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INTRODUCTION

In January 2003, President George W. Bush invoked the supposed failings of the civil jury as the rationale for sweeping changes to the civil justice system.[1] In a speech given at the University of Scranton, in Pennsylvania, a state where skyrocketing costs of medical malpractice insurance had created a political crisis, President Bush said, "Excessive jury awards will continue to drive up insurance costs, will put good doctors out of Scranton, Pa."[2] Among the changes he proposed were a decrease in the time that patients would have to sue their doctors, a national cap on pain and suffering awards at $250,000, and a limit on punitive damages.[3]

Mr. Bush's speech was only the most recent in a long line of attacks on the functioning of the American civil jury. We can trace the contemporary series of denunciations to the 1980s as part of a broad tort reform initiative begun during the Republican administrations of Ronald Reagan and George H.W. Bush.[4] A central argument is that

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1 *See* Richard W. Stevenson, *President Asks Congress for Measures Against Frivolous Suits*, N.Y. TIMES, Jan. 17, 2003, at A20.

2 *Id.*

3 *Id.*

4 *See* ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 14–17 (2001); *see also* PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991) (recommending changes to the civil justice system in response to the increasing problems of excessive costs and long delays in trials); U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (Feb. 1986) (recommending changes to the civil justice system in response to problems with insurance availability and cost).

Americans have become increasingly litigious, an argument that is now widely accepted among members of the public[5] and that President George W. Bush echoed in his most recent call for new limits on civil justice and the jury.[6] And juries, it is asserted, do not do a good job in differentiating bogus and valid lawsuits.[7] Instead, they exacerbate the problem by their unwarranted sympathy for questionable claimants and their concomitant delivery of excessive awards.[8]

We can identify several distinct criticisms of the civil jury. First is the broadly shared presumption that civil jurors are highly sympathetic to plaintiffs who bring lawsuits and tend to be hostile to corporate and insurance defendants.[9] A second charge is that civil jurors have serious problems comprehending trial evidence and legal instructions, particularly in complex cases and trials with expert witnesses.[10] Compensatory awards by juries are subject to criticism as well; they are seen as erratic and unpredictable, and usually too high,[11] although in some circumstances juries are accused of being too stingy.[12] Finally, the jury's involvement in punitive damages has come under concerted attack.[13] Critics claim that juries determine

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5 *See* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 58–67 (2000) (discussing the widespread public belief that America is experiencing a litigation crisis and that there are many unjustified lawsuits).

6 *See* Richard A. Oppel, Jr., *With a New Push, Bush Enters Fray over Malpractice*, N.Y. TIMES, Jan. 17, 2003, at A1.

7 *See generally* JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME: INJURIES, INSURANCE, AND INJUSTICE 23–32 (1987) (asserting that juries are not competent to evaluate evidence and testimony and are manipulated into verdicts by lawyer tactics).

8 *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 50–51, 181–87 (1988); O'CONNELL & KELLY, *supra* note 7, at 23–32; WALTER OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT *passim* (1991). *But see* HANS, *supra* note 5, at 52–58; Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 90–99 (1993) (refuting President Bush's statements that product liability litigation is hurting the American economy with empirical data showing that the number of product liability suits filed is decreasing); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1103–09 (1996) (arguing that empirical data do not support the assertion that Americans are increasingly litigious).

9 *See* HANS, *supra* note 5, at 12–14.

10 *See* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 853–75 (1999).

11 *See* EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 21–36 (2003).

12 *See id.*

13 *See* Brief of Certain Leading Business Corporations as Amici Curiae in Support of Petitioner at 1–23, Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2001 WL 1246676 (Utah Oct. 19, 2001), (addressing arguments related to a jury's involvement in awarding punitive damages) *rev'd*, 123 S. Ct. 1513 (2003).

punitive damages in a capricious and arbitrary manner, that juries are unable to translate their punishment desires into dollar figures consistently and fairly, and that juries consider legally inappropriate factors.[14]

Critics have proposed a variety of remedies to address the problems they have noted with the civil jury.[15] In addition to the Bush administration's proposals for national limits on pain and suffering and punitive damages, some commentators have suggested that civil juries should be more tightly controlled in the types of evidence that they may hear. In fact, the U.S. Supreme Court's line of decisions concerning expert testimony can be read as reflecting this perspective.[16] Critics favor greater use of carefully crafted interrogatories that allow only specific factual questions to be answered by the jury rather than allowing juries to reach general verdicts.[17] More drastic changes include the idea that judges should take over the jury's role in deciding complex cases[18] and in assessing punitive damages.[19] State legislatures have implemented a number of these reforms.[20]

In addition to changes that have or would limit the civil jury, other proposed modifications are aimed at improving the representative nature and function of the jury. These include changing jury selection methods to achieve more representative juries, altering jury structure to enable more efficient decisionmaking, and modifying

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14 *See* Vidmar, *supra* note 10, at 849–50.

15 *See infra* notes 16–20 and accompanying text.

16 *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999); Gen. Elec. v. Joiner, 522 U.S. 136, 142 (1997); Daubert v. Merrell Dow Pharm., 509 U.S. 579, 592–93 (1993). In these cases, the Court held that trial judges should serve as gatekeepers of expert testimony, making preliminary evaluations of the scientific basis of expert testimony before allowing an expert to testify in the presence of the jury. A key assumption is that jurors might be overly influenced by scientifically questionable expert testimony. *See* Sanja Kutnjak Ivkovich & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY (forthcoming 2003) (manuscript at 3, on file with authors); Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1124–25 (2001).

17 *See* Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 *passim* (1981).

18 *See* Lempert, *supra* note 17 *passim.*

19 *See* Campbell v. State Farm Mut. Auto Ins. Co., No. 981564, 2001 WL 1246676, at *6–18 (Utah Oct. 19, 2001), *rev'd*, 123 S. Ct. 1513 (2003) (assessing the appropriate role of the trial judge in upholding or denying a jury's punitive damages award to a plaintiff); CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 242, 248–49 (2002).

20 *See* THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 71–80 (2001) (surveying tort reform efforts in the states); Mark Ballard, *Tort Reform Advances in Mississippi (For Starters)*, NAT'L L.J., Feb. 3, 2003, at A1 (same).

trial practices to promote jury competence.[21] Jury reform commissions have been active in a number of states.[22] Court administrators, judges, lawyers, jury researchers, and jurors have recommended numerous changes to the jury system, both civil and criminal.[23] Innovations have included allowing juries to take notes, to ask questions of witnesses, and to discuss the evidence as it develops during the trial with other jurors, rather than waiting until the final deliberation.[24]

I. EMPIRICAL RESEARCH AND THE FUNCTIONING OF THE CIVIL JURY

In the midst of this remarkable period of proposed and actual reform of civil procedure relating to the jury, it is vital that we assess both the validity of the complaints about the civil jury and the probable impact of civil jury reform. Are civil juries, as a general matter, overly sympathetic to plaintiffs? Are they prejudiced against business and insurance parties in litigation? Is jury incompetence a serious problem, particularly in very complex trials with extensive expert evidence? Are jury awards erratic, excessive, and without legal merit? And what are the probable effects of the many reforms of the civil jury? Fortunately, a substantial amount of empirical research on the civil jury's functioning has been conducted. We draw on that research here to address the charges of civil jury bias and incompetence, and to predict how civil procedure reforms will affect jury decisionmaking.

The contemporary field of empirical jury studies may be traced to the 1950s and the groundbreaking work of the Chicago Jury Project,

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21 *See* Stephan A. Salzburg, *Improving the Quality of Jury Decision Making*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 341 (Robert Litan ed., 1993).

