

# TRUTH, JUSTICE, AND THE JURY

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An experienced attorney recently forwarded an email sharing the descriptions of several recent verdicts in civil cases. He suggested that the cases might be of use in teaching law students why most lawsuits are settled. The list contained in the email included the following cases:

(a) January 2000: Kathleen Robertson of Austin, Texas, was awarded \$780,000 by a jury of her peers after breaking her ankle tripping over a toddler who was running inside a furniture store. The owners of the store were understandably surprised at the verdict, considering the misbehaving little boy was Ms. Robertson's son.

(b) October 1998: Terrence Dickson of Bristol, Pennsylvania, was leaving a house he had just finished robbing by way of the garage. He was not able to get the garage door to go up since the automatic door opener was malfunctioning. He couldn't reenter the house because the door connecting the house and garage locked when he pulled it shut. The family was on vacation. Mr. Dickson found himself locked in the garage for eight days. He subsisted on a case of Pepsi he found, and a large bag of dry dog food. He sued the homeowner's insurance company claiming the situation caused him undue mental anguish. The jury agreed to the tune of half a million dollars.

(c) November 2000: Merv Garzinski of Oklahoma City, Oklahoma purchased a brand new 32 foot Winnebago motor home. On his

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first trip home, having joined the freeway, he set the cruise control at 70 mph and calmly left the drivers seat to go into the back and make himself a cup of coffee. Not surprisingly the Winnie left the freeway, crashed and overturned. Mr. Garzinski sued Winnebago for not advising him in the handbook that he couldn't actually do this. He was awarded \$1,750,000 plus a new Winnie. (Winnebago actually changed their handbooks on the back of this court case, just in case there are any other complete morons buying their vehicles.)

These reported verdicts offer dramatic support to critics of the civil jury who question the wisdom of the Seventh Amendment, to those who favor limiting the Seventh Amendment's application, and to advocates of tort reform who claim that the civil jury is out of control. The general theme is that a group of laypersons cannot be trusted to find the truth and to administer even-handed justice. One problem mars this neat fit with what critics of the civil jury have always assumed. It is that none of the three cases described above, or any of the other four included in the email, actually exists. Each of the described cases is complete with date, name of plaintiff, and location, but none could be located in court records, jury verdict reporters, contemporaneous news accounts, or even through more informal avenues, such as checking with the chairpersons of local bar association tort committees. In response to our query about the case that allegedly caused it to alter its manual, Winnebago replied, "As far as we are concerned, there is no truth to this story."<sup>2</sup>

Why was this list of imaginary cases created and circulated widely on the Internet? One possible answer is that supporters of tort reform create and diligently distribute false information about jury verdicts to garner support for their reform efforts. Even if such efforts to mislead do occur,<sup>3</sup> the question remains: why did a sophisticated attorney believe that these purported descriptions of jury verdicts were accurate reports? One logical possibility is that even if these cases are fabrications, juries regularly do make unjustified awards to undeserving plaintiffs. If that is true, however, why invent imaginary

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1. Email to Shari Diamond, Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern University (Jan. 1, 2003) (copy on file with author).

2. Email from Service Administration, Winnebago Industries, Inc., to Marcia Lehr, Reference Librarian, Northwestern University (June 12, 2002) (on file with author).

3. One piece of evidence that they do is that some versions of the "case descriptions" email message carried the name of a Dayton, Ohio attorney calling for assistance in tort reform "to put a stop to these insane jury awards." However, the attorney and her law firm do not exist.

cases?

If these urban legends do not accurately portray jury behavior, belief in their accuracy can impose serious costs. Defendants may be induced to settle unwarranted claims not merely to avoid the cost of defending them in court, but also in the mistaken belief that a jury cannot be trusted to reject those claims. Plaintiffs may be encouraged to file suit, mistakenly believing that a frivolous claim will succeed before a sympathetic and gullible jury.<sup>4</sup> The legal system may be forced to spend valuable time on claims that have no chance of succeeding on the merits. And the citizens called for jury duty may see their involuntary public service unjustifiably undermined and devalued.

