of Mercox. This would be the place to emphasize the implementation of multiple trial studies of efficacy and side effects, the quick reaction to signs of adverse consequences, the high volume response by physicians to the warnings and press releases (indicating their efficacy), etc. The defense may also want to tell a second story, this one with the victim/plaintiff as the protagonist. A story that begins with the victim's struggles with ill-health ("problem"), emphasizing the many features of his background, lifestyle, and prior problem-incidents. His "reaction" is to be concerned and to take medication to prevent further health incidents, but a heart attack ("outcome") results from his prior disposition and (ideally for the defense) a precipitating incident.

So what's so novel about the advice to attorneys to present the case in the form of a story? After all, hundreds of sources have already presented this common sense advice on trial tactics. However, we submit that our detailed advice, specifically the procedures for extracting stories from pre-trial mock-juries and the admonition to make sure that each component of a well-formed story is included in the presentations and arguments, is novel and more extreme than the trial tactics folk wisdom. In our experience, when attorneys have applied methods like those described above to pre-trial preparation, the primary value-added has been the discovery of stories that had not been anticipated before the behavioral test. Furthermore in several cases, these methods allowed attorneys to identify the potential weaknesses in the other party's stories and to set-up, with direct and cross-examination, assertions that were made in their own closing arguments about key unproven elements of the other side's stories.

Conclusion

My goal in this chapter has been modest: to provide an illustration of what a computational theory of juror decision making would look like for civil judgments. My primary assertion is that jurors' judgments are based on summaries of the evidence structured as chronological narratives, stories, that are created as a central part of the decision process. The Story Model is a useful prototype of a general model for juror decision making in civil cases. I presented behavioral evidence for the validity of the Story Model in the form of empirical observations from a study of mock-juror decisions on liability for punitive damages. Finally, I derived some implications from the Story Model for trial tactics by attorneys trying a hypothetical civil law suit.

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References

Anderson, T., & Twining, W. (1991). *Analysis of evidence*. Boston: Little, Brown.

Gates, H.L. (1998). *Thirteen ways of looking at a black man*. New York: Vintage.

Hart, H.L.A., & Honore, A.M. (1959). *Causation in the law*. Oxford, UK: Oxford University Press.

Hastie, R. (1999). The role of "stories" in civil jury judgments. *Michigan Journal of Law Reform, 32*(2), 1–13.

Hastie, R., & Pennington, N. (1996). The O.J. Simpson stories: Behavioral scientists look at *The People v. O.J. Simpson* trial. *University of Colorado Law Review, 67,* 957–976.

Hastie, R., & Pennington, N. (2000). Explanation-based decision making. In T. Connolly, H. R. Arkes, & K.R. Hammond (Eds.), *Judgment and decision making: An interdisciplinary reader* (2nd ed., pp. 212–228). New York: Cambridge University Press.

Hastie, R., Schkade, D.A., & Payne, J.W. (1998). A study of juror and jury judgments in civil cases: Deciding liability for punitive damages. *Law and Human Behavior, 22,* 287–314. (Also: Hastie, R., Schkade, D.A., & Payne, J.W. (1999). Reply to Vidmar. *Law and Human Behavior, 23,* 715–718)

Mauet, T.A. (1992). *Fundamentals of trial techniques* (3rd ed.). Boston: Little, Brown.

McKenzie, C.R.M., Lee, S.M., & Chen, K.K. (2002). When negative evidence increases confidence: Change in belief after hearing two sides of a dispute. *Journal of Behavioral Decision Making, 15,* 1–18.

Mixon, K.D., Foley, L.A., & Orme, K. (1995). The influence of racial similarity on the O.J. Simpson trial. *Journal of Social Behavior and Personality, 10,* 481–490.

Pennington, N., & Hastie, R. (1981). Juror decision making models: The generalization gap. *Psychological Bulletin, 89,* 246–287.

Pennington, N., & Hastie, R. (1986). Evidence evaluation in complex decision making. *Journal of Personality and Social Psychology, 51,* 242–258.

Pennington, N., & Hastie, R. (1988). Explanation-based decision making: The effects of memory structure on judgment. *Journal of Experimental Psychology: Learning, Memory, and Cognition, 14,* 521–533.

Pennington, N., & Hastie, R. (1991). A cognitive theory of juror decision making: The Story Model. *Cardozo Law Review, 13,* 519–557.
Pennington, N., & Hastie, R. (1992). Explaining the evidence: Tests of the story model for juror decision making. *Journal of Personality and Social Psychology, 62,* 189–206.
Pennington, N., & Hastie, R. (1993). Reasoning in explanation-based decision making. *Cognition, 49,* 123–163. (Reprinted in P.N. Johnson-Laird & E. Shafir (Eds.). (1994). *Reasoning and decision making*. Cambridge, MA: Blackwell)
Roese, N.J., & Olson, J.M. (Ed.). (1995). *What might have been: The social psychology of counterfactual thinking*. Hillsdale, NJ: Lawrence Erlbaum Associates.
Spellman, B.A. (1997). Crediting causality. *Journal of Experimental Psychology: General, 126,* 323–348.
Toobin, J. (1995). A horrible human event. *The New Yorker, 40* (October 23), 41–49.
Wells, G.L., & Gavanski, I. (1989). Mental simulation of causality. *Journal of Personality and Social Psychology, 56,* 161–169.

Civil Juries in Ecological Context: Methodological Implications for Research

Neil Vidmar

In this essay I argue that our actual knowledge base about civil jury decision-making processes and the quality of civil jury verdicts is not as robust as we want it to be and it needs to be. More innovative research methodologies need to be undertaken.

In 1999 Brian Bornstein, one of the editors of this volume, pointed out that jury researchers are motivated by the "desire to apply findings from simulation studies to understanding, and ultimately improving, the legal system."[1] As a consequence, he pointed out, major validity concerns discussed in the literature involved the juror sample (students versus non-student adults), the research setting (laboratory versus courtroom), the trial medium (written summaries versus more realistic trial materials), the trial elements (e.g., presence or absence of deliberation), dependent variables used (dichotomous versus probability judgments) and the consequentiality of the task (e.g., making a hypothetical versus a real decision). Yet, his review of twenty years of research revealed that most published studies on juries continue to involve minimal verisimilitude. Bornstein offered the caution the jury was still out on whether the research could be generalized to real juries. Devine et al. also commented on the need for more realism in their article reviewing over four decades of research on deliberating juries.[2] Devine et al., also noted that few studies have surveyed or interviewed real jurors,[3] a subject that I shall return to later in this essay.

I take a stronger position than Bornstein and Devine et al. and offer the view that advocates of simulation research have not carried their burden of proof. Even if meta-analyses show effects over multiple simulation studies, I take the

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[1] Brian Bornstein, *The Ecological Validity of Jury Simulation Research*, 23 Law and Human Behavior 75 (1999); see also Shari Diamond, *Illuminations and Shadows from Jury Simulations*, 21 Law and Human Behavior 561 (1997).

[2] Dennis Devine, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychology, Public Policy and Law 622 (2001).

[3] *Id.* at 696.

B. H. Bornstein et al. (eds.), *Civil Juries and Civil Justice*.
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position that the data show only the robustness of the phenomena in a restricted universe.

Although there are some important exceptions, most simulation research on juries, in my view, fails to capture the rich context of jury decision-making. The minimal stimulus materials used in the majority of simulation studies result in impoverished hypotheses about jury decision-making processes. If research is to have its best chance of having an impact on judges and other policy makers, more ecologically valid research is needed. In the first part of this essay I am intentionally a bit tendentious in setting forth these ideas and hope to stir what I hope will be fruitful controversy. As a critic, I also have an obligation to suggest what can be done. My goal is to challenge all of us, myself included, to think about the empirical study of civil juries in a richer and more productive way by using different methodological approaches. In particular, I offer the view that qualitative research will enhance the applicability of research for policy changes and, at the same time, enrich theoretical hypotheses that can then be tested and refined through simulations. I will argue my position around civil jury research, the subject of this volume (although my critique and proposed solutions apply equally well to criminal jury research). I draw attention to the fact that the civil jury system is embedded in a broad legal and social context.

The Validity Problem in Jury Research

Every social psychologist is familiar with the concepts of internal and external validity as originally enunciated by Campbell and Stanley in their classic methodological treatise.[4] Validity is the extent to which a study controls for extraneous variables that could confound assumptions about causal relationships between variables. Experimental simulation studies are specifically designed to do just that. External validity is the extent to which the results of studies can be generalized across settings and subject populations and times. Repeated replications of studies that differ in the noise variables are the way we make conclusions about the robustness of a phenomenon. Even if meta-analyses find similar effects across many studies we still have to confront another problem, namely the degree to which those studies capture the essential characteristics of the ultimate phenomenon to which we want to generalize, or what is broadly construed as "external validity." The terms "verisimilitude," "ecological validity" and "mundane realism" are related constructs that appear in

[4] Donald Campbell & Julian Stanley, Experimental and Quasi-experimental Designs for Research (1966). The most recent version of that work is William Shadish, Thomas Cook, & Donald Campbell, Experimental and Quasi-experimental Designs for Generalized Causal Inference (2002).

many articles on jury simulation research, but the terminology, as used, is imprecise.

At least as far back as 1974, when the field of jury research was still very young,[5] Gordon Bermant and his co-authors used the term "structural verisimilitude" to call attention to the need to have jury simulation research that closely mirrors "the realities of courtroom practice."[6] Some researchers call this experimental realism and others, like Bornstein, have used the term "ecological validity." The problem, in my view, is that clearer distinctions need to be made in conceptualizing the generalizability problem.

Recently I have drawn upon Marilyn Brewer's insightful chapter in the *Handbook of Research Methods in Social and Personality Psychology* and endorsed her use of the term "ecological validity" to call attention to this third major validity problem.[7] It seems better than structural verisimilitude and a third validity term is useful to avoid the tendency to treat robustness of phenomena in restricted research settings as probably applicable to the real world. According to Brewer:

> The question of whether an effect holds up across a wide variety of people or settings is somewhat different than asking whether the effect is representative of what happens in everyday life. This is the essence of ecological validity—whether an effect has been demonstrated to occur under conditions that are typical for the population at large. Representativeness is not the same as robustness. Generalizability in the robustness sense asks whether an effect can occur across different settings and people; ecological validity asks whether it [a finding or set of findings] does occur in the world as it is.[8]

Brewer's insight leads me to push my point further. While taking cognizance of the limited research settings on jury behavior, Bornstein noted that "... despite the variety of approaches to conducting jury simulation research, few differences have been found as a function of either who the mock jurors are or how the trial is presented."[9] In short, simulations involving very minimal stimulus settings produce results similar to more complex simulations. Yet, I

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[5] Kalven and Zeisel's classic study of the American jury which began in 1952 and published in 1967 was the major exception, see Harry Kalven & Hans Zeisel, The American Jury (1967).

[6] Gordon Bermant et al., *The Logic of Simulation in Jury Research*, 1 Criminal Justice and Behavior 224 (1974).

[7] Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error and Overreaching in Sunstein et al.'s Punitive Damages*, 53 Emory Law Journal 1359, 1375–77 (2004).

[8] Marilyn Brewer, *Research Design and Issues of Validity*, in Handbook of Research Methods in Social and Personality Psychology 3, 12 (Harry T. Reiss & Charles M. Judd, eds., 2000). Some research authorities prefer to treat ecological validity, as Brewer and I use it here, as an aspect of external validity. See Shadish et al., note 4 at 37–39. However, ecological validity is a better concept for conveying application of research in policy contexts. The basic principles of this concept were discussed many years earlier by Egon Brunswick, Perception and the Representative Design of Psychological Experiments (1956) and Roger Barker, *Explorations in Ecological Validity*, 20 American Psychologist 1 (1965).

[9] Bornstein, note 1 at 88.

contend that even the most complex simulations are still a long way from creating the rich environment out of which jury decisions are made.

The Ecology of the Personal Injury Trial

At the expense of being accused of talking down to my audience I think it is important to present a bare outline of the legal, factual, and social context in which the jury operates. My purpose is to emphasize the many factors that bear on the jury's decision processes. It is not that social science researchers are unaware of the elements that make up the context, but often they are implicitly treated as separate elements when in reality they are interdependent. In the discussion that follows I draw heavily from observations of trials and deliberations that were part of the Arizona Civil Jury Project[10] and from my research involving medical malpractice and other personal injury trials.[11]

Trial Structure

During *voir dire* the jurors are typically informed about the basic substantive issues in the case by the contending lawyers. The formal trial begins with preliminary comments by the judge, including the fact that opening and closing statements by the lawyers are not evidence. The opening statements typically involve an outline of the basic contested issues in the case and forecasting about the expected evidence to be called. In the ideal model of the trial the plaintiff goes first and the defense follows at the completion of the plaintiff's case. After direct testimony each witness is subject to cross-examination by the opposing lawyer. At the close of evidence each side makes closing arguments. Then the judge instructs the jurors on the law and sends them out to deliberate. In many jurisdictions the jurors are provided with written instruction on the law and verdict sheets plus documents and other physical evidence.

Not infrequently, however, the real trial does not precisely follow this model procedure. In medical malpractice and in other trials as well, the plaintiff's lawyer may begin the case by calling the defendant to testify. In this circumstance the rules of examination are closely akin to cross-examination rather than examination-in-chief. Defense witnesses may be called in the middle of the plaintiff's case to fit the schedule of a busy defense expert. In one Arizona case

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[10] See NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2007) Shari Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VIRGINIA LAW REVIEW 1857 (2001); Shari Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZONA LAW REVIEW 1–81 (2003).

[11] NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS (1995).

the plaintiff's direct testimony was interrupted for most of the day so that a defense expert could testify; the plaintiff's testimony resumed the next day where she had left off. In still another instance during the defense's case an out-of-state plaintiff witness who had testified in person earlier in the trial was recalled and testified by telephone to clarify issues that arisen as a result of other testimony.

Substantive Issues and Variation Across Trials

Juries are instructed to decide the following: whether the defendant was negligent; whether the plaintiff was injured; whether the defendant's negligence was a proximal cause of the plaintiff's injury; and the amount, if any, due the plaintiff in compensatory damages. Sometimes juries are also asked to decide whether punitive damages are warranted and the amount of the damages. In most cases negligence is decided around a "reasonable person" criterion but in medical malpractice cases the criterion is "the prevailing standard of medical care." Although in most cases the burden of proof in a civil case is "the preponderance of evidence" the burden of proof for awarding punitive damages is "clear and convincing evidence."[12]

There are many variations and nuances to these basic decisions across trials. In some trials the defendant concedes liability and the jury's task is to decide damages only. In other trials the defendant fights the case on liability but the real issue is damages; in other trials damages are conceded if the liability verdict is for the defendant. Some trials have multiple plaintiffs or multiple defendants so the jury's task is to apportion liability between them. In still others the plaintiff or a third person may be alleged to have acted negligently and thus the jury must decide comparative negligence. Sometimes there are persons who may have played a role in the events leading to the negligence suit, but they are missing from the trial evidence because a defendant may settle before trial and not be called to testify. In one Arizona automobile case occurring at dusk there was a claim that a third party, a bicycle rider, caused the accident, but disappeared in the darkness. In a North Carolina case two parties had settled before trial and were not part of the trial evidence even though they were crucial players in the events leading to the alleged injury. The jurors were puzzled and frustrated as they attempted to determine liability and damages.

Relationships of Liability to Damages

Some psychological literature assumes that liability and damages should necessarily be totally separate decisions and questions are raised about whether in

[12] These concepts and related matters are discussed in detail in NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2007)

fact juries inappropriately fuse the two decisions. But consider that civil juries are instructed to "determine the nature, extent and duration of the injury." Decisions on both causation and damages are often made complicated because the plaintiff may have been suffering from a prior injury or may have engaged in post-accident behavior that may have complicated the injury. In medical malpractice trials, for example, the patient underwent medical treatment because of some illness. In instances where the surgeon operates on the wrong limb, causation may be clear, but in many cases it is difficult to separate the bad outcome from the pre-existing injury or illness. The problem is not confined to medical malpractice. In automobile injury cases in the Arizona Jury Project a number of plaintiffs had suffered from injuries, say a bad back, prior to accident and a major issue at trial was whether or to what degree the accident caused the injury that the plaintiff was claiming.[13] With regard to duration, plaintiff and defendants vigorously contest how long the plaintiff suffered and when and if the plaintiff is or was sufficiently well to return to work.

Experts

Experts appear in most trials, Even in simple motor vehicle accident trials chiropractors and accident reconstruction specialists are common. Surveys have found that the number of experts ranged between 3.7 and 4.1 experts per trial.[14] About 40 percent of the experts were in the field of medicine or mental health and another 25 percent of the experts had expertise in business, finance or legal matters. Another 25 percent were specialists in engineering, or safety matters and the remainder had scientific specialties. Medical malpractice trials require doctors to testify about standards and techniques of medical practice. Product liability trials and patent infringement cases often require testimony from experts in biology, chemistry, physics or engineering. Accountants and economists testify about financial matters. Medical testimony often is highly relevant to the nature, duration and extent of the injury. In many cases both sides may produce more than one expert, leaving the jury to decide which testimony best fits the facts of the case. Debate about juries and experts often centers around examples of instances in which the expert evidence is very central to guilt or negligence: for example, the surgeon's decision to sever the third sacral nerve rather than the fourth nerve in a rhizotomy operation; the effects of

[13] Closer examination of the Arizona cases makes it seem reasonable to hypothesize that had the plaintiff been free of prior injuries or illness the defendant's insurer would have settled without trial.

[14] See generally, Samuel Gross, *Expert Evidence*, 1991 Wisconsin Law Review 1113 (1991); Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 Psychology, Public Policy and Law 309–32 (2002); L. Dixon & B. Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision*, 8 Psychology, Public Policy and Law 251(2002).

the drug Bendectin on birth defects.[15] In most trials, however, the expert testimony is only one piece of evidence among others that needs to be weighed by the jury. It must be weighed against other evidence, including the testimony of civilian witnesses and physical evidence.

Closing Arguments

While some simulation studies have drawn attention to the potential effects of *ad damnums* and counter-anchors to *ad damnums*,[16] closing arguments by both lawyers involve an attempt to review the evidence, suggest how the evidence fits with their theory of the case, and explain why the evidence does or does not justify an award or a certain amount of an award. In short, closing arguments provide more than a simple anchor. Rather, they provide the jury detailed—and conflicting—narratives or "stories" for the jurors to consider about causation, injury, negligence and compensation, plus in some instances punitive damages (see chapter by Hastie, this volume).

Judicial Instructions

Judicial instructions on the law that is to be applied also play an important role in the ecology of the trial. In addition to deciding causation and negligence jurors typically are required to make decisions about specific elements of damages. Special damages involve the economic losses that can, in theory, be clearly itemized according to a dollar metric. In personal injury cases special damages include such things as past and future medical expenses, past and future lost income, and property losses. In breached contract, anti-trust or eminent domain or trademark infringement disputes the losses are calculated in terms of the monies lost. General damages are the losses for which there is no clear metric. Compensation for pain and suffering has a long history in Anglo-American law. Jurors are asked to determine a dollar amount to compensate the plaintiff for past and future pain but are faced with the problem of how that is to be translated into dollar amounts. General damages are frequently called "non-economic" damages, and while this may be appropriate for pain and suffering, it is misleading because there are other compensable losses that have similar unclear metrics but nevertheless have economic consequences. Disfigurement often has economic implications for employment opportunities. Illinois law, for example, recognizes damages for "disability/loss of a normal

[15] There may, of course, be other evidence in the trial, some supporting and other contradicting the expert testimony, but my point is that in some trials the expert evidence essentially makes or breaks the case, regardless of this other evidence.

[16] Edie Greene & Brian Bornstein, Determining Damages (2003) at 151–53.

life," "increased risk of harm," "loss of society," "wrongful death" and "loss of consortium." The Illinois supreme court has ruled that these forms of damages involve economic losses.[17] A number of states allow damages for "loss of parental guidance and consortium." The New York pattern instructions for wrongful death tell jurors that while they should not award money for sorrow or mental anguish, pecuniary losses include the "intellectual, moral and physical training and education that the parent would have given."[18] Similar to "pain and suffering" these additional elements of general damages require normative social judgments about what amount is appropriate because the losses vary with the facts of the case and there is no way to place an exact figure on what they are worth. The third element is punitive damages, which are given to punish and deter behaviors that are wanton or reckless.

Comparative fault is also part of the instructions in the majority of states. The jury is instructed to decide the amount of the damages and what portion of fault should be attributed to each defendant if there is more than one defendant and the amount of responsibility, if any, that should be ascribed to the plaintiff.

The Jurors

I include the jurors themselves in my ecological scope. In evaluating the evidence, jurors are instructed to apply their experience, common sense and judgment in evaluating evidence, deciding negligence and awarding damages. As I will suggest below with some examples, the jurors' richness of life experience is applied in reasoning about the evidence and proposing analogies to their own life experiences. Moreover, different perspectives on the evidence and judgments on damages have to be reconciled through processes of negotiation among the jurors. Today, these instructions, along with the verdict sheets, are frequently provided to the jurors in written form when they begin deliberations. Sometimes, even in "simple" cases the instructions require a number of discrete decisions by the jury.

Post-trial Adjustments

A final ecological factor involves post-trial adjustments to the jury verdict. This element is exogenous to the jury decision itself, but it is an important factor in many trials and bears directly on the consequences of the jury verdict. The trial judge may reduce an award through *remittitur* (or, rarely, add to it through

[17] West's Smith-Hurd, Illinois Compiled Statutes Annotated (2005).
[18] West's Smith-Hurd, Illinois Compiled Statutes Annotated (2005)

additur). An appellate court may overturn the verdict or adjust the award. More frequently, the parties themselves may reach a settlement that differs from the verdict. A settlement range may even be determined before the trial or during trial through a high-low agreement between the parties. These agreements may affect the trial content. Consider two examples. Some trials have more than one defendant. If one of these the defendants settles before trial, she may not be called to testify even though her actions were relevant to the alleged injury. As a result, the jury may be puzzled about the chain of causation that led to the injury because a crucial piece of testimony is absent. In another instance, there is a pre-trial high-low agreement between the parties specifying that even if the jury decides for the defendant the plaintiff will receive a certain settlement and if the decision is for the plaintiff the award, no matter how large, will not exceed a certain amount. These agreements are quite common and the consequence is that,at trial, the defendant focuses on liability and does not contest the amount of damages whereas the plaintiff presents evidence bearing on both liability and damages. Simulation research fails to capture these kinds of factors that are so frequent in real trials, but clearly affect verdict outcomes.

The Jury at Work

The importance of considering the above synopsis of jury trial ecology can be illustrated by a number of examples of deliberations from the Arizona Jury Project.[19] From these examples, even divorced from the rest of the deliberations, we can see the richness of evidence that the jury utilizes in its decision-making processes. This richness is used in the stories that they develop about the dispute.[20]

Causation and Degree of Injury

In one case, a female driver was hit from behind and claimed an injury resulting from the impact. Her young child and a passenger were also in the car. The plaintiff estimated the speed at impact at 30 to 40 miles per hour. The defendant admitted negligence but contested the injury as absent, or at best minor, and called a biomechanical engineer who estimated the speed of impact at approximately 8 miles per hour. The jurors offered their own interpretations about evidence that complemented the expert testimony

[19] See Shari Diamond et al., note 10 for the background and methodology of the study. The excerpts provided in this essay are original data not reported in that article.

[20] Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model* 13 Cardozo Law Review 519–56 (1991); see also Hastie, this volume.

and raised questions about missing testimony, causing them to draw a negative inference from its absence:

Juror #3: And the weight of the SUV (Juror #8: Sure.) you know (Juror #4: Yeah.) even going very slowly.
Juror #8: And her car didn't move 25 feet, it moved a couple inches. A [Chevrolet] Geo is just gonna 'pck' [uses her hands to illustrate a car collapsing due to collision], I mean they're not made of much (Jurors #3 and #7: Yeah.) and I think it was really. . .
Juror #5: [interrupting]: It would at least crack the, uh, bumper, crack the tail light, something like that, if she hit her hard enough.
. . .
Juror #5: If the child was standing in there, and if she hit her at 40 miles an hour, 20 miles an hour . . . that child would've flown into the dashboard. (Juror #3: Yes.) (Juror #2 [pointing at his head]: Into her brain.) (Jurors #4 and #8: Yeah.) Regardless how much they tried to restrain that child, that child would've fell into it. (Juror #3: Yeah.)
Juror #5: She claimed that, uh, a, a cup of soda between her feet ended up in the back. (Juror #2: Right.) Now if that was true, that child would've hit that dash.
Juror #3: No, that could be true.
Juror #4: That child could've been injured by it.
Juror #3: Actually, just uh, I think that, uh, sliding under the seat, if there's a smooth surface under the seat, it could've.. . .
Juror #1: What happened to Nancy [the passenger] and the kid? Uh, did they get hurt?
Juror #5: That, that's the one that I wondered. Why Nancy wasn't brought in as a witness as to how hard the impact was and all this. . . . Especially that little baby. Restrained or not restrained, that little baby would've been hurt either way.

The jurors made other inferences about seriousness of the injury and, if it was real, whether it was due to a post-accident behavior. The driver worked as a stocking clerk in a grocery store and was required to lift boxes and other items:

Juror #7: And then she refused the um, the physical, I mean, physical therapy (Juror #8: Yeah.) and whether or . . .
Juror #2: Or call the paramedics or . . . mm-hmm.

...
Juror #8: I think she probably, probably went back to work. Three weeks later she lifted something, it aggravated her condition. [#7: nods in agreement.] If she did get hurt or, or whatever (#3: Oh.) I can't lift 50 pound boxes (#3: Oh I think that would aggravate the condition.) and I think I'm a bigger girl than her. (laughs) [#1 and #2 laugh] I'd have a heck of a time trying to lift that thing. #2: I think it'd be hard for her to lift such heavy boxes.
Juror #5: I think she's been having back problems since she was workin' there, and this gave her an opportunity to see a chiropractor.
Juror #7: Since she's something so small lifting boxes so heavy.
Juror #2: Yeah.
Juror #5: That's right.
Juror #2: I think and, at the very most, I think that this, if there was any jolt at all, could've maybe, caused something (#8: But she also had this. . .) (#5: Aggravation.) that she already had had, to aggravate it.. . .
Juror #5: And if the doctor, the first doctor that she seen.

Juror #8: [continuing]: if he felt had a neck injury (#7: Uh-huh.) he would have ordered one of those neck braces to keep her neck steady so that it would have time so it could possibly heal.
Juror #3: She didn't complain of a neck injury. (Juror #7: Nope.) I think she's quite an emotional person.
Juror #7: That's true, she didn't claim any neck injuries when she went to the doctor.

Prior Injuries and Illnesses

One of the most interesting insights from the sample of Arizona cases was how many plaintiffs had experienced prior injuries or illnesses. Prior illnesses or injuries are to be expected in medical malpractice cases since patients are ill or injured when medical attention is sought. Very often the claimed injury is intertwined with the illness, and the jury must separate the ex-ante injury or illness from the alleged malpractice injury in deciding the extent of the plaintiff's damages. One of the insights from the Arizona sample of cases is that many plaintiffs in non-medical malpractice cases had prior injuries or illnesses. This was especially true of automobile injury cases, although prior injuries figured in other personal injury cases as well. Of twenty-four automobile injury trials, eighteen defendants admitted negligence for the accident but simply contested the amount of the damages. In almost every case the plaintiff had suffered from prior injuries or illnesses, strongly suggesting that the plaintiff's prior condition was the reason the claimed injury was contested by the defendant's liability insurer. These issues played a significant role in jury deliberations. Here is an excerpt from a car accident case:

Juror #2: He was hospitalized three times and it wasn't within a long period of time.
Juror #3: It was a good idea to bring John's [plaintiff's] wife in because she seems very credible.
Juror #2: John and his wife have been through some hardships, but it's a matter of whether the hardships were caused by the accident.
. . .
Juror #6: They [plaintiff and his lawyer] spend a lot of time showing damages, but I don't think that has anything to do with the car accident. John had pre-existing conditions that were exacerbated.

The Evaluation of Experts Regarding Plaintiff's Injury

The basic issues that the jury had to decide in the next example were similar to the prior case except that there were more doctors on both sides who offered opinions about both causation and degree of injury. The jurors made some interesting observations during the trial that they compared to the expert evidence.

Juror #4: There's only one thing I want you all to think about and notice during the entire trial, every single doctor that he had testify said that he could not sit still longer than fifteen or twenty minutes, every doctor said that, I want you to note.

Juror #6: [consulting her notes and interrupting]: Before the accident?
Juror #4: No, after it. . .
Juror #6: Yeah, but let's differentiate doctors' testimony before the accident from doctors after . . .
Juror #4: No, after the accident, he cannot sit, he's got a "whoopy" cushion and he cannot sit for more than 15 or 20 minutes without getting up out of his chair at work and walking around. [Juror #2: The trial, he sat through the entire thing.] The entire trial, from 2 to 3pm in court, he did not move from his chair, I took notes as to every single day when he was sitting [Juror #2: My Lord!) starting on Tuesday, I can tell you how long that man sat in his chair [Juror #1: You know something. . .] he never got out of his chair [Juror #1: You're good], [Juror #2: You're good], and that he never got out of that chair the entire trial.
Juror #1: You know something, I was moving more than he was.
Juror #4: And my butt hurt.
Juror #1: He sat like a rock, didn't he?
[General laughter from all jurors] . . .
Juror #1: He looked more comfortable than us.
Juror #4: Every one of you guys moved, you either crossed your legs, moved this way, sat up or sat back. . . .
Juror #1: What else did you see that he was doing so good, his complexion on his face? You never saw bags under his eyes, like he couldn't sleep, he looked healthier than us. We were having trouble sleeping.

Failure to Mitigate the Injury or Illness

One of the striking things that emerges from the jury deliberation transcripts is the jurors applying normative values to the behavior of the plaintiff following an injury. Consider another example from an automobile accident in which the woman plaintiff failed to follow the instructions of the emergency room doctor, delayed seeing her own physician and only eventually went to a chiropractor.

Juror #5: Number one, she didn't get any of the medication filled for the 10 days after and I, I see it hard that somebody that hurt as bad as she did, didn't do anything for 10 days. She didn't see a doctor for 15 days afterwards and that was when her husband made her go. And, getting bumped a little bit, the damage, as a medical person, I'm sorry folks, I, I can't agree that the lady had that kind of suffering. (Juror # 2: Mm-hmm) I mean after I've been beat on and I've had hit a whole hell of a lot worse than that. Uh, I just find it hard that a person could be in that kind of excruciating pain, for that number of days, and never go anywhere. And why she didn't see uh, a different doctor other than a chiropractor? I mean, why wouldn't she go see an orthopedic doctor? Would she, I mean she's, I don't think that they're, they're dummies, her and her husband are, are, you know in any sense of the word like that. They know the difference between what's going on. (Juror #9: Mm-hmm.) And I, if I heard, and nothing was getting better, then I sure as hell wouldn't wait 10, 15 days before I went in if I couldn't move in my own house.. . .

Duration of Injury in Damages Awards

Jurors are instructed to consider the nature and *duration* of the injury. The following example shows one jury doing just that following an industrial accident:

Juror #1: My opinion is if we say he has, uh, an injury related to this thing, it's a minor injury and you've got to understand that he did work continuously for seven or eight weeks. I don't think this injury could ...
Juror#4: 6 weeks.
Juror #1: Is it 6 weeks?
Juror#4: Uh huh.
Juror#1: Well then I don't think the injury he had here would have lasted 5 weeks. And so I don't think he has any wage claim what so ever that's valid. We can look at all his medical expenses up say for 3 to 4 weeks . . . from this kind of a thing and say we'll pay those medical expenses.
Juror #3: But they should already be paid under workman's comp.
Juror #1: Well they would but we can't consider that. We still have to say if he's injured from here we can't think of that, we still have to award damages: If you want to ask me what the case is worth.
Juror #4: No, I just wanted you to tell me your theory of where you think we should be going to find the worth.
Juror #1: Oh, I think we should look at what his medical expenses were incurred for maybe a period up to four weeks, a month, for this kind of a thing, that's really extreme to me, I think two weeks would be a long time.
Juror #4: Hmm. Okay.

The jurors in another case also addressed the permanence of the injury:

Juror #5: See, I don't doubt that he has some kind of back problems, but I don't think the accident has permanently injured him.
Juror #6: It doesn't matter what we think, only what they proved. I don't think they proved . . .
Juror #4: I don't think they proved it.
Juror #7: [interrupting]: This is what bothers me [he holds up his notes]. Thirty-three visits to a doctor at $100 a visit and he's a total quack.
Juror #3: He did what?
Juror #7: Thirty-three visits to a quack who did absolutely nothing for him and it looks like that. Dr. Cerutti, a hundred bucks a visit.
Juror #4: The general practitioner?
Juror #7: No, Dr. Cerutti the psychologist. [Juror #4: You're right.] He is the psychologist and he is just about the biggest quack that I have ever seen.
. . .
Juror #4: But the bottom line is when you listen to the testimony, like [The defense lawyer] pointed out, did they prove their case that he is permanently injured for life [Juror #7: No] How many in this room believe that he is permanently injured for life due to the accident?
Juror #2: [shaking her head]: No. no, no.
Juror #7: No.
Jurors #1, #5, and #6: No.
Juror #3: I think the accident, at least that thing the way it was before, I'm talking from experience and I've had problems for years and years I can be just like the last

accident I was in. Right off I had horrible pain in my back and neck [Juror #4: Are you in pain right now?], no, I'm talking about how I got out of the car and my neck quit hurting but I know there are times I debated going to the doctor when my back is bad and I'll go give it another day or so: And finally, there have been lots of times that I've had to give in . . .

Juror #4: So my question to you is do you believe that because of this accident that he is permanently in pain and injured for life?

Juror #3: Well, no, I wouldn't say he is you know, disabled for life, no.

Juror #4: [throwing her hands up]: Unanimous, we got unanimous.

Calculation of Special Damages

More than fifteen years ago Edie Greene drew attention to the fact that there are differing theories about how jurors calculate damages.[21] One theory suggests that they anchor on a specific figure, particularly the *ad damnum* or an amount suggested by the defense. Another theory, which Greene called a "gestalt" approach, is that the jurors do not concern themselves with the damages components as an accountant might but search for a single amount and then work backward from that figure. The third theory is that the jurors do act like accountants and add component sums. These hypotheses need to be modified somewhat in jurisdictions, of which there are many, that require jurors to enter a separate verdict for each element of damages. In Florida, for example, the verdict sheet in medical malpractice cases usually requires that the jury enter a separate verdict for past medical expenses, future medical expenses, past lost income, future lost income and pain and suffering. Ordinarily the jurors in Arizona are required to provide only a general verdict on damages. The following example below is quite inconsistent with the "gestalt" approach and instead shows jurors as very tight-fisted accountants:

Juror #4: We have to find the doctor bills, so we can make a determination of the money.

Juror #2: Let me take a look at that one [Juror #4 hands her an exhibit] . . .

Juror #4 [interrupting]:
I found it guys, the medical bills.

Juror #7: I knew we had you as foreman for a reason.

Juror #5 [to Juror #4]:
Do they have them broken down by dates?

Juror #4: Yes they do, okay, um [Everyone is talking], . . .

Juror #6: If we keep those two figures in mind, the defense attorney said that at the most he deserves $15,000. The plaintiff said $175,000 and the defendant said, $15,000, so I think it would help me to know the total of medical bills and then take a look at what the plaintiff is asking . . .

Juror #4: [interrupting]: Okay, a question, I want to ask everybody the first question. There is no doubt that he missed one week of work after the accident, okay? [Juror #3: I thought he missed two.], [Juror #5: 1 ½ weeks.] well both attorneys

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[21] Edith Greene, *On Juries and Damage Awards: The Process of Decision making*, 52 Law & Cont. Probl. 225 (1989).

agree on that figure, the figure is $1,753, can this jury agree to $1,753 in the figure?
Juror #7: Oh, absolutely.
. . . .
Juror #1: I'll say $1,000 [Several jurors argue at once] and that's for a week.
Juror #4: Excuse me, these are the wages. Both attorneys agree on the figure.
Juror #6: $1,700 basically.
Juror #7: Let's not screw around, $1,700 . . .
Juror #4: Do you want to make it $1,700?
Juror #7: Yeah, let's just round it.
Juror #1: That's too much, though.
Juror #3: He made $4,000 a month.
Juror #4 [to Juror #1]:
$1,700. We can agree on that? Curt can you agree?
Juror #1: I will agree.
Juror #4: Okay, now the other thing the attorneys, okay, we have to figure out what the rest of it is. Can people here agree on the emergency room visit?
Juror #7: Absolutely
Juror #2: Yes.
[Others shake their heads in agreement.]
Juror #4: Now, let's figure out what that is. Okay, um, [looking at the exhibit of hospital visits and medical bills] the accident was on 10/15, so that would have to be what happened on 10/16. Okay, on 10/16, Dr. Phelps, well, now that says [reading] 10/16 to 4/22, 10/16 to 10/28 [Juror #6: It should say 10/16], oh, here it is, ER, ER, 10/15/96 is $557.26.
Jurors #6 and # 7 [simultaneously]:
$600
Juror #4: Do we want to make it $600?
Juror #3: Somebody said $500 and somebody said $600.
Juror #7: $600.
Juror #4: [writes it down]: $600 for the ER visit.

Calculation of General Damages

The calculation of general damages is a difficult task. Instructions on pain and suffering acknowledge the problem. For instance a North Carolina instruction says:

> Damages should include such amount as you find, by the greater weight of the evidence, is fair compensation for the actual physical pain and mental suffering which were the immediate and necessary consequences of the injury. There is no fixed formula for evaluating pain and suffering. You will determine what is fair compensation by applying logic and common sense to the evidence.

Such an instruction almost invites jurors to center on a gestalt figure, perhaps relying on the *ad damnum* and counter-anchor suggested by the defense. Plaintiff lawyers sometimes just suggest a general figure in their closings, and others suggest an hourly or daily amount that should be awarded and ask the jurors to apply that figure and calculate that amount over the plaintiff's expected remaining life span.

One case involved a healthy woman in her thirties who was badly and permanently injured in an industrial accident. Medical testimony indicated that she faced additional surgeries, permanent pain, brain damage and depression. In closing her lawyer suggested an amount per day and calculated it over the plaintiff's expected life, coming to a figure just short of $5 million dollars. The defense lawyer suggested $1 million was appropriate for pain and suffering. The jury deliberations on this element were intertwined with contested estimates of future medical costs and income. After initial discussion they agreed on a tentative upper limit of $5 million for the total award. The deliberations involved vacillations and backtracking over previous discussions but these edited excerpts give the flavor of the deliberations:

Juror #4: So what would you say, this guy [plaintiff lawyer] is asking for $5 million the other one said to give her $1 million?
Juror #6: I say $2 or $3 million.
Juror #7: Well, like you say, $5 million [Juror#3: Well, he wanted...] is too high and $1 million is too low.
Juror #6: That's everything, pain and suffering and everything.
...
Juror #8: I think that's the problem, I think that as the physical gets ... it's probably likely to say that the mental gets worse I don't know how it will work, I don't know if the mental gets better if the physical doesn't get better.
Juror #6: Yeah, she's in pain all the time.
Juror #8: So, if that's how you are for the rest of your life what amount of money makes your life okay? [Juror #6: Yeah].
Juror #8: I would say no amount of money ...
Juror #4: You can't put a dollar amount on it [Juror #8: Exactly].
Juror #3: I know I've been trying to think of a number [Juror #4: You can't put a dollar amount.] but, do you guys have a number? [Juror #6: We have to.]
Juror #3: I mean, right now, everybody, can everybody come up with a number they have thought of?
...
Juror #6: It's hard it really is, I keep thinking of the permanent damage, I keep thinking of the permanent damage she's going to have for the rest of her life, you can't think of just now.
Juror #8: And I think of even in terms of if she can get another job not only will it pay very low it probably won't be very satisfying but if it takes her seven more years to be medically at a place where she can work and then, given by then she will be in her mid-forties she's not going to have a lot of time to build anything up that she can retire on.
...
Juror #8: I think she's got to have over one million for pain and suffering.
Juror #6: I wouldn't want to go through what she did.
Juror #3: Yeah, I wouldn't want to know that I could never play with my children or grandchildren again, that I couldn't walk without a cane anymore.
Juror #4: Oh, that's not true my ex-wife is paralyzed on her left side, she can't walk, she can't run, she uses one of those cane things, she plays with our granddaughter, unbelievably, it's determination if you want to, this lady will not be able to run, they said she's determined to improve herself, I think she will walk, she's walking now, she can't chase [her] kid.
Juror #6: Yeah, she's walking good.

Juror #3: There's a lot of things that have been taken away from her [Juror #4: I agree] and I think a lot of those things are things in life that she needs and that she's not going to have anymore.

Non-linear Deliberations and Strategic Bargaining

Arizona civil juries are almost unique in that they are allowed to discuss the evidence among themselves at breaks while the trial is in progress.[22] One of the things that we observed was that discussion of the evidence was not linear, was in fact fluid and dynamic. Similar to face-to-face committee meetings in any setting, sometimes all of the jurors gave their attention to a single topic. At other times individual jurors expressed their thoughts without a response from other members. Some jurors just listened. Side conversations among two or three jurors were frequent. Topics were raised, dropped, then picked up again later, sometimes multiple times. The deliberations, as opposed to discussions during trial, were somewhat more orderly, though it is not clear whether this was a function of getting down to the final business or because the jurors had had an opportunity to slip and slide on issues during trial. Nevertheless, the same non-linearity characterized deliberations. Even when they apparently had decided issues of causation and liability and moved on to damages, it was not infrequent to slip back to earlier issues that seemingly had been decided. Sometimes opinions were changed as a result of additional discussion on the old issues and apparently affected the final amount of damages. Arizona juries require only a majority of six of the eight jurors to render a valid verdict. In several trials a majority voted for liability. When the discussion turned to the amounts of compensatory damages the minority hold-outs on liability attempted to leverage their resistance to awarding anything to reduce damage amount that the majority wanted. On at least one occasion a minority member was successful because the other jurors wanted to have a unanimous verdict, even though a unanimous verdict was not required. (It would require too lengthy a transcript to convey the deliberations from that case in this chapter, but details are available from the author.)

Simulation Experiments: Ecological Considerations

The Arizona data are unique. Such rich data may never be available again because judges are understandably reluctant to invade the privacy of the jury room. They do not tell everything about the jury deliberation process, but the examples above raise important issues about the generalizability of simulation research as it is usually carried out. Many of the Arizona juries had to consider multiple issues like those in the examples. In addition to detailed instructions on

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[22] See Shari Diamond et al., note 10.

the law, in the jury room most had many documents, such as medical bills, wage slips, or tax documents that they scrutinized closely.

As already discussed, most simulation studies in the literature involve college students, minimalist trial information, and individual rather than group decision-making. Isolating single variables in experiments may ensure internal validity and if a number of studies are undertaken may demonstrate external validity, but they seldom capture the essence of the real world to which the research is ostensibly focused. Consider how many simulation studies capture the richness of the interchanges of information and the development by the jury of the problems with the story provided by the plaintiff's claim about the causation and seriousness of the injury due to the speed and impact of the two cars. The jurors were aided by expert testimony but they developed their own counter theory from other pieces of testimony.

Similarly, how many simulation studies have captured the jurors' speculation about whether the plaintiff's injury may have been due to post-accident activities, such as lifting heavy boxes? The jurors' alternative story about the injury may well have been wrong, but it developed out of concerns about the plaintiff's evidence and knowledge about possible post-accident activities. Would a simulation study have been able to capture the jurors' dismissive responses to expert medical testimony about the plaintiff's back injury as they observed the plaintiff himself sitting for long periods without moving or expressing pain? Would the plaintiff's failure to mitigate damages have been built into a simulation or the written instructions, the medical bills and wage slips that figured in the jurors' calculation of special damages? How many studies in the literature have even considered the impact of prior injuries and illnesses on how the jury calculates damages? Or the plaintiff's post-injury behavior? Or discovered how a high-low agreement affected the trial evidence? The insights about non-linearity of deliberations and strategic bargaining are directly relevant to issues about fusion of liability and damages.[23]

And there's another problem, one that has been discussed in the literature, but never really tested, namely the hypothetical nature of simulation decisions. David Breau, Brian Brook and Andrea Alencar, three law students in one of my classes, were very skeptical of simulation research and with my close guidance, especially with respect to ethical issues, including thorough debriefing of participants, were allowed to carry out an experiment as part of their class assignment.[24] Law students were recruited to serve on panels involving testimony that another student had violated the school's honor code. Two of the juries were led

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[23] See Greene, note 21 at 232. Incidentally the fusion hypothesis was discussed by Harry Kalven, *The Dignity of the Civil Jury* 50 Virginia Law Review 1055–57 (1964) but in Kalven's day most juries operated under contributory fault as opposed to comparative fault. This difference may have colored the relevance of Kalven's comments for most of today's juries.

[24] David Breau, Brian Brook & Andrea Alencar, *"Mock" Mock Juries: A Field Experiment on the Ecological Validity of Jury Simulations*, 31 Law & Psychology Review 75 (2007).

to believe that they were deciding a real honors code case and two were told that they were participating in a mock jury experiment. With such a small sample the results could not be tested for statistical significance, but the results are very suggestive. The two panels ("juries") that believed they were deciding a real case deliberated 40 and 85 minutes, respectively, compared to the hypothetical juries who deliberated 30 and 25 minutes. One "real" jury voted not guilty and the other "real" jury hung, whereas the two hypothetical juries voted guilty. The "real" jury that voted not guilty recommended that the offending student should write a new memo on a different topic that would be graded by a different instructor and one of the hypothetical juries made a similar recommendation. However, on the other hypothetical jury one person recommended suspension for one semester, three recommended the harshest sanction short of suspension and one was undecided. Treat these findings very cautiously because of the small sample. Nevertheless, they raise support for skeptics of simulation research.

My comments and questions about simulation studies should not be taken as a blanket dismissal of simulation research. Devine et al.'s review of the literature suggests that over the years we have learned some important things about how juries decide.[25] There are some issues, such as the research on jury size, that are not practical to investigate any other way and besides, the jury size issue can be integrated with other social psychological research and elementary statistical theories. In other instances specific issues can be investigated in relatively minimalist settings, but the research should be based on a clear recognition that the variables of interest are likely intertwined with other issues. Attempts need to be made to see how the findings relate to other evidence bearing on jury behavior.

Sometimes simulation experiments provide opportunities to study phenomena comparatively that never occur in the real world. Landsman and Rakos compared the decisions of jurors with judges in their respective abilities to set aside inadmissible evidence (judges did not outperform jurors).[26] Guthrie et al. found similar results in their research on judicial decision-making.[27] Robbennolt compared samples of jurors and judges in their decisions about punitive damage awards. (They decided approximately the same way.)[28] Vidmar compared judges' and senior lawyers' decisions about awards for "pain and

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[25] Dennis Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychology, Public Policy and Law 622–727 (2001).

[26] Stephan Landsman & Richard Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 Behavioral Sciences and Law 113 (1994).

[27] Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001). A brief overview of this research may be found in Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 Judicature 44 (July–August 2002).

[28] Jennifer Robbennolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 Law and Human Behavior 315 (2002).

suffering" and "disfigurement" in medical malpractice cases. (They decided roughly the same way.)[29] Wissler et al. compared "pain and suffering" damages decision-making in samples of jurors, judges and senior lawyers (Jurors were similar to the two comparison groups).[30]

Pennington and Hastie's story model of jury decision-making, now widely accepted as the best model of juror decision-making processes, was developed through simulations, sometimes minimalist simulations.[31] Even the brief excerpts from real jury deliberations that I provided above, appear consistent with the story model. Nevertheless, that research had the goal of developing a general theory about how juries might work. It remains an outstanding example of good research. Yet, the story model has been largely applied to individual juror decision-making with few attempts to determine how jurors develop stories collectively.

One striking exception is an article by James Holstein[32] that showed that during deliberations mock jurors focused on alternative interpretations of "what really happened" as they sought to develop a consensus. The Holstein experiment suggested that the "story model" of decision-making by individual jurors articulated by Pennington and Hastie applies to the jury decision-making process as well and elaborated on how juries probably develop group consensus about the narrative by analyzing it part by part. Holstein's study raised a number of avenues for further research and additional questions that have not been followed up by other researchers. Also, his study dealt with criminal as opposed to civil trial issues, which arguably involve a different set of questions.

Simulation Experiments that have Attempted Greater Ecological Validity

Simulation studies that attempted to capture the essence of real trials and that more nearly approximate ecological considerations have been undertaken. A series of studies by Irwin Horowitz and his collaborators[33] have investigated issues relevant to a number of important issues in civil as well as

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[29] Neil Vidmar, note 11.

[30] Roselle Wissler et al., *Decision making about General Damages: A Comparison of Jurors, Judges and Lawyers*, 98 Michigan Law Review 751–826 (1999).

[31] Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model* 13 Cardozo Law Review 519–56 (1991).

[32] James A. Holstein, *Jurors' Interpretations and Jury Decision Making*, 9 Law and Human Behavior 83–100 (1985).

[33] E.g. see Kenneth Bordens & Irwin Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury decisions*, 73 Judicature 22–7 (2003); Lynne FosterLee, & Irwin Horowitz, *The Effects of Jury-aid Innovations on Juror Performance in Complex Civil Trials*, 86 Judicature 184–90 (2003).

criminal procedure: for example the effects of outliers in mass tort trials; the effects of joinder in criminal trials. Neal Feigenson undertook important simulation studies based on complex issues in real trials assessing how jurors assign blame for accidents.[34] Steve Landsman and his collaborators also created a simulation incorporating ecological validity components to compare effects of single phase versus bi-furcated trials involving punitive damages.[35] Diamond and Casper conducted a realistic experiment involving a complex price fixing case involving two types of expert testimony and engaged in careful analysis of the jury deliberations.[36]

Honess, Levi, and Charman provide another important example of attempting to create ecological validity in a study assessing the ability of jurors to understand the evidence presented in the major English criminal fraud trial of Kevin Maxwell and others.[37] Six hours of videotaped testimony involving actors incorporated the main issues from the actual Maxwell trial. The simulation was carried out over several sessions and took place in a specially prepared room that allowed the participants access to two large video screens and copies of the documentary evidence. At four points during the trial presentation the participants were asked to summarize the evidence, offer a tentative verdict, rate their confidence in the verdict and explain their reasons for choosing it. The jurors were then interviewed separately. Using the written responses and transcripts of the interviews the researchers carefully assessed the quality of the reasoning used by the jurors, their comprehension of the evidence and looked for improper reasoning that went beyond the trial evidence. The Honess et al. study, in my view, serves as a model of excellent simulation research that could be applied to the study of civil juries on any number of controversial questions about jury competence.

Yet, one problem with attempting to conduct ecologically realistic simulations is that they require an enormous commitment of financial resources. What alternative methodologies should we use?

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[34] Neal Feigenson, Legal Blame: How Jurors Think and Talk About Accidents (2000).

[35] Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wisconsin Law Review 297–342 (1998).

[36] Shari Diamond & Jonathan Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts and the Civil Jury*, 26 Law and Society Review 513 (1992).

[37] Terry Honess, Michael Levi, & E. Charman, *Juror Competence in Processing Complex Trial Information: Implications from a Simulation of the Maxwell Trial*, Criminal Law Review 763—73 (1998).

Alternative Methodologies to Study Jury Decision Processes

A Relevant Digression

Stanley Schachter was unquestionably one of our greatest social psychologists and something very useful can be gleaned from his approach to research. In the 1970s and early 1980s the received wisdom in medical and clinical psychology circles was that smoking was an extremely difficult habit to give up. One report summarized this wisdom: "That so many people who are motivated to seek therapy drop out of treatment, and that so many people eventually return to the habit underscores the scope of the task that one is faced with in dealing with the smoking problem." Stanley Schachter, an addicted smoker himself, questioned this wisdom. He set out with a plan to personally interview 160 persons that comprised convenience universes of people: all the members of the Psychology Department at Columbia, and year-round residents of a Long Island community where Schachter vacationed every summer.[38] Contrary to conventional wisdom, Schachter found that many persons in his samples had successfully, and on their own, quit smoking. These insights led to his classic laboratory studies on smoking and obesity that have been extended by others and that are still important today.[39]

Interestingly, in the second paragraph of his seminal American Psychologist article reporting these findings Schachter unabashedly acknowledged his debt to the qualitative observational techniques of Alfred Kinsey whose research on sexual behavior in men and women revolutionized scientific thinking about sex.[40] But Schachter does not stand alone. Kurt Lewin, his mentor and usually considered the father of modern social psychology, was as interested in developing hypotheses from observing the real world as he was in designing experiments.[41] Solomon Asch, another one of our greats, who is especially remembered for his clever experiments on conformity, was similarly oriented toward studying real world phenomena in their ecological context, as evidenced in his classic 1952 text, Social Psychology.[42] I could name many other social

[38] Stanley Schachter, *Recidivism and Self-cure of Smoking and Obesity*, 37 American Psychologist 436 (1982).

[39] Stanley Schachter, Emotion , Obesity and Crime (1971); Richard Nisbett, Stanley Schachter, Biographical Memoirs, National Academy of Sciences (undated) at books.nap.edu/html/biomems/s**schachter**.html

[40] *Id.* at 437, citing Alfred Kinsey, Pomeroy, & Martin, Sexual Behavior in the Human Male (1948).

[41] See Alfred Morrow, The Practical Theorist: The Life and Work of Kurt Lewin (1969).

[42] See Paul Rozin*, Social Psychology and Science: Some Lessons from Solomon Asch.*, 5 Personality and Social Psychology Review 2–14 (2001); See also Solomon Asch Social Psychology (1952).

psychologists who were or are great observers of real world phenomena as well as outstanding experimentalists,[43] but let me proceed to my point.

As I have argued above, most jury research focuses too much on studies designed with a heavy emphasis on internal validity with the consequence that the ultimate result is studies that ignore ecological variables. In my view many modern social psychologists, including jury researchers, appear to hold the view that experiments are the sine qua non of scientific research. My digression onto classic social psychology studies and their predecessors in biological science is to draw attention to the fact that the scientific enterprise can be greatly advanced by careful, objective observation of real world phenomena. I would go even further and argue that it is an essential first step, and in most instances should precede experiments. So what is to be done?

Observational Analyses and Interview Data from Jurors and Juries

An alternative to discovering how civil juries make decisions is to ask them, just as Schachter and Kinsey did. This was one approach taken by Valerie Hans in her book *Business on Trial*.[44] Hans undertook systematic interviews with samples of jurors shortly after they had decided cases. Her research provided important insights into the trial issues that concern juries. Her interview findings were supplemented by data from focus groups, surveys of the general public and simulation experiments. The use of multiple methodologies used by Hans provides another important form of validity not discussed earlier in this chapter, namely convergent validity.

One of the legitimate problems consistently raised with regard to post-trial interviews is whether jurors' memories accurately portray what occurred in the jury room. If there is a lengthy time lapse between the trial and the interview a juror may have forgotten details. Additionally the juror may not be articulate or consistent or may provide only a view that is biased by self-importance or hostility to other jurors. However, this criticism can be easily blunted by interviewing all of the jurors or a random selection of jurors with a standard interview protocol. The various perspectives and descriptions can then be pieced together. Another research strategy would be to interview several members of the jury at once, if this could be arranged.[45] The advantage of this last approach is that they could engage in collective recall and correct individual

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[43] I would include among my top list Theodore Newcombe, Richard Nisbett, Leon Festinger, and Melvin Lerner, but many others come to mind. Incidentally, at the expense of again talking down to readers, I recommend considering some other great qualitative researchers like Gregor Mendel, Charles Darwin, and Galileo.

[44] Valerie Hans, Business on Trial (2000).

[45] For discussion of such an approach see, Neil Vidmar, *When Juror Talk About their Verdict*, Jury Ethics: Juror Conduct and Juror Dynamics (in John Kleinig and James Levine, ed.,) (2006) at 237.

errors of recall. The disadvantages are that it might be difficult to arrange for a joint meeting once the trial is over and that the jurors might be unwilling to be as candid in the presence of other jurors. While in the united states there are no restrictions on talking to jurors, interview studies will more likely be successful if the cooperation of the judge and lawyers is sought in advance. Often a researcher can gain such cooperation and support.

Special mention needs to be given to the Capital Punishment Project that over a period of many years and trials around the country has resulted in literally dozens of interviews with jurors from capital trials, some of which resulted in death sentences and others in life sentences.[46] This body of research has produced an enormous amount of insight into jury decision-making in capital cases and the methodology could easily be adapted for civil juries.

As positively as I view the above post-trial interview studies, one difficulty with the approach is that the researchers depended upon the jurors to describe the evidence that was presented at trial. The jurors may get it wrong, or may not remember certain crucial evidence, especially if they dismiss some evidence early in their deliberations. For example, a potentially important issue that could have borne on how the case was decided may have been dismissed early in the deliberations and not recalled during the post-trial interview.

One way around this problem is for the researcher to actually observe the trial as it is going on and then follow up with juror interviews. Such studies have been rare, especially in civil cases. Arthur Austin sat through two different trials of a Cleveland anti-trust case and interviewed the jurors.[47] Joseph Sanders interviewed jurors that decided one of the Bendectin cases.[48] I and my students sat through several medical malpractice trials and interviewed jurors by telephone or in person shortly after the verdicts.[49]

Currently, Judith Fordham, an Australian barrister and forensics professor, is completing a study of jury responses to expert evidence in criminal trials in Western Australia that serves as an ideal model.[50] Fordham is sitting through

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[46] See, e.g., See William Bowers, *The Capital Jury: Is It Tilted Toward Death*? 79 Judicature 220 (1996); Theodore Eisenberg, Stephen Garvey, & Martin Wells, *Forecasting Life and Death: Juror Race Religion, and Attitudes Toward the Death Penalty*, 30 Journal of Legal Studies 277 (2001); William Bowers, Marla Sandy's, & Benjamin Steiner, *Foreclosing Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making* 83 Cornell Law Review 1476 (1998); Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Virginia Law Review 1109 (1997); Scott Sundby, A Life and Death Decision: A Jury Weighs the Death Penalty (2005).

[47] Arthur Austin, Complex Litigation Confronts the Jury System: A Case Study (1984).

[48] Joseph Sanders, *The Jury Deliberation in a "Complex Case": Havener v. Merrel Dow Pharmaceuticals*, 16 Justice System Journal 45–67 (1993).

[49] See Vidmar, note 11.

[50] For a preliminary report of this research, see Judith Fordham, *Illuminating or Blurring the Truth: Jurors, Juries and Expert*, Evidence Law and Psychology (Belinda Brooks_Gordon, eds.).

each trial and taking notes on the evidence. She then interviews jurors individually, asking permission to record the interview for research purposes. Transcripts are made of the interviews and then coded and interpreted. Although Fordham's research is still in progress at this writing, the preliminary findings suggest it will be groundbreaking, even though she will not have conducted a single experiment.

One response to such intensive research is that trials consume many days or weeks and it is difficult for a busy researcher to devote so much time to the trials. This is an efficiency argument, and I would counter that the researcher may learn more in one trial than in dozens of simulation studies. Besides, the problem may not be so difficult to solve. In the medical malpractice trials that I studied in this manner, my research assistants and I took turns monitoring the trials as our schedules allowed. Thus, for example, I attended the morning session and was spelled by a student for the afternoon session. I briefed the student on what happened in the morning and gave her my notes. She then briefed and gave the notes to the student who took over trial duties the next morning, and so forth. When the verdict was rendered we had a solid map of the evidence, the witnesses and the trial process that shaped the questions we developed for the juror interview protocol.

Here is an insight that can result from knowledge of the trial evidence that came from our studies of medical negligence trials. A jury awarded over $8 million to a child and his family in a case involving a birth injury. This was an enormous sum to the jurors who rendered the verdict, and in post-trial interviews almost all of them were concerned about the award. Why, then, did they give such a verdict? By observing the whole trial we knew that the plaintiff not only argued liability but also presented evidence from several expert "life care" witnesses that produced what can be characterized as the "Cadillac" plan for future care. The defendant denied liability and produced absolutely no counter testimony on the plaintiff's damages calculation. In fact the defense did not even vigorously cross-examine those witnesses. When the jurors were interviewed, their explanations for the award were clear and straightforward. While they unanimously thought the plaintiff's evidence and *ad damnum* were excessive, they carefully followed the judge's instructions to consider only the evidence presented at trial—and, of course, the only evidence they had was the plaintiff's evidence. Our post-trial interview protocol was shaped by our prior trial knowledge and it provided insight into what might otherwise be characterized as a "runaway" jury.

This medical malpractice case is not an anomaly. Many trials involve disputes over liability rather than damages. Other trials involve only disputes about damages. Consider again that in 24 Arizona trials involving automobile injuries, 18 (75%) involved defendant admissions of fault or negligence.

In summary, I am making a number of arguments for the merits of systematic observations and jury interviews as a methodology for understanding jury behavior as a way to gain a much richer understanding of the context out of which jury verdicts are produced. The insights derived from this information can produce better theoretical understandings—and lead to experimentally

testable propositions and make simulation experiments more realistic and relevant to actual legal issues. Interview data are not so difficult to collect. At minimum this methodological approach can be used with other methodologies to assess convergent and discriminant validity. Finally, let me emphasize again that qualitative research is empirical research and just as scientifically valid as simulation research.

Indirect Ways of Assessing the Quality of Jury Verdicts

Jury verdicts can also be assessed indirectly through archival methodologies. These approaches do not tell us precisely how the jury reached its verdict, but they provide yardsticks against which those verdicts can be assessed.

Case Studies of Jury Competence and Equity

Richard Lempert systematically examined reports of twelve complex trials.[51] The sample included corporate law violations, toxic torts involving injuries to many persons, conspiracies, stock manipulations, sexual harassment allegations, claims under anti-trust laws, breaches of contract and matters relating to the disclosure of trade secrets. In two cases, one involving highly technical evidence involving patents and trade secrets and the other involving both epidemiological and hydrogeological testimony, the expert evidence was so complex and arcane, Lempert concluded, that it is likely that neither judges nor juries would have been able to properly understand it. Indeed, it is likely that only specialists in the fields could have made sense of it. These two cases present a dilemma, suggesting the need for some extra-ordinary means of resolving disputes, perhaps neutral experts that could interpret the evidence for the judge and jury. However, in the remaining ten cases, Lempert argued that the evidence was not so esoteric that jurors would be confused by it and that there was no clear evidence that the jurors were befuddled in reaching their verdict.

Judges versus Juries: Kalven and Zeisel's Method

Kalven and Zeisel, as all jury researchers know, asked presiding trial judges to rate dimensions of the evidence and indicate how they would have decided the case.[52] Heuer and Penrod conducted a similar study of criminal and civil trials

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[51] Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert Litan, ed.) (1993).

[52] HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1967)

that took place in thirty-three states around 1990.[53] The rates of agreement between judge and jury in civil trials were roughly similar to those in Kalven and Zeisel's study, except the jurors were a little more inclined to decide for the defendant. Eisenberg et al., replicated the Kalven and Zeisel findings in a large sample of contemporary criminal trials.[54] Hannaford et al. studied 153 civil trials that were decided in Arizona in the middle of the 1990s.[55] Their research also asked the judge to make detailed evaluations of the trial evidence and to indicate how he or she would have decided the case. A study of California juries by the National Center for State Courts also found that judicial estimates of the strength and direction of the evidence were generally consistent with the jury verdicts.[56]

The major problem with the published reports of these studies is that they did not describe the nature of the cases, let alone the kind of evidence that the jury heard, how many of the cases were tried on both liability and damages, liability only or damages only, and a number of other things that could have affected the verdicts. Yet, they do provide important insights about how well the jury performed.

Comparisons with Actual Trial Judge and Appeal Court Verdicts

Eisenberg and his collaborators have conducted a series of studies comparing punitive damages verdicts by juries with verdicts rendered in bench trials.[57] Attempts were made to statistically control for selection differences between cases tried before juries and cases tried before judges. The principal finding was that judges and juries produced roughly similar awards. Incidentally, these findings are supported by the simulation experiment by Robbennolt that provided jurors and judges to decide punitive damages in variations of a products liability case.[58] In this instance we see evidence of convergent validity that enhances our confidence in ecological validity.

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[53] Heuer L. & Penrod S., *Trial Complexity: A Field Investigation of Its Meaning and Effects*, Law and Human Behavior 18: 29–51 (1994).

[54] Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's*, The American Jury, 2 Journal of Empirical Legal Studies 171 (2005).

[55] Hannaford P., Hans V. & Munsterman, G. *Permitting Jury Discussions During Trial: Impact of the Arizona Jury Reform*. 24 Law and Human Behavior 359 (2000).

[56] G. Thomas Munsterman et al., A Comparison of The Performance of Eight- and Twelve-Person Juries (1990).

[57] Theodore Eisenberg et al., *Juries, Judges and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996 and 2001 Data*, 3 J. Empirical Legal Stud. 263 (2006).

[58] Jennifer Robbennolt, *Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 Law and Human Behavior 315 (2002).

Patent infringement cases can involve incredibly arcane technical testimony about such matters as the underlying chemical structure of drugs or the physics of electronic duplicating processes. Many of the technical issues in patent cases are decided by the judge, often with assistance from special masters. The remaining parts of cases that juries decide usually involve testimony and documents revolving around the issue of whether the defendant intentionally set out to violate the plaintiff's patent, an issue sometimes referred to as "willfulness." "Willfulness" requires judgments about the motivations of human actors rather than highly technical decisions.

Katherine Moore examined verdicts in all patent cases that reached trial between 1983 and 2000 and whose verdicts were appealed to a higher court, a total of 533 jury trials and 676 trials by judge alone.[59] She then compared the respective sets of verdicts with the rates at which the appeals courts agreed with the verdicts or overturned them. Although a number of additional analyses caused Moore to equivocate she concluded:

> At first blush, the results of the study suggest that complaints about jury bias and incompetency are unfounded. Judges and juries decide some issues differently. For example, juries are significantly more likely to find patents valid, infringed and willfully infringed than judges. The differences, however, are not as profound and pervasive as one might expect. Judges and juries find patents enforceable with similar frequency. Additionally, juries seem as "accurate" in their decision-making as judges are, as measured by appellate affirmance rates.[60]

Like the Eisenberg study, the main methodological problem with the Moore study is that the disputing parties elected to have certain issues tried before juries and in others they decided to have trial by judge alone. Even with statistical controls we cannot be sure if apples were being compared to oranges.[61] A good laboratory simulation would add insight to Moore's findings.

Comparing Agreement between Health Professionals and Juries in Medical Malpractice Cases

Taragin et al. conducted a study of 8,231 insurance claims from a major New Jersey doctors' liability insurance company.[62] Each time a malpractice claim was made against a doctor the insurance company had its own independent experts

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[59] Moore K. Judges*, Juries, and Patent Cases—An Empirical Peek Inside the Black Box,* 99. Michigan Law Review 365 (2000).

[60] *Id.* at 368.

[61] Vidmar N., *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 Suffolk University Law Review1205 (1994).

[62] Mark Taragin, Mark et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*. 117 Annals of Internal Medicine 780 (1992).

review the medical records to assess whether the doctor had been negligent. The purpose of the review was to aid the insurer in deciding whether to contest the claim or try to settle it before trial. Jury verdicts favoring the doctor tended to be ones which had been classified as "defensible," and verdicts favoring the plaintiff tended to be ones classified as "indefensible" or "unclear." In addition Taragin et al. found that the jury outcome was not related to severity of the patient's injury, strongly suggesting that sympathy for the plaintiff did not play a role in the juries' decisions. Sloan et al. conducted a similar study, although with a smaller sample of cases.[63] Once again the negligence ratings of physician panels were positively related to the outcomes of the cases that went to trial.

A 2006 study by Studdert et al. in the *New England Journal of Medicine* used a similar methodology to Taragin et al. using a random sample of insurer files from four regions of the country.[64] A total of 1,452 claim files were reviewed by independent physicians for specific purposes of the research. Fifteen percent of claims were decided by jury trial. Plaintiffs prevailed in only 21 percent of trials, but the average award at trial was much larger than cases settled outside of court; i.e., $799,365 versus $426,099. Claims that the medical experts decided were claims without medical error were more likely to go to trial. Claims judged to involve medical error were almost five times as likely to receive compensation as claims judged likely to have involved no medical error.

Comparing Jury Verdicts against Pre-trial and Post-trial Settlements

One under-explored research methodology is a comparison of jury verdicts to settled cases and to settlements after the jury has returned its verdict. Recent research on medical malpractice cases provides a partial exception. One study showed that, especially in cases involving large awards, settlement amounts in cases that were settled without a lawsuit even being filed were as large as, and more frequent than, awards rendered by juries.[65]

Verdict Settlements Compared to Admitted Liability Claims

Even if jury verdicts for plaintiffs are settled for less than the verdict there is still a question of whether the final amounts are reasonable. A Florida archive of closed medical malpractice claims allows an indirect test of that

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[63] Frank Sloan et al., *Liability* in SUING FOR MEDICAL MALPRACTICE (in Frank Sloan et al., eds.)., (1993); see also the chapter by Landsman, this volume.

[64] David Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENGLAND JOURNAL OF MEDICINE 2024 (2006).

[65] *Neil Vidmar & Kara McKillop, Judicial Hellholes: Medical Malpractice Claims, Verdicts and the "Doctor Exodus" in Illinois*, **59** VANDERBILT LAW REVIEW 2006.

issue.[66] The data indicate that for every jury verdict over $1 million there are more than two times as many claims settled without a lawsuit being filed, presumably because defendant liability is so clear that it would be useless to contest the claim.

Horizontal versus Vertical Equity in Jury Awards

Another issue regarding damage awards involves their variability.[67] The debate is characterized as involving two dimensions, vertical equity and horizontal equity.[68] In laboratory simulations as well as in some archival research studies jury awards tend to be positively related to the seriousness of the injury suffered by the plaintiff. In short, there is vertical equity. However, the alleged problem appears to be one of horizontal inequity; that is, there is a lot of variability within levels of injury seriousness, suggesting horizontal inequity. For example, Bovbjerg, Sloan, and Blumstein found that the magnitude of jury awards in a sample of medical malpractice tort cases positively correlated with the severity of the plaintiffs' injuries, except that injuries resulting in death tended to result in awards substantially lower than injuries resulting in severe permanent injury, such as quadriplegia.[69] Later research by Sloan and van Wert, however, provided data offering a plausible explanation for this variability, namely that economic losses vary considerably within each level of injury severity.[70] The economic loss for a quadriplegic who is forty years old with a yearly income of $200,000 and a family of three young children would ordinarily be much greater than an identical quadriplegic who is retired, widowed, seventy-five years old, has no dependents, and whose annual income never exceeded $35,000.

Summary and Conclusions

This essay should not be taken as concluding that simulation experiments should be abandoned. Nevertheless, I have raised important questions bearing on the ecological validity of simulation experiments conducted in the absence

[66] Vidmar, MacKillop, & Lee, *Million Dollar Medical Malpractice Cases in Florida: Post-Verdict and Pre-suit Settlements*, 59 Vanderbilt Law Review 2006.

[67] Edie Greene & Brian Bornstein, Determining Damages: The Psychology of Jury Damage Awards (2003) at 24.

[68] Michael Saks et al., *Reducing Variability in Civil Jury Awards*, 21 Law and Human Behavior 243–56 (1997).

[69] Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW University Law Review 908 (1989).

[70] Frank A. Sloan & Stephen S. van Wert, *Cost of Injuries*, in Suing for Medical Malpractice (Frank A. Sloan et al., eds.) 123, 139–40 (1993).

of data collected by other methodologies. Examples from actual civil jury deliberations are used to demonstrate what I believe to be major weaknesses with many simulation experiments. At the same time, I have tried to be constructive by giving examples of alternative research methodologies, giving particular emphasis to juror interviews preceded by trial observations. I have pointed out that qualitative data methodologies were used by some of our most revered social psychologists who also knew how to do laboratory experiments based on those observations; jury researchers could profit from their example.

What is the Study of Jury Decision Making About and What Should it be About?

