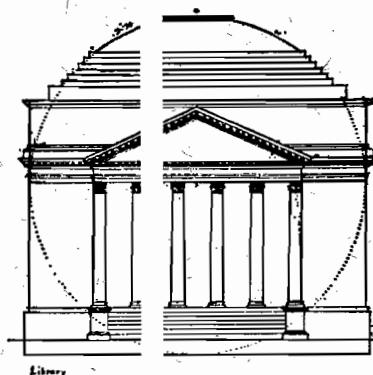


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Jury Room Ruminations on  
Forbidden Topics

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## JURY ROOM RUMINATIONS ON FORBIDDEN TOPICS

*Shari Seidman Diamond and Neil Vidmar\**

THE early English jury consisted of a group of witnesses assembled to report on facts they were presumed to know in advance of the formal proceedings. In sharp contrast, the modern American jury is expected to learn the facts of the case only from the evidence that the parties present at trial.<sup>1</sup> According to many accounts, the rules of evidence of the Anglo-American legal system developed in large measure to control the jury and to channel its decisionmaking.<sup>2</sup> A prominent feature of the rules of evidence is

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<sup>1</sup>Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 *Hastings L.J.* 579, 587 (1993); Pamela J. Stephens, *Controlling the Civil Jury: Towards a Functional Model of Justification*, 76 *Ky. L.J.* 81, 85 (1987-88).

<sup>2</sup>James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 266 (Boston, Little, Brown & Co. 1898) (calling the law of evidence "the child of the jury system"); 1 John Henry Wigmore, *Evidence in Trials at Common Law* § 8a, at

the set of exclusions that blindfold jurors to facts about the case that might influence their decisions in legally unacceptable ways.

The blindfolding approach to jury control implicitly assumes that jurors will not consider a topic unless it is introduced at trial. Modern behavioral research on the jury, however, both rejects the image of the jury as a blank slate on which evidence is etched and raises serious questions about the ability of some of these blindfolding efforts to control the jury by simply prohibiting mention of specific topics at trial. In this paper, we will suggest a revised approach to blindfolding. Our approach is informed by some preliminary data from the videotaped deliberations of forty civil juries that were collected as part of our Arizona Jury Project. The analysis distinguishes between conditions that are likely to benefit from blindfolding and those that call for other strategies to optimally focus the jury's attention on legally relevant information.

In Part I we will compare the image of the jury as a passive participant in the trial with the picture of an active jury that emerges from modern behavioral research. We will then analyze, in Part II, efforts to control the jury through rules of evidence that prohibit or limit some forms of information and through judicial instructions that direct the jury to ignore or limit their use of particular information. Part III will examine actual jury deliberations. We will focus on jury discussions about insurance and attorney's fees, controversial topics that have generated a variety of efforts at jury control. Part IV will describe a general approach to blindfolding that recognizes the crucial role that juror expectations and beliefs can play in jury decisionmaking and offer a strategy for guiding jury deliberations consistent with our findings about how jurors evaluate evidence. In particular, we will distinguish between topics that are and are not likely to be raised spontaneously by members of the jury and between information that is and is not likely to modify the narrative or story that jurors construct about the events

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621 (Tiller ed., 1983). The adversary system is often identified as an additional stimulus for the laws of evidence. Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 *U. Chi. L. Rev.* 247, 258 (1937); Dale A. Nance, *The Best Evidence Principle*, 73 *Iowa L. Rev.* 227, 229 (1988); see also Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *Cornell L. Rev.* 497, 501 (1990) (detailing the impact of a growing presence of lawyers and adversary procedures on the development of rules of evidence).

that led to the trial. In Part V we will apply this analysis of blindfolding to the topic of insurance and related issues, proposing an empirically informed and collaboration-based approach to jury control that offers a way to minimize the deleterious effects of some forbidden topics when blindfolding is not a plausible strategy.

### I. ACTIVE VERSUS PASSIVE JURIES

In almost all federal and state jurisdictions the jury is treated as a passive participant in the trial until deliberations begin. Following jury selection, the members of the jury are placed in the jury box and presented with testimony, arguments, and instructions. Jury members typically are not invited to clarify points by raising questions of their own.<sup>3</sup> The court instructs them to listen carefully to the testimony, but not to form impressions or make judgments about the verdict until the presentation of all of the testimony is completed and they have been instructed on the law. The court also tells the jurors not to talk amongst themselves about the evidence or possible verdicts until the end of the trial after they have received final instructions from the judge.<sup>4</sup> While common sense suggests that few jurors will actually achieve the nearly complete passivity envisioned by these norms, the legal system proceeds as

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<sup>3</sup> A few states regularly permit juror questions. E.g., Ariz. R. Civ. P. 39(b)(10). In others, courts have held that it is within the discretion of the court to allow juror questions. E.g., *People v. Heard*, 200 N.W.2d 73, 76 (Mich. 1972). Colorado, Florida, Maryland, Tennessee, and Washington have rule recommendations pending that would allow jurors to ask questions under conditions similar to those in Arizona. See Committee Report to Chief Justice Anthony F. Vollack (Aug. 1996) (Colorado); Judicial Management Council Jury Innovations Committee, Final Report (May 2001) (Florida); Council on Jury Use and Management, Report and Recommendations (Apr. 12, 2000) (Maryland); Report of Tennessee Bar Association Commission on Jury Reform (May 1999), <http://www.tba.org/news/juryreform.html> (Tennessee); Washington State Jury Commission, Report to the Board for Judicial Administration (July 2000) (Washington).

<sup>4</sup> Arizona is an exception. Rule 39(f) of the Arizona Rules of Civil Procedure permits jurors to discuss the evidence amongst themselves in the course of the trial. Influenced by Arizona, Colorado, Florida, and Maryland are in the process of considering pilot studies on rule changes to allow pre-deliberation discussion similar to those in Arizona. Committee Report to Chief Justice Anthony F. Vollack, *supra* note 3 (Colorado); Judicial Management Council Jury Innovations Committee, Final Report, *supra* note 3 (Florida); Council on Jury Use and Management, Report and Recommendations, *supra* note 3 (Maryland).

though it is an attainable goal. After hours, days, or months of receiving testimony and instructions, the jury is finally mobilized to deliberate.