22 *See, e.g.*, ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF TWELVE (1994) [hereinafter POWER OF TWELVE], *available at* http://www.supreme.state.az.us/jury/Jury/jury.htm (last visited Apr. 2, 2003); COUNCIL FOR CT. EXCELLENCE, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS IN WASHINGTON, D.C. (1998), *available at* http://www.courtexcellence.org/pdf/Jury%20Reform/juries_summary.pdf (last visited Mar. 21, 2003); DEL. SUPER. CT., REPORT OF THE TASK FORCE ON THE MORE EFFECTIVE USE OF JURIES (1998), *available at* http://www.dsba.org/tfrep.htm (last visited Mar. 21, 2003); THE JURY PROJECT, REPORT TO THE CHIEF JUDGE OF THE STATE OF N.Y. (1994), *available at* http://www.courts.state.ny.us/juryref.htm (last visited Apr. 3, 2003); SUP. CT. COMM. ON THE EFFECTIVE AND EFFICIENT USE OF JURIES IN COLO., WITH RESPECT TO THE JURY: A PROPOSAL FOR JURY REFORM (1997), *available at* http://www.courts.state.co.us/supct/committees/juryreformdocs/juryref.pdf (last visited Mar. 21, 2003).

23 *See, e.g.*, JURY TRIAL INNOVATIONS *passim* (G. Thomas Munsterman et al. eds., 1997) (compiling and describing various reform proposals).

24 *See* Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 85–96 (2002).

which focused primarily on criminal juries.[25] Most of the empirical research on the civil jury has been conducted since the 1980s when the tort reform movement highlighted questions about whether the civil jury was competent and fair.[26]

The empirical methods used to study the civil jury are diverse. They include first and foremost systematic analyses of civil jury trial outcomes. Scholars have examined whether trial outcomes have changed over time and what case characteristics are associated with verdicts and awards.[27] Jury verdict research firms have used lawyer and court reports to collect case information and jury trial outcomes in specific jurisdictions. Relying on verdicts or award data alone, though, to make inferences about jury behavior can be misleading.[28] The inference problems are compounded when verdict research firms selectively report verdict and award data.

Other social science methods have also been employed to study the jury. Researchers have interviewed jurors after they have served to ask them about the important evidence and other factors in their cases.[29] Interviews are an excellent way of obtaining jurors' perceptions of their cases, but they have some drawbacks. Memory problems or desires to present oneself in a favorable light decrease the accuracy of jurors' reports.[30]

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25 HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966); *see also* Valerie P. Hans & Neil Vidmar, The American Jury *at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323 (1991) (reviewing the Chicago Jury Project findings twenty-five years after the initial publication of Kalven & Zeisel's study).

26 For examples of the studies done on civil juries, see STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 60–183 (1995); NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000); GREENE & BORNSTEIN, *supra* note 11, at 175–99; SUNSTEIN ET AL., *supra* note 19, at 17–29 (2002); VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 21, at 137–285; and NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS (1995).

27 *See* DANIELS & MARTIN, *supra* note 26, at 87–91; Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 582–92 (1998); Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233 *passim* (1996); Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205 *passim* (1994).

28 *See* Clermont & Eisenberg, *supra* note 27, at 582–92; *see also* Vidmar, *supra* note 27, at 1211–24.

29 *See* Nicole L. Mott et al., *What's Half a Lung Worth? Civil Jurors' Accounts of Their Award Decision Making*, 24 LAW & HUM. BEHAV. 401, 405–16 (2000) (reporting data from interviews with civil jurors regarding the factors that were relevant to the jury in setting an award); *see also* HANS, *supra* note 5, at 141–49.

30 HANS, *supra* note 5, at 20, 235 n.94.

Several scholars have followed the early lead of Kalven and Zeisel by conducting judge-jury agreement studies.[31] In these studies, judges presiding over jury trials render hypothetical verdicts, the decisions they would have reached had they been trying the case themselves, or rate the extent to which the evidence favors one side or another. These hypothetical judge verdicts or judicial assessments are compared to the actual decisions of the jury. This is an attractive method, as it contrasts the jury's decision with that of a legal expert, but it has been criticized on several grounds. It relies on judicial assessments to make inferences about jury behavior, and it often assumes either implicitly or explicitly that the judge's verdict or assessment is the "right" one.[32]

The most frequent method that jury researchers employ is the mock jury experiment. In this approach, participants are asked to assume the role of jurors, to hear evidence in a case, and to decide which side should prevail. A variable of interest, such as jury instructions, is randomly assigned to mock juries, so that some mock juries have the instruction while others do not. The impact of the instruction is measured by comparing the judgments of the two sets of mock juries. This method allows the researcher to draw causal inferences about the impact of a particular variable, but there are questions about how relevant the mock jury study results are to actual juries.

The validity of jury simulation has been debated.[33] The legal and psychological sophistication of mock jury simulations varies tremendously, ranging from undergraduate students who read brief snippets of testimony or summaries of a case and make individual judgments on seven-point scales of evidence favorability, to full-scale mock trials held in courtrooms with juries composed of people from the jury rolls. In recent decades, developments in legal scholarship and various academic disciplines have fostered interdisciplinary and collaborative research. This climate has encouraged social scientists and legal scholars to undertake more legally sophisticated jury research. Al-

31 *See, e.g.*, GREENE & BORNSTEIN, *supra* note 11, at 63–66 (providing an overview of various studies employing Kalven and Zeisel's method).

32 *See* Hans & Vidmar, *supra* note 25, at 335–36.

33 *See* Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75 (1999) (reviewing the previous twenty years of jury simulation research); Shari Seidman Diamond, *Illuminations and Shadows from Jury Simulations*, 21 LAW & HUM. BEHAV. 561 (1997) (discussing the problems with jury simulation studies and how the problems affect the value of the research); Shari Seidman Diamond, *Simulation: Does the Microscope Lens Distort?*, 3 LAW & HUM. BEHAV. 1 (1979) (providing an overview of the arguments for and against the value of jury simulation research).

though unrealistic jury simulations are still published, there are increasing numbers of jury simulations of high verisimilitude.[34]

Finally, there are a small number of field experiments on the civil jury.[35] In these studies, courts agree to randomly assign particular juries to the experimental condition, while other juries serve as controls. These types of experiments have good potential for generalization as they study the influence of a factor on actual juries deciding real cases. However, they are very difficult and costly to carry out.[36]

Many social scientists conclude that it is best to use multiple methods to study the civil jury, as each methodological approach possesses inherent weaknesses and flaws.[37] Therefore, some research projects have employed multiple methods to triangulate on the object of their empirical study. It is a valuable approach for us as we consider what empirical research has discovered about the civil jury.

II. THE DECLINE OF THE CIVIL JURY: AN EMPIRICAL PORTRAIT

The first important finding to note is that, at least at the federal level where we have the most complete data, the civil jury trial rate has been declining.[38] Approximately 5000 civil jury trials are held in the

34 *See* Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513 (1992) (analyzing the results of a jury simulation that studied the effect of expert witnesses, deliberations, and jury blindfolding on damage awards); Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269 (1990) (describing the results of jury simulation research on the effect of trial structure and order and number of decisions on jury verdicts and damage awards); Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 309–33 (evaluating the use of bifurcated trials through a jury simulation study).

35 *See* Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 *passim* (2003) (reporting results from a field study on the impact of jury discussions about evidence presented during the trial on juror decisionmaking); Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359 (2000) (describing a field study on the impact of jury discussions during trials on verdicts); Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121 (1994) (reporting results of a field study on the effect of jury note taking and question asking during trials on jury satisfaction with the trial and verdict).