Richard L. Wiener

I write this commentary as a troubled jury researcher who has devoted a great deal of time and effort to the study of topics directly or indirectly related to both criminal (Wiener, 2003; Wiener et al., 1998; Wiener, Pritchard, & Weston, 1995; Wiener, Richmond, Seib, Rauch, & Hackney, 2002; Wiener et al., 2004) and civil (Wiener et al., 2002; Wiener & Hurt, 2000; Wiener, Voss, Winter, & Arnot, 2005; Wiener, Winter, Rogers, & Arnot, 2004) jury decision making. I have studied in depth the problems of culpability and responsibility assessments in capital murder and sexual misconduct, especially sexual harassment, from both theoretical and applied points of view. The papers in this section of this volume (see chapters by Hastie and Vidmar), authored by two eminent scholars in the field, raise some important issues for the psychological study of jury decision making. In many respects Professor Vidmar's work presented an indictment of our field; much of what he wrote is applicable to my work as well as to the work of most of my colleagues. At first, the indictment greatly distressed me. But, as I read on I found that not all was lost because both Professor Vidmar and Professor Hastie offered in their own ways some ameliorative suggestions, which if taken seriously could go a long way toward helping us overcome some of our most serious limitations.

To be blunt, the problem, according to Professor Vidmar, is that we, as a collective field are simply not sure what we are actually studying. To make matters worse, it is not at all clear that we agree on what we ought to be studying. Professor Vidmar in his paper identified as the most important structures to study the effects of the judge's preliminary comments, the attorneys' opening statements, the direct and cross examinations of plaintiffs' and defendants' attorneys, the actual testimony of the witnesses, the testimony of experts, attorneys' closing arguments, and finally jury instructions. Each of these important structural issues could influence the essential substantive judgments that judges and juries make in negligence trials, such as the defendant's

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negligence, the injury that the plaintiff suffered, the causal relationship between the negligent act and the injury, plaintiff's contributory negligence, and finally the amount of compensatory and punitive damages owed to the plaintiff. Professor Vidmar complains, justifiably, that jury simulation studies often fail to examine the relationship between the structural elements of civil trials and the judgment outcomes. Further, they fail to take into account the effects of issues such as plaintiff injuries suffered prior to the claim, calculations of special damages, and even the calculation strategies for general damages.

If only the problem were that simple, we experimental researchers could at least come up with some creative designs to model these structures and begin to understand how they might influence juror and jury decisions. However, for at least three important reasons the problem is much more complicated. First, as Professor Vidmar explains, each trial is itself a unique event with its own set of idiosyncratic procedures. There are variations in whether damages or liability is the central issue, the number of plaintiffs and defendants involved, the roles of each in the complaint, the role of third parties to the lawsuit in judging comparative negligence, the absence of key parties, and so on. How can experimental researchers possibly model even a small sample of these events with enough contextual integrity to learn much of anything about how jurors and juries reach decisions in real civil cases?

A second issue concerns the motivational and emotional component of ecological validity. Cognitive and social cognitive psychologists avoided studying the impact of motivation and emotion on judgments for many years after the cognitive revolution and instead focused on the cognitions of individual decision makers as they viewed, processed, and evaluated information online. For many tasks, this strategy was and is appropriate. However, for many other social judgments the motivational and emotional value of the "to be processed information" are not so easily dismissed (c.f., Forgas, 2001; Higgins, 1997; Kunda, 1990). The problem is especially acute in problems related to legal decision making among litigants, attorneys, judges, and especially jurors (Wiener, Bornstein, & Humke, 2006; Wiener, 2007). For civil jurors deciding liability and damages in hypothetical cases, the role of emotion and motivation may be very different than it is for those deciding actual liability and assigning real damages in court for which the jury's behavior has significant and potentially momentous consequences (Bornstein & McCabe, 2005). How is it possible to model experimentally the motivational and emotional processes implicated in jury decision making as it occurs in civil trials? How can experimental researchers using simulated techniques know what emotions and motivations to build into their models and how to enrich our experimental paradigms with these complex phenomena?

Third, much of our research relies on samples of convenience rather than samples that approximate the motivational and emotional complexities of real jurors making decisions in real cases. Although many researchers have relied on Professor Bornstein's 1999 analysis to suggest that college students reviewing trial scenarios behave similarly to jury eligible decision makers exposed to real

cases that involve complicated deliberations and negotiations, some of us remain very uneasy generalizing from simulated jury studies to real world trials. I was particularly struck by Professor Vidmar's description of this situation. He writes about real jurors, "In evaluating the evidence, jurors are instructed to apply their experience, common sense and judgment in evaluating evidence, deciding negligence and awarding damages. As I will suggest below with some examples, the jurors' richness of life experience is applied in reasoning about the evidence and proposing analogies to their own life experiences. Moreover, different perspectives on the evidence and judgments on damages have to be reconciled through processes of negotiation among the jurors." (p. 35–65). Vidmar asserts that individual differences in the jurors' cognitive, motivational, and emotional structures influence the self-referencing perspectives. Others have found strong support for the role of individual differences in self-referencing in both basic research in social psychology (Van Boven & Loewenstein, 2005a,b; Van Boven, Loewenstein, & Dunning, 2005) and applied research in legal decision making (Wiener et al., 2000, 2002, 2004). Moreover, Professor Vidmar's qualitative analyses of the comments of deliberating jurors in the Arizona jury project shows specifically and convincingly how jurors' own perspectives determine how they deliberate and negotiate judgments in these types of cases (see also, Diamond, Vidmar, Rose, Ellis, & Murphy, 2003). Can we support empirically the conclusion that college student samples are similar enough to actual jurors with regard to cognitive, motivational, and emotional attributes to conclude confidently that simulated studies using samples of convenience generalize to actual cases in which jurors with more diverse experiences, backgrounds, and perspectives decide liability and damages?

Are these issues real concerns? Do our simulated experiments that use college student simulated jurors and vignette summaries as trial materials capture the essence of jury decision making, or do they miss many of the more important subtleties of the juror and jury decision making processes? According to the 1999 paper in which Professor Bornstein examined and contrasted existing studies that allowed a comparison of these issues the problems may not be as serious as Professor Vidmar suggests and supports with his qualitative analysis of actual jury deliberations that occurred during the trials that made up the Arizona Civil Jury Project. I do not believe that "the jury is in" on this important issue. Much more work is needed to compare the performance of mock jurors sampled for specific cognitive, emotional, and motivational attributes in simulated experiments that vary along systematic lines the methods that they use to present the facts and law of the cases. Experimental studies that examine the interactions between type of case, type of mock jury participant, variations in specific facts, and most importantly, variation in the elements of law have the potential to tell us a great deal about the uniqueness of juror and jury judgments, at least in the simulated studies themselves. The presence of moderating effects could suggest that researchers need to consider these factors in our models, conclusions, and recommendations to the courts.

Some studies of systematic work show effects for samples and materials when researchers systematically manipulate them. For example, there is evidence on the criminal side (Pfeifer & Ogloff, 1991) that racial bias in verdicts exists in vignette studies that do not include jury instructions, relative to those that do offer approved charges. Further, in more recent work, Mitchell, Haw, Pfeifer, and Meisner (2005) conducted a meta-analysis of 46 independent tests across 36 studies that examined the effects of racial bias in simulated verdict judgments. Indeed, the researchers did find a small but significant effect across all studies such that jurors were more likely to find guilty defendants of other races than their own. However, more importantly for the current purposes, the meta-analysis found several moderators of the racial bias effects, that is, there were some very troubling interactions. Racial bias was more evident for Black as compared to White mock jurors, when a continuous scale measured guilt (as compared to more ecological jury scales that included guilty vs. not guilty options), and when jury instructions were absent in the materials. Further, a similar analysis on sentencing measures showed moderating effects for sample such that community samples showed more profound effects of racial bias compared to student samples.

As I read Professor Vidmar's analysis and reflected back on what we know about simulated jury research, I became more and more concerned for our field. Vidmar is certainly correct in his discussion of Cook and Campbell's treatment of internal and external validity and in his analysis of the current use of ecological validity. Yet there are two additional concepts that one can borrow from the research methodology and program evaluation literature for which Cook and Campbell (1969) share patriarchic stature. First, is the notion of construct validity (Shadish, Cook, & Campbell, 2002), which is concerned neither with causal inference (internal validity) nor with generalizing across persons, settings, or times (external validity). Instead, construct validity is about the ability of the research design to represent and study the constructs of the real world so that the relationships observed among those constructs reflects the reality in the real world. The goal of social science research is not only to maximize the internal and external validity of its product but also to maximize the construct validity of research results (Cook & Campbell, 1979). The problem is not one of finding the perfect research methodology, which is the method that best captures the constructs of interest while assuring both internal and external validity. Instead, the most productive approach involves admitting that all research methodologies are inherently flawed and that truth emerges from the consensus of designs, each of which is associated with a different type of systematic error.

How does one maximize the veridicality of the research results? The answer lies in using multiple methods, each making its own types of errors but errors that are maximally independent across approaches. This theory, referred to as "positivist critical multiplism," is at the heart of the philosophy of science that Cook and Campbell (1979) espoused. In short, the argument goes that using maximally different research strategies to converge on similar findings increases

our confidence in the validity of those findings because each method is associated with unique systematic error. The value in Vidmar's paper in this volume is to point out that one method of triangulation that jury researchers in psychology tend to ignore is the qualitative method. While that method has its own biases (e.g., memory biases, incomplete records, biased sampling, and the like), it offers a different vantage point than the traditional simulated jury studies that we research psychologists favor and feel so comfortable conducting. The answer to the construct validity problem in civil jury research is not to find the gold standard research methodology. Rather, it is to understand the strengths and weaknesses of all methods and triangulate findings using methods that have different sources of systematic errors in the way in which they define, sample, measure, and manipulate the jury processes and outcomes that together constitute the processes and substantive decisions in civil trials as Vidmar so clearly articulates them in this volume.

I always feel better when I can reframe a seemingly unsolvable methodological conundrum as a problem for positivist critical multiplism, at least for a short time. My comfort is short lived because as soon as one embraces the value of multiple methods, multiple operationalizations, multiple measures, and multiple designs to solve a problem, the realization that there are an almost limitless number of ways to define, measure, sample, manipulate, and control conceptual constructs is not far behind. How then can we possibly decide which constructs to be concerned with as essential in conducting civil (or criminal) jury studies? There are so many candidates, only some of which does Professor Vidmar introduce in his paper in this volume. Vidmar's answer appears to be to allow the data, that is, the trial facts and juror statements, to determine the critical factors and to follow the story in the case to direct the research direction. While I do not disagree that there is value to this most inductive approach to studying how jurors reach decisions in civil cases, I like other research psychologists am interested in developing a more general model or a theory of jury decision making. The goal then for jury researchers that adopt a psychological method and perspective is to integrate the issues at law with the psychology of the decision maker. I am not so sure that a purely qualitative methodology will accomplish that task.

What is required is an approach that directs researchers' attention to the correct legal questions, one that does so by identifying the assumptions that the law makes about human behavior and turns those assumptions into empirical questions. I and my colleagues have written about such an approach to studying legal decision making, referring to it as *social analytic jurisprudence* (Wiener, 2003; Wiener, Block-Lieb, Gross, & Baron-Donovan, 2005; Wiener, et al., 2006). There are three steps to this model. First, the legal psychologist describes in detail the law that governs the case or cases that are under investigation carefully identifying assumptions that the law makes about human behavior. Second, the researcher frames the assumptions as empirical questions that are answerable through psychological or social scientific theory or research results. At the same time, the researcher identifies theories or models and applies them

to the problem(s) under investigation to answer the empirical questions in order to test the assumptions that the law makes about human behavior. Third, the empiricist designs studies and collects data to test the efficacy of the theory to answer the empirical questions and in so doing tests the assumptions that the law has made about human behavior. The stronger tests will include multiple investigations, each using maximally different methodologies, measures, and research designs so that the answers flow from a research program that establishes convergent validity through a process of critical multiplism.

This approach requires that the investigator adopt a theoretical model to answer the questions under investigation because without such a model the research will likely flounder under the large number of variations of civil jury structures and crucial judgments that are potentially at play in any given civil law suit. Adopting a theoretical model to answer the legal questions upon which the research focuses is one way to make the investigation manageable and at the same time improve its construct validity. It is true that no single or even group of studies will answer all possible threats to construct validity in civil jury studies, but adopting a theoretical guideline at least points out the constructs that are under investigation and that need careful attention and definition. One such theoretical approach is Pennington and Hastie's (1986) story model of jury decision making.

Consider Professor Hastie's chapter in the current volume that summarized the story model and applied it to the problem of compensatory and punitive damages in jury decision making. In prior work, Pennington and Hastie (1986, 1988, 1991, 1992) laid out this model, which borrowed heavily from discourse processing in cognitive psychology, and tested it with criminal juror decision making. The model argues that jurors at trial integrate disparate testimonies offered out of context, but that they can best do so only with the aid of a story construction process. That is, jurors listen to the jumbled evidence that comes out at trial and organize that information into abstract stories with general narrative schemata. The story includes a setting with actors, physical conditions, knowledge states, and a problem event. The protagonist (here the plaintiff and/or defendant) reacts emotionally to the problem (facts described at trial) and enacts goals intentionally designed to resolve the problem. The stories include consequences and reactions to the consequences. Once jurors integrate the testimony into a story script, they apply the law of the case, as they understand it, accepting the elements of the law that best fit the model that they have constructed using the case facts and their own inferences. The story model has been tested and is well accepted in the decision making literature applied to criminal trials.

The story model does not offer a complete theory about civil trial structures or about all the essential juror or jury judgments that make up every civil case. However, it does offer a model that identifies the most important psychological constructs (goals, intentions, causal links, emotional reactions, and so on), which researchers need to measure or manipulate to explain jury decision making in some well-defined realm of inquiry. For example, Hastie, Schkade,

and Payne (1998) approached the problem of juror judgments in cases of punitive damages using an approach that is very similar to social analytic jurisprudence. First, they identified the law of punitive damages, described it in detail, and then analyzed instructions that jurors must follow to assess the availability of punitive damages. In this manner, they showed that the law assumes that jurors test the behavior of defendants against a number of very specific tests (legal constructs) to determine if the defendant's conduct was so reckless as to allow the assessment of punitive damages. Hastie et al. (1998) found evidence that mock jurors did not consider each of the instruction issues in deciding whether to assess punitive damages. Furthermore, Hastie (this volume) reports data that specifically offers the story model as a theory that explains why jurors are not likely to address adequately the instructional structure that the law requires to assess punitive damages. Professor Hastie uses the story model to suggest that jurors will construct an answer to the problem of punitive damages not by applying the elements of law articulated in the jury instructions but rather by creating a story of each case, drawing inferences from the stories that they created, and then judging recklessness (a prerequisite for awarding punitive damages) based upon those stories.

Using a student sample, Hastie (this volume) corroborates the findings of Hastie et al., 1998. The student mock jurors did create narrative stories for each case complete with inferences about the causal links that tied together the elements of testimony. Furthermore, only one student juror applied the theory in the law (i.e., tested all the elements in the instructions) to determine the appropriateness of punitive damages for the cases being considered. The modal approach to assessing punitive damages was to apply a mixed bag of the elements in the instructions to the stories that they had created and infer the existence of recklessness according to the fit of the stories to their own standards of recklessness.

It is clear that the Hastie et al. (1998; this volume) studies do not address adequately all the trial structures or all essential judgments that jurors make in every case. However, the studies draw strength through the application of a model or theory to study the ways in which jurors reach judgments about damages. If nothing else, the studies show convergence of findings across time, samples, and methods (the first using jury eligible participants with more natural trial like stimuli, and the second using college students with a much more limited simulation method). Therefore, the fact that they agree adds some veridicality to the conclusions that they reach. Each study included both overlapping bias (i.e., error common to all the research designs) and unique systematic bias (error prevalent in specific research designs).

These Hastie studies do add considerable persuasiveness through the application of a theoretical model using multiple methodologies, definitions, and operationalizations. They are probative but certainly not dispositive of the way in which jurors reach punitive damage decisions. They leave the reader who has followed Professor Vidmar's writings on this topic wondering how real jurors in real cases might reach these same judgments and damage awards. That is, the

methods share bias that is common to simulated studies and therefore leave the reader asking about some of the other empirical assumptions in the law and questions that those assumptions raise, such as: How do jurors negotiate punitive damage awards as a group? How do variations in instructions influence the stories that jurors create? What happens when jurors' stories conflict with each other at the end of the trial? How do judgments of liability interact with judgments of damages? What about plaintiff damages suffered prior to the claim? How would jurors calculate general and special damages in these types of cases? The list goes on, and the empirical issues that need more investigation seem to grow almost endlessly.

Furthermore, the story model is only one theory that researchers can apply to the problem of studying the way in which jurors assess and assign damage awards. There are many other legal assumptions that the law makes about the role of juror motivation, juror emotion (or lack of emotion), and juror comprehension that remain unaddressed in these studies. Theories of motivation such as Higgins' (1997) distinction promotion (goal seeking) and prevention (diligence seeking) based regulatory focuses could help answer questions and test assumptions about the way in which jurors use instructions to reach damage decisions. Cognitive appraisal theories of emotion (Lerner & Keltner, 2000, 2001; Lerner & Tiedens, 2006; Smith & Ellsworth, 1985), which identify underlying cognitive search for certainty, control, responsibility and other dimensions might help us understand the way in which jurors interact to negotiate damages when they are in disagreement. Finally, affective forecasting (i.e., anticipating the affective responses to outcomes in the psychological and real worlds) (Wilson & Gilbert, 2003, 2005) has the potential to illustrate the effect of juror expectations on final damage awards. Moreover, these are but just a few examples of theoretical models that researcher can bring to bear to the structural issues and essential judgments that make up civil trials.

Finally, it is important not to lose sight of the important concern that Professor Vidmar raises, namely, that there is no substitute for observing actual trials and interviewing real jurors. All simulation studies share the single bias that the decision makers know that they are not really assessing damages that any actor will ever have to pay (Bornstein & McCabe, 2005). Therefore, as Professor Vidmar points out, there is great value in testing the assumptions and investigating jury decision making theory with data from actual jury trials. It would indeed be interesting to gather some self-report data at the end of the trial from jurors who have deliberated and reached punitive damage awards in cases like those that Professor Hastie and his colleagues simulated. Certainly, after reading the Hastie simulations one wants to learn whether real jurors report that they generated stories with causal inferences between episodes and whether they applied systematically all the elements of the damage instructions to reach awards in those cases. These are important questions that story model researchers should find very important and interesting.

Professor Vidmar and Professor Hastie wrote very different papers for this volume and they themselves show maximally different approaches to studying

civil jurors and civil juries. When I considered their papers separately, I found myself very concerned that our field is troubled by a great sense of disagreement among even some its foundational leaders. However, the one lesson that I have learned from studying social science in the law is that there is strength and not weakness in maximally different approaches, theories, models, and research assumptions. In the end, I think that we do know what we are studying and the fact that we take different approaches with maximally different biases is a good thing. This is the only practical approach, and it is only by traversing multiple paths that we will ever be able to develop ecologically representative models that tell us how jurors and juries actually do reach judgments and decisions. I am excited to see what the next generation of models and methodologies will contribute to our understanding of how civil juries reach their decisions.

References

Bornstein, B. (1999). The ecological validity of jury simulations: Is the jury still out? *Law and Human Behavior, 23,* 75–91.

Bornstein, B.H., & McCabe, S.G. (2005). Jurors of the absurd? The role of consequentiality in jury simulation research. *Florida State Law Review, 32,* 443–467.

Cook, T.D., & Campbell, D.T. (1979). *Quasi-experimentation: Design and analysis for field settings*. Chicago, Illinois: Rand McNally.

Diamond, S.S., Vidmar, N., Rose, M., Ellis, L., & Murphy, B. (2003). Jury discussions during civil trials: Studying an arizona innovation, *University of Arizona Law Rev*iew, *45,* 1–81.

Forgas, J. (2001). Affect and information processing strategies: An interactive relationship. In J.P. Forgas (Ed.), *Feeling and thinking: The role of affect in social cognition* (pp. 253–282). Cambridge, UK: Cambridge University Press.

Hastie, R., Schkade, D.A., & Payne, J.W. (1998). A study of juror and jury judgments in civil cases: Deciding liability for punitive damages. *Law and Human Behavior, 22,* 287–314.

Higgins, E.T. (1997). Beyond pleasure and pain. *American Psychologist, 52,* 1280–1300.

Kunda, Z. (1990). The case for motivated reasoning. *Psychological Bulletin, 108,* 480–498.

Lerner, J.S., & Keltner, D. (2000). Beyond valence: Toward a model of emotion-specific influences on judgment and choice. *Cognition and Emotion, 14,* 473–493.

Lerner, J.S., & Keltner, D. (2001). Fear, anger, and risk. *Journal of Personality and Social Psychology, 81*(1), 146–159.

Lerner, J.S., & Tiedens, L.Z. (2006). Portrait of the angry decision maker: How appraisal tendencies shape anger's influence on cognition. *Journal of Behavioral Decision Making, 19,* 115–137.

Mitchell, T.L., Haw, R.M., Pfeifer, J.E., & Meissner, C.A. (2005). Racial bias in mock juror decision-making: A meta-analytic review of defendant treatment. *Law and Human Behavior, 29,* 621–637.

Pennington, N., & Hastie, R. (1986). Evidence evaluation in complex decision making. *Journal of Personality and Social Psychology,* 51, 242–258.

Pennington, N., & Hastie, R. (1988). Explanation-based decision making: The effects of memory structure on judgment. *Journal of Experimental Psychology: Learning, Memory, and Cognition, 14,* 521–533.

Pennington, N., & Hastie, R. (1991). A cognitive theory of juror decision making: The Story Model. *Cardozo Law Review, 13,* 519–557.

Pennington, N., & Hastie, R. (1992). Explaining the evidence: Tests of the story model for juror decision making. *Journal of Personality and Social Psychology, 62,* 189–206.

Pfeifer, J.E., & Ogloff, J.R.P. (1991). Ambiguity and guilt determinations: A modern racism perspective. *Journal of Applied Social Psychology, 21,* 1713–1725.

Shadish, W., Cook, T., & Campbell, D. (2002). *Experimental and quasi-experimental designs for generalized causal inference*. Boston: Houghton-Mifflin.

Smith, C.A., & Ellsworth, P.C. (1985). Patterns of cognitive appraisal in emotion. *Journal of Personality and Social Psychology, 48*(4), 813–838.

Van Boven, L., & Loewenstein, G. (2005a). Cross-situational projection. In M. Alicke, J. Krueger, & D. Dunning (Eds.), *Self and social Judgment* (pp. 43–64). Psychology Press: New York.

Van Boven, L., & Loewenstein, D. (2005b). Empathy gaps in emotional perspective taking. In S. Hodges & B. Malle (Eds.), *Other minds: How humans bridge the divide between self and others* (pp. 284–297). Guilford Press: New York.

Van Boven, L., Loewenstein, G., & Dunning, D. (2005). The illusion of courage in social predictions: Underestimating the impact of fear of embarrassment on other people. *Organizational Behavior and Human Decision Processes, 96,* 130–141.

Wiener, R.L. (2003). Death penalty research in Nebraska: How do judges and juries reach penalty decisions? *Nebraska Law Review, 81,* 301–320.

Wiener, R.L. (2007). Law and Everyday Decision-Making: Descriptive and Normative Models (2007). In Wiener, R.L., Bornstein, B.H., Schopp, R., & Willborn, S. (Eds.) *Social Consciousness in Legal Decision Making: Psychological Perspectives*. (pp. 3–34) New York: Springer Press.

Wiener, R.L., Block-Lieb, S., Gross, K., & Baron-Donovan, C. (2005). Unwrapping assumptions: Applying social analytic jurisprudence to consumer bankruptcy law and policy. *American Bankruptcy Law Journal*, *79,* 453–483.

Wiener, R.L., Bornstein, B.H., & Humke, A. (2006). Emotion and the law: A framework for inquiry. *Law and Human Behavior,* 30, 231–248.

Wiener, R.L., Hackney, A., Kadela, K., Rauch, S., Seib, H., Warren, L., & Hurt, L.E. (2002). The fit and implementation of sexual harassment law to workplace evaluations. *Journal of Applied Psychology, 87,* 747–764.

Wiener, R.L., Holtje, M., Winter, R.J., Cantone, J.A., Block-Lieb, S., & Gross, K. (2006). Psychology and BAPCPA: Enhanced disclosure and emotion. *Missouri Law Review, 71,* 1003–1033.

Wiener, R.L., & Hurt, L.E. (2000). How do people evaluate social-sexual conduct: A psycholegal model. *Journal of Applied Psychology, 85,* 75–85.

Wiener, R.L., Hurt, L.E., Thomas, S.L., Sadler, M.S., Bauer, C.A., & Sargent, T.M. (1998). The role of declarative and procedural knowledge in capital murder sentencing. *Journal of Applied Social Psychology, 28,* 124–144.

Wiener, R.L., Pritchard, C.C., & Weston, M. (1995). Comprehensibility of approved jury instructions in capital murder cases. *Journal of Applied Psychology, 80,* 455–467.

Wiener, R.L., Richmond, T.L., Seib, H.M., Rauch, S.M., & Hackney, A.A. (2002). The psychology of telling murder stories: Do we think in scripts, exemplars, or prototypes? *Behavioral Sciences and the Law, 20,* 119–139.

Wiener, R.L., Rogers, M., Winter, R., Hurt, L.E., Hackney, A., Kadela, K., Seib, H., Rauch, S., Warren, L., & Morasco, B. (2004). Guided jury discretion in capital murder cases: The role of declarative and procedural knowledge. *Psychology, Public Policy, and Law, 10*(4), 516–576.

Wiener, R.L., Voss, A.M., Winter, R.J., & Arnot, L. (2005). The more you see it, the more you know it: Memory accessibility and sexual harassment judgments. *Sex Roles, 53,* 807–820.

Wiener, R.L., Winter, R., Rogers, M., & Arnot, L. (2004). The effects of prior workplace behavior on subsequent sexual harassment judgments. *Law and Human Behavior, 28*(1), 47–67.

Wilson, T., & Gilbert, D.T. (2005). Affective forecasting. *Current Directions in Psychological Science, 14*(3), 131–134.

Wilson,T.D., & Gilbert, D.T. (2003). Affective forecasting. In M.P. Zanna (Ed.), *Advances in experimental social psychology* (Vol. 35, pp. 345–411). San Diego, CA: Academic Press.

Section II
The Relationship between Compensatory and Punitive Damages

Crossing the Punitive-Compensatory Divide

Catherine M. Sharkey

Introduction

Received judicial and academic wisdom holds that "in our judicial system, compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes."[1] Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered," while punitive damages are "intended to punish the defendant and deter future wrongdoing."[2] Likewise, the notion of a punitive-compensatory divide, or the alleged rigidity of these doctrinal categories of damages, drives the approach to tort policy in many realms, including the highly-charged debate surrounding tort reform—perhaps most controversially, proposals for caps on damages.

At the same time, there is acknowledgement that, for example, damages for emotional distress traverse this punitive-compensatory divide. According to the *Restatement (Second) of Torts*, "In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both."[3] This theme was echoed by the U.S. Supreme Court in a recent punitive damages case, when it remarked that, although "it is a major role of punitive damages" to condemn conduct leading to "outrage and humiliation," "*[c]ompensatory damages* [may] . . . already contain this *punitive* element."[4]

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[1] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

[2] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). For an elaboration of the distinction between the punishment (or retributive) view of punitive damages and the law-and-economics inflected deterrence-based view, *see* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 356–70 (2003).

[3] Restatement (Second) of Torts § 908 cmt. c (1979).

[4] *State Farm*, 538 U.S. at 426 (emphases added).

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What is the import of this blurred distinction between emotional distress compensatory damages and punitive damages? Does it become especially significant, for example, when punitive damages are not an available avenue? Over two decades ago, the Wisconsin Supreme Court speculated that "if punitive damages are not allowed, juries [will] give vent to their desire to punish the wrongdoer under the guise of increasing the compensatory damages, particularly those for pain and suffering."[5] More recently, in examining modern statutory and judicial constraints upon punitive damages, Victor Schwartz and Leah Lorber have resurrected this theme, claiming that "plaintiffs' lawyers . . . have poured new wine of punishment evidence, once used to obtain punitive damages, into old bottles of pain and suffering awards."[6] Tom Baker's interviews with plaintiffs' attorneys lend a modicum of support: "as the plaintiffs' lawyers report, in practice there is no clear dividing line between compensatory and punitive damages. Compensatory damages can punish, just as punitive damages can compensate."[7]

Academics are uncovering a parallel phenomenon at work in jury decision-making. As Cass Sunstein and colleagues report, "[a]lthough pain-and-suffering awards are essentially compensatory, there can be little doubt that such awards sometimes reflect jury judgments about the egregiousness of the defendant's behavior. Hence, such judgments are likely to have a punitive component."[8] With even greater conviction, Michelle Anderson and Robert MacCoun pronounce that "[t]he dynamic relationship between the two awards might resemble a water-filled balloon; if one pushes down on one end, the other pops up."[9]

The time is ripe to consider the implications of the collapsing punitive-compensatory divide. My goal in this chapter is to uncover judicial recognition of the crossover or "substitution" phenomenon, and to tie these developments to a considerable—and growing—body of empirical evidence that suggests the validity of such a substitution effect.[10] Experimental mock juror studies

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[5] *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 447 (Wis. 1980).

[6] Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment"*, 54 S.C.L. Rev. 47, 49 (2002).

[7] Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 Wis. L. Rev. 211, 212.

[8] Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2133 (1998).

[9] Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 Law and Hum. Behav. 313, 328 (1999).

[10] There are many contexts in which, because a particular damages avenue is closed off to the jury, substitution may occur. For example, sexual harassment damages, which are limited by a federal statutory cap, may be unlimited under state law. *See, e.g.*, Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. of Empirical Leg. Stud. 1 (2006). David Leebron posited an analogous effect in the realm of wrongful death damages. *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 305 (1989) ("[J]uries intuitively feel that wrongful death awards, constrained as they are primarily to reflect lost income, systematically understate the appropriate measure of damages. [As a result] . . . juries are presumed to add an extra amount

comprise the bulk of the existing empiricism. Jonathan Klick and I have contributed to this body of evidence an econometric regression analysis using broadly representative state court jury trial data.[11] Until recently, this crossover hypothesis, although widely presumed in certain circles, had not been tested empirically in the real world. The chapter concludes with an exploration of alternative explanations for the crossover effect that has now been demonstrated using divergent experimental and econometric techniques.

The Crossover Phenomenon

Our judicial system as a whole would seem to have a vested interest in retaining the punitive-compensatory dichotomy, in large part because of many policies and doctrines that are built upon its foundation. This functional account of damages—and the sharp delineation between compensatory and punitive damages that it draws—corresponds to the fact-law distinction that has weighed heavily in state constitutional analysis of limitations upon compensatory and punitive damages,[12] and has been recognized as critical to the federal constitutional analysis of the different standards for appellate review of compensatory and punitive damages.[13]

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to an award by assessing substantial damages for pain and suffering prior to death."). Other substitution effects have been explored in the criminal law context. *See, e.g.*, Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43 (1998); Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1135 (2002) ("Law enforcement can create substitution effects with respect to different offenses: If police begin a crackdown on heroin, for example, that may simply induce individuals to use other drugs for which penalties are not as strongly enforced."). Indeed, this "hydraulic" effect of selective regulation or restrictions imposed by law has been remarked upon in numerous contexts. *See, e.g.*, Pamela S. Karlan & Samuel Issacharoff, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999) (campaign finance context); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (incomplete regulatory system point in criminal law context).

[11] Jonathan Klick & Catherine M. Sharkey, *The Fungibility of Damage Awards: Punitive Damage Caps and Substitution* (working draft 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id = 912256.

[12] In assessing the constitutionality of various caps on compensatory and punitive damages, state courts are divided on the issue of whether the imposition of caps on damages is an issue of "fact" or "law." At the root of this question is the issue of whether the fact-finding province of the jury is distinct from the legal remedy granted by the court after operation of the cap.

[13] In *Cooper Industries*, the Supreme Court held that punitive damages are subject to de novo appellate review when challenged on federal constitutional grounds. This holding was based, in significant part, on the fact that punitive damages, as "moral" assessments, are not purely "factual" determinations. 532 U.S. at 439–40. This has potentially far-reaching implications in terms of characterizing the nature of punitive damages as a remedy different in kind from compensatory damages.

Two developments in the existing legal landscape bespeak a growing judicial recognition that the crossover phenomenon, and the malleability of traditional damages categories that it implies, threatens to disrupt the traditional order. First, there have been efforts taken to shore up the boundary line between the award of punitive and compensatory damages. Such measures, which target the instruction of juries as well as bifurcation procedures and evidentiary restrictions, respond (at least in part) to the perceived problem of essentially fungible damages, at least from the perspective of jurors. Second, there seems to be some more direct judicial recognition that juries may award "compensatory" punitive damages and "punitive" compensatory damages.

Efforts to Bolster the Punitive-Compensatory Divide

Jury Instructions

At the most basic level, most (if not all) instructions set out the conceptual and functional difference between the categories of damages: compensatory (or actual) damages are to "*compensate* the plaintiff for his injuries," whereas punitive (or exemplary) damages are "assessed as *punishment* for the defendant, and as an example to others."[14] But, beyond this basic distinction, as has been frequently noted, typical jury instructions on noneconomic compensatory damages and punitive damages offer "precious little guidance."[15] Increasing efforts are being directed towards policing the boundary between punitive and compensatory damages. To begin, instructions to the jury typically admonish jurors to consider punitive damages only after they have decided to award compensatory damages.[16] This directive for sequential decision-making

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[14] Colorado Jury Instructions 3d: Civil, 1989 (emphases added).

[15] Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instructions on Damage Awards*, 6 Psychol. Pub. Pol'y & L. 743, 763 (2000); *see also* Paul DeCamp, *Beyond* State Farm: *Due Process Constraints on Noneconomic Compensatory Damages*, 27 Harv. J.L. & Pub. Pol'y 231 (2003) (criticizing instructions for noneconomic damages for failure to provide meaningful guidance); Mark Geistfeld, *Constitutional Tort Reform*, 38 Loy. L.A. L. Rev. 1093, 1107 (2005) ("Vague jury instructions pose a due process concern by giving jurors an unreasonable opportunity to base their determinations on extralegal factors like bias or prejudice."); Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 Psychol. Pub. Pol'y & L. 712 (2000) (criticizing general damages instructions as providing vague guidance as to: (i) which harms are to be compensated and how to translate those harms into dollar amounts; (ii) what role, if any, should be played by plaintiff's attorney's fees, insurance coverage, or attorney's *ad damnum* requests; and (iii) whether party responsibility should be factored into jurors' decisions).

[16] Some jurisdictions go even further, and prohibit any mention of the issue of punitive damages before the jury has awarded compensatory damages. *See, e.g.*, Miss. Code Ann. § 11-1-65 (2002) ("the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages");

implicitly encourages jurors to compartmentalize their determinations of compensatory and punitive damages. Several courts have more explicitly distinguished the two inquiries. First, courts have emphasized that the purpose of punitive damages is to punish the defendant, not to compensate the plaintiff.[17] Second, and related, courts direct jurors, when deciding upon punitive damages, to assume that the plaintiff has already been fully and satisfactorily compensated.[18]

Bifurcation and Evidentiary Restrictions

Bifurcation of trials and use of evidentiary restrictions have been recognized as additional tools for courts to use in order to mitigate the risk of tainting the jury's determinations of compensatory liability and damages with considerations of evidence relevant only to punitive damages.[19] Bifurcation

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see AmSouth Bank v. Gupta, 838 So.2d 205, 223 (Miss. 2002) ("The spirit, and arguably the plain language, of section 11-1-65 requires that the subject of punitive damages not even be brought into the jury's mind as it deliberates upon compensatory damages."). Such rigid separation of the compensatory and punitive damages phases relies upon bifurcation procedures, discussed in the following section.

[17] *See, e.g.*, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 6 (1991) ("This amount of money [punitive damages] is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant.") (quoting Alabama court jury instruction). Likewise, when awarding compensatory damages, jurors have been told that these damages should not function as punishment.

[18] *See, e.g.*, *In re Exxon Valdez*, 296 F.Supp.2d 1071, 1081 (D. Alaska 2004) (instructing jurors that "punitive damages are not intended to provide compensation for plaintiffs' losses and that they should assume that the plaintiffs had been fully compensated for the damages that they had suffered as a result of the oil spill"); *White v. Ford Motor Co.*, 2003 WL 23353600, at *27 (D. Nev. 2003) (endorsing an instruction to a jury that they should assume that the plaintiffs had been fully compensated).

While designed to produce a rigid separation of jurors' compensatory and punitive damages determinations, such an instruction might have additional ancillary effects. For example, one experimental study found that jurors were less likely to award punitive damages when someone on the jury reminded the others that the plaintiff had already received compensatory damages. *See* Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 L. AND HUM. BEHAV. 287, 303 (1998).

[19] Bifurcation takes many different forms, the most common being a separation of the liability and damages phases. My focus in the text, however, is on forms of bifurcation designed to wall off the compensatory phase (liability and damages) from the punitive one. The necessity for bifurcation and evidentiary restrictions is often considered in conjunction with jury instructions. *See, e.g.*, *R.E. Linder Steel Erection Co. v. Wedemeyer, Cernik, Corrubia, Inc.*, 585 F.Supp. 1530, 1534 (D.Md. 1984) (denying bifurcation while noting that "any prejudice . . . can be cured with instructions to the jury"); *Allstate Ins. Co. v. Wade*, 579 S.E.2d 180, 185 (Va. 2003) (upholding trial court's denial of bifurcation—notwithstanding large discrepancy between $250,000 compensatory award and $15,000 punitive award—taking into account the fact that the trial court had instructed the jury on how to use the evidence of intoxication, which defendants had wanted excluded from the compensatory phase).

likewise promotes "acoustic separation" of jurors' compensatory and punitive damages decisions.[20] Bifurcation and evidentiary restrictions appear to be popular with legislatures as well as courts. Indeed, twenty-one states require, via statute or judicial fiat, a type of bifurcation, or at least prohibit admission of certain evidence until a finding of punitive liability has been made by the fact-finder.[21] Generally speaking, "considerations of convenience, prejudice to the parties, expedition, and economy of resources" affect bifurcation choices.[22]

Courts have recognized various types of evidence that may impermissibly prejudice the proceedings when determining liability for compensatory damages. The most widespread and strenuously enforced example is evidence of the defendant's wealth or ability to pay.[23] Bifurcation (or use of evidentiary restrictions) is justified in order to "minimize[ ] potential prejudice by

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[20] I borrow the phrase from Mier Dan-Cohen, who poses a thought experiment in the criminal law context to illustrate "law's attempt to segregate its normative message through acoustic separation" whereby the law conveys one set of messages to the general public ("conduct rules") and another to officials ("decision rules"). Meir Dan-Cohen, *Decision Rules and Conduct Rules*, 97 HARV. L. REV. 625, 636 (1984).

[21] Seven states always require bifurcation of the amount of punitive damages from the compensatory and punitive liability phase. some requiring "trifurcation," or three phases: (i) compensatory liability and damages; (ii) punitive liability; and (iii) punitive damages). *See* ALASKA STAT. § 09.17.020(a) (2005); GA. CODE ANN. § 51-12-5.1(d) (2005); KAN. STAT. ANN. § 60-3701(a) (2005); MONT. CODE ANN. § 27-1-221(7) (2005); NEV. REV. STAT. ANN. § 42.005(3) (2005); OKLA. STAT. ANN. tit. 23, § 9.1 (2005); *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981). Two require such upon request of the defendant. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (2005); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). Two states require such upon request of either party. *See* MO. ANN. STAT. § 510.263 (2005); *W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994). Other states do not require bifurcation, but nonetheless require exclusion of certain types of evidence prior to a finding of punitive liability. *See, e.g.*, CAL. CIV. CODE § 3295(d) (2005) (defendant's financial means excluded until punitive liability established); MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a) (2005) (same); UTAH CODE ANN. § 78-18-1 (2005) ("Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made."). One state always requires such. *See* MISS. CODE ANN. § 11-1-65(b) (2005). Two require such upon request of the defendant. *See* N.J. STAT. ANN. § 2A:15-5.13 (2005); N.C. GEN. STAT. § 1D-30 (2005). Four require such upon request of either party. *See* ARK. CODE ANN. § 16-55-211 (2005); MINN. STAT. ANN. § 549.20(4) (2005); N.D. CENT. CODE § 32-03.2-11(2) (2005); OHIO REV. CODE ANN. § 2315.21(B) (2005).

[22] *Emerick v. U.S. Suzuki Motor Co.*, 750 F.2d 19, 22 (3d Cir. 1984).

[23] Some states that do not require a wholesale separation of punitive and compensatory damages require exclusion of a defendant's wealth. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a) (2005) ("in any action for punitive damages for personal injury, evidence of the defendant's financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts"); *see also* CAL. CIV. CODE § 3295(d) (West 2005) ("on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud").

preventing jurors from learning of a defendant's 'deep pockets' before they determine the[ ] threshold issues."[24] Courts worry that juries may be more likely to find liability and may award higher compensatory damages if they know that the defendant is wealthy, although the defendant's net worth bears no relevance to whether the plaintiff's act injured the defendant. As one court has put it, "[d]efendant's wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty."[25]

Courts have also excluded evidence of prior similar acts from the compensatory phase, while admitting such evidence during the punitive damages phases. For example, the Georgia Court of Appeals held that the trial court, in a trifurcated proceeding, properly "ruled that evidence of prior disciplinary action against [the defendant] would be admissible only in the punitive damages phase of the trial, as it had no bearing on the issues of causation and compensatory damages."[26] Bifurcating and excluding this evidence ensures that it will not taint the initial compensatory phase while leaving intact a plaintiff's chance to present his strongest case for punitive damages.[27]

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[24] *Torres v. Auto. Club of So. Cal.*, 937 P.2d 290, 293–94 (Cal. 1997).

[25] *Rupert v. Sellers*, 48 A.D.2d 265, 272 (N.Y. App. Div. 1975). *See also Campen v. Stone*, 635 P.2d 1121, 1131 (Wyo. 1981) ("There is no need for a jury to know of defendant's resources while it is determining the amount of compensatory damages."); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the Deep Pockets Hypothesis*, 30 Law and Soc'y Rev. 121, 140–44 (1996) (concluding that there is little evidence that a defendant's wealth affects juror judgments).

[26] *Moresi v. Evans*, 572 S.E.2d 327, 330–31 (Ga. Ct. App. 2002). *See also Gunthorpe v. Daniels*, 257 S.E.2d 199, 201 (Ga. Ct. App. 1979) (admitting evidence of prior similar acts at punitive damages phase, but not compensatory phase, on ground that this evidence would show that defendant knew "the alleged negligence on his part would probably result in injury to the plaintiff, because he knew that such carelessness on his part in the past had resulted in similar injuries to others but continued in this course of conduct in utter indifference to the consequences").

[27] There is a danger, however, that such measures may backfire. Some mock jury studies that focus explicitly on the effects of bifurcation have found, surprisingly, that bifurcation appears to increase overall damages awards. *See, e.g.*, Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wis. L. Rev. 297, 329–30 (reporting that, with non-deliberating mock jurors, defendant's total expected loss was $641,487 in bifurcated trial, compared with $569,677 in unified trial, and with deliberating juries "the bifurcated trial creates an even more dramatic disadvantage to the defendant ($1,676,563 to $450,293)"); Edith Greene et al., *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 Law and Hum. Behav. 189, 196–98 (2000) (finding that bifurcation unexpectedly increased punitive damages). *But see* Christine M. Shea Adams & Martin J. Bourgeois, *Separating Compensatory and Punitive Award Decisions by Trial Bifurcation*, 30 Law and Hum. Behav. 11 (2006) (finding that bifurcation decreased variability in compensatory damages and decreased tendency for juries to award extremely high compensatory damages).

Crossover in the Courts: Anecdotal Evidence

Compensatory Punitive Damages

Appellate courts' acknowledgement of the potential overlap of punitive and compensatory damages has led courts, when invalidating the punitive damages portion of jury verdicts, to remand in order to allow the jury to reassess compensatory damages, this time without the availability of the punitive damages avenue.[28]

In *Chestnut v. City of Lowell*, the jury had awarded $210,000 in compensatory damages and $500,000 in punitive damages in a §1983 action involving alleged police brutality in making an arrest.[29] The First Circuit Court of Appeals invalidated the punitive damages award on the ground that municipalities are immune from punitive damages. The court nonetheless remanded the case for a new trial on compensatory damages, on the ground that the jury may have included some "compensatory" damages within its punitive damages assessment.[30] In other words, the court seemed to anticipate that, absent an opportunity to award punitive damages, the jury might well increase its award of compensatory damages. In doing so, the court echoed the sentiments of a Fifth Circuit Court of Appeals case from two decades earlier, *Webster v. City of Houston*.[31] There, the jury had awarded punitive damages, but no compensatory damages, to the decedent's parents for the loss of their child's companionship. The court reversed not only the punitive damages award as impermissible against a municipality, but also remanded for a new trial on compensatory damages on the ground that "the jury, in awarding punitive damages, [may have erroneously] thought it had covered all bases."[32]

A similar (albeit more nuanced) acknowledgement of the potentially fungible nature of compensatory and punitive damages may have motivated modifications to the U.S. Supreme Court's ratio analysis, or consideration of the ratio of punitive damages to compensatory damages (as proxy for harm)—one of three guideposts the Court established for appellate review of excessive punitive damages awards. In *BMW v. Gore*, the Court conceded that a higher punitive to compensatory damages ratio might be tolerated in those instances where the jury found the monetary value of noneconomic

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[28] It is difficult to assess the frequency of this practice; nonetheless, it is a development that warrants attention. Here, I describe the examples that I have uncovered to date; when examined together, they appear consistent with a wider trend.

[29] 305 F.3d 18 (1st Cir. 2002) (*en banc*).

[30] *Id.* at 21.

[31] 689 F.2d 1220 (5th Cir. 1982), *rev'd on other grounds on reh'g*, 735 F.2d 838 (5th Cir. 1984) (*en banc*).

[32] *Id.* at 1229–30.

harm "difficult to determine."[33] In other words, in such cases, the jury might well have awarded punitive damages to compensate the plaintiff for intangible harms not fully incorporated into the noneconomic portion of compensatory damages.[34]

Punitive Compensatory Damages

The converse of this phenomenon is at work where courts are faced with a remand to allow the jury to determine punitive damages in cases in which such damages were unduly precluded. In a recent case, the First Circuit Court of Appeals highlighted the risk of "potential overlap" between emotional distress damages and punitive damages given that "the jury's conclusion about the plaintiff's level of emotional trauma might well reflect its view concerning the reprehensibility of the defendant's conduct."[35] In other words, the court recognized that "the high [emotional distress] award [in the case before it] may partly reflect punishment for what the jury may have concluded was the degree of reprehensibility of the [defendant's] conduct."[36] The Fifth Circuit Court of Appeals has likewise remarked upon the "practical inseparability of the issues of intent, of damages for emotional injury, and of punitive damages."[37] The court reasoned that if the jury had been allowed to consider punitive damages, its decision "would have been intertwined with its view of the facts determining liability and its award of damages for emotional injury."[38]

The U.S. Supreme Court embraced a similar view in a recent punitive damages case, *State Farm v. Campbell*: namely, that a large noneconomic damages award already likely contains a significant punitive component, so that the award of punitive damages in addition would constitute impermissible double-counting.[39] In that case, the plaintiffs were awarded one million dollars

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[33] 517 U.S. 559, 582 (1996) (suggesting that a high ratio might be necessary where "the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine").

[34] *See, e.g.*, *Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9th Cir. 2001) ("This is precisely the type of case posited by the Court in *BMW* — the low award of compensatory damages supports a higher ratio of punitive damages because of 'particularly egregious' acts and 'noneconomic harm that might have been difficult to determine' ").*Cf.* Robert S. Peck, *Winning Increased Punitive Awards After* Cooper, ATLA-CLE 199 (2002) ("[I]n states where economic or noneconomic damages are capped, the award of punitive damages still performs a compensatory role.").

[35] *McDonough v. City of Quincy*, 452 F.3d 8, 24 (1st Cir. 2006).

[36] *Id.* at 25.

[37] *Hardin v. Caterpillar*, 227 F.3d 268, 272 (5th Cir. 2000).

[38] *Id.*

[39] 538 U.S. 408, 425 (2003) ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

for eighteen months of emotional distress (which the Court characterized as "minor economic injuries"). Not only did the Court find that this amount was "complete compensation," but it explained further:

> The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the [plaintiffs] suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. *Compensatory damages, however, already contain this punitive element*.[40]

Lower federal courts have picked up on this added nuance to the ratio analysis.[41]

Empirical Evidence of Crossover

While these markers from judicial practice intimate a growing recognition of the crossover phenomenon, in order to understand its impact, it is necessary to turn to more general empirical evidence. There is a significant body of existing empirical evidence, gathered almost exclusively from mock juror experiments, which suggests that jurors may think of damages holistically; thus, for example, if they are told of caps on punitive damages—contrary to the nondisclosure provisions in most jurisdictions[42]—they may inflate compensatory damages. These experimental studies, taken together, provide mixed evidence in support of such a substitution effect. Jonathan Klick and I have recently added an econometric regression analysis that validates the crossover effect, using data collected from actual jury trials.[43] Here, then, we have a powerful merger of two divergent strands of empiricism—experimental studies on mock jurors and econometric regression analysis of a large dataset of actual litigated cases—pointing in the same direction.

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[40] *Id.* at 426 (emphasis added).

[41] *See, e.g.*, *In re the Exxon Valdez*, 296 F.Supp.2d at 1098 ("Under this [ratio] guidepost, the court may also consider whether the compensatory damages award contained a punitive component . . . .").

[42] Nondisclosure provisions are detailed *infra* note 69. Pattern jury instructions in at least two states, however, specifically inform jurors regarding the statutory cap on punitive damages. *See, e.g.*, Colo. Jury Instructions—Civil 5:3 (4th ed. 2001) ("you may award a reasonable sum as punitive damages that may not be more than the amount awarded as actual damages"); Okla. Uniform Jury Instructions—Civil 5.0 (Vernon 2003) ("In no event should the punitive damages exceed the greater of . . . $10,000.00 or the amount of actual damages you have previously awarded . . . OR . . . $500,000.00, or twice the amount of actual damages you have previously awarded, or the increased financial benefit derived by the defendant as a direct result of the conduct causing the injury to the plaintiff and other persons or entities."). Jurors, moreover, might be aware of caps' existence even in the absence of explicit instructions.

[43] Klick & Sharkey, *supra* note 11.

Mock Juror Studies

The overarching theme of a fairly recent body of research, mostly in the realm of behavioral psychology, is that "[t]he task of assessing damages involves multiple and seemingly conflicting goals."[44] In particular, "defendant-focused concerns can cross over into the assessment of compensatory damages and plaintiff-focused concerns can cross over into the assessment of punitive damages."[45] This emerging body of academic work therefore attempts to debunk the traditional acoustic separation of compensatory and punitive damages:

> Decision makers are presumed to pursue different goals through each decision. Specifically, decision makers are expected to be driven . . . by the plaintiff-focused motive of compensation in making compensatory damages determinations, and by the defendant-focused motivations of retribution and deterrence in making punitive damages determinations.[46]

By contrast, the alternative conception of juror decision-making insists that "legal decision makers attempt to best use the available verdict options to satisfy numerous goals simultaneously."[47] This idea, which Michelle Anderson and Robert MacCoun have termed "equifinality," is based upon the common sense proposition that "actors can pursue goals through multiple pathways; if one pathway is thwarted, another is used."[48] Applied to the jurors' task of assessing damages, equifinality posits that "[j]urors can use punitive damage judgments to provide further compensation for needy plaintiffs, and they can use compensatory judgments to seek retribution or promote specific deterrence or general deterrence."[49]

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[44] Edith Greene, David Coon, & Brian Bornstein, *The Effects of Limiting Punitive Damage Awards*, 25 Law and Hum. Behav. 217, 219, 220 (2001).

[45] *Id.* at 220.

[46] Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 Brook. L. Rev. 1121, 1123 (2003).

[47] *Id.* at 1127.

[48] Anderson & MacCoun, *supra* note 9, at 315. *See also* Robbennolt et al., *supra* note 46, at 1128 ("some goals may be alternately satisfied through multiple pathways"). In some sense, the equifinality principle might be seen as a particularized example of Neal Feigenson's account of jurors' pursuit of "total justice," namely "striv[ing] to square all accounts between parties [and] reach a decision that is correct as a whole," even if in disregard of technical legal standards. Neal Feigenson, Legal Blame: How Jurors Think and Talk About Accidents 5 (2000).

[49] Anderson & MacCoun, *supra* note 9, at 315. *See also* Edie Greene & Brian H. Bornstein, Determining Damages: The Psychology of Jury Awards 142 (2003) ("jurors tend to use all the information that is relevant to their decision, even if they are expected to compartmentalize their judgments, using certain evidence for some judgments and different evidence for other judgments"); Robbennolt et al., *supra* note 46, at 1128 ("[j]urors . . . can compensate the plaintiff most straightforwardly through a compensatory damages award, but can also award punitive damages to achieve this goal"; conversely, "decision makers who are blocked from expressing their punitive intent through punitive damages find other mechanisms through which to satisfy their goals").

Behavioral psychologists have designed experiments to test the process by which juries assess damages. Several experimental studies have produced findings consistent with the equifinality theory that posits that "decision makers who are blocked from expressing punitive intent through punitive damages find other mechanisms through which to satisfy their goals."[50] Two of the studies confirmed (and none rejected) the hypothesis that jurors will inflate their compensatory damages awards when they are precluded altogether from awarding punitive damages. But, as one of the studies demonstrated, this crossover effect disappeared in the situation where the punitive damages were capped, as opposed to prohibited.[51] Because these studies comprise the extant body of empirical evidence of the substitution effect—which has yet to be incorporated into tort reform debates—they warrant comprehensive discussion.

In 1999, Anderson and MacCoun conducted an experiment with mock jurors who were given a written summary of a case based loosely upon an actual nail-gun product liability case.[52] In the case, the plaintiff, a 31-year-old male carpenter, had been injured when the nail-gun that his coworker was operating misfired a nail, piercing the plaintiff carpenter's skull, severely injuring, but not killing him. The mock jurors were instructed that they had previously found the corporate defendant liable for defective design of the nail-gun, and that their sole task was to assess damages. One group of the mock jurors was allowed to assess both compensatory and punitive damages; a second group was instructed to award compensatory damages only.[53]

[50] Robbennolt et al., *supra* note 46, at 1157. There are, nonetheless, experimental studies that seem to confirm the traditional compensatory-punitive categorization. For example, in a 1996 study, Cather et al. found evidence that the reprehensibility of defendant's conduct influenced jurors' punitive awards, but not compensatory damages awards. Corinne Cather, Edith Greene, & Robert Durham, *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 Law and Hum. Behav. 189, 201–03 (1996). In other words, jurors did not appear to award "punitive" compensatory awards. At the same time, however, Cather et al. did uncover evidence that jurors may be awarding "compensatory" punitive awards. Specifically, they found that, in a subset of personal injury cases, jurors awarded larger overall damages to severely injured plaintiffs, as compared to mildly injured ones, but roughly equal compensatory damages. These findings are consistent with the claim that jurors do not compartmentalize awards in the way that the law presumes.

[51] Finally, two studies reached somewhat conflicting conclusions regarding differences in the variability in compensatory damages as a function of a cap on punitive damages: in one, the cap seemed to reduce overall variability in the compensatory damages awards, *see* Greene et al., *supra* note 44; in another, both the size and variability of compensatory damages increased as the level of the punitive damages cap increased, *see* Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 Law and Hum. Behav. 353, 367 (1999).

[52] Anderson & MacCoun, *supra* note 9, at 317. The mock jurors in the study were 91 university graduate students, each of whom was given an eight to ten page booklet containing a factual summary of the lawsuit, followed by jury instructions, and a questionnaire.

[53] This latter group was specifically told that they could not award punitive damages. *Id.* at 319.

Anderson and MacCoun found that the mock jurors who were denied the opportunity to award punitive damages altogether awarded more in pain-and-suffering as compared with the mock jurors who were permitted to award both compensatory and punitive damages. The researchers concluded that "mock jurors who did not have the option to award punitive damages 'compensated' for this constraint by inflating compensatory damages."[54] Indeed, according to Anderson and MacCoun, "[t]he dynamic relationship between the two awards might resemble a water-filled balloon; if one pushes down on one end, the other pops up."[55]

Greene, Coon, and Bornstein conducted a more extensive study, leading to more equivocal results.[56] In their study, the mock jurors were divided into four different groups: (i) the first group was told that punitive damages were capped at $200,000; (ii) the second group was told that punitive damages could not exceed compensatory damages; (iii) the third group was given no restriction on the amount of punitive damages they could award; and (iv) the fourth group was not given the option of awarding punitive damages.[57] They examined the effects of limiting punitive damages across three different case types: personal injury; products liability; and insurance bad faith.[58] The researchers manipulated the reprehensibility of the defendant's conduct, which was either relatively "low" or "high." Finally, the researchers asked the jurors whether they intended each award—considering separately the compensatory damages component and (where applicable) punitive damages component—to (i) make up for plaintiffs' losses; (ii) punish the defendant; and/or (iii) deter the defendant and others from similar behavior.

Greene et al. had predicted "higher and more variable compensatory damages in situations in which the punitive damage award is artificially limited."[59] Their actual results were somewhat mixed. First, they found that, as compared with the scenario in which punitive damages were unlimited, caps on punitive damages (whether dollar limits or proportional limits) did not result in mock jurors' inflation of compensatory damages. Second, however, they did find that mock jurors who were precluded from awarding any

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[54] *Id.* at 321.

[55] *Id.* at 313.

[56] Greene et al., *supra* note 44. The 320 participants in their study were undergraduates at the University of Colorado. The participants' mean age was 24, and 12% had previously served on juries (half in criminal cases, half in civil). *Id.* at 222.

[57] *Id.* at 224. According to the authors, their study is "more legally driven and arguably more realistic" because it tracks actual legal restrictions imposed on punitive damages by various states. *Id.* at 221.

[58] Mock jurors were given case summaries of approximately 1,200 words, which included opening statements, direct examination and cross examination of witnesses, closing arguments, and jury instructions. Each of the case summaries was loosely based on an actual case. *Id.* at 222-24.

[59] *Id.* at 219.

punitive damages at all assessed greater compensatory damages than did the mock jurors who were allowed to make unrestricted punitive damages awards. Indeed, there was no significant difference between the total damages awarded by these latter two groups. Jurors who inflated compensatory damages, however, did not indicate that they intended for the compensatory damages to punish or deter.[60]

Given these results, the researchers posited that "jurors may not make the distinction between compensatory and punitive damages that the law intends but rather, that they may reason more holistically and award amounts that they believe constitute a sufficient *total* award."[61] They also concluded, however, that "as long as jurors are given the opportunity to award *some money* for purposes of punishment and deterrence, they do not feel the need to increase their compensatory award to meet those objectives."[62]

A third study, conducted by Jennifer Robbennolt and Christina Studebaker, explored the effects of differing levels of punitive damages caps: a low level ($100,000); moderate level ($5 million); and high level ($50 million).[63] Mock jurors were given a case summary of a personal injury lawsuit.[64] They were free to award both compensatory and punitive damages, although the latter was capped at one of the specified limits, which was disclosed to the mock jurors.[65] The researchers' main finding was that the level of the cap acted as an anchor for the size of the compensatory damages award (as well as for the punitive

[60] *Id.* at 225–30. The authors speculate that jurors may not be aware of the factors that influenced their awards. Alternatively, they hypothesize that so-called "demand characteristics" may explain jurors' responses—namely that the jurors inferred that compensatory damages are supposed to compensate, whereas punitive damages are supposed to punish. *Id.* at 230 n. 8.

[61] *Id.* at 227.

[62] *Id.* at 231. In addition, they found that capping the punitive damages award (which, as mentioned did not affect the size of compensatory damages) generally reduced the variability in compensatory damages awards.

[63] Robbennolt & Studebaker, *supra* note 51, at 357. The cap amounts were based upon a pretesting of their case. They do not (nor were they meant to) reflect punitive damages caps actually in place. *See* Klick & Sharkey, *supra* note 11, Appendix A (State Punitive Damages Limitations).

[64] According to the case narrative, plaintiff contracted the HIV virus from a blood transfusion administered after a car accident. Plaintiff sued the company responsible for testing the blood. The parties agreed upon liability and also stipulated as to the economic compensatory damages. The mock jurors were asked to award only noneconomic compensatory damages (pain and suffering) and punitive damages. The mock jurors were 124 undergraduate students, 97% of whom were white; 70% of whom were female; and included only one individual who had previously served as a juror. Robbennolt & Studebaker, *supra* note 51, at 357–58.

[65] *Id.* at 361–62. Participants were informed of the cap in one of two ways: (1) "restrictive" ("you may not award more than $X in punitive damages"); or (2) "permissive" ("you may award punitive damages in any amount up to $X"). *Id.* at 358.

award).[66] In other words, as the level of the cap on punitive damages increased, so did the size (and variability) of the compensatory damages award.[67]

It is highly relevant here that the mock jurors were explicitly told of the punitive damages cap.[68] This is at odds with the law in most jurisdictions, which expressly prohibits such disclosure, either by statute or common law.[69] Moreover, the experimental framework inherent in mock juror studies in some respects casts additional doubt on the transferability of these results into the real world.[70]

In sum, the experimental studies seem to confirm that jurors (at least under certain conditions) might be receptive to arguments encouraging them to engage in shifting amounts between damages categories. It is therefore particularly surprising that this body of research concerning jurors' propensity for

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[66] For a discussion of anchoring, "the judgmental process of selecting an initial value, or 'anchor,' as a starting point from which to arrive at an award by a process of adjustment," as well as the body of behavioral research that has uncovered its potential distorting influence in juror and legal decision making, *see* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 80 N.Y.U. L. Rev. 391, 408–10, 421 n. 130 (2005) (listing studies presenting empirical results substantiating the claim that salient numbers, such as a plaintiff attorney's request for a specific dollar amount, have a dramatic impact on jurors' awards, both compensatory and punitive).

[67] Robbennolt & Studebaker, *supra* note 51, at 361. The authors did not discern a "reactance effect" among the mock jurors—namely that the imposition of caps led to increases in compensatory damages. The authors suggest that participants may not have been sufficiently invested in the case to demonstrate reactance.

[68] *Id.* at 358. Researchers defend such disclosure—even in the face of prohibitions in almost every state—on the basis of their suspicion that "even if jurors are not directly instructed that punitive damages are capped at a certain level, they may nonetheless have this expectation from information available in the media, conversations with others, or from general knowledge of tort reform legislation." Greene et al., *supra* note 44, at 224. It would be interesting to test this claim empirically. I am not aware of any existing studies that attempt to do so.

[69] *See, e.g.*, Ala. Code 6-11-21(g) (2005) ("jury may neither be instructed nor informed" of punitive damages cap); Fla. Stat. 768.73(4) (2004); 735 ILCS 5/2-1107.1 (2004); Ind. Code 34-51-3-3 (1998); Nev. Rev. Stat. 42.005(3) (2004); N.J. Stat. Ann. 2A:15-5.16 (West 2000); N.D. Cent. Code 32-03.2-11(4) (1996); Ohio Rev. Code 2315.21(F) (Anderson 1998); Va. Code Ann. 8.01-38.1 (Michie 2000). *See also* 1991 Civil Rights Act, 42 U.S.C. § 1981a(c)(2) ("the court shall not inform the jury of the limitations described in subsection (b)(3)"). *But see supra* note 42 (noting that pattern jury instructions in Colorado and Oklahoma inform jurors of punitive damages caps). These prohibitions against disclosure to the jury might be seen as statutory attempts to reinforce the categories of damages. As Colleen Murphy has argued, state law proscriptions here might well be guided by anchoring concerns. Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 Tex. L. Rev. 345, 347 n. 8 (1995).

[70] *See* Cather et al., *supra* note 50, at 203 (conceding that one of their findings—that juror-awarded compensatory damages exceeded punitive damages—"raises concern about the merits of using simulation methodology to explore jurors' decision-making process about damages."); *see also* Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.'s* Punitive Damages, 53 Emory L.J. 1359 (2004) (discussing internal and external validity and ecological concerns); see also the chapter 3 by Vidmar, this volume.

equifinality has, until now, not been connected with recent work focusing on attorneys as the active agents in this process (discussed below).

Econometric Regression Analysis

The crossover (or substitution) hypothesis—although widely presumed in certain circles—had not been tested empirically using observational jury data. Using data from the Civil Justice Surveys performed by the National Center for State Courts,[71] Jonathan Klick and I demonstrated, in various econometric specifications, that the adoption of punitive damage caps leads to a statistically significant increase in the compensatory damages awarded.[72] This result holds up to a variety of robustness checks, including alternate plausible contemporaneous control groups, implying that jurors may actually substitute higher compensatory awards for prohibited punitive damage awards.

A simple bivariate regression of compensatory damages (logged) on an indicator for whether a state has a punitive damages cap is not likely to provide much insight into the causal effects of enacting a punitive damages cap. For example, "defendant-friendly" states might coincidentally have both punitive damages caps and lower compensatory damages awards, on average, with no causal connection between the two. Alternatively, at the time states enacted punitive damages caps, there might have been a general trend toward decreasing compensatory awards. More generally, the existence of unobservable trends can generate an omitted variable bias. To mitigate this problem, we employed a conventional difference-in-difference design.

The difference-in-difference design controls for a host of location-specific and year-specific effects, in addition to the host of dummy variables that can be included in the simple bivariate regression such as party constellation or type of litigant (e.g., individual, corporation, hospital, or government), the number of plaintiffs and defendants, and the presence of bodily injury. Specifically, we controlled for idiosyncratic differences across the counties where the cases were filed by having site fixed effects and we controlled for any common temporal effects by including dummy variables for the year a case was filed. The twenty-two states in our sample are evenly divided into those with punitive damages caps (cap states) and those without (noncap states).[73] And, because, at least in

[71] The surveys include fairly detailed information from tort, contract, and real property cases from 46 of the 75 most populous counties in the United States. The data were collected at three separate time intervals, corresponding to cases that were disposed of in 1992, 1996, and 2001.

[72] *See* Klick & Sharkey, *supra* note 11. The description of our model and main results presented in this section is taken from our working paper.

[73] Eleven of the states have been uncapped during the entirety of the relevant time frame (AZ, CA, HI, KY. MA, MI, MN, MO, NY, WA, and WI). Five of the states have capped punitives throughout the period (CT, FL, GA, TX, and VA); and six have enacted a cap at some point within the study's time period (IL, IN, NJ, NC, OH, PA (for medical malpractice cases)).

some states, the punitive damages caps apply according to the year a case is filed (as opposed to the year in which the case is decided), the difference-in-difference specification allows us to compare two cases decided in the same site during the same year that differ only in their filing years (which determine whether a punitive cap is in effect).[74] We can thus identify the effect of punitive damages caps by comparing two cases of the same type decided in the same place and year, differing only by when they were filed, net of any effect observed among all cases of that type that were filed and decided in comparable years. Our results suggest that the imposition of caps on punitive damages leads to an average 30% increase in compensatory awards.[75]

But our results confirmed that not only did compensatory awards increase, but so did total (compensatory plus punitive) awards, implying that something more than mere substitution was taking place. We surmised that time-varying county specific case type effects might be generating this result,[76] particularly because the 5-year gaps in our data (collected from cases that terminated in 1992, 1996, and 2001) limited our ability to net out underlying trends in the data.[77] Such unobservable trends, however, would affect our results only if there were some simultaneity bias—namely, in our case, that some unobservable trend were simultaneously leading to the imposition of punitive damages caps and higher compensatory damages awards. Simultaneity bias can lead to absurd results. If it is not possible to control for these effects, any estimated treatment effect will attribute the effects of these unobservable factors to the legal change; it is thus imperative to find ways to control (or at a minimum mitigate) the bias. Our strategy here was to include

[74] From this difference, we were able to net out any observed idiosyncratic effect that is common to all cases that are filed in a particular year and decided in a particular year. We also controlled for differences across case types. (There are twenty-seven different case types in our dataset.) Auto cases (vehicular negligence) comprise roughly half of the dataset. Other categories of cases include intentional torts, products liability, medical malpractice, and fraud.

[75] The coefficient is not, however, statistically significant at the standard 5% level. We had reason to suspect measurement error bias, given that not all states' punitive damages caps apply as of date of filing. (Specifically, a number of states apply caps on the basis of the date of injury—which unfortunately is information not available in the NCSC datasets.) Therefore, we ran the same model using a restricted sample that includes only those states that apply the cap as of date of filing. We confirmed a positive—and statistically significant—treatment effect and the magnitude is greater: an average 72% increase in compensatory awards. In other words, measurement error would appear to bias our treatment effect downwards.

[76] Time invariant unobservables are most likely controlled for in our difference-in-difference models through the sets of dummy variables.

[77] Even though we had observations of cases filed in each year from 1986 to 2001, the data were collected in three time intervals—cases that terminated in 1992, 1996, and 2001. It is likely that the most interesting dynamics occur according to the decision year, as the composition of jury pools change and as the preferences of the jurors themselves change. Given that we only observed snapshots of these dynamics at three points in time, the gaps between sample years could be problematic.

the level of punitive damages as a control variable, in order to control for unobservable effects that might influence damage awards in general. We reasoned that any significant unobservable trend would most likely be correlated not only with compensatory awards and the adoption of punitive caps, but also with punitive damages awards as well. So, by controlling for punitive damages, the only remaining uncontrolled unobservable effects would have to be driven by some variable that is correlated with compensatory awards and punitive caps, but *not* with punitive awards—most likely a null set. In other words, it is difficult to conceive of such a variable that would vary with the size of compensatory awards and the existence of caps on punitive damages, but not be related at all to the size of punitive awards.[78] Employing this specification, our main finding holds: the imposition of punitive caps leads to higher compensatory awards.[79]

Finally, we also employ a state-of-the-art triple difference model to control for time-varying unobservables. The triple difference model exploits a group of cases that, by hypothesis, should be impervious to the crossover effect: automobile cases. Punitive damages are especially rare in auto cases;[80] moreover, punitive caps often exclude drunk driving cases—the small fraction of auto cases where punitives might be a salient possibility.[81] Automobile cases—which make up nearly half of the dataset—provide a contemporaneous within state control to mitigate the effect of unobservables. Once again, the triple difference results essentially confirm the original effect.[82]

While it is comforting that a plethora of models with different specifications confirms our essential crossover effect finding, the magnitude of the effect gives us some pause. If, as seems reasonable to assume, the crossover effect applies only in cases with some positive amount of punitive damages, the results from our restricted dataset estimates imply a crossover effect between two and ten

[78] Obviously, the estimated effect on the punitive damages variable will be biased (as it most likely is jointly determined with the dependent variable, compensatory damages), but we are not interested in that effect. We only include punitives in the regression equation as a strategy to control for simultaneity bias.

[79] Our original effects appear to be overstated a bit. The (statistically significant) treatment effect in the restricted sample was 67%, as compared to 72% in the original (restricted sample) specification (*see supra* note 75).

[80] In the NCSC data, punitive damages are awarded in a mere 1.5% of vehicular negligence cases (as compared to nearly 10% of all other cases). *See also* Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 635, 637 (1997) (finding punitive damages awards to be very rare in automobile-related suits, appearing in 2% of suits won by plaintiffs).

[81] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (2004); N.C. GEN. STAT. §§ 1D-25(b), 1D(26) (2004).

[82] We estimate a 69% increase using the restricted sample—roughly consistent with the results in the alternative model specifications (*see supra* note 79). Using the full sample, however, we estimate a 42% increase, which again suggests that the double difference full sample estimate (30%) underestimates the effect.

times compensatory awards.[83] If crossover were limited, however, only to cases in which punitive awards are high and thus likely to butt up against caps—typically greater than $250,000 or else three times compensatory damages—then our restricted dataset estimates imply a much larger crossover effect between six and thirty-eight times compensatory awards.[84] Is a magnitude of this size plausible? It is difficult to answer this question as an absolute matter; but we did devise a reality check based on our prior hypothesis that, all things equal, it should be easier for plaintiffs' attorneys to transfer punitive damages into compensatory awards in cases with higher expected compensatory awards.[85] To check whether this in fact was the case, we estimated quantile regressions to see whether the treatment effect increased for cases at the higher end of the distribution (based on size of compensatory damages). Indeed, our results confirmed that, in the full sample, the effect at the 90th percentile of compensatory awards (81%) was more than three times as large as the effect at the 25th percentile of compensatory awards (24%).[86] Moreover, the marginal effect increases monotonically (as we predicted) as compensatories increase.