A second approach to the jury that implicitly reflects its passive image is the method of dealing with matters such as pretrial publicity or legally irrelevant testimony. In both instances, jurors are instructed to set aside (to erase) information that is already available to them and to reach their verdicts based simply on the legally permissible evidence which has been presented at trial. While courts recognize that jurors cannot be expected to proceed in this fashion on some occasions, granting a change of venue or a mistrial as a remedy, the reliance on simple admonitions to disregard inadmissible information reflects a perception of the jury as a blank slate on which trial testimony can be written and erased.<sup>5</sup>

A contrasting image of the jury emerges from studies of both jurors<sup>6</sup> and other human decisionmakers.<sup>7</sup> Jurors bring expectations and preconceptions with them to the jury box, actively search for causal explanations to make sense of the events described, and consciously or unconsciously process information so as to fill in missing blanks or interpret ambiguities in testimony in ways that may strongly influence their decisions. Jurors' expectations, beliefs, and values affect the way they react to evidence.<sup>8</sup> In that

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<sup>5</sup> See, e.g., Judge Nancy Gertner & Judith H. Mizner, *The Law of Juries 7-7 to 7-32* (1997).

<sup>6</sup> See, e.g., W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (1981); Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 *Law & Soc'y Rev.* 513, 557 (1992); Shari Seidman Diamond et al., *Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 *DePaul L. Rev.* 301, 315 (1998); Shari Seidman Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 *J. Crim. L. & Criminology* 17, 43 (1996); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *Cardozo L. Rev.* 519, 519 (1991) [hereinafter Pennington & Hastie, *Cognitive Theory of Juror Decision Making*]; Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 *J. Personality & Soc. Psychol.* 189, 189 (1992).

<sup>7</sup> See, e.g., Paul T.P. Wong & Bernard Weiner, *When People Ask "Why" Questions, and the Heuristics of Attributional Search*, 40 *J. Personality & Soc. Psychol.* 650, 661-62 (1981).

<sup>8</sup> E.g., Vicki L. Smith & Christina Studebaker, *What Do You Expect?: The Influence of People's Prior Knowledge of Crime Categories on Fact-Finding*, 20 *Law & Hum. Behav.* 517, 528-29 (1996).

respect, jurors are like other decisionmakers: People ordinarily scrutinize more carefully and are more likely to reject information that is inconsistent with their beliefs and expectations.<sup>9</sup> They also find it easier to remember theory-consistent information than theory-inconsistent information<sup>10</sup> and tend to interpret ambiguous information as consistent with their previously held theories.<sup>11</sup>

Jurors draw on their prior understandings about the world as they evaluate and make sense of information presented at trial. They impose a narrative structure to describe and explain various possible events that led to the outcomes presented at trial. Empirical studies of jury behavior reflect this description of jurors as active processors of incoming information. Early models of jury decisionmaking included: (1) averaging models, in which jurors assess and weigh pieces of evidence, combining the results to reach a verdict<sup>12</sup> and (2) Bayesian models, in which jurors consider and evaluate each new piece of information, revising their prior position on the appropriate verdict in light of their earlier position and the additional evidence.<sup>13</sup> These formal models have enjoyed limited success as descriptions of how jurors actually decide cases. Explanation-based models of jury decisionmaking, such as Professors Nancy Pennington and Reid Hastie's story model, provide accounts of juror behavior that comport better with empirical evidence about juries.<sup>14</sup> Consistent with the story model, jurors do not simply record and store the evidence for later use as they receive

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<sup>9</sup> Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 *J. Personality & Soc. Psychol.* 2098, 2099 (1979).

<sup>10</sup> Anne Locksely et al., *The Ambiguity of Recognition Memory Tests of Schema Theories*, 16 *Cognitive Psychol.* 421, 422 (1984).

<sup>11</sup> Robert P. Vallone et al., *The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the Beirut Massacre*, 49 *J. Personality & Soc. Psychol.* 577, 584-85 (1985).

<sup>12</sup> Norman H. Anderson, *Foundations of Information Integration Theory* (1981); Martin F. Kaplan & Gwen DeArment Kemmerick, *Juror Judgment as Information Integration: Combining Evidential and Nonevidential Information*, 30 *J. Personality & Soc. Psychol.* 493 (1974).

<sup>13</sup> David A. Schum & Anne W. Martin, *Formal and Empirical Research on Cascaded Inference in Jurisprudence*, 17 *Law & Soc'y Rev.* 105 (1982).

<sup>14</sup> Pennington & Hastie, *Cognitive Theory of Juror Decision Making*, *supra* note 6; Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 *J. Experimental Psychol.: Learning, Memory, & Cognition* 521 (1988).

it. Rather, they actively select and organize the trial evidence to construct a story about what happened. They construct a story based on the evidence and fill gaps in evidence with inferences based on their understandings about how the world works. Jurors arrange evidence in the form of a sequence of motivated human actions that include important events, the circumstances of the case, inferences about character, and the parties' motivations and states of mind. The organization of the evidence can have important consequences for the verdict. For example, the order in which facts are presented (that is, in story order rather than witness order) influences jurors' understanding of what took place and can affect verdicts.

Knowledge structures or information-processing heuristics may also influence the ways in which jurors interpret ambiguous testimony and fill in "blanks"—issues about which there is no testimony at all.<sup>15</sup> For example, a "hindsight bias" can affect the way jurors reconstruct the pre-event probability of a particular outcome.<sup>16</sup> In one study, mock jurors hearing evidence in a civil damage suit against officers alleged to have engaged in an illegal search were influenced by knowledge about the outcome of the search (whether evidence of the crime was found when police searched the apartment of a suspect who was now the plaintiff).<sup>17</sup> The influence of this outcome information operated primarily through its effect upon jurors' recollection of the testimony at the trial. When jurors heard the suit of a plaintiff whose search had produced evidence of a crime, they were more likely to interpret ambiguous testimony in ways favoring the police.<sup>18</sup>

Based on the evidence that jurors are active information-processors, we can make a number of predictions about juror response to some attempts by the legal system to channel and control jury decisionmaking. These standard techniques aimed at

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<sup>15</sup> Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 *J. Experimental Psychol.: Hum. Perception & Performance* 288 (1975).

<sup>16</sup> Jonathan D. Casper et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 *Law & Hum. Behav.* 291 (1989).