36 *See* Valerie P. Hans, *Inside the Black Box: Comment on Diamond and Vidmar*, 87 VA. L. REV. 1917, 1920–25 (2001).

37 *See* GREENE & BORNSTEIN, *supra* note 11, at 204–05.

38 *See* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142–44 (2002); *see also* Patrick E. Higginbotham, *So Why Do We Call Them*

federal courts each year.[39] Although civil case filings have increased over the past thirty years, the proportion that is resolved through jury trial has been decreasing. Judge Patrick Higginbotham reviewed Administrative Office data on civil filings in federal district courts from 1970 through 1999, and found that the number of civil cases rose by 152%, yet the number of cases that were tried by a judge or jury dropped by 20%, so that, by 1999, the percentage of civil cases that were resolved by trial was just 3%.[40] Interestingly, the judge trial rate declined at a faster rate than the jury trial rate.[41] Another analysis of Administrative Office data on federal civil trials found the same pattern of overall reductions in the civil trial rate and a sharper decline in judge trials than in jury trials.[42]

Data on jury trial rates over time in the state courts, where most jury trials occur, are harder to come by, since states use diverse methods to record the activities of their trial courts. However, the National Center for State Courts and the Bureau of Justice Statistics have recently collaborated in a national study of state courts of general jurisdiction in seventy-five of the most populous counties in the United States. Samples of court data were collected in 1992 and 1996.[43] In 1992, juries decided an estimated 12,000 civil cases in these state courts, and plaintiffs won 52% of these jury trials.[44] Four years later, the win rate was 49%, and fewer jury trials were held—10,616, a drop of over 10% although one that the study authors say is not statistically significant.[45] In both years, over two-thirds of the trials held were jury trials with the remainder bench trials.[46] A third round of data collection planned for the state courts will allow an assessment of whether

Trial Courts?, 55 SMU L. REV. 1405, 1405 (2002); Mark Galanter, Remarks at AALS Annual Meeting (Jan. 4, 2003) (transcript on file with author).

39 SWARD, *supra* note 4, at 14.

40 Higginbotham, *supra* note 38, at 1408.

41 *See id.* at 1412–13 (Charts 7 and 8), 1421–22.

42 SWARD, *supra* note 4, at 12–14; Clermont & Eisenberg, *supra* note 38, at 142–44 & n.127.

43 CAROL J. DEFRANCES ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES, *in* BUREAU OF JUST. STAT., SPECIAL REPORT (July 1995) (reporting the 1992 data), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cjcavilc.pdf (last visited Mar. 21, 2003); CAROL J. DEFRANCES & MARIKA F.X. LITRAS, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, *in* BUREAU OF JUST. STAT., BULLETIN (Sept. 1999) (reporting the 1996 data), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf (last visited Mar. 21, 2003).

44 DEFRANCES ET AL., *supra* note 43, at 1.

45 DEFRANCES & LITRAS, *supra* note 43, at 16.

46 *Id.* at 1.

jury trials or the jury trial rate are increasing, decreasing, or staying the same in the state courts.

As for the civil jury's business, the vast majority of civil jury trials in state courts are tort cases, with smaller numbers of contract and real property cases.[47] A substantial proportion of civil jury trials are automobile personal injury cases.[48] The high profile cases such as medical malpractice and products liability constitute only a small proportion of the civil jury's caseload.[49]

A number of theories about why civil jury trial rates are declining have been advanced, including the expense of trial, the pressures to settle cases, the push toward alternative dispute resolution, an increase in summary judgment, and cultural factors.[50] A desire to escape from the unpredictability and presumed biases of the jury has also been asserted.[51] However, Judge Higginbotham points out that the more rapid decline of judge trials hints that other reasons are more pertinent:

> Commentators have suggested that the flight from the courthouse is, in the main, a flight from the jury. . . . The decline in trials has not reflected the premise of a preference for a bench trial over a jury trial. . . . [I]n a sense there is some vindication of the jury trial but the overall picture of flight remains.[52]

A portrait of the frequency and business of the civil jury begins to emerge, then, from the empirical data. Although there is evidence of declining use over time, particularly in the federal courts, juries decide a small but significant number of civil cases in federal and state courts. Now that we have a picture of the work of the civil jury, let us turn to the central claims about the civil jury's biases and competence in determining verdicts and arriving at damage awards.

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47 DEFRANCES ET AL., *supra* note 43, at 2.

48 DEFRANCES & LITRAS, *supra* note 43, at 1.

49 *See id.* at 2 (Table 1); DEFRANCES ET AL., *supra* note 43, at 2 (Table 1).

50 *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2–4 (1996) (arguing that American cultural values favor settlements over trials); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 *passim* (1986) (arguing that the Federal Rules of Civil Procedure have produced a decline in adjudication); *see also* Clermont & Eisenberg, *supra* note 38, at 143 n.28; Higginbotham, *supra* note 38, at 1414–20.

51 Higginbotham, *supra* note 38, at 1421–22.

52 *Id.*

III. EMPIRICAL EVIDENCE ABOUT JURY BIAS

A number of commentators assert that jury bias undermines the soundness of civil jury decisionmaking.[53] Let us examine the empirical evidence. Mock jury research experiments point to the potential impact of bias in that jurors' attitudes and personal experiences help to shape perceptions of trial evidence and the narrative or story that jurors develop as they listen to evidence and decide cases.[54] Evidence that is inconsistent with jurors' prior views and attitudes may be discounted or ignored, while consistent evidence may be emphasized.[55] Jurors' attitudes are usually more significant than demographic characteristics in predicting verdicts.[56]

Jurors' attitudes in civil jury decisionmaking could become increasingly significant due to recent, widely publicized corporate misbehavior by Enron, WorldCom, and other companies. In this light, public opinion polls conducted by jury consulting firms and other groups are disquieting. For instance, significant minorities of respondents in one poll said that they could not be impartial if asked to decide cases with asbestos manufacturers, health maintenance organizations, or tobacco companies.[57] Many respondents to a 2002 national poll reported negative assessments of corporate management.[58] The *National Law Journal*, reporting on its top one hundred verdicts of

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53 *See infra* notes 54–78 and accompanying text.

54 *See* FEIGENSON, *supra* note 26, at 171–210; REID HASTIE ET AL., INSIDE THE JURY 22–23 (1983) (describing the "story model" of juror decisionmaking); Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 42, 47–48 (Reid Hastie ed., 1993).

55 *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 120 (1986).

56 *See* Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 711–12 (1991); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 9–14 (1997).

57 Bob Van Voris, *Voir Dire Tip: Pick Former Juror*, NAT'L L.J., Nov. 1, 1999, at A1 [hereinafter Van Voris, *Voir Dire*]. Fifteen percent said they could not be fair if a case involved a tobacco company, 14% if a party were an asbestos manufacturer, and 12% if a party were a health maintenance organization. *Id.* A year later, the numbers saying they could not be impartial increased: 34% for tobacco companies, 31% for asbestos manufacturers. Bob Van Voris, *Jurors to Lawyers: Dare To Be Dull*, NAT'L L.J., Oct. 23, 2000, at A1 [hereinafter Van Voris, *Jurors to Lawyers*].