As with any empirical study of litigation, our analysis suffers from some data problems, primarily the absence of settlement data and time gaps in the data, suggesting it would be profitable to examine this phenomenon in the other available state level court datasets.[87]

Explanations of Crossover

What might explain the crossover phenomenon? The imposition of caps on punitive damages might have a variety of behavioral effects on plaintiffs' attorneys. First, certain categories of cases might be particularly amenable to shifting damages across the punitive-compensatory boundary. Dignitary and emotional harm cases might be especially prone to such transfers, given the inherently blurry line between the compensatory and punitive bases for injuries

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[83] This is based upon an assumption that crossover potentially occurs only in cases with non-zero punitive damages. In the restricted sample, 12% of the non-auto cases have positive punitive damages.

[84] In the restricted sample, of the non-auto cases with positive punitive damages, punitive damages are greater than or equal to $250,000 in roughly one-third of the cases; and punitive damages are at least three times the size of compensatory damages in one-fourth of the cases.

[85] It is reasonable to assume that substitution is less transparent at higher levels of compensatory damages. The intuition here is that there must be a plausible existing category of noneconomic (e.g., pain and suffering) losses to form the basis of any expansion of this category.

[86] The difference is statistically significant at the 0.1% level.

[87] For an exploration of various data concerns with alternative available state court datasets, *see* Helland et al., *Data Watch: Tort-uring the Data*, 19 Journal of Economic Perspectives 207 (2005). Notwithstanding their limitations, the NCSC datasets may be, at least for the time being, the ones best suited to comprehensive empirical inquiry.

that amount to insults, emotional anguish, and humiliation. Second (and relatedly), plaintiffs' attorneys might be able to manipulate juries in a wider set of cases (i.e., not only dignitary and emotional harm cases). Here, it might take a bit more effort on the part of the plaintiffs' attorney, and the damages categories may be somewhat (although not completely) fungible. Third, in the face of caps on punitives, plaintiffs' attorneys might alter their screening of cases. Caps might also affect settlement dynamics.

Dignitary and Emotional Harm Cases: The Inherently Blurry Line

Dignitary and emotional harm cases present a fertile ground for crossover, or overlap, between punitive and compensatory damages.[88] In these cases, the defendant's motives and the nature of its conduct—typically relevant for the determination of punitive damages—assume a relevance to compensatory damages: as a general matter, the more outrageous the defendant's behavior, the more outraged and distressed the victim will be.[89] These cases are the strongest examples in which the line between compensatory and punitive damages is inherently blurry. The formal doctrinal (and statutory) divisions for these categories of damages would seem, to take one salient example, to be particularly illusory in the realm of sexual harassment, where noneconomic pain and suffering damages are awarded to compensate for the very outrage, humiliation, and indignity that are likewise covered by punitive damages.[90] And, for this reason, efforts to police boundary lines may be doomed to fail. Moreover, as with bifurcation, appellate courts apply a fairly stringent "abuse of discretion" standard when examining whether the plaintiff's attorney made improper, prejudicial arguments.[91]

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[88] *See, e.g.*, *Brown v. Estate of Stuckey*, 749 So.2d 490, 493 (Fla. 1999) (remanding for a new trial where "[t]here was not evidence as to loss or suffering resulting from defamation . . . that would reasonably equate to $50,000 and the award can be seen by this Court only as one meant to punish rather than to fairly compensate as instructed by this Court"); *Cosmos Forms, Ltd. v. State Div. of Human Rights*, 541 N.Y.S.2d 50, 52 (N.Y. App. Div. 1989) (remanding award in racial discrimination case on the ground that the award of $35,000 for mental anguish was "grossly excessive" and the court "may not award what would amount to punitive damages solely on the finding that unlawful discrimination occurred").

[89] *See* Dobbs, Remedies § 7.3(2) at 310.

[90] *See* Sharkey, *supra* note 10, at 4 (suggesting that noneconomic and punitive damages are likely "jointly determined" in sexual harassment cases, which has important implications for empirical models of damages awards, which instead generally track conventional doctrinal categories and attempt to measure the effect of compensatory damages upon punitive damages).

[91] *See, e.g.*, *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 207 (3d Cir. 1992). Furthermore, courts may rely on allegedly curative instructions when the court recognizes the prejudicial arguments at the time of trial. *See, e.g.*, *Massie v. Godfather's Pizza, Inc.*, 844 F.2d 1414, 1422 (10th Cir. 1988) (in response to plaintiff's attorney's inflammatory exhortation to the jury to "send a message" to the defendant, trial court instructed the jury: "But any amount that you award is not punishment to Godfather's or to Head or to anybody else. The damages in this case will be to compensate Ms. Massie."). *See supra* pp.

Courts might nonetheless be particularly on guard in cases involving dignitary and constitutional harms. For example, in *Levka v. City of Chicago*, the jury awarded $50,000 for "[e]motional trauma and distress, mental and physical suffering, anguish, fear, humiliation and embarrassment" to a woman who was subjected to an unwarranted strip search.[92] The jury had rejected altogether the woman's claim for lost earnings and loss or impairment of earning capacity. The Court of Appeals remitted the award to $25,000; in so doing, the court explained: "We are left with the distinct impression from all the evidence that the jury was in fact assessing punitive rather than compensatory damages . . . ."[93] *Roth v. Farner-Bocken*,[94] a South Dakota age discrimination case provides another example. The jury awarded plaintiff $25,000 in compensatory damages and $500,000 in punitive damages. The South Dakota Supreme Court rejected this 20:1 punitive:compensatory ratio. Of particular relevance here, the court considered the compensatory damages "substantial," especially in light of the fact that they "consisted of emotional distress, including feelings of anger, betrayal, and devastation."[95] Thus, in line with the dictate of *State Farm*, the court concluded that "not only was [plaintiff] completely compensated for his economic injuries by the large compensatory damage award, but we find also that the compensatory damages in this case contained a punitive element."[96]

Manipulation by Plaintiffs' Attorneys

Victor Schwartz and Leah Lorber have speculated that the imposition of punitive damages restrictions, including caps, leads to inflated compensatory awards, as plaintiffs' attorneys steer jurors' punishment impulses into increased damages for pain and suffering.[97] Several litigation consultants subscribe to a similar hypothesis of manipulation of the jury by plaintiffs' attorneys faced with caps on punitive damages. According to the CEO of a New York litigation consultancy:

> The decrease in [punitive] awards . . . is due to caps on punitive damages, now implemented in more than half of the states. In addition, plaintiffs' lawyers are shifting from arguing for punitive damages to pushing for large compensatory damages.[98]

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[92] 748 F.2d 421 (7th Cir. 1984).

[93] *Id.* at 427.

[94] 667 N.W.2d 651 (S.D. 2003).

[95] *Id.* at 670.

[96] *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003)).

[97] *See* Schwartz & Lorber, *supra* note 6. Tom Baker, instead, ascribes the result to "insurance law in action [which] transforms punishment into compensation." Baker, *supra* note 7, at 214. He too has predicted that "efforts to reduce the impact of punitive damages will have less effect on the out-of-pocket cost of the tort system than expected. Instead, what is likely to happen is that 'punishment' will come increasingly in the guise of compensation." *Id.*

[98] Leigh Jones, *It's a Harder Sell*, NAT'L L.J., Feb. 20, 2006, at S2.

Another jury consultant echoed:

> Plaintiffs' lawyers have enhanced some verdicts by advising juries to award damages in categories not affected by state caps. For example, if pain and suffering is capped and disfigurement is not, . . . lawyers may try to steer jurors that way.[99]

A recent Third Circuit Court of Appeals decision in the mass torts settlement of the phen-fen diet drug litigation draws attention to the ways in which noneconomic damages for mental anguish, pain and suffering and the like can substitute for punitive damages.[100] At issue in the case was the scope of a release that restricted those who opted out of the settlement from pursuing punitive damages.[101] The opt-out plaintiffs were charged with undermining the settlement by "evading or circumventing" the punitive damages restriction.[102] The court was cognizant of the fact that "mental anguish, pain, or loss of consortium" could serve as "vehicles for sub rosa punitive awards."[103] Moreover, according to the court, "the actual conduct of the litigation raised justifiable fear in the District Court, and among the counsel for defendant and the class, that the plaintiffs were seeking to obtain through the back door what they were barred from receiving through the front."[104] At the same time, the court, constrained by due process and federalism to construe the settlement agreement narrowly, determined that the drafters of the agreement "meant only to block the *specified type of damages* award" and thus did not reach evidence submitted in support of permissible types of damages—namely noneconomic compensatory damages.[105]

Tom Baker's surveys of plaintiffs' attorneys in Connecticut and Florida revealed some evidence that attorneys try to persuade juries to maximize the

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[99] David Hechler, *Smaller at the Top; Big Awards Continue to Drop, as Punitives Decline after 2003's "*State Farm*"*, Nat'l L.J., Feb. 21, 2005, at S2.

[100] *In re: Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 369 F.3d 292 (3d Cir. 2004). The court focused upon the strategic manipulation by attorneys, referring to "efforts by creative counsel on both sides to interpret and apply settlement terms so as to gain advantage in the individual lawsuits brought by intermediate opt-outs in various state courts." *Id.* at 296. In less diplomatic terms, the court referred to "guerrilla warfare from the opt-out lawyers." *Id.* at 304.

[101] Specifically, the case addressed the plight of "intermediate opt-outs," who did not exercise their right to opt out at the beginning, but rather, at a later period (but before the settlement was concluded). These intermediate opt-outs could pursue their claims individually, but they were precluded, under the settlement agreement, from pursuing punitive, exemplary, or multiple damages. The punitive damages release was described as "a central pillar of the settlement agreement." *Id.* at 306.

[102] *Id.* at 296.

[103] *Id.* at 310.

[104] *Id.* at 300.

[105] *Id.* at 310. The court nonetheless made it clear that "the District Court is not without recourse in the event that a verdict is rendered that appears to grant punitive damages under the guise of some other damage category." *Id.* at 318. While "[t]he precise circumstances that might arise" were too speculative, the court advised that "post-trial remedies should not be categorically rejected." *Id.*

compensatory damages awards to their plaintiff clients by introducing evidence on issues seemingly far afield from the harm done to the plaintiff—issues typically associated with the assessment of punitive damages: the wrongfulness of the defendant's conduct and the defendant's net worth.[106] Opening and closing arguments present plaintiffs' attorneys with a further opportunity to sneak punitive elements into compensatory awards—one that can easily evade the barriers set by juror instructions, evidentiary restrictions, and bifurcation.[107]

In light of this evidence, a key question leaps to mind: were plaintiffs' attorneys previously leaving money on the table? In other words, why wouldn't they have always pushed to maximize the amount of compensatory damages, especially if punitives were likely to be some multiple of compensatories? One response is that plaintiffs' attorneys seek to maximize their net awards: in jurisdictions without limits on punitives, it is more profitable to seek higher punitive damages, whereas in capped jurisdictions, attorneys must pursue a costlier approach of seeking higher compensatories. The latter approach might generate a higher total award, but perhaps other requirements (e.g., additional expert witnesses to substantiate greater compensation, etc.) make this strategy more expensive to pursue. The end result might be that total revenues increase for plaintiffs' attorneys, whereas total profits decrease.

A second complementary response might be that the jury has in mind some total damages award number and that constrains the domain of the plaintiffs' attorney. Even if a plaintiffs' attorney can boost this aggregate number, it might be increasingly costly to do so (eventually approaching infinity, or impossibility). Recent studies of lawyerly tactics in manipulating juries to shift damages between categories implicitly assume a "ready and willing" jury of the sort posited above by the behavioral psychologists. In the words of one plaintiff's attorney:

> Our opinion is that in most instances a jury has a figure in mind, and when you have a figure in mind, it can come in the guise of compensatory damages or in the guise of punitive damages. If they have that amount to award in punitive damages, most likely it's going to be reduced from compensatories . . . .[108]

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[106] *See* Baker, *supra* note 7. The reason, according to Baker, is that plaintiffs' attorneys shape their cases in order to maximize the possibility for recovery of insurance proceeds. Based upon interviews with plaintiffs' attorneys in Connecticut and Florida, Baker discovered that "[t]he most common obstacle plaintiffs' lawyers seek to avoid in potential punitive damages situations is the intentional harm exclusion [in standard insurance contracts]." *Id.* at 223.

[107] Indeed, plaintiffs' attorneys' argument strategies often appear inextricably linked to evidentiary issues. *See, e.g.*, *Vosevich v. Doro, Ltd.*, 536 S.W.2d 752, 759 (Mo. Ct. App. 1976) (ordering new trial where plaintiff's improper argument included references to inadmissible evidence of "net worth, dividends, profits, investment and retained earnings" that "were all calculated to prejudice and bias the jury"); *Carter v. Kirk*, 628 N.E.2d 318, 324 (Ill. App. Ct. 1993) ("Plaintiff's financial status, especially information that her house was in foreclosure was completely irrelevant and extremely prejudicial to the issues in this case. This information could only serve to evoke unwarranted sympathy on the part of the jury.").

[108] Baker, *supra* note 7, at 227 (quoting unnamed plaintiff's attorney).

And the prevailing view is that "every good trial lawyer knows that punitive damages, you really build them into your compensatory damages anyway, by showing just short of intentional misconduct."[109] In other words, attorneys shape their claims in order to shift damages that would otherwise fall within the rubric of "punitive" into the category of "compensatory."

There are, nonetheless, limits to courts' tolerance of "sub rosa" punitive awards. A vivid example is provided by a recent decision of the Michigan Supreme Court, overturning a $21 million jury award in a sexual harassment case—"the largest recorded compensatory award for a single-plaintiff sexual harassment suit in the history of the United States."[110] Plaintiff, the first female millwright hired at a Chrysler plant in Detroit, alleged hostile work environment sexual harassment on the basis of lewd pictures and messages in her workspace and sexually suggestive comments made by a fellow employee.[111] Punitive damages were not authorized under Michigan law.[112] The compensatory award, however, was comprised of $20 million for noneconomic damages—"mental anguish, physical pain and suffering, fright and shock, denial of social pleasures and enjoyments, embarrassment, humiliation, mortification, shame, anger, chagrin, disappointment, worry, outrage, [and] disability including the loss or impairment of plaintiff's psychological well-being."[113]

In its appeal to the Michigan Supreme Court, DaimlerChrysler argued that the verdict was "a disguised punitive-damages award."[114] And the court was persuaded that plaintiff's attorney sought to "incite the jury to punish the defendant even while disclaiming that he was seeking punitive damages" by "repeatedly using language that call[ed] for punitive rather than compensatory damages."[115] For example, plaintiff's counsel exhorted the jury that its verdict

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[109] *Id.* at 211 (quoting unnamed plaintiff's attorney).

[110] *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 394 (Mich. 2004). According to the court: "To our knowledge, plaintiff's $21 million verdict is the largest amount ever awarded for a single-plaintiff sexual harassment claim in the United States. It is seventy times larger than the maximum award permitted under title VII, the federal civil rights act." *Id.* at 401.

[111] *Id.* at 394–97.

[112] Michigan is somewhat unique in terms of allowing punitive damages only in specified contexts and for compensatory purposes only; and punitive damages were not authorized in this context. *Id.* at 400 ("[P]unitive damages are available in Michigan *only* when expressly authorized by the Legislature. Here, the Civil Rights Act does not authorize punitive damages . . . ."). *See* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 Md. L. Rev. 409, 447 (2005) (listing "compensatory punitive damages states" as "Connecticut, Michigan, and, on some accounts, New Hampshire and Louisiana"); *Id.* at 459–60 (appendix listing states with no common law punitive damages, including Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington).

[113] *Gilbert*, 685 N.W.2d at 421.

[114] Adam Liptak, *Pain-and-Suffering Awards Let Juries Avoid New Limits*, N.Y. Times, Oct. 28, 2002, at A14 ("As all sorts of limitations have recently been placed on punitive damages, creative lawyers have shifted their attention to pain and suffering, a little-scrutinized form of compensation for psychic harm.").

[115] *Gilbert*, 685 N.W.2d at 405.

should "reflect the enormity of the wrong, the intolerable nature of the injury, the extent of the humiliation, the torture, the extent of the outrage perpetrated."[116] Accordingly, the court determined that, "[i]nstead of awarding plaintiff an amount that fully and fairly compensated her, the jury returned a verdict that responded to plaintiff's request that they 'send a message' to Chrysler."[117]

But perhaps the exception proves the rule: certainly trial counsel's tactics in this case where the court intervened were far from subtle. To give a flavor of plaintiff's attorney's argument: "Plaintiff's counsel evoked images of physical abuse and torture, compared his client to survivors of the Holocaust, and argued that defendant DaimlerChrysler thought of itself as 'God Almighty,' exempt from the legal norms that govern others."[118] And, while extreme, such inflammatory rhetoric is common in cases where courts have ordered retrials or else reduced awards on the basis of improper argument.[119]

[116] *Id.*

[117] *Id.* at 406. The "send a message" mantra is typically associated with appeals for punitive damages. *See, e.g.*, Sharkey, *supra* note 2, at 397.

[118] *Gilbert*, 685 N.W.2d at 404 ("By associating plaintiff with those who had endured inhuman treatment in concentration camps, counsel likened defendant DaimlerChrysler—which, as the jury was informed, was partially under German ownership—with the Nazis."). In sum, the court was persuaded that "[o]verreaching, prejudice-baiting rhetoric appears to be a calculated, routine feature of counsel's trial strategy." *Id.* at 406.

[119] *See, e.g.*, *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1158 (Fla. Ct. App. 1994) (ordering a new trial given "the fundamental impropriety of prejudicial and inflammatory remarks during closing argument"); *Central of Georgia R. Co. v. Swindle*, 398 S.E.2d 365, 367 (Ga. 1990) (ordering a new trial where trial transcript "show[ed] a pervasive and persistent attempt on the part of the plaintiff to establish improper motive and anti-union sentiment on the part of the defendant railroad" leading to an award that was at least partially punitive); *Minichiello v. Supper Club*, 745 N.Y.S.2d 24, 25 (N.Y. App. Div. 2002) (granting new trial where plaintiff's attorney made analogies to Nazi Germany and the Holocaust because one of the defendants was a German national with an accent). Equally typical are exhortations to the jury to "send a message" to the defendant, thus attempting to plant the seed for punitive awards when the only issue before the jury is compensatory damages. *See, e.g.*, *Fisher v. McIlroy*, 739 S.W.2d 577, 582 (Mo. Ct. App. 1987) (affirming retrial order, holding that "a closing argument to a jury that the jury could, by its verdict, speak out about its feelings as to a certain matter in issue at trial and that the jury could send a message to a particular group in the community through its verdict is viewed as injecting the issue of punitive damages into a case through argument, even though such damages have not been pled"); *Halftown v. Triple D Leasing Corp.*, 453 N.Y.S.2d 514, 516 (N.Y. App. Div. 1982) (ordering new trial where plaintiff's attorney "told the jury six times that they were 'the conscience of the community' and must send a message to those in the construction field to be more careful so that this does not happen again, thereby inviting the jury to award punitive damages").

Plaintiffs' Attorney Screening & Selection Effects

Alternatively, the crossover effect might be due, not to direct manipulation by plaintiffs' attorneys, but instead to a more indirect effect caused by shifts in the types of cases that are pursued (and when they are pursued).

A variety of selection effects may be at work. First, caps will likely affect plaintiffs' attorneys' screening of cases. Cases with higher expected compensatory damages become comparatively more attractive, whereas previously, a case with expected low compensatory damages coupled with high punitive damages might have been equally (if not more) attractive. If plaintiffs' attorneys set a higher cut-off on expected compensatory damages when screening cases, we would observe higher compensatory damages after the imposition of a punitive damages cap.

Second, the comparative valuation of cases might change in the face of caps. Certain types of cases—automobile cases (or any other category where punitive damages are rare), for example—might be comparatively more profitable in a jurisdiction with punitive caps as compared to one with unlimited punitive damages.

Finally, caps might significantly affect settlement dynamics and thus the mix of cases that get litigated. The malleability of damages categories might widen differences between opposing attorneys' respective predictions of expected damages, leading to more cases going to trial. These selection effects might lead to increasing compensatory damages, but the increase would be caused by a change in the mix of litigated cases.

Conclusion

The crossover phenomenon— punitive damages spilling over into compensatory damages in the face of caps—has gained judicial recognition and, more recently, significant empirical validation. More empirical study is needed in order to arbitrate among the alternative explanations of the crossover effect. In order to test the plaintiff's attorney manipulation explanation, it would be worthwhile to investigate the behavior of plaintiffs' attorneys, both across capped and uncapped jurisdictions and within jurisdictions before and after enactment of a cap: Is there a perceptible rush to file cases or any change in filing behavior in anticipation of the adoption of caps on punitive damages? Alternatively, is there a shift in the types of cases that are selected by plaintiffs' attorneys? The empirical work to date should be the beginning, not the end, of the investigation of this phenomenon and its impact on the judicial system.

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The Relation between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards

Theodore Eisenberg, Valerie P. Hans and Martin T. Wells*

The relation between punitive and compensatory awards has long been a prominent policy question. In the last decade the relation has become of constitutional dimension. Two U.S. Supreme Court cases have held that federal due process limitations apply to the relation between punitive and compensatory damages, and have invalidated punitive damage awards in the instant cases as unconstitutionally large.[1] While reluctant to impose a bright-line rule for the ratio of compensatory to punitive damages, it held that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[2] The Court held further that, granted that the factual circumstances and defendant's conduct in some cases might merit a disproportionate award, in general there should be a proportionate relationship between the compensatory and punitive damages awarded to the plaintiff.[3]

Until empirical analyses of the punitive-compensatory relation were published, observers were left to guess about the relation. They apparently did so based on anecdotal evidence and eye-catching awards reported in news headlines. In 1996, the year of BMW v. Gore, which was the first Supreme Court case to invalidate a punitive award on constitutional grounds, The Washington Post newspaper editorialized about the haphazard pattern of punitive awards. The

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[1] *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *BMW v. Gore*, 517 U.S. 559, 586 (1996). See also *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (reiterating that the Constitution prohibits "grossly excessive" punitive awards).

[2] *State Farm Mutual Automobile Ins. Co. v. Campbell*, at 426.

[3] *Id.* at 425.

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paper, citing no systematic data, had juries pulling "numbers out of the air" in picking punitive awards.[4]

A wave of empirical research in the last decade has produced little support for the pulling-numbers-out-of-the-air approach. Multiple studies establish that punitive damages are rarely awarded,[5] are most frequently awarded in cases where intentional misbehavior likely occurred,[6] and bear a rational relation to the compensatory damages award.[7] However, these findings are contested by several researchers.[8]

Little disagreement exists about the existence of a strong association between punitive and compensatory awards in the mass of cases. Analysis has consequently shifted from the mass of cases, in which no systematic pathology is found, to a relatively small subset of extreme cases. Two available data sets enable systematic exploration of large awards. First, an academic project growing out of ExxonMobil's research initiative, an article by Joni Hersch and W. Kip Viscusi,[9] reports on a data set consisting of the largest punitive damages awards (63 awards greater than $100 million). The paper suggests that, in very large cases, jury punitive awards bear no relation to compensatory

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[4] "Legislation is needed because punitive damages are wildly unpredictable, so arbitrary as to be unfair and are awarded without any guidance to juries, which simply pick numbers out of the air." Editorial, Trial Lawyers' Triumph, WASH. POST, Mar. 19, 1996, 1996 WL 3069750.

[5] E.g., Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1094 (2000) ("punitive damages currently are not a significant factor in personal injury litigation in Georgia"); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002) [hereinafter "Juries and Judges"]; Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 633–37 (1997) (summarizing studies) [hereinafter "Predictability"]; Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida*: *In Terrorem and In Reality*, 38 HARV. J. LEGIS. 487, 487 (2001) ("frequency of punitive damages was strikingly low"); Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1515–19 (summarizing studies).

[6] E.g., Eisenberg et al., *Juries and Judges*, *supra* note 5, at 745. Punitive damages are most likely to be awarded in cases of slander and libel, intentional torts, and employment disputes. See Hans & Albertson, *supra* note 5, at 1515–16.

[7] E.g., Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1 (2006); Theodore Eisenberg & Martin T. Wells, *The Significant Association Between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer*, 3 J. EMPIRICAL LEGAL STUD. 175 (2006); Theodore Eisenberg, Paula L. Hannaford-Agor, Michael Heise, Neil LaFountain, G. Thomas Munsterman, Brian Ostrom & Martin T. Wells, *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. EMPIRICAL LEGAL STUD. 263 (2006).

[8] Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 2 (2004) (arguing that juries are more likely to award punitive damages and their awards are larger); Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 916 (1998).

[9] Hersch & Viscusi, *supra* note 8.

awards. Second, the National Law Journal (“NLJ”) made available to us its data on the largest trial awards for 2001 through 2004.

This article combines the H-V data with the NLJ data and with data about the mass of punitive awards collected by the National Center for State Courts (NCSC data). The combined data sets, the most comprehensive data set on contemporary punitive damages in U.S. courts, yield a highly significant relation between punitive and compensatory awards. Over 50% of the variance in punitive awards can be explained by using the compensatory award standing alone. A second major result is the absence of evidence that punitive damages awards have increased over time.

The Data Sets

This section briefly describes the data sets used in our analysis. For all three data sets, descriptive and other statistics are available in previous publications. We have removed the duplicates of thirteen observations that we believe appear in the data sets more than once.

The Hersch-Viscusi Data

H-V analyzed the relation between punitive and compensatory awards in 63 tried cases decided from January 1985 to June 2003. The cases were collected using “a detailed search to identify all cases for which there were punitive damages of at least $100 million.”[10] During the same time period they found three bench trials resulting in a punitive damages award in excess of $100 million. H-V report no meaningful relation between punitive awards and compensatory awards in the same case. “Analysis of these very large awards indicates that they bear no statistical relation to the compensatory awards.”[11] That conclusion seems questionable in light of a more rigorous statistical analysis of the H-V data.[12] But the correctness of their analysis is not the question of primary interest here. Rather, it is how the H-V and NLJ data “look” when viewed simultaneously with other data sets of punitive damage awards.

Prior research suggests that the H-V data have both similarities to, and differences from, the mass of punitive awards. Like the NCSC data (described below), the H-V data show a statistically significant association between

[10] *Id.*

[11] *Id.* at 2.

[12] Eisenberg & Wells, *supra* note 7.

punitive and compensatory awards. But the association is less strong, and the slope of the best-fitting regression line is noticeably different and flatter than the slope of the line that fits the NCSC data.[13]

NCSC Data

The *Civil Justice Survey of State Courts*, a project of the NCSC and the Bureau of Justice Statistics, presents data gathered directly from state court clerks' offices on tort, contract, and property cases disposed of by trial in fiscal year 1991-1992 and then calendar years 1996 and 2001.[14] The three separate data sets cover state courts of general jurisdiction in a random sample of 46 of the 75 most populous U.S. counties in the United States.[15] The 75 counties sampled include approximately 33% of the 1990 U.S. population; the actual 45 counties contributing data account for approximately 20% of the population.[16] The initial data set (1991-1992) includes only jury trials. The two subsequent data sets, 1996 and 2001, include both jury and bench trials. The three NCSC data sets include all completed trials in all three years in most of the counties. Sampling in the 1992 and 1996 data sets is described in earlier publications (see note 16). Sampling was used in three counties in the 2001 data set: Cook County (including Chicago), Illinois, Philadelphia County, Pennsylvania, and Bergen County, New Jersey. The three NCSC data sets yield 551 punitive awards used in our analysis.

These data are the most representative sample of state court trials in the United States. With direct access to state court clerks' offices, as well as approximately 100 trained coders recording data, the information gathered does not rely on litigants or third parties to report, in contrast to typical jury verdict reporting services.

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[13] Cf. Hersch & Viscusi, *supra* note 8, with *Juries and Judges*, *supra* note 5; Eisenberg & Wells, *supra* note 7.

[14] The NCSC is in the process of gathering data for 2005.

[15] The 2001 data included 46 counties; the 1991–1992 and 1996 data included 45. One county included in the 1991–1992 and 1996 study, Norfolk, Massachusetts, fell out the nation's 75 most populous in the 2000 census and was replaced by Mecklenburg County, North Carolina, and El Paso County, Texas. Two Maryland counties declined to participate in the 1991–1992 study, and were replaced with Fairfax County for all three iterations of the Civil Justice Survey.

[16] For a summary of the data and methodology, see Bureau of Justice Statistics Bulletin: Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001 (April 2004) [hereinafter "BJS, 2001"]; Bureau of Justice Statistics Bulletin: Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties (1996) [hereinafter "BJS, 1996"]; Bureau of Justice Statistics Bulletin: Civil Justice Survey of State Courts, 1992: Tort Cases in Large Counties 6 (1995) [hereinafter "BJS, 1992"]. See also Hersch & Viscusi, *supra* note 7, at 10–13 (describing 1996 data); *Juries and Judges*, *supra* note 5 (describing 1996 data); Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 Case Western Res. Univ. L. Rev. 813, 822–27 (2000) (describing 1992 data).

NLJ Data

The NLJ data set consists of what the NLJ has found to be the largest total (punitive plus compensatory awards) jury trial awards in the years 2001 through 2004. One hundred of those largest awards contain a punitive damages component and a non-punitive damages component. For these 100 cases, as for the 63 H-V cases, and the 551 NCSC cases, one can explore the relation between the punitive and the compensatory award. Detailed discussion of the NLJ data appears in the NLJ articles reporting on their data.[17] Like the H-V data, the NLJ data do not account for post-verdict adjustments to awards. In contrast, the NCSC data report the judgment as entered, which may reflect a judicial reduction of a jury award.

To our knowledge, no systematic analysis of the NLJ data for the relation between punitive and compensatory awards has been published. In results not reported here, we analyzed each of the 4 years of NLJ data. For 3 of the 4 years, we found no statistically significant positive relation between punitive and compensatory awards. For 2004, there was a marginally significant association. That the NLJ awards, standing alone, show no significant association, but are consistent with a significant association in the context of the mass of awards, is itself of interest. That could be a consequence of the highly filtered data NLJ seeks–only the most extreme awards in a year. But the H-V data with even a more extreme set of awards do show a statistically significant association, so extremity alone is not the likely sole explanation. For present purposes our goal is to explore how the NLJ and other data play out in the larger pattern represented by the three datasets. That the NLJ data fit reasonably well in a larger pattern suggests the importance of trying to place extreme data in context.

Combining Extreme Data with the Mass of Awards

Studying large awards in isolation naturally distorts the picture of punitive damages awards. As seductive as extreme awards are, they are, by their nature, atypical. It is instructive to try and place them in context by combining them with other data relating to punitive damages. This section first explores the punitive-compensatory relation using the three data sets. It then explores time trends in punitive and compensatory awards using the data sets.

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[17] See *NLJ Verdicts 100: Top Verdicts of the Year: The Big Get Smaller*, Nat'l L.J., Feb. 4, 2002, at C3; David Hechler, *Tenfold Rise in Punitives: Total Value of 2002's 100 Largest Awards More than Triples the Previous Year's Value*, Nat'l L.J., Feb. 3, 2003, at C3; David Hechler, *The Big Drop: The Jury's Out on Why, But Punitive Awards Took a Nosedive in 2003*, Nat'l L.J., Feb. 9, 2004, at S2; David Hechler, *Top 100 Verdicts of 2004: Smaller at the Top: Big Awards Continue to Drop, as Punitives Decline after 2003's "State Farm,"* Nat'l L.J., Feb. 21, 2005, at S2.

The Punitive-Compensatory Relation

Figure 1 is a scatterplot of the combined data sets, after removing duplicates of the 13 cases that appeared in more than one data set. It suggests that the basic punitive-compensatory relation holds throughout the range of punitive and compensatory awards. And the absence of cases from the upper left quadrant of the figure suggests that large punitive awards are almost never given for relatively small compensatory awards. No million-dollar punitive award (10^6 in logs on the figure's y-axis) appears for any compensatory award of less than \$100,000 (10^5 in logs on the figure's x-axis).

But the figure also suggests some differences in the three data sets. The NCSC data, represented by circles, have the strongest association between punitive and compensatory awards. The H-V data, designated by triangles, have a weaker but observable positive association between punitive and compensatory awards, as reported elsewhere.[18] The NLJ data (represented by squares), as their separate analysis suggests, show little relation between the punitive and compensatory awards.

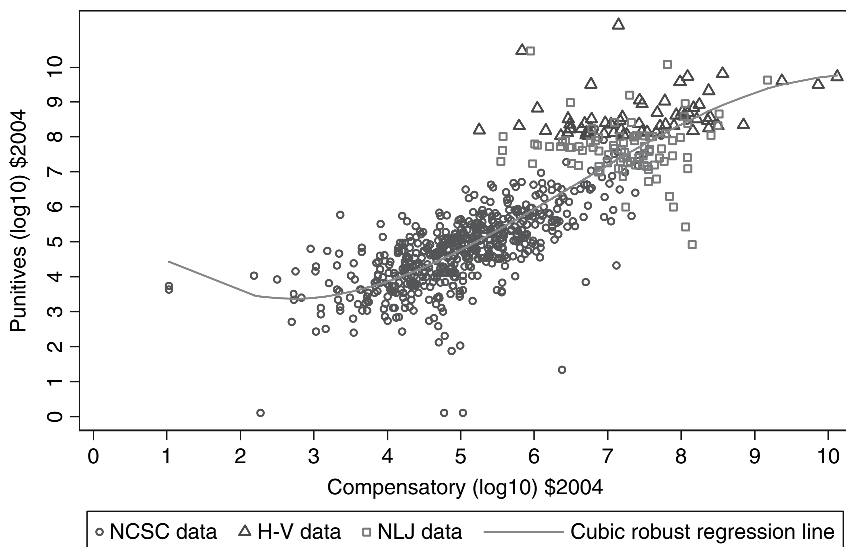

Fig. 1 Punitive-Compensatory Relation, Three Data Sets

[18] That analysis depends on including a dummy variable for tobacco cases, a refinement not needed for purposes of this article.

The slopes at the low and high ends of the compensatory award distribution have been previously observed and explained.[19] The data sets suggest a "flattening out" of the punitive-compensatory relation as one moves from the mass of NCSC data to the more extreme NLJ and H-V data sets. This flattening pattern suggests that as compensatory awards become very high, adjudicators' behavior is consistent with the belief that the amount of punitive damages awarded per unit of compensatory damages can decrease without substantially diluting the intended punishment.

The "flattening" of punitive damages at the top end of the compensatory award distribution is accompanied by a nonlinear relation at the low end of the compensatory award distribution. At the low end of compensatory awards, "[f]actfinders outraged enough to award punitive damages in the face of low compensatory awards might be expected to employ higher or less predictable multiples of compensatory awards."[20] For example, outrageous behavior such as a failed murder attempt could result in little or no compensatory damages. A bullet may simply miss its target. The miss does not make the shooter non-reprehensible or make the attempt unworthy of punishment. A nominal compensatory award of $1 or even $1,000 in bad behavior-low harm cases may generate an extreme punitive-compensatory ratio when adjudicators award punitive damages.

These varying slopes at the tails of the compensatory distribution suggest fitting a cubic model that includes compensatory awards (log10) squared and cubed as explanatory variables. The curved line shown in Fig. 1 is the best fitting robust regression cubic model using only three compensatory award variables (linear, squared, cubed) as explanatory variables. The cubic model provides a reasonably good visual fit to the data. And cubic models, not reported here, in fact slightly improve on the linear models reported below. The utility of cubic models in fitting these data sets is consistent with cubic models fitting the 1992 and 1996 NCSC data.[21]

Combining the data sets generates new methodological issues, some of which can be addressed and some of which cannot. Since neither the H-V data nor the NLJ data include post-verdict reductions in awards, one should expect them to be more extreme. We lack the data to adjust for this difference from the NCSC data.

We can, however, adjust for another key difference among the data sets. The H-V data span 19 years, the NLJ data span 4 years, and the NCSC data span

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[19] Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 S. Ct. Econ. Rev. 59, 69–70 (1999).

[20] *Id.* at 70. See also Eisenberg et al., *Predictability*, *supra* note 5, at 654 (low or zero compensatory awards in punitive damages cases are "consistent with egregious misbehavior, hence a punitive award, in which insubstantial harm occurred, hence a small or zero compensatory award.").

[21] Eisenberg & Wells, *supra* note 19, at 81.

3 years. In addition, both the H-V and the NLJ data sets purport to cover the entire country. The BJS estimates that about half of all tort cases are handled in the 75 largest counties.[22] Since the actual BJS samples include only 45 of the 75 largest counties, one can estimate the fraction of tort litigation in the 45 sampled counties to be 45/75 times 50%, or about 27.8%. Thus, while the NLJ data attempt to account for all the largest cases in 4 years, and the H-V data account for all the very largest cases over 19 years, the NCSC data account for about 27.8% of the mass of cases decided in 3 years. The combined sample thus over represents the largest awards relative to the mass of awards, meaning that large cases are more likely to be in our combined sample than are more routine cases. By weighting the data based on the estimated probability of a case being in the sample we can adjust for the unbalanced sample design.

Table 1 reports the results. Models (1) and (3) include only the compensatory award (log) as an explanatory variable. Models (2) and (4) include both the compensatory award (log) and dummy variables for the data sets as the explanatory variables. The NCSC data serve as the reference category. Model (5) adds a tobacco dummy variable for cases involving tobacco company defendants, as earlier work shows that accounting for tobacco cases helps to explain the H-V data.[23] The first two models do not adjust for the oversampling of large awards. Models (3), (4), and (5) use weighted regressions to account for the oversampling. Model (6) examines the ratio of punitive to compensatory awards (logs) as a function of the sources of the data.

Table 1 contains two major findings. First, consistent with other studies of more limited data sets, the punitive award is highly correlated with the compensatory award. In all four models, the coefficient for the compensatory damages explanatory variable (top row) is statistically significant beyond any reasonable threshold. Second, the models have substantial explanatory power. All explain more than half the variation in the punitive award.

Table 1 also suggests the importance of accounting for the unbalanced sample structure. The unweighted results in models (1) and (2) convey an exaggerated picture of the models' explanatory power of the punitive award. Models (3), (4), and (5) provide a more realistic estimate of the amount of variation in the punitive award that the compensatory award helps to explain. As Table 1 shows, the unweighted models provide artificially high measures of the degree of variance explained. The unweighted models yield R-squareds of 0.68 and 0.77 while the more appropriate models yield R-squareds of 0.55 and 0.59. Regression diagnostics also suggest the superiority of the weighted models. Both residual versus fitted plots and inspection of the distribution of the regression residuals are more satisfactory for the weighted models than for the unweighted models.

Table 1 also shows statistically significant, positive coefficients for the H-V and NLJ dummy variables. Model (6) confirms this effect even when the

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[22] BJS, 1992; BJS, 1996; BJS, 2001, *supra* note 16.

[23] Eisenberg & Wells, *supra* note 7.

Table 1. Regression models of combined punitive damages data sets

	(1)	(2)	(3)	(4)	(5)	(6)
	Unweighted models		Models weighted to reflect oversampling of large-award cases			
		Dependent variable = punitive damages (log10) $2004				Dependent variable = ratio of logs
Compensatory (log10) $2004	1.062**	0.689**	0.874**	0.779**	0.779**	–
	(34.43)	(16.65)	(22.51)	(17.70)	(17.69)	–
NLJ dummy	–	1.360**	–	1.161**	1.160**	0.105**
	–	(9.51)	–	(7.87)	(7.86)	(5.19)
H-V dummy	–	2.183**	–	1.966**	1.832**	0.210**
	–	(14.68)	–	(13.03)	(13.72)	(9.41)
Tobacco case dummy	–		–	–	1.652*	
	–		–	–	(2.51)	
Constant	-0.377*	1.313**	0.424*	0.861**	0.860**	0.964**
	(2.18)	(6.25)	(2.06)	(3.83)	(3.82)	(92.69)
Observations	683	683	683	683	683	683
R-squared	0.68	0.77	0.55	0.59	0.59	0.01

Robust t statistics in parentheses
+ significant at 0.1; * significant at 0.05; ** significant at 0.01

dependent variable is changed to the ratio of punitive to compensatory awards. Thus, per unit of compensatory damages, cases in the H-V and NLJ data sets tend to have higher punitive awards. This likely is due in part to the mechanism for being selected into the H-V or NLJ samples. Observations could not enter the H-V sample unless they had at least a $100 million punitive award. Thus, one expects these cases to have larger punitive awards per unit of compensatory award than cases from a broader cross-section of awards. The NLJ data were also selected for their overall size, but not necessarily the size of their punitive damages awards. Note that the coefficient for the NLJ dummy variable is noticeably smaller than that for the H-V dummy variable. This likely reflects the less direct focus on punitive damages in choosing cases for the NLJ analysis.

Time Trends

All three data sets span multiple (albeit different) years. Given often expressed concerns about time trends in award sizes,[24] the three data sets allow for

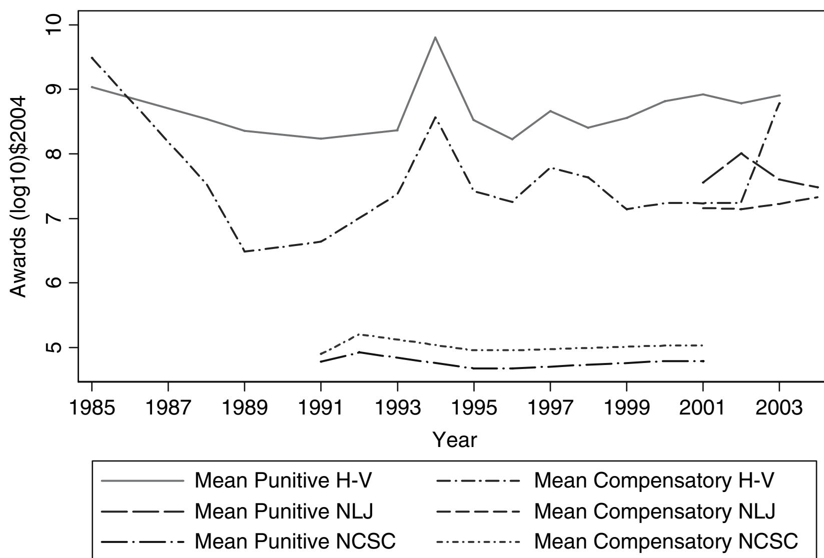

Fig. 2 Time Trends in Punitive & Compensatory Awards, Three Data Sets

[24] E.g., Ellen Kelleher, *AIG Intensifies Efforts on Tort*, Financial Times 16, Sept. 4, 2003, 2003 WL 62023040 (referring to “a sudden rise in jury awards as well as increased risks of class action and corporate governance issues”). See generally the discussion in William Haltom & Michael McCann, Distorting the Law: Politics, Media, and the Litigation Crisis 52–56 (2004).

exploration of time trends in punitive and compensatory awards. Figure 2 shows the mean punitive and compensatory award for each data set for each year covered by the data set (in 2004 dollars), from1985 to 2004. The figure suggests no noticeable increase over time for either compensatory or punitive awards for any of the three data sets. This result is consistent with other recent evidence that perceptions of broad-based increases in recoveries,[25] fee awards,[26] and tort awards are not well supported by the evidence.[27] The two datasets comprised of extreme awards, and one comprised of the mass of awards, show no time trend. For a discussion of why a perception of increasing awards persists in the absence of any demonstrable trend, see Bornstein and Robicheaux, this volume.

Conclusion

Data about the largest punitive damages awards allow estimation of the relation between punitive and compensatory awards for both the mass of cases and for the most extreme cases. Throughout a substantial range of compensatory awards, from about $1,000 to over $100 million, a strong, significant correlation exists between punitive awards and compensatory awards in the same case. For extremely low and extremely high compensatory awards beyond this range, the association decreases. We hypothesize that bad behavior-low harm cases contribute to the flattening at the lower end of the award distribution. Furthermore, with extremely high compensatory damage awards, the intended punishment may be achieved with a lower punitive-compensatory ratio. We also find no evidence of increased awards over the time period of 1985 to 2004, either in run-of-the-mill punitive awards or in blockbuster awards.

These analyses show the value of examining the broad range of damage awards, placing extreme awards in context. Our results generally confirm the bulk of empirical research suggesting that punitive damages are less volatile and inexplicable than tort reform proponents claim. Perhaps the major policy implication is that legislatures and businesses are devoting too much time and resources to a social issue that, if anything, presents a problem of much smaller degree than rhetoric[28] would have one believe.

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[25] Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004).

[26] *Id.*

[27] Seth A. Seabury, Nicholas Pace & Robert Reville, *Forty Years of Civil Jury Verdicts*, 1 J. Empirical Legal Stud. 1 (2004).

[28] E.g., Stewart Taylor & Evan Thomas, *Civil Wars: Doctors, Teachers, Coaches, Ministers. They all share a common fear: being sued on the job. Our litigation nation–and a plan to fix it.* Newsweek, Dec. 13, 2003.

Damages as Metaphor: A Commentary

Susan Poser

It was fortuitous that as I sat down to write this commentary on the last two chapters, news broke of the latest Supreme Court case on punitive damages—*Phillip Morris v. Williams*.[1] What better way to introduce a chapter about how juries determine punitive damages than with perhaps the most convoluted Supreme Court analysis on the subject to date.

The Oregon jury in *Williams* found that cigarette smoking caused the death of the plaintiff, Jesse Williams, and that Phillip Morris was negligent and engaged in deceit in leading Williams to believe that it was safe to smoke.[2] The jury awarded $821,000 in compensatory damages (of which approximately $800,000 was for noneconomic harm) to Jesse Williams' estate, and $79.5 million in punitive damages.[3]

The issue before the U.S. Supreme Court was whether the Oregon jury, in assessing punitive damages, had sought to punish Phillip Morris for harm caused to other smokers apart from Mr. Williams, the plaintiff. In a 5–4 majority opinion by Justice Breyer, the Court stated that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few[4] and that punitive damages may be imposed to

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[1] 1 127 S. Ct. 1057 (2007).

[2] *Id.* at 1060–61.

[3] *Id.* at 1061. In Oregon, the state receives 60% of a prevailing party's punitive damages award. OR. Rev. Stat. § 31.735 (2003). *See Enquist v. Or. Dep't of Agric.*, No. 05-35170, 2007 WL 415249 (9th Cir. Feb. 8, 2007); *DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002). For discussion of split-recovery statutes like Oregon's, *see, Catherine M. Sharkey, Punitive Damages as Societal Damages*, 113 Yale L.J. 347 (2003); Victor E. Schwartz, Mark A. Behrens, & Cary Silverman, *I'll Take That: Legal and Public Policy Problems Raised by Statutes that Require Punitive Damages Awards to be Shared with the State*, 68 MO. L. Rev. 525 (2003); Patrick White, *The Practical Effects of Split-recovery Statutes and their Validity as a Tool of Modern Day "Tort Reform"*, 50 Drake L. Rev. 593 (2002).

[4] 127 S. Ct. at 1064.

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further the state's interest in punishing unlawful conduct and deterring its repetition.[5] Juries may not, however, use punitive damages to punish a defendant directly for harms that the defendant visited on nonparties.[6] Thus, the Court made a distinction between juries using evidence of harm to others for the purpose of determining reprehensibility, on the one hand, and for the purpose of imposing punishment for those harms, on the other hand. According to the majority of Justices, the former is permitted, but the latter violates due process. The Court held that in *Williams*, the particular instructions to the jury may have led the jury to engage in the latter and therefore remanded the case to the Oregon Supreme Court so that it could evaluate the trial court proceedings in light of the Court's discussion of this distinction.[7] Significantly, the Court chose not to reach the issue of whether the $79.5 million award for punitive damages was excessive, which would have given it the opportunity to revisit the guide-post jurisprudence of *State Farm v. Campbell*[8] and *BMW v. Gore*.[9]

The dissenters in *Williams*[10] expressed their confusion about and disagreement with the Court's distinction between using harm to others to determine reprehensibility and using harm to others to punish the defendant for that harm. Justice Stevens argued that because there was no evidence of harm to others presented at the trial, the jury would have no basis for knowing about harm to others, thus supporting the inference that if the jury's considered harm to others (it was mentioned in closing argument by plaintiff's counsel) it must have been directed toward determining reprehensibility.[11]

Justice Ginsburg noted that the purpose of punitive damages, by definition, is to punish for reprehensibility, not for harm done to the plaintiff or anybody else,[12] and that the jury was properly so instructed. Justice Ginsburg also noted that the issue, as it was taken up by the Court, was never preserved in the Oregon courts so it should not have been addressed at all.

In *Williams,* the how-many-angels-dance-on-the-head-of-a-pin question for the Court was whether it is possible to know if the jury assessed evidence of harm to nonparties for a proper purpose (determining reprehensibility) or for an improper purpose (imposing punishment for harm to nonparties). Although Justice Stevens, in dissent, lamented that "[t]his nuance eludes me," the majority seemed to assume that it is possible for a trial court to police this distinction with precise jury instructions, although it offered no suggestions.

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[5] *Id*. at 1062.
[6] *Id*. at 1063.
[7] *Id*. at 1065.
[8] 538 U.S. 408 (2003).
[9] 517 U.S. 559 (1996).
[10] Justices Stevens, Thomas, and Ginsburg each filed a brief dissent.
[11] 127 S. Ct. at 1066 (Stevens, J., dissenting).
[12] *Id*. at 1068 (Ginsburg, J., dissenting).

The Court's notion that that jury instructions can effectively structure the decisional processes of juries concerning punitive damages awards is highly contested. Research into other situations in which juries are asked to use evidence for one purpose but ignore it for another has generally concluded that jurors are not able to follow jury instructions so precisely.[13] Some studies on mock juries have found that jurors tend to do a good job of assessing reprehensibility and attaching a monetary award to it,[14] while others have concluded that jurors have difficulty translating their understanding of reprehensibility into a monetary award.[15] Still other studies have found that juries tend to think about damages holistically and do not carefully parse the instructions when determining punitive damages.[16] Although lawyers will likely understand the *Williams* decision as a clarification (or attempted clarification) of the distinction between harm to others and reprehensibility in punitive damages, those who study the psychology of juries are likely to view it as yet another set of assumptions about jury behavior that needs to be tested by empirical methods.

Punitive Damages and Empiricism

The chapters in this volume by Catherine Sharkey and Theodore Eisenberg et al., are recent examples of empirical studies that address the issue of what juries understand and what they do with this understanding in the context of punitive damages. Catherine Sharkey, in the chapter entitled "*Crossing the Punitive-Compensatory Divide*", presents empirical evidence of a "crossover phenomenon" in jury decision-making about punitive damages. Juries, she finds, increase compensatory damages in cases in which there are caps on punitive damages. Because juries do not know about these caps, Sharkey speculates that the existence of caps affects how plaintiffs' attorneys argue their cases, which in turn results in jury decisions exhibiting this crossover effect. This is plausible if one also believes, as mock jury experiments have shown, that juries tend to think holistically about damages.[17] If that is true, then

[13] Edith Greene & Brian Bornstein, Determining Damages 20 (2003).

[14] Cather et al.; *See* Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instructions on Damage Awards*, 6 Psychol. Pub. Pol'y & L. 743 (2000) (reviewing studies on the topic).

[15] Cass R. Sunstein, Daniel Kahneman, David Schkade, & Ilana Ritov, *Predictably Incoherent Judgments*, 54 Stan. L. Rev. 1153 (2002).

[16] Michael C. Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 Law and Hum. Behav. 313 (1999); Edith Greene, David Coon, & Brian Bornstein, *The Effects of Limiting Punitive Damage Awards*, 25 Law and Hum. Behav. 217 (2001); Sharkey p. 8; Cass Sunstein et al., *Punitive Damages: How Jurors Decide* (2002).

[17] *Id.*

juries would seem easily manipulated by attorneys who, faced with punitive damages caps, encourage them to plug more of the damages into the compensation side of the ledger.

Theodore Eisenberg, Valerie P. Hans, and Martin T. Wells, in their chapter *The Relation between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, combine and analyze three large data sets to show that the size of compensatory damages is strongly correlated with the size of punitive damages, and that neither type of damages has increased over time.[18] This reinforces other studies with similar findings.[19]

Both chapters are examples of empirical work that attempts to sort out accurate from inaccurate assumptions about jury decision-making. Sharkey gives several examples of judicial recognition of a jury predilection to confuse or merge compensatory and punitive damages. Techniques that courts are increasingly using to help juries understand the distinction between compensatory and punitive damages include precise jury instructions that attempt to articulate clearly the distinction between compensatory and punitive damages, trial bifurcation, and restrictions on when particular types of evidence that might relate to punitive damages can be admitted.[20]

Sharkey also provides anecdotal evidence that judges are concerned about the particular problem of juries increasing compensatory damages when punitive damages are either not available or are limited. She cites several cases in which judges have justified remands of damages decisions based on an assumption that the jury may have crossed categories.[21] She also reviews prior studies of mock juries that document the crossover phenomenon.[22] Sharkey's significant contribution is to add robust empirical support to the crossover hypothesis. Thus, she has brought together her own statistical analysis of a large data set, prior mock jury experiments, and what we might call common, experiential-based knowledge among litigators and judges. All together, these three sources provide powerful evidence that caps on punitive damages affect awards of compensatory damages.

The chapter by Eisenberg, Hans, and Wells complements Sharkey's work by showing through empirical evidence that there is a systematic relationship between compensatory and punitive damages. This reinforces other studies finding that jurors follow instructions and act reasonably in making punitive

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19 *See*, e.g., Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990); Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System – and Why Not?*, 140 U. PA. L. REV. 1147 (1992); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997).

20 Sharkey draft pp. 4–6

21 Sharkey draft p. 5

22 Anderson & MacCoun, *supra* note 16; Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW AND HUM. BEHAV. 353 (1999).

damages determinations.[23] The clear point of agreement in these studies is that the relationship between compensatory and punitive damages is dynamic. Sharkey shows that caps on punitive damages tend to result in increased compensatory damages, and Eisenberg et al. show that the size of one predicts the size of the other.

Empirical work that tests our beliefs and assumptions about the effects of legal rules and legal actors is growing by leaps and bounds. Although the sociological study of law has been around for a long time, this new wave of empirical work is now regularly published in main line legal journals. Theodore Eisenberg himself is one of the editors of a relatively new journal, the *Journal of Empirical Legal Studies*, which publishes only this type of work. Empirical work meant for legal audiences is being done in many areas of the law aside from Torts, including Contracts, Constitutional Law, Employment Law, and International Law.[24] The mining and analysis of data sets complements the ongoing work on juries that uses mock jury experiments rather than analysis of archival data. Using multiple methods to study jury behavior is important because each method suffers from its own particular limitations, and obtaining similar findings across diverse methodologies affords convergent validity (see chapter by Vidmar, this volume).

This recent explosion of empirical work about legal phenomena, whose intended audience is lawyers, legal scholars, judges, and policy makers, creates its own new set of assumptions and questions that must be addressed in order for the work to be meaningful and useful. The conscious choices of the researchers affect the results of the statistical analysis.[25] Among these choices are the particular statistical method chosen, the definition of terms, the coding rules, and the terminology and metaphors used in analyzing the data and drawing conclusions. The studies by Sharkey and Eisenberg et al. are just two recent examples that raise these same issues. In the remainder of this commentary, I will discuss one of these issues—choice of metaphor—and show how the choice of metaphors can have a significant effect on the interpretation and use of the data.

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[23] Corinne Cather et al., *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 Law and Hum. Behav. 189 (1996).

[24] *See, e.g.*, Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 Berkeley J. Emp. & Lab. L. 49 (2006); Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 Mich. L. Rev. 2678 (2000); Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 Harv. Int'l L. J. 33 (2006); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006).

[25] This is well documented, for example, in the ongoing debate between Theodore Eisenberg and Kip Viscusi concerning the proper statistical techniques that should be applied to data sets in regard to punitive damages. *Cf., e.g.,* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 Cornell L. Rev. 743, 747 (2002) *with* Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. Legal Stud. 1, 2 (2004).

Metaphor and Punitive Damages

Sharkey provides compelling empirical verification of the hypothesis that juries will increase compensatory damages if the punitive damages vehicle is unavailable or inadequate. She calls this the "crossover hypothesis" and reviews the work of others who have found a similar phenomenon. She reports that Anderson and MacCoun articulate this phenomenon as a "water-filled balloon; if one pushes down on one end, the other pops up,"[26] and she notes judicial recognition of this phenomenon in a variety of cases.[27] In almost the same breath, however, Sharkey describes this phenomenon in quite different terms, using the metaphor of blurred boundaries rather than the metaphor of boundaries being crossed.[28]

This highlights the difficulty of choosing metaphors when discussing the dynamic relationship between punitive and compensatory damages. On the one hand, in the law of damages, punitive and compensatory damages are distinct categories, employed for different purposes. Compensatory damages are meant to redress loss, to make the plaintiff whole again, while punitive damages are meant to punish and deter. If we view damages as divided into these categories, then if compensatory damages are being used to punish, or punitive damages are being used for redress, it is meaningful to speak of there being distinct boundaries with crossover.

On the other hand, Sharkey talks about the "distinction between emotional distress compensatory damages and punitive damages" as being "blurred," and "collapsing"[29] She quotes Tom Baker as stating that "there is no clear dividing line between compensatory and punitive damages."[30] This gives the impression that compensatory and punitive damages are not distinct categories, and that, at least in some circumstances, they redress similar harm.

Sharkey uses these metaphors interchangeably in her discussion leading up to the presentation of her own empirical analysis showing that caps on punitive damages lead to higher compensatory damages. For the purpose of making the empirical claim about the effect of punitive damages caps, it does not matter which metaphor is used to describe the relationship between compensatory and punitive damages. Whether juries think of these damages as separate categories or as one big blurred mix of emotional harm to the plaintiff and bad conduct by

[26] Anderson & MacCoun, *supra* note 16 at 313.

[27] Sharkey pp. 6–8 citing *Chestnut v. City of Lowell*, 305 F.3d 18 (1st Cir. 2002); *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982); *McDonough v. City of Quincy*, 452 F.3d 8 (1st Cir. 2006); and *State Farm v. Campbell*, 538 U.S. 408 (2003).

[28] Sharkey p. 2. Sharkey asks: "What is the import of this blurred distinction between emotional distress compensatory damages and punitive damages?"

[29] Sharkey p. 2.

[30] Sharkey p. 2, fn 7. It is not clear whether another quote from Cass Sunstein that compensatory damages have a "punitive component" is a reference to crossover or blurred boundaries. Sharkey p. 2.

the defendant, the cause and effect phenomenon that Sharkey captures is interesting to know about and, of course, significant for the litigants and their lawyers for the purpose of trial strategy.

At the same time, however, Sharkey's mixing of metaphors alerts us to an important question that we need to consider if the goal of the research is not only to understand how juries think about emotional distress and punitive damages, but also to lay a foundation for policy discussions about damages. What is the level of juries' understanding of the distinction between compensatory damages for emotional distress and punitive damages? Or, to oversimplify, do juries, consciously or unconsciously, move damages from one category to another in reaction to the exhortations of plaintiffs' lawyers, or are they confused about or oblivious to the difference between these types of damages and therefore assign amounts to different categories arbitrarily?

There is evidence for both of these understandings of jury cognition and behavior. For example, one oft-cited rationale for bifurcation of the compensatory and punitive damages stages of a trial is that evidence of the defendant's wealth is permitted for the purposes of punitive damages but not for compensatory damages. Bifurcation is thought to prevent the jury from inflating compensatory damages based on evidence of the defendant's wealth and evidence of reprehensibility.[31] Thus, bifurcation of trials into different stages for the awarding of compensatory and punitive damages is premised on the notion that these are two distinct categories with distinct criteria, but that the possibility of jury confusion about these criteria requires judicial monitoring. This supports the crossover metaphor. It is also in the spirit of the *Williams* case insofar as it reflects a belief that jury understanding of damages categories can be effectively managed by procedural rules and jury instructions.

Some courts have shown confusion about what bifurcation is intended to prevent. One court stated that "without an evidentiary buffer at trial, juries will ultimately confuse the basic issue of fault or liability and compensatory damages with the contingent issue of wanton and reckless conduct which may or may not ultimately justify an award of punitive damages."[32] It is not clear how bifurcation prevents this kind of confusion since evidence of the defendant's actions would be admissible to show fault and causation for the purposes of compensatory damages. But this comment does seem to assume that there are distinct categories and judges must help juries keep them separate.

Many judges, however, have expressed the view that compensatory damages for emotional distress and punitive damages are not distinct categories and that there is significant overlap between them. Sharkey gives one particularly stark example from *State Farm v. Campbell*, in which the Court comments on the similarity between damages for injury due to outrage and humiliation, and

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[31] *Holt v. Grinnell*, 441 S.E.2d 874 (Ga. Ct. App. 1994); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994); Edith Greene et al., *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary*?, 24 Law and, Hum,. Behav,. 187 (2000).

[32] *Bradfield v. Schwartz*, 936 So. 2d 931, 938 (2006).

damages punishing those who caused such outrage and humiliation. The Court stated that emotional distress damages of this kind contain a punitive element.[33] Other courts have required that when juries are deliberating about compensatory damages in a case where punitive damages will also be available, the jury should be told of the availability of punitive damages in order to "insure that the jury's sense of outrage will not be reflected either in its assessment of compensation or in some other aspect of the case."[34]

If there is no real boundary between emotional distress damages and punitive damages, then one could make a plausible argument that there is double recovery in every case where juries made awards under both headings of damages. Plaintiffs are getting some punitives with the compensatories under the heading of emotional distress damages, and then more compensatories along with punitives under the heading of punitive damages. We see this concern with double recovery in individual cases, as discussed above, but the acceptance of the metaphor of "blurred boundaries" would make it a de facto concern in all cases. This is analogous to the ongoing debate about whether there is a real boundary between damages for loss of enjoyment of life, on the one hand, and pain and suffering, on the other.[35] The perceived overlap between these types of noneconomic damages and the subsequent concern about double recovery have led many courts to prohibit juries from making separate awards for loss of enjoyment of life and pain and suffering.[36]

Studies of juries over the past decade do not solve this puzzle of how juries conceptualize these different types of damages. Many of the studies of jury decision-making focus on exploring whether juries follow proper legal distinctions in making damages awards. For example, Cather et al. found that mock jurors properly focused on reprehensibility in punitive damages determinations (even when the extent of injuries might tempt them to raise punitives), and extent of harm in compensatory damages determinations (even when reprehensibility might tempt them to raise compensatory damages). This would seem to support the view that there are distinct categories and juries understand these categories and apply the right criteria in assessing damages. But the fact situations presented to the mock jurors in these studies often compare punitive damages with economic damages, rather than emotional distress damages, which are more difficult to distinguish.[37]

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[33] *State Farm*, 538 U.S. at 426; Sharkey draft p. 8.

[34] *Wanetick v. Gateway Mitsubishi*, 750 A.2d 79, 85 (N.J. 2000). *See also, Cates v. Eddy*, 669 P.2d 912 (Wyo. 1983).

[35] *See*, Susan Poser, Brian H. Bornstein, & E. Kiernan McGorty, *Measuring Damages for Lost Enjoyment of Life: The View from the Bench and the Jury Box*, 27 Law and Hum. Behav. 53 (2003).

[36] *Id.*

[37] Cather et al., *supra* note 23; *See also*, Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instructions on Damage Awards*, 6 Psychol. Pub. Pol'y & L. 743 (2000) (reviewing studies).

Like all empirical research, the two punitive damages studies in this book contain lurking normative issues. Although some empiricists will claim that their sole purpose is to uncover reality, most empirical research in the social sciences is undertaken with policy goals in mind.[38] This is particularly true, I would argue, when those researchers also have legal training (as do Professors Eisenberg and Sharkey), as traditional legal training is almost entirely "theoretical and doctrinal."[39] My contention here is that the researcher's choice of metaphor can have an impact on the uses to which empirical research can be put. As explained above, Professor Sharkey's work is a particularly compelling illustration of this claim.

Those who might want to use the studies in this book to respond to claims of the so-called "tort reform" movement might find comfort in the work of Sharkey and Eisenberg. One of the central tenets of the tort reform movement is that both emotional distress and punitive damages are excessive and rising and they should be capped, at the least.[40] Sharkey's work, when understood as describing crossover between distinct categories, supports the position that capping punitive damages is not an effective way to lower overall damages because all it does is move the money over to a different category.[41] Eisenberg's work might stand for the broader proposition that tort reform is unnecessary because there is no problem that needs reforming; tort damages are not increasing.

But if the phenomenon observed by Sharkey is better described by the metaphor of blurred boundaries, then this research could have quite different policy implications. In fact, it could assist tort reformers in opening up a whole new front in the battle against emotional distress and punitive damages. This research could support the proposition that emotional distress and punitive damages, by their very nature, result in double-recovery; it is the inevitable product of their co-existence. One can imagine possible solutions to this situation, the most obvious being a proposal that the plaintiff can choose between emotional distress and punitive damages, but cannot recover both in the same case. Another solution might be to make the boundaries less blurry with more

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[38] *See*, Philippe Nonet & Philip Selznick, Law and Society in Transition: Toward Responsive Law (1978).

[39] Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship; Judicial Decision Making and the New Empiricism*, 2002 U. Ill. L. Rev. 819, 824.

[40] Mark Ballard, 17-Front Tort War: One-Third of States have Bills Pending, Nat'l L.J., May 12, 2003; Peter Geier, Tort Reform War Heats Up on New Fronts: Cash, Attack Ads and Newspapers, Nat'l L.J., April 24, 2006. *See*, generally, the chapter by Bornstein and Robicheaux, this volume.

[41] Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393 (1993); Mitchell J. Nathanson, *It's the Economy (and Combined Ratio) Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 Penn St. L. Rev. 1077, 1107–1110 (2004) (arguing against caps on both punitive and non-economic damages); Kimberly A. Pace, *Recalibrating the Scales of Justice*, 46 Am. U. L. Rev. 1573, 1621 (1997).

detailed jury instructions and more utilization of special verdicts. But that solution does not address the fundamental problem of jury comprehension of those instructions and the risk of holistic thinking.

Sharkey's research might indicate that if any of these solutions were adopted, lawyers would adapt by figuring out how to get their arguments about punitive damages to incorporate emotional distress and vice-versa, and by tailoring their evidence to comport with more detailed jury instructions and special verdict forms. But trial lawyers, in addition to being unhappy at the loss of potential damages, would also argue that eliminating one category of damages would constitute under-compensation and under-deterrence. That contention, like the double-recovery contention on the other side, runs up against the problem of incommensurability and the absence of any objective standard against which to measure the adequacy of money damages to compensate for emotional harm and to punish.[42] In the absence of a test for empirical validity, these issues would need to be resolved politically.

Conclusion

The studies in this book help to remind us that as empirical legal scholarship continues to grow in amount and variety, researchers need to be just as careful about language as they are about methodology. As Theodore Eisenberg has pointed out elsewhere, we need sophisticated empirical research in order to uncover unsupported assumptions about how the legal system works and create new law and policy that is grounded in reality rather than myth.[43] But the legal scholars who write up and analyze the data also have to acknowledge that their audience may be more interested in the selective use of the results to further their own agenda, be it in the realm of litigation or policy. As Eisenberg has noted, "[s]elf-interested advocates have less interest in objective assessment of the system than in pushing preferred policy agendas."[44] It has even been suggested that because of their training in the adversarial method, lawyers are particularly ill-equipped to handle social science data. When lawyers get their hands on data, they immediately figure out how best to use it to their advantage, rather than looking to it to help them form their opinions.[45] Thus, scholars of

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[42] *See*, Cass R. Sunstein et al., *supra* note 16.

[43] Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 San Diego L. Rev. 1741 (2004); *See also* Michael J. Saks, *Legal Policy Analysis and Evaluation*, 44 Amer. Psychol. 1110 (1989); Michael J. Saks, *Do we Really know Anything about the Behavior of the Tort Litigation System—and Why Not?* 140 Univ. Penn. L. Rev. 1147 (1992).

[44] *Id*.

[45] D. Marie Provine, *Courts in Law and Society Research: The Terms of Engagement*. In Austin Sarat, Marianne Constable, David Engel, Valerie Hans, & Susan Lawrence, Crossing Boundaries: Traditions and Transformations in Law and Society Research 296–316 (1998).

empirical legal research must take care to represent their data carefully and use language that accurately expresses their analysis. After that, the sharks will feed as they see fit.

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Section III
Medical Injuries and Medical Evidence

Faking It? Citizen Perceptions of Whiplash Injuries

Valerie P. Hans

This paper reports results from a series of research studies examining citizen perceptions of automobile accident injuries. It focuses particularly on the most controversial and contested type of car accident injury, which is the neck injury commonly referred to as "whiplash." The research includes a focus group project in two locales as well as a national telephone survey exploring perceptions and attitudes about these injuries and the civil justice system. These projects have documented the widespread derision and doubts that many citizens hold toward claims of whiplash and other "soft-tissue" injuries.[1]

In the trial practice literature, a number of suggestions have been advanced about how to confront these problems in jury trials with whiplash injuries. Some commentators suggest changes in the terminology and language used to describe soft-tissue injuries, while others promote distinctive ways of presenting the injury to juries. However, these suggestions have been largely untested. My research collaborators and I explored the impact of a number of these proposed trial practices in a mock jury experiment. The mock jury study varied arguments and evidence in a civil jury trial to examine whether such changes could shift participants' views about the legitimacy and seriousness of whiplash injury.

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[1] The research has been presented at professional conferences and described in a series of published articles, including Valerie P. Hans, *What Jurors Think about Connective Tissue Injuries,* TRIAL, July 2000, at 18 (hereinafter *What Jurors Think*); Valerie P. Hans & Juliet Dee, *Whiplash: Who's to Blame?* 68 BROOK. L. REV. 1093 (2003); and Valerie P. Hans & Nicole Vadino, *Whipped by Whiplash? The Challenges of Jury Communication in Lawsuits Involving Connective Tissue Injury*, 67 TENN. L. REV. 569 (2000) (hereinafter *Whipped by Whiplash?*). See also Valerie P. Hans & Nicole Vadino, *After the Crash: Citizens' Perceptions of Connective-Tissue Injury Lawsuits* (unpublished paper, Cornell Law School, May 1, 2006) (hereinafter *After the Crash*) (on file with author).

B. H. Bornstein et al. (eds.), *Civil Juries and Civil Justice.*

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The Mundane Automobile Accident Lawsuit

In terms of its human toll, the automobile accident dwarfs most other causes of personal injury in the United States. Americans suffer a significant number of injuries in automobile accidents.[2] The most recent report from the U.S. Department of Transportation indicates that in 2005 alone, a total of 39,189 people were killed and an estimated 1.8 million were injured in motor vehicle accidents.[3]

Automobile accident claims and lawsuits generate a lot of work for lawyers and the courts. The personal injury bar and insurance defense work are both dominated by motor vehicle cases; furthermore, motor vehicle cases form the single greatest component of the state jury trial caseload.[4] For example, the Civil Justice Survey of State Courts found, in a national sample of the work of state courts of general jurisdiction, that 53% of tort trials were automobile accident cases.[5] The vast majority of these trials over car accidents, 93%, were tried to juries. Plaintiff attorneys identify such cases as their bread and butter because they are a routine and regular staple of the personal injury bar's work.[6]

Yet thus far, the lowly automobile case has attracted minimal scholarly attention. In the theoretical realm of torts, the mundane auto accident takes a back seat to the sexier and more exciting topics of medical malpractice, toxic torts, and high profile class actions. Whether measured by presentations in the torts casebooks or in law review articles, automobile accidents and their attendant injuries don't generate much scholarly attention. The low stakes in many of the individual cases, combined with the fact that most cases are resolved through insurance settlements, keep many of these injuries out of the courtroom and away from the front pages. Despite the extraordinary number of injury-producing auto accidents, very little research has been done on how juries or the public respond to personal injuries from auto accident.

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[2] Deborah R. Hensler et al., Compensation for Accidental Injuries in the United States (1991); Nat'l Ctr. for Stat. & Analysis, Highway Traffic Safety Admin., U.S. Department of Transportation, Traffic Safety Facts 2005, http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSFAnn/TSF2005.pdf (last visited April 9, 2007); Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System – and Why Not?, 140* U. Pa. L. Rev. 1147 (1992).

[3] Nat'l Ctr. for Stat. & Analysis, *supra* note 2, at 14.

[4] Thomas H. Cohen, Tort Trials and Verdicts in Large Counties, 2001. Bureau of Justice Statistics Bulletin (Nov. 2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc01.pdf (last visited April 9, 2007); Stephen Daniels & Joanne Martin, *"The Impact It Has Had is Between People's Ears:" Tort Reform, Mass Culture and Plaintiffs' Lawyers,* 50 DePaul L. Rev. 453 (2000); Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 Tex. L. Rev. 1781, 1789 (Table 4) (2002); Brian Ostrom, David Rottman, & J. A. Goerdt, *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*. 79 Judicature 233 (1996); Saks, *supra* note 2.