<sup>17</sup> *Id.* at 300.

<sup>18</sup> *Id.* at 306-07.

jury control include blindfolding and judicial instructions to ignore particular topics or information.

## II. BLINDFOLDING AND ADMONITIONS AS METHODS OF JURY CONTROL

One of the most commonly employed techniques for controlling juror decisionmaking is blindfolding, that is, withholding certain information from the jury. Ordinarily, juries cannot be told about the criminal record of a defendant who does not testify,<sup>19</sup> subsequent remedial measures taken in the wake of an accident,<sup>20</sup> the taxability or non-taxability of an award,<sup>21</sup> settlement between original parties to the suit,<sup>22</sup> or the fact that the court in a private antitrust suit will automatically triple the jury's damages award.<sup>23</sup> Such rules of exclusion are justified on several grounds, including the possible bias that might be introduced by the undisclosed information and the possibility that some facts are so complicated that they might confuse rather than assist the jury. The general rule is that legally irrelevant evidence is inadmissible because it lacks probative value and will, at best, waste the jury's time and, at worst, improperly influence its decision. In addition, blindfolding is justified as a way to achieve social policy goals. Litigants may be encouraged to engage in (or at least not be discouraged from engaging in) some beneficial behaviors, such as making repairs following an accident or attempting to reach a settlement, only if they are assured that a jury will not be told about their efforts.

Some blindfolding efforts probably succeed in preventing jurors from considering forbidden topics. If the jury has no reason to make assumptions or speculate about an issue unless it is mentioned at

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<sup>19</sup> Fed. R. Evid. 609(a).

<sup>20</sup> Fed. R. Evid. 407.

<sup>21</sup> 26 U.S.C. § 104(a) (1994); see also Robert Emmett Burns, *A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?*, 14 *DePaul L. Rev.* 320, 321 (1965) (noting that a majority of courts do not allow juries to consider tax consequences when determining damages).

<sup>22</sup> Cynthia A. Sharo, Note, *Knowledge by the Jury of a Settlement Where a Plaintiff Has Settled with One or More Defendants Who Are Jointly and Severally Liable*, 32 *Vill. L. Rev.* 541, 549-63 (1987).

<sup>23</sup> 15 U.S.C. § 15(a) (1994); see, e.g., *Pollock & Riley, Inc. v. Pearl Brewing Co.*, 498 F.2d 1240, 1242-43 (5th Cir. 1974); *Cape Cod Food Prods., Inc. v. Nat'l Cranberry Ass'n*, 119 F. Supp. 900, 911 (D. Mass. 1954).



trial (for example, did the defendant happen to replace his staircase after the plaintiff slipped and fell?), avoiding any mention of the topic eliminates any possibility that it will affect the jury. Blindfolding attempts, however, are not always successful.

Failures can arise in three common situations. First, the topic may be introduced at trial because an attorney is able to argue persuasively that it is being offered for a legally acceptable purpose (for example, in the case of a defendant's criminal history, in order to show motive; in the case of subsequent remedial measures, for impeachment). Courts then must rely on a limiting instruction to tell jurors how they are permitted to use the information. Thus, the jury is given the psychologically challenging, and probably impossible, task of using the defendant's criminal record to assist in assessing his credibility as a witness, but not as evidence that he is more likely to be guilty of the crime with which he is currently charged. Studies of juror reactions to information about a defendant's criminal record demonstrate that the limiting instruction remedy in this situation is likely to fail.<sup>24</sup>

Blindfolding attempts may also fail when a witness mentions a subject in front of the jury even though the rules of evidence prohibit it. The party who is potentially disadvantaged by the introduction of a legally inappropriate topic must then determine whether or not to make an immediate objection and request either an instruction to disregard or a mistrial. The potential cost of an objection is that it may draw increased attention to the witness's statement that an instruction to disregard will not overcome. Researchers have examined the effect on mock jurors of simple admonitions that instruct the jury to disregard psychologically compelling but inadmissible testimony. The results provide support for practitioner intuitions: Simple admonitions often fail to unring the bell.<sup>25</sup> A vari-

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<sup>24</sup> A.N. Doob & H.M. Kirshenbaum, *Some Empirical Evidence on the Effect of § 12 of the Canada Evidence Act Upon the Accused*, 15 *Crim. L.Q.* 88, 96 (1972); Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberation of Simulated Juries*, 18 *Crim. L.Q.* 235, 237, 251 (1976); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instruction: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 *Law & Hum. Behav.* 37, 43 (1985).

<sup>25</sup> See generally Diamond & Casper, *supra* note 6, at 518-20, 533, 558 (including a simple admonition to ignore automatic trebling of award failed to prevent jurors from reducing their award); Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies,*

ety of theoretical explanations have been offered to explain these findings. A motivation-based explanation, based on reactance theory,<sup>26</sup> is that jurors see the admonition as an attempt to restrict their freedom to weigh and evaluate probative evidence in reaching their verdict. Responding to this threat to their freedom, jurors may not only be motivated to ignore the instruction to disregard the inadmissible evidence but may even focus more attention on the evidence they were instructed to ignore. The result is that the instruction does not eliminate, and may even emphasize, the impact of the inadmissible evidence. Even if jurors are motivated to follow the judge's admonition to disregard the forbidden information, cognitive influences may impose obstacles to achieving that goal. Professor Daniel Wegner's theory of ironic mental processes predicts that individuals who attempt to suppress specific thoughts may fail precisely because of the effort they engage in to suppress those thoughts.<sup>27</sup> As we suggest in Part V, the nature of both the inadmissible evidence and the judicial admonition can affect the operation of both reactance and ironic processes of mental control.

Events at trial are not the only threats to successful blindfolding. The third and perhaps most common situation in which a blindfolding attempt may fail occurs when the jurors' pretrial experiences,

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and Jury Bias, 14 *Law & Hum. Behav.* 409, 412-13, 424 (1990) (noting that the instruction to disregard failed to remove effects of emotionally biasing pretrial publicity); Vicki L. Smith, When Prior Knowledge and Law Collide: Helping Jurors Use the Law, 17 *Law & Hum. Behav.* 507, 532-33 (1993) (discussing how cautionary instructions fail to induce mock jurors to set aside predispositions about crime categories); J. Alexander Tanford, The Law and Psychology of Jury Instructions, 69 *Neb. L. Rev.* 71, 71-73 (1990) (critiquing court assumptions that admonitions to disregard are effective); Lisa Eichhorn, Note, Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence, 52 *Law & Contemp. Probs.* 341, 353 (1989) (suggesting the need for ways to assist jurors in using limiting instructions).