The theme of this Symposium is Law and Truth. Consistent with that theme, I will take a closer look at “the truth” about the jury and its ability to get at “the truth,” comparing the information the ordinary citizen receives from the media with the data that emerge from systematic studies of jury decisions and decision-making.

#### I. PUBLIC INFORMATION ABOUT THE JURY

To find what is true about the jury and to explain how and why perceptions of the jury differ from reality, a more complex and systematic approach is required than simply surfing the Internet or absorbing what the news media offer. The public picture of the jury is sketchy and unsystematic, so it is easy to fill in the gap with anecdotes and misinformation. Because media reports generally focus on the unusual case or verdict, the popular image of jury behavior that emerges is skewed in the direction of those exceptional cases. In addition, even news stories about actual jury verdicts provide incomplete and potentially misleading descriptions of the evidence that the jury heard and, due to the secrecy of jury deliberations, only limited information on how the jury reached its decision.

For example, the media generally described the now infamous McDonald’s case as one in which “a woman spills coffee in her lap, sues McDonald’s for making coffee so hot that it severely burned her, and gets millions.”<sup>5</sup> Although a few stories provided more detail,

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4. Judges may dismiss the most obviously frivolous claims, but at least some of the claims remain in the legal system long enough to require defendants to shoulder unnecessary litigation costs.

5. Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 142 (2001).

most failed to include some or all of the following information that might have altered the ubiquitous impression that the case was a prototype of unjustified litigiousness and jury irrationality.<sup>6</sup> The plaintiff, 79-year-old Stella Liebeck, was a passenger in her adult grandson's car, which was parked by a curb in the McDonald's parking lot.<sup>7</sup> When she attempted to remove the lid from the coffee just purchased at the drive-thru, the coffee spilled in her lap.<sup>8</sup> It caused third degree burns, requiring hospitalization and skin grafts and resulting in severe pain, partial disability for up to two years following the accident, and permanent disfigurement.<sup>9</sup>

The McDonald's manual specified that coffee should be served at temperatures between 180 and 190 degrees, and experts confirmed that liquids at that temperature can cause highly painful and disfiguring third degree burns.<sup>10</sup> A McDonald's quality assurance supervisor admitted during trial that coffee at 180 to 190 degrees can cause burns and is a hazard.<sup>11</sup> McDonald's had received over 700 complaints about injuries due to hot coffee in the previous decade<sup>12</sup> and had not changed the temperature of its coffee.<sup>13</sup>

The jury determined that compensatory damages amounted to \$200,000, but attributed 20% of the liability for the accident to Ms. Liebeck, presumably for putting the coffee cup between her legs in order to free up both her hands for prying off the lid, producing an award of \$160,000 to Ms. Liebeck.<sup>14</sup> The mediator on the eve of trial recommended a settlement of \$225,000, which McDonald's turned down.<sup>15</sup> Post-trial interviews indicated that the jurors, who initially thought the case was a waste of their time, came to be convinced that the hot coffee was unreasonably dangerous and that McDonald's had callously disregarded the danger.<sup>16</sup> The jury awarded \$2.7 million in

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6. *See id.* at 142-43.

7. *See id.* at 119.

8. *See id.*

9. *See id.* at 120 (Third degree burns are described as "extreme injuries ... [that] ... permeate through the full thickness of the skin to the subcutaneous fat, muscle, and bone.").

10. *See id.* at 123.

11. *Id.* at 124.

12. *See id.*

13. *See id.* at 125-26.

14. *See id.* at 128.

15. *See id.* at 122.