[5] Cohen, *supra* note 4, at 2.

[6] See Daniels & Martin (2000), *supra* note 4; Daniels & Martin (2002), *supra* note 4.

This paper reports results from a multi-methodological research project that was designed to explore public perceptions and evaluations of these ubiquitous yet understudied injury claims resulting from automobile accidents. The project focuses particularly on "soft-tissue" or alternatively "connective-tissue" injury cases stemming from automobile accidents. They include whiplash, back injuries, and other injuries to connective tissue, muscles, or skin.

As is usual with all civil litigation, lawsuits over auto accident injuries are most often resolved without a formal trial.[7] The vast majority settle. For example, in one study of US courts, 2% of auto accident tort cases were resolved by a trial.[8] Most auto torts involve individuals suing other individuals, reducing the complexities of the litigation.[9] Hence, it is not surprising that the processing of auto accident cases is faster than for all other types of tort cases.

There has been a new wrinkle, however, in insurance adjuster treatment of soft-tissue injury claims arising out of auto accidents. Traditionally, the insurance company representative of the driver who caused the accident would offer a settlement to the injured party, and that was that. However, in recent decades, insurance company representatives have begun to speak out against the fraud they say is rampant in soft-tissue injury claims arising from auto accidents.[10] Rand researchers analyzed the prevalence of "hard claims" for physical injury versus "soft claims" arising from auto accidents in a database of insurance company closed claims files from the 1980s.[11] Comparing the ratio of hard to soft claims in states with different legal regimes, the researchers concluded that states in which compensation for auto accidents was governed by the tort system generated "excess" claiming of soft injuries, and the amount was substantial.[12] They assert that, compared to the control states, 42% of reported soft-tissue

[7] Thomas H. Cohen & Steven K. Smith, Civil Trial Cases and Verdicts in Large Counties, 2001 at 2. Bureau of Justice Statistics Bulletin (April 2004), http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc01.htm (last visited April 9, 2007).

[8] Steven K. Smith, Carol J. DeFrances, Patrick A. Langan, & John Goerdt, Bureau of Justice Statistics Special Report: Tort Cases in Large Counties, 1992 (April 1995), at 3 (Table 2), at http://www.ojp.usdoj.gov/bjs/pub/pdf/tcilc.pdf (last visited April 9, 2007).

[9] *Id.* at 5, Table 6. Individuals sued other individuals in 65% of the automobile tort cases.

[10] J. Perry, The Claim-Fraud Epidemic, 92 Best's Review Casualty Insurance Edition 28 (1992); see also W. Scott Palmer, Combating Soft Tissue Injury Fraud in the U.S. Auto Insurance Industry (Feb. 10, 2004), http://www.injurysciences.com/Documents/FraudArticle.pdf (last visited April 9, 2007).

[11] Stephen J. Carroll, Allan Abrahamse, & Mary Vaiana, The Costs of Excess Medical Claims for Automobile Personal Injuries (1995); Stephen J. Carroll & Allan Abrahamse, *The Frequency of Excess Auto Personal Injury Claims*, 3 Am. L & Econ. Rev. 228 (2001).

[12] Careful review of their pieces suggests some problems with the analytic strategy. As controls, they used three states that permitted general damages to be awarded only for specific types of listed injuries (death, dismemberment, fracture). Injuries to connective tissue apparently were not on the list. These states may differ along other lines; in addition, while it is true that the incentives to submit "excess" claims are lower in these three states, it may also be true that the incentives to submit claims for real but unlisted injuries are also lower. There seems to be an assumption that most claims for soft tissue injury are fraudulent.

injuries in the other states were exaggerated or were based on pre-existing injuries.[13] Furthermore, the authors assert that excess claims for soft-tissue injury are probably increasing.[14]

Several insurance companies have allegedly modified their settlement practices for whiplash, soft-tissue, and other connective-tissue injury claims from car accidents.[15] Insurance companies have introduced programs to handle car accident claims in which the physical damage to the car was low and the participants have made claims of whiplash and other soft tissue injuries. These programs are reportedly less generous to plaintiffs and have titles such as "MIST" (Minimal Impact Soft Tissue), "DOLF" (Defense of Litigated Files), and "Colossus." The names of the programs alone seem suggestive of an anti-plaintiff attitude, for example, that a plaintiff's claim will be lost in an insurance company's protective "mist." Or that plaintiffs must grapple with a "colossus" if they wish to pursue their claims.[16] According to dissatisfied plaintiffs' attorneys, low settlement offers are made in such cases, forcing the plaintiff to go to trial to obtain reasonable compensation for the injuries.[17]

Exactly how this has affected the overall fate of the car accident lawsuit is unclear, but now juries hear fewer automobile tort cases and their damage awards are lower on average. One government report compared tort jury trials in 1992 and 2001 in a national survey of state courts in the 75 largest counties.[18] Tort jury trials decreased in frequency over the decade, from 9,431 to 7,218.[19] In 1992, the median award in an auto accident jury trial, adjusted for inflation, was $37,000. By 2001, the median award had dropped to just $16,000.[20] Interestingly, the rates of plaintiff victories remained constant at around 60% in both years.

Could the change over time be the result of comparing apples to oranges? That is, were the cases that juries heard in 2001 less serious than those heard in 1992, given that by 2001 small cases were more apt to go to trial because of changes in insurance company settlement strategies? Or can the difference be attributed to some attitudinal shifts in juries themselves? Have juries become more suspicious of plaintiffs who make claims about whiplash and other injuries from car accidents, or are juries evaluating the injuries differently?

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[13] Carroll & Abrahamse, *supra* note 11, at 248.

[14] *Id.*

[15] M. Ballard, *Hammering Allstate*. NATIONAL LAW JOURNAL, Dec. 13, 1999, at A1.

[16] "Colossus"–A Claims Management System, Creates Standards for Measuring Pain/Suffering Claims. Insurance, Advocate, Vol. 110, Issue 19, at 25 (May 8, 1999); Sally Witney, Calculating the Value of Pain, Best's Review, Nov 2001, at 131.

[17] Barbara Bowers, Take It to Court, Best's Review, May 2000, at 84.

[18] Cohen, *supra* note 4.

[19] *Id.* at 7 (Table 7). The drop in the number of auto tort jury trials paralleled a decrease in all tort jury trials.

[20] *Id.* The drop in auto case median awards paralleled a drop in median awards in all tort cases from $64,000 to $28,000; however, awards in medical malpractice and product liability cases increased substantially during the same time period.

Although we lack the longitudinal data to answer these questions about changes over time, it is useful to discover what jurors currently think about injury claims arising from car accidents—particularly the controversial claims that are the target of special handling by insurance companies.

Injury and Credibility

There are also some interesting theoretical questions that arise in considering citizen responses to whiplash claims. An X-ray can confirm a broken bone, but traditional medical tests often can't reveal damage to the ligaments, tendons, and other soft tissues of the body. A doctor primarily relies upon a patient's report to make a diagnosis of whiplash. Without the hard, cold confirmatory evidence of a medical test, the plaintiff's credibility becomes the central issue in the case.

As one defense attorney who represents insurance companies assessed the situation:

> With few exceptions, soft tissue injuries can neither be proven, nor dis-proven in an objective sense. The nature of the injury, and the subsequent medical treatment, is based entirely on the subjective complaints of the plaintiff—if the plaintiff tells the physician that he or she feels sore, has a headache, or experiences radiating pain, the plaintiff will be treated for those symptoms. Pain can neither be measured nor evidenced, and medical personnel do not weigh the credibility of their patients before administering treatment. Physicians are obliged to believe patients; jurors, however, are not obliged to believe plaintiffs. In a soft tissue trial, credibility consumes the thought process of the jury, and as such had better be the focus of any attorney prosecuting or defending a soft tissue case.[21]

Judgments of credibility and related assessments of responsibility and blame have been extensively studied.[22] How these judgments are incorporated into the "story model" of juror decision making in whiplash cases is worth examining.[23] Unfortunately, most people have direct experience with auto accidents. It seems likely that a juror's prior experiences and attitudes about civil justice, risk, accidental injury, and insurance companies would all influence how the juror perceives the evidence in a whiplash trial. Stereotypes and expectations about auto accident injuries should play a role, in the same way that widely shared prototypes of criminal offenses have been shown to affect juror decision making

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[21] Shawn Swope, *That's (In)Credible: Defense Theory in Soft Tissue Trials*, 17 CBA Record 43 (2003).

[22] Kelly G. Shaver, The Attribution of Blame: Causality, Responsibility, and Blameworthiness (1985); Neal Feigenson, Legal Blame: How Jurors Think and Talk about Accidents (2000).

[23] See chapter by Reid Hastie, this volume.

in criminal cases.[24] On the other hand, auto accidents are ubiquitous and mundane. They might be less likely to evoke powerful symbolic responses than cases such as toxic torts and environmental damage, or cases in which the defendant is a company with a bad reputation.[25]

The relatively low severity of whiplash injuries generates another set of theoretical questions. Most of the scholarly work to date on injury severity has concentrated on the impact of high severity injuries. The worry is that such severe injuries might cause jurors to find fault even when none exists so that the severely injured plaintiff is able to receive compensation. The research literature provides a mixed picture about the impact of injury severity, with some surveys of the research finding that more serious injuries increase judgments of defendant responsibility, while others find no consistent effect.[26]

Are injuries of low severity treated in a fundamentally different way? Some years ago Harry Kalven, Jr. and Hans Zeisel offered the de minimus factor, a theory which was based on an ancient legal precept which states: "De minimus non curat praetor" or "The law does not concern itself with trifles" to explain some judge-jury disagreement in criminal cases.[27] They identified some cases in which judges disagreed with jury verdicts that were associated with trivial violations or minimal harm. It seems plausible that the de minimis factor may influence civil jury judgments in soft-tissue injury cases, if whiplash is seen as a relatively minor injury.

Working against these potential de minimus sentiments is the fact that defendants face much lower consequences if they are found liable for modest injuries. In a mock jury experiment, Greene, Johns, and Bowman varied the severity of the injuries suffered in an automobile accident.[28] They found that

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[24] Vicki Smith, *Prototypes in the Courtroom: Lay Representation of Legal Concepts*, 61 J. Personality & Soc. Psychol. 857 (1991).

[25] See Valerie P. Hans, Business on Trial: The Civil Jury and Corporate Responsibility (2000); Shari Seidman Diamond, Michael J. Saks, & Stephan Landsman, *Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DePaul L. Rev. 301 (1998).

[26] Compare Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. Applied Soc. Psychol. 1477 (1998), C. Cather, Edie Greene & R. Durham, *Plaintiff Injury and Defendant Reprehensibility: Implications for Compensatory and Punitive Damage Awards*, 20 Law and Hum. Behav. 189 (1996); Kelly Shaver, *Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for an Accident*, 14 J. Personality & Soc. Psychol. 101 (1970); E. Thomas & M. Parpal, *Liability as a Function of Plaintiff and Defendant Fault*, 53 J. Personality & Soc. Psychol. 843 (1987), M. Karlovac & John Darley, *Attribution of Responsibilty for Accidents: A Negligence Law Analogy*, 6 Soc. Cognition 287 (1988). An excellent summary and meta-analysis of the combined results of the studies may be found in Jennifer K. Robbennolt, *Outcome Severity and Judgments of "Responsibility:" A Meta-Analytic Review*, 30 J. Applied Soc. Psychol. 2575 (2000).

[27] Harry Kalven, Jr. & Hans Zeisel, The American Jury (1966) at 258-60 (notes 1–4).

[28] Edie Greene, M. Johns, & J. Bowman, *The Effects of Injury Severity on Jury Negligence Decisions*, 23 Law and Hum. Behav. 675 (1999).

mock jurors evaluating the case individually found the defendant who severely injured a plaintiff more at fault than a defendant who had caused mild injuries. However, when the individuals were grouped into mock juries and asked to make a group decision on the verdict, defendants who caused mild injuries were found negligent with greater frequency. Puzzling over these results, Greene and her colleagues concluded that juries who considered verdicts in severe injury situations were torn between their desires to compensate badly injured plaintiffs and to protect defendants from extraordinarily high awards. The small injury lawsuits were less unlikely to trigger this conflicting set of emotional responses. Injury severity can clearly interact with other aspects of a case. For example, Bornstein and his colleagues found in a mock juror experiment that a defendant's remorse exerted a stronger effect in a case in which the injuries were more severe as opposed to less severe.[29]

In sum, on practical grounds, we know little about how jurors respond to various factors in one of the most common and increasingly contested types of civil lawsuits. Learning more about how people respond to modest injuries may generate knowledge about judgments of personal injuries across the spectrum of seriousness of injury.

Description of the Research Project

To explore people's responses to auto accident injuries, my collaborators and I conducted several research studies, including focus groups, surveys, and a mock jury experiment. These studies vary in their methodological approach. The use of multiple methodologies, which helps to circumvent the limitations of any one research approach, is often recommended for obtaining sound information about a phenomenon.

Focus Groups

As an initial exploration of how people perceive and assess soft tissue injuries within the context of automobile accidents, four focus groups of eight to ten members were assembled, two in Louisville, Kentucky, and two in Denver, Colorado. In each location, one of the groups included all men and the other included all women.[30] All groups were racially mixed. Journalists, attorneys

[29] Brian H. Bornstein, Lahna M. Rung, & Monica K. Miller, *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 Behav. Sci. & L. 393 (2002).

[30] Focus group handbooks advise forming relatively homogeneous groups. *See*, *e.g.*, Richard A. Krueger & Mary Anne Casey, Focus Groups: A Practical Guide for Applied Research 69–70 (3rd ed. 2000).

and law firm employees, people in the medical and insurance fields, and anyone who had been or was currently involved (personally or through immediate family) in a medical malpractice, auto accident, personal injury or class action lawsuit were excluded from participation.

Trained facilitators asked focus group members a series of questions on related topics, including the following: their perceptions of automobile accidents; their judgments of fault in auto accidents; their views of various injuries arising out of automobile accidents; their attitudes toward traditional and alternative medical providers; views of civil lawsuits; and their views of insurance companies. Each group was also presented with a scenario of a whiplash injury claim arising from an automobile accident, and asked to discuss their reactions to the scenario.

The focus group discussions were transcribed and reviewed, generating qualitative information about people's views about whiplash and similar injuries caused by auto accidents.[31] Since only a small number of participants were included in the focus groups, there was also a need to conduct a study with a more representative group.

National Survey on Attitudes toward Whiplash Injuries

To obtain a more diverse group, a public opinion telephone survey was conducted with respondents who were selected using random digit dialing techniques to ensure that every household with a telephone in the United States had an equal probability of being included in the survey. Respondents were required to be 18 years of age and to reside at the location reached by telephone. Individuals within households were also randomly selected using the last-birthday method of respondent selection, whereby the adult individual who most recently celebrated a birthday was invited to participate. The gender split was controlled so that the final sample included half men and half women respondents. The response rate was 89.5%.

The average interview length was 23 minutes. The questionnaire asked for respondents' views of connective-tissue injuries, car accident claims, lawyers, and insurance companies, as well as their demographic characteristics. In addition, as described next, a scenario experiment was included in the poll.

Scenario Experiment Design

During the telephone survey, each respondent received a randomly selected scenario of a personal injury caused by an automobile accident. The scenario

[31] Hans & Vadino, *Whipped by Whiplash?*, *supra* note 1.

varied whether the injury was a connective-tissue injury or a bone fracture.[32] One version of the "No Fracture" scenario read as follows:

> Jane Harris, a married woman in her mid-forties, works as a manager at a local bank. Two years ago, while she was waiting in her car at a red light, she was rear-ended by another automobile. Her car had about $500 worth of damage to the rear end. Jane Harris had x-rays taken of her neck shortly after the accident because she reported being in pain. The x-rays showed no injury to the bones in her neck, but her doctor says she has a muscle sprain.
>
> Since the accident, Jane Harris has continued to complain about having neck pain. She has visited her doctor six times for treatment of the pain. She has gone to a chiropractor and has been taking pain medication on and off. She has had difficulty sitting at her desk for long periods of time, bending to hug her children, and no longer engages in her favorite hobbies of bowling and golf, all because of the pain in her neck.
>
> She has received an offer of $500 from the other driver which would pay for the damage to her car, but has not received any offer for her medical expenses, lost wages from missing work, and to compensate her for changes to her lifestyle caused by her now chronic neck pain. Therefore, she is filing a lawsuit.

The other scenarios for this type of injury were described identically except that in the "Fracture" conditions, the X-rays "showed a slight fracture in one of the bones in her neck." Respondents answered questions about their reactions to the scenario and the lawsuit, including their perceptions of the seriousness of the plaintiff's injury, the reasonableness of the lawsuit and the other driver's offer, and their views about whether the plaintiff should receive money damages.

Mock Jury Study Procedure

As described below, both the focus group study and the national poll uncovered substantial suspicion of plaintiffs claiming whiplash injury from automobile accidents. Therefore, a mock jury study was designed to examine how varying the presentation of a whiplash injury within a personal injury lawsuit might affect juror judgments.[33] Community residents in New Castle County, Delaware were recruited through newspaper advertisements to participate as jurors in a mock trial. Participants were randomly assigned to view one of two videotaped versions of a mock trial of a personal injury lawsuit, and decided the case in six-person mock juries. Twenty mock juries of six people participated in the study.

The Control version of the lawsuit reflected a typical soft-tissue injury automobile accident lawsuit. It involved injuries stemming from a low impact,

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[32] The scenario also varied whether the injury was to the neck or back (Injury Location); and the gender of the injured party (Plaintiff Gender). However, this chapter describes only the Injury Type dimension. Hans & Vadino, *After the Crash, supra* note 1, presents the complete results of the analysis.

[33] More details may be found in Hans & Vadino, *After the Crash*, *supra* note 1.

minimal damage rear-end auto accident. The plaintiff suffered whiplash which had developed into a chronic condition that lessened his ability to work full-time as an electrician and also interfered with other aspects of the quality of his life. Medical evidence of injury was presented through the plaintiff's doctors in a straightforward way. The term "whiplash" was used by the plaintiff's attorney and by the plaintiff's witnesses to identify and describe the injury. The presentation of damages was likewise straightforward, describing pain and suffering associated with the injury, medical treatment and bills, loss of wages, and impact on lifestyle. The other driver presented experts who disputed the severity of the injury and the damages.

The Experimental condition script modified the Control condition script in a number of ways, including terminology used to identify the injury; plaintiff character and motivation to bring a lawsuit; the defendant's character and evidence of irresponsibility; presentation of evidence about the severity of the injury; scrutiny of the motives of defense expert witnesses; and presentation of damages.

These variations, based on trial practice literature, included the following:

Terminology: In the Experimental condition, the whiplash injury was referred to as a "neck injury" by the plaintiff's attorney and by plaintiff witnesses. (The defense lawyers and witnesses continued to use the terms *whiplash* and *soft-tissue injury*.)

Plaintiff character and motivation: To confront concerns about why the plaintiff is suing, we expanded the plaintiff's testimony, the testimony of supporting plaintiff witnesses, and the statements and arguments made during trial by the plaintiff's attorney. The experimental condition script stressed the plaintiff's reluctance to bring a lawsuit, his lack of prior lawsuits, and his efforts to manage the multiple effects of the injury on him and his family and work life before bringing a lawsuit.

Injury severity: Knowing of citizen questions about the legitimacy of whiplash injuries and their severity, we experimented with different ways to convey injury severity and to support the plaintiff's evidence about the existence, extent and impact of the injury. Addressing people's concerns that whiplash is not real because one cannot see it, in his closing argument, the plaintiff's attorney pointed out that, like whiplash, migraine headaches also cannot be seen but are nonethelesss real. He also addressed concerns about whether a passenger can suffer a severe injury when the car is not damaged by noting the analogy to broken eggs in an egg carton.

Damages: We added several arguments to the plaintiff attorney's closing argument to more fully convey the significance of money damages.

Defendant character and motivation: We applied a personal responsibility theme to the defendant and her behavior. In the plaintiff's attorney arguments and cross-examination of the defendant, the defendant's lack of personally responsible driving and failure to follow up with the person she injured were emphasized.

Defense witness motivation: Jurors are often unaware of the way in which defense attorneys hire experts to conduct "independent exams" and testify as defense witnesses. We introduced questions on cross-examination about these hiring circumstances and the frequency with which the defense experts in the present case had testified for defendants in civil trials, raising the possibility that they might be hired guns.

Questionnaire items administered during and at the end of the study tapped mock jurors' verdict preferences, agreement with their group verdict and award, as well as their beliefs and attitudes about whiplash, insurance, civil litigation, and other factors.

Research Program Results

All three lines of research document widespread suspicion of plaintiffs who claim whiplash injuries arising out of automobile accidents. In focus groups, opinion polls, and mock juries, it was common to express derision of whiplash plaintiffs and doubts about whiplash injuries.

Anti-Plaintiff Sentiment

The research program confirmed the phenomenon of anti-plaintiff sentiment that has been documented in other research.[34] Most Americans are convinced that a substantial proportion of lawsuits are frivolous and many legal claims are illegitimate.[35] In our national survey, we found a similar set of views: 92% of our poll respondents believed that "There are far too many frivolous lawsuits today" and 77% agreed that people who sue are just trying to blame others for their problems. Focus group comments put some flesh on these numbers. A woman who participated in the Denver focus group said: "I think we're a sue-happy society. And I think so many people are out for what they can get from the insurance company, from whoever . . ."[36] A Denver man from another focus group agreed: "Yeah, if you are in a car accident and you sprain your thumb and now you can't flip the remote and you want ten grand because you can't flip the remote for two months, give me a break.[37]

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[34] Hans, *supra* note 25; Feigenson, *supra* note 22.

[35] Hans, *supra* note 25, at 59–60 (approximately 80–90%, depending on the study, agreeing that "There are far too many frivolous lawsuits today.")

[36] See Hans & Vadino, *Whipped by Whiplash?, supra* note 1, at 572–73.

[37] *Id.* at 573.

In the scenario experiment in the opinion poll and the mock jury study, we designed the plaintiff's cases to be strong ones. The scenario experiment, for example, included a "good" plaintiff and there was no mention of any contributory fault on the plaintiff's part. Similarly, although the presentation of the plaintiff in the mock jury setting was more nuanced, the evidence in the case was designed so that the defendant was clearly at fault and the mock jurors would be forced to consider the nature and worth of whiplash injury. Interestingly, people who participated in the mock jury study of the whiplash case expressed fewer negative sentiments about plaintiffs overall. For instance, 35% of the mock jurors agreed that people who bring lawsuits are just trying to blame others for their problems, compared to 77% of the national poll respondents. The mock jurors had just decided a lawsuit in which most juries found for the plaintiff and at least half of the mock jurors described the lawsuit as "worthwhile."[38] The mock jurors who found the lawsuit worthwhile were less likely to agree with general anti-plaintiff statements. The experience of being a mock juror may have reduced the tendency to respond in a symbolic way to the question about the general worth of lawsuits.[39] After all, they had a clear example right in front of them. This variation across research methodologies highlights the value of asking the same questions in a range of situations.

Cynicism about Whiplash Injuries

The research program found substantial doubt about the validity of whiplash injuries. This should not surprise us since it builds on the anti-plaintiff sentiment just described. In the minds of citizens, whiplash is perhaps the quintessential fraudulent injury. Less than a third of the national poll respondents believed that whiplash claims are always or usually truthful.[40] Instead, many people believe that these claims are more likely to be asserted to manipulate insurance companies or the legal system. In the words of a focus group member: "A lot of people complain of it when they have an accident and a lot of lawsuits are won because you can't see it. I just figure when they go with whiplash, a lot of times they don't have whiplash, but the first thing they think of is, 'Oh, my neck….Like how much can I get for this one?' "[41] Similarly: "I think of, you know, somebody gets in a fender bender they go

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[38] About half (50%) agreed that it was worthwhile; 37% said it was not; the rest were unsure.

[39] For a discussion of how different methodological approaches may produce divergent results, *see* Valerie P. Hans & William S. Lofquist, *Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil Jurors*, 12 Behav. Sci. & L. 181(1994) (noting that symbolic responses may predominate in the less engaging and shorter public opinion surveys).

[40] Hans & Vadino, *Whipped by Whiplash?, supra* note 1, at 573-75.

[41] Kentucky woman cited in Hans & Vadino, *Whipped by Whiplash?, supra* note 1, at 575.

'Oh, my neck,' and, you know, they're trying to collect insurance. I've heard of people . . . I think it happens a lot. I think people manipulate the system."[42] Neck braces evoke not sympathy but suspicion: "Two months ago I had jury duty and it was a young 19-year-old girl who had been in a car accident. She was wearing [a collar] and she made a big point to walk in with her cane. . .. I am so skeptical of people like that."[43] And: "I tend to think that they're wearing [a neck brace] and as soon as the check comes in, they take it off."[44] The perceived exaggeration of injury costs the rest of us, according to some: "People try to milk it just because they've got a little neck injury . . . that kind of lawsuit's filed probably every day and that's why our court systems and our premiums are so high."[45]

The focus group participants acknowledge that it is difficult to prove injuries to connective and soft tissue: "Normally if it was a broken bone, in most places you might be able to put a cast on it and you could see. . .. But some of these sprains, you can't see but you just feel them. It would be hard to try to convince someone by just looking at you that you had this sprain."[46] While some see this as a proof problem, others see this as an open invitation to swindle: "What I'm concerned about is that if people know they can get money for pain and suffering, then they're going to be in pain. I think a lot of people's pain is in their head in certain accidents. I'm not saying all accidents. I'm sure people feel a lot of pain, but if you know you've got $15,000 coming down your way, you're going to be really hurting. A lot of people would and that's what bothers me."[47] One focus group member sagely observed: "[Injuries] are permanent until the payment comes and then it is gone."[48] Pain is in reality difficult to link to verifiable tissue damage, a problem that the medical profession has wrestled with for years. But in these observers' eyes, that fact opens up the possibility and indeed likelihood of widespread fraud.

What Is a Soft Tissue Injury?

In addition to the widespread view that fraud is more likely with whiplash cases, we have discovered that the terms that lawyers commonly use in the courtroom to describe muscle and connective tissue injury are often mystifying to jurors.[49]

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[42] Colorado woman cited in Hans & Vadino, *Whipped by Whiplash?*, *supra* note 1, at 575.

[43] *Id.* at 576.

[44] Kentucky man cited in Hans & Vadino, *Whipped by Whiplash?, supra* note 1, at 575–76.

[45] Colorado man cited in Hans & Vadino, *Whipped by Whiplash?, supra* note 1, at 573.

[46] Kentucky man cited in Hans & Vadino, *Whipped by Whiplash?, supra* note 1, at 576–77.

[47] Kentucky woman, focus group transcript (on file with author).

[48] Kentucky man, focus group transcript (on file with author).

[49] Hans, *What Jurors Think*, *supra* note 1; Hans & Vadino, *Whipped by Whiplash?*, *supra* note 1.

This seemed to work to the detriment of the plaintiff, since if an injury is ambiguous and not understood, people appear to downgrade it. Whiplash and muscle injuries are variously described by lawyers as "soft tissue" or "connective tissue" injuries – the first more favored by the defense attorneys and the second more common among plaintiff attorneys.[50] But both terms were confusing to focus group members: "I've never heard of that.... I think soft tissue is just the stuff that's surrounding your bones and your organs and ... you get a bruise on it.... Deep bruise or definitely a contusion, I think maybe from the deepness of it."[51] As for connective tissue: "I've heard of that, but I don't know what it is."[52] "Sounds like that'd be like the tissue connecting to your bones or your joints or something like that ... It's damage. It may be releasing something."[53]

Poll respondents were asked to rate the seriousness of various types of injuries, using a 1–10 scale where 1 was the least severe and 10 was the most severe injury (Fig. 1). While the previous focus group quotes suggest that we must keep in mind that people may not have understood the various terms, the results are interesting nonetheless.

There are a few surprises. First the typical lawyerly terms, soft tissue and connective tissue, are both lower in average rated severity than the homespun term of whiplash. An even plainer expression, "neck injury," is perceived as

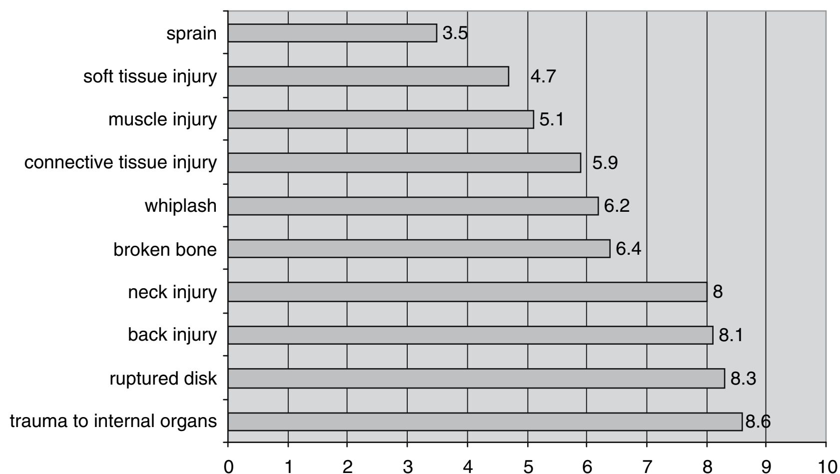

Fig. 1 Ratings of Injury Severity, National Poll

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[50] Hans & Dee, *supra* note 1, at 1117.

[51] Kentucky woman cited in Hans & Vadino, *Whipped by Whiplash?*, *supra* note 1, at 578.

[52] Kentucky woman cited in Hans & Vadino, *Whipped by Whiplash?*, supra note 1, at 578.

[53] Kentucky woman cited in Hans & Vadino, *Whipped by Whiplash?*, *supra* note 1, at 578.

more severe than any of those terms. Interestingly, both whiplash and neck injury are more specific than the more diffuse categories of soft tissue and connective tissue injuries. It's possible that the severity of a concrete injury is easier to bring to mind than a more diffuse and less specific one. Whether plaintiff attorneys should rush to adopt neck injury and defense attorneys should recast soft tissue injuries as bruises and sprains has not yet been proven. But, at a minimum, we can conclude that the more medical-sounding names seem to confuse laypeople.

Scenario Experiment Varying Injury Type

Another way of examining whether connective tissue injury is treated distinctively is to vary the type of injury, but maintain as a constant the other elements of the injury, such as its medical and financial consequences. We took that approach in the scenario experiment in the national poll. The plaintiff's injury was depicted as either a fracture or damage to connective tissue in the form of a muscle sprain. The plaintiff's pain, the doctor and chiropractor visits, and the impact on work and lifestyle were described in identical terms. We found, as expected, that the type of injury – fracture versus connective tissue – had a systematic effect on perceptions of injury severity, reasonableness of the lawsuit, and the appropriateness of money damages (Fig. 2).[54] Our respondents

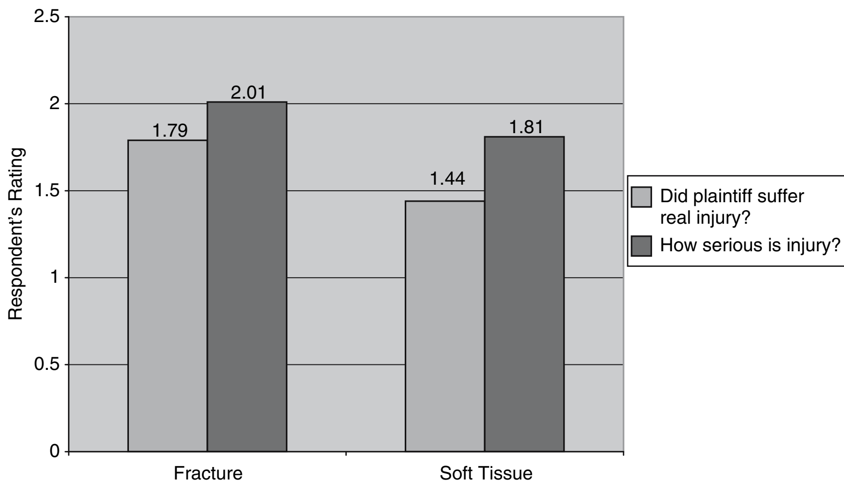

Fig. 2 Scenario Experiment in National Poll: Fracture versus Soft Tissue Injury

[54] Hans & Vadino, *After the Crash*, *supra* note 1.

were more likely to perceive the injury as serious, and more likely to agree that the fracture was a "real" injury and that it deserved compensation.[55]

Mock Jury Experiment: Can We Shift Anti-Plaintiff Attitudes and Whiplash Cynicism?

The focus groups and national poll provided evidence that many citizens question plaintiffs who bring civil lawsuits and think that whiplash and other injuries to connective and soft tissues are often fraudulent. So, the interesting practical and theoretical question is how one might – if one were so inclined – shift these predominant perceptions. That was the aim of the mock jury experiment, which varied how the plaintiff's case and his injury were presented along several different dimensions.

Did it work? It seems so. We compared the responses of mock jurors who watched the Control version of the videotaped trial with those who watched the Experimental version. The combined changes made a significant difference in the initial mock juror judgments of perceived strength of the plaintiff's case and the credibility of the plaintiff and his attorney, as rated on 10-point scales (see Fig. 3). The defendant in the Control condition was at a decided advantage over the plaintiff. In the Experimental condition, the

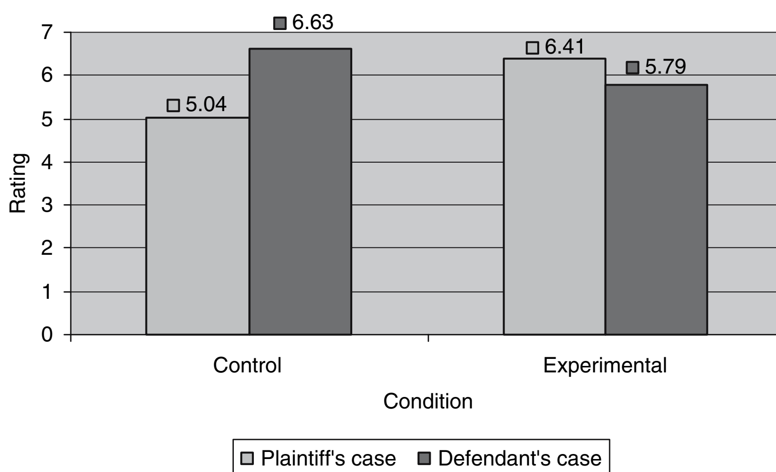

Fig. 3 Rated Strength of Each Side's Case

[55] Severity was evaluated on a 4-point scale from not at all serious (1) to very serious (4); agreement was also evaluated on a four-point scale from strongly disagree (1) to strongly agree (4).

plaintiff's side was seen as significantly stronger. Thus, the changes we introduced appear to have had the intended effect of improving the plaintiff's chances before a jury and worsening the defendant's.

The question is – why? You'll recall that we varied a number of factors in this exploratory work. Because the manipulation combined multiple factors, we cannot determine from the broad comparison of the Experimental and Control condition participants exactly which variables contributed to perceiving a soft-tissue injury as legitimate. Instead, we have to look at the pattern of other judgments for insights into which were the most powerful and effective elements, which can then be tested in subsequent experiments.

The changes that we made seemed to have a positive effect on the plaintiff's credibility, and even that of his lawyer (see Fig. 4). Comparing the credibility ratings of the subjects in the Control condition with those of the Experimental condition, Fig. 4 shows that the plaintiff and his attorney received significantly higher credibility ratings in the Experimental condition. Two witnesses, one from each side, also received significantly different credibility ratings – one of the plaintiff's doctors was more positively evaluated and one of the defense experts was more negatively evaluated in the Experimental as opposed to the Control condition. The overall pattern of Fig. 4 shows, however, that except for the defendant who was seen as equally credible in both scenarios, all the other participant evaluations trend in the pro-plaintiff, anti-defendant direction in the Experimental condition.

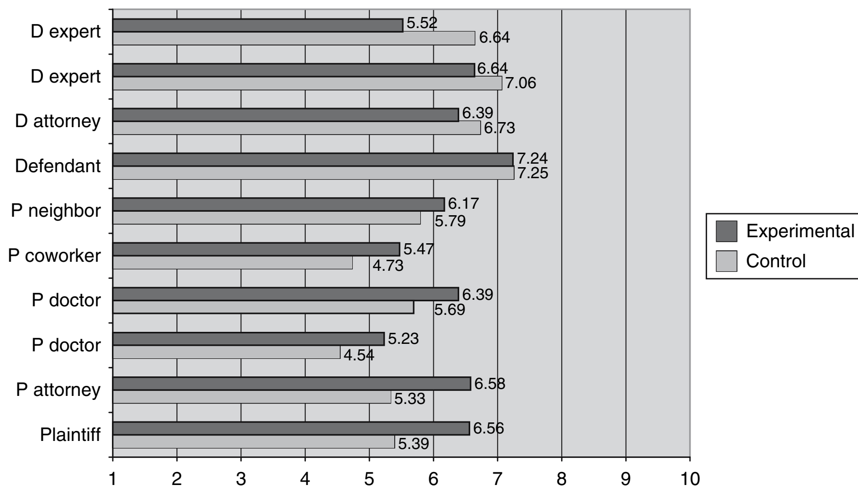

Fig. 4 Credibility of Mock Trial Participants

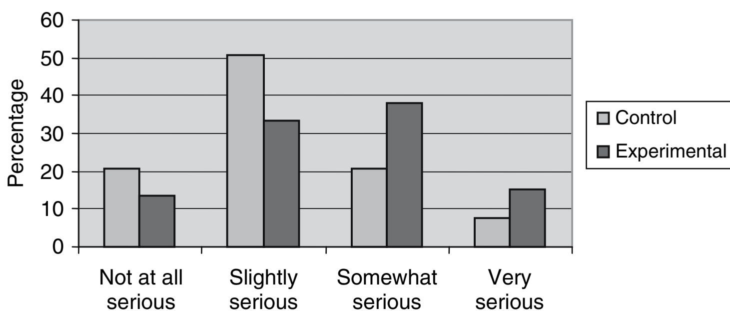

Fig. 5 Rated Seriousness of Plaintiff's Injury

Perceptions of the Plaintiff's Whiplash Injury

Now what about that purportedly fraudulent injury of whiplash? Could we counteract our participants' tendencies to see it as questionable? Yes, the plaintiff's injury was seen as more serious in the Experimental version of the videotape. Most respondents who watched the Control version videotape did not see the whiplash as very serious at all. When trial practice reforms including terminology and pro-plaintiff arguments were introduced in the Experimental condition, the perceived seriousness of the plaintiff's neck injury increased significantly. Proportionately more participants saw the injury as somewhat or very serious.

Case Judgments

The other case judgments were in line with these changed perceptions of the plaintiff's credibility and the seriousness of his injury, but did not achieve statistically significant levels for the most part. Before discussing the case with their fellow jurors, mock jurors in the Experimental condition were somewhat more likely to favor the plaintiff, although the difference was not statistically significant. Initially, 45% in the Control condition voted for the plaintiff, compared to 58% in the Experimental condition. (That difference becomes statistically significant after deliberation; most juries decided in favor of the plaintiff.) There were also marginal differences in initial damage award preferences. The 25th percentile of damage awards for Control condition jurors was $3,875 or less, compared to $8,500 for the Experimental condition jurors, which was more than twice as high. There were some trends in a similar direction at the high end, where 92% of the Control condition jurors favored an award of $300,000 or less, compared to 83% of the

Experimental condition jurors. Thus, the verdicts and damage awards tended to move in a more favorable direction for the plaintiff in the Experimental condition.

Conclusion

This program of research has identified a number of tendencies that lay observers reveal when they consider whiplash injuries in the context of civil lawsuits. Many Americans possess the view that civil lawsuits are often questionable. Why? Legal claims brought by tort plaintiffs are seen as attempted violations of important norms and values, especially the principle of individual personality responsibility for one's actions.[56] Although jury hostility to legal claims contradicts the widespread view that juries are overly sympathetic to plaintiffs, it is consistent with findings from a large body of research in social psychology on how people treat injured victims. A tendency to blame victims is rooted in the psychological preference for a just and predictable world in which innocent people do not suffer. Derogating victims, minimizing injuries, and holding victims personally responsible for their own harms are all ways to reconcile the fact of suffering with a belief in a just world.[57]

The skepticism toward plaintiffs and their injuries seems particularly pronounced in cases in which plaintiffs assert whiplash and other muscle and connective tissue injuries. It's hard to disentangle the generalized willingness to blame the plaintiff and the skepticism about whiplash claims. Although comments about whiplash in the focus groups conveyed strong and vivid images, any damage claim that is unable to be readily verified through external evidence might face similar disdain.

Proving whiplash injuries to a suspicious audience is challenging. A plaintiff's credibility is paramount. The mock jury study suggests that enhancing plaintiff credibility and providing evidentiary support for the seriousness of whiplash injuries through experts and lay witnesses appear to influence jurors' perceptions of the case, resulting in more pro-plaintiff decisions. The study results, while promising, constitute only a first step. Subsequent work should systematically vary different approaches aimed at bolstering plaintiff credibility and conveying injury severity. An alternative informative angle might be to explore what types of evidence seem to be most damaging to a plaintiff's whiplash claims. Research should also examine whether and how jurors' views and attitudes about civil litigation, personal injury, and insurance all combine to affect the approach they take to judging whiplash injury.

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[56] Hans, supra note 25, at 40-41.
[57] Feigenson, *supra* note 22.

Acknowledgment The whiplash research project received funding from the Pound Civil Justice Institute (formerly Roscoe Pound Institute). I thank Professor Brian Bornstein for organizing a stimulating and lively conference, and also for providing helpful comments on an earlier draft of this chapter. Thanks also to Professor Jeffrey Rachlinski for title assistance. I am also grateful to my research collaborators in this endeavor, University of Delaware Professor Juliet Dee, and graduate students Nicole Vadino, Stephanie Albertson, and Jessica Hodge. Amanda Stevens and Julie Jones provided research assistance and Bonnie Jo Coughlin helped with the figures.

Reflections on Juryphobia and Medical Malpractice Reform

Stephan Landsman

Introduction

In November of 1999 the Institute of Medicine of the United States (IOM) published a volume entitled, To Err is Human.[1] That book identified medical errors as one of the leading challenges facing medicine.[2] Its most headline-making conclusion was that as many as 98,000 hospitalized Americans die each year due to mistakes made by those involved in caring for them and that hundreds of thousands more are injured during the course of treatment.[3] The IOM noted that misadventure in hospitals was but one aspect of a far larger medical error problem facing the nation, encompassing, as well, iatrogenic injury in outpatient facilities, nursing homes and doctors' offices.[4]

Reaction to the IOM's report was swift and dramatic. Media attention was "frenzied"[5] and Congress proceeded to schedule hearings.[6] President Bill

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[1] Committee on Quality of Health Care in America, Institute of Medicine, To Err is Human: Building a Safer Health System (Linda T. Krohn et al. eds., 2000). [hereinafter To Err Is Human].

[2] *Id.* at 26 The concern about medical error grew steadily throughout the second half of the 1990s, spurred by widely publicized malpractice horror stories, a series of high profile conferences and the formation of an alliance of business and labor leaders dedicated to efforts to address the problem. *See* Paul Barach, *Lessons Learned from the Patient Safety Movement*, 24 J. Legal Med. 7, 10–12 (2003).

[3] To Err Is Human, 26.

[4] *Id.* at 30–31; David A. Hyman & Charles Silver, *The Poor State Of Health Care Quality In The U.S.: Is Malpractice Liability Part Of The Problem Or Part Of The Solution*?, 90 Cornell L. Rev. 893, 903–04 (2005).

[5] *See* David H. Johnson & David W. Shapiro, *The Institute of Medicine Report on Reducing Medical Error and Its Implications for Healthcare Providers and Attorneys*, 12 NO. 5 Health Law 1, 1 (2000) [hereinafter Johnson].

[6] *See Hearing on Medical Errors Before the Subcomm. On Health of the House Ways and Means Comm., 106th Cong*. (2000); *see also* Barach *supra* note 2, at 12.

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Clinton, no stranger to healthcare disputes, in February, 2000, delivered a major address on the topic in which, among other things, he endorsed a number of proposals from a federal interagency task force, declared a National Action Plan with the goal of cutting preventable medical-error-related deaths by 50% in five years, announced the promulgation of new regulations affecting the 6,000 hospitals across the nation that received Medicare funds, and called for the creation of a nationwide state-based reporting system with both mandatory and voluntary components.[7] Before his speech, the President had directed federal agencies to begin an effort to implement a number of the IOM's proposals.[8]

Reforms of a variety of sorts have been proposed to deal with the challenge of medical error. Although many were first advanced before the IOM released its report, virtually all were given a boost by that document. The central thrust of many of these reforms has been to reduce medical mistakes and the harm they cause through disclosure of errors, either among health professionals or to patients. There have been essentially two objectives, first, to prevent future treatment errors and, second, to address injuries already suffered by patients. Among the preventive measures none has been more frequently urged than the collection, analysis and reporting of data concerning treatment mistakes.[9] There has been considerable debate about precisely what sorts of data should be the focus of such efforts. Some have called for concentration on sentinel, or catastrophic, events that result in death or serious injury to patients.[10] Others have proposed the identification and review of all events that cause patient injury. [11] Still others, taking a page from the book of the civil aviation industry, urge the identification and recording of "near misses" – events that do not result in harm but could have done so under slightly different circumstances.[12] The gathering and reporting of data of any of these types is viewed as a stepping stone to analysis that can pinpoint risks in the delivery of medical care and lead to the development of protocols that can prevent injury.[13]

Most prominent among the proposals designed to address injured patients' needs are ones calling for more candid communications between

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[7] William Clinton, "Remarks by the President on Medical Errors." http:/www.ahrq.gov/wh22200rem.htm, 02/27/00; *see* Johnson *supra* note 6, at 5.

[8] *See* Barach *supra* note 2, at 12.

[9] *See, e.g.,* Barach *supra* note 2, at 18; Barry R. Furrow, *Medical Mistakes: Tiptoeing Toward Safety*, 3 Hous. J. Health L. & Pol'y 181, 182 (2003).

[10] *See* Furrow *supra* note 9, at 203 (IOM proposal), 207 (Joint Commission on Accreditation of Healthcare Organizations Sentinel Event Policy).

[11] *Id.* at 213 (PA legislation).

[12] On aviation near miss reporting, *see* Barach *supra* note 2, at 20–21. On medical use of the near miss approach, *see generally* Hyman and Silver *supra* note 5, at 931.

[13] *See* Bryan A. Liang & Steven D. Small, *Communicating About Care: Addressing Federal-State Issues in Peer Review and Mediation to Promote Patient Safety*, 3 Hous. J. Health L. & Pol'y 219, 225 (2003) [hereinafter Liang & Small].

healthcare professionals and patients who have been injured in their care.[14] Building on this notion some reformers have urged that whenever medical error is discovered caregivers should apologize and, in at least some contexts, seek to negotiate an appropriate compensatory settlement.[15] To enhance the reach and effectiveness of disclosure, reformers have urged that when litigation arises out of cases involving medical injury a series of legal changes be considered. One of the most prominent of these is a shifting of responsibility away from medical practitioners to the enterprises for which they work.[16] Others have sought more radical steps including the creation of new non-judicial adjudicatory mechanisms to decide whether and, if so, to what extent injured patients deserve compensation for injuries suffered during treatment.[17]

With so many interested players calling for change and so many reform proposals being advanced, it is striking how little actual reform has been accomplished and how much resistance there has been to the modest changes and proposals made.[18] In fact, the major push from within the medical establishment has not been for internal change to address medical errors but rather for the capping of damage awards to those most severely injured by what the legal system classifies as medical malpractice.[19] The futility of this step to respond to the incidence of medical malpractice and its tragic discriminations against children and the elderly have been frequently noted[20] and will not be the focus of this article. But it should not go unremarked that the cap movement provides an insight into the healthcare industry's virtually single-minded preoccupation

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[14] *See* Keith Myers, *Medical Errors: Causes, Cures, and Capitalism*, 16 J.L. & HEALTH 255, 278 (2002); Furrow *supra* note 9, at 207.

[15] *See generally* Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice,* 27 FORDHAM URB L.J. 1447 (2000); SEE ALSO THE CHAPTERS BY ROBBENNOLT AND GREENE, THIS VOLUME.

[16] Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381 (1994); TO ERR IS HUMAN, *supra* note 1, at 111.

[17] *See, e.g.*, Liang & Small *supra* note 13, at 239–42; Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 Cardozo L. Rev. 1361, 1419 (2003).

[18] *See* Randall R. Bovbjerg & Laurence R. Tancredi, *Liability Reform Should Make Patients Safer: "Avoidable Classes of Events" Are a Key to Improvement*, 33 J.L. MED. & ETHICS 478, 478 (2005) ("Half a decade [after TO ERR IS HUMAN], significant reduction of injury remains a distant prospect, despite some apparent progress."); Lucian L. Leape & D.M. Berwick, *Five Years After To Err Is Human: What Have We Learned?*, 293 J. AM. MED. ASSOC. 2384–90 (2005); D.E. Altman et al., *Improving Patient Safety – Five Years After the IOM Report*, 357 NEW ENGL. J. MED. 2041–43 (2004).

[19] *See* Bovbjerg & Tancredi, *supra* note 19, at 481.

[20] *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and The Elderly*, 53 EMORY L.J. 1263 (2004); David Studdert et al., *Can the United States Afford a "No Fault" System of Compensation for Medical Injury?*, 60 LAW & CONTEMP. PROBS. 1 (1997); *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125 (2005).

with lawsuits and large monetary awards whenever the question of error arises. That preoccupation, to which I will refer as "juryphobia," because of the fear of jury action that appears to be at its core, has been the healthcare industry's primary justification for resisting reform. This chapter will begin with an examination of the rhetoric of juryphobia and its impact on reform proposals. It will then proceed to suggest the utility of an empirical examination testing the claims of those who fear that change will lead to a massive increase in the number and size of jury awards for malpractice. It will conclude by considering curative steps that might be taken to counter hypothesized adverse juror reaction to reform.

A Report from the Field

Over the past several years, as suggested above, the medical establishment and various units of government have considered an array of information-sharing proposals to address the problem of medical error. I was involved in one such effort, undertaken by a leading medical reform organization (call it the "MRO") located in a Midwestern community.[21] The MRO concluded that patient safety was a high priority concern and that to address that concern data should be gathered and analyzed to determine if patterns of error might be discovered and protective protocols designed. As has been the case in the literature on reporting, precisely what information should be gathered was a matter of debate. Some thought all errors ought to be recorded and examined while others thought more would be gained if near miss events alone were the object of scrutiny. Another source of contention was whether different institutions, including major hospitals and healthcare providers like HMOs, could and should share error data with each other, thereby creating a broader and richer pool for assessment.

My job was to provide legal analysis to the MRO about the vulnerability to discovery in litigation of the data gathered by such an error reporting and assessing system, a question the healthcare professionals found of great significance because of what appeared to be their deep and abiding anxiety about disclosure and its legal consequences.[22] The state in which these events took place had legislation extending privilege protection to data gathered and prepared for internal quality control (i.e., peer review) or medical study purposes.[23]

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[21] I have chosen to present this material without identifying characteristics in order to protect the confidences of those who participated in the MRO's work.

[22] *See* Marshall B. Kapp, *Medical Error Versus Malpractice,* 1 DePaul J. Health l. 751, 765 (1997); J. Bryan Sexton et al., *Error, Stress, and Teamwork in Medicine and Aviation: Cross Sectional Survey* 320, Brit. Med. J. 745, 747 (2000) (71% of medical practitioners found acknowledging error difficult due to malpractice suit threat) *as cited in* Melissa Chiang, *Note-Promoting Patient Safety: Creating a Workable Reporting System*, 18 Yale J. On Reg. 383, 396 n. 60 (2001).

[23] *See generally* William D. Bremer, *Scope and Extent of Protection from Disclosure of Medical Peer Review Proceedings Related to Claim in Medical Malpractice Action,* 69 A.L.R. 5th 559.

The contours of the privilege shielding records from disclosure to medical malpractice plaintiffs were not entirely clear, and there existed a series of judicial decisions granting injured patients access to such items as HMO documents refusing to approve treatment, informal conversations among medical staff regarding patient injury and incident reports created in the course of providing treatment or care. In this unsettled legal environment there was a great deal of concern about the scope and reliability of the privilege. In a written evaluation I suggested that a program could be designed that was highly likely to assure privilege protection so long as certain formalities were followed and litigation-related risk-management operations were separated from safety-focused medical study activities – a separation that appeared to be mandated by the applicable statute and caselaw.[24]

To my surprise my recommendations were viewed as extremely controversial. Medical professional participants in the MRO found them encouraging while hospital lawyer members of the group were intensely hostile.[25] The concerns the lawyers voiced were numerous but seemed to turn on several key points. First, and foremost, hospital counsel argued that privileged materials were never truly safe from discovery and that juries provided with such materials would inevitably use them to award huge damages. Second, plaintiffs' lawyers (with whom I was identified because I occupy a chair endowed by an eminent plaintiff's personal injury lawyer) would exploit any reform for their own nefarious purposes. Third, counsel argued that their insurance coverage arrangements imposed restrictions on data sharing that simply made the proposal impossible.[26] Finally, the lawyers said hospital counsel and the associated risk-management teams needed access to all care-related information in order effectively to protect their clients and any barrier to access would undermine that ability.[27] Over the course of time it became increasingly clear to me that the hospital attorneys were in the grip of an irrational fear that could not be assuaged by legal analysis, reason, or program revision. Counsel were so adamant in their opposition and so alarmed by my analysis that they threatened to scuttle any progress in error reporting if my work were relied upon or if I were

[24] *See Id.*

[25] Some data, like those cited in Chiang *supra* note 23, at 396 n. 61, suggest that doctors themselves do not believe that the law will protect the confidentiality of error reporting materials. (85% of healthcare professionals in one non-rigorous online survey doubted confidentiality protection) *citing Bus. Wire*, Mar. 22, 2000, Lexis, News Library, Bus. Wire File). My experience suggests that this may have more to do with the legal advice provided by hospital, HMO and insurance company counsel than with health professionals' experience or personal beliefs.

[26] Insurance contracts generally require the cooperation of the insured in defending claims. It may be argued (albeit unpersuasively) that information sharing betrays that requirement. *See* Cohen *supra* note 16, at 1471–72 (focusing on apology rather than error reporting); Bryan A. Liang, *The Adverse Event of Unaddressed Medical Error: Identifying and Filling the Holes in the Health-Care and Legal Systems,* 29 J.L. Med. & Ethics 346, 353 (2001).

[27] On the limited efficacy of risk management *see* Liang, *Id.*, at 348.

to continue as a major contributor to the reform project, and I was eased out of the effort.

The intensity of this opposition and the more general attitude it disclosed undermined the MRO's patient safety initiative. Progress on error reporting slowed to a crawl and no system as yet exists or appears likely to be put in place any time soon. Moreover, if my analysis is correct the privileged status of error reports in any such system has been placed in greater jeopardy because of the continued yoking together of risk management and patient safety initiatives despite legal requirements that they be separated. My experience suggested to me that one of the most important reasons for the slow pace of patient safety reform is the fact that the lawyers advising doctors and the physicians who listen to them appear to embrace a paranoid vision of the legal world.[28] At the heart of that vision is the proposition that juries in medical malpractice actions are ready, on virtually any pretext, to find against healthcare providers and to award enormous damages. There are two corollaries to this view: first, that plaintiffs' lawyers exploit such jury proclivity for their own venal ends; and second, that insurance companies are properly worried about juries – justifying the barriers they sometimes seek to impose on information sharing and other reforms. In the grips of this juryphobia any reform that does not do away with courtroom adjudication and jury trials is doomed to rejection by the medicolegal establishment or the most substantial resistance in implementation.

Juryphobia in the Literature of Patient Safety and Medical Malpractice Reform

The juryphobia I encountered in my work for the MRO is readily visible in the literature advocating patient safety and medical malpractice reform. Not surprisingly, at least in light of my experience, many of the contributors to this literature are men and women who provide legal advice to the healthcare industry. Fear of juries and a desire to thwart their receipt of records dominates the works that urge reporting reform. Juryphobic rhetoric has also been deployed in opposition to the implementation of a variety of reporting schemes mandated by state statute and by the national hospital accrediting body, the Joint Commission on Accreditation of Healthcare Organizations (JCAHO). Reformers, virtually without exception, assert that error reporting is impossible

[28] That vision extends to other areas as well, such as end of life decisions, where some hospital counsel have intruded inappropriate legal constraints on familial and medical decision making. *See* Fost, Norman*, Do the Right Thing: Samuel Linares and Defensive Law*, 17 Law, Medicine & Health Care 295–334; Marshall B. Kapp, *Treating Medical Charts Near the End of Life: How Legal Anxieties Inhibit Good Patient Deaths*, 28 U. Tol. L. Rev. 521 (1997).

unless ironclad guarantees of confidentiality are provided.[29] Their objective is a walled-off error-reporting universe with complete internal openness and "largely surrounded by an external wall to shut out injured patients and their lawyers."[30]

The primary reason given for this demand for protection is the fear that without it plaintiffs' attorneys, either through discovery in litigation or through other means, like freedom of information requests, will seize the candid and revealing error assessment documents dutifully filed by cooperating doctors, nurses and other healthcare professionals.[31] As one commentator has picturesquely described healthcare providers' fears, the existence of error reports "would attract plaintiff [sic] attorneys as surely as honey attracts bears."[32] The imagery here speaks volumes about the healthcare industry's anxieties. Plaintiffs' lawyers are depicted as bears, large and fierce beasts with voracious appetites. The information they seek is described as the sweetest and most attractive substance known to the ursine world, a commodity bears will do almost anything to get.

According to error reporting advocates records seized by members of the plaintiffs' bar will significantly increase the number of malpractice claims filed.[33] Such reporting systems as that created by JCAHO have been described as a "lawsuit kit for attorneys."[34] With error reporting documents in hand, the reformers contend, patients and their lawyers will be able to cow doctors, hospitals, and HMOs into settling ever more cases.[35] Where settlement cannot be achieved such "smoking gun" documents will persuade juries to find malpractice and award substantial sums.[36] Some reporting advocates have sought to further their campaign against malpractice liability by strengthening this nightmare scenario with anecdotal horror stories like the case where an error was disclosed when it could easily have been hidden and the result was "a protracted lawsuit."[37] One is reminded of the campaign run against juries, lawyers and courts by those who made repeated and inaccurate reference to the case of Stella Liebeck who was scalded when a cup of McDonald's coffee

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[29] *See, e.g.*, Johnson *supra* note 6, at 6 ("Perhaps the greatest impediment to the successful implementation of error reduction systems is. . . . the fundamental question of whether and how reported information can be kept confidential."); Bovbjerg & Tancredii *supra* note 19, at 480.

[30] Bovbjerg & Tancredi *supra* note 19, at 480.

[31] *See* Liang & Small *supra* note 13, at 238.

[32] Furrow *supra* note 10, at 183.

[33] *See* Liang *supra* note 26, at 351; *but see* Bernard Black et al., *Stability, Not Crisis: Medical Malprctice Claim Outcomes in Texas, 1988–2002*, 2 J. Empirical Legal Studies 207 (2005) (finding that in Texas, numbers of large claims held steady and smaller claims declined).

[34] *Id.*

[35] *See* Liang & Small *supra* note 13, at 238.

[36] *Id.*

[37] *Id.*, at 231 n. 66.

spilled in her lap.[38] In both cases, with virtually no supporting data, we are invited to assume that left to itself the legal system will produce absurd and unjust results.

When error reporting is mandated and confidentiality is not guaranteed it is claimed that doctors and other healthcare professionals experience mounting anxiety about their exposure to legal liability. The result of this anxiety is the chilling of medical personnel's willingness to file any reports at all. Richard Davidson, then President of the American Hospital Association (AHA), relied on this argument when he declared that reporting "is not possible if some plaintiff's attorney is climbing on your back."[39] Where reporting has been mandated, as in Pennsylvania, underreporting is common.[40] The same has been true with respect to the JCAHO reporting system[41] and one instituted by the Veterans Administration.[42] In all these cases, reform advocates claim that uncertainty about access to or use of reports has played a part in forestalling cooperation.[43] There is a belief among some medical malpractice reformers that the situation was not always this way; that justified distrust of juries, lawyers and courts is on the rise and is "transforming healthcare."[44] In this view, one that seems to harken back to a lost golden era, doctors have become ever more fearful, so much so that they will not discuss cases in e-mails or make records of any sort.[45]

As in the case of error reporting, with which it overlaps, the literature urging doctors and other caregivers to provide patients with information about errors is replete with juryphobic concerns.[46] The same may be said of the materials championing the idea that doctors and hospitals should apologize to patients whom they have harmed.[47] Those who urge providing patients with

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[38] William Haltom & Michael McCann, Distorting the Law: Politics, Media and the Litigation Crisis 183–226 (2004); see also the chapter by bornstein and robicheaux, this volume.

[39] Chiang *supra* note 23, at 391 citing Robert Pear, *Clinton to Order Steps to Reduce Medical Mistakes*, N.Y. Times, Feb. 22, 2000 at A1.

[40] *See* Chiang *supra* note 23, at 393 ("[I]n Pennsylvania, which requires reports for gross events such as death due to injuries, suicide or malnutrition, the Department of Health received only one report for the one-year period that ended in June 1999.")

[41] *See* Furrow *supra* note 10, at 208.

[42] *See* David A. Hyman & Charles Silver, *Believing Six Improbable Things: Medical Malpractice and "Legal Fear,"* 28 Harv. J.L. & Pub. Pol'y 107, 110 (2004).

[43] *See supra* notes 29–33.

[44] *See* Troyen A. Brennan & Philip K. Howard, *Heal the Law, Then Health Care,* Wash. Post, Jan. 25, 2004, at B7.

[45] *Id.*

[46] *See* Bovbjerg & Tancredi, *supra* note 19, at 479.

[47] *See* Jonathan R. Cohen, *Advising Clients to Apologize,* 72 S.Cal. L. Rev. 1004, 1009 (1999); Aviva Orenstein, *Apology Expected: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It,* 28 W. U.L. Rev. 221 (1999); but see Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. 1135 (2000). also robbennolt, this volume.

information about injurious errors do so on the grounds that patients have both a therapeutic and moral claim to be informed about medical mistakes and treatment-related injuries.[48] Only patients who are properly informed can take the steps necessary to address their injuries through treatment, let alone consider legal remedies. The American Medical Association (AMA) and AHA have both concluded that it is a part of the physician's ethical responsibilities to inform her or his patient of iatrogenic injuries.[49] Building on this notion, those who suggest that treaters apologize for the injuries they cause argue that patients deserve the respect and contrition an apology signals.[50]

Despite the powerful medical and moral appeal of providing patients with information and, where appropriate, an apology, there has been substantial resistance to both steps in the medical industry. The reformers again lay much of the blame on the legal system. It is asserted that doctors so strongly fear being sued if they admit errors to patients that they phrase everything they say exceedingly carefully.[51] Often they will decide to say nothing at all although the situation calls for candor if the patient's interests are to be best served.[52] The reformers say that the cost of disclosure is very likely to be a traumatic and debilitating lawsuit.[53] As in the case of reporting it is repeatedly claimed that plaintiffs' lawyers are lurking in the shadows, ready to pounce on any admission.[54] The natural and predictable result, so the argument goes, is that doctors and other caregivers feel a chill that leads them to adopt a policy of silence.[55]

Apology first gained serious attention among reformists in 1987, when the Veterans Administration (VA) hospital in Lexington, Kentucky, adopted an innovative program to respond to acts of medical malpractice by its staff.[56] Pursuant to that program, as soon as the VA hospital discovered what it determined was an injurious medical error to a patient it would contact that patient (or his surrogate), apologize for the error, advise the patient to obtain the assistance of counsel and proceed to make an offer of monetary

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[48] *See* Cohen *supra* note 16, at 1477; Bovbjerg & Tancredi *supra* note 19, at 482.

[49] *See* Bovbjerg & Tancredi *supra* note 19, at 482. (The AMA has stated that doctors have an ethical duty to "at all times deal honestly and openly with patients," provide them "all the facts necessary to ensure understanding of what has occurred," so that they will be able to make informed decisions regarding future medical care. *Id.*)

[50] *See* Taft *supra* note 47, at 1160.

[51] Bovbjerg & Tancredi *supra* note 19, at 482.

[52] *Id.*

[53] *See* R. Zimmerman, *Doctors' New Tool to Fight Lawsuits: Saying "I'm Sorry,"* WALL ST. J., May 18, 2004; Randall R. Bovbjerg, *Patient Safety and Physician Silence,* 25 J.L. MED. 505 (2004).

[54] *Id.*

[55] *Id.*

[56] *See* Steven S. Kraman & Ginny Hamm, *Risk Management: Extreme Honesty May Be the Best Policy,* 131 ANNALS OF INTERNAL MED. 963 (1999); Cohen *supra* note 16, at 1447–1459.

compensation or other corrective action.[57] The program was remarkably successful. Among its achievements were the boosting of staff morale at the VA hospital,[58] the reducing of patients' suspicion and hostility[59] and a reduction in the hospital's overall expenditures on medical malpractice claims.[60]

This program of candid disclosure, apology and compensation would seem to fly in the face of juryphobia, but a good deal of the apology literature has taken great pains to show how the VA situation is different from that existing in other healthcare settings. The reformists argue that these differences doom apology to failure outside the VA system unless broad confidentiality protections are extended to apologizing doctors and hospitals.[61] Again, the villains of the reformers' analyses are the lawyers and jurors who are just waiting to slam any healthcare provider who apologizes.[62] The reform advocates argue that the VA program works because federal law requires that all claims be heard by a judge rather than a jury; that no claimant be awarded punitive damages; that VA physicians, who are employees of the federal government, are not generally subject to suit individually and that these physicians (because of their position as government employees) are not tied to the vagaries of maintaining private malpractice insurance.[63] These arrangements, it is argued, make for a setting in which the menace from juries and lawyers has been, to a large extent, neutralized. Without such neutralization apology is allegedly impossible.

Around the country those boosting apology have rallied to the idea that confidentiality is key. To this end they have promoted legislation that bars any judicial consideration of apology or of "benevolent gestures."[64] Perhaps the high watermark of this effort is a Colorado statute that states:

> In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim and which relate to the discomfort, pain, suffering, injury, death of the alleged victim as the result of the unanticipated outcome of medical care shall be

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[57] *See* Kraman & Hamm *supra* note 56, at 966–67; Cohen *supra* note, 16 at 1449–51.

[58] *See* Kraman & Hamm *supra* note 56, at 964; Cohen *supra* note 16, at 1451–59.

[59] Kraman & Hamm *supra* note 56, at 966;

[60] *Id*. at 966.

[61] *See* Cohen *supra* note 15, n. 68 (2000).

[62] *See* Aaron Lazare, On Apology, 20 (2004).

[63] *See* Cohen *supra* note 15, at 1455–57.

[64] *See* Bovbjerg & Tancredi *supra* note 19, at 482; *see generally* Jonathan R. Cohen, *Legislating Apology: the Pros and Cons*, 70 U. Cinn. L. Rev. 819 (2002).

> inadmissible as evidence of an admission of liability or as evidence of an admission against interest.[65]

The scope of this exclusion is remarkable. It is far broader than the protection granted by most other states.[66] It leads one to wonder whether the point of apology – a statement accepting responsibility for an offense[67] – has been absolutely vitiated in the effort to prevent any jury consideration whatsoever of the words of a caregiver.

It should come as no surprise that juryphobia does not only find expression in discussions about error reporting and apology but surfaces in healthcare professionals' discussions of the merits of the present medical malpractice system. Here juryphobia does not have the effect of squelching reforms but is used to energize calls for change. The defects in the malpractice system and, most particularly in the work of juries, are said, without a great deal of empirical justification, to be many and grave. Jury trial is claimed to be extremely inefficient and costly.[68] Moreover, it is charged with being exceedingly inaccurate in its determination of liability.[69] Because it is said to function only sporadically, jury trial is equated with a lottery, and the "threat" to use it is said to be extortionate.[70] To remove doctors from this fearsome lottery a number of reformers have argued that only hospitals, HMOs and other organized entities should be amenable to suit and that enterprise liability generally should replace the individual tort exposure of medical personnel.[71] Of course, this solution only goes part way by freeing individual physicians from suit. Many reformers urge a far more thoroughgoing solution that substitutes non-judicial forums for court procedures[72] or removes malpractice claims from the scrutiny of judges and juries and places them before private arbitrators and mediators whose proceedings are kept secret and whose rulings, it is presumed, will be far less critical of the medical profession.[73]

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[65] Colo. Rev. Stat. Ann. § 13-25-135 (West 2005).

[66] *See, e.g.*, Mass Gen. Laws Ann. Ch. 233 § 23D (West 2006); Cal. Evid. Code Ann. § 1160(A) (West 1995) (both focusing on "benevolent" gestures and remarks rather than admissions of liability).

[67] *See* Lazare, *supra* note 62, at 23; Jennifer Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. 460 (2003).

[68] *See* Myers *supra* note 14, at 264.

[69] *See* Liang *supra* note 26, at 349.

[70] *See* Brennan & Howard *supra* note 44.

[71] *See* Abraham & Weiler *supra* note 16; Myers *supra* note 14, at 274–77.

[72] *See* Liang & Small *supra* note 13, at 238–42 (promoting mediation as an alternative to litigation); Newt Gingrich, Speaker of the House of Representatives for the United States Congress from 1995 to 1999, proposed a new "health-court system" in which the majority of judges would have medical rather than legal training. Alan Feigenbaum, *Special Juries: Deterring Spurious Medical Malpractice Litigation In State Courts*, 24 Cardozo L. Rev. 1361, 1419 (2003).

[73] *Id.*; Liang *supra* note 26, at 359–60.

Unanswered Questions and Unsupported Assumptions in the Reformist Literature

The medical malpractice literature is littered with untested assumptions about the behavior of medical professionals, patients and juries. A number of these assumptions are critical to the policy steps urged by reformers. These cry out for empirical examination. If they are determined to be well founded then the case for change is significantly strengthened. If, on the other hand, they are found to be unsupported, the proposals advanced by reformers would seem to require serious re-examination and, perhaps, modification.

Error Reporting

In the areas of error reporting and doctor/patient communication regarding iatrogenic injury there are, at least, three critical assumptions that warrant social science scrutiny. The first is whether medical malpractice claiming stifles the amount of injury-related information provided by medical personnel. The second is what reaction patients will have if provided with information about medical errors in their treatment. The third is what reaction juries will have if informed of medical workers' error reports or comments to an injured patient.

It would seem logical to assume, based on the vehemence of the reformers' assertions about the chilling effect of litigation, that reporting, either to error systems or patients, is powerfully influenced by legal activity regarding medical malpractice. There are, however, reasons to doubt this core assumption. Resistance to reporting does not appear to be a new phenomenon. In fact, there are grounds to believe that medical professionals since early times have been close-mouthed about errors.[74] Medical culture emphasizes perfection and ostracizes those who do not achieve it.[75] These positions, which have little to do with legal assessment but a great deal to do with professional attitudes and esteem are, arguably, at the root of the non-reporting problem.[76] The medical world's silence about its mistakes may, in other words, be the product of forces and views within medicine rather than a response to the intrusions of the legal system. The tortuous history of the informed consent doctrine, through which courts eventually compelled doctors to provide patients with more information about the risks of and alternatives to treatment, suggests that a significant number of doctors are not inclined to freely share information, whether pre-treatment or later, and that it has been legal or other societal interventions that have been needed to break down

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[74] *See* Furrow *supra* note 10, at 185–89; Hyman & Silver *supra* note 42, at 112.

[75] *See* Myers *supra* note 14, at 261–62; Hyman & Silver *supra* note 4, at 898-899.

[76] *See* notes 74 and 75 *supra*.

medically manufactured walls of silence.[77] The impact of medical culture and attitudes deserves close scrutiny before it is concluded that juryphobic concerns are to blame for non-reporting.

No matter what one concludes about the impact of medical culture, it would be unwise not to examine the influence of legal activity on the rate of error reporting in the healthcare industry. It is likely that there are multiple causes for medical silence and that the threat of legal scrutiny may be one of them. An empirical assessment of the influence of a reasonably reliable promise of confidentiality on the rate of error reporting would help us decide if removing the threat of legal scrutiny boosts the willingness to report. Unfortunately, there are little data on the question.[78] One of the few studies available found that there was virtually no difference in reporting rates between systems that offered confidentiality and those that did not.[79] In both cases massive underreporting was the norm.[80] This is far from definitive evidence but is augmented by other information suggesting that lawsuits are not central to the medical profession's decisions about reporting. For example, the British confine medical malpractice litigation fairly narrowly, yet error reporting is less frequent there than in the United States with its relatively robust malpractice dockets.[81] In America, doctors specializing in certain areas of medical practice, like obstetrics, are far more likely to be sued than those in other specialties. In none of the less litigious specialties, however, is reporting more robust.[82] There may be a number of explanations for these phenomena, but they certainly reinforce doubts about the causal link between litigation and resistance to reporting.