58 Tamara Loomis, *Scandals Rock Juror Attitudes: Enron/WorldCom Ripple Seen Across the Board*, NAT'L L.J., OCT. 21, 2002, at A30. DecisionQuest (a jury consulting firm) and the Minority Corporate Counsel Association undertook the national survey. Reportedly, "more than 80% of those polled agreed that 'the events of Enron and WorldCom are just the tip of the iceberg.'" *Id.*

2002, attributed at least some of them to "juror rage" against corporate entities.[59]

Although it is too soon to tell whether recent high profile corporate scandals have produced greater juror bias against corporate defendants in the courtroom, the common beliefs that jurors are highly sympathetic to individual plaintiffs and anti-business are not supported by empirical evidence to date.[60]

Hans's research program took a multi-pronged approach to examining the claims that civil juries are pro-plaintiff and anti-business, combining several different research methods to assess the charges.[61] She interviewed civil jurors who had decided cases with business and corporate litigants, conducted laboratory experiments varying whether a defendant was a business corporation or an individual, and did public opinion polling. Interviewing jurors about how they decided their cases, Hans found that instead of rampant pro-plaintiff sympathy, many civil jurors were hostile to plaintiffs who brought civil lawsuits.[62] They were not entirely hard-hearted; jurors were compassionate in a number of cases, especially when plaintiffs suffered severe injuries.[63] However, on the whole, jurors voiced suspicions about the plaintiffs in their cases, examined their claims critically, and looked for ways that plaintiffs contributed to or might have fabricated their own injuries.[64] Jurors were deeply committed to an ethic of individual responsibility, and many saw the fact of plaintiffs bringing lawsuits as counter to that ethic.[65] Interestingly, they saw themselves as standing guard against the potential of frivolous lawsuits.[66]

These attitudes are very consistent with public opinion survey results showing that many Americans believe there are far too many frivolous lawsuits today, and that there is much meritless litigation.[67] In the public view, jury awards are "out of control."[68]

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59 Gary Young, *Jury Room Rage*, NAT'L L.J., Feb. 3, 2003, at C17 ("If punitive damages are a measure of juror anger, there were a lot of angry jurors last year.").

60 *See* HANS, *supra* note 5, at 138–77; VIDMAR, *supra* note 26, at 191–202.

61 *See* HANS, *supra* note 5, at 138–77.

62 *Id.* at 36–39.

63 *Id.* at 30–31.

64 *Id.* at 36–49.

65 *See id.*

66 *See id.*

67 *Id.*; *see also* Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 806 (1991) (noting media attention and reform efforts in the mid-1980s).

68 Van Voris, *Jurors to Lawyers*, *supra* note 57; *see also* Valerie P. Hans & William S. Lofquist, *Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil Jurors*, 12 BEHAV. SCI. & L. 181, 181–82 (1994).

Neal Feigenson and his colleagues have also discovered anti-plaintiff bias in their simulation studies. They constructed mock juror experimental materials so that in certain conditions the plaintiffs were legally blameless.[69] Even when the plaintiff was completely blameless as a legal matter, some participants still held him accountable.[70] For example, in one scenario, a worker obeyed all the rules, and thus would not have been legally accountable for his accident, but the mock jurors attributed 22% of the responsibility for his accident to him.[71] In another scenario, the gas company installed a propane gas tank with a faulty valve in a home. It malfunctioned, causing injuries. The homeowner did not contribute to the accident in any way, yet mock jurors judged the homeowner to be 14% responsible for the injuries.[72]

If jurors are not particularly pro-plaintiff in personal injury litigation, what about the other charge that jurors are prejudiced against business defendants? Hans's research again used multiple methods to attempt to identify anti-business prejudice. Public opinion polls generally produce ambivalent responses toward business, with strong support for capitalism and small business but some concerns about the ethics of corporate executives and large businesses.[73] In interviews with civil jurors, Hans found some occasional instances in which jurors made very harsh comments against corporate defendants, although they appeared to be more strongly linked to the trial evidence about the behavior of the corporate defendants rather than pre-existing biases against business.[74]

She also used mock jury experiments to determine whether people responded differently when there was a corporate defendant as opposed to an individual defendant in the case.[75] Other researchers have taken a comparable approach.[76] These studies show marked dif-

69 *See* FEIGENSON, *supra* note 26, at 185–91; Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597, 610–12 (1997); Douglas J. Zickafoose & Brian H. Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 LAW & HUM. BEHAV. 577, 579 (1999).

70 Feigenson et al., *supra* note 69, at 597–611.

71 *Id.*

72 *Id.* at 611.

73 *See* HANS, *supra* note 5, at 157–61; *see also* Loomis, *supra* note 58; Van Voris, *Jurors to Lawyers*, *supra* note 57 (describing statistics showing that three-quarters of potential jurors believe that corporate executives engage in unethical conduct).

74 HANS, *supra* note 5, at 157–61.

75 *Id.*

76 *See, e.g.*, Robert MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121 (1996) (report-

ferences. For example, in a standard slip-and-fall case, mock jurors were much more likely to attribute responsibility and liability to the defendant when the fall occurred in a store as opposed to a private home during a tag sale.[77] Awards were higher as well.[78]

The question is, why? If anti-business views are the reason, then one would expect that attitudes toward business would be strongly related to the decisions these mock jurors reached. Yet, attitudes toward business were weakly and inconsistently related to the case decisions; and furthermore they were just as often a predictor of case outcome in the individual as opposed to the corporate defendant cases. Thus, although the research showed that people treated corporate litigants differently from individual litigants, the reason they differentiated between them appeared to be due to higher expectations and more rigorous standards for corporate conduct rather than anti-business sentiments.

IV. Empirical Evidence About Jury Factfinding Competence

A number of reviews of empirical research have concluded that the civil jury is generally competent as a factfinder.[79] Different strands of empirical evidence point to the conclusion that most civil jury verdicts are sound. First, judge-jury agreement studies show substantial rates of judicial agreement with jury verdicts. A substantial rate of judicial agreement with civil jury verdicts was first discovered in the 1950s in Kalven and Zeisel's Chicago Jury Project.[80] Comparing the judge's hypothetical verdict with the jury's actual decision in civil trials, they found that judge and jury agreed in 78% of the trials.[81] Notably, their disagreements were largely symmetrical; judges would have found for the defendant when juries reached a plaintiff verdict in 12% of the trials, whereas judges would have found for the plaintiff when the jury reached a defense verdict in 10% of the trials.[82] More recent studies of civil jury verdicts also show substantial agreement rates. For

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ing the results of research on the impact of the presence of a corporate defendant on jury awards).

77 Hans, *supra* note 5, at 157–61.

78 *Id.*

79 *See* Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, *in* Verdict: Assessing the Civil Jury System, *supra* note 21, at 181, 233–35; Saks, *supra* note 56, at 13–14, 48–52; Vidmar, *supra* note 10, at 898–99. But see Petitioner's Brief at 23–25, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (No. 97-1709).

80 *See* Kalven & Zeisel, *supra* note 25.

81 *Id.* at 63.

82 *Id.* at 64.

instance, Diamond and others' videotape study of Arizona civil juries found 77% agreement with the jury verdicts in forty-six cases in which judges expressed an opinion.[83] A national study of juror question asking and note taking found 63% agreement with the jury verdicts in sixty-seven civil jury trials.[84] Importantly, the agreement rate was unaffected by the complexity of the trial.[85] The Hannaford and others' study of Arizona civil juries found that overall, jury verdicts were in line with judicial assessments of the evidence, and that the most powerful predictor of jury verdicts was the judge's rating of the strength of the evidence.[86] Again, trial complexity did not affect the agreement rate. National surveys of judges find that as a group they voice strong support for the civil jury, although they are willing to contemplate reforms to improve the jury trial.[87] Comparisons of jury verdicts to the assessments of other experts such as claims adjusters have yielded similar findings of substantial agreement.[88] Although there could be a variety of reasons that juries might disagree with a judge's or other expert's assessment of a case aside from incompetence, it is reassuring that in the substantial majority of trials legal experts endorse the jury's verdict.