16. *See id.* at 129. They were surprised to learn that Ms. Liebeck, who "had never filed a lawsuit in her life," had initially contacted McDonald's without consulting a lawyer, simply asking that they check the machine for a potential malfunction or "reevaluate their

punitive damages, based on an estimate of two days' revenues from coffee at McDonald's nationwide.<sup>17</sup> Whether or not the jury's award was justified (the judge left the compensatory damages award intact and reduced the punitive damages award to \$480,000),<sup>18</sup> adding further information about the case in evaluating the jury's judgment undermines its value as a poster child for jury irrationality. Moreover, as with any single case, it tells us nothing about the frequency of similar cases.

## II. SYSTEMATIC STUDIES OF JURY DECISIONS

How then can we learn the truth about the jury? Scholars studying the jury have relied on four primary approaches: archival studies of jury verdicts; post-trial surveys of jurors; surveys of jury observers, such as judges and attorneys; and simulations. Each of these research approaches provides evidence that contradicts the impression conveyed by the email "cases" and the coverage in the popular press that portrays jurors as overwhelmingly pro-plaintiff. For example, systematic archival studies of jury verdicts show a distribution of jury verdicts that belies this description. In tort cases decided by juries, a study of court files in the 75 most populous counties reveals that plaintiffs prevailed at trial in an average of 48% of cases.<sup>19</sup> It is another question, of course, whether 48% is too high or too low in light of what the facts and the law warrant. Nonetheless, the number makes it clear that the public image of the jury as a mindless money machine for plaintiffs simply cannot be true. Contrast the 48% figure with the results of a content analysis of five national popular and business magazines, which shows that the magazines over-represented the plaintiff victory rate before juries in tort cases at 85%.<sup>20</sup> The distorted distribution of plaintiff verdicts that emerges in media coverage can lay the groundwork for enticing even

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temperature standards," and pay for the costs related to her injury (unspecified at the time of the letter, which was written two weeks after the event). McDonald's responded by refusing "requests for a change of policy" and offering to pay \$800. *See id.* at 120-21.

17. *See id.* at 128.

18. *See id.* at 130.

19. Carole J. DeFrances & Marika F.X. Litras, *Civil Trial Cases and Verdicts in Large Counties, 1996*, BUREAU OF JUSTICES STATISTICS BULLETIN, Sept. 1999 at 1.

20. *See* Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419 (1996) (showing media coverage that reflects inflated median and mean jury awards as well as plaintiff victory rates); *see also* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1102 (1996) (reviewing evidence that rates of claims are low compared to rates of injuries).

sophisticated consumers with urban legends.

Similarly, claims are made that juries are generally made up of uneducated citizens who cannot figure out a way to get out of jury duty.<sup>21</sup> This image of the jury is often accompanied by the complaint from educated citizens or corporate executives that they cannot possibly be tried by a “jury of my peers” because the jury pool fails to draw on middle and upper class citizens. The modern American jury is the product of a multi-stage selection process that typically begins with a list of potentially eligible jurors drawn from voter registration lists and often supplemented by individuals holding drivers licenses in the general geographic area where the court sits. Even these efforts at inclusion leave the jury pool with disproportionate losses from lower income and minority citizens, as well as younger people, who are more mobile and less likely to respond to a jury summons.<sup>22</sup> Most states have eliminated traditional occupational exemptions for physicians, lawyers, and clergy, and are less willing to accept occupational bases as an excuse from jury duty in the larger jurisdictions that use one day/one trial systems.<sup>23</sup> Where juror pay is low (e.g., \$6 per day in Dallas) and a prospective juror works on commission or for low wages with an employer who will not pay the juror during jury duty, judges are more willing to grant an excuse for economic hardship. The result is that a comparison of the demographic characteristics of the adult citizenry of a geographic area with the jury pool in the court that draws from that area reveals a systematic *underrepresentation* of minorities, younger individuals, and those at lower income levels.