There is at least one other point that raises questions about the reformers' hypothesized connection between malpractice litigation and reporting. Beginning in the mid-1980s anesthesiologists faced rising error rates and spiraling insurance premiums.[83] Through a concerted program of training, equipment redesign and reporting the specialty was able to drive down the error rate dramatically.[84] This was accomplished despite the active and aggressive efforts of the plaintiffs' bar to bring and win medical malpractice claims. Similar results have been reported in emergency medicine, the provision of transfusions and

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[77] *See, e.g., Canterbury v. Spence,* 464 F.2d 772 (D.C. Cir. 1972).

[78] *See* Furrow *supra* note 10, at 203; Chiang *supra* note 23, at 396. ("The number of studies investigating the problem of underreporting is small and their sample sizes are smaller.")

[79] *See* Furrow *supra* note 10, at 203 n. 162 citing *State Reporting of Medical Errors and Adverse Events: Results of a 50-State Survey,* Executive Summary, available at http://www.nashp.org/_docdisp_page.cfm?LID = 0560704C-4CAC-11D6-BCEE00A0CC558925.

[80] *Id.*

[81] *See* Hyman & Silver *supra* note 42, at 111.

[82] *Id.*

[83] *See* Johnson & Shapiro *supra* note 6, at 4–5; Myers *supra* note 15, at 266.

[84] *Id.*; *see also* sources cited in Barach *supra* note 2, at 19 and n. 75; Hyman & Silver *supra* note 4, at 917–20.

the dispensing of prescription medication.[85] Significant improvements in safety have been achieved and reporting has helped make it possible notwithstanding the interventions of the bar. All of this tends to cast doubt on the assertions that confidentiality has a key part to play in safety improvement or even in error reporting. Careful study seems warranted to answer the questions posed by these facts.

One of the key analogies relied upon by reformers to justify their calls for confidentiality involves the aviation industry. There a confidential near miss reporting system has been in operation for many years.[86] No one who uses the system is called to account for the contents of a report and, in fact, the only way to get into trouble with respect to reporting is to fail to report a near miss incident when others report it.[87] The submitted reports are analyzed and often lead to directives designed to enhance safety. While the aviation model has real appeal, a number of points urge caution before concluding that a more or less identical system is warranted in medicine. In aviation all crashes are thoroughly investigated by the National Transportation Safety Board (NTSB). Their work is not confidential and may be utilized by litigants.[88] Tort doctrines like *res ipsa locitur* make a finding of liability a near certainty in commercial aviation cases.[89] When an airliner goes down there is virtually no doubt that victims will be compensated. The key questions are how much will be paid and by whom. This should be contrasted with medical malpractice litigation where causation and liability are often hotly contested and there is no definitive assessment of the sort provided by the NTSB. Thus, there is scant legal need for aviation near miss data in litigation. It is impossible to say the same of the error reports that might be generated in the medical setting. This is not to say that litigation needs trump medical concerns but rather that without clear proof that confidentiality substantially boosts reporting and safety, the reformers' arguments lack the gravity necessary to justify a policy of secrecy in a setting where appropriate compensation is often not provided and information may be extremely difficult to acquire.

The juryphobic hypothesis is that unprotected communications admitting error, especially those made to patients, will increase the volume of litigation.

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[85] *Id.*

[86] *See* Barach *supra* note 2, at 20–1.

[87] *Id.*

[88] "After an aircraft accident there is a civil trial for damages. In most cases these suits are brought many months if not years after the accident has occurred. In an effort to obtain the best information available on the accident, litigants routinely move, under the Freedom of Information Act, to get the reports of the NTSB... Additionally, in most circumstance, the Factual Report (which contains the Field Notes) is admissible at trial under the public documents exception to the hearsay rule." Trowbridge Littleton, *The National Transportation Safety Board: How Should They Conduct Witness Investigations-The Need for a Privilege*, 27 Transp. L.J. 255, 261 (2000).

[89] Prosser & Keeton on the Law of Torts 246–247 (5th ed. 1984).

At the outset it should be noted that the level of malpractice claiming in the United States is far below the level of injury, raising the most significant doubts about the litigiousness of the American patient.[90] That large numbers of previously docile but injured patients are going to rise up in response to error reports may grant these reports excessive significance. Putting that aside, studies suggest that patients appreciate candor about medical errors, that communication reduces the number inclined to sue their doctor and makes caregivers seem more human and sympathetic to their injured patients.[91] Suits grow in number when doctors appear dishonest, arrogant or unconcerned about the consequences and implications of their mistakes.[92] While lawsuits, especially about serious injuries,[93] are not likely to disappear because of error reporting, the patient reaction data cast doubt upon the hypothesis that reporting without confidentiality is legal suicide. More research is clearly warranted to assess patient reaction to reform.

It is an article of the reformist faith that juries exposed to error reports will be more inclined to find against caregivers in medical malpractice cases. There are a number of theoretical bases advanced for that contention. It has been said that error reports and similar statements will trigger the "hindsight bias" of the jury.[94] Hindsight bias has been observed in the deliberations of juries asked to determine the reasonableness before the fact (in other words, ex ante) of a course of conduct that eventually results in injury.[95] The usual source of the bias is the fact of the injury. It is, in such cases, "read back" into the preceding circumstances to suggest that the defendant knew or should have known beforehand that his actions were unreasonably risky.[96] Hindsight bias is a serious problem in some categories of negligence cases and in cases involving the review of business decisions gone wrong.[97] In the context of error reporting, however, its relevance may be questioned. Error reports declare medical mistakes; they do not, however, suggest medical foreknowledge or unreasonableness ex ante.

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[90] *See generally,* To Err is Human; *supra* note 1 Studdert, *supra* note 21; Lori Andrews, *Studying Medical Error In Situ: Implications for Malpractice Law and Policy*, 54 DePaul L. Rev. 357, 370 (2004) (13 of 1,047 patients who suffered medical errors brought claims); Hyman & Silver *supra* note 42, at 104–08; *Hearing on: Medical Liability: New Ideas for Making the System Work Better for Patients* (statement by Vidmar), n. 18, (2006).

[91] *See* Bovbjerg & Tancredi *supra* note 19, at 482 and n. 79; Myers *supra* note 15, at 278 and n. 224.

[92] *Id.*

[93] *Id.*

[94] *See* Liang & Small *supra* note 14, at 229.

[95] *See* Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post? Ex Ante: Determining Liability in Hindsight*, 19 Law and Hum. Behav. 89 (1995); Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 Law and Hum. Behav. 501 (1996); Jonathan D. Casper et al., *Juror Decision Making Attitudes, and the Hindsight Bias,* 13 Law and Hum. Behav. 291 (1989).

[96] *Id.*

[97] *Id.*

The injury about which the patient complains and which the case addresses may provoke hindsight bias, but it is hard to see why an ex post report would enhance such bias where the facts of a case have already triggered it. That said, the precise nature of the impact of such reports deserves further empirical scrutiny.

Error reports are admissions of mistakes. They bear a strong resemblance to confessions or inculpatory statements in criminal cases. The United States Supreme Court has held that confessions are so powerful that when wrongfully admitted (although later withdrawn) they destroy the possibility of a jury's dispassionately considering the innocence of the defendant.[98] Psychological examination has tended to confirm the power of confessions and the wisdom of being cautious about exposing decision makers to them.[99] If error reports work in the same way as confessions they may pose a serious danger to the fair assessment of all the facts in medical malpractice actions. The trouble with this hypothesis is that it has not been tested and that there are a wide variety of different sorts of reports containing different sorts of information.

What would be useful if confidentiality is to be justified is a robust program of empirical assessment regarding the impact of error report and error admission evidence in malpractice cases. The first question is whether jurors will understand how to use error reports and admissions. All error reports are not created equal. Some will clearly document errors amounting to malpractice, others will discuss mistakes that are legally defensible in the context of prevailing medical practice and still others will be entirely irrelevant to the legal issues surrounding a patient's injury. In addition, certain reporting systems will only contain descriptions of near misses which, by definition, have not led to harm; and some sort of injury is a prerequisite of a negligence claim. An important experimental question is whether jurors can successfully distinguish between these different sorts of error documents and use them appropriately. If it is shown that jurors can use such documents in a discriminating way, then the risk is substantially reduced that unfounded verdicts will be reached in cases in which they are disclosed.

A second question is what impact such documents will have on the cases in which they are used. Will such documents, like confessions, overwhelm the other evidence? Will they dictate liability even when causation is unclear? At least as significant is the question of the impact of such materials on the setting of damages. Will their introduction boost or shrink jury awards? It is, on the one hand, conceivable that admissions of error will be perceived as honorable efforts to improve medical care. If so, then juror reaction may mirror the previously described patient reaction, and doctors may be seen in a more sympathetic light. That might lead to the reduction of awards. On the other

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[98] *See Jackson v. Denno*, 378 U.S. 368 (1964).

[99] *See generally* Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial 86–93 (1988)

hand, if error information has been suppressed or defendants have chosen to absolutely deny liability then the introduction of error reports may be seen as the revelation of a "smoking gun" that justifies a large verdict, especially because the defendants' conduct looks like a cover-up.[100] There is no shortage of questions worthy of examination and the challenge will be to design simulation experiments that yield broadly applicable data.

Apology

The questions raised by the apology literature are similar to those already considered with respect to reporting. The same medical culture that has fostered silence rather than reporting has restrained apology. There was little material in the medical literature advocating apology until the last ten years and it would appear that apologies have never been routinely provided by erring doctors and other healthcare professionals.[101] Once again, it seems fair to suggest that the problem may be attitudes within the medical profession rather than the pernicious influence of litigation. Nevertheless, the question remains if litigation concerns have significantly increased the fear of apology and whether the present legal climate makes reform more difficult. We have so little data that it is impossible to hazard a guess about the answer to such questions, although the error reporting data would suggest that malpractice litigation rates have little influence on the frequency of apology.[102]

With respect to the question of patient reaction to apology we, again, have to rely on the analogous error reporting data. These suggest that a significant number of patients will react positively to apology (as they do to admission of error). Many patients are likely to view an apology as a caregiver's effort to be honest. Perceived lack of candor has been found to be one of the key determinants in the decision to sue. A substantial number of patients may be dissuaded from litigating if given a proper apology.[103] It is not clear, however, whether all sorts of apologies will affect patients in the same way.[104] One might hypothesize that a vague and general apology will be less effective than a specific one, that an apology from a hospital's chief of staff will be less powerful than one from the medical professional who made the mistake and that an apology that avoids

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[100] *See* note 91 *supra*; Brian H. Bornstein et al., *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 Behav. Sci & Law 393 (2002) (noting varied impact of apology on awards based on timing of apology).

[101] *See Ninth Annual Stein Center Symposium: The Role of Forgiveness in the Law*, 27 Fordham Urb. L.J. 1347, 1426; Lazare *supra* note 62, at 98.

[102] Brian Bornstein, in communications with the author, has suggested that the adoption of laws to protect apology raises a series of similar empirical questions about physician awareness of legal change and the laws' effect (if any) on the rate and quality of apology.

[103] Lazare *supra* note 62, at 173.

[104] See Robbennolt, *supra* note 67, at 460.

making an offer of compensation will be less influential than one that does so. Each of these matters is worthy of empirical scrutiny.[105]

A central issue regarding apology, as was the case with error reporting, is how jurors will use apologies in determining liability and fixing damages in malpractice litigation. Since there are different sorts of apologies the question arises whether jurors are capable of making the fine distinctions that may be necessary in interpreting different sorts of remarks from caregivers. Much of the legislation in the apology area differentiates between "benevolent gestures" and apologies. It is benevolent gestures – statements voicing sympathy, commiseration or compassion – that have most frequently been classified as confidential.[106] It is an interesting question whether jurors would take note of the benevolence/apology distinction.[107]

Assuming the existence of a full-blown apology, the next question is its impact on the finding of liability and on the size of the damages awarded. There is reason to anticipate that an apology will moderate an award because of the medical professional's candor and the positive feelings it is likely to generate.[108] There is, however, little data in the area and none on the liability question.[109] If apology does cut findings of liability and the size of damages, states that bar legal consideration of such materials may cause a boomerang effect that raises awards by preventing evidence of a caregiver's contrition. It might be argued that the Colorado statute quoted above has this effect unless the statute is read only to bar plaintiffs from the use of apology to establish liability rather than barring all litigants from making any reference to any apology that is "an admission of liability." The impact of apology on settlement discussions also deserves to be examined. Whether settlements grow in number or size because of apologies appears to be an open question.[110]

It has been suggested that apologies may present opportunities for defendants to manipulate claimants. There has been some discussion in the reform literature about the "strategic" use of apology – the calculated deployment of apology to forestall suit or reduce damages.[111] Will such strategies work or will juries and patients react to them as they do to dishonest or dissembling behavior? Among other matters that may be worth examining is the question of the timing of apologies. Does it make a difference when an apology is made? One might expect that sooner is better but the question is an open one.[112] The matter

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[105] *Id.*

[106] *See* statutes cited in note 66 *supra*.

[107] Robbennolt *supra* note 67, at 470.

[108] Robbennolt *supra* note 67, at 464 and n. 17; Brian H. Bornstein et al., *supra* note 100.

[109] *Id.* Robbennolt, at n. 19.

[110] *See Id.*, at 485–86.

[111] For a description of Toro Company's seemingly strategic use of apology techniques to reduce its liability for injuries suffered by users of its mowers and other lawn care products, *see* Cohen, *supra* note 16, at 1460–62.

[112] Robbennolt, *supra* note 67, at n. 25; Brian H. Bornstein et al., *supra* note 100.

takes on added salience when one considers the possibility of a lawyer advising a doctor client to make an apology at trial or at some other point during legal proceedings in order to lessen the risk of a large damage award.

Enterprise Liability and Alternatives to Judicial Assessment of Malpractice Claims

Juryphobia has led to a search for alternatives to the present malpractice system. One of the alternatives that has featured prominently in the reformist literature is enterprise liability, which shifts responsibility for healthcare professionals' malpractice liability from their shoulders to the entities for which they work or with which they are associated. This approach has been championed by the IOM and a number of others.[113] The safety-related premise upon which enterprise liability relies is that such a shift in legal responsibility will have two significant consequences; first, it will reduce caregivers' fear of litigation, thus freeing them to behave in ways that enhance safety[114] and, second, it will place the malpractice burden on corporate entities that will have clearer incentives and more substantial resources to improve safety.[115] As with so much in the patient safety setting, these hypotheses are open to question and have not undergone social science scrutiny. As noted above, there are a number of non-law-related reasons why healthcare professionals do not report medical errors or take other steps to improve safety. Removing the threat of litigation for doctors and other treaters will not change those influences so the anticipated improvement in reporting and other safety activities may not materialize. Moreover, the pressures that enterprises will exert on the professionals who work under their supervision or control may recreate the alleged environment of fear and silence said to exist because of litigation. The enterprise liability idea needs to be tested so that caregivers' attitudes and responses may be measured as well as those of the representatives of enterprises being placed in heightened legal jeopardy.

Jury reaction to enterprise liability should also be considered. What will jurors do when confronted by medical malpractice claims for which healthcare enterprises rather than doctors and nurses are said to be liable? Juries across the United States have shown themselves to be extremely friendly to doctors as defendants in malpractice actions.[116] Plaintiffs prevail in such cases between 20

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[113] *See* materials cited in note 16 *supra*.

[114] *See* Myers *supra* note 15, at 274.

[115] *See* materials cited in note 17 *supra*.

[116] *See* Hyman & Silver *supra* note 42, at 115 and n. 52 (medical malpractice plaintiffs win 19% of their cases); Theodore Eisenberg et al., *Federal Product Liability Litigation Reform: Recent Developments and Statistics*, 19 Seattle U. L. Rev. 433, 447 (1996) (plaintiff medical malpractice success rate 26% in state court, 30% in federal court).

and 30% of the time – a far lower winning percentage than in most other sorts of civil litigation.[117] While all the reasons for this are not clear, an important one appears to be that individual doctors garner significant jury sympathy when accused of medical malpractice.[118] This should be contrasted with the treatment accorded corporate entities when sued by individuals who claim injury. A series of studies, most particularly those of Valerie Hans, suggest that when an individual defendant (let alone an apparently sympathetic one, like a doctor) is replaced by a corporate defendant the likelihood of a liability finding and the size of the damages awarded grow.[119] It appears that corporate defendants are held to a higher standard of conduct than individuals are.[120] If that pattern carries over to the medical context, enterprise liability may result in more frequent and larger plaintiffs' verdicts. Such an outcome is one that healthcare provider entities would not be happy about.

Another alternative advanced by reformers to improve patient safety is a shifting of medical malpractice cases away from jury trial to some sort of alternative dispute resolution (ADR) mechanism like arbitration or mediation. Putting aside questions about the legal soundness of such proposals, especially in light of the right to jury trial,[121] the empirical questions posed by such a shift are many and serious. As already indicated, the existence of the courtroom process may have only negligible impact on the willingness of medical personnel to pursue error reporting and other safety measures. Indeed, it has been suggested that were tort liability to disappear tomorrow there would be no appreciable improvement in patient safety and that the real keys to reform are financial and regulatory incentives for reporting.[122] As with so many other questions in this area the need for research is substantial.

Any procedure used to replace or short-circuit medical malpractice lawsuits will have to satisfy a number of requirements in order to work. There is a large body of literature by scholars like Tom Tyler emphasizing the importance of providing a potential claimant with a chance to participate and to be heard.[123] Some reformers mindful of the confidentiality of certain ADR procedures have suggested that ADR be used as a way to allow patients to "vent" after their caregiver has provided them with error-in-treatment information.[124] If ADR

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[117] *Id.*

[118] *See* Vidmar, *supra* note 90, at n. 23.

[119] *See* Valerie P. Hans, Business on trial: The Civil Jury and Corporate Responsibility 112–37 (2000).

[120] *Id.*

[121] See Hillary Rodham Clinton & Barack Obama, *Making Patient Safety the Centerpiece of Medical Liability Reform*, 354 New. Eng.. J. Med. 2205 (2006).

[122] *See* Furrow *supra* note 10, at 205.

[123] *See* Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: The September 11th Victim Compensation Fund*, 53 DePaul L. Rev. 355 (2003); E. Allen Lind & Tom R. Tyler, The Psychology of Procedural Justice (1988)

[124] *See* Liang *supra* note 26, at 359.

procedures are used to patronize patients while at the same time sealing their lips (because of the confidentiality requirements of ADR), the likely result is patient hostility and a backlash against the medical establishment. Such was the case when the Permanente Medical Group abused its private ADR process to string out care-related hearings for months, and in some cases, years, thereby delaying or denying treatment and saving money (some patients died during these delays).[125] This conduct so outraged the people of California that legislation was adopted curtailing Kaiser's opportunity to utilize private dispute resolution mechanisms.[126] The risk of overreaching and the public reaction to it demonstrated in the Kaiser case suggest just how carefully ADR processes will have to be designed and policed. On the question of overreaching it should be noted how many of the reformers' proposals seek to bar or discourage the involvement of lawyers in representing injured patients.[127] The idea seems to be that everything will be fine if an injured patient does not know his or her rights and has no advocate. This seems like an invitation to subordination rather than respect and invites a process in thrall of the "repeat players" from the healthcare industry.[128] The challenge is to create processes that are both perceived to be fair and truly operate fairly. To determine how to achieve that end substantial empirical scrutiny will be needed.

Assuming that fair processes can be established and maintained, the next question is whether their results are likely to satisfy the healthcare professionals who have been so desirous of securing relief from judicial scrutiny. There are data that suggest non-judicial medical malpractice panels will be far tougher on doctors than are juries. In one study only 3 of 83 claims referred to such a panel were found not to warrant an award.[129] In another study just 54 out of 2,638 received no compensation.[130] The scope of liability may actually grow under an ADR regime – not a surprising result in light of the IOM's findings about the ubiquity of medical injury. Again, the relative merits and implications of alternatives to jury trial need to be tested and their impact on safety initiatives measured. It will not do to accept without challenge the juryphobia that undergirds many of the calls for reform.

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[125] *See Engalla v. Permanente Med. Group, Inc.*, 938 P2d 903 (Cal. 1997).

[126] *See* Cal. Health & Safety Code § 1373.20 (West 2000); Marc A. Rodwin, *Backlash as Prelude to Managing Managed Care*, 24 J. Health Pol. Pol'y & Law 1115, 1118 (1998).

[127] *See* Liang & Small *supra* note 14, at 239–242.

[128] *See* Marc Galanter, *Why the "Haves" Come Out Ahead, Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

[129] *See* Henry S. Farber & Michelle J. White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 J. Legal Studies 777 (1994).

[130] *See* Stephen J. Spurr & Walter O. Simmons, *Medical Malpractice in Michigan: An Economic Analysis,* 21 J. Health Pol. Pol'y & L. 315 (1996).

Steps Short of Scrapping the Jury Trial

If it were determined that there is a jury-connected problem which undermines error reporting or any of the other proposed information-sharing reforms, a number of steps may be available for use before or at the jury trial to lessen the threat to safety initiatives. Some of the commentators who have considered the reporting problem have recommended two ways to reduce legal intrusion. The first of these is to collect only near miss data. Such an approach would, by definition, not gather material regarding injurious events and would, in the vast majority of cases, not produce information relevant to medical malpractice litigation.[131] Near miss reporting's irrelevance would make it far less likely to be subject to litigation-driven discovery. This effect may be strengthened if the data submitted is "deidentified" at some point after filing.[132] Because there is significant value in dialogue at the time reports are submitted, anonymous filings would seem inferior to reports that indicate the identity of the filer.[133] Once follow-up questions and clarifications have been completed, however, the utility of identified filings is probably outweighed by the value of confidentiality so that identifying information ought to be purged. As a further measure of insulation, error report data might be aggregated so that individual incidents are melded into an overall picture useful for safety diagnosis but disconnected from any particular patient or claim. These points do not directly affect patient safety but provide approaches that may facilitate and encourage healthcare industry use of reporting systems.

For obvious reasons record keeping solutions will not work with respect to error reports provided to injured patients and apologies. If it is concluded that the courtroom use of such materials poses a real threat to safety reporting then a number of in-court responses ought to be considered. Over the course of the last thirty years the courts and psychologists have worked out a series of protective interventions to deal with the challenge of eyewitness testimony – evidence that sometimes proves overly persuasive to jurors.[134] The courts will seldom bar such material but have allowed a number of steps to guard against its misuse by potentially credulous jurors. The three responses that are most frequently permitted are vigorous cross-examination of the eyewitness (this is the response traditionally relied on), the use of expert testimony to describe potential flaws in eyewitness testimony and limiting instructions designed to caution jurors against excessive reliance on certain sorts of eyewitness material.[135] These

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[131] *See* Barach *supra* note 2, at 16–17.

[132] *See* Johnson & Shapiro *supra* note 6, at 9–10.

[133] *Id.*

[134] *See* Valerie P. Hans & Neil Vidmar, Judging the Jury 127–28 (1986).

[135] *See* Wallace D. Loh, Social Research in the Judicial Process 549–600 (1984); *Steven Penrod & Brian Cutler, Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation,* 1 Psychol. Pub. Pol'y & L. 817 (1995).

approaches have not provided a perfect solution but have been demonstrated to be helpful. It would seem appropriate to examine the utility of these tools in the error report and apology contexts, if such statements prove overly persuasive to jurors.

If it is found that despite these interventions admissions and apologies still have an inordinate influence on juries then it may be worth weighing the possibility that they should be classified as confidential and their use prohibited in the courtroom. This choice, to "blindfold" the jurors, should be viewed as a last resort. Shari Diamond and colleagues have pointed out a number of problems with blindfolding, most particularly the possibility that jurors will make erroneous factual assumptions in the absence of accurate information about a potentially influential topic.[136] This has been found to be the case with the embargoed topic of insurance coverage. Despite the blindfold jurors think and talk about the existence of insurance.[137] Failing to address insurance has not made juries more reliable but rather less amenable to court supervision and direction. The analogy between problems with insurance and admissions/apologies may not be perfect but such materials, like the existence of insurance coverage, may affect juror attitudes in ways that harm one side or the other and should be regulated.

Afterword

There is substantial evidence that medical culture on its own produced the environment in which errors are not reported, information is not shared and apologies are not made. It is striking that reformers spend so much of their time and effort on litigation questions rather than on the problems posed by medical attitudes and culture. It is possible to see this as a blaming of victims for complaining about malpractice. Adopting a policy of secrecy vis-à-vis the courts is a troubling step especially when the medical profession has not displayed any great willingness to get its own house in order and accept responsibility for errors. Instead it has fought with all its might to cap the damages awarded to the children and elderly seriously injured by malpractice. The motive for this approach to malpractice does not seem to be improvement of care but protection of the bottom line. On a number of prior occasions medicine had to be pushed to adopt changes beneficial to patients. This was the case with respect to

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[136] *See* Shari S. Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts and the Civil Jury,* 26 LAW & SOC'Y REV. 513 (1992).

[137] *See* Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).

informed consent. Perhaps society needs to push once again. Learned Hand, in the case of the *T.J. Hooper*,[138] decided that the well-settled custom of an industry had to yield to the safety interests of society at large. But before such a step is taken we need more data about the behavior of caregivers, patients and juries.

[138] *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

How Juryphobia and Fears of Fraudulent Claims Disserve Medical Malpractice Reform Efforts

Monica K. Miller

The concern about a medical malpractice "crisis" has led to a great deal of debate and legislation (see chapter by Bornstein and Robicheaux, this volume; Marder, 2005; Peters, 2007). Much of this alarm is due to what Landsman (this volume) calls "juryphobia" and a phenomenon that Hans (this volume) describes as excessive or fraudulent use of the civil justice system. Simply put, lawmakers are concerned that juries award excessive monetary awards and that plaintiffs are too eager to sue. Thus, lawmakers have attempted to address the medical malpractice crisis by focusing on tort reform, which in many respects makes it harder for plaintiffs to access the courts.

By using the Landsman and Hans chapters and supporting research as springboards, this chapter suggests that the most positive solution to the medical malpractice crisis is not tort reform, but a reformation of the medical profession. First, this article will discuss the medical malpractice crisis as it has been framed by politicians, researchers, and the media. This includes a discussion of the reforms that have been proposed or implemented. Second, an analysis of research reveals whether there is sound reason for the medical profession's juryphobia. The chapter concludes with a proposed method of dealing with medical mistakes outside the legal system. By preventing malpractice and changing the way the medical profession deals with medical mistakes, the medical profession could handle the crisis itself and, in many cases, avoid the juries it fears.

Medical Malpractice Crisis, Causes and Reform

In recent years, there has been much concern over a medical malpractice crisis (see Bornstein & Robicheaux chapter, this volume). The crisis has supposedly had many negative effects: Doctors have been driven out of business (Boulard,

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2002), patients have had increasing difficulties accessing medical care (Geary, 2002), and insurance companies have had to make dramatic increases in malpractice insurance premiums in order to stay solvent (Pritchard, 2004). As a result of the crisis, Congress has held hearings, the media have reported the details of the crisis, and Presidents Bill Clinton and George W. Bush have given public addresses on the topic. Many approaches to fixing this crisis have been proposed; for instance, at the beginning of his second term, President Bush addressed what he called the "medical liability crisis." He professed support for tort reform and identified the need to defend doctors from a legal system that favors plaintiffs (Baker, 2005; Benedetto, 2005). Landsman (this volume) notes that President Clinton took a different approach to solving the medical malpractice crisis. He endorsed a proposal to cut preventable medical errors by 50% in 5 years by implementing new regulations and an error reporting system.

Landsman further points out two different approaches, reflected by the Bush and Clinton proposals, respectively, to addressing the problem. First, lawmakers can alter the way that injuries are handled in the court system (e.g., tort reform). Second, the medical profession can address medical errors and take steps to prevent medical malpractice. Studdert, Mello, and Brennan (2004) further delineate three categories of tort reform. The first category focuses on limiting patients' access to the courts. For example, several states have implemented screening panels intended to prevent nonmeritorious lawsuits from reaching the trial stage. The second category of tort reform suggested by Studdert and colleagues includes measures that reduce the frequency of malpractice claims. Such proposals include shortening statutes of limitations (i.e., the amount of time a patient has to file a lawsuit), eliminating joint-and-several liability, and revising burden of proof and liability standards. Finally, the last category of tort reforms is designed to limit the size of awards, for example through capping the amount of damages juries can award (Studdert et al., 2004).

While the media, politicians, and lawmakers have given tort reform a great deal of attention, much less attention has been paid to Landsman's second approach to the crisis: preventing medical errors. This is an unfortunate oversight, as there is evidence that medical errors occur at an alarming rate. Landsman begins his chapter with mention of a report by the Institute of Medicine that "identified medical error as one of the leading challenges facing medicine." The report indicated that 98,000 Americans die as a result of medical mistakes each year (Institute of Medicine, 2000). Many different measures have been proposed to address this issue. The most common recommendation is the development of reporting systems that track injuries and "near misses" (i.e., incidents in which a patient is nearly harmed). Such reporting systems could allow the medical profession to learn how and why injuries are caused and how to prevent them. In addition to reporting systems, Landsman also discusses the use of apologies in the medical system (see also the chapters by Robbennolt Greene, this volume). He reports on research suggesting that some patients may sue merely to find out

what caused their injuries, and thus may not sue if their doctors are honest and candid about adverse medical events.

Despite much discussion and many recommendations that would improve medical care, Landsman notes that little reform has actually been implemented. The most commonly enacted malpractice reforms are caps on damages and other measures that make it harder for patients to sue. Landsman calls this "juryphobia" because such measures represent the fear that juries will make doctors and hospitals pay extremely high damage awards. Juries are accused of relying on their sympathies and emotions; they are also supposedly unpredictable because they are easily swayed by extra-legal factors. Hans (this volume) indicates that there could be understandable reasons for some of this juryphobia; she presents data indicating that changes in terminology (e.g., calling an injury a "fracture" instead of a "soft tissue injury") and trial presentation (e.g., a lawyer providing information that injuries can exist even if they cannot be seen) can influence the jury's decisions and perceptions of the plaintiff's credibility. Such research likely encourages juryphobia and supports the notion that trials may be risky and hard to predict because of the many things that can influence a jury.

In her chapter, Hans points out that there is concern about excessive or fraudulent lawsuits (see also Bornstein & Robicheaux's chapter, this volume). She indicates that there is fear that soft tissue injuries that are often the subject of automobile injury lawsuits are faked, exaggerated, or are actually pre-existing injuries unrelated to the automobile accident. Lawsuits based on such meritless injuries have been blamed for unnecessarily burdening the legal system. This is evidence that there is also "plaintiff phobia" (i.e., fear that opportunistic individuals can capitalize on automobile accidents by faking or exaggerating injuries). Hans focuses on automobile injuries, but the same phenomenon could exist in the medical malpractice arena; patients who have an unexpected reactions to treatment are quick to sue. In the case of medical malpractice, this phenomenon could be called "patient phobia." The fear that patients are too eager to sue (see also Collini, 2003) could encourage lawmakers and the medical field to support legislation that discourages legal claims – especially frivolous ones – and establishes caps on damages.

Landsman's discussion makes it clear that the medical profession is fearful; his own experience as a lawyer asked to analyze the legal consequences of a proposed medical error reporting system is a good illustration. Such a system would benefit the medical system by revealing how and when mistakes are likely to occur, so that similar future mistakes could be prevented. He recommended that procedures could be put in place that would protect data gathered for a hospital's reporting system from being used against the hospital in court. His recommendations were rejected for a variety of reasons, many of which indicate that the fear of losing at trial was stronger than the desire to protect patients and determine why errors were being made. This incident

reveals strong juryphobia. Several researchers have investigated whether these concerns are reasonable.

Blaming Jurors

Landsman provides evidence that juryphobia exists, yet questions remain as to whether there is good reason for this fear. Several chapters in this book, along with other published work (e.g., Marder, 2005), speak to the debate as to whether or not juryphobia is warranted.

Evidence that Juryphobia is a Legitimate Concern

There are several reasons that juryphobia may be warranted. First, there is concern that jurors are driven by their sympathies for injured plaintiffs and are unable to properly evaluate complicated medical testimony (see Vidmar, 1995 for a review of the arguments that juries are incompetent or inadequate). Hastie, Schkade and Payne (1998) determined that mock jurors were unable to understand the instructions about punitive damages. Most mock jurors determined that punitive damages should be awarded, even though judges had ruled that punitive were unwarranted in those cases. Thus, jurors were unable to come to a “correct” decision.

Second, there is also concern over a “deep pockets effect,” which suggests that the identity and/or wealth of the defendant affects the jury’s award. Specifically, a plaintiff is awarded a larger sum when the defendant is a corporation rather than an individual. It is suspected that jurors reason that a corporation can afford to pay a larger amount than an individual. Some early studies (reported in Hans, 2000) found that awards differed in this way. Such findings likely encourage the belief in a medical malpractice crisis and promote juryphobia.

Third, juries can be persuaded by many factors, some of which are irrelevant to the legal process. For instance, research has shown that the attractiveness and race of the defendant can affect jurors’ decisions (e.g., Abwender & Hough, 2001). Hans (this volume) conducted an experiment in which participant mock jurors read about a lawsuit involving a neck injury. All jurors read identical details about the injury (e.g., the amount of pain suffered, impact on the plaintiff’s life), but the injury was described as a “soft tissue injury” in some cases and a “fracture” in other cases. Hans found that when a plaintiff’s injury was called a “soft tissue injury,” mock jurors indicated that the injury was less serious, less “real” and less deserving of a damage award as compared to when the injury was called a “fracture.” Thus, the Hans research indicates that the words used to describe an injury can influence jurors’ perceptions and decisions. Similarly, the way a case is presented can be influential. For instance, a lawyer

can compare a whiplash injury to migraine headaches; both ailments exist even though there are no definitive tests or other medical proof that they exist. The experimental condition in the Hans study included several such manipulations that were intended to strengthen the plaintiff's case. She found that the case presentation can affect jurors' perceptions of the strength of the case. Studies such as these indicate that juries can be influenced by a number of factors and thus it may be hard to predict jurors' behavior.

Next, jurors' characteristics (e.g., gender, race, political orientation) and attitudes could affect their verdicts. Although such factors account for only a small portion of variability in verdicts (Lieberman & Sales, 2007), these effects are important enough to make scientific jury selection a profitable career and pique the interest of many researchers. The belief that the jury selection process can readily affect the outcome of the trial encourages juryphobia and reforms that prevent cases from going to trial.

A final concern is that jurors in recent years have begun to award increasingly high or "skyrocketing" awards that demonstrate the jury's incompetence (Viscusi, 2004). The media have supported these views (Pritchard, 2004; Taylor et al., 2003) and have provided anecdotal evidence that awards are increasing (for review, see Vidmar, 1995). In 1986, the U.S. Department of Justice released a report claiming that the average medical malpractice award rose from $200,108 in 1975 to $1,017,716 in 1985 (reported in Vidmar, 1995). Evidence from seemingly reputable sources such as the Department of Justice likely encouraged the notion that jury awards are increasing at an alarming rate.

As a whole, this research suggests that jury trials can be unpredictable, and that verdicts depend on which jurors are chosen, the characteristics of the parties, and the lawyer's words and trial tactics. In addition, the suggestion that awards are skyrocketing causes tremendous apprehension for doctors and hospitals, as well as for tort defendants in general. It is no surprise, given these concerns, that there is widespread juryphobia and support for reforms that avoid letting "incompetent" juries decide the outcome of medical malpractice disputes. Despite these criticisms, there is also strong evidence that juryphobia is unwarranted.

Evidence that Juryphobia is Not a Legitimate Concern

There is much research suggesting that there are several reasons that juries are not to be feared. First, jurors rely more heavily on legal evidence than on any other factor and are actually much more capable of making rational decisions than some critics claim (e.g., Mott, Hans & Simpson, 2000; Vidmar, 1992, 1994, 1995). In fact, juries typically come to rational decisions and are capable of understanding the evidence and issues (Vidmar, 1995). Greene and Bornstein (2003) conducted an empirical analysis of jury damage awards. They determined that, overall, jurors perform well and occasional "bad" verdicts are more

likely due to the difficult task (e.g., understanding complex trial evidence and judges' instructions) than because of incompetence.

The second line of research demonstrating that juries are not guilty of the extreme incompetence they are often accused of is represented by studies conducted by Hans (2000), MacCoun (1996) and Vidmar (1995). These authors have determined that there is no deep pocket effect, although there is evidence of an anti-corporate defendant bias. Hans conducted a mock jury experiment in which she varied the financial information that the mock jurors were given about the defendant. She found that mock juror verdicts and awards did not differ based on whether the defendant had great financial resources, few financial resources, or undisclosed resources (in the control condition). MacCoun and Vidmar similarly found that the wealth of the defendant did not affect jury awards.

Third, research has indicated that juries are not necessarily sympathetic to plaintiffs. Research by Hans (this volume) confirms anti-plaintiff bias in whiplash cases. Participants in focus groups expressed suspicion that whiplash injuries are often invalid lawsuits. In addition, Hans conducted a poll and found that 92% of all participants expressed the opinion that there is an excessive number of lawsuits and 77% indicated that plaintiffs utilize the court system as a way of blaming someone else for their injuries. Less than a third of all respondents indicated that whiplash lawsuits are always or usually valid. Thus, participants indicated a substantial anti-plaintiff bias.

Other research has indicated that the win rate for plaintiffs is quite low for medical malpractice cases in particular – further indicating that jurors do not favor plaintiffs (Peters, 2007). Vidmar (1995) found that plaintiffs won only 33% of medical malpractice trials, while both Cohen and Smith (2004) and MacCoun (2006) found that medical malpractice plaintiffs only win 27% of the time. Plaintiffs in other types of cases win approximately 50% of the time (except in products liability cases, where the win rate is roughly the same as in medical malpractice cases; MacCoun, 2006).

Finally, there is much evidence that awards are not skyrocketing. Anecdotes (e.g., media accounts) are misleading because they are not representative of all cases, but merely represent only the extreme cases (MacCoun, 2006; Saks, 1992). Sound, methodologically valid research has indicated that awards are not skyrocketing (Vidmar, 1995) and are likely better characterized by stability rather than increase (Black, Silver, Hyman, & Sage, 2005). While a few early studies indicated that the average medical malpractice award increased over a large period of time (10 or 15 years), these studies are flawed in a variety of ways (Vidmar, 1995). For instance, averages can be artificially inflated by a few very large awards. This gives the misleading impression that all awards have increased, when in fact only a very few awards have gotten extreme. Hans (this volume) suggests that (when adjusted for inflation), the median award for auto accidents in 1992 was $37,000 and in 2001 actually decreased to only $16,000. This finding supports other research that found no evidence of

skyrocketing awards (Daniels & Martin, 1995; Vidmar, 2005). Thus, the notion that jury awards are skyrocketing is likely a myth.

Regardless of whether juryphobia is warranted, it does exist, and it has shaped legal responses to the medical malpractice crisis (as well as medical and insurance responses). Landsman stops short of saying that the juryphobia is unnecessary; however much research suggests that juries are not irrational and are instead typically quite competent. If so, legal changes are not the solution to the medical malpractice crisis. Further, Hans (this volume) and other researchers (Gross & Syverud, 1996; Vidmar, 1995) provide statistics indicating that most civil litigation does not go to juries (e.g., the parties settle before trial). Thus, it may not be reasonable to place the blame on juries when they actually decide so few cases.

As Landsman points out, the most popular legislative response to the medical malpractice crisis is the adoption of legal obstacles and caps on damages. This is likely a result of the juryphobia described by Landsman and patient phobia resulting from the improper use of the civil system described by Hans. Despite the blame on juries and patients, the Institute of Medicine (2000) report indicates that medical errors do happen at an alarming rate. Therefore, it is important to determine the appropriateness of preventing injured patients from accessing the legal system and recovering adequate damages for their injuries. Legislation making it harder for patients to sue and recover damages does not address the causes of the injuries or prevent them from happening again. A more positive approach to solving the medical malpractice crisis (if indeed there is one) is to prevent medical errors from happening and then to make changes in the medical system's responses to errors that inevitably do occur.

A Solution to the Medical Malpractice Crisis: Prevention

The medical profession deserves credit for the development of life-saving technology and procedures that have saved millions of lives. Nevertheless, mistakes do happen. Gibson and Singh (2003) claim that the 98,000 deaths that the IOM has attributed to medical malpractice could actually be an underestimate. The IOM only includes mistakes that were recorded by a doctor in the patient's medical records. It is likely that doctors do not record all mistakes for fear of lawsuits or because they fail to recognize that a mistake has been made. In addition, the IOM did not include medical mistakes that occurred in physicians' offices, outpatient centers, nursing homes, rehabilitation centers, kidney dialysis centers, or as a result of erroneous prescriptions (Gibson & Singh, 2003). These incredible statistics indicate that it is time to make changes in the medical system in order to reduce the number of medical mistakes. There are several areas that could be changed in order to reach this goal.

First, the medical profession could establish clearer standards for medical care. The American Medical Association (AMA) is simply a society for a profession; its role does not include establishing or setting standards. Although some organizations, such as the American Academy of Pediatrics, set "guidelines" for diagnosis and management of some ailments (AAP, 2007), the AMA maintains that there can be no set standard, as every procedure and every patient is different. Medicine is more like an art in which different doctors could approach the same patient in different ways. Because there is so much variability in patients, procedures, medical problems, and doctors' preferences and abilities, it is impossible to have established standards that every doctor must follow (Williams, 2004). As such, most efforts to set standards have been met with hostility. For decades, medical societies have attempted to establish grievance committees and reporting systems, but few are able to make any significant strides in regulating the field, disciplining doctors, or improving healthcare. This unwillingness of the profession to set its own standards means that every single patient is a potential lawsuit. Because there are no medical standards, patients cannot know whether their treatment was adequate. This leaves it up to the legal system to determine whether the care was sufficient or negligent. This is a defensive approach to addressing the problem of medical mistakes; it is also an inefficient and ineffective method for preventing mistakes (Williams, 2004).

Second, the medical profession needs to adequately monitor itself in order to prevent medical errors. For instance, the medical profession does not do a good job of weeding out doctors who make errors or who are at high risk of making errors (Gibson & Singh, 2003). Doctors who are drug abusers, refuse to keep up with new medical procedures, are aging or are seriously affected by personal trauma need to be monitored, and to some extent they are, although state systems vary widely. Additionally, there is no system in place that regulates doctors' treatment choices (Williams, 2004). To further complicate the situation, a doctor who makes a serious error is not likely to get her license revoked. Although medical boards have the power to revoke a doctor's license, they typically do not do so, even after a doctor experiences frequent malpractice accusations or trials. Even doctors who are convicted felons can get their licenses back after they serve their prison time (Williams, 2004). Research has indicated that a very small proportion of doctors are disciplined each year; for example, Morrison and Wickersham (1998) found that .24% of doctors in California were disciplined each year. Negligence/incompetence was the cause of discipline for 34% of these cases. The most common disciplinary measures were license revocation (21% of cases) and suspension of license (13%). In comparison, Clay and Conatser (2003) found that .37% of Ohio doctors were disciplined each year. The most common infractions were alcohol or drug impairment (21% of offenses) and inappropriate drug prescriptions or possession (14%). Negligence/incompetence constituted only 7% of infractions. Offending doctors were less likely to be women, experienced physicians (more than 20 years in practice), and board certified (Clay & Conatser, 2003). While it would certainly not be beneficial for every doctor accused of

malpractice (nor even every doctor found to have committed a single act of malpractice) to lose her license, a clear pattern of mistakes or near-misses should indicate that a doctor is not fit to practice.

Third, in addition to the inability to weed out incompetent doctors, the medical field generally lacks the ability and resources to make necessary changes to prevent mistakes (Gibson & Singh, 2003). This is partially because the environment is not conducive to making changes to prevent or address errors, for a couple of reasons. First, medical professionals and hospitals do not want to admit that changes need to be made. Admitting that mistakes are made or changes are needed could invite lawsuits. In addition, doctors and hospitals must always be on the defensive to protect themselves from lawsuits; this is valuable time and energy that could be spent on finding ways to prevent malpractice. As Landsman (this volume) and Gibson and Singh (2003) point out, many other industries (e.g., airlines and nuclear power plants) have systems in place to minimize mistakes before they occur; the medical profession does not have such a system. Landsman argues that a reporting system is needed to learn why mistakes are made so that they can be addressed. This system tracks mistakes to learn what procedures and which doctors are prone to errors. Such plans allow the aviation and nuclear power industries to avoid accidents, yet this philosophy of prevention has not carried over to the medical field.

A similar concern is that medical professionals do not monitor each other. They are naturally concerned about errors, but most do not speak out because it could mean losing their jobs or being ostracized. Typically, there is no formal system to report a colleague who has made a mistake, and the environment is not supportive of a reporting system (Williams, 2004). There is an established pecking order in hospital systems that must not be upset (Gibson & Singh, 2003). In short, the medical profession is an exclusive club that fosters secrecy and protection of its members (Williams, 2004). Thus, medical professionals are unlikely to report suspicions that a colleague has made an error. In contrast, other industries have elaborate systems to track errors. Landsman (this volume) points out that the aviation industry has a near-miss reporting system that requires individuals to report safety incidents. He states that those involved with the near-miss incident are not disciplined. In fact, individuals who fail to report the incident could be disciplined. This encourages reporting so that the industry can correct problems and enhance future safety.

Changes in the procedures and operations of the medical profession could also help prevent medical mistakes. Critics argue that hospitals are understaffed, unorganized, and offer procedures their doctors are unqualified to perform (Gibson & Singh, 2003; Williams, 2004). In addition, high staff turnover and disorganization can lead to inadequate training, confusion in patient records, and errors in procedures and tests. Perhaps the biggest concern is that medical professionals often work long shifts and a great deal of overtime. As a result, they often make decisions while tired and preoccupied. They may be unable to communicate clearly, may forget important details of the patient's case, or may confuse one patient with another. Studies have shown that, at least for new

doctors, extended work hours increase the risk of injuries to both the doctor and the patient (Ayas et al., 2006; Barger et al., 2006; Landrigan et al., 2004). As a result of these concerns, the Accreditation Council for Graduate Medical Education (ACGME) recommended restrictions on the hours that interns can work. For instance, they can only average 80 hours a week, cannot work more than 24 consecutive hours, and must have one day off every seven days (ACGME, 2007). Unfortunately, many doctors do not obey these limits. One study found that 84% of interns surveyed violated these guidelines (Landrigan, Barger, Cade, Ayas, & Czeisler, 2006).

Doctors are also prone to mistakes because of their overreliance on clinical judgment and underuse of actuarial models. Many doctors prefer basing their diagnosis and treatment choices on personal observations rather than on statistical models. However, doctors are likely to rely on only a few factors (e.g., family history, symptoms) when deciding on a diagnosis, whereas a statistical model can consider a much greater number of factors. Statistical models can incorporate many more cases than any one doctor could experience. This means that models have a larger number of previous cases that can guide their diagnoses.

Similarly, treatment guidelines and best practices are becoming more common (Hawkins, 2005). Although doctors often have positive attitudes toward guidelines (Stapleton, Cuncins-Hearn & Pinnock, 2001), doctors do not always comply with these standards (Dahm, 2006; Grover et al., 2007; Rodgers & Stough, 2007; Taur & Smith, 2007). For instance, Taur and Smith (2007) found that guidelines set forth by the Infectious Diseases Society of America did not affect doctors' treatment of 2,339 cases of urinary tract infections. Similarly, Grover and colleagues (2007) found only 25% compliance with evidence-based guidelines. Thus, evidence-based guidelines have potential to prevent errors, though they are not used as frequently as possible.

One procedure that many hospitals have changed to help prevent mistakes concerns doctors' handwriting. Some research has indicated that doctors have sloppier handwriting than the general population or other medical professionals (Cheeseman & Boon, 2001; Goldsmith, 1976; Lyons, Payne, McCabe, & Fielder, 1998), while other research has indicated that doctors' handwriting is similar in quality to other groups (Berwick & Winickoff, 1996; Schneider, Murray, Shadduck, & Meyers, 2006). Regardless of whether their writing is worse than that of others, 20% of medication orders are illegible (Winslow, Nestor, Davidoff, Thompson, & Borum, 1997). Doctors who have sloppy handwriting can inadvertently produce records and prescriptions that are hard to read. A nurse or pharmacist can misread the doctor's orders and cause the patient injury (e.g., overdose). A July 2006 IOM report indicates that doctors' sloppy handwriting leads to errors in prescriptions that kill 7,000 people a year. As a result, some medical facilities are adopting electronic prescription systems (Caplan, 2007). There is also growing support for electronic records to prevent overlooked allergies or other medical conditions. Some research has indicated that doctors who have access to handheld computers are likely to use them (Shannon, Feied, Smith, Handler, & Gillam, 2006), especially those doctors who have

positive attitudes toward the systems (Schectman, Schorling, Nadkarni, & Voss, 2005). Although research on the effects of computerized prescription systems is credited with significantly reducing the number of medication errors (Cordero, Kuehn, Kumar, & Mekhjian, 2004; Shulman, Singer, Goldstone, & Bellingan, 2005), computerized systems also increase the risks of different types of errors (Koppel et al., 2005).

As the examples in this section illustrate, there are many environmental factors that can contribute to mistakes, many of which can be addressed to prevent medical malpractice. An active, prevention-based system would be a more positive and less defensive method of addressing the medical malpractice crisis as compared to the current system of allowing the legal system to find solutions. Of course, mistakes will still occur even in the best prevention-based system; thus, other changes need to be made in instances when mistakes do occur.

When Mistakes Happen

Because mistakes will inevitably happen, changes need to be made in the way they are handled. Doctors and hospitals should evaluate their post-injury behavior (e.g., apologizing for the error) and choose actions that will help resolve disputes in a more positive way.

Change in Post-injury Behavior

As mentioned above, the medical field creates an environment in which medical professionals must be perfect, hide their mistakes, and protect others who make mistakes (Landsman, this volume; Williams, 2004). This leads doctors to refuse to give patients information about their injuries because they do not want to look like they are admitting responsibility for an error. As Landsman notes, this silence is not necessarily a response to intrusion by the legal field, but an ingrained cultural phenomenon that developed with the invention of modern medicine. A change in this medical culture (e.g., change in the doctor's behavior) could help resolve the medical malpractice problem. There is some research that supports such an assertion. For instance, there is evidence that patients often have trouble getting information about the incident, leaving a lawsuit as their only way to get answers (Farber & White, 1991; Hickson, Clayton, Githens, & Sloan, 1992; Williams, 2004). Despite a common belief that injured patients sue only to get money, research has revealed that many also sue to obtain information, to force wrongdoers to take responsibility for their errors, or to encourage the development of measures to prevent future injury (Hickson et al., 1992; Huycke & Huycke, 1994; Macgregor, 1984; Sloan,

1991, Vincent Young, 1994). Thus, a culture of silence may encourage lawsuits rather than prevent them.

Other behaviors can also encourage or discourage lawsuits. For instance, insensitivity to the patient's concerns, poor communication and unsatisfactory explanations can encourage legal action (Huycke & Huycke, 1994; Vincent & Young, 1994). Often doctors refuse to provide information, believing that this act could be interpreted as a confession of wrong-doing that will encourage lawsuits (Cohen, 1999; Williams, 2004). Research has found that a refusal to provide information may actually encourage lawsuits, as patients often sue to learn what caused their injuries (Farber & White, 1991; Hickson et al., 1992). Some patients sue because they recognize that a doctor is trying to cover-up a mistake or intentionally mislead them about what happened (Hickson et al., 1992). Even when explanations are given, they are often inadequate, leading to patient dissatisfaction (Vincent & Young, 1994). Thus, a number of behaviors can affect the likelihood of filing a lawsuit. The behavior that has received the most attention from researchers is the act of apologizing for errors.

Apology and Remorse

Apologies have received a modest amount of attention from researchers, the legal system, and the medical profession (see Robbennolt chapter, this volume). Although those who believe in juryphobia believe that admitting error leads to increased litigation, there are some researchers who support Landsman's contention that apologies could actually reduce lawsuits. Apologies are believed to increase patient satisfaction, reduce the likelihood of being sued, promote more favorable settlement negotiations, and repair relationships between the parties (Cohen, 1999; Woods, 2004). Such a strategy is superior to the tight-lipped approach that doctors often take because of fear that any information or apology they provide can be used against them in court (Cohen, 1999).

Apologies and remorse have been topics of interest in many empirical studies which have studied their use in social and legal contexts. In general, when mistakes are made, an apology is often the appropriate social response (Scher & Darley, 1997; Schlenker & Darby, 1981). Parents teach their children to apologize for their mistakes (Schlenker & Darby, 1981) and individuals see remorseful children as less blameworthy and less deserving of a harsh punishment (Darby & Schlenker, 1989). Apologies positively affect perceptions of the wrongdoer's trustworthiness, character, interpersonal judgment, reliability, and likelihood of future transgressions (Gold & Weiner, 2000; Orleans & Gurtman, 1984; Scher & Darley, 1997).

Studies investigating the use of apologies and remorse in the legal setting have largely focused on criminal cases (see Robbennolt and Greene chapters, this volume). Several studies have found that mock jurors give remorseful

defendants less punishment than non-remorseful defendants (Jacobson & Berger, 1974; Pipes & Alessi, 1999; Rumsey, 1976). Proeve and Howells (2006) found that shame and remorse affected a number of judgments about the defendant; emotional defendants were perceived to be more amenable to rehabilitation and less likely to re-offend. Emotional defendants also received less punishment, though the difference was only marginally significant. In another study, Kleinke, Wallis, and Stalder (1992) found that, when the defendant expressed remorse, he was perceived as having a less negative character, more potential for rehabilitation, and was assigned fewer years in prison; but these effects were not statistically significant. Crosby, Britner, Jodl, and Portwood (1995) also found that remorse was not a predictor of jury verdicts. Thus, remorse has been found to lessen sanctions in some studies but not in others. Nevertheless, remorse seems to positively affect perceptions of defendants even when it fails to affect sentencing (Robinson, Smith-Lovin, & Tsoudis, 1994; Taylor & Kleinke, 1992). Of course studies of apologies in criminal cases are not directly applicable to apologies in malpractice cases, as intentional criminal acts could be perceived differently from medical mistakes.

In the only study to investigate medical malpractice apologies, Bornstein, Rung, and Miller (2002) presented participants with a summary of the damages phase of a trial for a defendant doctor who had been found liable for malpractice. The doctor expressed remorse either at the time of the trial, both at the time of the injury and at trial, expressed no remorse, or explicitly demonstrated a lack of remorse. Researchers found that defendants who showed remorse (i.e., at time of trial or at time of trial and at time of incident) were perceived more favorably than defendants who did not show remorse. Despite this more favorable perception, a defendant who apologized at the time of the event and again at trial nonetheless paid more in compensation than a defendant who showed remorse only at trial. It is possible that jurors saw the early apology as an admission of negligence. This study indicates that apologies affect *juror* decision-making, but it does not address *victim* decision-making.

One study has investigated the effects of apology on the victim's likelihood of settling a legal claim. Robbennolt (2003) found that admitting fault could promote a positive outcome during settlement discussions regarding a personal injury case. This research demonstrated that full apologies that admit responsibility are more likely to improve the victim's perceptions of the circumstances and increase the probability of a settlement as compared to a partial apology that does not admit fault.

As the disparate results of these studies illustrate, more research is needed to fully understand the effects of apologies in medical situations. While general apology research indicates that apologies lead to more favorable outcomes for transgressors, the effects of apologies in legal and medical settings are mixed and in need of further study. Specific research is needed to determine whether apologies are effective at preventing lawsuits.

Though little research on doctors' apologies exists, some hospitals have adopted this philosophy, putting apologies to the test. Supporters of the "Sorry Works!" program believe that apologies from doctors can reduce lawsuits. First, medical professionals are instructed to review possible medical mistakes immediately, rather than avoiding an investigation (Victims and Families United, 2004). Then, if an error is found, the doctor explains to the patient what happened, apologizes, and offers a fair settlement. Patients get honesty and accountability and are allowed to be a part of the process of changing procedures to prevent future medical mistakes. The program's supporters believe that this approach results in fewer lawsuits, promotes quicker resolution, and preserves patient/provider relationships (see chapter by Greene, this volume). Apology programs have not been well studied, however, so it is not clear whether apologies or other behavioral changes actually affect the likelihood of lawsuits.

Conclusion

The Institute of Medicine calls its report "To Err is Human"; however, Landsman's analysis indicates that there is much fear that juries will not be so understanding of errors made by doctors who are merely human. As Landsman points out, the current tort reform efforts reflect the medical field's juryphobia. Hans discusses how the insurance and legal fields fear fraudulent lawsuits such as automobile accident cases in which the plaintiff "suffers" from exaggerated whiplash injuries. Such fears have led to a variety of legal responses.

Recently, the emphasis has been on protecting doctors from incompetent jurors; however, many researchers (Greene & Bornstein, 2003; Hans, 2000; Vidmar, 1995) indicate that jurors do not deserve such strong criticism and are generally quite capable of handling their difficult tasks. For instance, Hans (this volume) provides evidence that juries are actually suspicious of civil plaintiffs rather than being sympathetic toward them. Because of the culture of secrecy and juryphobia that Landsman (this volume) describes, there is hesitation to address the real problem: the high number of medical accidents. It is time that the medical profession recognizes that medical errors do occur. While tort reforms may be well intentioned, they potentially cause greater harm by making it difficult for injured parties to recover monetary compensation and by perpetuating inefficiencies in the medical care system. In order to prevent harm and protect patients, the medical field should make changes from within. Prevention of medical malpractice incidents is ultimately a better solution than prevention of medical malpractice lawsuits. Thus, measures such as reporting systems can help the medical profession learn from its mistakes. When mistakes do happen, doctors can engage in positive behaviors (e.g., apologies and providing information about the injury), which could also help prevent lawsuits. Although there are no easy cures for

juryphobia and fraudulent lawsuits, these fears must be kept in perspective so that the medical system can focus its energy on preventing injuries rather than preventing lawsuits.

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References

Abwender, D. A., & Hough, K. (2001). Interactive effects of characteristics of defendant and mock juror on U. S. participants' judgment and sentencing recommendations. *Journal of Social Psychology, 141*, 603–615.

Accreditation Council for Graduate Medical Education (2007). The ACGME's approach to limit resident duty hours: The common standards and activities to promote adherence. Retrieved April 23, 2007 from: http://www.acgme.org/acWebsite/dutyHours/dh_dhSummary.pdf.

American Academy of Pediatrics. (2007). Clinical practice guidelines. Retrieved April 23, 2007 from: http://aappolicy.aappublications.org/practice_guidelines/index.dtl.

Ayas, N. T., Barger, L. K., Cade, B. E., Hashimoto, D. M., Rosner, B., Cronin, J. W., et al. (2006). Extended work duration and the risk of self-reported percutaneous injuries in interns. *Journal of American Medical Association, 296*, 1055–1062.

Baker, P. (2005, January 6). Bush campaigns to curb lawsuits: President says "junk" litigation is driving small-town doctors out of business. *Washington Post*, p. A6. Retrieved March 9, 2007 from: http://www.washingtonpost.com/wp-dyn/articles/A50603-2005Jan5.html

Barger, L. K., Ayas, N. T., Cade, B. E., Cronin J. W., Rosner, B., Speizer, F. E., et al. (2006). Impact of extended-duration shifts on medical errors, adverse events, and attentional failures. *PloS Medicine, 3*, 487.

Benedetto, R. (2005, January 5). Bush pushes for medical malpractice case limits. *USA Today*. Retrieved March 9, 2007 from: http://www.usatoday.com/news/washington/2005-01-05-bush-tort_x.htm.

Berwick, D. M., & Winickoff, D. E. (1996). The truth about doctors' handwriting: A prospective study. *BMJ, 313*, 1657–1658.

Black, B., Silver, C., Hyman, D. A., & Sage, W. M. (2005). Stability, not crisis: Medical malpractice claim outcomes in Texas, 1988–2002. *Journal of Empirical Legal Studies, 2*, 207–260.

Boulard, G. (2002, December). The doctors' big squeeze. *State Legislatures*, 48–62.

Bornstein, B. H., Rung, L. M., & Miller, M. K. (2002). The effects of defendant remorse on mock juror decisions in a malpractice case. *Behavioral Sciences and the Law, 20*, 393–409.

Caplan, J. (2007). *Cause of Death: Sloppy Doctors*. Retrieved March 9, 2007 from: http://www.time.com/time/health/article/0,8599,1578074,00.html?cnn = yes.

Cheeseman, G. A., & Boon, N. (2001). Reputation and the legibility of doctors' handwriting in situ. *Scottish Medical Journal, 46*, 79–80.

Clay, S. W., & Conatser, R. R. (2003). Characteristics of physicians disciplined by the State Medical Board of Ohio. *Journal of the American Osteopathic Association, 103*, 81–88.

Cohen, J. R. (1999). Advising clients to apologize. *Southern California Law Review, 72*, 1009–1068.

Cohen, T. H., & Smith, S. K. (2004). Civil trial cases and verdicts in large counties, 2001. *Bureau of Justice Statistics Bulletin*. NCJ 202803. Washington, DC: Bureau of Justice Statistics. Retrieved March 9, 2007 from: http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf.

Cordero, L., Kuehn, L., Kumar, R. R., & Mekhjian, H. S. (2004). Impact of computerized physician order entry on clinical practice in a newborn intensive care unit. *Journal of Perinatology, 24*, 88–93.

Collini, F. J. (2003, February). "Dirty little secret" of the medical malpractice crisis. *Physicians News Digest*. Retrieved March 9, 2007 from: http://www.physiciansnews.com/commentary/203.html.

Crosby, C. A., Britner, P. A., Jodl, K. M., & Portwood, S. G. (1995). The juvenile death penalty and the Eighth Amendment. *Law and Human Behavior, 19*, 245–261.

Dahm, P. (2006). Evidence-based medicine in prostate cancer: Where do we stand in 2006? *Current Opinion in Urology, 16*, 162–167.

Daniels, S., & Martin, J. (1995). *Civil juries and the politics of reform*. Evanston, IL: Northwestern University Press.

Darby, B. W., & Schlenker, B. R. (1989). Children's reaction to transgressions: Effects of the actor's apology, reputation, and remorse. *British Journal of Social Psychology, 28*, 353–364.

Farber, H., & White, M. (1991). Medical malpractice: An empirical examination of the litigation process. *Rand Journal of Economics, 22*, 199–217.

Geary, F. (2002, December 7). Malpractice insurance crisis: Kenny says UMC care threatened. *Las Vegas Review Journal*, p. 1B

Gibson, R., & Singh, J. P. (2003). *Wall of silence: The untold study of the mistakes that kill and injure millions of Americans*. Washington, DC: LifeLine.

Goldsmith, H. (1976). The facts on the legibility of doctors' handwriting. *Medical Journal of Australia, 2*, 462–463.

Greene, E., & Bornstein, B. H. (2003). *Determining damages: The psychology of jury awards*. Washington, DC: American Psychological Association.

Gross, S. R., & Syverud, K. D. (1996). Don't try: Civil jury verdicts in a system geared to settlement. *UCLA Law Review, 44*, 1–64.

Grover, M. L., Bracamonte, J. D., Kanodia, A. K., Bryan, M. J., Donahue, S. P., Warner, A. M., et al. (2007). Assessing adherence to evidence-based guidelines for the diagnosis and management of uncomplicated urinary tract infection. *Mayo Clinical Proceedings, 82*, 181–185.

Gold, G., & Weiner, B. (2000). Remorse, confession, group identity and expectancies about repeating a transgression. *Basic and Applied Social Psychology, 22*, 291–300.

Hans, V. P. (2000). *Business on trial: The civil jury and corporate responsibility*. New Haven, CT: Yale University Press.

Hastie, R., Schkade, D., & Payne, J. (1998). A study of juror and jury judgments in civil cases: Deciding liability for punitive damages. *Law and Human Behavior, 22*, 287–314.

Hawkins, R. C. (2005). The evidence based medicine approach to diagnostic testing: Practicalities and limitations. *Clinical Biochemist: Reviews, 26*, 7–18.

Hickson, G. B., Clayton, E. W., Githens, P. B., & Sloan, F. A. (1992). Factors that prompted families to file medical malpractice claims following perinatal injuries. *Journal of American Medical Association, 267*, 1359–1363.

Huycke, L. I., & Huycke, M. M. (1994). Characteristics of potential plaintiffs in malpractice litigation. *Annals of Internal Medicine, 120*, 792–798.

Institute of Medicine. (2000). To Err is Human: Building a safer health system. Retrieved March 9, 2007 from: http://www.iom.edu/object.file/master/4/117/0.pdf.

Jacobson, S. K., & Berger, C. R. (1974). Communication and justice: Defendant attributes and their effects on the severity of his sentence. *Speech Monographs, 41*, 282–286.

Kleinke, C. L., Wallis, R., & Stalder, K. (1992). Evaluation of a rapist as a function of expressed intent and remorse. *Journal of Social Psychology, 132*, 525–537.

Koppel, R., Metlay, J. P., Cohen, A., Abaluck, B., Localio, A. R., Kimmel, S. E., & Strom, B. L. (2005). Role of computerized physician order entry systems in facilitating medication errors. *Journal of the American Medical Association, 293*, 1261–1263.

Landrigan, C. P., Barger, L. K., Cade, B. E., Ayas, N. T., & Czeisler, C. A. (2006). Interns' compliance with Accreditation Council for Graduate Medical Education work-hour limits. *Journal of American Medical Association, 296*, 1063–1070.

Landrigan, C. P., Rothschild, J. M., Cronin, J. W., Kaushal, R., Burdick, E., Katz, J. T., et al. (2004). Effect of reducing interns' work hours on serious medical errors in intensive care units. *New England Journal of Medicine, 351*, 1838–1848.

Lieberman, J. D., & Sales, B. D. (2007). *Scientific jury selection*. Washington, DC: American Psychological Association.

Lyons, R., Payne, C., McCabe, M., & Fielder, C. (1998). Legibility of doctors' handwriting: Quantitative comparative study, *BMJ, 317*, 863–864.

MacCoun, R. J. (2006). Media reporting of jury verdicts: Is the tail (of the distribution) wagging the dog? *DePaul Law Review, 55*, 539–562.

MacCoun, R. J. (1996). Differential treatment of corporate defendants by juries: An examination of the "deep-pockets" hypothesis. *Law and Society Review, 30*, 121–161.

Macgregor, F. C. (1984). Cosmetic surgery: A sociological analysis of litigation and a surgical specialty. *Aesthetic Plastic Surgery, 8*, 219–224.

Marder, N. S. (2005). The medical malpractice debate: The jury as scapegoat. *Loyola of Los Angeles Law Review, 38*, 1267–1296.

Morrison, J., & Wickersham, P. (1998). Physicians disciplined by a state medical board. *Journal of American Medical Association, 279*, 1915–1916.

Mott, N. L., Hans, V. P., & Simpson, L. (2000). What's half a lung worth? Civil jurors accounts of their award decision making. *Law and Human Behavior, 24*(4), 401–419.

Orleans, J. F., & Gurtman, M. B. (1984). Effects of physical attractiveness and remorse on evaluations of transgressors. *Academic Psychology Bulletin, 6*, 49–56.

Peters, P. G. (2007). Doctors and Juries. *Michigan Law Review, 106*, 1453–1496.

Pipes, R. B., & Alessi, M. (1999). Remorse and a previously punished offense in assignment of punishment and estimated likelihood of a repeated offense. *Psychological Reports, 85*, 246–248.

Pritchard, R. S. (2004, March 26). *Illinois health care system reaches code blue*. Springfield, IL: Office of State Representative Robert W. Pritchard.

Proeve, M. J., & Howells, K. (2006). Effects of remorse and shame and criminal justice experience on judgments about a sex offender. *Psychology, Crime & Law, 12*, 145–161.

Robbennolt, J. K. (2003). Apologies and legal settlement: An empirical examination. *Michigan Law Review, 102*, 460–516.

Robinson, D. T., Smith-Lovin, L., & Tsoudis, O. (1994). Heinous crime or unfortunate accident? The effects of remorse on responses to mock criminal confessions. *Social Forces, 73*, 175–190.

Rodgers, J. E., & Stough, W. G. (2007). Underutilization of evidence-based therapies in heart failure: The Pharmacist's role. *Pharmacotherapy, 27*, 18–28.

Rumsey, M. G. (1976). Effects of defendant background and remorse on sentencing judgment. *Journal of Applied Social Psychology, 6*, 64–68.

Saks, M. J. (1992). Do we really know anything about the behavior of the tort litigation system – and why not? *University of Pennsylvania Law Review, 140*, 1147–1290.

Schectman, J. M., Schorling, J. B., Nadkarni, M. M., & Voss, J. D. (2005). Determinants of physician use of an ambulatory prescription expert system. *International Journal of Medical Informatics, 74*, 711–717.

Scher, S. J., & Darley, J. M. (1997). How effective are the things people say to apologize? Effects of the realization of the apology speech act. *Journal of Psycholinguistic Research, 26*, 127–140.

Schlenker, B. R., & Darby, B. W. (1981). The use of apologies in social predicaments. *Social Psychology Quarterly, 44*, 271–278.

Schneider, K. A., Murray, C. W., Shadduck, R. D., & Meyers, D. G. (2006). Legibility of doctors' handwriting is as good (or bad) as everyone else's. *Quality and Safety in Health Care, 15*, 445.

Shannon, T., Feied, C., Smith, M., Handler, J., & Gillam, M. (2006). Wireless handheld computers and voluntary utilization of computerized prescribing systems in the emergency department. *Journal of Emergency Medicine, 31*, 309–315.

Shulman, R., Singer, M., Goldstone, J., & Bellingan, G. (2005). Medication errors: A prospective cohort study of hand-written and computerized physician order entry in the intensive care unit. *Critical Care, 9*, 427–428.

Sloan, F. A. (1991). Winners and losers: How medical malpractice disputes are resolved. *Journal of American Health Policy, 1*, 20–25.

Stapleton, A. M., Cuncins-Hearn, A., & Pinnock, C. (2001). Attitudes to evidence-based practice in urology: Results of a survey. *ANZ Journal of Surgery, 71*, 297–300.

Studdert, D. M., Mello, M. M., & Brennan, T. A. (2004). Health policy report: Medical malpractice. *New England Journal of Medicine, 350*(3), 283–292.

Taur, Y., & Smith, M. A. (2007). Adherence to the Infectious Diseases Society of America guidelines in the treatment of uncomplicated urinary tract infection. *Clinical Infectious Diseases, 44*, 775–776.

Taylor, S., Thomas, E., Meadows, S., Wingert, P., Rosenberg, D., Carmichael, M., et al. (2003, December, 15). Civil wars. *Newsweek, 142*, 42–52.

Taylor, C., & Kleinke, C. L. (1992). Effects of severity of accident, history of drunk driving, intent, and remorse on judgments of a drunk driver. *Journal of Applied Social Psychology, 22*, 1641–1655.

Victims and Families United. (2004). Why Sorry Works! works. Overview of Sorry Works Program for the Medical Malpractice Crisis. Retrieved March 5, 2007 from: http://www.victimsandfamilies.com/Sorry.phtml.

Vidmar, N. (1992). The unfair criticism of medical malpractice juries. *Judicature, 76*, 118–125.

Vidmar, N. (1994). Are juries competent to decide liability in tort cases involving scientific/medical issues? Some data from medical malpractice. *Emory Law Journal, 43*, 885–911.

Vidmar, N. (1995). *Medical malpractice and the American jury: Confronting the myths about jury incompetence, deep pockets, and outrageous damage awards*. Ann Arbor, MI: University of Michigan Press.

Vidmar, N. (2005). Medical malpractice and the tort system in Illinois. *Illinois Bar Journal, 9*3, 340–348.

Vincent, C., & Young, M. (1994). Why do people sue doctors? A study of patients and relatives taking legal action. *Lancet, 343*, 1609–1615.

Viscusi, W. K. (2004). The blockbuster punitive damages awards. *Emory Law Journal, 53*, 1405–1436.

Williams, I. E. (2004). *First, do no harm: The cure for medial malpractice*. Greenville, SC: Author.