The empirical evidence indicates agreement with jury verdicts in most cases, but what about very complex civil trials? Cases of medical malpractice, products liability, and toxic torts often include complicated expert testimony. As noted above, agreement rates in several studies were unaffected by case complexity, suggesting that any difficulties that juries had with complex evidence and law were not major contributors to unreasonable verdicts.

Other methodological approaches to the question also indicate that juries can handle even very complex cases, although jurors report that they are difficult. Neil Vidmar studied medical malpractice cases to determine whether juries were able to reach rational decisions, analyzing court files and insurers' closed claim files, interviewing attorneys and jurors, and conducting experiments.[89] He discovered that jury verdicts were defensible and generally overlapped with medical

83 Diamond et al., *supra* note 35, at 67 n.108.

84 Heuer & Penrod, *supra* note 35, at 135 (Table 7).

85 Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 49 (1994).

86 *See* Hannaford et al., *supra* note 35, at 374–75.

87 *See* Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence?*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM *supra* note 21, at 248, 261–65.

88 *See* Brief Amici Curiae of Neil Vidmar et al. at 9–10, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (No. 97-1709).

89 VIDMAR, *supra* note 26, at 49–175.

experts' opinions, although jurors seemed to be more supportive of doctors.[90]

Several case studies of juries, using post-trial interviews, have reached more critical conclusions about the civil jury's competence, discovering instances in which jurors did not appear to understand the significance of key expert testimony.[91] Richard Lempert reviewed thirteen very complex jury trials, the majority of which were civil trials, concluding that most verdicts were defensible and observing that "[e]ven when juries do not fully understand technical issues, they can usually make enough sense of what is going on to deliberate rationally."[92] Experimental studies likewise do not show a consistent pattern of mock juries' inability to handle complex evidence.[93]

Nonetheless, experimental research has identified some types of evidence that can be particularly challenging to jurors. Statistical and economic evidence, for example, is difficult to weigh and assess properly, although judges can be just as susceptible to these problems as lay jurors.[94] Another well-documented problem is with judicial instructions. Poorly written instructions delivered orally in court at the end of a jury trial can prove to be challenging for laypersons to comprehend and apply.[95]

Fortunately, a number of trial reforms such as pre-instructing jurors in the law, allowing note-taking, permitting jurors to ask questions of witnesses, letting jurors discuss the evidence during the trial, and revising judges' instructions have been shown to promote better comprehension and use of complex evidentiary and legal material.[96]

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90 *Id.* at 175–82.

91 *See, e.g.*, MOLLY SELVIN & LARRY PICUS, THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE 24–26 (1987); Joseph Sanders, *Jury Deliberation in a Complex Case:* Havner v. Merrell Dow Pharmaceuticals, 16 JUST. SYS. J. 45 *passim* (1993) (evaluating jury performance in the *Havner* case, involving complex expert testimony).

92 Lempert, *supra* note 79, at 234.

93 *See* Brief Amici Curiae of Neil Vidmar et al. at 14–19, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (No. 97-1709).

94 *Id.*

95 *See* JURY TRIAL INNOVATIONS, *supra* note 23, at 18–20; PETER M. TIERSMA, LEGAL LANGUAGE 231–40 (1999).

96 *See* POWER OF TWELVE, *supra* note 22; B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1247–71 (1993) (evaluating and advocating for jury reforms that promote greater juror participation in the trial); Lynne FosterLee & Irwin A. Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184, 186–88 (2003) (providing the results of mock jury research demonstrating the positive effects of note-taking and better jury instructions on juror deliberations); Hans, *supra* note 24, at 89-97 (2002) (describing and advocating for reforms that promote more active ju-

V. JURY DAMAGE AWARDS IN CIVIL TRIALS: EMPIRICAL EVIDENCE

Jury damage awards have also been the subject of empirical study.[97] Here the need for systematic empirical information is especially critical, because news publications tend to publish only the most extreme jury damage awards. Perhaps the most famous jury damage award came in the McDonald's coffee case, in which Stella Liebeck received third degree burns from the spill.[98] McDonald's had received over 700 complaints over a ten-year period regarding the coffee temperature and coffee burns, yet never consulted a burn specialist.[99] The plaintiff was awarded $160,000 in compensatory damages and $2.7 million in punitive damages.[100] The case is well known, yet its extraordinary coverage may have provided the public with a misleading picture of the frequency and size of the typical damage award.[101] The same goes for the *National Law Journal*'s practice of reporting the one hundred largest verdicts of the year; this can tend to obscure the overall picture of jury awards in more typical cases.[102] Professor Theodore Eisenberg observes that focusing on the biggest verdicts of the year may provide an erroneous impression of typical jury behavior.[103]

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ries); Heuer & Penrod, *supra* note 35 *passim* (reporting results of a field study refuting arguments that juror note-taking distracts jurors and promotes biases in juror decisionmaking); Larry Heuer & Steven Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 NW. U. L. REV. 226 *passim* (1990) (advocating for a greater use of juror note-taking and question-asking); William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL. F. 119, 128–32, 138–43 (evaluating the benefits of jury instructions and juror discussions about evidence); Robin C. Larner, Annotation, *Jurors Questioning Witnesses in Federal Court*, 80 A.L.R. FED. 892, 894–96 (1994) (reviewing cases where judges found that juror question asking did not result in biased juror deliberations); *see also* JUDICIAL MGMT. COUNCIL, FINAL REPORT OF THE JURY INNOVATIONS COMMITTEE (2001), *available at* http://www.flcourts.org/osca/divisions/committee/bin/finalreport1.pdf (suggesting that Florida reform its court procedures to include juror questions, discussions of evidence, note-taking, and improved jury instructions); Ellen Chilton & Patricia Henley, *Jury Instructions: Helping Jurors Understand the Evidence and the Law*, *at* http://www.uchastings.edu/plri/spr96tex/juryinst.html (last visited Apr. 3, 2003) (discussing the value of jury question-asking, juror discussions about evidence, and jury instructions to decisionmaking).

97 *See, e.g.*, GREENE & BORNSTEIN, *supra* note 11 (recent review and summary of empirical research).

98 *See* Liebeck v. McDonald's Rest. P.T.S., Inc., No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994); Michael McCann et al., *Java Jive: Genealogy of a Judicial Icon*, 56 U. MIAMI L. REV. 113, 120 (2001).

99 *See* McCann et al., *supra* note 98, at 124–25.

100 *Liebeck*, 1995 WL 360309, at *1.

101 McCann et al., *supra* note 98, at 114.

102 *See* David Hechler, *NLJ Verdicts 100: Billions and Billions*, NAT'L L.J., Feb. 3, 2003, at C1.