The actual composition of juries compared with the composition of

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21. John Langbein repeated this claim at the Twenty-First Annual Student Symposium of the Federalist Society: “The typical civil jury is composed of people who have nothing better to do . . . .” Remarks at the Federalist Society Twenty-First Annual Student Symposium on “Law and Truth” at Yale Law School (Mar. 2, 2002). As it turned out, based on the response to my request for a show of hands at the conference, that description apparently would have applied to roughly 20 percent of that elite audience.

22. See Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, NAT’L BLACK L.J. 238, 263-64 (1994) (discussing the 1986 California Jury Survey, University of California, Riverside); see also Hiroshi Fukurai et al., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 65 (1993) (providing evidence that minority groups and those without a high school education are underrepresented on jury panels).

23. Under one day/one trial systems, a prospective juror is excused from jury duty after one day of service unless he or she is selected to serve on a particular trial. If selected, the juror’s service ends when the trial is over. Since most trials last only a few days, jury service is far shorter than the traditional two-week or month-long tour of duty.

the jury venire that enters the courthouse has received less attention, but the limited data available from recent studies suggest that the distribution of jurors who end up serving on trials substantially reflects the distribution of those who are in the venire on race, gender, occupation, and educational background. For example, Diamond and Casper found that 18% of jurors who qualified and reported for jury service had previously served on a jury, but the rate did not differ between white non-Hispanic jurors and minority jurors.<sup>24</sup> Similarly, jurors with professional or managerial occupations were as likely to report that they had previously served on a jury as were jurors with other occupations. Reports of prior service on a jury increased with juror age, reflecting the longer period of jury eligibility for the older jurors. Retired jurors were more likely than other jurors to report that they had previously served on a jury, but that rate was consistent with the elevated rate of prior service among older jurors generally. The only other background characteristic on which jurors and non-jurors differed significantly was education, but the least and most well-educated were similar in their record of prior service. Jurors with a college degree, but not graduate training, were somewhat less likely to report that they had served (11%), in contrast with those who had no more than a high school diploma (22%), some college (19%), or graduate training (19%).<sup>25</sup> These results suggest that, at least in the aggregate, jury selection in the courthouse does not substantially affect distribution on the jury.<sup>26</sup> In the end, as a result of the various selection forces that shape the jury, juries tend to be somewhat more educated, wealthier and older, and less likely to include a representative number of minorities than the distribution of these groups in the adult population.

Information about the composition of the jury and the fact that the

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24. Shari S. Diamond & Jonathan D. Casper, UNDERSTANDING JURIES (unpublished manuscript, on file with author).

25. The sample of 1022 randomly selected jurors included 30% with no more than a high school diploma, 28% with some college, and 23% with a college degree, and 18% with graduate school experience. Shari S. Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 529-30 n.15 (1992).

26. The aggregate picture is the product of some cross-cutting forces. For example, Mary R. Rose found that although the racial distributions on juries generally matched the distributions in the venires from which they were selected, African Americans were significantly more likely to be excused by the prosecution and whites were more likely to be excused by defense. Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data From One County*, 23 LAW AND HUM. BEHAV. 695 (1999).

jury tends to find as often for the plaintiff as the defendant provide truths about the jury that offer needed corrections to some misperceptions about the jury. They do not, however, tell us how good a job the jury does at uncovering the truth, or how the jury compares with alternative institutions that might be charged with that task. If a jury, no matter what its make-up, simply flipped a coin, we could arbitrarily produce a 50% win rate for plaintiffs.<sup>27</sup> Another set of studies reveals that jury verdicts are far from arbitrary. Several researchers have compared jury verdicts with the verdict that the trial judge said he or she would have given in the same case. The consistent finding from these studies on guilty-not guilty verdicts in criminal cases and defendant liability-no liability verdicts in civil cases is that the judge agreed with the jury in the majority of cases.<sup>28</sup> In addition, when there was disagreement, the judge tended to characterize the balance of the evidence as close rather than clearly favoring one side. This pattern of agreement does not indicate whether the judge or the jury was closer to “the truth”; it does indicate that the particular features of the case strongly influenced both of their verdicts.