Winslow, E. H., Nestor, V. A., Davidoff, S. K., Thompson, P. G., & Borum, J. C. (1997). Legibility and completeness of physicians' handwritten medication orders. *Heart and Lung: The journal of critical care, 26*, 158–164.

Woods, M. S. (2004). *Healing words: The power of apology in medicine*. Oak Park, IL: Doctors In Touch.

Section IV
Apologies and Restorative Justice

Apologies and Civil Justice

Jennifer K. Robbennolt

Introduction

An apology is a statement offered by a wrongdoer that expresses "acknowledgment of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done."[1] Although more attention has been paid to the role of such expressions of apology and remorse in the context of criminal offenses, there is growing recognition that apologies are also relevant to many decisions that must be made in civil cases. Civil defendants or potential defendants must make decisions about whether to offer apologies and to what extent such apologies will conform to the definition above. In addition, apologies of various kinds may affect plaintiffs' interpretations of an injury-producing incident and their decisions about whether to seek legal advice, whether to file a lawsuit, and whether and for how much to settle that lawsuit, and for how much. Similarly, it is possible that jurors' decisions about liability and damages will be affected by whether and how defendants apologize.

In the context of existing or possible civil litigation, the potential that apologies have for contributing to the resolution of the dispute is complicated by the worry that an apology that includes an admission of fault will increase the risk of an adverse liability determination. Despite on-going concern about the possible negative legal implications of apologies, however, potential defendants, including physicians,[2] business

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[1] Nicholas Tavuchis, Mea Culpa: A Sociology of Apology and Reconciliation 3 (1991).

[2] *See*, *e.g*., Douglas N. Frenkel & Carol B. Liebman, *Words that Heal*, 140 Annals Internal Med. 483 (2004); Gail Garfinkel Weiss, *Medical Errors: Should You Apologize?*, Med. Econ., April 21, 2006; Katherine Mangan, *Acting Sick: At Medical Schools, Actors Help Teach Doctors How to "Fess Up to Mistakes—and How to Avoid Them"*, Chron. Higher Educ., Sept. 15, 2006; Lindsey Tanner, *Doctors Eye Apologies for Medical Mistakes*, Associated Press, Nov. 8, 2004; Peter Geier, *Emerging Med-Mal Strategy: "I'm Sorry,"* Nat'l L.J., July

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leaders,[3] and others, are increasingly considering the relative merits of apologizing for having caused injury.[4]

The notion that apologies may have a role to play in how civil disputes are resolved has caught the attention of state legislatures as well, with many states enacting statutes that provide evidentiary protection for some types of apologetic expressions in some cases.[5] Some legislation has made inadmissible apologetic statements that include admissions of fault,[6] while other provisions protect only statements expressing sympathy while preserving the admissibility

24, 2006; Rachel Zimmerman, *Medical Contrition: Doctors' New Tool to Fight Lawsuits: Saying "I'm Sorry,"* WALL STREET J., May 18, 2004, A1. For a review see Jennifer K. Robbennolt, *What We Know and Don't Know about the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009 (2005).

[3] *See*, *e.g*., Patricia G. Barnes, *Who's Sorry Now? Media Defendants' High-Profile Apologies are Cheaper than Litigation*, ABA J., Jan. 1996, at 20; Mike France, *The Mea Culpa Defense*, BUSINESSWEEK, Aug. 26, 2002, at 76; Barbara Kellerman, *When Should a Leader Apologize and When Not?*, HARV. BUS. REV., April 2006, at 73–81; Tess Vigeland, *Analysis: Whether Companies Should Publicly Apologize for Wrongdoing* (National Public Radio broadcast, Apr. 3–4, 2002); Alison Stein Wellner, *Making Amends*, INC. MAG., June 2006, at 41.

[4] *See*, *e.g*., Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999) [hereinafter Cohen, *Advising Clients to Apologize*]; Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002) [hereinafter Cohen, *Legislating Apology*]; Deborah Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997); Erin Ann O'Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT L. REV. 1055 (2004); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) [hereinafter Robbennolt, *Apologies and Legal Settlement*]; Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333 (2006) [hereinafter Robbennolt, *Apologies and Settlement Levers*]; Daniel Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 180 (2000); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1157 (2000).

[5] In the absence of such protection (and unless offered in the context of settlement negotiation or in mediation) an apology is likely to be admissible as a party's own statement, an exception to the hearsay rule. FED. R. EVID. 801(d)(2). See discussion of admissibility of apologies in Cohen, *Advising Clients to Apologize*, *supra* note 4; Orenstein, *supra* note 4; Robbennolt, *Apologies and Legal Settlement*, *supra* note 4. Some statutes apply to apologies offered in the context of civil litigation generally. *See*, *e.g*., CAL. EVID. CODE § 1160(a); FLA. STAT. § 90.4026(2); MASS. GEN. LAWS ch. 233 §23D; TENN. R. EVID. § 409.1; TEX. CIV. PRAC. & REM. § 18.061; WASH. REV. CODE § 5.66.010(1). Other states limit the protection to cases of medical error only. *See*, *e.g*., ARIZ. REV. STAT. ANN. § 12-2605; COLO. REV. STAT. § 13-25-135; CONN. GEN. STAT. § 52-184D(B); GA. CODE ANN. §24-3-37.1; 735 ILL. COMP. STAT. 5/8-1901; LA. REV. STAT. ANN. § 13:3715.5; MD. CODE ANN., CTS. & JUD. PROC. § 10-920; MONT. CODE. ANN. § 26-1-814; N.H. REV. STAT. ANN. § 507-E:4; N.C. GEN. STAT. § 8C-4, RULE 413; OHIO REV. CODE ANN. §2317.43; OKLA. STAT. ANN. TIT. 63, § 1-1708.1H; OR. REV. STAT. §677.082; S.D. CODIFIED LAWS § 19-12-14; UTAH CODE ANN. § 78-14-3; VA. CODE ANN. § 8.01-581.20:1; W. VA. CODE § 55-7-11A(B)(1); WYO. STAT. ANN. § 1-1-130.

[6] *See*, *e.g*., ARIZ. REV. STAT. ANN. § 12-2605; COLO. REV. STAT. § 13-25-135; CONN. GEN. STAT. § 52-184D(B); GA. CODE ANN. §24-3-37.1; MONT. CODE. ANN. § 26-1-814.

of any part of the statement that acknowledges fault.[7] These statutes are based on assumptions about the decision making of each of the participants in civil litigation. At the most general level, the perceived need for such evidentiary protection is premised on assumptions about the legal risks of apologizing, including assumptions about how jurors and other factfinders will respond to apologies offered by defendants. In addition, such statutes assume that providing evidentiary protection will influence the settlement behavior of the parties. In particular, proponents argue that the effect of protecting apologetic expressions from legal admissibility will change the behavior of defendants so that they will offer apologies more frequently and that increased settlement will result.[8] However, critics worry that providing apologies with a cloak of legal protection will alter the ways in which they are understood, morally diminishing their meaning and lessening their ability to resolve disputes.[9]

Very little empirical research has examined the assumptions about whether, how, and under what circumstances apologies may influence decision making in civil litigation. There does, however, exist an established body of psychological research exploring the effects of apologies in human interaction generally. In addition, a body of studies has examined reactions to remorse expressed by criminal defendants and some recent studies have examined the role of apologies in civil litigation.

In this chapter, I attempt to explore the state of the research on the role of apologies in the context of civil litigation with an eye toward suggesting avenues

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[7] *See*, *e.g.*, Cal. Evid. Code § 1160(a); Fla. Stat. § 90.4026(2); La. Rev. Stat. Ann. § 13:3715.5; Mass. Gen. Laws Ann. Ch. 233, § 23D; Me. Rev. Stat. Ann. tit. 24, § 2907; Md. Code Ann., Cts. & Jud. Proc. § 10-920; Mo. Rev. Stat. § 538.299; N.H. Rev. Stat. Ann. § 507-E:4; Tenn. R. Evid. § 409.1; Tex. Civ. Prac. & Rem. § 18.061; Wash. Rev. Code § 5.66.010(1). Several states provide that "apologies" will be inadmissible without defining the term. *See*, *e.g.*, 735 Ill. Comp. Stat. 5/8-1901; N.C. Gen. Stat. § 8C-4, Rule 413; Ohio Rev. Code Ann. §2317.43; Okla. Stat. Ann. tit. 63, § 1-1708.1H; Or. Rev. Stat. §677.082; Utah Code Ann. § 78-14-3; Va. Code Ann. § 8.01-581.20:1; W. Va. Code § 55-7-11a(b)(1); Wyo. Stat. Ann. § 1-1-130. For discussion of this legislation and the choice of what expressions to protect, *see* Cohen, *Legislating Apology*, *supra* note 4.

[8] *See*, *e.g.*, Cal. Assembly Comm. on Judiciary, Historical Notes to Cal. Evid. Code § 1160 (characterizing the bill as "an attempt to reduce lawsuits and encourage settlement"); S.B. 1477, 21st Leg. (Haw. 2001) (describing provision as allowing defendants to "reach out to others in a humane way without fear of having such a communication used subsequently as an admission of liability"); Arthur Kane, *GOP Pushes Tort Reform*, Denver Post, Apr. 6, 2003, at B4 (characterizing the Colorado apology legislation as part of a "flurry of bills to limit lawsuits and damage awards"); Peggy Lowe, *"Sorry" Bill Advances*, Rocky Mountain News, Apr. 2, 2003, at 22A (noting that sponsor called the bill the "I'm sorry legislation," but that opponents called it "anti-patient rights"); SorryWorks! http://www.sorryworks.net/WhatIs.phtml (arguing that apologies increase settlements, improve justice for victims, reduce settlement and defense costs, and reduce medical errors); Tenn. Advisory Comm. Comment on Tenn. R. Evid. § 409.1 (stating that rule is "designed to encourage the settlement of lawsuits"). *See* discussion *infra* notes 136–40.

[9] *See*, *e.g.*, Taft, *supra* note 4.

of future research. Part II explores some of the psychological theories that contribute to an understanding of how and why apologies influence judgments and decision making. Apologies may influence a range of legally related judgments as they provide assurance that the offender will not re-offend, express the proper relative moral positions of the parties, provide positive information about the injured party's social identity, influence emotional reactions, trigger social conventions, and change expectations about legal entitlements. Part III reviews studies that have specifically examined the role of apologies in civil litigation. Part IV explores a number of variables that may moderate the effects of apologies on legal decision making. Part V concludes with recommendations for future research.

The Psychology of Apologies

Psychological research has examined the ways in which apologies influence perceptions, emotions, and decisions. Overall, this literature has demonstrated that apologies can have a variety of favorable consequences for both apology providers and recipients.[10] For example, studies have found that apologies or other expressions of remorse influence attributions of offender responsibility,[11] assessments of the offender's character,[12] estimates

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[10] There are exceptions – *see infra* §IV.

[11] *See*, *e.g.*, Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. Personality & Soc. Psychol. 742 (1982) [hereinafter Darby & Schlenker, *Children's Reactions to Apologies*]; Bruce W. Darby & Barry R. Schlenker, *Childrens' Reactions to Transgressions: Effects of the Actor's Apology, Reputation, and Remorse*, 28 Brit. J. Soc. Psychol. 353, 358–59 (1989) [hereinafter Darby & Schlenker, *Children's Reactions to Transgressions*]; Ken-ichi Ohbuchi & Kobun Sato, *Children's Reactions to Mitigating Accounts: Apologies, Excuses, and Intentionality of Harm*, 134 J. Soc. Psychol. 5, 11 (1994); Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. Psycholinguistic Res. 127, 134–36 (1997); Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. Personality 281, 291 (1991).

[12] *See*, *e.g.*, Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 11; Darby & Schlenker, *Children's Reactions to Transgressions*, *supra* note 11; Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 Basic & Applied Soc. Psychol. 291 (2000); Marti Hope Gonzales et al., *Victims as "Narrative Critics": Factors Influencing Rejoinders and Evaluative Responses to Offenders' Accounts*, 20 Personality & Soc. Psychol. Bull. 691 (1994); Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. Personality & Soc. Psychol. 219, 221 (1989); Ohbuchi & Sato, *supra* note 11; Jennifer R. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressions*, 6 Acad. Psychol. Bull. 49 (1984); Weiner et al., *supra* note 11.

of the likelihood that similar behavior will recur,[13] expectations about the parties' future relationship,[14] affective reactions such as anger and sympathy,[15] physiological responses,[16] and behaviors such as forgiveness,[17] aggression,[18] and recommendations for punishment.[19] There are a number of psychological mechanisms by which these effects might occur.

Attribution Theory

One way in which apologies may influence litigation decision making is by changing the attributions that people make about the causes of injury-producing behavior. Indeed, apologies may be "designed to convince an audience that although the actor accepts blame for the undesirable event, any attributions made on the basis of it would not be accurate."[20] When a wrongdoer apologizes for his or her conduct, "the offense and the intention that produced it are less likely to be perceived as corresponding to some

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[13] *See*, *e.g*., Gold & Weiner, *supra* note 12; Ohbuchi et al., *supra* note 12; Orleans & Gurtman, *supra* note 12; Gary S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attributions of Intent, and Level of Punishment*, 17 British J. Soc. Clinical Psychol. 293 (1978); Weiner et al., *supra* note 11.

[14] *See*, *e.g*., Holley S. Hodgins & Elizabeth Liebeskind, *Apology Versus Defense: Antecedents and Consequences*, 39 J. Experimental Soc. Psychol. 297 (2003).

[15] *See*, *e.g*., Mark Bennett & Deborah Earwaker, *Victims' Response to Apologies: The Effects of Offender Responsibility and Offense Severity*, 134 J. Soc. Psychol. 457 (1994); Gold & Weiner, *supra* note 12; Seiji Takaku, *The Effects of Apology and Perspective Taking on Interpersonal Forgiveness: A Dissonance—Attribution Model of Interpersonal Forgiveness*, 141 J. Soc. Psychol. 494 (2001); Weiner et al., *supra* note 11.

[16] *See* Charlotte vanOyen Witvliet et al., *Please Forgive Me: Transgressors' Emotions and Physiology During Imagery of Seeking Forgiveness and Victim Responses*, 21 J. Psychol. & Christianity 219 (2002); Charlotte Witvliet et al., *Victims' Heart Rate and Facial EMG Responses to Receiving an Apology and Restitution*, Psychophysiology 588 (2002).

[17] *See*, *e.g*., Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 11; Gold & Weiner, *supra* note 12; Ohbuchi & Sato, *supra* note 11; Weiner et al., *supra* note 11. *See also* Alfred Allan, *Exploration of the Association between Apology and Forgiveness amongst Victims of Human Rights Violations*, 24 Behav. Sci. & L. 87 (2006).

[18] *See*, *e.g*., Ohbuchi et al., *supra* note 12; Schwartz et al., *supra* note 13.

[19] *See*, *e.g*., Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 11; Darby & Schlenker, *Children's Reactions to Transgressions*, *supra* note 11; Gold & Weiner, *supra* note 12; Schwartz et al., *supra* note 13; Weiner et al., *supra* note 11.

[20] Jerald Greenberg, *Looking Fair vs. Being Far: Managing Impressions of Organizational Justice*, 12 Research Org. Behav. 111, 133 (1990). Erving Goffman, speaking of remedial exchanges generally, argues that the function of remedial work is to change the meaning that otherwise might be given to an act."Erving Goffman, Relations in Public: Microstudies of the Public Order 109 (1971).

underlying trait of the offender."[21] Accordingly, when a wrongdoer apologizes, attributions about the causes of the offense may change such that those causes are perceived as being less internal to the offender, less controllable by the offender, and less stable.[22]

In particular, ascriptions about the stability of the behavior in question are influenced by an apology from the wrongdoer. When a wrongdoer apologizes, observers may attribute the offense to less stable causes and may, therefore, conclude that such behavior is unlikely to be repeated.[23] In one study of this phenomenon, Gregg Gold and Bernard Weiner asked participants to read a scenario in which an offender either expressed remorse or did not.[24] Participants rated wrongdoers who expressed remorse as being of higher moral character and as less likely to repeat the wrongful behavior in the future.[25] Studies in the legal context are consistent with these findings. Remorseful offenders in both civil and criminal cases are anticipated to be less likely to engage in similar wrongful conduct going forward.[26] Gold and Weiner conclude that "[o]ne reason for the anticipation of positive future behavior may be that when an individual confesses with remorse, the moral character of the offender is recovered," and the wrongful behavior is no longer seen as representative of the offender's true character.[27] Such attributions – i.e., the judged likelihood that the wrongful behavior will be repeated – are often central to legal judgments, including decisions about settlement and decisions about punishment.[28]

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[21] Takaku, *supra* note 15, at 495. *See* E.E. Jones & K.E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, 2 ADV. EXPERIMENTAL SOC. 219 (1965) (describing correspondent inference theory).

[22] Takaku, *supra* note 15, at 495. *See* BERNARD WEINER, JUDGMENTS OF RESPONSIBILITY (1995) (describing an attribution model of emotion and motivation).

[23] *See*, *e.g*., FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS (1958).

[24] Gold & Weiner, *supra* note 12.

[25] *Id.* Participants also expressed more sympathy for remorseful wrongdoers, were more likely to forgive them, and recommended less punishment. *Id.*

[26] In the civil context, I found that participants rated wrongdoers who accepted responsibility for having caused a bicycle accident and apologized for it as being of higher moral character, are more likely to be careful in similar circumstances in the future, and as having engaged in less egregious conduct. Robbennolt, *Apologies and Legal Settlement*, *supra* note 4, at 487, 495. In the criminal context, studies that have explored how remorseful criminal defendants are evaluated have also found that defendants who exhibit more remorse are perceived as less likely to engage in similar behavior in the future. *See*, *e.g*., Randolph B. Pipes & Marci Alessi, *Remorse and a Previously Punished Offense in Assignment of Punishment and Estimated Likelihood of a Repeated Offense*, 85 PSYCHOL. REP. 246 (1999); Dawn T. Robinson et al., *Heinous Crime or Unfortunate Accident? The Effects of Remorse on Responses to Mock Criminal Confessions*, 73 SOC. FORCES 175 (1994).

[27] Gold & Weiner, *supra* note 12, at 292. Goffman suggests that the act of apologizing causes a "splitting of the self into a blameworthy part and a part that stands back and sympathizes with the blame giving, and, by implication, is worthy of being brought back into the fold." GOFFMAN, *supra* note 20, at 113.

[28] *See* review in Robbennolt, *Apologies and Legal Settlement*, *supra* note 4, at 479.

Equity Theory

Equity theory[29] also suggests ways in which apologies may influence legal decision making. Equity theory proposes that inequity is created in a relationship when one member of the relationship engages in wrongdoing that harms another—that is, wrongdoing results in a moral imbalance in the relationship. Inequity in a relationship, furthermore, causes people—both participants in the relationship and observers of the relationship—to experience distress.[30] This distress motivates attempts to restore equity to the relationship.[31]

Equity theorists have suggested that an apology by the wrongdoer is one of the ways in which equity in the relationship might be re-established.[32] Because to apologize is to engage in a social "ritual whereby the wrongdoer can symbolically bring himself low (or raise us up),"[33] an apology may provide evidence of an equitable relationship, perhaps in part by demonstrating that the offender has suffered as a result.[34] Consistent with this notion, empirical studies have shown that offenders who apologize or otherwise show remorse are perceived to have suffered more than offenders who have not apologized.[35] Thus, an apology may accomplish the restoration of equity and moral balance between the parties.

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[29] *See* Jeffrie Murphy, *Forgiveness and Resentment*, *in* FORGIVENESS AND MERCY 14, 28 (Jean Hampton & Jeffrie G. Murphy, eds., 1988); TAVUCHIS, *supra* note 1; Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 1 (1973).

[30] *See* Walster et al., *supra* note 29, at 153.

[31] *See id.* at 154.

[32] *See id.* at 163.

[33] Murphy, *supra* note 29, at 28.

[34] *See* William Austin et al., *Equity and the Law: The Effect of a Harmdoer's "Suffering in the Act" on Liking and Assigned Punishment*, 9 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 163 (1976); Dana Bramel et al., *An Observer's Reaction to the Suffering of his Enemy*, 8 J. PERSONALITY & SOC. PSYCHOL. 384 (1968); Jerry I. Shaw & James A. McMartin, *Perpetrator or Victim? Effects of Who Suffers in an Automobile Accident on Judgmental Strictness*, 3 SOC. BEHAV. & PERSONALITY 5 (1975); Harry S. Upshaw & Daniel Romer, *Punishment For One's Misdeeds as a Function of Having Suffered From Them*, 2 PERSONALITY & SOC. PSYCHOL. BULL. 162 (1976).

[35] Brian H. Bornstein et al., *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 BEHAV. SCI. & L. 393 (2002) (finding that defendants who showed remorse were rated as having suffered more); Michael N. O'Malley & Jerald Greenberg, *Sex Differences in Restoring Justice: The Down Payment Effect*, 17 J. RES. IN PERSONALITY 174 (1983) (wrongdoer who admits responsibility perceived to have suffered more); Michael G. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCHOL. 64 (1976).

Emotion Theory

Strong emotions are often involved when an offender's conduct is thought to have caused injury to a victim. Importantly, anger and blame tend to result when people attribute an offender's injurious behavior to causes within that offender's control.[36] Notably, the types of injurious actions that are often at issue in civil litigation – violations of the victim's autonomy – have been specifically linked to anger responses.[37] Anger and other negative emotions have, in turn, been linked to increased blame,[38] decreased trust,[39] more punitive responses,[40] and less productive bargaining behavior.[41]

Apologies, and their effects on attributions and perceptions of justice, are likely to shape these emotional reactions. In particular, in a number of studies, apologies offered after injurious behavior have been shown to reduce anger and increase sympathy for the offender.[42] To the extent that apologies reduce the anger that is likely to result from legally actionable conduct and increase the experience of sympathy toward the offender, apologies are likely to alter the

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[36] *See*, *e.g.*, Jennifer S. Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 Personality & Soc. Psychol. Bull. 563 (1998).

[37] Paul Rozin et al., *The CAD Triad Hypothesis: A Mapping Between Three Moral Emotions (Contempt, Anger, Disgust) and Three Moral Codes (Community, Autonomy, Divinity)*, 76 J. Personality & Soc. Psychol. 574 (1999) (finding connections between violations of autonomy and anger, community and contempt, and divinity and disgust). *See also* R. A. Shweder et al., *The "Big Three" of Morality (Autonomy, Community, Divinity) and the "Big Three" Explanations of Suffering*, in Morality and Health 119 (A. Brandt & Paul Rozin, eds., 1997). A lack of either procedural or interactional justice also leads to increased anger. Laurie J. Barclay et al., *Exploring the Role of Emotions in Injustice Perceptions and Retaliation*, 90 J. Applied Psychol. 629, 635–36, Tables 2 and 3 (2005). For discussion of procedural and interactional justice, *see infra* notes 44–62.

[38] *See*, *e.g.*, Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 Psychol. Bull. 556 (2000); Dacher Keltner et al., *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception*, 64 J. Personality & Soc. Psychol. 740 (1993).

[39] *See*, *e.g.*, Jennifer R. Dunn & Maurice E. Schweitzer, *Feeling and Believing: The Influence of Emotion on Trust*, 88 J. Personality & Soc. Psychol. 736 (2005).

[40] *See*, *e.g.*, Lerner et al., *supra* note 36.

[41] *See*, *e.g.*, Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 Organizational Behav. & Hum. Decision Processes 175 (1997); J.P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiation Cognition and Behavior*, 74 J. Personality & Soc. Psychol. 565 (1998); George F. Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. Personality & Soc. Psychol. 426 (1989). *See generally* Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 Int'l Rev. L. & Econ. 31 (1992) (describing economic model of the influence of emotions on litigation decisions to sue, settle, or go to trial).

[42] *See*, *e.g.*, Bennett & Earwaker, *supra* note 15; Gold & Weiner, *supra* note 12; Ohbuchi et al., *supra* note 12; Robbennolt, *Apologies and Legal Settlement*, *supra* note 4; Takaku, *supra* note 15; Weiner et al., *supra* note 11.

negative attributions and punitive responses that are linked to those negative emotions.[43]

Justice

Similarly, apologies may shape perceptions of justice and fairness in ways that influence legal decision making. First, perceptions of *procedural* justice relate to the processes, procedures, and rules by which a decision is reached.[44] Research in organizational decision making has demonstrated that employee perceptions of the procedural fairness utilized by an organization in making decisions are strongly related to employee decisions about whether to sue the organization over these decisions.[45]

Second, in addition to the procedures and policies utilized to resolve a dispute, the nature of the interpersonal treatment that parties experience during the course of an encounter influences their responses to the encounter.[46] Individuals' attention to this less formal *interactional* justice includes not only concern for the substantive content of their communication with others, but also concern for an "interpersonal sensitivity" that symbolizes

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[43] *See generally* Bernard Weiner, Attribution Theory of Motivation and Emotion (1986); Weiner, *supra* note 22.

[44] *See generally* E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988).

[45] *See*, *e.g.*, Robert J. Bies & Tom R. Tyler, *The "Litigation Mentality" in Organizations: A Test of Alternative Psychological Explanations*, 4 Org. Sci. 352 (1993) (consideration of lawsuit in context of ongoing employment relationship); E.A. Lind et al., *The Winding Road from Employee to Complainant: Situational and Psychological Determinants of Wrongful Termination Claims*, 45 Admin. Sci. Q. 557 (2000) (finding that fair treatment at termination had a greater impact on decisions about whether to file wrongful termination lawsuits than did economic expectations); Karen Roberts & Karen S. Markel, *Claiming in the Name of Fairness: Organizational Justice and the Decision to File for Workplace Injury Compensation*, 6 J. Occupational Health Psychol. 332 (2001) (decisions to file workers' compensation claim for repetitive motion injuries). For research on claiming more generally *see* Deborah R. Hensler et al., Compensation for Accidental Injuries in the United States (1991); Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 Law & Soc'y Rev. 655 (1980–81); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 Law & Soc'y Rev. 631 (1980–81); E. Allan Lind, *Litigating and Claiming in Organizations: Antisocial Behavior or Quest for Justice?* in Antisocial Behavior in Organizations 150 (R.A. Giacalone & J. Greenberg, eds., 1997) (reviewing research); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 Law & Soc'y Rev. 525 (1980–81).

[46] *See generally*, Robert J. Bies, *The Predicament of Injustice: The Management of Moral Outrage*, 9 research in organizational behav. 289, 292 (1987) [hereinafter Bies, *Predicament of Injustice*]; Robert J. Bies & Joseph S. Moag, *Interactional Justice: Communication Criteria of Fairness,* 1 Research on Negot. in Organizations 43 (1986). *See also* Robert J. Bies, *Are Procedural Justice and Interactional Justice Conceptually Distinct?* in Handbook of Organizational Justice 85–112 (J. Greenberg & J.A. Colquitt, eds., 2005).

respect and evidences dignity.[47] In this vein, Dale Miller argues that people believe that they are entitled to be treated with interpersonal sensitivity and to be provided with accounts "for any actions that have personal consequences for them."[48] The lack of such sensitivity and accountability is experienced as disrespect.[49] Miller concludes that "[d]isrespectful treatment . . . can both compound the injustice created by an undeserved outcome and constitute an injustice of its own."[50] Failure to apologize or otherwise to account to the injured party may contribute to such feelings of injustice, adding "insult to injury." Conversely, to the extent that apology contributes to a feeling that one has been treated in a respectful and dignified manner, apologies can enhance perceptions of interactional justice and decrease the experience of injustice.

A growing body of research in this area has demonstrated that the interpersonal treatment that parties experience influences their decision making in conflict situations. For example, in one experiment, Kwok Leung and his colleagues found that negotiators who treated each other fairly had smaller disparities in their notions of a fair outcome, reached impasse less frequently, and reached settlement more quickly than did negotiators who experienced unfair interpersonal treatment.[51] In a study of the U.S. Postal Service's mediation program for employment disputes, Tina Nabatchi and Lisa Bingham found that the ways in which disputants treated each other during mediation influenced their satisfaction with outcomes.[52] Similarly, in a study of litigants, Allan Lind and his colleagues found that litigants' perceptions of the dignity of their treatment were significantly related to outcome satisfaction.[53]

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[47] Daniel P. Skarlicki et al. *When Social Accounts Backfire: The Exacerbating Effects of a Polite Message or an Apology on Reactions to an Unfair Outcome*, 34 J. Applied Soc. Psychol. 322 (2004).

[48] Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 Ann. Rev. Psychol. 527, 531–32 (2001).

[49] *Id.* (describing disrespect as a violation of a "psychological contract").

[50] *Id. See also* Gerold Mikula, *The Experience of Injustice: Toward a Better Understanding of Its Phenomenology,* in Justice in Social Relations 103 (H.W. Bierhoff et al., eds., 1986) (identifying "failure to admit an error" as an instance of injustice).

[51] Kwok Leung et al., *Effects of Interactional Justice on Egocentric Bias in Resource Allocation Decisions*, 89 J. Applied Psychol. 405, 408–09 (2004). The opponents were trained in either "fair" ("display of openness and neutrality, willingness to provide explanations, showing understanding, willingness to listen,, and appreciation for suggestions") or "unfair" ("insistence on own point of view, frequent remarks that the other side was wrong, unwillingness to provide explanations, impatience in listening and frequent interruptions, and little appreciation of the other side's position and suggestions") tactics. *Id.* at 407.

[52] *See* Tina Nabatchi & Lisa B. Bingham, *Expanding Our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice*, SSRN (finding that an index comprised of questions about the interactions between the negotiators had a significant influence on outcome satisfaction).

[53] E.A. Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 59 L & Soc'y Rev. 953 (1990).

Consistent with these findings, research into the antecedents of claiming in the context of medical malpractice has found that interactional justice concerns are related to patients' decisions to pursue lawsuits. For example, Marlynn May and Daniel Stengel interviewed dissatisfied patients following adverse medical events.[54] They found that dissatisfaction with the physician–patient interaction was related to whether the patient would seek the assistance of an attorney in response to the injury.[55] Other studies have found, similarly, that communication problems between the patient and the physician are related to patients' decisions about whether to sue.[56]

Social identity theory provides some insight into why procedural and interactional justice may be important to injured parties. According to social identity theory, individuals construct their social identity using information they acquire as they interact with others.[57] According to the group-value model of procedural justice, the manner in which an injured party is treated by a wrongdoer contributes information to the injured party's social identity about the degree to which he or she is valued by others.[58] Therefore, "treatment with dignity and respect are important because they tell people that they have status within the group."[59] In contrast, treatment that does not signal dignity and respect conveys a message of a lack of status among the community. In the context of understanding the information conveyed by responses to injury, "it

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[54] Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 LAW & SOC'Y REV. 105 (1990)

[55] *Id.* at 116–17.

[56] *See*, *e.g.*, Howard B. Beckman, *The Doctor-Patient Relationship and Malpractice: Lessons from Plaintiff Depositions*, 154 ARCHIVES INTERNAL MED. 1365, 1367–68 (1994); Gerald B. Hickson et al., *Factors That Prompted Families to File Medical Malpractice Claims Following Prenatal Injuries*, 267 JAMA 1359, 1361 (1992) [hereinafter Hickson et al., *Factors*]; LaRae I. Huycke & Mark M. Huycke, *Characteristics of Potential Plaintiffs in Malpractice Litigation*, 120 ANNALS INTERNAL MED. 792, 797 (1994); Gregory W. Lester & Susan G. Smith, *Listening and Talking to Patients: A Remedy for Malpractice Suits?*, 158 W. J. MED. 268, 270 (1993); Wendy Levinson et al., *Physician-Patient Communication: The Relationship with Malpractice Claims Among Primary Care Physicians and Surgeons*, 277 JAMA 553, 557–58 (1997); Robyn S. Shapiro et al., *A Survey of Sued and Nonsued Physicians and Suing Patients*, 149 ARCHIVES INTERNAL MED. 2190, 2192–93 (1989); *see also* T. Elaine Adamson et al., *Physician Communication Skills and Malpractice Claims: A Complex Relationship*, 150 W. J. MED. 356 (1989) (assessing "the relationship between patients' opinion about their physicians' communication skills and the physician's history of medical malpractice claims"). Studies of complaints also suggest a relationship between communication and lawsuits. *See*, *e.g.*, Gerald B. Hickson et al., *Patient Complaints and Malpractice Risk*, 287 JAMA 2951, 2957 (2002).

[57] *See* Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCHOL. 1 (1982).

[58] *See* LIND & TYLER, *supra* note 44; Tom R. Tyler, *Procedural Strategies for Gaining Deference: Increasing Social Harmony or Creating False Consciousness?* in SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 69 (John M. Darley et al., eds., 2001).

[59] Tyler, *supra* note 58, at 80. In the context of procedural justice, Tyler argues that "[p]eople may value this favorable identity-relevant information more than they value receiving fair or favorable outcomes." *Id.*

would seem that a person can learn a considerable amount about his or her status by viewing the way that others react to acts that diminish that status."[60] The offender's reaction to an injured person, in particular, can

> convey respect for the victim and affirm his or her status. The very fact that the perpetrator thinks that the victim is due an explanation signals respect for the victim and tends to diminish the victim'anger. . . . When the offender's response goes beyond mere explanation and includes apology, this action is likely to diminish the victim's anger even more. . . . [T]the expression of remorse takes the sting out of an offense because it affirms the status of the victim and acknowledges that he or she has been treated unjustly.[61]

In this way, an apology may signal to the injured party that despite the injurious behavior, he or she is still a valued member of the community.

The norms of the community are also at play with regard to another form of justice – retributive justice. Retributive impulses are triggered by the outrage that is experienced when an offender violates a community norm and causes harm.[62] Importantly, "[r]etribution is concerned primarily with the elimination of a sense of injustice" that results from the offense.[63] Punishment, then, attempts to reassert the value of the violated norm and to provide the offender with his or her just deserts. The psychology of retributive justice suggests that an apology can mitigate outrage over a harm and reduce the desire to punish the offender. As noted above, an apology acknowledges the wrongfulness of the norm violation and signals that the offender is less responsible,[64] has suffered,[65] and will not recidivate.[66] Moreover, as noted above, an apology diminishes the anger felt about the offense.[67] Consequently, observers tend to recommend less

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[60] Miller, *supra* note 48, at 538.

[61] *Id.* at 537.

[62] *See* Neil Vidmar, *Retributive Justice,* in The Justice Motive in Everyday Life 291 (M. Ross & D.T. Miller, eds. 2002). See also John Darley, *Just Punishments: Research on Retributional Justice* in The Justice Motive in Everyday Life 314 (M. Ross & D.T. Miller, eds. 2002). For discussion of apologies and retributive justice, *see* Neil Vidmar, *Retribution and Revenge,* in Handbook of Justice Research in Law 31, 52–4 (2001). For discussion of apologies and restorative justice see Edith Greene, this volume (discussing apologies and restorative justice in the civil context); Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 Utah L. Rev. 15 (discussing apologies and restorative justice in the criminal context).

[63] Dale T. Miller & Neil Vidmar, *The Social Psychology of Punishment Reactions,* in The Justice Motive in Social Behavior: Adapting to Times of Scarcity and Change 145, 146 (M.J. Lerner & S.C. Lerner, eds., 1981).

[64] *See supra* note 11.

[65] *See supra* note 35.

[66] *See supra* notes 23–8.

[67] *See supra* notes 36–44.

harsh punishment against offenders who have apologized or shown remorse.[68]

Reciprocity and Social Norms

It is also possible that apologies may influence legal decision making through norms of reciprocity. The reciprocity norm requires "that we should try to repay, in kind, what another person has provided us."[69] In the context of negotiations, people tend to make concessions in response to a concession that is offered to them.[70] When wrongdoers offer the "concession" of an apology, victims and observers may respond favorably because they feel an obligation to respond with a reciprocal "concession" of their own.

Some evidence of this reciprocal obligation to accept an apology comes from a series of studies conduct by Mark Bennett and Christopher Dewberry.[71] Bennett and Dewberry first examined how participants evaluated victims' responses to apologies, finding that participants rated victims most favorably when they accepted a wrongdoer's apology and least favorably when they rejected the apology.[72] Moreover, victims who rejected "unconvincing" apologies were not rated any more favorably than those who rejected more convincing apologies.[73] In a second study, Bennett and Dewberry asked participants to indicate how they would respond to an apology by an offender in a scenario. They found that participants were likely to accept even an apology judged to be unconvincing.[74] Thus, there may be an apology "script" that indicates that

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[68] *See supra* note 19. For research examining criminal punishment, *see*, *e.g.*, Chris L. Kleinke et al., *Evaluation of a Rapist as a Function of Expressed Intent and Remorse*, 132 J. Soc. Psychol. 525 (1992) (finding that recommended sentences for a convicted rapist were predicted by perceived remorse); Pipes & Alessi, *supra* note 26; Rumsey, *supra* note 35 (finding that participants gave a defendant in a drunk-driving case who was described as "extremely remorseful" a shorter sentence than they did a defendant who gave "no indication of remorse"). *But cf.* Christy Taylor & Chris L. Kleinke, *Effects of Severity of Accident, History of Drunk Driving, Intent, and Remorse on Judgments of a Drunk Driver*, 22 J. Applied Soc. Psychol. 1641 (1992) (finding that a defendant who expressed remorse was rated as being a person of greater responsibility and sensitivity than a defendant who did not express remorse, but not finding significant differences in sentences).

[69] *See* Robert B. Cialdini, Influence: Science and Practice 19 (1993).

[70] See Robert Axelrod, The Evolution of Cooperation (1984); Chris Guthrie, *Principles of Influence in Negotiation*, 87 Marq. L. Rev. 829, 833–35 (2004).

[71] *See* Mark Bennett & Christopher Dewberry, *"I've said I'm sorry, haven't I?" A Study of the Identity Implications and Constraints that Apologies Create for Their Recipients*, 13 Current Psychol. 10 (1994) (finding a tendency for participants to accept even an unconvincing apology).

[72] Bennett & Dewberry, *supra* note 71, at 14.

[73] *Id.* at 16.

[74] *Id.* at 18–19.

social norms call for acceptance of apologies when they are offered by offenders.[75]

Expectations about Success of Claim

In contrast to the positive effects of apologies reported above, the conventional wisdom among legal actors has been that apologies will adversely affect legal decision making. In particular, to the extent that apologies provide additional information about the offender's responsibility for having caused an injury, apologies may change assessments of the offender's legal liabilities. For example, an apology that provides evidence that an offender engaged in a particular behavior that caused an injury may alter the judgments of legal decision makers. Jurors or judges may be more likely to find civil liability (e.g., negligence).[76] Predicting this, litigants bargaining in the shadow of the law might conclude that the plaintiff has a greater likelihood of obtaining a favorable outcome if the case were to go to trial than they had estimated prior to the apology. If claimants assess their chances of winning at trial as being greater, they may be less inclined to settle their case or more willing to hold out for a larger settlement. Consistent with these expectations, in an experimental study of apologies and settlement decision making, I found that when a wrongdoer admitted responsibility for having caused harm, participants estimated the injured party's chances of winning at trial to be greater than when the wrongdoer simply expressed sympathy, and they adjusted their expectations about bargaining accordingly.[77] However, these effects were outweighed by the other effects of apologies, described above, that tend to improve the prospects for reaching an agreement.[78]

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[75] *See also* WILLIAM IAN MILLER, FAKING IT 92 (2003) (arguing that "the victim is as often forced by social pressure to forgive no less than the wrongdoer is forced to apologize. Or he forgives because it is embarrassing not to once the wrongdoer has given a colorable apology"). In equity theory terms, the apology itself may trigger a change in the equities in the relationship that calls for a response. *See supra* notes 29–31.

[76] *See infra* notes 104–13 for discussion of this assumption.

[77] Robbennolt, *Apologies and Settlement Levers, supra* note 4, at 362, 367 (finding that responsibility-accepting apology increased estimates of likelihood of winning and that these predictions were associated with increased reservation prices, aspirations, and estimates of fair settlement value).

[78] *Id.* at 370 (concluding that "the intangible value of an apology to participants was sufficiently large as to outweigh the value of the apology for furthering the participants' monetary self-interest"). *See generally* Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 53 (1998) (finding that individuals overestimate the effects of self-interest on attitudes and behavior).

Apologies and Legal Decision Making

In the context of conflicts that could result in civil litigation, apologies may be viewed in the shadow of possible legal liability. That shadow may affect the influence of apologies on decision making in ways that differ from such judgments in other contexts and may color decisions by defendants to offer apologies, decisions by plaintiffs about how to respond to an apology that may be offered, and decisions by jurors when a defendant has apologized.

Plaintiffs

The effects of apologies on the decisions of injured parties have been the primary focus of research on apologies in the context of civil litigation. To the extent that apologies change attributions about both the situation and the wrongdoer and compensate for less tangible damage through their effects on perceptions of equity and justice,[79] apologies are likely to affect a range of decisions that plaintiffs (or potential plaintiffs) must make. A growing body of studies suggests that apologies do influence claimant decision making in a number of ways, including decisions to consult attorneys for advice, decisions about whether or not to file suit, judgments about negotiating positions, and ultimate decisions about settlement.

As a general matter, people claim to want apologies when they are injured. In the context of medical error, a number of studies have explored how patients predict they would like medical professionals to respond following an error. Thomas Gallagher and his colleagues conducted focus groups of patients to explore patients' views on how medical errors should be handled.[80] Patients expressed a desire to receive apologies, assurance that the health care provider regretted the error, information about what happened, and assurance that such errors would be prevented in the future.[81] Similarly, Amy Witman and her colleagues asked patients to consider hypothetical descriptions of medical errors that resulted in injury.[82] Across injuries of varying degrees of severity, 98% of the patients "desired or expected the physician's active

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[79] *See* Shuman, *The Role of Apology in Tort Law*, *supra* note 4, at 181 ("Practically, tort damages for these intangible losses [pain and suffering, loss of consortium, indignity, and grief] defy the formulation of an empirically grounded metric . . ."); *see also* Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. Kan. L. Rev. 39, 71 (1994).

[80] Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001, 1001 (2003).

[81] *Id.* at 1004.

[82] Amy B. Witman et al., *How Do Patients Want Physicians to Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 Archives of Internal Med. 2565, 2565 (1996).

acknowledgement of an error. This ranged from a simple acknowledgement of the error to various forms of apology."[83] In another study of patients' responses to hypothetical medical errors, Kathleen Mazor and her colleagues found that most patients (88%) endorsed the notion that following a medical error they "would want the doctor to tell me that he or she was sincerely sorry."[84]

Additional research has explored the claiming process more specifically, examining the decisions injured parties make in response to their injury. This research suggests that apologies can influence people's initial decisions to become claimants. In particular, a number of studies have explored the motivations of litigants (primarily litigants in medical malpractice cases) in filing suit. These studies provide evidence that apologies have a role to play in preventing lawsuits and settling disputes. In one study of individuals who had brought legal claims against a health care provider, Vincent and his colleagues found that nearly 40% of claimants who thought that something could have been done to prevent litigation indicated that litigation would not have been necessary if the medical provider had offered an explanation and apologized.[85] In a similar study of claimants in cases involving perinatal injuries, Gerald Hickson and his colleagues found that claimants' motives for filing suit included a variety of non-monetary goals related to explanations and apologies including the need to discover what had happened, the perception that the healthcare provider was not straightforward in providing information about what had happened, and a desire to deter or punish the provider in order to, in part, prevent similar injuries in the future.[86] Similarly, interviews with libel plaintiffs indicate that many of them attempted to first resolve their conflict with the media source and most of them ask for "retraction, correction, or apology."[87]

While it is possible that these predictions will not precisely match people's litigation behavior, experimental research has found that apologies influence litigation decision-making in ways that are consistent with these self-reported desires for apologies. First, in a series of studies, Kathleen Mazor and her colleagues have found that how physicians handle the aftermath of a medical injury influences patients' decisions about whether to seek out legal advice.[88] Members of a health-care plan took the perspective of a patient who had been injured by a medical error. Patients assessing medication errors that resulted in minor injuries were less likely to report that they would seek legal advice following the injury when the physician had provided "full disclosure"

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[83] *Id.*

[84] Kathleen M. Mazor et al., *Health Plan Members' Views about Disclosure of Medical Errors*, 140 ANNALS OF INTERNAL MED. 409, 415 (2004).

[85] Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994).

[86] Hickson et al., *supra* note 56.

[87] John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 220 (1985).

[88] Mazor et al., *supra* note 84.

(i.e., provided information about the error, took responsibility, and outlined how similar errors would be prevented going forward) than when the physician failed to disclose the error and did not take responsibility.[89] Thus, people say that they want apologies and indicate that apologies influence their decisions about whether to become claimants.

Second, there is evidence that apologies can alter claimant perceptions and attributions about the injury, the wrongdoer, and the events that led to the injury. For example, experimental studies have found that apologies influence the degree to which claimants believe that the wrongdoer feels remorse, is of good moral character, and will act carefully in the future.[90] Similarly, apologies influence claimants' evaluations of the egregiousness of the conduct and the damage to the relationship, and the degree to which they feel anger at and sympathy toward the other party.[91] All of these emotions and perceptions are likely to have an influence on bargaining behavior.[92]

Third, there is evidence that apologies can influence the settlement posture of claimants as they approach settlement negotiations. A recent study examined the effects of apologies on settlement levers—claimants' reservation prices (or bottom-line), aspirations, and judgments of fair settlement value.[93] At least when offender fault was relatively clear, apologies offered by wrongdoers lowered the values of claimants' settlement levers.[94] There are at least two reasons why settlement is more likely or may occur more quickly when claimants' settlement levers are lower. First, a lower reservation price increases the chance that a bargaining range will exist and increases the size of any existing bargaining range. Second, claimants are likely to have more favorable subjective assessments of settlement offers when comparing them to lower reservation prices, aspirations, or estimates of fair settlement value.

Finally, there is evidence that apologies can influence claimants' willingness to accept a settlement offer from the wrongdoer. In one experimental study, Russell Korobkin and Chris Guthrie examined the effects of an apology on litigants' settlement decisions in a landlord-tenant dispute.[95] Participants assumed the

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[89] *Id.* at 413. Respondents in the full disclosure conditions were also less likely to indicate that they would change physicians, were more satisfied, reported more trust in the physician, and reported fewer negative emotions than did those in the nondisclosure conditions. *Id.* at 414. *See also* Kathleen M. Mazor et al., *Disclosure of Medical Errors: What Factors Influence How Patients Respond?* 21 J. Gen. Internal Med. 704 (2006) (reporting similar findings).

[90] Robbennolt, *Apologies and Legal Settlement*, *supra* note 4; Robbennolt, *Apologies and Settlement Levers*, *supra* note 4.

[91] *Id.*

[92] *See generally* Leigh Thompson, *Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues*, 108 Psychol. Bull. 515 (1990); Leigh Thompson & Reid Hastie, *Social Perception in Negotiation*, 47 Organizational Behav. & Hum. Decision Processes 98 (1990).

[93] Robbennolt, *Apologies and Settlement Levers*, *supra* note 4.

[94] *Id.*

[95] Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich. L. Rev. 107 (1994).

role of the tenant and evaluated an offer of settlement from the landlord.[96] Participants who were told that the landlord had "apologized" to them, saying "I know this is not an acceptable excuse . . . but I have been under a great deal of pressure lately," were marginally more likely to accept the landlord's offer than were participants who had not received this "apology."[97] Similarly, apologies have been found to influence willingness to accept a settlement offer in other types of cases as well.[98] In particular, comparisons of the effects of no apology, sympathy expressions, and full, responsibility-accepting apologies on settlement acceptance have found that full, responsibility-accepting apologies altered respondents' assessments of how well the offer "made-up-for" the injury and increased their tendency to accept the offer.[99]

Thus, there is growing evidence that apologies can play a role in facilitating the settlement of legal disputes. Apologies appear to be able to influence a variety of perceptions and attributions relevant to settlement decision making, alter settlement levers in ways that make settlement more likely, and make claimants more willing to accept particular offers of settlement. Some possible boundary conditions on these effects will be described below.[100]

Jurors

While they have been the primary focus of recent empirical research, plaintiffs are not the only legal actors whose decisions are impacted by apologies offered in the legal context. Impartial observers such as jurors or other legal fact finders may also be influenced by the offer of an apology by an offender. Just like the direct participants in the injurious relationship, observers are motivated to restore equity to an imbalanced relationship. Moreover, the rule violation that led to the injury may be seen as a violation against the community that

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[96] *Id.*

[97] *Id.* at 148.

[98] Robbennolt, *Apologies and Legal Settlement*, *supra* note 4.

[99] *Id.* at 487. The effects of an apology that simply expressed sympathy and did not accept responsibility did not have these effects. *Id.* However, the effects of such apologies appear to be more variable and context dependent. *Id.*; Robbennolt, *Apologies and Settlement Levers*, *supra* note 4. For examples of instances in which apologies were important to settlement discussions, *see* Piper Fogg, *Minnesota System Agrees to Pay $500,000 to Settle Pay-Bias Dispute*, CHRON. HIGHER EDUC., Feb. 14, 2003, at A12 (describing class-action plaintiff's disappointed reaction to the settlement: "I want an apology," she said, "and I am never going to get it") (internal quotes omitted); Editorial, *The Paula Jones Settlement*, WASH. POST, Nov. 15, 1998, at C6; Nathalie Des Rosiers et al., *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 442 (1998); Bruce W. Neckers, *The Art of the Apology*, MICH. B.J., June 2002, at 10, 11; Carl D. Schneider, *What It Means To Be Sorry: The Power of Apology in Mediation*, 17 MEDIATION Q. 265, 274 (2000) (describing negotiations stalling "over the plaintiff's demand for an apology, even after the sides had agreed on the damages to be paid") (emphasis omitted).

[100] *See infra* § IV.

has established the rule. As legal decision makers who represent that community, jurors may attempt to express their valuing of the victim of the wrongdoing, to establish their support for the violated rule, or to exact expressive defeat of the wrongdoer through their verdicts.[101]

Most studies of jurors' reactions to apologies have been conducted in the criminal context. Experimental studies of responses to criminal defendants who apologize have generally shown that remorseful defendants are perceived more positively,[102] thought to have acted less intentionally,[103] thought to be less likely to re-offend,[104] and sentenced less harshly[105] than are defendants who do not show remorse. Interviews with jurors in capital cases also suggest that jurors' perceptions of defendants' remorse influence their decisions about whether to sentence defendants to death or to life in prison.[106] The limited evidence with respect to criminal guilt determinations is more mixed.[107]

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[101] *See* Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision-Makers as Goal Managers*, 68 Brook. L. Rev. 112 (2003). *See also* Bies, *Predicament of Injustice*, *supra* note 46, at 294 ("a violation of justice norms represents an attack on the social group that endorses and supports those moral guidelines. As an expression of moral outrage, the group may impose sanctions and punishments on the harmdoer for violation of the justice norms or rules").

[102] *See*, *e.g*., Kleinke et al., *supra note* 68 (finding that a convicted rapist was judged to be of less negative character if he demonstrated remorse than if he did not); Taylor & Kleinke, *supra note* 68 (finding that a defendant who expressed remorse was rated as being a person of greater responsibility and sensitivity than a defendant who did not express remorse).

[103] *See*, *e.g*., Kleinke et al., *supra* note 68 (finding that a convicted rapist was judged to have acted with less intent if he demonstrated remorse than if he did not).

[104] *See*, *e.g*., Kleinke et al., *supra* note 68 (finding that a convicted rapist was judged to have more potential for rehabilitation if he demonstrated remorse than if he did not); Pipes & Alessi, *supra* note 26.

[105] *See supra* note 68. See discussion of the role of apologies in criminal cases in Stephanos Bibas & Richard Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L. J. 85 (2004); Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 Behav. Sci. & L. 337 (2002).

[106] *See* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599 (1998). For further discussion of the role of remorse in criminal punishment, see Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 Vand. L. Rev. 1, 38–40 (2003); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1559–60 (1998). For interesting discussion of the complications of the relationship between remorse and sentencing in the criminal context, *see* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2013 (2003); Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 Cal. L. Rev. 425 (2004).

[107] In one study, Christian Meissner and his colleagues found that mock juries were less likely to find a defendant charged with first-degree murder (euthanasia) guilty when he was highly remorseful than when he was not. Christian A. Meissner et al., *Jury Nullification: The Influence of Judicial Instruction on the Relationship Between Attitudes and Juridic Decision*

In the context of civil litigation, there is evidence that, as a general matter, civil defendants who express remorse are perceived more favorably by mock jurors than are defendants who do not express remorse.[108] Civil jurors, however, have a variety of decisions to make—liability, compensatory damages, and, occasionally, punitive damages—and apologies may influence each of these decisions differently.

Liability

The primary concern potential civil defendants have about offering an apology is that the apology may be interpreted as evidence tending to prove liability.[109] Indeed, in the criminal context, confession evidence has been shown to be quite powerful.[110] Statutes providing evidentiary protection for some apologies have been implemented in response to these concerns.[111] However, it is not clear whether, under what circumstances, or to what degree an apology might alter the risk of an adverse liability determination.

Given the concern over and the attention paid to the risks posed by apologies in this context, there is a striking lack of empirical research examining the ways in which apologies influence juror liability determinations. This is particularly true given that studies examining attributions of responsibility in nonlegal contexts have found that offenders who apologize are seen as having acted less intentionally and are blamed less.[112] Similarly, Weiner and his colleagues found that offering an apology and accepting responsibility reduced

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Making, 25 BASIC & APPLIED. SOC. PSYCHOL. 243, 251 (2003). *See also* Kristin A. Seidner & Wendy P. Heath, *Effects of Defendant Remorse Level and Type of Excuse Defense on Mock Jurors' Decision Making*, paper presented at 2002 AP-LS meeting (finding that mock jurors rated a remorseful defendant as less guilty than a non-remorseful defendant). In contrast, Keith Niedermeier and colleagues found that some remorseful defendants were found to be more guilty when they expressed remorse. Keith E. Neidermeier et al., *Exceptions to the Rule: The Effects of Remorse, Status, and Gender on Decision Making*, 31 J. APP. SOC. PSYCHOL. 604 (2001). They found that high status, male defendants were rated as more guilty when the expressed remorse than when they did not; this pattern was not true for female defendants or low status defendants. *Id.* They posit that this effect might have resulted because remorse was "counternormative" or less expected from the male, high status defendant. *Id.*

[108] *See* Bornstein, *supra* note 35. In his first study, Bornstein found that remorse had a significant positive effect on jurors' overall perceptions of the defendant. *Id.* at 400. In a second study, Bornstein found that physicians who expressed remorse were perceived as having suffered more than defendants who did not express remorse. *Id.* at 404.

[109] *See generally* Cohen, *Advising Clients to Apologize*, *supra* note 4; Robbennolt, *Apologies and Legal Settlement*, *supra* note 4. *See also* Gallagher et al., *supra* note 80, at 1003.

[110] *See*, *e.g.*, Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUMAN BEHAV. 469 (1997); Saul Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN THE PUB. INTEREST 33 (2004).

[111] *See supra* notes 5–9.

[112] *See* Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 11, at 746, 749; Darby & Schlenker, *Childrens' Reactions to Transgressions*, *supra* note 11, at 358–59;

attributions of responsibility to internal causes and increased attributions to external causes.[113] This was true in particular when the cause or causes of the incident were less clear.[114] Clearly, there is much additional work to be done to explore the dynamics of how wrongdoer apologies may influence juror liability determinations in civil cases.

Compensatory Damages

In contrast to the adverse effect predicted with regard to liability determinations, it is often suggested that a civil defendant who has apologized will be advantaged when the jury turns its attention to the awarding of damages.[115] In fact, many state statutes specifically provide that apologies are one factor to consider in mitigation of damages in defamation cases.[116] In the context of apologies following medical error, Dr. Lucian Leape has argued that

> The long, painful, shameful spectacle of the plaintiff lawyer trying to prove in public that the physician is negligent, a bad person, will not take place. The court's role will be limited to establishing just compensation. What is a jury likely to do with a physician who has been honest and also apologized? Judgments will most likely be far less costly.[117]

Some, however, worry that apologizing, "which implies knowledge of wrongdoing, will exacerbate damage awards by showing a level of intent beyond mere negligence."[118]

It is likely that the effects of apologizing on damage-award decision making will be complex. Brian Bornstein conducted a set of experimental studies to examine the effects of an expression of "remorse" (but not fault) on damage-award decision making – comparing the damages awarded against a physician-offender who was either explicitly remorseless, expressed remorse at the time of the trial, expressed remorse both at the time of the incident and at the time of trial, or did nothing to indicate either remorse or a lack thereof.[119] In one study,

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Ohbuchi & Sato, *supra* note 11, at 11; Scher & Darley, *supra* note 11, at 134–36. *See also* Seidner & Heath, *supra* note 107.

[113] Weiner et al., *supra* note 11, at 291 ("This is in accord with a conceptualization linking confession to perceived lack of responsibility (in spite of an admission of responsibility!).").

[114] *Id.* at 295.

[115] *See*, *e.g.*, Cohen, *Advising Clients to Apologize*, *supra* note 4; Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. Disp. Resol. 1, 52–3 n. 147.

[116] *See*, *e.g.*, Fla. Stat. § 770.02 (2003); Miss Code Ann. § 95-1-5 (1999); Tenn. Code Ann. § 29-24-103 (2000); Tex. Civ. Prac. & Rem. Code Ann. § 73.003 (1997); Va. Code Ann. § 8.01-48, 8.01-46 (2000); W. Va. Code § 57-2-4 (1997).

[117] Lucian Leape, *Understanding the Power of Apology: How Saying "I'm Sorry" Helps Heal Patients and Caregivers*, 8 Nat'l Patient Safety Foundation Newsl. 3 (2005).

[118] Levi, *supra* note 4, at 1187.

[119] Bornstein et al., *supra* note 35.

male (but not female) participants awarded marginally more in damages against the explicitly remorseless physician and against the physician who expressed remorse both at the time of the incident and at the time of trial than against the other two physicians.[120] In a second study, participants awarded more in compensatory damages against the physician who displayed remorse both at the time of the incident and at the time of trial than against the others.[121] These results suggest that there may be some risk attendant to an early expression of remorse or sympathy; it is unclear whether this is related to the timing of the expression or because the expression was unaccompanied by acceptance of responsibility or some offer of compensation.[122]

The importance of the presence or absence of acceptance of responsibility in this context is also suggested by a study in which Michael O'Malley and Jerald Greenberg examined people's reactions to a car accident that resulted in damage.[123] In one study, they found that female (but not male) participants indicated that lower amounts of compensation were appropriate when the wrongdoer had admitted responsibility than when the wrongdoer had not admitted responsibility.[124] In another study, they found that female (but not male) participants indicated that lower fines were appropriate when a negligent driver was "moderately remorseful," but not when the driver was "very remorseful."[125] They suggest that the participants "may have perceived the excessively apologetic overtures of a negligent driver to be manipulative gestures designed to reduce his or her penalty rather than as spontaneous shows of remorse."[126]

Punitive Damages

It is perhaps most likely that apologies will have a favorable influence on the awarding of punitive damages, damages intended to punish a civil defendant and to deter misconduct. Indeed, courts have explicitly taken defendants'

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[120] *Id.* at 399–400.

[121] *Id.* at 403.

[122] It is worth thinking about these results in the context of findings about how apologies are interpreted in the absence of offers of repair. Perhaps jurors doubt the sincerity of the defendant who apologizes early, but fails to accomplish a fair settlement of the case. Jurors might have questioned why the defendant did not "put his money where his mouth is." *See infra* notes 147–54 (for discussion of the importance of accepting responsibility), notes 159–74 (for discussion of the importance of offers of compensation), and notes 212–21 (for discussion of the importance of sincerity).

[123] O'Malley & Greenberg, *supra* note 35.

[124] *Id.* at 177. *See infra* notes 146–53 (for discussion of the importance of taking responsibility).

[125] *Id.* at 182.

[126] *Id. See infra* notes 208–17 (for discussion of the importance of sincerity).

remorse into account in awarding punitive damages.[127] However, to my knowledge there are no empirical studies that specifically examine the effects of apologies on jurors' decision making about punitive damages. As a general matter, O'Malley and Greenberg found that participants were "more motivated to deter and punish" wrongdoers who did not apologize as compared to wrongdoers who offered apologies.[128] In addition, this task of civil jurors is the most closely analogous to criminal sentencing. As noted above, a number of studies have shown that criminal defendants who apologize or express remorse are sentenced more leniently than are unremorseful defendants.[129] To the extent that we can generalize from these studies in the criminal context, apologies would be expected to reduce jurors' punitive damage awards.

Defendants

While much of the attention surrounding apologies in litigation has focused on the effects of apologies on plaintiffs, several authors have articulated the potential costs and benefits of apologies to civil defendants. Apologizing may benefit wrongdoers by helping to relieve guilt and other negative emotions, repair their relationships, improve their reputations, inhibit aggressive responses—such as litigation—on the part of injured parties, and minimize the costs of litigation (i.e., improve settlement opportunities, decrease costs, decrease exposure).[130] On the other hand, apologizing may also present risks to the wrongdoer, including the experience of emotions such as humiliation and shame, increased exposure to liability, and loss of insurance coverage.[131]

There is evidence that civil defendants, such as physicians in medical malpractice cases, desire to offer apologies. For example, in focus groups with physicians to discuss the handling of medical errors, physicians reported a desire to apologize but also reported concern that disclosure would increase

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[127] *See*, *e.g*., *Johnson v. Smith*, 890 F. Supp. 726, 727 n. 6 (1995) (finding that the defendant's "testimony (and the nature of his immediately-post-offense behavior, including his prompt apology after he had sobered up) disclosed him to be less culpable in the offense and suggested that it was really an aberration on his part (totally out of character with his responsible conduct since then). Although punitive damages are in order against him, the much more moderate awards reflected in this opinion have taken those mitigating factors into account."). *See also Patane v. Broadmoor Hotel, Inc*., 708 P.2d 473 (Colo. App., 1985) (finding that defendant's "failure to apologize . . . is relevant to the issue of exemplary damages).

[128] O'Malley & Greenberg, *supra* note 35, at 180.

[129] *See supra* note 105.

[130] Cohen, *Advising Clients to Apologize*, *supra* note 4 (articulating benefits of apologizing); O'Hara & Yarn, *supra* note 4 (same). *See also* Jonathan R. Cohen, *The Immorality of Denial*, 79 Tulane L. Rev. 903 (2005).

[131] Cohen, *Advising Clients to Apologize*, *supra* note 4 (articulating risks of apologizing); O'Hara & Yarn, *supra* note 4, at 1174–80 (same).

the possibility for legal liability.[132] Thus, defendants or potential defendants who contemplate apologies must anticipate how an apology might influence a variety of decisions to be made by plaintiffs, judges, and jurors—including decisions about settlement, liability determinations, and decisions about appropriate damage awards—as well as weighing the less strategic aspects of apologizing. Despite defendants' central role in the apology conversation, there has been even less research on how civil defendants make these decisions than on civil plaintiffs or jurors.

Not surprisingly, therefore, many unanswered questions remain. We know very little about the circumstances under which defendants choose to offer apologies and what those apologies look like. In a recent study examining how physicians say they would respond to medical errors, Gallagher and his colleagues asked physicians to consider a particular medical error and to indicate whether they would disclose the error and apologize.[133] Across several different error scenarios, they found that 6% of their physician respondents indicated that they would not offer any apology, 61% indicated that they would only express sympathy, and 33% claimed that they would give an explicit apology acknowledging the error.[134] Thus, the researchers found evidence that physicians varied in their inclinations to apologize following a medical error. Additional studies exploring these tendencies in other populations, extending this research to actual defendant behavior, and examining the factors underlying these tendencies would be extremely useful.

In addition, we know very little about the factors that inhibit defendants from apologizing. As noted above, many potential defendants cite fear of litigation or liability as preventing them from apologizing.[135] Steve Landsman explores "juryphobia" as a source of these fears,[136] and Jonathan Cohen catalogues a host of reasons – including pride, denial, concern that the time for apology has passed, and loss aversion – why defendants and defense counsel may fail to consider apologies.[137] Recent research examining physicians' concerns about disclosing medical errors found that a variety of "factors beyond the malpractice environment influence physicians' willingness to disclose serious errors" – including attitudes about litigation, attitudes about patient safety, the culture of medicine, and the difficulty of apologizing.[138] Research

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[132] Gallagher et al., *supra* note 80, at 1003, 1004 and table 2.

[133] Thomas H. Gallagher et al., *Choosing Your Words Carefully: How Physicians Would Disclose Harmful Medical Errors to Patients*, 166 ARCHIVE INTERNAL MED. 1585 (2006).

[134] *Id.* at 1590, table 6.

[135] *See* Gallagher et al., *supra* note 80; Rae M. Lamb et al., *Hospital Disclosure Practices: Results of a National Study*, 22 HEALTH AFF. 73 (2003).

[136] See chapter by Stephan Landsman, this volume.

[137] Cohen, *Advising Clients to Apologize*, *supra* note 4, at 1023–24, 1042–46.

[138] Thomas H. Gallagher et al., *U.S. and Canadian Physicians' Attitudes and Experiences Regarding Disclosing Errors to Patients*, 166 ARCHIVES INTERNAL MED. 1603 (2006). *See also* Lauris C. Kaldjian et al., *An Empirically Derived Taxonomy of Factors Affecting Physicians'*

on how these various possibilities play out in the decision-making processes of defendants and their counsel would provide welcome insight into how apologies operate in litigation contexts.

Similarly, we know very little about how the evidentiary rules passed in recent years affect defendant decision making about whether to offer an apology and how such an apology is worded. Proponents often argue that providing evidentiary protection will allow defendants to apologize safely, concluding that more apologies will be offered as a consequence. But, as Nancy Berlinger has noted, "merely protecting apologies is not the same as encouraging them. Genuine apologies are never fun to make."[139] It remains to be seen how evidentiary protection for apologies will play out as one factor in the complex and emotional decisions defendants make about apologizing.

Moderators – Context Matters

While it is clear that apologies have the potential to increase the possibilities for settlement of a dispute, it is also clear that there are a number of variables that may moderate the effects of apologies. The nature and timing of the apology itself, the circumstances and conduct that led to the injury, the resulting harm, and other factors may all play a role in how an apology is understood and how it affects decision making. Many of these factors have particular import in the context of civil litigation.

Components of Apology

At a minimum, apologies are thought to include "acknowledgement of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done."[140] Certainly, not all statements that might commonly be termed "apologies" include all of or only these elements. For example, as noted, many "apology" statutes focus on protecting statements expressing sympathy and not statements that accept responsibility.[141] Conversely, some apologies may go beyond these minimum requirements to include assurance that the offender will forbear from similar conduct in the future or an offer to repair the harm caused by compensating the injured party.[142]

Willingness to Disclose Medical Errors, 21 J. Gen. Internal Med. 942 (2006) (describing factors that facilitate and factors that impede physician disclosures of medical error).

[139] Nancy Berlinger, After Harm: Medical Error and the Ethics of Forgiveness 62 (2005).

[140] Tavuchis, *supra* note 1, at 3.

[141] *See supra* note 7.

[142] *See*, *e.g.*, Goffman, *supra* note 20, at 113.

Steven Scher and John Darley examined the effects of including several different components of an apology. In addition to an expression of remorse, they examined the effects of admitting responsibility, promising future forbearance, and making an offer of repair.[143] Scher and Darley found that while offering some apology rather than none had the greatest impact, each of the additional components independently contributed to the effectiveness of the apology.[144] Similarly, Bruce Darby and Barry Schlenker found that children judged wrongdoers who offered more elaborate apologies more favorably, as better persons whom they liked more, blamed less, were more willing to forgive, and thought should be punished less.[145]

Responsibility

In particular, whether an apology consists simply of an expression of sympathy or also comprises an acknowledgment of responsibility for having caused harm may influence its effects. Consistent with this intuition, courts have sometimes made a distinction between these two types of statements.[146]

The empirical research also finds a distinction in the reactions to full, responsibility-accepting apologies and sympathy expressions. In a series of studies that I conducted, apologies that admitted responsibility for having caused the harm were judged more favorably than were mere expressions of sympathy.[147] Wrongdoers who offered apologies that accepted responsibility were viewed as having experienced greater regret, as being of higher moral character, as more likely to engage in careful conduct in the future, and as having behaved less badly.[148] Respondents also reported feeling greater sympathy and less anger toward wrongdoers who took responsibility for having caused the injuries.[149] Apologies that were merely expressions of sympathy had

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[143] Scher & Darley, *supra* note 11, at 132.

[144] *Id.* at 133. The effectiveness of the apology was measured by adults' judgments about the appropriateness of the wrongdoer's response, how bad he felt, the degree to which he was to blame and would be condemned, and how reliable and conscientious he was. *Id.* See also Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 11 (finding more positive reaction to more elaborate apologies than to more perfunctory apologies).

[145] Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 11. The authors compared reactions to no apology, a perfunctory "excuse me," an expression of remorse, and an apology with an offer of repair. *Id.* at 744.

[146] *See*, *e.g.*, *Denton v. Park Hotel*, 180 N.E.2d 70 (Mass. 1962) (finding that the statement that the defendant was "'sorry' the accident happened . . . was no more than an expression of sympathy by the defendant's manager . . . and had no probative value as an admission of responsibility or liability").

[147] Robbennolt, *Apologies and Legal Settlement*, *supra* note 4; Robbennolt, *Apologies and Settlement Levers*, *supra* note 4.

[148] *Id. See also* O'Malley & Greenberg, *supra* note 35, at 177 (wrongdoer who admitted responsibility perceived more positively).

[149] *Id.*

effects that were much more variable. Depending on the circumstances, these sympathy expressions had positive effects that were similar to (but smaller than) the effects of full apologies, did not produce different reactions than failure to apologize, or had negative effects on perceptions.[150]

Manfred Schmitt and his colleagues also examined several different apology components, including whether the apology included the admission of responsibility. They found that the more respondents believed that the wrongdoer had admitted fault, the more favorably they evaluated the wrongdoer's character.[151] Similarly, the more respondents believed that the offender had acknowledged the harm, the more favorably they evaluated the wrongdoer's character and the less negatively they responded to the wrong.[152] Admitting responsibility also influenced the ways in which the respondents interpreted other aspects of the apology—when the wrongdoer accepted responsibility for having caused the harm, respondents were more likely to believe that the wrongdoer had expressed remorse, acknowledged the harm, asked for pardon, or offered compensation.[153]

Forbearance

Whether or not the wrongdoer promises to refrain from engaging in similar behavior in the future may also influence the effectiveness of an apologetic expression. Many definitions of a complete apology include a commitment to improved behavior in the future.[154] Indeed, many claimants assert that one of the goals of pursuing litigation is to effectuate a change in the wrongdoer's future behavior.[155]

As noted above, Scher and Darley found that including an explicit promise to refrain from committing future offenses improves the perceived sufficiency of an apology.[156] But it seems that such a commitment may also be implicit in a

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[150] Robbennolt, *Apologies and Legal Settlement*, *supra* note 4; Robbennolt, *Apologies and Settlement Levers*, *supra* note 4.

[151] Manfred Schmitt et al., *Effects of Objective and Subjective Account Components on Forgiving*, 144 J. Soc. Psychol. 465, 480 (2004).

[152] *Id.* at 478–80.

[153] *Id.* at 477.

[154] *See*, *e.g.*, Goffman, *supra* note 20, at 113 ("espousal of the right way and an avowal henceforth to pursue that course"); Orenstein, *supra* note 4, at 239 ("give appropriate assurance that the act will not happen again"); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 Law & Soc'y Rev. 461, 469–70 (1986) (that "the act will not happen again").

[155] *See* Gallacher et al., *supra* note 80; Hickson et al., *supra* note 56; Vincent et al., *supra* note 85; Witman et al., *supra* note 82. *See also* Mazor et al., *supra* note 84 (finding that 99% of respondents would want to know that something was being done to make sure the error did not happen again).

[156] Scher & Darley, *supra* note 11.

sincerely offered apology, even in the absence of an explicit promise. Recall that a number of studies have found that a wrongdoer who apologizes is viewed as being less likely to reoffend.[157]

Compensation

It is also likely that whether the apology is accompanied by an offer of compensation or restitution will have an influence on how the apology is received. As with assurances of forbearance, many observers define complete apologies as including offers of repair.[158] The notion that offering to compensate the injured for the harm suffered is central to apology has been articulated by Bishop Desmond Tutu with this example: "If you take my pen and say you are sorry, but don't give me the pen back, nothing has happened."[159] Nancy Berlinger adapts this notion to the context of medical error: "If a physician apologizes to an injured patient, if a physician genuinely feels remorse for having injured the patient, if a physician acknowledges that the mistake was her fault, but there are no provisions for fairly compensating the patient for the cost of medical care and lost wages resulting from the injury and no provisions for helping this physician to avoid injuring other patients, nothing has happened."[160]

Empirical research supports the importance of offers of repair to the effectiveness of apologies. As noted above, Scher and Darley found that the effectiveness of an apology was improved when the apology included an offer of repair.[161] Similarly, Schmitt and his colleagues found that when respondents believed that the wrongdoer had offered compensation, they experienced less negative emotion, made more favorable assessments of the wrongdoer's

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[157] *See supra* notes 23–27.