103 Young, *supra* note 59.

Therefore it is worthwhile to review the available empirical data on damage awards. We return to the National Center for State Courts/Bureau of Justice Statistics project for information about jury damage awards in seventy-five large urban courts.[104] In the 1992 sample, jury trials with plaintiff winners had a median total award of $52,000 (including both compensatory and any punitive damages) and a mean of $455,000.[105] Typical awards varied by the type of case, with lower awards characteristic of the very frequent automobile cases (median of $29,000) and higher awards more typical in medical malpractice (median of $201,000) and product liability (median of $260,000) trials.[106] There were similar findings in the 1996 sample; in 1996 jury trials with plaintiff verdicts, the median total jury award was $35,000.[107] Medical malpractice, product liability, and employment discrimination cases had the highest median awards,[108] and automobile cases the lowest at $18,000.[109] Although median awards were lower in 1996 than 1992, there was a greater proportion of awards over one million dollars in 1996 (7% of the jury trials with plaintiff winners)[110] compared to 1992 (4%).[111] Thus, the typical award in state jury trials is modest, but there has been an increase in large awards in specific types of cases. Some analyses relying on data from jury verdict reporters show an increase in jury damage awards over the last several decades in some jurisdictions.[112] One must caution that verdict reporters are not fully representative and that changes over time may reflect changes in the behavior of the parties such as settlement practices as well as differences in jury valuation and verdicts.[113]

Other approaches have been taken to examine the reasonableness of jury awards, including examining the correlation between award size and the plaintiffs' reported severity of injury.[114] These studies show that injury size and award amount are positively related,

104 *See supra* notes 42–47 and accompanying text.

105 DEFRANCES ET AL., *supra* note 43, at 5 (Table 6).

106 *Id.*

107 DEFRANCES & LITRAS, *supra* note 43, at 1.

108 *Id.* at 7 (Table 6) (showing that the median award for medical malpractice cases was $286,000, for employment discrimination cases was $200,000, and for products liability cases was $1,593,000).

109 *Id.*

110 *Id.* at 8 (Table 7).

111 DEFRANCES ET AL., *supra* note 43, at 5.

112 ERIK K. MOLLER, EXPLAINING VARIATION IN PERSONAL INJURY JURY AWARDS 26, 56–58, 103 (1997).

113 *Id.* at 28, 103.

114 See Vidmar, *supra* note 10, at 879–81, for a summary of these studies.

except that death produces a lower award than very serious injury.[115] There is also a substantial amount of variability within levels of injury, which may reflect actual differences in plaintiffs' injuries from case to case as well as differences attributable to jury evaluations.

Some studies have contrasted how jurors, or mock jurors, compare to other decisionmakers in awards. In one such comparative study, Vidmar and Rice presented a case in which a female patient suffered a severely burned knee and considerable pain and suffering, and they asked participants to render a compensatory damage award.[116] Vidmar and Rice found nearly equivalent median and mean damage awards between jurors and practicing senior lawyers.[117]

One finding from the state court data is that jury trials in which a corporation is the defendant have higher average damage awards than cases with individual defendants.[118] This may be due, at least in part, to the fact that different types of cases are brought against individuals and corporations. However, critics have also asserted that juries operate with a deep-pockets approach, and consider the defendant's financial resources in arriving at their damage awards.[119] There is plausibility in this assertion, but thus far it has not been supported by experimental tests that have attempted to separate corporate identity from financial resources. In Hans's mock jury research comparing corporate versus individual defendants, she found consistently higher awards in cases with corporate parties.[120] But when she tested the deep-pockets hypothesis more directly, by varying the stated financial resources of the defendant, there were no differences in recommended awards.[121] Similarly, Robert MacCoun gave personal injury cases descriptions to mock juror participants, varying whether the defendant in each one was described as a rich individual, a poor individual, or a corporation.[122] People's judgments did not differentiate between wealthy and poor defendants, another blow to the deep-pock-

115 *Id.*

116 Neil Vidmar & Jeffrey R. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 891 (1993).

117 *Id.* at 892–95.

118 DEFRANCES ET AL., *supra* note 43, at 6; *see also* DEFRANCES & LITRAS, *supra* note 43, at 6–7.

119 *See* Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217 *passim* (1993) (analyzing the assertion that juries award huge damages when they believe the defendant has an ability to pay large sums).

120 *Id.*

121 HANS, *supra* note 5, at 178–214.

122 MacCoun, *supra* note 76, at 121.

ets hypothesis.[123] In another mock jury study, Vidmar asked jurors to award compensatory damages.[124] In one of the scenarios, jurors were told that the cause of injury was automobile negligence, while for other scenarios it entailed medical malpractice.[125] Whether the defendant was an individual (e.g., driver or doctor) or a corporation (e.g., the driver's company or a hospital) was also varied.[126] No statistically significant differences between jurors awarding damages to individuals or corporations were found.[127] Finally, a mock jury experiment of a complex product liability case also varied the net worth of a company as either $11 million or $611 million, but those who learned about the higher net worth did not reach higher compensatory damage awards.[128]

VI. Jury Competence in Punitive Damages: Empirical Evidence

Unlike compensatory damages, which are awarded to compensate for the plaintiff's pain and suffering, lost wages, and medical expenses, punitive damages are awarded to punish the defendant and to deter the defendant and others from harmful behavior.[129]

Some critics have claimed that punitive damage verdicts are soaring out of control.[130] In state courts, the collaborative research of the Bureau of Justice Statistics and the National Center for State Courts shows that punitive damages are typically awarded in a minute portion of all civil jury trials, and they are rarely awarded in the high profile cases such as medical malpractice and products liability.[131] In 1992, punitive damages were awarded in 6% of the jury trials in which plaintiffs prevailed, with a median of $50,000.[132] They were more frequent in contract cases, where 12% of plaintiff winners were awarded punitive damages, than in tort cases, in which 4% of the plaintiff winners got punitive damages.[133] There was a clear pattern of frequency of punitive damages by type of case: slander and libel (30% of the plaintiff winners received punitive damages), employment disputes (27%),

123 *Id.*
124 Vidmar, *supra* note 119, at 241–55.
125 *Id.* at 244–46.
126 *Id.*
127 *Id.* at 256–58.
128 Landsman et al., *supra* note 34, at 312 n.59.
129 Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 Law & Hum. Behav. 353, 353 (1999).
130 *See* Vidmar, *supra* note 10, at 849.
131 Defrances et al., *supra* note 43, at 8 (Table 8).
132 *Id.* at 6; *id.* at 8 (Table 8).
133 *Id.* at 8 (Table 8).

fraud (21%), and intentional torts (19%) being the most frequent case categories for punitive damages.[134] Medical malpractice cases only rarely result in a punitive damages award. For instance, of the 403 medical malpractice cases during 1992 with a plaintiff winner, just thirteen cases resulted in punitive damages.[135] In fact, after reviewing hundreds of medical malpractice cases over three decades, Rustad and Koenig concluded, "punitive damages were awarded in only the most egregious cases involving healthcare practitioners."[136]

In 1996, the National Center for State Courts/Bureau of Justice Statistics project found that punitive damages were awarded to about 5% of plaintiffs who won their trials,[137] with a median punitive damage awarded by juries of $50,000.[138] Thus, the empirical data from large urban state courts are fairly consistent in showing that punitive damages are awarded rarely, and are concentrated in certain types of cases such as intentional torts.

Despite the rarity of punitive damages, an intense debate over punitive damage awards in civil trials has erupted over the last several years. Skeptics claim that juries determine punitive damages in a capricious and arbitrary manner, that juries consider legally inappropriate factors, and that there is too much variability and unpredictability in juries' punitive damage awards.[139] The critics argue that because of the many failings of the civil jury in their damage assessments, judges rather than juries should decide punitive damages.[140] Judges are more experienced in assessing liability and determining appropriate punishment.[141] Alternatively, some have argued for limits, or a cap, on the amount that can be awarded.[142]

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134 *Id.* at 6; *id.* at 8 (Table 8).

135 *Id.* at 1.

136 Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters"*, 47 RUTGERS L. REV. 975, 1027 (1995); *see also id.* at 985–91 (discussing the history and empirical reality of punitive awards in medical malpractice cases).