Judges, it appears, are not immune from the effects of compelling but inadmissible evidence. Professors Stephen Landsman and Richard Rakos compared the reactions of judges and mock jurors exposed in a civil products liability case to information that had been ruled inadmissible. The two groups were influenced by the information to a similar extent. Stephen Landsman & Richard Rakos, A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation, 12 *Behav. Sci. & L.* 113, 125 (1994).

<sup>26</sup> See generally J.W. Brehm, *A Theory of Psychological Reactance* (1966) (introducing the theory of psychological reactance and providing examples of its implications).

<sup>27</sup> Daniel M. Wegner, Ironic Processes of Mental Control, 101 *Psychol. Rev.* 34, 34 (1994).

attitudes, or beliefs provide them with a foundation of potentially relevant information that makes the forbidden topic likely to come to mind. Although a variety of topics are candidates for this category (for example, insurance, attorney's fees, the taxability of jury awards, and settlement offers), it is difficult to know how frequently jurors actually consider them as they arrive at their verdicts. A few surveys have attempted to assess how often jurors talk about these topics by asking the jurors. For example, John Guinther and his colleagues collected survey responses from jurors in thirty-eight civil trials.<sup>28</sup> When asked directly whether they thought that the defendant carried insurance, 54% of the jurors said they thought he did, but few said they thought it affected their verdict.<sup>29</sup> Twenty-nine percent said they had discussed the insurance that the plaintiff might have, and the majority who said they had discussed it (58%) said it did not affect their decision.<sup>30</sup> It is unclear how accurately these post-verdict reports by jurors reflect their actual behavior in the jury room, but they suggest that blindfolding has not prevented jurors from considering insurance in at least some cases. We need not rely on these post-verdict reports, however, to assess how jurors handle topics like insurance because an unusual opportunity has given us a more direct source of information. We have been able to assess the success of blindfolding by observing the conversations of a sample of real deliberating civil juries in Arizona. As a result, we have an unmediated picture of how often jurors discuss several forbidden topics and what they say about those topics.

### III. A LOOK INSIDE THE JURY ROOM

#### A. *The Arizona Jury Project*

##### 1. *The Background*

Although the jury has been the subject of acclaim and critical commentary throughout its history,<sup>31</sup> the beginning of systematic

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<sup>28</sup> John Guinther, *The Jury in America* 294 (1988).

<sup>29</sup> *Id.* at 298-99.

<sup>30</sup> *Id.* at 303.

<sup>31</sup> E.g., Patrick Devlin, *Trial by Jury* 3-5 (1956); William Forsyth, *History of Trial by Jury* 1-12 (N.Y., James Oakcroft & Co. 1875); Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 108-25 (1949); William Langbein, *Introduction to*

behavioral research on the jury can be traced to the 1950s in the work of Professors Harry Kalven, Jr., Hans Zeisel, and their colleagues on the Chicago Jury Project. Their research began as a multi-pronged effort that included: (1) a series of case simulations using mock jurors responding to the identical case or to versions of the case that were varied to assess different factors;<sup>32</sup> (2) a national judicial survey in which judges described case characteristics, the jury's verdict, and their own verdict preference in each jury trial on which they reported;<sup>33</sup> (3) a series of post-trial interviews with jurors after they reached their verdicts;<sup>34</sup> and (4) an attempt to audiotape actual deliberating juries in a set of civil trials. These approaches all yielded valuable information about jury behavior, with the exception of the attempt to tape jury behavior.<sup>35</sup> What the authors of *The American Jury* referred to as the "purple heart" of the project followed the taping of jury deliberations in five civil cases in the federal district court in Wichita, Kansas. The taping occurred with the consent of the trial judge and counsel, but without the consent of the jurors. When the fact of the taping became public, it resulted in "public censure by the Attorney General of the United States, a special hearing before the Sub-Committee on Internal Security of the Senate Judiciary Committee, [and] the en-

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William Blackstone, *Commentaries on the Laws of England*, at vii (U. Chi. Press 1979) (1768); Alexis de Tocqueville, *Democracy in America* 281 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1945) (1835). See generally *World Jury Systems* 1-52 (Neil Vidmar ed., 2000) (comparing the functioning of jury systems in countries adopting English law).

<sup>32</sup> E.g., Rita James Simon, *The Jury and The Defense of Insanity* (1967); Fred L. Stodtbeck et al., *Social Status in Jury Deliberations*, 22 *Am. Soc. Rev.* 713, 714-15 (1957).

<sup>33</sup> Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 10 (Phoenix ed. 1971); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 *Va. L. Rev.* 1055, 1056 (1964); Harry Kalven, Jr., *The Jury, The Law, and the Personal Injury Damage Award*, 19 *Ohio St. L.J.* 158, 159 n.9 (1958) [hereinafter Kalven, *Personal Injury*].

<sup>34</sup> See, e.g., Dale W. Broeder, *Plaintiff's Family Status as Affecting Jury Behavior: Some Tentative Insights*, 14 *J. Pub. L.* 131, 131 (1965); Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 *S. Cal. L. Rev.* 503, 503 (1965).

<sup>35</sup> Arguably the attempt at taping revealed other attitudes: the perceived sanctity of the jury room, attitudes toward scientific inquiry, and suspicion about the motives and trustworthiness of the academic community. For example, Kalven's trustworthiness was called into question while testifying before the Eastland Committee on October 12, 1955, when Kalven was asked if it was true that he had written a letter in support of clemency for Julius and Ethel Rosenberg who had been convicted of passing atomic secrets to the Soviet Union. Jay Katz, *Experimentation with Human Beings* 86 (1972).

actment of statutes in some thirty-odd jurisdictions prohibiting jury-tapping . . . ."<sup>36</sup> Since that time, there have been only two opportunities, both in criminal cases, to view real juries deliberating. In 1986, Professors Stephen Herzberg and Alan Levin videotaped the deliberations of a single criminal trial, in order to see how a jury responded to a case in which the defense attorney and the facts made a plausible case for nullification.<sup>37</sup> The result was a fascinating picture of a jury struggling with a conflict between the letter of the law and competing views of justice. In 1997, CBS obtained permission to videotape four Arizona juries deliberating in criminal cases.<sup>38</sup> With these few exceptions, researchers have had to learn about jury deliberations without being able to observe them directly.