[158] Goffman, *supra* note 20, at 113 (apology in "its fullest form" includes "the volunteering of restitution"); Orenstein, *supra* note 4, at 239 ("At their fullest, apologies should . . . compensate the injured party"); Wagatsuma & Rosett, *supra* note 154, at 469–70 ("the apologizer will compensate the injured party").

[159] Cited in Berlinger, *supra* note 139, at 61–62.

[160] *Id.* Berlinger concludes that in the context of medical error, "apology after medical harm is rarely, if ever, the only right thing to do: If physicians and hospitals want to say they're sorry, they must also find ways to give the pen back." *Id.* at 62.

[161] Scher & Darley, *supra* note 11, at 133. *See also* Darby & Schlenker, *Children's Reactions to Apologies*, *supra* note 11 (finding more positive reaction to more elaborate apologies than to more perfunctory apologies).

character, and were more likely to believe that the wrongdoer had admitted responsibility and harm, expressed remorse, and asked for pardon.[162]

Several recent studies provide additional evidence of the importance of restitution to the assessment of apologies. In one study, Jeanne Zechmeister and her colleagues manipulated both the presence or absence of an apology from the offender and whether or not the harm was removed.[163] They found that even when an apology was offered, failure also to remove the offense resulted in less conciliatory behavior and less forgiveness.[164] The researchers linked these negative impacts to a perceived lack of sincerity on the part of the offender: "These findings may indicate the effect of a 'false' or insincere apology, in which the experimenter apologized but did nothing to ameliorate the consequences of the offense."[165] In a similar study, William Bottom and his colleagues explored the effects of apologies and offers of compensation ("penance") on cooperation in a repeated play prisoners' dilemma game.[166] They found that while apologies improved cooperation, apologies accompanied by offers to sacrifice to allow greater payoff for the partner improved cooperation to a greater degree.[167]

Using a slightly different approach, Daniel Skarlicki and his colleagues conducted an experiment using the ultimatum game[168] to explore the effects of apologies.[169] Participants received an unfair proposal from their negotiation partner that was accompanied by either an apology, a polite message, or no message.[170] Unfair offers that were accompanied by these ex ante apologies and polite messages were perceived to be less fair and more manipulative, the offers were rejected more often, and the offerors were punished

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[162] Schmitt et al., *supra* note 151, at 477–80. Schmitt and his colleagues conclude that "negative emotion is most likely when the victim feels that a harm-doer wants to be forgiven without naming the damage that he or she has caused and without offering compensation for it." *Id.* at 483. *See also* Martha Minow, Between Vengeance and Forgiveness, 117 (1998) (concluding that "[i]f unaccompanied by direct and immediate action, such as monetary reparations, official apologies risk seeming meaningless").

[163] Jeanne S. Zechmeister, *Don't Apologize Unless You Mean It: A Laboratory Investigation of Forgiveness and Retaliation*, 23 J. Soc. & Clinical Psychol. 532 (2004).

[164] *Id.* at 548, 551.

[165] *Id.* at 548. *See infra* notes 211–20 (for discussion of importance of sincerity).

[166] William P. Bottom et al., *When Talk is Not Cheap: Substantive Penance and Expressions of Intent in Rebuilding Cooperation*, 13 Org. Sci. 497 (2002).

[167] *Id.* at 506–07.

[168] In the ultimatum game, one player is provided with a sum of money to divide between herself and a second player. The first player is to propose a division of the money that the second player is to accept or decline. If the proposed division is accepted, the players receive the amounts indicated in the proposal. On the other hand, if the proposed division is rejected, neither player receives anything. *See* Alvin E. Roth, *Bargaining Experiments*, in The Handbook of Experimental Economics 253, 282–302 (John H. Kagel & Alvin E. Roth, eds., 1995); Richard H. Thaler, The Winner's Curse: Paradoxes and Anomalies of Economic Life 21–35 (1992).

[169] Skarlicki et al., *supra* note 47, at 336.

[170] *Id.*

more than those offers that were made with no comment.[171] The authors posit that these negative effects may have resulted from "inconsistencies between outcomes (what is offered) and processes (interpersonal treatment)."[172] In other words, the apology didn't ring true given the unfair substantive outcome with which it was paired.[173]

Severity of Injury

In addition to the components of the apology itself, features of the injury situation may also influence the impact of an apology.[174] For instance, several studies suggest that the degree of harm suffered by the victim influences the degree to which a given apology is accepted or effective. Ken-ichi Ohbuchi and his colleagues found that the impact of the same apology differed depending on the severity of the harm suffered. While participants formed a better impression of and expected less verbal aggression to be directed toward an offender who apologized than one who did not, these effects were smaller when the injury was more severe.[175] Similarly, Mark Bennett and Deborah Earwaker found that participants were more likely to reject an apology that was offered following severe property damage than they were to reject the same apology following less severe damage.[176] In addition, the apology was more successful in reducing participants' anger when the injury was minor than it was when the injury was more severe.[177]

In a series of studies of apologies and legal settlement, I found that apologies that express sympathy, but not responsibility, are particularly affected by the severity of the injury at issue. Specifically, an expression of sympathy was viewed as more sufficient than no apology when the injury to the victim was relatively minor than when the injury was more severe.[178] In addition, when a wrongdoer merely expressed sympathy, but not responsibility, for an incident that resulted in a severe injury, the wrongdoer was viewed as more responsible

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[171] *Id.* at 336

[172] *Id.* "For those who would try to con someone with honey-sweet words to offset potential harm, the message is clear: Sweet talking while providing unfavorable outcomes might not only fail to achieve perceived fairness, but also motivate more unfairness and hostility than if such a sugar-coating attempt had been absent." *Id.* at 338.

[173] The timing of the apologies (i.e., at the time of the offer) is also relevant. *See infra* § IV D.

[174] *See generally* Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 Ariz. St. L.J. 371, 371 (2006) (noting that "[w]hat works for small wrongs is likely to be quite unacceptable for wrongs of greater magnitude").

[175] Ohbuchi et al., *supra* note 12.

[176] Bennett & Earwaker, *supra* note 15.

[177] *Id.*

[178] Robbennolt, *Apologies and Legal Settlement*, *supra* note 4, at 498–99.

for having caused the harm[179] and a monetary offer from the wrongdoer was seen as less likely to make up for the injury.[180]

Perhaps intuiting these types of effects, wrongdoers may adjust their apologies in light of the severity of the injury caused. Schlenker and Darby have found that offenders tend to offer more complex and elaborate apologies – apologies that include more components – following more severe injuries to the victim than when the victim's injuries are relatively minor.[181]

Evidence of Responsibility

The impact of an apology on decision making may vary depending on the degree to which it is already apparent from other evidence that the apologizer has caused the harm. Where it is clear that an actor is responsible for causing harm, an apology that accepts responsibility may be particularly necessary and may pose relatively little additional risk. As Cohen notes: "[w]here one's culpability can readily be proved by independent evidence other than an apology, admitting one's fault when making an apology will also have little impact on the plaintiff's ability to prove his case, for he already can."[182] But failing to accept responsibility in similar circumstances "can be worse than saying nothing at all. It's insulting to merely express sympathy or benevolence when you should be admitting your fault."[183] On the other hand, where culpability is not clear, an apology that takes responsibility may remove any ambiguity and change interpretations of the incident in the direction of more blame directed at the apologizer. When circumstances are such that it is not clear what has happened, an expression of sympathy, without acceptance of fault, may be more acceptable.[184]

Peter Kim and his colleagues compared the effects of apologies under circumstances in which either evidence of wrongdoing or evidence of innocence later became available.[185] They found that when evidence of wrongdoing became available, the accused who had apologized was evaluated more favorably than

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[179] *Id.* (compared to either a wrongdoer who offered no apology or a wrongdoer who offered a responsibility-accepting apology).

[180] *Id.* (compared to offers from wrongdoers who offered no apology or who offered responsibility-accepting apologies).

[181] Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44Soc. Psychol. Q. 271 (1981).

[182] Cohen, *Advising Clients to Apologize*, *supra* note 4, at 1028–29.

[183] Cohen, *Legislating Apology*, *supra* note 4, at 838.

[184] Cohen, *Advising Clients to Apologize*, *supra* note 4, at 1048 ("Expressing one's sympathy without expressing fault or remorse can be a very useful step in those many cases where the extent of each party's fault is unclear.").

[185] Peter H. Kim et al., *Removing the Shadow of Suspicion: The Effects of Apology Versus Denial for Repairing Competence- Versus Integrity-Based Trust Violations*, 89 J. Applied Psychol. 104 (2004).

the accused who had denied responsibility.[186] Conversely, they found that when evidence of innocence became available, the accused who had apologized was evaluated less favorably than the accused who denied responsibility.[187]

In several studies of reactions to apologies in civil cases, I examined the effects of varying the independent evidence of wrongdoer fault.[188] In one study, I found that when it was clear that the wrongdoer was at fault, but the wrongdoer only offered sympathy but no acceptance of responsibility, participants reported less sympathy for the wrongdoer, predicted less care in the future, and found the apology to be no more sufficient than no apology.[189] In contrast, where the wrongdoer was less clearly responsible, an expression of sympathy was perceived as more sufficient than no apology and the wrongdoer's conduct was viewed as being less negative.[190] In a second, similar study, I found that participants assessed apologies more favorably when the offender's fault was more ambiguous than when it was relatively clear.[191] When offender fault was relatively clear, participants who received a full apology made more positive evaluations than did participants who were told they had received only a partial apology, who, in turn, made more positive evaluations than did participants who received no apology.[192] Similarly, the degree of the offender's fault also moderated the influence of the type of apology on participants' evaluations.[193] When offender fault was more ambiguous,[194] participants who received a partial apology made more positive evaluations than did participants who received no apology.[195] It seems that accepting responsibility is less necessary when fault is uncertain.

Timing

The timing of an apology is also thought to be important to its effectiveness.[196] However, the effects of timing on the interpretation of apologies may be

[186] *Id.* at 113.

[187] *Id.*

[188] Robbennolt, *Apologies and Legal Settlement*, *supra* note 4; Robbennolt, *Apologies and Settlement Levers*, *supra* note 4.

[189] Robbennolt, *Apologies and Legal Settlement*, *supra* note 4.

[190] *Id.*

[191] Robbennolt, *Apologies and Settlement Levers*, *supra* note 4.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* Participants who received a full apology also made evaluations that were somewhat more positive than those who received no apology, but this difference did not reach traditional levels of statistical significance. *Id.*

[196] *See* Aaron Lazare, On Apology 170–79 (2004); Shuman, *supra* note 4, at 186 (noting that "the more time that passes after the conduct at issue, the more reason to doubt the sincerity of an apology"). *See also* Mazor et al., *supra* note 84 (finding that 99% of patients wanted to be told about a medical error as soon as it was discovered).

complex. On one hand, an apology offered quickly after an injury has occurred may prevent an injury from developing into a grievance or conflict.[197] The sociologist Nicholas Tavuchis argues that there is "a critical, if variable, period following a transgression after which the potential efficacy of an apology diminishes or is nullified."[198] Consistent with these predictions, Edward Tomlinson and his colleagues found that willingness to reconcile was greater when an offender's "restorative action" came quickly after the breach than when it was delayed.[199]

On the other hand, there is also a sense that apologies may ring hollow if they are offered too quickly and without reflection.[200] Accordingly to Tavuchis, "[i]f . . . one of the essential functions of an apology is to retrace the offense and convert it into an occasion for sorrow, expiation, and forgiveness, then it cannot fully accomplish its work if it is offered too early or too late."[201] In the legal context, Jonathan Cohen notes the tension between the sense that it might be beneficial to apologize soon after an injury occurs in order to "subtract the insult from the injury" and the legal "safety" of apologizing later once negotiations have begun.[202]

Cynthia McPherson Frantz and Courtney Bennigson argue that one of the keys to an effective apology is to allow sufficient time for an exchange in which the injured person expresses his or her concerns and the offender expresses an understanding of those concerns.[203] In one of the few empirical studies that has explored the effects of the timing of an apology, Frantz and Bennigson asked participants to recall a recent conflict, to indicate whether and in what order several events had occurred in their conflict, to indicate whether they had been able to voice their concerns and felt understood by the other party to the conflict, and to report how satisfied they were with the ultimate resolution of the conflict. Frantz and Bennigson found that there was greater satisfaction with the resolution of conflicts when apologies came later in the process than when apologies were offered earlier. Importantly, disputants who received an apology later in the process tended to experience a greater opportunity for voice

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[197] *See* Felstiner et al., *supra* note 45

[198] Tavuchis, *supra* note 1, at 87.

[199] Edward C. Tomlinson et al., *The Road to Reconciliation: Antecedents of Victim Willingness to Reconcile Following a Broken Promise*, 30 J. Management 165 179–80 (2004).

[200] *See* O'Hara & Yarn, *supra* note 4; Shuman, *supra* note 4, at 186 (noting that "[a]n apology before the investigation is completed may seem hollow and ritualistic, trivializing the wrong").

[201] Tavuchis, *supra* note 1, at 88. Note also the likely ineffectiveness of apologies that are offered prior to the injurious behavior. *See* Lazare, *supra* note 196, at 171–72; Skarlicki et al., *supra* note 47 (experimental study using the ultimatum game finding that ex ante apologies were not effective).

[202] Cohen, *Advising Clients to Apologize*, *supra* note 4, at 1049.

[203] Cynthia McPherson Frantz & Courtney Bennigson, *Better Late Than Early: The Influence of Timing on Apology Effectiveness*, 41 J. Experimental Soc. Psychol. 201 (2005).

and understanding.[204] In other words, victims valued the chance to tell their stories and *then* receive apologies more highly than they valued obtaining immediate contrition from the offender.

In a second study, Frantz and Bennigson explored this phenomenon experimentally. They asked participants to assume the role of an injured party in a hypothetical conflict and to indicate to what degree they would experience several emotions both before and after a conversation with the offender. Participants who received an apology later in this conversation experienced more positive emotional change than did those who received an apology at the beginning of the conversation or those who did not receive an apology in the conversation at all.[205] Frantz and Bennigson conclude that "[a]pologies that are offered too quickly may not be effective, in part because the victim still feels unheard, and is not convinced that the offender knows what he or she did wrong, or why it was hurtful, or how hurtful it was."[206]

Evidentiary Statutes

Several commentators have argued that protecting apologies through the rules of evidence will drain apologies of their moral value. Lee Taft, articulating this view, argues that

> The law recognizes that an apology, when authentically and freely made, is an admission; it is an unequivocal statement of wrongdoing. The law permits such an acknowledgement to enter the legal process as a way to allow the performer of apology to experience the full consequences of the wrongful act. An apology made in this context, with full knowledge of the legal ramifications, is much more freighted than an apology made in a purely social context.[207]

In contrast, to disconnect the apology from its consequences is, in this view, to diminish its strength.

Several studies have, thus far, failed to find that recipients discount apologies made in the context of legal rules protecting the apologies from admissibility.[208] There is, however, some evidence that drawing attention to or explaining a lack of evidentiary protection – that is, making the legal risks of an apology salient – may provide a situational explanation for a failure to apologize completely. In one study, claimants who were told that the legal rules did not protect a party's apology made more positive assessments of offenders who did not apologize or who offered only a partial apology.[209] Thus, the effects of such statutes on how

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[204] *Id*. at 204.

[205] *Id*. at 205

[206] *Id*. at 202.

[207] Taft, *supra* note 4, at 1157.

[208] Robbennolt, *Apologies and Legal Settlement*, *supra* note 4; Robbennolt, *Apologies and Settlement Levers*, *supra* note 4.

[209] Robbennolt, *Apologies and Settlement Levers*, *supra* note 4.

apologies will be interpreted by claimants may be complex. Moreover, as noted earlier, there has been no research on how such statutes might affect the decision making of defendants or potential defendants.[210]

Sincerity

To the extent that an apology is perceived to be offered sincerely, it is more likely to be accepted and more likely to be effective. With regard to excuses, studies have found that the sincerity of the excuse is an important determinant of how satisfying the excuse is.[211] Similarly, despite an apology script that endorses apology acceptance,[212] the perceived sincerity of an apology is likely to be a key factor in determining reactions to apologies. As Dale Miller has argued, "[w]hen victims perceive apologies to be insincere and designed simply to "cool them out," they often react with more rather than less indignation."[213]

In one study examining responses to a business dispute, Tomlinson and colleagues found that an apology that was described as "sincere" resulted in a greater willingness to reconcile than did an apology that was not.[214] In addition, in the study of apologies in the context of the ultimatum game described above, unfair offers that were accompanied by apologies were perceived as more manipulative and were more likely to be rejected than were the same offers made unapologetically.[215] The authors suggest that when apologies and other social accounts are thought to be manipulative—i.e., insincere—they will not have the same beneficial effects as sincere accounts: "Manipulative intention conveys a lack of respect as its interpersonal message, whereas polite or apologetic accounts deemed sincere would have a greater chance of implying the transmitter's concern about the account receiver's feelings."[216]

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[210] *See supra* note 139.

[211] See review of studies in Greenberg, *supra* note 20, at 130. *See also* Sim B. Sitkin & Robert J. Bies, *Social Accounts in Conflict Situations: Using Explanation to Manage Conflict*, 46 Hum. Rev. 349 (1993).

[212] *See supra* note 75.

[213] Miller, *supra* note 48, at 538. *See also* Robert A. Baron, *Attributions and Organizational Conflict: The Mediating Role of Apparent Sincerity*, 69 Org. Behav. Hum. Decision Processes 272 (1988); Erving Goffman, *On Cooling the Mark Out*, 15 Psychiatry 451 (1952). "It also should be added that people may strive to attain the benefits of being recognized as fair, but without actually behaving fairly. Such self-promotions of fairness lacking in substance may be referred to as *hollow justice*. Any mere "veneer of fairness" may function as effectively as any more deeply rooted concern for moral righteousness as long as it is not perceived to be manipulative. A perceived intentional "using" of fairness as a tool of manipulation is likely to backfire when such insincerity is suspected." Greenberg, *supra* note 20, at 139.

[214] Tomlinson et al., *supra* note 199, at 179–80. *See also* Allan, *supra* note 17 (finding that belief that offender was "truly sorry" predicted forgiveness).

[215] Skarlicki et al., *supra* note 47, at 336.

[216] *Id.* at 336–37 (2004) ("social accounts were not effective in reducing the unfairness of a low offer when they were seen as manipulative").

It may be the case that many of the factors that moderate an apology's effectiveness function, at least in part, by altering the perceived sincerity (or lack thereof) of the apology. Many of the variables that influence reactions to apologies described so far – e.g., promises to forbear, acceptance of responsibility, offers to compensate, timing, and so on – likely operate as signals as to an apology's sincerity. For example, apologies that accept responsibility for having caused the harm are perceived to be more sincere than are apologies that only express sympathy.[217]

The importance of sincerity to the effectiveness of apology has significant implications for apologies offered in the legal context. As Jonathan Cohen notes, "[a]pology should be rooted in responsibility and remorse rather than in economics and strategy. It is the ethical response to injuring another, irrespective of the economic consequences."[218] However, many are concerned that injurers will offer carefully-worded apologies as calculated legal strategies, divorced from a feeling of responsibility and remorse.[219] About these strategic apologies, Ed Dauer remarks, "[o]n the one hand, if practiced apologizing is effective, it will be so only because it satisfies some need the recipients of the apologies actually have. On the other hand, there is the nagging thought that insincerity camouflaged as contrition is, well, insincere."[220] Additional research into the abilities of injured parties to detect insincere apologies and into the ways in which injured parties respond to apologies of differing levels of sincerity may shed some light on this tension.

Conclusion

It is clear from the empirical research that has been done so far that apologies have some role to play in the resolution of civil disputes. Apologies appear to be able to influence parties' construal of the events at issue and their perceptions of the offender in ways that are likely to facilitate settlement. In addition, there appear to be circumstances under which apologies influence plaintiffs' decisions about whether to seek counsel and how to approach and respond to offers of settlement. However, it is also clear that the effects of apologies on litigation decisions are complex—involving a series of disparate, but connected, decisions made by a range of legal actors, and depending on a host of contextual factors. Under some conditions the effects of apologies on plaintiffs' decision making

[217] Robbennolt, *Apologies and Settlement Levers*, *supra* note 4, at 359; Robbennolt, *Apologies and Legal Settlement*, *supra* note 4 (unpublished data).

[218] Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 Fordham Urb. L.J. 1447, 1459 (2000).

[219] *See*, *e.g*., Taft, *supra* note 4.

[220] Edward A. Dauer, *Apology in the Aftermath of Injury: Colorado's "I'm Sorry" Law*, 34-Apr Colo. Law. 47, 51 (2005).

seem less likely to influence settlement. Moreover, the decisions of defendants about whether and how to apologize and effects of apologies on juror decision making are even less well understood. Therefore, there is much additional research still to be done to untangle the conditions under which apologies have effects on litigation decisions and the nature of those effects.

The existing research has identified a variety of factors that moderate the effects of apologies on decision making. More research is needed to understand the nuances and boundary conditions under which these factors operate and there are surely additional factors that ought to be examined. In addition, much, though not all, of the research that has been done in the legal context has focused on cases involving medical error.[221] Understanding the role of apologies in medical cases may have particular import given the intimate nature of the relationship between physician and patient, the trust involved in that relationship, and medicine's ethic of care.[222] However, it would also be valuable to understand the similarities and differences in how apologies function across diverse types of cases, facts, and relationships. For example, what are the distinctions among different types of cases–such as those involving medical error, automobile accidents, contracts, corporate law, or civil rights[223]–that might alter the ways in which apologies operate within those cases?

The existing research has revealed much useful information about the ways in which apologies influence litigation decision making. It should be clear that there are many more promising avenues of inquiry to be pursued.

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[221] See review in Robbennolt, *supra* note 2.

[222] *See* May & Stengel, *supra* note 54, at 110 ("[T]he patient/doctor connection is unique in the 'personal' bond that links the parties. The doctor is dealing with the patient's body and health and may literally hold the life of the patient in his/her hands."); C.A. Vincent & A. Coulter, *Patient Safety: What About the Patient?* 11 QUALITY SAFE HEALTH CARE 76, 78 (2002) (noting that "patients have been harmed, unintentionally, by people in whom they placed considerable trust" and that then "they are often cared for by the same professions, and perhaps the same people, as those involved in the original injury").

[223] For discussion of apologies in the civil rights context, see Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, SSRN, http://ssrn.com/abstract=924500 (2006).

“Can we Talk?”
Therapeutic Jurisprudence, Restorative Justice, and Tort Litigation

Edie Greene

> *What we are doing in our legal system is not working. Clients are unhappy with their lawyers, the system, and the results. . .Nonlegal dispute resolution mechanisms in society by and large have failed, and parties still depend on litigation processes to resolve conflict. As a result, society in general is suffering from the effects of the law’s overly adversarial, other-blaming, position-taking, and hostile approach to conflict resolution.*
> *(Daicoff, 2003)*

The tort system engenders fervent debate. Some believe that it is not working properly because it is an expensive, uncertain, and inefficient means of resolving disputes (Sugarman, 2000; Sunstein, Hastie, Payne, Schkade, & Viscusi, 2002; see also Smith, 1987). The present chapter bypasses this familiar critique. Instead, it addresses another, less-frequently heard concern about the tort system: that it is no place one would want to be. More specifically, I examine the putative harms (and benefits) experienced by people who use the negligence-based tort litigation system to settle their disputes and do so through the lenses of two, relatively new approaches to the practice of law: therapeutic jurisprudence and restorative justice.

One perspective on the experience of litigation is that plaintiffs and defendants alike are traumatized by the process; that continuing contentiousness surrounding every aspect of a case (including claiming, insurance adjusting, negotiating, settling, and, if all else fails—going to trial) deters or delays healing and restoration in injured people and causes psychological and physical distress in injurers. Another possibility is that tort litigation actually empowers litigants and dignifies the process of reaching accord on issues of wrongdoing. Whatever the effects, few would disagree that tort litigation can be hard-edged and, on occasion, bitterly adversarial. In this chapter, I examine the possibility that the ideals and perspectives of therapeutic jurisprudence and restorative justice, when applied to the tort system, can move us beyond a zero-sum approach (i.e., “I win and you lose”) and focus our attention on ways to enhance the experience of litigation and dispute resolution for all involved parties.

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These relatively novel approaches share several goals that are largely absent from the traditional model of tort litigation. First, they recognize that receipt of money—the traditional form of recompense in tort cases—is not the only objective of people who enter into tort litigation and that people's emotions, needs, morals, and other intangible desires can also explain their decisions to sue. Second, they seek to understand litigants' well-being by considering not just the economic impact of litigation, but also the less tangible effects of legal processes on litigants' emotional and physical health, moral development, and social integration (Daicoff, 2003). Finally, they focus on a means of collaborative and non-adversarial dispute resolution that "leaves the parties in better—or at least no worse—shape, overall, than they were at the outset" (Daicoff, 2003). I ask whether these ideals might be useful in assisting people to resolve their tort-based claims.

The scope of this chapter is as follows: First, I describe some of the tenets and assumptions of therapeutic jurisprudence—the approach that focuses on laws' healing and, in some cases, harming potential. This will set the stage for examining empirical data on the psychological and physical effects on plaintiffs and defendants of entering into (or being entered into) tort litigation. Here, I address the question "Is the tort system any place that one would want to be?" Forecasting the answer (a qualified "no"), I examine the viability of restorative justice principles in alternative dispute resolution contexts for enhancing the well-being of tort litigants.

Therapeutic Jurisprudence: Description and Prescription

Formulated in the early 1990s, therapeutic jurisprudence has served as an approach to legal policy that involves evaluating the therapeutic and countertherapeutic consequences of law for individuals and reforms aimed at facilitating the former and minimizing the latter. It is "a way to look beyond the law's façade and into its actual impact on the mental and physical health of the governed" (Hensel, 2005, p. 163). Originally developed to address issues in mental health law, it has now been applied to such diverse areas of law as family, juvenile, probate, criminal, health, disability, employment, commercial, and torts and has spawned hundreds of empirical studies and commentaries by law professors, judges, criminologists, sociologists, philosophers, and psychologists (e.g., Wexler & Winick, 1996).

Therapeutic jurisprudence does not supersede or devalue the substantive goals of the law (e.g., in tort, generally to deter and to compensate) but rather, it stands beside these objectives and assesses their impact on the physical and emotional functioning of people whose lives they touch. In fact, Shuman (1993) suggests that therapeutic jurisprudence may be particularly useful as a way to evaluate tort law issues because "tort law's agenda for both deterrence and

compensation are therapeutically driven—injury avoidance and restoration of the injured” (p. 744).

Although the approach of therapeutic jurisprudence is obviously normative (i.e., it assumes that the law *should* encourage therapeutic, and discourage counter-therapeutic effects), it also has descriptive and prescriptive components. It describes, based on empirical analysis, the effects of laws, legal procedures, and legal actors on the well-being of people, and it prescribes reforms that research findings suggest could be implemented to enhance people’s experiences with the law. For example, descriptive work has identified a number of “psycholegal soft spots,” emotional issues in the litigation process that have the potential for producing anger, anxiety, stress, or hurtful feelings, and that should be taken into account when making decisions about how to use the law (Stolle, Wexler, Winick, & Dauer, 1997). Stolle et al. provide the example of the emotional issues raised in elder law when an inheritance is placed in trust for one child and provided outright to another. Examples from tort law are plainly seen as well, including the distress that can arise when using a public forum to resolve injury-related issues of an intensely private nature, the stress of being subjected to forceful questioning by lawyers skilled at raising doubts about intangible injuries (see, e.g., the chapter by Hans on whiplash injuries), and the emotional costs associated with extending the distress over the years that may be required to reach a legal resolution. Prescriptions for reform to enhance the law’s healing potential might include the use of private dispute resolution mechanisms that sidestep involvement with the formal court system and that have the potential to reduce time and costs (Hensler, 2003a).

Therapeutic and Counter-therapeutic Effects of Tort Litigation on Claimants/Plaintiffs

Based on the distinction between therapeutic and counter-therapeutic effects of laws and of legal actions, we can ask more pointedly about the effects of becoming involved in tort litigation from the vantage point of both the injured and the injurer. Some evidence of therapeutic benefit to tort litigants comes from empirical research on procedural justice, and in particular, from the relatively small literature on the effects of involvement in the litigation process. It suggests, in broad strokes, that people pursue tort litigation as a way to be heard and to have their claims dignified by a court of law. They perceive the results to be fairer and are more satisfied with the outcome when they feel they were treated respectfully and when they deemed the procedures used to be fair (Lind et al., 1990). Establishing that one’s case is worthy of judicial attention may provide validation and satisfaction to some claimants (Lind et al., 1990; Tyler, 1996). Finally, litigants may appreciate the opportunity to have their cases decided by those whom they trust to be neutral and unbiased and to take adequate time to decide their claims, namely juries and judges (Shuman, 2000b).

Although these findings provide some insight into the reasons that people opt to litigate and the values that they hope to advance through the experience, we know little about people's more nuanced, emotional reactions to the experiences of tort litigation: *Do* claimants feel empowered by the process? Are they able to be heard? Do they feel validated by the courts? Are they able to force injurers to provide adequate explanations of wrongdoing? Do they feel that juries and judges can act as neutral arbiters of the facts and deliver reasoned verdicts? Are claimants relieved when the dispute is resolved? Does resolution reduce their anger and sense of being wronged? Does the award of monetary damages satisfy their needs? Does it bring closure? As of yet, we have scant data and little systematic way to answer these profoundly important questions. Until we do, we can only speculate about the extent to which adversarial procedures can enhance the well-being of people who opt to litigate.

Also, as far as I know, no data exist on any direct therapeutic effects to defendants of involvement in tort cases, although one could reason that an opportunity to "be heard" might confer benefits equally on plaintiffs and defendants and, to the extent that tort mechanisms allow, defendants can profit psychologically from the acceptance of responsibility for harm. (Accepting responsibility can sometimes absolve defendants of their wrongdoing and forms an essential component of restorative justice about which I have more to say later.). Finally, being vindicated by others has obvious therapeutic value.

One could reasonably argue, then, that the process of litigating a tort claim might *not* reduce feelings of anger and hurt, that the exchange of money might *not* satisfy a claimant's need for explanation and closure, and that lengthy involvement in an adversarial process might *not* improve one's physical or emotional well-being. Indeed, there is reason to believe that tort litigation can have a variety of counter-therapeutic effects on litigants. Consider, for example, the possibility that litigation can prolong people's suffering, particularly among individuals whose claims include an element of emotional distress: ". . . throughout the entire process [of litigation] the victim must relive the event, re-experience the pain, and in general, remain almost frozen in time until the claim is resolved" (Hepler, 1993, p. 101). Counter-therapeutic effects of litigation come to light in reports linking litigation processes (e.g., compensation-seeking) to decrements in physical health and mental well-being in litigants (e.g., Binder & Rohling, 1996; Feinstein, Ouchteriony, Somerville, & Jardine, 2001).

The notion of a "secondary gain" arises in this context (Shuman, 2000a). Secondary gain is any advantage (e.g., of a financial nature) that accrues after an illness or injury and that either contributes to or perpetuates the illness or injury. An implication of secondary gain theory is that a patient will exaggerate his or her injury either consciously or unconsciously in order to increase the opportunity for gain. Indeed, if the objective of a tort action is to maximize the damages awarded, then plaintiffs can advance that objective by showing that they were, are, and will continue to be detrimentally affected by the defendant's actions. (There is little evidence that symptoms are consciously exaggerated, but

they might still be unconsciously exaggerated [Mendelson, 1986].) As Shuman (2000a) describes this theory:

> . . . litigation provides an incentive not to get better. Litigation draws claimants into a blaming struggle in which they are encouraged to place responsibility for their injury on others and exacerbate their symptoms and complaints ... ending the litigation as quickly as possible removes any encouragement for the claimant to play the sick role and encourages the claimant to rejoin society as a productive member (Shuman, 2000a, p. 887).

There is controversy about the viability of secondary gain theory and mixed support for the idea that a claimant's *physical health* improves after the receipt of compensation (Shuman, 2000a; Weighill, 1983). Some studies (e.g., Culpan & Taylor, 1973) have shown that people's health improves when litigation ends and the financial incentive for prolonging ill health is removed, and other studies (e.g., Mayou, 1992) have shown that symptoms persist long after litigation has ended. Individual differences probably explain some of the mixed results of litigation effects. The interplay between health (particularly physical health) and litigation is undoubtedly complex, and responses to litigation vary significantly as a function of personality variables and social support (Shuman, 2000a).

There is less controversy about the negative *psychological* consequences of involvement in litigation, particularly in cases of wrongful death (Shuman, 2000b; Strasburger, 1999). Consider a hypothetical parent who files a wrongful death case against the driver who crashed a car in which his or her child was a passenger. According to grief theorists, this parent must work through various stages of reaction to loss of a child, moving from acknowledgement of the loss, to memorializing the decedent, and eventually to separation from the deceased and to some form of acceptance and future-directedness (Bonanno & Kaltman, 1999). By many accounts (e.g., Rosenblatt, 1983; Weissman, 1991), litigation processes would tend to prolong this parent's bereavement period.

Studies that examine the effects of litigation have difficulty drawing causal conclusions. Because researchers cannot use an experimental methodology that assigns some injuries to resolution by litigation and other injuries to alternative means of resolution (e.g., does time really heal all wounds?), we cannot know with certainty what causes any of these effects. If litigation is associated with prolonged and more severe symptoms experienced by people who opt to sue, to what extent is the litigation process itself to blame, and to what extent can the lack of healing be attributed to the severity of the symptoms, personality factors, or the lack of social support?

Fortunately, newer empirical studies that use more sophisticated methodological techniques can begin to provide an answer. These studies are of two sorts: individual clinical studies that compare litigants to non-litigants or post-litigants while controlling for injury severity, extent of psychological distress, and demographic, personality and other psychosocial variables; and large-scale meta-analyses that combine the results of several individual clinical studies and that allow examination of general trends. What they suggest is that

involvement in on-going litigation affects one's experience of and recovery from a painful or chronic injury or disorder.

One clinical study examined neurobehavioral and cognitive symptoms in 100 patients who had suffered mild traumatic brain injury an average of 6 weeks prior to testing (Feinstein et al., 2001). Approximately 30% of the sample had pending litigation. There were no differences between litigants and non-litigants on demographic characteristics, ratings of injury severity, premorbid risk factors for poor outcome or cognitive functioning. However, the litigants were significantly more depressed and more anxious than non-litigants and had greater social dysfunction and lower scores on a head injury outcome measure. Litigation was also associated with increased psychological distress. Swartzman, Teasell, Shapiro, and McDermid (1996) compared current litigants' and post-litigants' physical and psychosocial adjustment using a sample of people who sustained whiplash injuries in a car accident. There were no differences in demographic characteristics, employment status, or psychological distress between the two groups, but even controlling for injury severity and length of time since the accident, litigants reported more chronic pain than post-litigants.

The meta-analyses also show powerful associations between litigation or compensation-seeking status and recovery from injuries and surgeries. Binder and Rohling (1996) evaluated the strength of the association between financial claims or incentives and neuropsychological test results and symptoms across 18 studies involving 2,353 patients suffering from closed-head injuries. The overall effect size, .47, was significantly different from zero, indicating an association between the presence of financial claiming and more serious symptoms post-injury.

Rohling, Binder, and Langhinrischsen-Rohling (1995) conducted a similar kind of analysis combining data from 32 individual studies (7,651 patients) to examine the relationship between compensation status and people's experiences of pain. Their overall effect size of .60 showed an association between receipt of financial compensation and greater experience of pain along with reduced treatment effectiveness. They attributed this result to the likelihood that compensation results in an increase in pain perception and a reduction in the ability to be aided by medical and psychological treatment. They dismissed the possibility that increased pain results in compensation, noting that all of the studies from which their findings were drawn used quasi-experimental designs that involved matched control groups of noncompensated patients.

Finally, Harris, Mulford, Solomon, van Gelder, and Young (2005) performed a meta-analysis to investigate the relationship between compensation status and recovery from surgery. They used data from 129 studies (n = 20,498 patients) in which surgical interventions were performed and compensation-seeking status was reported. Outcomes were measured by region-specific outcome scores (e.g., Low Back Outcome Score); general functioning, health outcome, and pain scores; and patient satisfaction. Results were compared according to compensation-seeking status and showed a powerful association between compensation status and poor outcomes post-surgically. In fact, 123 of the 129

studies found this relationship. Although none of these studies demonstrates a *causative* role of litigation status on health outcomes, the strong and consistent associations between litigation or compensation-seeking status on the one hand, and poor outcomes or impaired physical and mental health on the other, are apparently important clinically (Harris et al., 2005) and suggest counter-therapeutic effects of pursuing litigation. People seem to stay sick when there is a financial incentive to do so.

Counter-therapeutic Effects of Tort Litigation on Defendants

Being involved in litigation is surely a stressful event: it costs money; takes time away from work, family, and recreation; breeds ill will; and, as I have shown, is associated with lingering medical problems and psychological dysfunction in claimants and plaintiffs. Although many of these consequences can adhere to plaintiff and defendant alike, the latter may be especially likely to experience stress because they are brought into their roles involuntarily. Research has identified two consequences for defendants of involvement in litigation; both point to psychological (and some physical) distress and dysfunction.

Professor Sara Charles and her colleagues compared the psychological and physical reactions in physicians who had been sued for malpractice with responses of similarly situated physicians who had not been sued (Charles, Wilbert, & Franke, 1985; Charles, Wilbert, & Kennedy, 1984). They found that the former group showed elevations in what investigators termed "depressive symptom clusters"—insomnia, headaches, difficulty concentrating, suicidal ideation, depressed mood, irritability, and increased alcohol use. So despite the fact that physicians (like most tort defendants) are insured and that a monetary judgment against them would have little impact on their personal financial well-being, the experience of being sued for malpractice (including symptoms such as decreased sleep and increased alcohol use) could have potentially negative effects on patient care (Charles, Warnecke, & Wilbert, 1987).

Professor Jonathan Cohen has articulated a second means by which injurers (though not necessarily defendants) are affected by the experience of causing harm. When wrongdoers fail to take responsibility, especially when they are at fault, they have, according to Cohen, performed an act of profound moral regression, and both psychological and spiritual consequences result (Cohen, 2005). Cohen speculates that these include feelings of internal shame, guilt, and diminished self-esteem. Indeed, some research has shown that when people take responsibility and seek forgiveness for transgressions, they experience a reduction in feelings of sadness, guilt and shame (Witvliet, Ludwig, & Bauer, 2002). Cohen points to well-known examples of situations where failure to accept responsibility not only increased litigation costs, but caused other problems to worsen significantly (e.g., the clergy sexual abuse scandal in the Catholic Church).

Why Litigation can be Counter-therapeutic

I can identify three factors that seem related to the counter-therapeutic nature of involvement in litigation; all of them, in some sense, explained by the rigid structure of tort processes. First, there is often a long delay between the time that an accident or injury occurred and a tort claim is finally resolved. Data from the Bureau of Justice Statistics show that the average time from filing to disposition by trial in the 75 largest U.S. counties was 22 months for all tort cases, 20 months for automobile negligence cases, and 29 months for medical malpractice cases (Cohen, 2004).

This delay can have negative effects on plaintiffs and defendants alike. As Shuman (2000a) points out, delay can exacerbate the negative health consequences just described and increase costs of litigation that are borne by the injured, the alleged injurer, and society in the form of tort judgments, disability payments, and decreased productivity. Until they are resolved, allegations of wrongdoing can become the dominant focus of both plaintiffs' and defendants' lives.

The second structural impediment to well-being in tort litigation is the fact that the injured and the injurer rarely come together, face to face, to acknowledge losses and responsibilities, settle their differences, and bring closure to the case. Instead, most disputes are resolved by the payment of money to the plaintiff by a third party (an insurance company or governmental entity) that is contractually or statutorily obligated to do so. Often, these resolutions are reached during settlement negotiations between insurance claims representatives and attorneys representing the various parties or with the aid of a mediator who becomes involved when earlier attempts at settlement have been unsuccessful. These arrangements typically leave both the injured and the injurer out of the mix, the former never able to address the wrongdoer personally and the latter never able to accept personal responsibility for transgressions or to express regret.

Yet a long line of research documents the psychological benefits of self-determination and control (e.g., Deci & Ryan, 1987) and in the psycho-legal realm, data from experimental social psychologists suggest that victims feel most satisfied (and, by extension, that the process is most healing) when compensation is provided directly by the injurer, rather than by a third party (deCarufel, 1981). Further, data from the Rand Institute for Civil Justice show that a combination of reforms, including having litigants present at settlement conferences or available by phone, reduced the time to case disposition by as much as 30% (Kakalik et al., 1996). Whether face-to-face presence increased litigants' satisfaction along with their willingness to compromise is unclear, but the absence of those encounters surely denies a potential opportunity for healing.

Finally, I note a third reason that tort litigation can be counter-therapeutic. The tort system rests on the assumption that money will compensate and

vindicate the injured party, return that person to a pre-injury level of functioning, and repair the damage caused by the injury or wrong. Clearly, payment of monetary damages can address the financial consequences of an injury, but it may do little to heal the intangible aspects of an injury, enable the injured party to understand the precursors to the injury, or repair an ongoing relationship that was strained by the harm. So, in some sense, and borrowing a refrain from alternative rock singer "Reckless Johnny" Wales (2003), "it's not about the money."

Quite obviously, though, in another sense it *is* about the money; that is the primary reason that plaintiffs sue. But the opportunity for financial recompense is often not enough, and claimants say that they frequently desire more. In particular, they value apologies and expressions of sympathy from wrongdoers; symbolic offerings of empathy and concern that are unlikely to be provided given the current structural arrangement of tort litigation procedures (see the chapters by Robbennolt and Landsman, this volume). Plaintiffs also value accountability by wrongdoers, promises from them to change their practices to prevent recurrences, information about how to cope, and acknowledgement of the extent of their losses (Duclos et al., 2005; Hensler, 2003b), actions that are unlikely to be undertaken in the context of traditional tort litigation.

Plaintiffs' Desire for Apology and Accountability

Apology is a relatively novel concept in the law (Petrucci, 2002), yet apology and expressions of remorse are powerful rituals that have been shown to provide healing to victims and plaintiffs (Latif, 2001; Poulson, 2003; Strang & Sherman, 2003; Umbreit, Coates, & Roberts, 1998; Umbreit, Vos, Coates, & Brown, 2003) and to teach lessons to offenders and defendants (Flaten, 1996; Netzig & Trenczek, 1996; Umbreit et al., 2003).

The desire for apology and acceptance of responsibility is apparent in popular accounts of tort cases. Anne Anderson, the lead plaintiff in the toxic tort case against the R.W. Grace and Beatrice Food companies depicted in the book and movie *A Civil Action,* apparently told her lawyer that she "wasn't after money, that what she wanted was for J. Peter Grace to come to her front door and apologize" (Harr, 1995, p. 452). Another plaintiff, Richard Toomey, whose son died of leukemia allegedly caused by drinking contaminated water, said "I didn't get into this for the money. I got into this because I want to find them guilty for what they did. I want the world to know that" (p. 442). In the book *Damages,* Donna Sabias, discussing settlement in a case brought on behalf of her son who was allegedly injured at birth, tells her lawyer "No amount of money is going to justify what's happened to this family" (Werth, 1988, p. 312). Her husband, Tony, tells the lawyer "Show me an admission of guilt . . . and I don't want a thing" (p. 367).

A large number of empirical studies—using survey, focus group, and experimental methodologies—also point to the powerful role that apologies can play in appeasing plaintiffs and reducing their litigiousness (Bezanson, Cranberg, & Soloski, 1987; DesRosiers, Feldthusen, & Hankivsky, 1998; Gallagher, Waterman, Ebers, Fraser, & Levinson, 2003; Hickson, Clayton, Githens, & Sloan, 1992; Mazor et al., 2004; Robbennolt, 2003; Vincent, Pincus, & Scurr, 1993; Vincent, Young, & Phillips, 1994; Witman, Park & Hardin, 1996). In defamation cases, in particular, plaintiffs tend to care more about an apology than about money because retractions and apologies can effectively repair damage to one's reputation in ways that money cannot (Bezanson et al., 1987). Similar findings have come from a study of victims of sexual violence who filed claims to recover civil damages from their offenders (DesRosiers et al., 1998). Overwhelmingly, these victims reported that money played a relatively minor role in their decisions to sue; rather, they said they launched their civil suits to gain public affirmation of the wrongs, seek justice and closure, deter defendants from harming other people, and receive apologies—in short, to gain therapeutic, rather than monetary, benefits. Focus group research has also documented patients' preferences for disclosure by health care providers about medical errors (Gallagher et al., 2003). In particular, patients want information about how and why the mistake occurred and how recurrences will be avoided, and they want assurance that the physician felt regret about the error.

The absence of apology can have important consequences on people's thoughts about pursuing litigation. In the context of health care, Gerald Hickson and his colleagues (Hickson et al., 1992) examined the factors that prompted 127 family members to pursue malpractice claims against medical providers as a result of perinatal injuries. Nearly one-quarter of respondents who sued reported doing so because the physician had not been completely honest with them, and one-fifth said they filed suit when they realized that "the courtroom was the only forum in which they could find out what happened" (p. 1361). Similarly, in a survey of British patients and their families who filed malpractice claims against their doctors, Vincent, Young, and Phillips (1994) discerned that 37% would not have done so had there been a full explanation and apology, and that these factors were more important to the plaintiffs than monetary compensation.

Results of experimental research complement the survey findings. Mazor et al. (2004) examined patients' responses to medical errors by presenting written vignettes in which the physician's response to the error varied. In the "full disclosure" versions, the physician assumed full responsibility for the error, explained why it had occurred, offered a plan to prevent future errors, and apologized. In the "nondisclosure" versions, the physician did none of these things. Predictably, patients who read the full disclosures said they would be less likely to seek legal advice, had more trust in the physician, and reported more satisfaction than patients in the nondisclosure conditions.

Apologies can have a variety of placating effects in personal injury cases as well. Robbennolt (2003) asked respondents to assume the perspective of a pedestrian injured in a bicycle-pedestrian accident and evaluate a settlement offer from the offender. She varied the content of the apology provided by the offender; when the apology included acceptance of responsibility for the accident, participants were more likely to accept a settlement offer than when the apology provided only an expression of sympathy. The full, responsibility-acceptance apologies also changed participants' attributions about the situation; they felt more sympathy for the offender, less anger, and more willingness to forgive (see also Robbennolt, this volume, for a review of this study and related research findings).

Explanations of Apologies' Impact

Apologies can deter litigiousness because they reduce antagonistic behavior on the part of injured parties. Cohen (1999) frames this benefit in the context of a friend versus foe question ("Are you my friend or foe?"), a fundamental issue that must be determined after an injury occurs. An apology implies that the offender opts for the friend role and seeks future constructive interactions with the injured party. When an offender apologizes, retributive impulses typically decrease (Ohbuchi, Kameda, & Agarie, 1989), as does the victim's sense of anger (Strang et al., 2006), while feelings of sympathy for the offender tend to increase (Strang et al., 2006). In some instances, an injured person who has received an apology is able to forgive the offender (McCullough, Worthington, & Rachal, 1997).

A novel study shows the effects of apology and restitution on physiological assessments of arousal and suggests a biological role for apologetic discourse. Witvliet, Worthington, and Wade (2002) asked participants to picture themselves as robbery victims and to imagine receiving an apology, restitution, both or neither from the perpetrator the day after the robbery. Mock victims who received either a strong apology or restitution experienced lower heart rates and less muscular tension at the corrugator (eyebrow) and orbicularis oculi (near the eye) facial muscles than did "victims" who received neither. When apology and restitution were both offered, effect magnitudes approximately doubled. If individuals experience reduced physiological arousal by merely *contemplating* the offer of an apology in a simulation, then presumably the effects of an actual apology on a truly injured person could be significant.

The lack of antagonism that results from apologies enhances the chances that the injured person and the injurer can come together to address issues of compensation. According to Cohen (1999), "even if Bill and Fred were total strangers before Bill drove his car into Fred's, following the accident Bill and Fred will likely have interactions concerning how Bill should compensate Fred.

Apologizing after an injury can be essential to making that relationship a constructive one" (p. 1020).

Not infrequently, injuries arise in the context of a preexisting relationship—within families, in the workplace, between physicians and patients, among friends. Here, an apology may be even more crucial as a fulcrum to repair damage to that relationship. Without that conciliatory offering, the parties may have difficulty putting the incident behind them and resuming their normal relations. In health care contexts where relationships are often long-term, apologies can increase patients' trust in their providers, lead to better patient-physician relationships, and reduce suffering experienced by both patients and providers after an injury. Remarkably, patients who reported good communication with their physicians after an adverse medical event tended to call these events "mistakes or complications" whereas those who were dissatisfied with the communication tended to ascribe the event to incompetence or malicious intent (Duclos et al., 2005).

Apologies can provide a number of strategic benefits to the person who offers them. First, if an injured party receives an apology early enough, he or she may decide not to file a lawsuit. On the other hand, people who have been hurt and who receive no apology often feel angered by the apparent lack of regard from the offender. This anger can trigger the decision to make a legal claim.

Second, even if a lawsuit is commenced, apologies enhance the chances of successful settlement negotiations. Jennifer Robbennolt's empirical work helps us to understand why (Robbennolt, 2006). When she varied the nature of the apology (a full, responsibility-accepting apology compared with a partial, sympathy-expressing apology and with no apology) and evidence of the offender's fault in an accident (clear fault compared with ambiguous fault) in a vignette study, Robbennolt found several interesting explanations of the role of apology in forging settlements. When the offender's fault was clear and the apology was full, participants' evaluations of the offender were more positive: They felt more sympathy and less anger toward the offender and were more inclined to forgive and less desirous of punishment. She also found that when the offender's fault was clear, apologies had important effects on settlement levers, those factors that influence a claimant's negotiating posture and ultimately, negotiation outcomes (White & Neale, 1994). For example, reservation prices—the lowest amount of money that a negotiator is willing to accept—were influenced by the nature of the apology: Participants' reservation prices were lower when they received a full apology. Participants' aspirations—the best settlement agreement that a negotiator hopes to attain—were also lower when the offender had offered a full apology. Finally, settlement estimates—negotiators' judgments of what would be a fair settlement—were lower when the offender offered an apology than when an apology was lacking. When settlement levers are reduced by apologies, then bargaining ranges increase, evaluations of the opposing party's offer become more positive, and the prospects for settlement are enhanced (Robbennolt, 2006).

Another strategic advantage that may accrue to one who apologizes is that an apology can enhance third-party observers' impressions of a wrongdoer. So even if the harm is transformed into a formal legal dispute and proceeds to trial, the apologetic offender may be benefited. For example, a number of states allow jurors to use the offer of an apology to mitigate damages in defamation cases. Indeed, if punitive damages are awarded in part because a defendant showed little contrition, then one might expect an offer of apology or statement of remorse to reduce or eliminate punitive damages.

Some psychologists (e.g., Bornstein, Rung, & Miller, 2002) suspect that apologies influence observers' judgments of offenders through the process of impression management; people want to present themselves to others in a positive light, and when one's image is tarnished by information about wrongdoing, an apology can polish that image and enhance impressions on traits such as likeability, blameworthiness, goodness (Darby & Schlenker, 1989), trustworthiness, character, and reliability (Gold & Weiner, 2000). An apologetic wrongdoer is also perceived as less likely to recidivate (Gold & Weiner, 2000). Finally, an apology can influence observers' attributions for the wrongful or careless conduct. Rather than attribute the behavior to stable, dispositional factors, observers who know that an offender has apologized are more likely to invoke unstable, situational explanations for the behavior (Bennett & Dewberry, 1994). Simply stated, expressions of remorse and apology are incongruent with notions of badness and malevolence.

A large literature documents that remorse and apologies result in improved impressions of a wrongdoer. Several studies (e.g., Darby & Schlenker, 1989; Hodgins & Liebeskind, 2003) come from experimental social psychologists who have examined the effects of apologies and remorse on judgments in non-legal contexts. Other studies have examined jurors' impressions of criminal defendants as a function of the latters' willingness to apologize or show remorse. Although conventional wisdom might suggest that a defendant's apology, especially if it involves accepting responsibility for harming another, would cause observers to think harshly of the offender, there are many indications that it would not. Some data show, for example, that when jurors believe that a defendant is truly sorry for committing a crime, they perceive his character more positively and are more likely to sentence him to life imprisonment than to death (Eisenberg, Garvey, & Wells, 1998). In capital cases, a defendant's lack of remorse is perceived by jurors as an aggravating factor (Garvey, 1998). In mock jury studies, criminal defendants who expressed remorse were generally perceived more positively (Robinson, Smith-Lovin, & Tsoudis, 1994). They were also thought to be less likely to recidivate (Pipes & Alessi, 1999), more likely to be rehabilitated (Kleinke, Wallis, & Stalder, 1992), and sentenced to shorter prison terms (Rumsey, 1976) than offenders who lacked remorse.

In a study directly relevant to the effects of apology in tort cases, Bornstein et al. (2002) described a wrongful death medical malpractice case to mock jurors who were informed that the physician's liability had already been determined and that their task was to assess damages against the doctor to compensate the

patient's widow for pain and suffering and lack of consortium. The physician's level of remorse was varied: He expressed remorse either at the time of the patient's death and then again at trial, only at trial, or not at all. Results showed that defendants who showed remorse were perceived more favorably than those who did not, but that expressions of remorse at the time of the patient's death and again at trial augmented the damage awards in comparison to conditions in which the defendant expressed remorse only once or not at all. Bornstein et al. suspect that mock jurors may have interpreted the physician's remorse at the time of the incident to be an admission of wrongdoing or negligence, rather than a simple statement of sadness about the outcome. Multiple apologies might have underscored the possibility that the patient's care was substandard.

There is one final way, of great relevance to the present chapter, that apologies can have an impact on the parties in a civil dispute: They can provide salutary emotional benefits to both the apologizer and the recipient of the apology (Cohen, 1999; Worthington et al., 2005). The offer of an apology allows a wrongdoer to begin to assuage his or her guilt, and gives the recipient an opportunity to forgive and to release pent-up feelings of anger and hostility toward the wrongdoer.

Enter Restorative Justice: Restorative Principles Applied to Tort Litigation

Although favorable verdicts and settlements can compensate plaintiffs' financial losses, they do little to address less tangible needs. Many of these needs—the offering of apologies, explanations, and plans for corrective actions; the taking of responsibility; and the acknowledgment of loss from both the offender and the larger community—form the core concepts of restorative justice. Can the tort system respond to plaintiffs' less tangible needs by using concepts and procedures already in place in restorative justice programs, and if so, can they promote healing in ways that traditional litigation processes and adversarial practices cannot?

The movement for restorative justice began as an attempt to rethink the needs that crimes create and the ability of the conventional retributive justice system to meet those needs. An important concern of early advocates was to expand the circle of participants and stakeholders in a dispute beyond the typical offender-government dyad, and to include victims and the community in the collective resolution of criminal matters (Zehr, 2002). Victims of crime have often felt slighted by the justice system that considers their needs only as an afterthought. In fact, they have multiple needs (for information, truth-telling, empowerment, and restitution or vindication), many of which go unaddressed. Offenders, too, have needs that the criminal justice system largely overlooks in its desire to punish, including encouragement to understand the consequences of their actions and to take responsibility for them, and support from the community to "make things right" (Zehr, 2002). Even the community has

needs that arise from crime, including involvement in the resolution of cases, attention to the concerns of secondary victims, and opportunities to rebuild a sense of community in the aftermath of crime (Zehr, 2002). Tort litigants probably have many of the same concerns.

The goal of restorative justice is to restore victims, offenders, and the community. Through formal and informal legal procedures, offenders are encouraged to accept responsibility for their actions and, when appropriate, to sincerely apologize. This process can restore dignity to the offender, provide solace to the victim, and reconnect the wrongdoer to his or her sense of responsibility to the community. When people become more aware of their responsibilities to others in the community, they are more likely to follow their own moral principles (Tyler, 2006).

Restorative justice policies have now become embedded in various components of many justice systems in this country and throughout the world (Sullivan & Tifft, 2006). An increasing number of state and local jurisdictions have adopted the principles and practices of restorative justice and in so doing, have radically altered their criminal and juvenile justice systems (Umbreit et al., 2005). Legal scholars[1] are increasingly taking notice of these transformations, and some theorists (e.g., Braithwaite, 1989) have begun to ponder the broader uses and implications of restorative justice goals and principles, suggesting that they have relevance beyond reformation of the criminal and juvenile justice systems. Although there are no formal ties between restorative justice and tort systems, given the adversarial nature of tort cases and the largely inadvertent (i.e., negligent) conduct on which they are based, it seems propitious to try to use restorative principles of apology, remorse, and forgiveness to aid resolution of some of these cases.

There are reasons to suspect these practices might be beneficial. Broadly construed, restorative and tort-based systems share common goals and principles, though they rely on different methods of compensation for past wrongs. The commonly understood goal of restorative justice—to address the harms, needs, and obligations caused by offending behavior in order to heal the victim and right the wrongs caused by that behavior—is not radically different from the generally accepted goal of the tort system—to restore an injured person to his or her pre-injury condition, to make that person whole. So in broad stroke their ambitions are similar: to heal and restore, and to right the wrongs resulting from offensive or unreasonable behavior. Both restorative justice and tort systems attend to the victim/plaintiff's needs *and* to the offender/defendant's responsibility for meeting those needs and repairing the harm. Although the law-related behaviors in criminal contexts (where restorative principles have most often been used) are clearly different from those in tort-related situations, the notions of responsibility-taking, accountability, and reparation of harm are common to both. Thus, restorative principles that have been used in the former context may indeed have some legitimate role to play in the latter.

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[1] *E.g.,* Entire issue, 25 *Hamline Journal of Public Law and Policy* (2004); entire issue, 89 *Marquette Law Review* (2005).

The obvious way that restorative and tort-based systems differ is in the mechanisms they provide for reparation, though both ideologies acknowledge that an injured person is owed recompense. Restorative justice advocates tout the therapeutic effects of remorse, apology, and even forgiveness as important to the satisfactory resolution of disputes. The traditional tort system, on the other hand, assumes that money will be enough. But as I have suggested, though money is necessary, it may *not* be enough. I suspect that restorative practices can provide an additional source of non-pecuniary compensation and therapeutic benefits for plaintiffs and defendants alike.

Implementation of Restorative Justice Ideals in Tort Cases

If restorative principles can be beneficial, how might they be incorporated into the tort litigation process? I see three possibilities and describe them briefly here. First and most simply, apologies could be admissible to mitigate damages for a plaintiff's intangible losses. In some tort cases—particularly those that involve significant emotional distress—a defendant's meaningful apology can do more to aid a plaintiff's healing than any monetary award for the intangible portion of loss. In these instances, an apology is able to "achieve more at less cost" (Shuman, 2000b, p. 180–181). As noted, this practice is already in place in defamation actions in some jurisdictions and could be extended to mitigate damages for intangible losses in other kinds of cases. Use of this remedy might require a bifurcated trial format in which evidence of apology is excluded during the liability phase and included during the damages phase. But an economic incentive of this nature just might encourage the offering of apologies.

Often, though, tort procedures discourage apologies (see chapter by Landsman, this volume). Plaintiffs' lawyers tend to dismiss a client's wish for an apology as secondary to monetary relief[2] (Levi, 1997), and relatively few defendants want to apologize. Many are advised by their attorneys, insurance companies, and risk managers (all of whom may have their own financial interests in mind) not to apologize because they fear that any apology or expression of remorse could be construed as an admission of liability.[3]

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[2] One explanation (cynical, perhaps) is that plaintiffs' lawyers—paid on a contingency fee basis—stand to make less if their clients accept lower settlements because the offers are accompanied by apologies. As Brian Bornstein has correctly observed, attorneys cannot get much out of 1/3 of an apology (personal communication).

[3] Even the SettlementCentral.com website (an internet service for self-help injury claims) admonishes: No apologies-EVER. **DO NOT APOLOGIZE TO ANYONE AT ANYTIME.** That does not mean that you cannot **express empathy for any injuries to others**, but an apology can be turned into an admission by an insurance adjuster. You can say I hope you are not in too much pain; what can I do to make you more comfortable? Some people are so intimidated in talking to an insurance adjuster that they just blurt out an apology-or express that they are sorry for the accident. This puts them in an inferior position right off the bat (http://www.settlementcentral.com/page0007.htm).

Yet when attention is paid to the context in which an apology is offered and how, exactly, it is made, it becomes clear that at least some apologies pose little risk of liability. For example, apologies made during settlement negotiations and mediations (so-called "safe apologies") typically are inadmissible on the question of liability. In addition, expressions of sympathy and benevolence ("partial apologies") are also generally inadmissible. For example, the California Evidence Code includes the following:

> The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action (CAL. EVID. CODE § 1160).

Finally, apologies from medical providers are protected in some states. For example, an Oregon statute states that "any expression of regret or apology made by or on behalf of [a licensed medical provider] does not constitute an admission of liability for any purpose and may not be subject of examination by deposition or otherwise,"[4] and a Colorado law exempts "all statements, gestures, and conduct expressing sympathy, commiseration, apology, fault ... from being admitted in a lawsuit."[5] It is worth noting that some mild controversy exists about the moral weight of an apology protected in these ways. Taft (2005) argues that if no formal legal consequences attach, safe apologies are essentially devoid of moral weight; that protection cheapens them and renders them empty and ineffectual. On the other hand, Robbennolt's (2005) experimental data suggest that claimants value apologies even when the apologies are "safe" and cannot be used as evidence.

Because injured people desire apologies and some wrongdoers wish to apologize (e.g., to mitigate damages or to avoid litigation), attorneys should be encouraged to appreciate the broader effects of apologies on their clients' well-being and to promote their issuance and acceptance, especially in situations where the apology would be protected. (Attorneys should also probably advise their clients to offer full, responsibility-accepting apologies whenever fault is already clear and can be proven by independent evidence. Here, the offer of an apology would do little to increase the likelihood of a liability judgment but would do much to appease the injured party's sense of having been wronged and may reduce the time to disposition and the damages awarded.) In general then, attorneys should be willing to discuss apologies with their clients and to inform clients of the situations in which carefully-worded messages of sympathy, benevolence, and apology can be made safely (Cohen, 1999).

A third way to make the tort system more therapeutic would be to add a form of early intervention mediation as an alternative to the "psychological brutality of the adversary system" (Waldman, 1998, p. 160). This forum would offer the

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[4] OR. REV. STAT. § 677.082 (1)-(2).

[5] COLO. REV. STAT. 13-25-135.

parties an opportunity to come together face-to-face as soon as practical after an incident and its resulting harms have been recognized, but prior to the filing of any formal claims (Dauer, 2003; Dauer & Marcus, 1997). A professional mediator would facilitate the discussion and attorneys would have little role to play. Early mediation could enable an injured person to be heard in a dignified, though non-legal setting, and to be given the opportunity to explain the consequences of the injury, find out why it happened, and request changes that reduce the likelihood of recurrences. Arrangements of this sort would allow participants to control the presentation of information, determination of applicable legal rules, and the decision—all features of dispute resolution that parties tend to favor (Shestowsky, 2004). And because they are confidential, mediations can provide a "safe harbor" for acknowledgement of responsibility. Finally, as Dauer (2003) points out, the outcome is almost infinitely flexible, ranging from an understanding of each other's circumstances and views to an injurer's commitment to undergo additional training or education or to take responsibility for the incident in some other way.

The therapeutic benefits of early intervention mediations are multiple. Early mediations can achieve most of the law's present policy goals while also providing an opportunity for the parties to participate actively in the process and to have their own voices heard, give parties a chance to forge understanding and request and offer apologies, and also deliver the tangential benefit of reducing the adversarial hardening of positions that occurs in litigation. They can prevent some injury-causing incidents from escalating into formal disputes. Successes of this sort have been noted in a variety of areas where early intervention mediation has been used (Dauer & Marcus, 1997).

In a variant on early mediation, some large corporations and hospitals have begun to experiment with policies that provide full disclosure and expressions of sympathy and apology as soon as claims arise. In fact, several states now require physicians and hospitals to disclose medical mistakes to patients as soon as they are known, and the American Medical Association instructs physicians that it is their ethical responsibility to disclose the facts of medical errors (Robbennolt, 2005).

The Veterans' Administration Hospital in Lexington, Kentucky was the first institution to formulate a plan for responding proactively to medical mistakes (see the chapter by Landsman for further discussion of this kind of response to medical negligence). When a mistake was reported, a risk management team responded immediately to determine its cause. They met with patients to discuss steps they would take to assess needs for future medical care, disability benefits, and compensation. If the committee determined that the hospital or its employees had been at fault, they offered an apology and a fair settlement. Remarkably, in some instances, the patients themselves were not even aware that they had suffered harm (Kraman, 2001). According to Steve Kraman, a pulmonary care specialist and former chief of staff at the Lexington VA hospital, this kind of proactive openness and disclosure can maintain patient loyalty and enhance patient-physician relationships:

> If you sue your doctor or hospital, that is the last time you walk in there as a patient . . . They're the enemy, you're the enemy, and you go elsewhere for health care. By treating people decently up front, not only did they remain within the system, they felt even better about us than they did before. Some people felt so good about the way they were treated, they wanted to get even closer to the hospital. We had people who signed up as hospital volunteers. (Murdock, 2005).

An important benefit to an organization with this kind of early disclosure policy is the opportunity to learn from its mistakes and to take action to prevent recurrences. As Cohen (2000) notes, when an organization has the expectation of responsibility-taking, its employees are more willing to report mistakes, more honest in investigating them, and more receptive to procedural reform.

This is apparently what happened in the University of Michigan Hospital System after a full-disclosure policy, modeled closely after the Lexington VA example, was instituted there. According to Chief Risk Officer Rick Boothman, the program allowed hospital employees to learn from their mistakes and fix internal deficiencies that reduced the incidence of error. As a result, the number of lawsuits pending against the hospitals and the cost of litigation were both cut in half between 2001 and 2004, resulting in some "excited actuaries," reported Boothman (http://www.sorryworks.net/media22.phtml).

Clearly, these reforms present interesting challenges of their own and are not feasible or practical in every case. Some situations require no apologies and others (e.g., complex cases or those likely to involve the exchange of significant monies) would not be suited for procedures like early intervention mediation. Some defendants may be unwilling to risk apologizing even when that apology is protected from admissibility, fearing that it would change the tenor of ongoing negotiations and put them in a less auspicious bargaining position. Perhaps most importantly, restorative principles assume a certain degree of moral maturity and capacity for empathy that many people lack (Daly, 2006). Claimants and plaintiffs may not be generous toward those who have possibly harmed them, and wrongdoers may feel little contrition. Obviously, much depends on the circumstances and the parties involved. Still, these reforms hold promise for some people in some situations by providing ways to accommodate expressions of sincere regret and remorse alongside monetary damages. Although apologies may not end litigation, in many instances they can reduce feelings of litigiousness, ease strained relationships between the parties, and enhance the chances for settlements.

Conclusion

Judge Learned Hand once said "I should dread a lawsuit beyond almost anything else short of sickness and death" (quoted in Louisell, Hazard, & Tait 1989). His intuition was quite correct: People rank the prospect of being a party to a lawsuit as comparable to losing a job, experiencing a grave illness, or

suffering the death of a loved one (Dohrenwend, Krasnoff, & Askenasy, 1978). The counter-therapeutic effects of tort litigation seem clear: Defendants are dragged involuntarily into lawsuits, plaintiffs often cannot or do not heal while they relive the experiences of injury, and both parties assume entrenched, adversarial positions soon after litigation commences. Claimants' desires for compensation other than money (i.e., for information, opportunities to be heard, expressions of remorse and apology, and plans for correction) also seem clear, sensible, and conducive to healing. Yet although injured people might wish for apologies in addition to other, more traditional forms of recompense, only occasionally are those wishes granted. The tort system would do well to incorporate offers of apology and other features of restorative justice into its procedures. Wrongdoers' lives would be no worse, and claimants' lives would clearly be enhanced by the changes.

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References

Bennett, M., & Dewberry, C. (1994). "I've said I'm sorry, haven't I?" A study of the identity implications and current restraints that apologies create for their recipients. *Current Psychology, 13*, 10–21.

Bezanson, R., Cranberg, G., & Soloski, J. (1987). *Libel law and the press: Myth and reality*. New York: Free Press.

Binder, L., & Rohling, M. (1996). Money matters: A meta-analytic review of the effects of financial incentives on recovery after closed-head injury. *American Journal of Psychiatry, 153*, 6–10.

Bonanno, G., & Kaltman, S. (1999). Toward an integrative perspective on bereavement. *Psychological Bulletin, 125*, 760–776.

Bornstein, B., Rung, L., & Miller, M. (2002). The effects of defendant remorse on mock juror decisions in a malpractice case. *Behavioral Sciences and the Law, 20*, 393-409.

Braithwaite, J. (1989). *Crime, shame and reintegration*. New York: Cambridge University Press.

Charles, S., Warnecke, R., & Wilbert, J. (1987). Sued and nonsued physicians: Satisfactions, dissatisfactions, and sources of stress. *Psychosomatics: Journal of Consultation Liaison Psychiatry, 28*, 462–468.

Charles, S., Wilbert, J., & Franke, K. (1985). Sued and non-sued physicians' self-reported reactions to malpractice litigation. *American Journal of Psychiatry, 142*, 437–440.

Charles, S., Wilbert, J., & Kennedy, E. (1984). Physicians' self-reports of reactions to malpractice litigation. *American Journal of Psychiatry, 141*, 563–565.

Cohen, J. (1999). Advising clients to apologize. *University of Southern California Law Review, 72*, 1009–1069.

Cohen, J. (2000). Apology and organizations: Exploring an example from medical practice. *Fordham Urban Law Journal, 27*, 1447–1482.

Cohen, J. (2002). Legislating apology: The pros and cons. *University of Cincinnati Law Review, 70*, 819–872.

Cohen, J. (2005). The immorality of denial. *Tulane Law Review, 79*, 903–953.

Cohen, T. (2004). *Tort trials and verdicts in large counties, 2001* (NCJ #206240). Washington, DC: U.S. Department of Justice Bureau of Justice Statistics.
Culpan, R., & Taylor, C. (1973). Psychiatric disorders following road traffic and industrial injury. *Australian and New Zealand Journal of Psychiatry, 7*, 32–39.
Daicoff, S. (2003). Resolution without litigation: Are courtrooms battlegrounds for losers? American Bar Association G/P Solo Magazine, Oct./Nov. Retrieved from: www.abanet.org/genpractice/magazine/octnov2003/resolutionwithoutlit.html.
Daly, K. (2006). The limits of restorative justice. In D. Sullivan & L. Tifft (eds.), *Handbook of restorative justice: A global perspective*. London: Routledge.
Darby, B., & Schlenker, B. (1989). Children's reaction to transgressions: Effects of the actor's apology, reputation, and remorse. *British Journal of Social Psychology, 28*, 353–364.
Dauer, E. (2003). A therapeutic jurisprudence perspective on legal responses to medical errors. *Journal of Legal Medicine, 24*, 37–50.
Dauer, E., & Marcus, L. (1997). Adapting mediation to link resolution of malpractice disputes with health care quality improvement. *Law and Contemporary Problems, 60*, 185–218.
DeCarufel, A. (1981). Victims' satisfaction with compensation: Effects of initial disadvantage and third party intervention. *Journal of Applied Social Psychology, 11*, 445–459.
Deci, E., & Ryan, R. (1987). The support of autonomy and the control of behavior. *Journal of Personality and Social Psychology, 53*, 1024–1037.
DesRosiers, N., Feldthusen, B., & Hankivsky, O. (1998). Legal compensation for sexual violence: Therapeutic consequences and consequences for the judicial system. *Psychology, Public Policy, and Law, 4*, 433–451.
Dohrenwend, B., Krasnoff, L., & Askenasy, A. (1978). Exemplification of a method for scaling life events: The PERI Life Events Scale. *Journal of Health and Social Behavior, 19*, 205–229.
Duclos, C., Eichler, M., Taylor, L., Quintela, J., Main, D., Pace, W., & Staton, E. (2005). Patient perspectives on patient-provider communication after adverse events. *International Journal for Quality in Health Care, 17*, 479–486.
Eisenberg, T., Garvey, S., & Wells, M. (1998). But was he sorry? The role of remorse in capital sentencing. *Cornell Law Review, 83*, 1599–1637.
Feinstein, A., Ouchteriony, D., Somerville, J., & Jardine, A. (2001). The effects of litigation on symptom expression: A prospective study following mild traumatic brain injury. *Medicine, Science and the Law, 41*, 116–121.
Flaten, C. (1996). Victim-offender mediation: Application with serious offenses committed by juveniles. In B. Galaway & J. Hudson (eds.), *Restorative Justice: International Perspectives*. Monsey, NY: Criminal Justice Press.
Gallagher, T., Waterman, A., Evers, A., Fraser, V., & Levinson, W. (2003). Patients' and physicians' attitudes regarding the disclosure of medical errors. *Journal of the American Medical Association, 289*, 1001–1007.
Garvey, S. (1998). Aggravation and mitigation in capital cases: What do jurors think? *Columbia Law Review, 98*, 1538–1567.
Gold, G., & Weiner, B. (2000) Remorse, confession, group identity and expectancies about repeating a transgression. *Basic and Applied Social Psychology, 22*, 291–300.
Harr, J. (1995). *A civil action*. New York: Vintage Books.
Harris, I., Mulford, J., Solomon, M., van Gelder, J., & Young, J. (2005). Association between compensation status and outcome after surgery: A meta-analysis. *Journal of the American Medical Association, 293*, 1644–1652.
Hensel, W. (2005). The disabling impact of wrongful birth and wrongful life actions. *Harvard Civil Rights-Civil Liberties Law Review, 40*, 141–195.
Hensler, D. (2003a). Our courts, ourselves: How the alternative dispute resolution movement is re-shaping our legal system. *Penn State Law Review, 108*, 165–197.
Hensler, D. (2003b). Money talks: Searching for justice through compensation for personal injury and death. *DePaul Law Review, 53*, 417–455.