137 DEFRANCES & LITRAS, *supra* note 43, at 9 (Table 8).

138 *Id.* at 10 (Table 9).

139 *See* Brief of Certain Leading Business Corporations as Amici Curiae in Support of Petitioner at 1–23, Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2001 WL 1246676 (Utah Oct. 19, 2001), *rev'd*, 123 S. Ct. 1513 (2003).

140 *Id.* at 22; FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 283–85 (1994); Lisa M. Sharkey, Comment, *Judge or Jury: Who Should Assess Punitive Damages?*, 64 U. CIN. L. REV. 1089, 1127–40 (1996).

141 SUNSTEIN ET AL., *supra* note 19, at 186–207; Sharkey, *supra* note 140, at 1089.

142 *See, e.g.*, Theodore Eisenberg & Martin T. Wells, *Punitive Awards After BMW, A New Capping System, and the Reported Opinion Bias*, 1998 WIS. L. REV. 387, 388–89. *But see* Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 192 (1994) (finding that persons who engaged in outra-

VII. The Question of Jury Competence in Assessing Punitive Damages

A major program to assess jury competence in punitive damages decisionmaking was funded by the Exxon Corporation in the wake of the Exxon Valdez oil spill and subsequent jury trial, which involved punitive damages.[143] The program of research included a series of mock juror and mock jury studies in which participants determined the appropriateness and amount of punitive damages either individually or in groups.[144] In one key study, mock jurors were presented with summaries of case facts, in addition to instructions concerning punitive damages.[145] In each of these cases, either the trial judge or an appellate judge had ruled that punitive damages were not justified as a legal matter, although that was not communicated to the study participants.[146] Jurors were instructed that a compensatory damage award had already been reached, and were asked to determine if punitive damages were "proper," providing the case facts.[147] The researchers stated, "Most of the mock juries decided that the consideration of punitive damages was warranted, although appellate and trial judges had concluded that they were not warranted."[148] Other studies found mock juries wanting in their ability to translate consistently and reliably their sense of disapproval of the defendant's behavior into dollar values, and in understanding and applying judicial instructions regarding punitive damages.[149] A book summarizing the research program concluded that jurors perform unreasonably in punitive damage decisionmaking, and that judges should be more aggressive in managing jury punitive damage awards.[150] The studies also urge serious consideration of moving away from juries and toward damages schedules and civil fines.[151]

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geous civil misconduct should be required to pay for actual damages as well as damages sufficient to punish their conduct to deter them and others in the future).

143 *In re* Exxon Valdez, No. A89-0095-CV, 1995 U.S. Dist. LEXIS 12952, at *19 (D. Alaska Jan. 27, 1995); Sunstein et al., *supra* note 19 *passim* (collecting the empirical studies funded by Exxon, which were initially published in a variety of scholarly journals and law reviews).

144 Sunstein et al., *supra* note 19, at 4–5, 17–26.

145 Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 Law & Hum. Behav. 287, 290–92 (1998).

146 *Id.* at 290–91.

147 *Id.* at 289.

148 *Id.* at 287.

149 *See* Sunstein et al., *supra* note 19, at 31–42, 223–27.

150 *See id.* at 242–43.

151 *See id.* at 248–55.

This empirical program of research on punitive damages has provided some important insights into how lay people approach the issue. The findings that mock jurors have difficulty with legal instructions about punitive damages is quite consistent with research showing similar problems with other types of legal instructions.[152] However, a number of scholars have raised compelling criticisms of the punitive damages research, particularly its applicability to actual cases. It contradicts statistical analyses of punitive damages showing that they have been appropriately awarded.[153] Another criticism is that the mock jury research on punitive damages determination does not mimic conditions under which real juries operate.[154] Within the study, mock jurors were asked to make judgments concerning law. Yet with true juries, this decision is left entirely to the judge.[155] These mock jurors were asked to render a legal decision, rather than one based upon fact.[156] Another concern with this study entails the summaries provided to mock jurors. Scenarios provided to jurors comprised only 1000 to 1500 words, and videotaped evidence presented to jurors, including the judge's instructions on the law, ranged from eleven to fifteen minutes.[157]

Professor Richard Lempert reviewed the mock jury punitive damages research, finding many flaws that compromised its external validity.[158] Lempert concluded that this study:

> tells us almost nothing about the likely magnitude of inappropriate hindsight effects on punitive damage verdicts. The study's external validity is sufficiently low, given the many differences between the

152 *See* TIERSMA, *supra* note 95, at 231–40 (providing an overview of the findings from research on jury instructions).

153 Brief Amici Curiae of Certain Leading Social Scientists and Legal Scholars in Support of Respondents at 6–7, Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2001 WL 1246676 (Utah Oct. 19, 2001), *rev'd*, 123 S. Ct. 1513 (2003) [hereinafter Brief of Certain Leading Scholars]; Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867, 876 (1999); Neil Vidmar, *Juries Don't Make Legal Decisions! And Other Problems: A Critique of Hastie et al. on Punitive Damages*, 23 LAW & HUM. BEHAV. 705 (1999). In response to Vidmar's piece, see Pheobe C. Ellsworth, *Sticks and Stones*, 23 LAW & HUM. BEHAV. 719 (1999); Reid Hastie et al., *Reply to Vidmar*, 23 LAW & HUM. BEHAV. 715 (1999); Robert J. MacCoun, *Epistemological Dilemmas in the Assessment of Legal Decision Making*, 23 LAW & HUM. BEHAV. 723 (1999); and Richard L. Wiener, *Point and Counterpoint: A Discussion of Jury Research in the Civil Arena*, 23 LAW & HUM. BEHAV. 703 (1999).

154 *See* Vidmar, *supra* note 153, at 709.

155 *Id.*

156 Brief of Certain Leading Scholars, *supra* note 153, 21–27; Vidmar, *supra* note 153, at 705–13.

157 SUNSTEIN ET AL., *supra* note 19, at 43–46.

158 Lempert, *supra* note 153 *passim*.

> experimental conditions and the situations of actual juries, that generalizing from the study's results to actual juries would be risky.[159]

Professor Jennifer Robbennolt reviewed the available empirical research on punitive damages by juries and concluded,

> the research examining the processes by which jurors determine punitive damages suggests that jurors take into account important characteristics of the cases in making their punitive awards. . . . [J]urors do not appear to make decisions that clearly differ from the decisions that judges would make, certainly not to the dramatic extent that most critics of the jury would suggest.[160]

We would urge that researchers explore other methodological approaches in punitive damages research, including highly realistic simulations and juror interviews, to better assess how real juries decide real punitive damages.

VIII. Empirical Evidence About Impact of Caps or Limits on Compensatory and Punitive Damages

President George W. Bush's recent call for limits or caps on jury awards at the federal level has been preceded at the state level by a substantial amount of legislative action.[161] Caps on damage awards, primarily limits on pain and suffering awards and punitive damages, are intended to control the maximum amount awarded by juries. To date, over forty states have instituted limits on the amount of damage awards.[162]

There are many criticisms of award limits, and in some states the legislation has been found unconstitutional.[163] One criticism of im-

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159 *Id.* at 876.

160 Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 Buff. L. Rev. 103, 158 (2002).