Researchers studying the behavior of the jury since the Chicago Jury Project have used a variety of techniques, including simulations, post-trial interviews, and surveys of courtroom jury observers like judges and attorneys, to produce a picture of jury decisionmaking. In addition to the approaches reflected in the early work, researchers have (1) conducted archival studies in which jury verdicts are analyzed as a function of variations in trial characteristics, such as severity of injury<sup>39</sup> and race of the defendant and the victim;<sup>40</sup> (2) studied shadow juries who watched the actual trial as it occurred, but whose deliberations could be taped and analyzed;<sup>41</sup> and (3) carried out field experiments in which actual jury trials are assigned to varying experimental conditions (for

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<sup>36</sup> Kalven & Zeisel, *supra* note 33, at xv.

<sup>37</sup> *Frontline: Inside the Jury Room* (PBS television broadcast, 1986).

<sup>38</sup> CBS News: *Enter the Jury Room* (CBS television broadcast, April 1997). As Professor Valerie Hans has pointed out, the fact that three of the four cases involved in this program resulted in hung juries may suggest that the cases were somewhat atypical. Valerie Hans, *Inside the Black Box: Comment on Diamond and Vidmar*, 87 Va. L. Rev. 1923 (2001).

<sup>39</sup> Audrey Chin & Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials 3-4* (1985); James K. Hammitt et al., *Tort Standards and Jury Decisions*, 14 J. Legal Stud. 751, 752-53 (1985).

<sup>40</sup> David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis 42-44* (1990).

<sup>41</sup> Shari Seidman Diamond & Hans Zeisel, *A Courtroom Experiment on Juror Selection and Decision-Making*, 1 *Personality & Soc. Psychol. Bull.* 276, 276 (1974); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 *Stan. L. Rev.* 491, 492 (1978).

example, jurors in some trials are permitted to ask questions, while jurors in other trials are not permitted to ask questions) to ascertain the effect of those variations on jury behavior.<sup>42</sup> Lurking in the shadow of all of this research has been the question of whether real jury deliberations would reveal behaviors consistent with the picture that has emerged from more indirect methods of study. The Arizona Jury Project provides the first opportunity to examine a sample of jury deliberations in civil cases directly.

## *2. Implementing the Arizona Jury Project*

In 1993, the Arizona Supreme Court appointed a committee to review jury service, to recommend innovative changes, and to monitor new policies. The Committee on More Effective Use of Juries included on its agenda of reforms a controversial rule change: allowing jurors to discuss the evidence among selves during the trial.<sup>43</sup> The change went into effect on December 1, 1995, but the rule remained controversial, and members of the judiciary and others were interested in evaluating its effects. The Arizona Supreme Court agreed to suspend its new rule as part of a research effort to evaluate the rule's effects. In an initial study, cases were randomly designated as "discuss" and "no-discuss" conditions and jurors filled out questionnaires designed to assess their reactions and to gauge what had occurred during discussions<sup>44</sup> and deliberations.<sup>45</sup> The post-trial survey responses revealed little evidence of deleterious effects of discussions and suggested that jurors found the new procedure attractive.<sup>46</sup>

The Arizona Jury Project was designed to take the investigation one step further and analyze directly how jurors use their time when they are permitted to discuss evidence before the end of the trial. To study the discussion and deliberation process directly, the

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<sup>42</sup> Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 *Law & Hum. Behav.* 121, 127-29 (1994).

<sup>43</sup> Other reforms included encouraging mini-opening statements before voir dire, permitting jurors to ask questions, and giving jurors copies of jury instructions.

<sup>44</sup> Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 *Law & Hum. Behav.* 359 (2000).

<sup>45</sup> Here and throughout, we use the term discussions to refer to talk among jurors that occurs in the jury room during the course of the trial, as distinguished from deliberations that occur at the end of the trial.

<sup>46</sup> Hannaford, *supra* note 44, at 377-78.

Arizona Supreme Court sanctioned a videotaping project in Pima County (where Tucson is the major city). Cases were randomly assigned to the discuss and no-discuss conditions, and the jurors in all cases involved were videotaped whenever at least two of them were in the jury room.<sup>47</sup> The project required an elaborate set of permissions and security measures. In addition to the judges who agreed to participate in the project, the jurors, litigants, and attorneys in each case had to give their consent. All participants were informed of the Supreme Court order, which ensured strict confidentiality and limited use of the tapes exclusively to the research sanctioned by the court.<sup>48</sup>

Jurors were told about the videotaping project when they arrived at court for their jury service. If they preferred not to participate, they were assigned to cases not involved in the project. The enthusiasm of Kathy Brauer, the Pima County Superior Court Jury Commissioner, was infectious: The juror participation rate was over 95%.<sup>49</sup> Attorneys and litigants were less willing to take part in

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<sup>47</sup> A later article will analyze the effects of the discussion reform on discussions and deliberations.

<sup>48</sup> Supreme Court of Arizona Administrative Order 98-10 reads in part:

[T]he materials and information collected for the study, including audio and videotapes may be used only for the purposes of scientific and educational research. The Court shall take all measures necessary to ensure confidentiality of all materials. All tapes shall be stored using appropriate security measures. The materials and information collected for the study, including audio and videotapes, shall not be subject to discovery or inspection by the parties or their attorneys, to use as evidence in any case, or for use on appeal.

Supreme Court of Arizona Administrative Order 98-10 (February 5, 1998). As part of their obligations of confidentiality under the Supreme Court Order, as well as the additional assurances to parties and jurors undertaken by the principal investigators, the authors of this paper have altered certain materials to disguise individual cases. The changes do not, however, affect the substantive nature of the findings that are reported.