To assess how the jury operates as a decision-maker, we cannot compare the jury’s verdict with some gold standard of truth because no such dependable standard exists. The ambiguity of ground truth extends beyond the murky domain of reconstructing mental states. Consider an ordinary automobile accident in which liability turns on whether the light was red or green. The plaintiff claims it was red; the defendant says it was green. In the absence of additional witnesses, the outcome of the case will depend on which party the decision-maker, judge or jury, finds more credible. (Note that in addition both

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27. Indeed, that image is not far from the classic Priest-Klein hypothesis that close cases—ones that could go either way—are the cases that go to trial and explain the 50% plaintiff win rate. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). In fact, the win rate is actually lower than 50% because plaintiff wins are preordained in some number of trials in which liability is not at issue and the dispute is solely about the amount of damages or liability. See, e.g., Shari S. Diamond et al., *Juror Discussions During Civil Trials: A Study of Arizona’s Rule 39(f) Innovation*, U. ARIZ. L. REV. (forthcoming Spring, 2003).

28. The classic study is Harry Kalven, Jr. & Hans Zeisel, *THE AMERICAN JURY*, 58-68 (1966) (78% agreement in 3576 criminal trials, 78% agreement in approximately 4000 civil trials). See also, Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of its Meaning and Effects*, 18 LAW AND HUM. BEHAV. 29, 48 (1994) (74% agreement in 77 criminal trials, 63% agreement in 67 civil trials); Diamond et al., *supra* note 27 (77% agreement in 46 civil trials, 74% agreement in 40 trials in which liability was contested).

parties may actually believe they are telling the truth.) How can we, or the jury, or a judge, ascertain the actual color of the light when the accident occurred? Additional cues may be available, but in the end we cannot be certain that the correct conclusions have been drawn. When cases involve more complicated intersections of credibility and incomplete information, the “truth” becomes even more difficult to ascertain.

We can, in contrast, say something about the quality of juror decision-making by assessing whether the jurors have considered relevant facts and legal instructions in arriving at their verdicts. We can investigate whether the processes that the jury applies to the task of deciding a case are consistent with the standards that might be used in arriving at a defensible conclusion about who is more likely to be telling the truth. A defensible conclusion may not be correct, but no human decision-maker—jury or judge—can produce uniformly correct verdicts, and if he or she did, no human evaluator would be in a position to recognize that the decision-maker had succeeded.<sup>29</sup>

### III. HOW JURIES DECIDE

What do we know about how jurors typically decide cases? The composite picture presented below<sup>30</sup> is constructed primarily from three sources: (1) post-trial interviews with jurors about their deliberations;<sup>31</sup> (2) simulations that include deliberations;<sup>32</sup> and (3) a unique study in which actual civil jury deliberations have been videotaped and analyzed.<sup>33</sup> In relying on these sources, two caveats are in order. First, post-trial interviews are incomplete and can be misleading even when jurors are willing to describe how they arrived at their verdict. Jurors are being questioned about the process that produced the verdict they ultimately voted for—they know how the trial came out. The outcome can have a powerful impact on jurors, leading them in retrospect to view the verdict ultimately arrived at as

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29. With the advent of DNA testing, there is potentially one set of cases that has provided convincing evidence of error by juries and judges who convicted defendants who could not have done the crimes they were convicted of doing.

30. Individual juries may deviate from this portrait. The attempt here is to present an overview of how juries generally behave.

31. *See, e.g.*, VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* 18 (2000).

32. *See, e.g.*, Phoebe Ellsworth, *Are Twelve Heads Better Than One?* 52 *LAW & CONTEMP. PROBS.* 205, 208-09 (1989).