161 Oppel, *supra* note 6.

162 For a summary of legislative actions, see Sward, *supra* note 4, at 302–05; and Jacqueline Perczek, Note, *On Efficiency, Punishment, Deterrence, and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 Suffolk U. L. Rev. 825, 878–904 (1993). Examples of caps legislation may be found in Ala. Code § 6-11-21 (1993); Cal. Civ. Code § 3333.2 (West 1997); Fla. Stat. Ann. § 768.73 (West 1997); and Nev. Rev. Stat. Ann. 42.005 (Michie 2002). *See also* Ballard, *supra* note 20 (describing recent tort reforms, including limitations on jury compensatory and punitive damage awards, in Mississippi).

163 *See* David A. Saichek, *Putting the Lid on Caps*, Wis. Law., Dec. 1996, at 5 (noting that, as of December 1996, caps on non-economic damages had been struck down in Oregon and Washington, and caps in medical malpractice cases had been found unconstitutional in Alabama, Kansas, New Hampshire, North Dakota, Ohio, and Texas); Martha Middleton, *A Changing Landscape: As Congress Struggles To Rewrite the Nation's Tort Laws, the States Already May Have Done the Job*, A.B.A. J., Aug. 1995, at 56, 59 (pro-

posing a limit in all civil trials in cap states is that they do not provide the ability to fully reflect the severity of the defendant's conduct.[164] Defendants who have behaved egregiously and caused harm to one or more plaintiffs may get a "free pass" for their behavior, it is argued.[165] Placing caps on awards could discriminate against those plaintiffs who are unable to demonstrate a significant amount of actual harm.[166] Limits may also serve the deterrent purpose of punitive damage awards.[167] Others have claimed that limitations on awards can frustrate the jury's efforts to determine appropriate punishment and deterrence.[168]

One would predict that the institution of such caps would have a dramatic effect on overall damage award amounts, and very importantly, on insurance rates. For example, a study conducted by the Rand Institute for Civil Justice estimated caps on punitive damages in financial injury cases would result in a reduction in damage awards by approximately 65%.[169] Recently, doctors have responded to spikes in their malpractice premiums by withholding medical services and holding highly publicized walk-outs, hoping to influence state legislators to impose limits on jury awards, which in turn they predict will decrease their malpractice premiums.[170] Perhaps surprisingly, then, statistical studies to date show mixed evidence that caps are having these in-

viding a chart of the tort reform legislation passed by the states). For a discussion of the constitutional issues at stake in tort reform proposals, see Robert S. Peck et al., *Tort Reform 1999: A Building Without a Foundation*, 27 FLA. ST. U. L. REV. 397, 416–20 (2000).

164 Thomas M. Melsheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329, 346–48 (1994).

165 *Id.* at 347.

166 *Id.*

167 *Id.* at 348.

168 *Id.*; *see also* Perczek, *supra* note 162, at 865.

169 ERIK MOLLER ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES IN FINANCIAL INJURY JURY VERDICTS 44 (1997).

170 Neil Vidmar and Leigh Ann Brown argue that analysis of the problem of medical malpractice premium increases is incomplete, tending to focus on the tort system and ignoring the insurance business cycle and other causes of insurance rate increases. Neil Vidmar & Leigh Ann Brown, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 28 MISS. C. L. REV. (forthcoming 2003) (manuscript at 4–11, on file with author).

tended effects.[171] Some states have experienced decreases, while others have not.[172]

Empirical research using jury simulation methodology suggests one possible reason why caps may be not be as surefire a method for award reduction as they may seem. Robbennolt and Studebaker found an anchoring effect with the punitive damage cap.[173] In their study, undergraduate students read a brief vignette describing a scenario in which the plaintiff contracted human immunodeficiency virus (HIV) following a blood transfusion as a result of a vehicular accident.[174] Researchers manipulated both the punitive damage cap level ($100,000, $5 million, and $50 million) and the manner in which the cap was presented (restrictive or permissive).[175] The restrictive method informed participants they were not permitted to award more than the amount of the assigned cap, while permissive instructions informed jurors they could award up to the amount of the cap.[176] A control condition was also incorporated in which no punitive damage limits were present. Results indicated that as the cap level increased, the size and variability of the punitive damage award also increased.[177] According to these authors,

> while the cap was successful at limiting the size and variability of punitive damage awards when the cap was low or moderate, when the cap on punitive damages was relatively high, participants made larger and more variable punitive damage awards than did those in the control group in which no limit was imposed. Thus, the high cap anchored punitive damage awards to the extent that the cap pulled punitive damage awards higher than they otherwise would have been.[178]

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171 *See* Oppel, *supra* note 6; *see also* GREENE & BORNSTEIN, *supra* note 11, at 179. *Compare* Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 76–78 (1986) (finding caps reduced plaintiff recovery), *with* William P. Gronfein & Eleanor DeArman Kinney, *Controlling Large Malpractice Claims: The Unexpected Impact of Damage Caps*, 16 J. HEALTH POL. POL'Y & L. 441, 447–48 (1991) (noting that Indiana claim payment amounts are higher than those in neighboring states).

172 *See* GREENE & BORNSTEIN, *supra* note 11, at 179; *compare* Danzon, *supra* note 171, at 76–78 (finding caps reduce plaintiff recovery), *with* Gronfein & Kinney, *supra* note 171, at 447–48 (noting that Indiana claim payments have increased since the state imposed caps on damages).

173 Robbennolt & Studebaker, *supra* note 129, at 361.

174 *Id.* at 357–58.

175 *Id.*

176 *Id.*

177 *Id.* at 361.

178 *Id.*

Although the applicability of this jury simulation to actual jury decisionmaking remains to be demonstrated, it suggests that even though caps are intended to restrict overall damage amounts, this approach to guiding the jury may have some unintended consequences.[179]

CONCLUSION

In sum, this review of empirical evidence about the functioning of the civil jury indicates that the problems with the civil jury are overstated. Civil jury verdicts appear to be sound; civil jury verdicts are generally in line with the weight of the evidence, and there is a high rate of agreement with legal experts such as trial judges. The claim that juries are uniformly pro-plaintiff cannot be supported. Although jurors can be sympathetic, there is a countervailing tendency to question plaintiffs' claims in civil litigation. As for the charge that business corporations are treated with hostility, we observe that corporate behavior is judged by more exacting standards, but to the extent that we can tell, it seems to be linked to a higher standard for corporate action than individual action, derived from the greater resources and potential impact of corporations. Whether this will hold true in a post-Enron world remains to be seen.

With respect to civil jury awards, media coverage and advertising campaigns have led to a gross overestimation of the typical jury award.[180] Many jury awards appear to be appropriate and equitable in that cases with more serious injuries generally result in higher awards. However, there is also empirical evidence of what Professor Michael Saks calls horizontal inequity, where similar injuries are treated differently.[181] The proposed remedy of capping pain and suffering awards and punitive damage awards appears to have inconsistent impact in both the research laboratory with mock juries and in the real world laboratory of state tort reform.

We see a continuing need for empirical research on the civil jury. Additional empirical research is required to examine different methods of promoting greater equity in jury awards and to explore the effects of recently enacted tort reforms. States can function as a natural laboratory for assessing the effects of caps and other civil jury reforms, although as we have seen the complexities of determining the

179 Michael J. Saks et al., *Reducing Variability in Civil Jury Trials*, 21 LAW & HUM. BEHAV. 243, 245–46 (1997) (noting that caps may enhance windfalls to the slightly injured while depriving those most seriously injured).

180 *See supra* notes 98–103 and accompanying text.

181 *See* Saks et al., *supra* note 179, at 253–55.

effects on jury behavior can be challenging. Finally, we would encourage judges and lawyers to take full advantage of innovative trial practice reforms, such as revising instructions, allowing note-taking, question-asking, and trial discussions, which can enhance the civil jury's decisionmaking ability.