<sup>49</sup> A crucial question is whether the jury behavior we observed was affected by the fact that the jurors were aware that their discussions and deliberations were being filmed. The jury experience is a gripping one for most citizens and the compelling interaction with their fellow jurors captures their attention. Moreover, the videotapes reveal some conversations and behaviors that jurors presumably would not want to risk being made public or available to any of the trial participants, suggesting that they were not inhibited by the presence of the cameras. Previous research on the effects of videotaping on interactive behavior in non-therapeutic sessions suggests that any initial reactions to being videotaped dissipate rapidly. K. Weick, *Systematic Observational Methods*, in 2 Gardner Lindzey & Elliot Aronson, *The Handbook of Social Psychology* 372 (2d ed. 1968). Thus, although it is impossible to answer this

the study. Some attorneys were generally willing to participate when they had a case before one of the participating judges; others consistently refused. The result was a 22% yield among otherwise eligible trials.<sup>50</sup>

In each case, we videotaped the entire trial from the opening statements to the closing arguments and jury instructions. Because Arizona does not audiotape (or videotape) court proceedings and a transcript is typically ordered only if there is an appeal, we arranged to have a relatively unobtrusive camera installed in the courtrooms of the participating judges. The camera was focused on the witness box in order to capture as much of what the jurors saw as possible.<sup>51</sup> In each case, we transcribed opening and closing statements. We also created a "roadmap" of the trial to describe in substantial detail what each witness said during the trial (indicating separately whether it emerged on direct examination, on cross-examination, or on redirect).

The technician on site videotaped the conversations in the deliberation room whenever at least two jurors were present. Two unobtrusive cameras mounted in opposite corners of the room at the ceiling level made it possible to see jurors seated around the rectangular table on a split screen without disrupting their normal seating arrangement.

In addition to the trial, discussion, and deliberation videotapes, we collected additional data on each trial: exhibits, juror questions, judicial instructions on the law, and jury verdict forms. At the end

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question definitively, we have no reason to believe that the videotaping affected the way jurors reached their decisions in these trials.

<sup>50</sup> We defined an eligible trial as one (1) presided over by a judge who agreed to participate in the project, (2) beginning at a time when two participating trials were not already occupying the video technician, (3) occurring in a courtroom wired for taping near an available jury room also wired for taping, and (4) not expected to last longer than twelve days. Two otherwise eligible longer trials were excluded to avoid tying up the video-eligible rooms for an extended period in an effort to maximize the number of cases in the study. To avoid any bias in computing the response rate, we did not include trials that were assigned on the eve of trial to pro temp judges, although we were able to tape four of them. The data are included in our results, but not in our response rate calculation. We excluded all of the pro temp cases in computing the response rate because these cases were difficult to track (that is, permission from the pro temp judges generally could not be solicited in advance, and the pro temp judges often sat in courtrooms that were not camera-ready).

<sup>51</sup> When the camera malfunctioned or was not turned on, it was necessary to order a transcript from the court reporter.



of each trial, we also asked each of the trial participants to fill out a brief questionnaire about the trial and their personal reactions to the case. We asked the judge and attorneys to complete the questionnaire while the jury was deliberating. The jurors were asked to fill out questionnaires after they completed their deliberations.

We were able to obtain complete data on a sample of fifty cases.<sup>52</sup> The final sample consists of twenty-six motor vehicle tort cases (52%), seventeen non-motor vehicle tort cases (34%), four medical malpractice cases (8%), and three contract cases (6%). This distribution is nearly identical to the breakdown for civil jury trials for the Pima County Superior Court for the 1996-97 fiscal year: 55% motor vehicle tort cases, 29% non-motor vehicle tort cases, 8% medical malpractice cases, and 8% contract cases.<sup>53</sup>

The forty-seven tort cases in the total sample varied from common rear-end collisions with claims of soft tissue injuries to cases involving severe and permanent injury. Awards ranged from \$1000 to \$2.8 million, with a median award of \$25,500. Plaintiffs received an award in 65% of the cases.<sup>54</sup>

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<sup>52</sup> One additional case settled during the trial.

<sup>53</sup> Internal Pima Superior Court document.

<sup>54</sup> This calculation is based on 30.5/47, treating the one hung jury as 0.5 of a plaintiff verdict and 0.5 of a defense verdict. The plaintiff win rate in our sample was higher than the 49% average for all tort cases that Brian Ostrom and his colleagues obtained in a national study of forty-five urban state courts, but appears to be the standard pattern for Pima County. Brian J. Ostrom et al., *A step above anecdote: a profile of the civil jury in the 1990s*, 79 *Judicature* 233, 235 fig.4 (1996). Hans obtained data from the National Center for State Courts indicating that plaintiff win rates in Pima County were 76% for motor vehicle cases and 52% for non-motor vehicle cases, identical to the win rates we obtained in our sample. Hans, *supra* note 38, at 12. Motor vehicle cases tend to have a higher than average plaintiff win rate (60% in Ostrom et al.'s national study). Pima County has an unusually high percentage of motor vehicle jury trials among its tort jury trials compared to the national levels (60% versus the 42% estimate from the Ostrom study). Ostrom et al., *supra*, at 235-41. That does not entirely explain the higher overall win rate for plaintiffs in Pima County among motor vehicle cases, however. One potential reason for the difference may be that litigants in civil cases in Pima County can appeal from arbitration verdicts and obtain a jury trial *de novo*. Fourteen of the sixteen cases in our total sample that involved previous arbitration verdicts had been verdicts for the plaintiff where the defendant then requested a jury trial. Plaintiffs' attorneys in cases in which an arbitrator found for the defendant would have less of an incentive to pursue a jury trial because they operate on a contingent fee basis. Another possible explanation for the difference in plaintiff win rates may be that 18% of cases in our sample had preordained a plaintiff verdict because the defendant admitted some liability. The issue in these cases, then, was how much of the damages were due to the defendant's

Working from the videotapes, we have produced quasi-transcripts of the discussions during trial and the deliberations.<sup>55</sup> The results discussed in this article are based primarily on the forty tort cases with completed trial roadmaps and systematic examination of the discussions and deliberations from the quasi-transcripts.