33. *See, e.g.*, Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 *VA. L. REV.* 1857, 1869-73 (2001).

inevitable and thereby affecting their recollection of the process that produced it.<sup>34</sup> Second, jurors participating in simulations, even those using members of the jury venire (rather than students) and presenting full videotaped trials (rather than minimalist written vignettes), know that they are in a simulation.<sup>35</sup> The extent to which that knowledge affects their behavior is likely to vary, depending on the nature of the case and the behavior being measured. A unique opportunity to view actual jury deliberations, the third source mentioned above, provides a check on the potential limitations of these other two sources.<sup>36</sup>

Overall, jurors attempt to arrive at the most plausible reconstruction of the events by pooling their assessments of the incomplete and conflicting stories that the witnesses tell. Where the time line is crucial in attributing causation (e.g., did the accident cause the claimed injuries? Were pre- or post-accident injuries responsible?), they pore over the evidence relating to the timing of medical treatments and post-accident activities. They are aware that experts are being paid by the side that produced them, and assess both credentials and content in evaluating whether to accept what the experts say. Jurors do not generally impose unjustified liability on 'deep pocket' defendants; they do hold corporations to a higher standard of care than individual defendants of similar wealth. The jurors draw heavily on their various prior experiences to determine whether a witness is credible (e.g., does it make sense that the alibi witness would have left her young child in a car with a total stranger?). Jurors are attentive to some points that lawyers may miss (e.g., if the plaintiff claims he cannot sit in one position for more than a half-hour, why is it that he was able to sit still for much longer than that in the courtroom?). A majority of questions raised during deliberations are answered correctly by other jurors. Moreover, the jury is a remarkably adaptable instrument: the jurors who participate more during deliberations also tend to have better comprehension levels and are more influential on the jury than their fellow jurors. Although education is a predictor of both participation and influence, the level of testimony comprehension in the particular case adds an

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34. See Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCH. 288, 288 (1975).

35. For a discussion of the value and limitations of jury simulations, see Shari S. Diamond, *Illuminations and Shadows From Jury Simulations*, 21 LAW & HUM. BEHAV. 561, 562 (1997).

36. Diamond & Vidmar, *supra* note 33; Diamond et al., *supra* note 27.

independent contribution to the level of participation and influence. Juries that begin deliberations holding heterogeneous verdict preferences tend to have more in-depth deliberations than juries that begin with a more homogeneous view of the evidence.

Some images of jury deliberations do not represent how juries generally behave. For example, a common image of the jury is that it nearly always takes a vote at the beginning of deliberations, but in one study only 6% of jurors on post-trial interviews reported taking a first vote within 10 minutes of the start of deliberation.<sup>37</sup> Simulations have found that an early first vote was taken by 20-27% of juries.<sup>38</sup> Our observations of actual jury deliberations offer one explanation for these different results. While there is usually a call for a vote early in deliberations, the vote is frequently derailed by discussion about the evidence.<sup>39</sup> Moreover, the longer the trial, the longer the discussion tends to be before any vote is taken,<sup>40</sup> suggesting that a heavier evidentiary load leads jurors to engage in more processing time before attempting to reach a verdict.

This generally favorable account of jury fact-finding requires some caveats. The jury faces two primary types of challenges that can threaten its ability to reach justifiable decisions. The first arises when the evidence is highly technical, as in the Bendectin cases<sup>41</sup> of the 1980s and 90s in which the dispute was whether the plaintiffs' birth defects were caused by the anti-nausea drug Bendectin. Jurors were asked to evaluate complex scientific and statistical evidence that was the subject of heated controversy among highly credentialed scientists. The cases ultimately led the U.S. Supreme Court in *Daubert v. Merrell-Dow Pharm., Inc.*<sup>42</sup> to clarify that the Federal Rules of Evidence require judges to act as gatekeepers in determining the admissibility of evidence. On remand, Judge Kozinski observed:

Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what

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37. Marla Sandys & Ronald Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 LAW AND HUM. BEHAV. 175, 183 (1995).