Hepler, D. (1993). Providing creative remedies to bystander emotional distress victims: A feminist perspective. *Northern Illinois University Law Review, 14*, 71–104.

Hickson, G., Clayton, E., Githens, P., & Sloan, F. (1992). Factors that prompted families to file medical malpractice claims following prenatal injuries. *Journal of the American Medical Association, 267*, 1359–1363.

Hodgins, H., & Liebeskind, E. (2003). Apology versus defense: Antecedents and consequences. *Journal of Experimental Social Psychology, 39*, 297–316.

Kakalik, J., Dunaworth, T., Hill, L., McCaffrey, D., Oshiro, M., Pace, N., & Vaiana, M. (1996). An evaluation of judicial case management under the Civil Justice Reform Act (Publication MR-802-ICJ). Santa Monica: Rand Institute for Civil Justice.

Kleinke, C., Wallis, R., & Stalder, K. (1992). Evaluation of a rapist as a function of expressed intent and remorse. *Journal of Social Psychology, 132*, 525–537.

Kraman, S. (2001). A risk management program based on full disclosure and trust: Does everyone win? *Comprehensive Therapy, 27*, 253–257.

Latif, E. (2001). Apologetic justice: Evaluating apologies tailored toward legal solutions. *Boston University Law Review, 81*, 289–320.

Levi, D. (1997). The role of apology in mediation. *New York University Law Review, 72*, 1165–1210.

Lind, E. A., MacCoun, R., Ebener, P., Felstiner, W., Hensler, D., Resnik, J., & Tyler, T. (1990). In the eye of the beholder: Tort litigants' evaluations of their experiences in the civil justice system. *Law and Society Review, 24*, 953–996.

Louisell, D., Hazard, G., & Tait, C. (eds.) (1989). *Pleading and procedure: State and federal (6th edition)*. Foundation Press. (Quoting Learned Hand. The deficiencies of trials to reach the heart of the matter. Address before the Association of the Bar of the City of New York. Nov. 17, 1921.)

Mayou, R. (1992). Psychiatric aspects of road traffic accidents. *International Review of Psychiatry, 4*, 45–54.

Mazor, K., Simon, S., Yood, R., Martinson, B., Gunter, M., Reed, G., & Gurwitz, J. (2004). Health plan members' views about disclosure of medical errors. *Annals of Internal Medicine, 140*, 409–418.

McCullough, M., Worthington, E., & Rachal, K. (1997). Interpersonal forgiveness in close relationships. *Journal of Personality and Social Psychology, 73*, 321–336.

Mendelson, G. (1986). Chronic pain and compensation: A review. *Journal of Pain Symptom Management, 1*, 135–144.

Murdock, D. (2005). "Sorry Works" A prescription for fewer medical-malpractice lawsuits. *National Review*, August 29. Retrieved from: http://www.sorryworks.net/media35.phtml.

Netzig, L., & Trenczek, T. (1996). Restorative justice as participation: Theory, law, experience and research. In B. Galaway & J. Hudson (eds.), *Restorative Justice: International Perspectives*. Monsey, NY: Criminal Justice Press.

Ohbuchi, K., Kameda, M., & Agarie, N. (1989). Apology as aggression control: Its role in mediating appraisal of and response to harm. *Journal of Personality and Social Psychology, 56*, 219–227.

Petrucci, C. (2002). Apology in the criminal justice setting: Evidence for including apology as an additional component in the legal system. *Behavioral Sciences and the Law, 20*, 337–362.

Pipes, R., & Alessi, M. (1999). Remorse and a previously punished offense in assignment of punishment and estimated likelihood of a repeated offense. *Psychological Reports, 85*, 246–248.

Poulson, B. (2003). A third voice: Review of empirical research on the psychological outcomes of restorative justice. *Utah Law Review, 2003,* 167–203.

Robbennolt, J. (2003). Apologies and legal settlement: An empirical examination. *Michigan Law Review, 102*, 461–516.

Robbennolt, J. (2005). What we know and don't know about the role of apologies in resolving health care disputes. *Georgia State University Law Review, 21*, 1009–1027.

Robbennolt, J. (2006). Apologies and settlement levers. *Journal of Empirical Legal Studies, 3*, 333–373.
Robinson, D., Smith-Lovin, L., & Tsoudis, O. (1994). Heinous crime or unfortunate accident? The effects of remorse on responses to mock criminal confessions. *Social Forces, 73*, 175–190.
Rohling, M., Binder, L., & Langhinrichsen-Rohling, J. (1995). Money matters: A meta-analytic review of the association between financial compensation and the experience and treatment of chronic pain. *Health Psychology, 14*, 537–547.
Rosenblatt, P. (1983). Grief and involvement in wrongful death litigation. *Law and Human Behavior, 7*, 351–359.
Rumsey, M. (1976). Effects of defendant background and remorse on sentencing judgment. *Journal of Applied Social Psychology, 6*, 64–68.
Shestowsky, D. (2004). Procedural preferences in alternate dispute resolution: A closer, modern look at an old idea. *Psychology, Public Policy, and Law, 10*, 211–249.
Shuman, D. (1993). Making the world a better place through tort law? Though the therapeutic looking glass. *New York Law School Journal of Human Rights, 10*, 739–759.
Shuman, D. (2000a). When time does not heal: Understanding the importance of avoiding unnecessary delay in the resolution of tort cases. *Psychology, Public Policy, and Law, 6*, 880–897.
Shuman, D. (2000b). The role of apology in tort law. *Judicature, 83*, 180–189.
Smith, S. (1987). The critics and the "crisis": A reassessment of current conceptions of tort law. *Cornell Law Review, 72*, 765–798.
Stolle, D., Wexler, D., Winick, B., & Dauer, E. (1997). Integrating preventive law and therapeutic jurisprudence: A law and psychology based approach to lawyering. *California Western Law Review, 4*, 15–51.
Strang, H., & Sherman, L. (2003). Repairing the harm: Victims and restorative justice. *Utah Law Review, 2003*, 15–42.
Strang, H., Sherman, L., Angel, C., Woods, D., Bennett, S., Newbury-Birch, D., & Inkpen, N. (2006). Victim evaluations of face-to-face restorative justice conferences: A quasi-experimental analysis. *Journal of Social Issues, 62*, 281–306.
Strasburger, L. (1999). The litigant-patient: Mental health consequences of civil litigation. *Journal of the American Academy of Psychiatry and the Law, 27*, 203–211.
Sugarman, S. (2000). A century of change in personal injury law. *California Law Review, 88*, 2405–2436.
Sullivan, D., & Tifft, L. (2006). Introduction: The healing dimension of restorative justice: A one-world body. In D. Sullivan & L. Tifft (eds.), *Handbook of restorative justice: A global perspective*. London: Routledge.
Sunstein, C., Hastie, R., Payne, J., Schkade, D., & Viscusi, W. (2002). *Punitive damages: How juries decide*. Chicago: University of Chicago Press.
Swartzman, L., Teasell, R., Shapiro, A., & McDermid, A. (1996). The effect of litigation status on adjustment to whiplash injury. *Spine, 21*, 53–58.
Taft, L. (2005). Apology and medical mistake: Opportunity or foil? *Annals of Health Law, 14*, 55–94.
Tyler, T. (1996). The psychological consequences of judicial procedures: Implications for civil commitment hearings. In D. Wexler & B. Winick (eds.), *Law in a therapeutic key: Developments in therapeutic jurisprudence*. Durham, NC: Carolina Academic Press.
Tyler, T. (2006). Restorative justice and procedural justice: Dealing with rule breaking. *Journal of Social Issues, 62*, 307–326.
Umbreit, M., Coates, R., & Roberts, A. (1998). Impact of victim-offender mediation in Canada, England and the United States. *The Crime Victims Report,* Jan.–Feb., 20–92.
Umbreit, M., Vos, B., Coates, R., & Brown, K. (2003). *Facing violence: The path of restorative justice dialogue*. Monsey, NY: Criminal Justice Press.

Umbreit, M., Vos, G., Coates, R., & Lightfoot, E. (2005). Restorative justice in the 21st century: A social movement full of opportunities and pitfalls. *Marquette Law Review, 89*, 251–304.
Vincent, C., Pincus, T., & Scurr, J. (1993). Patients' experience of surgical accidents. *Quality in Health Care: QHC, 2*, 77–82.
Vincent, C., Young, M., & Phillips, A. (1994). Why do people sue doctors? A study of patients and relatives taking legal action, *Lancet, 343*, 1609–1615.
Waldman, E. (1998). The evaluative-facilitative debate in mediation: Applying the lens of therapeutic jurisprudence. *Marquette Law Review, 82*, 155–170.
Wales, "Reckless Johnny" (2003). "It's not about the money" (CD). Villa Villa Music.
Weighill, V. (1983). Compensation neurosis: A review of the literature. *Journal of Psychosomatic Research, 27*, 97–104.
Weissman, H. (1991). Forensic psychological assessment and the effects of protracted litigation on impairment in personal injury litigation. *Forensic Reports, 4*, 416–429.
Werth, B. (1988). *Damages: One family's legal struggles in the world of medicine*. New York: Simon & Schuster.
Wexler, D., & Winick, B. (1996). *Law in a therapeutic key: Developments in therapeutic jurisprudence*. Durham, NC: Carolina Academic Press.
White, S., & Neale, M. (1994). The role of negotiator aspirations and settlement expectancies in bargaining outcomes. *Organizational Behavior and Human Decision Processes, 57*, 303–317.
Witman, A., Park, D., & Hardin, S. (1996). How do patients want physicians to handle mistakes. *Archives of Internal Medicine, 156*, 2565–2569.
Witvliet, C., Ludwig, T., & Bauer, D. (2002). Please forgive me: Transgressors' emotions and physiology during imagery of seeking forgiveness and victim responses. *Journal of Psychology and Christianity, 21*, 219–233.
Witvliet, C., Worthington Jr., E., & Wade, N. (2002). *The effects of apology and restitution on self-report and physiological responses associated with reducing unforgiveness*. Paper presented at the Society of Behavioral Medicine, Washington, DC.
Worthington, E., Witvliet, C., Lerner, A., & Scherer, M. (2005). Forgiveness in health research and medical practice. *Explore: The Journal of Science and Healing, 1*, 169–176.
Zehr, H. (2002). *The little book of restorative justice*. Intercourse, PA: Good Books.

Constructs of Justice: Beyond Civil Litigation

Alan J. Tomkins and Kimberly Applequist

It is the case that civil justice problems constitute the bulk of courts' work in both the state and federal legal systems (see, e.g., Court Statistics Project, 2006; U.S. Courts, 2007). Nevertheless, a decision rendered by a jury (or a judge) takes place in only a relatively small percentage of civil disputes. There are exponentially more civil disputes resolved outside of court than are resolved via jury verdicts (see, e.g., Galanter, 1983, 1993, 1996; Miller & Sarat, 1980–1981; Trubek, Grossman, Felstiner, Kritzer, & Sarat, 1983), a state of affairs true for the UK as well as the US (Pleasence, 2006). Hersch's (2006) analysis of nearly 3,800 federal civil cases shows even a litigant's request for a jury trial rather than a bench trial (regardless of whether it emanates from the plaintiff or the defendant) in trial-eligible cases is more likely to result in the parties' out-of-court *settlement* than it is to result in a jury *verdict*.

The empirical reality, thus, is that juries play only a limited – it is fair to say, a relatively minor – role in civil dispute resolution. Yet jury research has dominated the scholarship of the psychology and law community virtually since the revival of psycholegal research in the 1970s, and the pattern of focusing on jury matters continues today. This chapter is a call for psycholegal scholars to study civil justice matters beyond the context of litigation and the courts, both to allow us to better understand the resolution of civil issues in the litigation/court contexts and to better understand the larger institutional (and sometimes societal) contexts in which civil disputes materialize and are most often resolved (see Felstiner, Abel, & Sarat, 1980–1981; Galanter, 1983, 1993, 1996; Kritzer, Vidmar, & Bogart, 1991; Trubek et al., 1984; Trubek, Sarat, Felstiner, Kritzer, & Grossman, 1983).

An area of psycholegal research that has provided significant insights into civil disputes is the different conceptualizations of "justice." Over the last fifty years or so, there has been a great deal of commentary and research into various psychosocial constructs of justice. In this chapter we focus on the more

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prominent justice theories, that is, distributive, procedural, restorative, and retributive justice (e.g., Tyler, Boeckmann, Smith, & Huo, 1997).[1]

Briefly, distributive justice is concerned primarily with the perceived fairness of the outcome of a given proceeding, whether that proceeding is judicial, quasi-judicial (e.g., arbitration, mediation, or some other form of dispute resolution), or entirely non-judicial in nature (e.g., legislative decisions that affect distribution of resources). Procedural justice, in contrast, is concerned with whether the procedures used in a given process are considered fair by the participants, and is similarly not restricted to judicial settings. Restorative justice is concerned, as the name implies, with restoring an injured party to his or her pre-injury state and helping the injuring party recognize and redress the injurious nature of his or her acts. Finally, retributive justice looks at the psychology of responding to harms that have been inflicted. Recent research indicates that retributive and restorative justice principles are, as with the distributive and procedural justice contexts, applicable outside the judicial context (e.g., Morrison & Ahmed, 2006).

More thorough reviews of justice concepts are offered elsewhere in this volume (see, e.g., Greene's chapter on therapeutic and restorative justice and Robbennolt's chapter on apologies; for particularly useful analyses of the psychological dimensions of justice, see the scholarship of Tom Tyler – e.g., Lind & Tyler, 1988; Tyler, 1994b; Tyler et al., 1997). In this chapter, we will briefly discuss justice constructs and offer examples of important questions outside the courtroom litigation realm that we believe present opportunities for psycholegal scholars to more fully develop our understanding of civil justice.

Distributive Justice

Early research into theories of justice focused primarily upon the perceived fairness of the outcome of a dispute or allocation process as the primary factor influencing a party's satisfaction with the proceedings. This focus evolved from the notion that people would primarily be concerned with the fairness of the outcomes they received (or were burdened with), though thinking of distributive justice as merely defined by "what's in it for me" would be missing the point. Rather, it is more accurate to characterize distributive justice as being primarily concerned with the appropriate distribution of costs and benefits within a

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[1] There is some disagreement about whether additional justice constructs ought to be included among the "prominent" justice theories. For example, Weinrib (2002) writes about *corrective justice*, referring to "the idea that liability rectifies the injustice inflicted by one person on another" (p. 349). There are even disagreements about the precise taxonomy of the various justice constructs as well as the numbers, their boundaries, etc. For purposes of this chapter, we rely on the constructs of justice used by Tom Tyler, by far the most prolific and important of modern justice scholars, and his colleagues in their book, *Social Justice in a Diverse Society* (1997).

society, and the principles that people believe ought to influence and determine such distributions.

Deutsch (1985) points out that although the concept of distributive justice is quite old, going back at least as far as Aristotle, theoretical and experimental social psychology only began to seriously consider justice issues about a half-century ago as an extension of equity theory (e.g., Adams, 1965; Thibaut & Kelley, 1959; see generally, Lerner, 1975; Lerner & Lerner, 1981; Walster, Walster, & Berscheid, 1978). In the past few decades, distributive justice has been studied frequently in the context of the legal system. Although manifestly applicable in litigation contexts (who wins, who loses, and how do the parties feel about the fairness of the outcomes?), it is equally relevant to the allocation of resources in other societal contexts as well, ranging from political theory and policy to education, business and other similar areas.

John Rawls, a philosopher, has developed some of the most influential ideas about distributive justice. In his 1971 treatise, *A Theory of Justice*, Rawls explored principles of justice using the concept of a "veil of ignorance." According to Rawls, the fairest principles that could be chosen for a society would be the ones its members would choose if it were not possible for them to know in advance what role they would occupy within that society (Hegtvedt & Cook, 2001). Such principles, Rawls theorized, would focus on "impartial behavior and fairness in the distribution of social benefits and burdens" (Michelbach, Scott, Matland, & Bornstein, 2003, p. 523) – thus the term *distributive* justice.

There are several principles that influence opinions about what constitutes fairness of outcome, and they may have different relative importance depending upon the situation in question and the parties involved. Michelbach et al. (2003) identify four key allocation concepts that consistently appear in the research literature: "*equality*, *efficiency*, *need*, and *merit*" (p. 524, emphasis in original), although some authors focus on only three principles: *equity* (roughly the equivalent of efficiency as described by Michelbach et al., below), *equality* and *need* (e.g., Hegtvedt & Cook, 2001). All four concepts noted by Michelbach et al. are specifically identified in Rawls' early work. *Equality* has been defined in a number of ways, and there is significant disagreement regarding what, exactly, it means. Definitions vary from "absolute equality of income" (Michelbach et al., p. 524, citing Rawls, 1971) to more general conceptualizations like equality of opportunity or similar compensation for similar levels of effort. *Efficiency* (or equity) constitutes a departure from absolute equality to an unequal distribution of resources motivated by increased overall productivity (Michelbach et al., p. 524). *Need* refers, as the name implies, to access (or lack thereof) to the essentials of life, and *merit* (sometimes called *desert* or *proportionality*) refers to inherent qualities like intelligence, beauty, and willingness to work hard (Michelbach et al., pp. 524–525). Interestingly, Rawls and others argue merit should *not* be a basis for distribution of resources, though many others disagree (Michelbach et al., p. 525).

These four concepts, applied individually, might well lead to different outcomes in any given situation. For example, *equality* might require an even

distribution of resources among competing parties, while a *need*-based allocation might result in a previously disadvantaged party receiving a larger share of the resources, and an *efficiency*-based allocation might call for distributing a larger share to those parties that produce the most. In a given situation, then, how might one decide which principle(s) should be applied to make an appropriate allocation determination? There is, perhaps not surprisingly, some dispute about this. Rawls himself felt that the principles apply in some sort of orderly hierarchy, but others have argued that people may use most or all of the principles to some degree, depending on the given situation (Scott, Matland, Michelbach, & Bornstein, 2001). Research in the area of distributive justice also suggests that there may be differences in priority for people of different demographic groups. Gender, race/ethnicity, and cultural background can all affect distribution prioritization (Michelbach et al., 2003; Scott et al., 2001), as can cognitive processes such as attributions (Hegtvedt & Cook, 2001).

Given the principles that appear to be at work in the distributive justice construct, then, it is not difficult to see how research in this area could tell us much not only about civil justice in courtroom settings, but also about legislative decisions that regulate courtroom outcomes (e.g., should there be caps placed on medical malpractice awards?) or allocate resources directly (e.g., through regulations or restrictions that limit agricultural water use to protect the water rights of downstream water users). Distributive justice principles would be particularly valuable to examine public satisfaction with administrative agency decision-making, which regulates so much activity in American society, particularly with respect to the allocation or distribution of resources (e.g., Helm, 2001; Rubin, 2005; Suk, 2006).

Procedural Justice

Perhaps somewhat surprisingly, distributive justice principles are often less important to disputants than other factors when individuals are asked to evaluate their overall satisfaction with the resolution of some dispute or resource allocation. In many instances, procedural justice principles carry greater weight than distributive outcome measures like equity or equality in determining the overall level of satisfaction for parties to a dispute. In other words, individuals who view the dispute resolution *process* (whether that process involves a criminal or civil trial, arbitration or mediation, or some less formal dispute resolution mechanism) as fair are often more willing to accept outcomes that are objectively less equal or equitable.

Starting with early research by John Thibaut, a social psychologist, and Laurens Walker, a law professor, into procedural justice, the role of perceptions of procedural justice has been and continues to be a major focus for psycholegal researchers (Thibaut & Walker, 1975, 1978; see generally, Lind & Tyler, 1988; Tyler & Lind, 2001). Indeed, research into the interactive roles of procedural

and distributive justice indicates that a sense of procedural justice is usually *more* important than a sense of distributive justice in determining whether an outcome or distribution allocation is likely to be accepted by the parties to a dispute (Tyler, 2000; Tyler et al., 1997).

Procedural justice, as the name implies, focuses on whether the procedures used to make an allocation determination are fair, without regard to the actual outcome. Tyler (1991) identifies four key factors that individuals weigh when determining whether a proceeding is procedurally fair: fairness and neutrality of the decision maker; opportunity to present one's side of the dispute (also called *voice*); trustworthiness (as opposed to mere neutrality) of the decision maker; and respectful treatment of all parties during the course of the proceedings.

Perhaps least surprising among the four components of procedural justice is the requirement that the decision maker be perceived as *neutral*. Although it might seem reasonable that one would prefer to have a dispute heard by a judge known to be biased in favor of the claimant's position,[2] it is also the case that no one would want to have a matter resolved by a decisionmaker known to be biased against the claimant. Thus, it is important that the decisionmaker be perceived as neutral by all parties to a dispute in order to prevent either party from feeling that justice has suffered due to the decisionmaker's bias.

As important as the neutrality of the decisionmaker is the opportunity to present one's side of the dispute in front of that neutral decisionmaker. Research indicates that the opportunity to *voice* one's position is critical to the overall perception of procedural justice. Indeed, there are reports of instances where even though a party has received everything sought in a dispute, he or she nevertheless reports frustration with the proceedings due to the denial of the opportunity to fully tell his or her story. Tyler (1988) reports defendants' dissatisfaction with a traffic court judge who routinely dismissed the tickets of those who appeared in court to contest them. The judge reasoned that if the defendants had taken the time off their jobs to come to court to fight the matter, they had been sufficiently punished for whatever infraction they might have been charged with. Although the outcome manifestly favored those who contested their traffic tickets, the defendants frequently reported that they felt frustrated with the outcome because they were not given the opportunity to present their case before the decision was rendered. Many of them had gone to some lengths to prepare their case–taking pictures of the scene or arranging witnesses – only to have all charges dropped before they could tell their side of the story. Despite the positive distributive outcome, they were disturbed by the fact that their voice was not heard.

Related but not identical to the neutrality of the decisionmaker is his, her, or their *trustworthiness*. A biased decisionmaker by definition will not be deemed trustworthy by all parties to a dispute, but neutrality does not guarantee

[2] Indeed, this common sentiment is the inspiration behind a t-shirt that is popular among litigators, which reads, "A good lawyer knows the law; a *great* lawyer knows the judge."

trustworthiness. Rather, the decisionmaker must be an individual or group whom the parties believe will apply any relevant laws, rules, or other decision-making principles in an appropriate and consistent manner to oversee the proceedings and arrive at his, her, or their decision(s). Trustworthiness also has implications for legitimacy in governmental actions (Tyler, 2000; Tyler et al., 1997; see generally, Cross, 2005).

Respectful treatment is at least partially related to, yet distinct from, the other factors that comprise procedural justice. Giving the parties the opportunity to voice their concerns and stories can indicate respect for the parties. Similarly, an open display of neutrality can convey the message that one has sufficient respect for all parties to withhold judgment until the facts of the matter have been heard. Yet respectful treatment also includes such simple factors as courteous treatment and an absence of sarcasm or harsh or inappropriate criticism over the course of dispute resolution proceedings.

Often, the presence of sufficient evidence of procedural justice can overcome a lack of distributive justice in the outcome of a given proceedings, leaving losing participants nevertheless willing to accept the outcome of the process (e.g., Lind & Tyler, 1988). Interestingly, perceptions of a lack of procedural justice can cause parties to be dissatisfied with a proceeding even when the outcome of the proceeding is in their favor. Tyler's example of the traffic court judge cited previously is just one example of this paradoxical effect.

The potency of procedural justice constructs for understanding participant perceptions in civil disputes goes beyond litigation contexts. For example, Markell (2006) argues that procedural justice provides a framework that allows researchers and others to anticipate and understand citizen satisfaction with and attributions of legitimacy to international administrative actions in environmental policymaking and decision-making domains under the North American Free Trade Agreement (NAFTA). Procedural justice also makes a difference in participant perceptions in such civil justice areas as commitment hearings (Tyler, 1992), affirmative action (Tyler, 2004), and compliance with intellectual property laws (Tyler, 1997a). Sunshine and Tyler (2003) show that procedural justice principles help confer legitimacy upon government actions, in this instance the legitimacy of the police in New York (see generally, Hibbing & Theiss-Morse, 2001; Tyler, 1997b, 2006, 2007; Tyler & Darley, 2000).

Retributive and Restorative Justice

Retributive justice is focused on whether there should be sanctions for those who break rules; if sanctions are imposed, which ones are appropriate in light of the circumstances; and how severe the sanctions imposed should be (e.g., Tyler, Boeckmann, Smith & Huo, 1997; Tyler et al., 1997, chap. 5). Sanctions can include compensation to one's victim as well as punishment of the transgressor as

a means of restoring that which has been disrupted by a dispute, rule-breaking, or other transgression (e.g., Brickman, 1977; Shultz & Darley, 1991).

The concept and theory of restorative justice, sometimes alternatively described as *therapeutic justice* or *victim-offender mediation*, is relatively new, though many of the procedures it generally utilizes are actually quite old. It has gained significant popularity in the context of relatively minor crimes, particularly when such crimes are committed by youthful offenders. Restorative justice generally involves bringing the victim of the crime (or other injury) and/or his or her family together with the offender (and perhaps the offender's family or other community members, depending upon the age of the offender and the nature of the offense). The parties meet in a supportive setting that allows the victim to express how he or she has been affected by the offender's acts and be involved in determining appropriate punishment or restitution, and allows the offender to be held directly accountable to his or her victim (Umbreit & Ritter, 2006). The hope of restorative justice proponents is that such proceedings ultimately produce greater satisfaction among all the parties involved than traditional judicial proceedings would, and that they will decrease the likelihood of future wrongdoing by the offender.

The restorative justice movement arose in response to traditional criminal justice methods, which historically focused on determining whether an offender has violated a statute and meting out appropriate punishment for such a violation, usually in the form of incarceration or fines, without regard to whether such proceedings were adequate to help make the victim(s) of the offender's crimes whole again. Indeed, as noted by Umbreit, Vos, Coates, and Lightfoot (2006):

> Most contemporary criminal justice systems focus on law violation, the need to hold offenders accountable and punish them, and other state interests. Actual crime victims are quite subsidiary to the process and generally have no legal standing in the proceedings. Crime is viewed as having been committed against the state, which, therefore, essentially owns the conflict and determines how to respond to it. The resulting criminal justice system is almost entirely offender driven (p. 253).

The process is thus often highly unsatisfactory to the offender's victims, who may feel ignored or undervalued by the process, as if they were merely bystanders to the process of justice. It may also produce less than ideal results for offenders by focusing on punishment rather than healing the damage they caused, denying them the opportunity to understand the ramifications of and make restitution for their past actions (Gray-Kanatiiosh & Lauderdale, 2006; Roche, 2006).

As part of their in-depth analysis of a restorative justice dialogue that arose from the robbing of an Israeli woman by two Palestinian boys, Umbreit and Ritter (2006) articulate six elements to a restorative justice dialogue. First, everyone who was directly affected by the crime should be encouraged to participate in the dialogue. Second, the victim and the offender should be able to choose family members and/or support persons to be present, if they desire.

Third, critically, participation in the dialogue must be voluntary by all parties. Fourth, the process of the dialogue should be adapted to the needs of both the victim and the offender. Fifth, extra deference should be shown to the victim, but the offender should still be treated with respect. And sixth, all of the primary parties to the dialogue should be prepared in advance through in-person meetings with some mediator/facilitator prior to the dialogue.

While the concept of restorative justice is relatively new to American courts, similar principles can be found in many traditional or historical societies. Gray-Kanatiiosh and Lauderdale (2006) discuss the use of restorative principles in Native American societies as a way of maintaining balance within the society. They argue that, rather than exerting control through "stricter laws, more law enforcement officers, and increased funding" as a way to decrease crime in Native American communities, the money would be better spent restoring "a multidimensional 'web of justice' by identifying, understanding and, where possible, re-creating traditional cultural social practices and structures to maintain social balance, diversity, and harmony within their societies" (pp. 29–30). The "web of justice" they describe includes "preventative as well as restorative mechanisms that together function to maintain justice, *at least justice as fairness*" (p. 30, emphasis added).

More recent research in the area of restorative justice has expanded from the criminal law context to applying the principles of restorative justice in other areas (e.g., Tyler, 2006; see generally, Morrison & Ahmed, 2006). One such area is that of civil litigation. Civil litigation, and more particularly tort litigation, is generally intended to redress some injury that results from the intentional or negligent acts or omissions of another. Such cases can range from the deliberate injury of one person by another (e.g., battery or libel), to medical malpractice, to the notorious slip-and-fall case (negligence). Similarly, in breach of contract litigation, a party generally alleges that it has been injured due to the other party's failure to perform under the terms of the contract, entitling the non-breaching party to damages or other equitable relief. In both types of lawsuit, the injured party sues in order to be made whole for his or her injury. Yet, is the civil litigation process, with its monetary verdicts, the best recompense for an injury?

Greene's chapter (Ch. 12) in this volume is an example of the application of restorative justice in the civil justice arena. As Greene points out, the civil litigation experience can be very unpleasant for all the participants, and can ultimately leave even successful litigants feeling unsatisfied. This lack of satisfaction may stem from a number of factors, including the length of time required for the process, its costs – which include time away from work or loved ones and emotional toll in addition to legal fees and court costs – and various other frustrations.

Greene explores the therapeutic – and especially the counter-therapeutic – effects of litigation. Drawing on procedural justice theory, she argues both plaintiffs and defendants in tort litigation may gain some measure of satisfaction from being able to voice their side of the story and from being treated fairly

and respectfully. On the other hand, the lengthy and often acrimonious process of litigation, which may stretch out for a considerable period of time and usually results at most in the exchange of monetary compensation, often without the actual dispute being heard by the court (i.e., when the parties settle), may actually have a counter-therapeutic effect in terms of prolonging the suffering of both parties and worsening the physical and mental health and well-being of the injured party (or at least slowing his or her full recovery). It is for these reasons that Greene argues for adoption of a restorative justice approach to tort litigation, as its emphasis is upon speedy resolution to disputes and providing the parties an opportunity to talk through the injury and its impacts and explain their respective sides of the story. The hope is that by encouraging out-of-court resolution, the parties will find it more satisfying and allow them to move past the dispute or incident that led to the initial conflict.

Rather than focusing strictly on restorative justice, Robbennolt in her chapter (Ch. 11) in this volume examines the effects of apologies in a civil litigation context. While apologies can have a therapeutic effect for both an injured party and the wrongdoing party, they are often viewed as counter to the interests of the wrongdoing party, as they may be or appear to be an admission of wrongdoing and responsibility, which may affect the wrongdoing party's financial liability if the matter is brought to trial (i.e., in tort litigation) (see, e.g., Vines, 2007). Robbennolt delves into the research surrounding the practical effects of apologies and the different effects of true apologies that accept responsibility and express remorse versus mere expressions of sympathy, all in terms of an injured party's likelihood of filing a lawsuit or accepting a settlement offer, and in terms of jury perceptions about the wrongdoing party's guilt and financial liability to the injured party. Her work (see especially, Robbennolt, 2003, 2005, 2006) in this regard is admirably thorough and provides helpful guidance for future research into the therapeutic values of apologies and their effects in the dispute resolution process both inside and outside the courtroom.

Justice Principles Outside the Courtroom

The chapters by Greene and by Robbennolt are examples of psycholegal scholarship that examines justice notions inside the context of courts and litigation *and also goes beyond* this narrow bandwidth of disputes. Disputes may be resolved, for example, through quasi-legal proceedings such as arbitration or mediation, either by being referred to such proceedings by a court, by virtue of contract provisions requiring that disputes be resolved, at least in the initial stages, through such proceedings, or by the mutual agreement of the parties, who may prefer the speedier and usually less expensive alternatives of arbitration or mediation to formal litigation. In such proceedings, the applicability of the justice constructs described in this chapter are clearly analogous to

formal courtroom proceedings, with arbitration in particular resembling court trials and mediation more closely paralleling the sort of proceeding seen in restorative justice contexts.

In addition, theories of justice may have applicability in areas that seem further outside the dispute resolution process. In ordinary day-to-day affairs, disputes of all sorts arise which may be handled solely by the parties involved or by the parties appealing to some other person to help resolve the dispute. Corporations make internal decisions about resource allocation, among competing programs or internal departments; governmental entities make decisions that affect public health or welfare or require the allocation of resources in a manner that will be accepted by their constituents; health care organizations and insurers make decisions that involve the allocation of scarce healthcare resources, and patients or physicians may seek to appeal those decisions through internal appeal mechanisms within the healthcare organization or health insurer; and friends or family members may argue about any number of decisions and seek help resolving the dispute from therapists or other friends or relatives. The satisfaction of the parties with the outcomes of such disputes may be influenced by the same justice principles seen at work in formal legal proceedings.

For example, in areas such as health care, we can see the application of civil justice principles in an extremely important domain that resides mostly outside of the litigation and courtroom contexts. Extensive research has been done into the applicability of justice principles, particularly procedural and distributive justice, in the health care context. Daniels (2001), for example, relies on distributive and procedural justice principles in his examination of inequities in the healthcare system. Among other things, he concludes that distributive justice principles require protection and maintenance of proper health functioning, in that protection of health also protects the individual's "fair share of the normal range of opportunities (or plans of life) reasonable people would choose in society" (p. 3). However, he argues, since societies have resource constraints, preventing unfettered access to healthcare by all, societies must find a way to meet healthcare needs fairly given such constraints. He argues societies must "rely on a fair process for arriving at solutions to these problems and for establishing the legitimacy of rationing decisions" (p. 9, citing Rawls, 1971). Such procedures should be tied to "deliberative democratic procedures" (p. 9). Also in the healthcare arena, but in contrast to Daniels, Elster (1995) focused on the application of distributive justice principles on allocative decision-making in the context of organ transplantation. At any given time, there are huge numbers of people awaiting organ transplants, yet only a limited number of organs availability for transplantation. Decisions about who should receive organ transplants are constrained or influenced by various factors, including tissue compatibility, likelihood of organ rejection, likely lifespan of a patient if transplantation is successful, and urgency of a given recipient's need or likely level of improvement if the patient receives the transplant. In any given decision, where two recipients might have identical probability of successful

transplantation (e.g., equal tissue compatibility and probability of transplant success), giving preference to one of the factors over another might lead to a different allocation decision than giving preference to the other factor(s). Often in such situations, doctors will choose to give the transplant to the sicker patient, viewing that patient as having the greater need (thus implicating the distributive justice principle of using need as a determining factor in just allocation decisions), but Elster argued that some measure of consideration should also be given to the likely level of benefit the competing patients would receive, introducing and efficiency component to the distributive justice process of allocation determinations. Furthermore, as Elster notes, often the patient's poor health and need for organ transplantation are "the predictable outcome of earlier behavior" (p. 8). For example, an alcoholic or drug abuser might so damage his or her liver functioning as to require a liver transplant to restore healthy functioning. In such cases, Elster argues, it might be better or more efficient, from a societal perspective, to give preference to a competing patient who requires the transplant due to illness or damage from some prescribed medication, because it provides more incentive for people not to engage in detrimental behaviors if they know that society will not bail them out from the consequences of that behavior.

In addition to his examination of the role of justice principles in the context of organ transplantation, Elster (1995) also reviewed their applicability in the allocation of educational resources, focusing on admission to higher education. Again, this is a form of decision making between competing interests that ordinarily falls outside of the litigation context (barring the occasional lawsuit brought by someone who is denied admission in favor of other objectively similarly-qualified applicants) that implicates distributive and perhaps procedural justice principles. Often college admission decisions are based primarily on merit, which may or may not be one of the distributive justice principles (as discussed elsewhere in this chapter), though frequently some consideration is made with respect to a candidate's relative need, particularly when decisions are made regarding scholarships or other forms of financial support for higher education – again, raising a distributive justice principle. Yet by definition, basing decisions upon merit or need is not providing equality of educational opportunity to all college applicants, bringing the process into conflict with another distributive justice principle. Furthermore, basing a decision primarily upon merit, which may arise in part due to unequal environments and unremedied needs earlier in life, also brings the admissions process into conflict with the distributive justice principle of need as well as equality.

Justice principles also come into play in connection with public acceptance of governmental decision-making. Arvai (2003) found that when members of the public were told that a governmental decision had been made with public participation, they were more likely to approve of the actual decision, a finding that is consistent with Tyler's views of the intersection between procedural justice and legitimacy of governmental decision-making (e.g., Tyler, 2000, 2006; Tyler & Darley, 2000). Arvai's study looked at public reactions to a

governmental decision in the context of a risk communication by the National Aeronautics and Space Administration (NASA) and the Jet Propulsion Laboratory (JPL) with regard to a space mission. One central issue in the risk communication was the decision by mission planners to include generators containing approximately 33 kilograms of plutonium for generating spacecraft electricity. The decision was considered a controversial one due to the dangerous nature of the radioactive fuel when it appeared that other non-nuclear options were available, and while NASA and the JPL took several steps to help minimize the risk to civilians and the environment, there was considerable protest in the time leading up to the mission launch.

The Arvai study provided participants with one of two sets of documents describing the mission. Both documents included language developed by NASA and JPL to discuss the risk of the nuclear fuel on the mission. However, one version of the fact sheet indicated that the decision had involved "joint discussions and careful planning among experts in the North American and European space program," while the other included the following language:

> Planning for this mission was one of the firsts of its kind to involve active participation from the public as well as experts. All of the parties, expert and public alike, involved in mission planning were treated equally by the International Space Consortium in terms of their values and objectives for a safe and productive mission (p. 283).

Participants were asked to respond to a variety of questions, some of which were designed to assess their opinions about both the decision to proceed with the space mission (decision-making outcome) and the *process* used to arrive at that decision and whether that process made them more or less likely to support the overall decision. Participants were more likely to support the mission in the public involvement condition than in the expert-only condition. Similarly, participants were more satisfied with the decision-making process in the public involvement condition than in the expert-only condition. The author concluded that the use of participatory decision-making processes – that is, those that provide an opportunity for public *voice*, a procedural justice concern – conferred greater legitimacy upon governmental decisions than an expert-only decision-making process.

In another study examining the effects of justice constructs outside of the courtroom context, Hopkins and Weathington (2006) recently looked at the influence of distributive and procedural justice principles and their interaction, along with other factors, in downsizing situations in the corporate workplace. Their research focused on the survivors of the downsizing – that is, those who remained employed at the workplace following a round of layoffs. Noting earlier research by McFarlin and Sweeny (1992), which had concluded that employee perceptions of procedural justice in the workplace were a predictor of organizational commitment and trust in the organization, Hopkins and Weathington found significant relationships between both distributive justice and procedural justice, coupled with trust, on the one hand, and factors like organizational satisfaction, affective commitment, and turnover intentions (i.e., intent to seek employment elsewhere), on the other hand.

Conclusion

Decisions made between competing parties and among various options are a daily fact of life across the societal spectrum: Businesses decide which projects to allocate resources to, parents decide appropriate rewards and punishments for their children, employers resolve disputes between employees or with their customers, health maintenance organizations decide how to spend limited financial resources to try to obtain the best overall results for their covered enrollees (usually while attempting to maintain profitability), federal, state and local governments make resource allocation determinations, and so forth. Procedural and distributive justice principles, and possibly even restorative and retributive justice principles, are implicated in all of these instances, and thus provide fertile ground for future inquiry by behavioral science researchers interested in expanding their research outside of the courtroom context.

In conclusion, while government, business, education, and many other spheres of civil society that raise justice concerns touch on the law and are impacted by the courts, they nonetheless operate primarily outside the litigation context, exercising enormous influence on human behavior. Psychologal scholars should consider devoting more time and resources to studying justice issues in these contexts. We have long known the *threat* of judge or jury decision-making facilitates dispute resolution (e.g., Mnookin & Kornhauser, 1979), but we know much less about why it is the case that the vast majority of disputes are resolved without any recourse to the formal legal system. There is much to know. Whether the matter is as potentially mundane as teenager compliance with school rules, as nationally imperative as health care or economic reforms (e.g., Smith & Tyler, 1996), or as wrenching as the debate about the appropriate forums to resolve claims and the compensation amounts to be paid to the victims of the September 11th terrorist attacks (e.g., Bornstein & Poser, in press; Tyler & Thorisdottir, 2003), justice constructs can assist in social scientific understanding of the vast array of differences that arise in modern-day, diverse civil society (e.g., Tyler, 1994a, 2000; Tyler, Lind, & Huo, 2000).

References

Adams, J. S. (1965). Inequity in social exchange. In L. Berkowitz (Ed.), *Advances in experimental social psychology* (Vol. 2, pp. 267–299). New York: Academic Press.

Arvai, J. L. 2003. Communicating the results of participatory decision making: Effects on the perceived acceptability of risk-policy decisions. *Risk Analysis, 23*, 281–291.

Bornstein, B. H., & Poser, S. (in press). Perceptions of procedural and distributive justice in the September 11th Victim Compensation Fund. *Cornell Journal of Law and Public Policy*.

Brickman, P. (1977). Crime and punishment in sports and society. *Journal of Social Issues, 33*(1), 140–164.
Court Statistics Project. (2006). *State court caseload statistics, 2005*. Williamsburg, VA: National Center for State Courts. Available on-line at http://www.ncsconline.org/D_Research/csp/2005_files/State%20Court%20Caseload%20Statistics%202005.pdf.
Cross, F. B. (2005). Law and trust. *Georgetown Law Review, 93*, 1457–1545.
Deutsch, M. (1985). *Distributive justice: A social-psychological perspective*. New Haven: Yale University Press.
Elster, J. (1995). The idea of equality revisited. In J. Altham and R. Harrison (Eds.), *World, mind, and ethics: Essays on the ethical philosophy of Bernard Williams* (pp. 4–18). New York: Cambridge University Press.
Felstiner, W. L. F., Abel, R. L., & Sarat, A. (1980–1981). The emergence and transformation of disputes: Naming, blaming, claiming. *Law and Society Review, 15*, 631–655.
Galanter, M. S. (1983). Reading the landscape of disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society. *UCLA Law Review, 31*, 4–71.
Galanter, M. S. (1993). News from nowhere: The debased debate on civil justice. *Denver University Law Review, 71*, 77–103.
Galanter, M. S. (1996). Real world torts: An antidote to anecdote. *Maryland Law Review, 55*, 1093–1160.
Gray-Kanatiiosh, B., & Lauderdale, P. (2006). The web of justice: Restorative justice has presented only part of the story. *Wicazo Sa Review, 21*(1), 29–41.
Greene, E. (2007). "Can we talk?" Therapeutic jurisprudence, restorative justice, and tort litigation. [this volume]
Hegtvedt, K. A., & Cook, K. S. (2001). Distributive justice: Recent theoretical developments and applications. In J. Sanders & V. L. Hamilton (Eds.), *Handbook of justice research in law* (pp. 93–132). New York: Kluwer Academic/Plenum Publishers.
Helm, J. P. (2001). Asbestos litigation and the proposed administrative remedy: Between the values of individualism and distributive justice. *Emory Law Journal, 50,* 631–662.
Hersch, J. (2006). Demand for a jury trial and the selection of cases for trial. *Journal of Legal Studies, 35*, 119–142.
Hibbing, J. R., & Theiss-Morse, E. (Eds.) (2001). *What is it about government that Americans dislike?* New York: Cambridge University Press.
Hopkins, S. M., & Weathington, B. L. (2006). The relationships between justice perceptions, trust, and employee attitudes in a downsized organization. *Journal of Psychology: Interdisciplinary and Applied, 140*, 477–498.
Kritzer, H. M., Vidmar, N., & Bogart, W. A. (1991). To confront or not to confront: Measuring claiming rates in discrimination grievances. *Law and Society Review, 25*, 875–887.
Lerner, M. J. (1975). The justice motive in social behavior: Introduction. *Journal of Social Issues, 31*(3), 1–19.
Lerner, M. J., & Lerner, S. C. (Eds.) (1981). *The justice motive in social behavior: Adapting to times of scarcity and change*. New York: Plenum.
Lind, E. A., & Tyler, T. R. (1988). *The social psychology of procedural justice*. New York: Plenum Press.
Markell, D. L. (2006). Understanding citizen perspectives on government decision making processes as a way to improve the administrative state. Environmental Law, 36, 651–708.
McFarlin, D. B., & Sweeney, P. D. (1992). Distributive and procedural justice as predictors of satisfaction with personal and organizational outcomes. *Academy of Management Journal, 35*, 626–637.
Michelbach, P. A., Scott, J. T., Matland, R. E., & Bornstein, B. H. (2003). Doing Rawls justice: An experimental study of income distribution norms. *American Journal of Political Science*, *47*, 523–539.

Miller, R. E., & Sarat, A. (1980–1981). Grievances, claims, and disputes: Assessing the adversary culture. *Law and Society Review,15*, 525–566.

Mnookin, R. H., & Kornhauser, L. (1979). Bargaining in the Shadow of the Law: The Case of Divorce, *Yale Law Journal, 88*, 950–997.

Morrison, B., & Ahmed, E. (Eds.) (2006). Restorative justice and civil society. *Journal of Social Issues, 62* (2), 209–438.

Pleasence, P. (2006). *Causes of action: Civil law and social justice* (2nd ed.). Norwich, England: The Stationary Office and Legal Services Commission.

Robbennolt, J. K. (2003). Apologies and legal settlement. *Michigan Law Review*, *102*, 461–516.

Robbennolt, J. K. (2005). What we know and don't know about the role of apologies in health care disputes. *Georgia State University Law Review*, *21*, 1009–1027.

Robbennolt, J. K. (2006). Apologies and settlement levers. *Journal of Empirical Legal Studies, 3*, 333–373.

Robbennolt, J. K. (2007). Apologies and civil justice. [this volume]

Roche, D. (2006). Dimensions of restorative justice. *Journal of Social Issues, 62*(2), 217–238.

Rubin, E. (2005). The myth of accountability and the anti-administrative impulse. *Michigan Law Review*, *103*, 2073–2136.

Scott, J. T., Matland, R. E., Michelbach, P. A., & Bornstein, B. H. (2001). Just deserts: An experimental approach to distributive justice. *American Journal of Political Science, 45*, 749–767.

Shultz, T. R., & Darley, J. M. (1991). An information-processing model of retributive justice based on "legal reasoning". In W. M. Kurtines & J. L. Gewirtz (Eds.), *Handbook of moral behavior and development: Research* (Vol. 2, pp. 247–278). Hillsdale, NJ: Erlbaum.

Smith, H. J., & Tyler, T. R. (1996). Justice and power: Can justice motivations and superordinate categorizations encourage the advantaged to support policies which redistribute economic resources and encourage the disadvantaged to willingly obey the law? *European Journal of Social Psychology*, *26*, 171–200.

Suk, J. C. (2006). Antidiscrimination law in the administrative state. *University of Illinois Law Review, 2006*, 405–473.

Thibaut, J. W., & Kelley, H. H. (1959). *The social psychology of groups*. New York: John Wiley.

Thibaut, J., & Walker, L. (1975). *Procedural justice: A psychological analysis*. Hillsdale, NJ: Erlbaum.

Thibaut, J., & Walker, L. (1978). A theory of procedure. California Law Review, 66, 541–66.

Trubek, D. M., Grossman, J. B., Felstiner, W. L. F., Kritzer, H. M., & Sarat, A. (1983). *Civil litigation research project: Final report*. Madison: University of Wisconsin Law School.

Trubek, D. M., Sarat, A., Felstiner, W. L. F., Kritzer, H. M., & Grossman, J. B. (1983). The costs of ordinary litigation. *UCLA Law Review, 31*, 72–127.

Tyler, T. R. (1988). What is procedural justice?: Criteria used by citizens to assess fairness in legal procedures. *Law and Society Review*, 22, 103–135.

Tyler, T. R. (1991). Using procedures to justify outcomes: Testing the viability of a procedural justice strategy for managing conflict and allocating resources in work organizations. *Basic and Applied Social Psychology, 12*, 259–279.

Tyler, T. R. (1992). The psychological consequences of judicial procedures: Implications for civil commitment hearings. *Southern Methodist University Law Review*, *46*, 401–413.

Tyler, T. R. (1994a). Governing amid diversity: Can fair decision-making procedures bridge competing public interests and values? *Law and Society Review*, *28*, 701–722.

Tyler, T. R. (1994b). Psychological models of the justice motive. *Journal of Personality and Social Psychology*, *67*, 850–863.

Tyler, T. R. (1997b). The psychological of legitimacy: A relational perspective on voluntary deference to authorities. *Personality and Social Psychology Review*, *1*, 323–345.

Tyler, T. R. (2000). Social justice: Outcome and procedure. *International Journal of Psychology, 35*, 117–125.
Tyler, T. R. (2004). Affirmative action in an institutional context: The antecedents of policy preferences and political support. *Social Justice Research, 17*, 5–24.
Tyler, T. R. (2006b). Restorative justice and procedural justice: Dealing with rule breaking. *Journal of Social Issues, 62*(2), 307–326.
Tyler, T. R. (2007). Racial profiling, attributions of motive, and the acceptance of social authority. In R. L. Wiener, B. H. Bornstein, R. Schopp, & S. L. Willborn (Eds.), *Social consciousness in legal decision making: Psychological perspectives* (pp. 61–74). New York: Springer.
Tyler, T. R., Boeckmann, R. J., Smith, H. J., & Huo, Y. J. (1997). *Social justice in a diverse society*. Boulder, CO: Westview Press.
Tyler, T. R., & Darley, J. (2000). Building a law-abiding society: Taking public views about morality and the legitimacy of legal authorities into account when formulating substantive law. *Hofstra Law Review*, *28*, 707–739.
Tyler, T. R., & Lind, A. E. (2001). Procedural justice. In J. Sanders and V. L. Hamilton (Eds.), *Handbook of justice research in law* (pp. 65–92). New York: Kluwer Academic/Plenum Publishers.
Tyler, T. R., Lind, E. A., & Huo, Y. J. (2000). Cultural values and authority relations. *Psychology, Public Policy, and Law*, *6*, 1138–1163.
Tyler, T. R., & Thorisdottir, H. (2003). A psychological perspective on compensation for harm: Examining the September 11th Victim Compensation Fund. *DePaul Law Review, 53*, 355–391.
Umbreit, M. S., & Ritter, R. (2006). Arab offenders meet Jewish victim: Restorative family dialogue in Israel. *Conflict Resolution Quarterly, 24*, 99–109.
Umbreit, M. S., Vos, B., Coates, R. B., & Lightfoot, E. (2006). Restorative justice in the twenty-first century: A social movement full of opportunities and pitfalls. *Marquette Law Review, 89*, 251–304.
U.S. Courts. (2007, March 13). *Fiscal year 2006 caseloads remain at high levels*. On-line at http://www.uscourts.gov/Press_Releases/caseload031307print.html.
Vines, P. (2007). The power of apology: Mercy, forgiveness or corrective justice in the civil liability arena? *Public Space: The Journal of Law and Social Justice, 1* (1), Art. 5, 1–51. Available on-line at http://epress.lib.uts.edu.au/ojs/index.php/publicspace/article/viewFile/535/482.
Walster, E., Walster, G. W., & Berscheid, E. (1978). *Equity: Theory and research*. Boston: Allyn & Bacon.
Weinrib, E. J. (2002). Corrective justice in a nutshell. *University of Toronto Law Journal, 52*, 349–356.

Signs for the Future of Civil Justice Research

Brian H. Bornstein

The chapters in the present volume provide a number of signs for the future of civil justice research. Many of the signs are favorable and point to continued fruitful collaborations between legal and psychological researchers on pressing topics in the justice arena with important policy implications; yet the contributions also highlight several gaps in the literature, data limitations, and false steps. In other words, some of the signs are not-so-favorable, and there is still much work to be done. In this concluding commentary, I identify the major portents for the future, both good and bad.

Favorable Signs

This book itself is an indication that the field is in good shape.[1] The book will rise or fall on its own merits, but the fact that the book—and the conference that spawned it—attracted a stellar group of talented researchers and a leading publisher shows that there is a market for this kind of research. As noted in the Preface, disputes over the responsibility for injuries, and consequent attempts to attain justice, are an everyday occurrence. Most of these disputes do not ultimately result in trial by jury. As mentioned in several chapters, jury trials are rare, and some of the more controversial elements and types of trials (e.g., punitive damages, medical malpractice) are especially uncommon; yet juries are nonetheless such a central feature of the American civil justice system, with such profound ripple effects throughout society (influencing the behavior of consumers, manufacturers, insurers, policy-makers, and others), that their study is a worthy enterprise. A number of recent books on juries attest to the

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[1] This is, of course, a rather immodest claim for an editor to make about his own book, which I recognize and for which I ask the reader's indulgence.

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attention that they receive from researchers, the media, and the public (e.g., Abramson, 1994; Greene & Bornstein, 2003; Jonakait, 2003; Sunstein, Hastie, Payne, Schkade, & Viscusi, 2002; van Koppen & Penrod, 2003; Vidmar & Hans, 2007).[2]

Other signs exist that civil justice research is a vibrant field. The membership and conference attendance of leading interdisciplinary organizations, such as the American Psychology-Law Society and Law and Society Association, have grown steadily in recent years. Journals that frequently publish jury and related research, such as *Law and Human Behavior*, *Behavioral Sciences and the Law*, *Psychology, Public Policy, and Law*, and *Psychology, Crime, and Law*, have seen their submission numbers and impact factors rise. Law journals are increasingly publishing empirical scholarship, and "empirical legal studies" has become its own subdiscipline with its own journal, the *Journal of Empirical Legal Studies*, which appeared in 2004. To some extent, then, the field has been the beneficiary of the growth of law-and-psychology and law-and-social-science more broadly (see, e.g., Blumenthal, 2002; Ogloff & Finkelman, 1999).

No doubt part of this growth reflects the fact that the jury system is being considered, adopted, or used more widely in a number of countries besides the U.S. and U.K. (e.g., Germany, Japan, Korea, Spain, Russia; see Kaplan & Martin, 2006; Vidmar, 2000). Interestingly, and somewhat ironically, this movement toward the increasing use of juries in much of the world comes at a time when jury trials are on the decline in the U.S. (Galanter, 2004; Hans, 2006). Some other countries also employ lay judges, who in terms of knowledge, training, and experience are somewhere between jurors and professional judges; and empirical research has recently begun to focus on this class of legal decision maker (e.g., Bliesener, 2006; Diamond, 2003). Like lay judges, professional judges behave similarly to jurors in many respects (Robbennolt, 2005), but there are differences between these two types of legal decision makers as well (Diamond, 2003; Guthrie, Rachlinski, & Wistrich, 2001). As jurors are not the only factfinders who resolve disputes at trial, it is encouraging that more research is focusing on these other decision makers as well.

The study of other kinds of legal decision makers has required the development and adoption of new research methods. For example, it is harder (though not impossible) to get judges to act as "mock judges" and read or view a simulated trial than it is to get college undergraduates to serve as mock jurors. Thus, the bulk of legal decision making research involves student mock jurors who read a simulated trial (Bornstein, 1999). The limitations, as well as the advantages, of jury simulations as a research tool have been amply demonstrated

[2] It is not a coincidence that some of these books have authors who are also contributors to the present volume. The list is selective and, in addition to omitting other scholarly works, leaves out the large number of novels about juries and books written, in some cases by jurors themselves, about individual well-publicized jury trials. The volume of these works also attests to the public's seemingly insatiable appetite for information on juries.

(Bornstein, 1999; Bornstein & McCabe, 2005; Diamond, 1997; Kerr & Bray, 2005; Vidmar, this volume).

The use of diverse methodologies, such as juror interviews and case studies, is increasing, as illustrated by some of the selections in this book (see chapters by Vidmar and Hans). The increase in the number of archival analyses of actual jury verdicts, as exemplified by the empirical legal studies movement, also contributes to this diversity (see chapters by Sharkey, Eisenberg et al., and Poser). Field studies are another valuable piece of the puzzle, as they afford a degree of experimental control within a real-world context; but they are difficult and expensive to conduct and therefore rare. Using multiple methodologies to investigate the same issue is valuable because of the principle of *convergent validity* (Wiener, this volume); simply put, one can be more confident in the "truth" of some finding if it has been demonstrated across multiple contexts or exemplars using a variety of techniques.[3] The increasing use of diverse research methods is clearly a good sign for the field, but as Vidmar (this volume) points out, researchers should use more ecologically valid methods more of the time.

Not-so-favorable Signs

Part of the allure of studying jurors is that in addition to performing research that has policy implications, the jury is an ideal laboratory within which to study basic psychological processes such as decision making, hypothesis testing, persuasion, and group dynamics (Kerr & Bray, 2005). Thus, jury researchers have, in a very real sense, the best of both worlds: the opportunity to make scientific as well as practical contributions. Many, if not most, researchers would agree that the best possible sign for civil justice research would be that the research is having some sort of real-world impact. Indeed, the best sort of psycholegal research adheres to a model of "social analytic jurisprudence," which combines legal and psychological analysis of legal doctrines with empirical research methods to bear on law and policy (Wiener, 2007). Empirical research on juries is critical to the proper establishment of policies governing jury trials, such as requirements regarding a jury's size, composition, decision rule, and other procedures (Saks, 1989, 1992). As Bornstein and Robicheaux describe in their introductory chapter, the tort reform debate has become increasingly data-driven, which is a good thing; nonetheless, legislators still evince a disturbing tendency to enact reforms in the absence of data demonstrating their effectiveness. Perhaps not surprisingly, some of these non-empirically-based reforms have turned out to be

[3] There are never any guarantees, and there are no conventions for how to weigh conflicting findings. Findings can be contradictory not only across research methods but within a particular method depending on a variety of factors, such as assumptions, choice of data set, and analytic techniques (see Eisenberg et al., this volume).

counter-productive. Unintended effects can occur, at least under some circumstances, for such reform measures as caps (Robbennolt & Studebaker, 1999; Sharkey, 2005; Sharkey, this volume) and split-recovery statutes (Sharkey, 2003).

There is also little evidence that empirical social scientific research is influencing the courts. For example, civil jury researchers submitted amicus curiae briefs in the two most recent punitive damages cases decided by the U.S. Supreme Court (*Philip Morris USA v. Williams*, 2007; *State Farm Mutual Automobile Insurance Company v. Campbell*, 2003), but neither opinion cited the brief, and in both cases the respondent (in support of whom the brief was submitted) lost.[4]

It is interesting to consider why jury research has had relatively little impact on the courts, whereas other experimental psychological research, such as the study of eyewitness memory, has made significant inroads (Benton, McDonnell, Ross, Thomas, & Bradshaw, 2007; Technical Working Group for Eyewitness Evidence, 1999).[5] In part, it seems to reflect an expectation that jurors can make the sorts of decisions required in civil cases (e.g., negligence, damages) just fine despite receiving little guidance (Greene & Bornstein, 2000). Attorneys themselves are aware that it is not all common sense—hence the rise of trial consulting in civil cases (Bornstein & Greene, in press; Hastie, this volume).

Rather than hiring consultants or retaining experts, wouldn't it be better, and more efficient, to train the attorneys themselves? Even though expert testimony, often of a scientific and/or experimental nature, is quite common in trials nowadays (Vidmar, this volume), few law schools offer instruction in scientific research methods or statistics. A survey of new law school course offerings (1994–1997) conducted by the Association of American Law Schools that reported the top 25 areas of curricular growth had no entries for statistics, research methods, or scientific practice (Merritt & Cihon, 1997). However, an entry for "nonlegal skills" under "additional areas of potential curricular growth" did include 10 courses (from 83 law schools) on "quantitative methods, statistics, or social science techniques" (Merritt & Cihon, p. 561). Thus, although most law students still finish law school without any significant empirical training, there are signs of progress.[6] This is not to say, of course, that having lawyers with a modicum of scientific or methodological training would obviate the need for consultants or experts in all cases; but it would

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[4] The present author signed the Philip Morris brief, and several other contributors to the present volume also signed one or both briefs.

[5] Although it has had little impact on caselaw, jury research has contributed to some procedural changes. For example, findings demonstrating poor comprehension of judge's instructions by jurors have contributed to the revision of instructions by some states, such as California (Miller & Bornstein, 2004; Post, 2004).

[6] It is possible, of course, that more courses have been added in the 10 years since this survey was conducted, a possibility corroborated by an informal survey done recently by Robert Lawless, Jennifer Robbennolt, and Thomas Ulen (Robbennolt, personal communication), who are preparing a textbook on the topic (Lawless, Robbennolt, & Ulen, in press).

undoubtedly reduce attorneys' reliance on them, and it would enable them to make better use of their services when they were retained.

One of the biggest shortcomings in civil justice research, as a field, is its overemphasis on jury behavior to the near exclusion of alternative methods of dispute resolution. Several chapters, particularly those in Section IV, highlight this shortcoming. As Tomkins and Applequist (this volume) note, there are many aspects of justice: distributive, procedural, restorative, and retributive, to which one could also add interactional (Robbennolt, this volume) and corrective (Sheinman, 2003; see generally, Tyler, Boeckmann, Smith, & Huo, 1997). These various aspects of justice are all implicated in dispute resolution at trial, but their principles can also be employed to understand civil dispute resolution outside the courtroom litigation context, where it occurs much more often. There are lots of civil disputes, and most of them are resolved without a trial, by some alternative means. Not only can other approaches to justice, such as therapeutic jurisprudence and restorative justice, be incorporated into tort litigation—as by encouraging harmdoers to apologize and protecting their statements from expanded liability—but they have the power in many cases to preempt litigation altogether by facilitating settlement or discouraging the filing of a claim in the first place (see chapters by Robbennolt, Greene, & Landsman). This would make trials both less likely to occur and less painful when they do occur (see chapter by Greene, this volume). Researchers would do well to heed Tomkins and Applequist's recommendation to devote more time and resources to studying justice issues in non-trial contexts.

The emphasis on juries also obscures the fact there are many other, potentially more beneficial and cost-effective, ways to improve the civil justice system. Improving jury instructions, mentioned above, is one example; the chapter by Bornstein and Robicheaux (this volume) mentions other possibilities, many of them endorsed by organizations such as the American Tort Reform Association, but which receive much less attention. For instance, promoting jury service and sound science in the courtroom are uncontroversial goals that could yield enormous benefits. Both would lead to a more efficient system, and the latter would undoubtedly lead to more just outcomes.

There are many procedures outside the litigation context that would further the aims of justice as well. In light of the small number of trials (especially jury trials), it is necessary to focus reform efforts where they can do the most good. In the healthcare context, that means worrying less about malpractice lawsuits and more about reducing medical errors and changing medical attitudes and culture (see chapters by Landsman and Miller). There are many medical errors (Institute of Medicine, 2000), but few lawsuits; so strategies should focus on preventing the injuries in the first place. Nor should physicians be singled out for their "juryphobia": It is rampant in society, afflicting product manufacturers, businesses, service providers, and governments. Everyone has his or her favorite example of how juryphobia has gotten out of control and diminished our quality of life. One that hits close to home for me is that many golf courses no longer place water coolers along the course, due to fears that the water might

somehow become contaminated and make an unsuspecting golfer sick. And excessive warnings are everywhere (e.g., “Do not place hands under lawnmower while blade is moving”). As in the case of medical malpractice, the specter of a jury trial, legal liability, and a large damage award loom large in these cases—but the problem goes well beyond the jury.

The excessive emphasis on physicians’ liability in malpractice trials also ignores the much more common, and potentially more vexing, issue of medical injuries and evidence, as well as testimony by physician witnesses who are not party to the lawsuit. After all, trials involving physical or psychological (as opposed to financial or property) injury are going to contain testimony describing the nature and extent of the injury. Often, though not always, medical experts will provide testimony in these cases, in order to characterize or quantify the harm that has been done (Bornstein & Greene, in press). There are many variables to consider in addressing the effect that such testimony is likely to have, especially when the injury’s effects are not readily observable (Hans, this volume). Physicians have a much larger role to play in the civil justice system than merely as possible defendants.

Conclusion

Empirical research on civil juries is a relatively young field, dating back roughly to the 1950s (Kalven, 1958, 1964). The empirical study of civil justice is somewhat older, and philosophical discussions of justice go back thousands of years; but there is still much research to be done on these topics. In the present chapter, I have tried to identify some of the promising signs for the field as a whole, while also pointing out limitations and areas where there is room for improvement.

Questions of civil justice raise much larger issues than whether juries do a good or poor job and how we can improve their performance. They go to normative questions about what is fair and reasonable and the kind of society we wish to live in. Nonetheless, civil juries and civil justice are intertwined. Whether we like it or not, jurors are the poster children of our civil justice system. As psycholegal researchers, we should study more than just juries; but a better understanding of juries would go a long way toward the larger goal of achieving civil justice.

References

Abramson, J. (1994). *We, the jury: The jury system and the ideal of democracy*. New York: Basic Books.

Benton, T.R., McDonnell, S., Ross, D.F., Thomas, W.N., & Bradshaw, E. (2007). Has eyewitness research penetrated the American legal system? In R.C.L. Lindsay, D.F.

Ross, J.D. Read, & M.P. Toglia (Eds.), *Handbook of eyewitness psychology, Vol. 2: Memory for people* (pp. 453–500). Mahwah, NJ: Erlbaum.

Bliesener, T. (2006). Lay judges in the German criminal court: Social-psychological aspects of the German criminal justice system. In M.F. Kaplan & A.M. Martin (Eds.), *Understanding world jury systems through social psychological research*. NewYork: Psychology Press.

Blumenthal, J.A. (2002). Law and social science in the twenty-first century. *Southern California Interdisciplinary Law Journal, 12*, 1–53.

Bornstein, B.H. (1999). The ecological validity of jury simulations: Is the jury still out? *Law and Human Behavior, 23*, 75–91.

Bornstein, B.H., & Greene, E. (in press). Consulting on damage awards. To appear in R.L. Wiener & B.H. Bornstein (Eds.), *Handbook of trial consulting*. New York: Springer.

Bornstein, B.H., & McCabe, S.G. (2005). Jurors of the absurd? The role of consequentiality in jury simulation research. *Florida State University Law Review, 32*, 443–467.

Diamond, S.S. (1997). Illuminations and shadows from jury simulation. *Law and Human Behavior, 21*, 561–571.

Diamond, S.S. (2003). Convergence and complementarity between professional judges and lay adjudicators. In P. van Koppen & S.D. Penrod (Eds.), *Adversarial vs. inquisitorial justice* (pp. 321–332). New York: Springer.

Galanter, M. (2004). The vanishing trial: An examination of trials and related matters in federal and state courts. *Journal of Empirical Legal Studies, 1*, 459–570.

Greene, E., & Bornstein, B.H. (2000). Precious little guidance: Jury instruction on damage awards. *Psychology, Public Policy, and Law, 6*, 743–768.

Greene, E., & Bornstein, B.H. (2003). *Determining damages: The psychology of jury awards.* Washington, DC: American Psychological Association.

Guthrie, C., Rachlinski, J.J., & Wistrich, A.J. (2001). Inside the judicial mind. *Cornell Law Review, 86*, 777–830.

Hans, V.P. (2006, Spring). The twenty-first century jury: Worst of times or best of times? *Criminal Law Brief*, 3–8.

Institute of Medicine (2000). To err is human: Building a safer health system. Retrieved March 9, 2007 from: http://www.iom.edu/object.file/master/4/117/0.pdf.

Jonakait, R.N. (2003). *The American jury system*. New Haven, CT: Yale University Press.

Kalven, H. (1958). The jury, the law, and the personal injury damage award. *Ohio State Law Journal, 19*, 159–178.

Kalven, H. (1964). The dignity of the civil jury. *Virginia Law Review, 50*, 1055–1075.

Kaplan, M.F., & Martin, A.M. (2006). *Understanding world jury systems through social psychological research*. New York: Psychology Press.

Kerr, N.L., & Bray, R.M. (2005). Simulation, realism, and the study of the jury. In N. Brewer & K.D. Williams (Eds.), *Psychology and law: An empirical perspective* (pp. 322–364). New York: Guilford.

Lawless, R.M., Robbennolt, J.K., & Ulen, T.S. (in press). *Empirical methods in law.* New York: Aspen Publishers.

Merritt, D.J., & Cihon, J. (1997). New course offerings in the upper-level curriculum: Report of an AALS survey. *Journal of Legal Education, 47*, 524–570.

Miller, M.K., & Bornstein, B.H. (2004). Juror stress: Causes and interventions. *Thurgood Marshall Law Review, 30*, 237–269.

Ogloff, J.R.P., & Finkelman, D. (1999). Psychology and law: An overview. In R. Roesch, S.D. Hart, & J.R.P. Ogloff (Eds.), *Psychology and law: The state of the discipline* (pp. 1–20). New York: Kluwer Academic/Plenum Publishers.

Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

Post, L. (Nov. 10, 2004). Spelling it out in plain English. *National Law Journal* online.

Robbennolt, J.K. (2005). Evaluating juries by comparison to judges: A benchmark for judging? *Florida State University Law Review, 32*, 469–509.

Robbennolt, J.K., & Studebaker, C.A. (1999). Anchoring in the courtroom: The effects of caps on punitive damages. *Law and Human Behavior, 23*,353–373.

Saks, M.J. (1989). Legal policy analysis and evaluation. *American Psychologist, 44*, 1110–1117.

Saks, M.J. (1992). Do we really know anything about the behavior of the tort litigation system—and why not? *University of Pennsylvania Law Review, 140*, 1147–1292.

Sharkey, C.M. (2003). Punitive damages as societal damages. *Yale Law Journal, 113*, 347–453.

Sharkey, C.M. (2005). Unintended consequences of medical malpractice damages caps. *New York University Law Review, 80*, 391–512.

Sheinman, H. (2003). Tort law and corrective justice. *Law and Philosophy, 22*, 21–73.

State Farm Mutual Automobile Insurance Company v. Campbell, 123 S. Ct. 1513 (2003).

Sunstein, C., Hastie, R., Payne, J., Schkade, D., & Viscusi, W. (2002). *Punitive damages: How juries decide*. Chicago, IL: University of Chicago Press.

Technical Working Group for Eyewitness Evidence (1999). *Eyewitness evidence: A guide for law enforcement*. Washington, DC: U.S. Department of Justice.

Tyler, T. R., Boeckmann, R. J., Smith, H. J., & Huo, Y. J. (1997). *Social justice in a diverse society*. Boulder, CO: Westview Press.

Van Koppen, P., & Penrod, S.D. (2003). *Adversarial vs. inquisitorial justice*. New York: Springer.

Vidmar, N. (2000). *World jury systems*. New York: Oxford University Press.

Vidmar, N., & Hans, V. (2007). *American juries: The verdict*. Amherst, NY: Prometheus Press.

Wiener, R.L. (2007). Law and everyday decision making: Rational, descriptive, and normative models. In R.L. Wiener, B.H. Bornstein, R. Schopp, & S.L. Willborn (Eds.), *Social consciousness in legal decision making* (pp. 3–32). New York: Springer.

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