### *3. An Overview of the Arizona Jury Project*

We are addressing a variety of questions about jury behavior in this research. They include: What does the jury consider to be important evidence? Does the jury understand the evidence and how does it arrive at this understanding? How do jurors go about resolving their differences? How do juries handle expert testimony and respond to conflicting experts? How does the jury arrive at a damage award? What is the role played by errors and corrections introduced into the deliberation process? Our early viewing of the videotaped juries indicates, for example, that some juries make use of resident "experts" (such as engineers, nurses, and jurors who have worked on automobiles) to address questions about testimony. Unlike the expert who testifies, these jurors are not qualified by the court and are not subject to cross-examination but they do undergo testing by their fellow jurors. We have also observed the crucial role that jury instructions can play in deliberations. Our analysis of the instructions and the jurors' reactions highlights two things. First, it is difficult to develop clear instructions on some widely applicable legal principles (for example, explaining the entitlement of a plaintiff to recover for aggravation of a preexisting condition versus the obligation of a defendant to fully compensate an "eggshell" plaintiff). Second, jurors are often asked to make difficult judgments even in simple motor vehicle cases (as shown by a juror's rueful comment, "we need a crystal ball," as the jury reviewed

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actions (three cases) or how much damage the plaintiff actually suffered (six cases). Thus, among the thirty-eight tort cases in which liability was contested, the plaintiff win rate dropped to 21.5/38 or 54%. It is unclear how often trials in other jurisdictions involve disputes about damages rather than both damages and liability. This information is not regularly compiled by courts and Ostrom and his colleagues did not collect this information in their archival study of state court jury verdicts. Ostrom et al., *supra*, at 233 n.1. A fully accurate account would require a case-by-case examination of trial transcripts or jury instructions like the one we carried out on our Pima County sample.

<sup>55</sup> Actually, an energetic team that has included law students and graduate students, as well as other colleagues, was involved.

the court's instruction on the average life expectancy for a person of the plaintiff's age and discussed how or whether to adjust it in light of the fact that the plaintiff was substantially overweight and in poor health prior to the accident). Future articles will report on these topics in detail.

#### *4. Juror Talk About Forbidden Topics*

Our focus in this first article from the Arizona Jury Project is on juror talk about forbidden topics, but it is important to point out that these forbidden considerations were but a small part of the juries' focus of attention. Even in cases in which juries discussed forbidden topics, they spent only a small portion of their time on those topics. Our preliminary data analysis reveals that the juries invested most of their time and effort in actively sorting out competing claims and arriving at a plausible interpretation of the evidence presented at trial and in struggling to understand and apply the court's instructions on the law. Although we postpone any judgment on how juries performed with respect to particular issues pending more complete data analyses, we can report our general impression at this point that, notwithstanding the occasional grumblings of jurors about being conscripted, the tedium of trial, or the performance of the lawyers, all of the juries we studied took their assigned tasks seriously. They diligently reviewed the evidence, attempted to understand it, paid attention to the judicial instructions, and applied the law as they understood it.

In this first report on the Arizona Jury Project focusing on evidentiary issues, we examine two specific instances of presumed jury behavior that have attracted speculation from a variety of quarters. Both have stimulated efforts at jury control that would be better informed by some empirical evidence on actual jury behavior.

As we analyze what the jurors said during their discussions and deliberations, three notes of caution are in order. First, jurors may privately draw conclusions or make inferences that they do not share with the other members of the jury, but that affect their own personal judgments and ultimately affect the jury's verdict. In light of the likelihood that jurors had such unexpressed thoughts at least occasionally, the frequent references to insurance and attorney's fees described below are probably best interpreted as a conservative

compilation of juror thoughts. Second, jurors may express views designed to influence the perceptions and behavior of other members of the jury, but which do not reflect their own actual beliefs or preferences. Thus, while we consider in our analyses the context in which juror statements are made, we cannot always be sure *why* they are being made. Finally, the analyses here are based on forty cases. While the data are unique, the cases nonetheless represent a modest sample of behavior from jury trials in one jurisdiction.

### *B. Juror Talk About Insurance*

#### *1. Evidentiary Constraints*

Rules of evidence generally preclude parties from introducing evidence that a person carried liability insurance for the purpose of establishing whether the person acted negligently or wrongly.<sup>56</sup> Although insurance, or lack of insurance, may affect the care that a person is likely to take<sup>57</sup> and therefore may have probative value, the exclusion reflects a concern that jurors will use the information to decide cases on improper grounds.<sup>58</sup> When negligence is uncontested, the argument that information on insurance coverage should be excluded is that it is irrelevant, as well as potentially prejudicial. Evidence about insurance may, however, be introduced for other purposes,<sup>59</sup> and under those conditions jurors may learn of its existence or its absence. Rules mandating the exclusion of testimony about insurance are predicated on assumptions about what jurors will do with the information if it is revealed (that is, that they will use it inappropriately in reaching their verdict) and what they will do if no evidence on the existence or absence of insurance is presented (that is, they will not consider it in reaching

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<sup>56</sup> See, e.g., Fed. R. Evid. 411; Unif. R. Evid. 54; Cal. Evid. Code § 1155; N.J. R. Evid. 411.

<sup>57</sup> Risk compensation theorists have argued that a variety of measures designed to reduce injury may encourage risk-taking. See, e.g., Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. Pol. Econ. 677, 717 (1975) (reporting evidence that increased risk-taking can offset effects of mandatory safety devices).

<sup>58</sup> See Fed. R. Evid. 411 advisory committee's note; 1 McCormick on Evidence § 201 (John W. Strong ed., 5th ed. 1999).

<sup>59</sup> Examples of exceptions listed in Federal Rule 411 include "proof of agency, ownership, or control, or bias or prejudice of a witness." Fed. R. Evid. 411.

their verdict). These rules assume that blindfolding will prevent jurors from considering the forbidden topic.

## *2. The Prevalence of Talk about Insurance*

For a topic that is ostensibly irrelevant or forbidden and generally entitled to little or no attention from jurors, talk about insurance was a strikingly common occurrence in the jury room. Conversations about insurance occurred in 85% of all cases. On average, jurors in these trials referred to insurance at least four times during deliberations. Moreover, in the majority of those cases, the insurance conversations in the jury room could not have been stimulated merely by the mention of insurance in the trial.