38. REID HASTIE ET AL., *INSIDE THE JURY* 60 (1983).

39. Diamond et al., *supra* note 27.

40. *Id.*

41. See JOSEPH SANDERS, *BENDECTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION* 118 (1998).

42. 509 U.S. 579 (1993).

is and what is not “good science,” and occasionally to reject such expert testimony because it was not “derived by the scientific method.”<sup>43</sup>

The dilemma then is whether judges are better equipped than juries to handle this challenge. Some evidence suggests that they are not.<sup>44</sup> Although research on jury behavior indicates that jurors are not uncritical consumers of expert testimony, there is no doubt that technical and complex material poses special challenges to both juries and judges.

Perhaps the most serious and unique obstacle faced by the jury arises in applying the facts it finds to the law it receives in jury instructions. Both the persistently opaque language and construction of jury instructions and the reluctance to address issues that almost inevitably will come up in deliberations<sup>45</sup> impair the ability of the jury to apply the instructions. I am not referring here to instances of jury nullification in which the jury intentionally disregards the law,<sup>46</sup> but to the more common occasion when the jury invests considerable effort during deliberations attempting to apply incomprehensible or ambiguous directives on the applicable law. Despite a large body of research showing that instructions can be clarified and understood,<sup>47</sup> jury instructions often (and unnecessarily) fail to provide adequate instruction on the applicable law. When the law does not comport with the jury’s intuitive understanding of legal standards, the jury can be led astray.

#### IV. CONCLUSION

In keeping with the theme “Truth and the Jury,” my focus has been on both the accuracy of images of the jury and on the way juries actually decide cases. I have not discussed the important political roles of the jury in the legal system: as a potential source of

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43. *Daubert v. Merrell-Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 189 (1995).

44. For a discussion of the evidence on this point, see Neil Vidmar & Shari S. Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121 (2001).

45. *See, e.g.*, Diamond & Vidmar, *supra* note 33, at 1907-14 (discussing the reluctance of courts to give more informative instructions on the collateral source rule, despite the fact that insurance is often discussed by jurors).

46. *See* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1604 (2001).

47. For a review of the evidence, see Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCH., PUB. POL’Y & LAW 589 (1997); Shari S. Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996).

legitimacy, as a conduit for community standards, and as an educator for the citizens who serve as jurors.<sup>48</sup> These roles are important, but they would not be sufficient to justify jury trials if the jury failed to perform competently in its role as an adjudicator. Although some anecdotes, true and false, point to weaknesses, systematic studies of jury decision-making reveal that the jury generally is a competent decision-maker. Nonetheless, because they<sup>49</sup> are human, jurors and judges are both imperfect decision-makers<sup>49</sup> and, in the courtroom, must rely on imperfect and incomplete information. While the jury has the advantage of being able to pool experience and perception from all of its members, it has traditionally lacked some tools that the trial court judge has always had. Recent jury innovations, such as those that permit jurors to take notes, submit questions to witnesses, and receive copies of the jury instructions, all give the jury access to these judicial tools on the reasonable assumption that these methods can assist the jury as well.<sup>50</sup>

The presence of both the civil and criminal jury in the Bill of Rights does not deny the capacity for jury error. Indeed, the right to appeal a jury verdict explicitly recognizes that some decisions may be unjustified and, with the exception of acquittals in criminal cases, a jury verdict may not be the last word. But the wisdom of the system is that it limits the judge who would overturn a jury verdict, implicitly recognizing that truth is elusive, that juries typically reach justifiable results, and that judges too can make mistakes.

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48. See Shari S. Diamond, *Juries*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 8031, 8032 (N.J. Smelser & P.B. Baltes, eds., 2001).

49. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779 (2001).

50. See G. THOMAS MUNSTERMAN ET AL., JURY TRIAL INNOVATIONS 141-47, 174-76 (1997); B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, 68 IND. L. J. 1229, 1249-55 (1993) (reviewing the effectiveness of new jury procedures).