Although these figures reveal the ubiquity of talk about insurance coverage, an analysis of its content is required to assess how jurors treat the topic and to evaluate the effectiveness of current efforts to control or limit juror consideration of insurance. We begin with an overview of the insurance talk that occurred in the course of the trials, examining the juror responses during discussions and deliberations when a reference to insurance was made at trial. We then look at the questions that jurors asked in those cases and in cases in which no such mention occurred at trial, the courts' responses to those juror questions, and the jurors' reactions. Next, we analyze the references to insurance in the course of all jury discussions and deliberations. Finally, we consider the effect of insurance talk on the juries' decisionmaking.

## *3. Mention of Insurance by a Witness at Trial*

Although testimony about insurance is generally prohibited at trial, it may be mentioned appropriately in the course of testimony if offered for a legitimate purpose (for example, a plaintiff explains that he failed to follow a doctor's instructions because he lacked medical insurance) or it may be raised inappropriately if a witness refers to insurance in the course of answering a question before the attorneys or judge are able to prevent it. The subject of insurance (or lack of insurance) relating to at least one party came up during 35% of the trials (10/25 of the motor vehicle cases and 4/15 of the non-motor vehicle cases). In each case where trial testimony referred to insurance, we examined juror reaction in order to assess whether the trial testimony led jurors to focus on insurance.

*a. Talk About Insurance Traceable to Trial Testimony*

In six cases, jurors referred explicitly to the information that the trial had provided about insurance. In the first three cases, the plaintiffs mentioned their lack of insurance during their testimony in order to explain their failure to undergo recommended medical treatments, thus providing a clear signal to the jury that the plaintiff lacked such coverage. In all three of these cases, the jurors discussed plaintiff's lack of insurance coverage in their deliberations and speculated about whether the defendant had insurance. One case (GT11)<sup>60</sup> produced an award substantially higher than what the judge would have awarded, the second (MV5)<sup>61</sup> produced an award lower than the award that the judge would have given, and the third (MV4) awarded less than both what the judge would have given and what an earlier arbitration award had been. Although the trial testimony in these cases may have encouraged the jurors to discuss the topic of insurance, the verdicts provide no indication that a plaintiff who lets the jury know that she lacks medical insurance guarantees a generous award from the jury.

In three other cases, trial testimony indicating that the plaintiff did have insurance influenced juror talk. In a slip and fall case (GT12), the treating physician mentioned that the plaintiff's insurance company had asked for some information about the recommended therapy. Although the jury spent most of its time analyzing whether the premises were unreasonably dangerous, questioning whether the plaintiff had actually fallen, and musing on the tendency of people to blame others, they also noted that the plaintiff had insurance coverage:

Juror #5: Every time somebody gets hurt they want to sue somebody.

Juror #7: I agree.

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<sup>60</sup> GT refers to a general tort case, that is, one that is neither a motor vehicle tort case or a medical malpractice tort case.

<sup>61</sup> MV refers to a motor vehicle tort case.

Juror #5: Nobody wants to take responsibility for their own actions anymore.

Juror #7: Everything is someone else's fault.

Juror #8: I wonder if he needs assistance anyway . . . .

Juror #5: Well, he had insurance.

The jurors offered a variety of potential explanations for the events that led to this trial, each of which may account for, or have contributed to, the verdict in favor of the defendant reached by the jury: (1) often accidents happen that are no one's fault; (2) the plaintiff had preexisting injuries that produced the plaintiff's injuries at issue; (3) the plaintiff brought the lawsuit to obtain revenge for conflict in the parties' prior relationship; and (4) the plaintiff caused the accident by his clumsiness. It is also possible that the jury was less willing to hold the defendant liable because the jurors were aware that the plaintiff had insurance and other financial resources. In addition, one juror concluded that the defendant probably did not have insurance because the case would have settled if an insurance company had been involved.

In a second case (MV9), the plaintiff suing for personal injury said his wife took pictures at the accident scene for the insurance company and his doctor mentioned sending the claim to the plaintiff's insurance company. The jurors were convinced that the plaintiff's insurance had paid for most of his medical expenses. A juror who initially argued against making any award said, "That is what insurance is for." Eventually, the jurors converged on an award only \$2000 more than what the defense attorney had claimed in his closing statement was the amount that reflected the reasonable lost wages and medical bills. The award was \$8000 less than what the plaintiff had requested for lost wages and medical bills, and it omitted any recovery for the much larger amount requested for pain and suffering and associated expenses for permanent injury. The jurors discussed the medical testimony at length, the existence and implications of the plaintiff's preexisting injuries, and the inconsistency between the plaintiff's injury claims and his behavior in the courtroom. The jurors were uniformly skeptical about whether the plaintiff suffered permanent injury, but one juror who favored an award of

\$25,000 to \$30,000 agreed to the \$16,000 award only upon being assured that the plaintiff's medical bills had already been covered ("Good insurance pays 100%").

In the remaining case (MV17), the defendant conceded negligence in a motor vehicle accident when he struck the plaintiff from behind. The defendant denied liability for the plaintiff's alleged personal injuries, claiming that the accident had not caused the plaintiff any injury. The plaintiff indicated during his testimony that his own insurance had already covered some of his medical bills. The jurors did not find the plaintiff in this case to be credible, blamed the plaintiff for failing to get appropriate tests, and drew the conclusion that the medical bills were inflated. Most of the deliberation centered on the speed at which the impact occurred, whether the impact could cause any injury, the credibility of the plaintiff, and the likelihood that the medical problems were the result of preexisting injury. The jury found for the defendant, and the plaintiff's testimony that he had insurance that had already covered some of his medical expenses provided at least one juror with an additional reason to support the defense verdict:

Juror #3: The worst-case scenario would be to say, OK, [the defendant] was guilty, he was at fault. But I wouldn't want to compensate [the plaintiff]. He had insurance, he [has a job] and had insurance and much has probably already been paid for. And the fact that the plaintiff denied treatment to himself for whatever reason. He could have had X-rays [an MRI], but he did [have x rays] and they didn't show anything.

This case illustrates a general pattern in our sample of jury cases: Even when jurors inappropriately consider insurance in arriving at their verdict, their primary focus is on reconstructing what they believe occurred just prior to the accident and injury. Juror #3 offers a series of explanations for supporting a defense verdict. While he is critical of the plaintiff's failure to get appropriate medical treatment, which is usually an issue of damages rather than liability, he also expresses skepticism about the injury because of the plaintiff's failure to get diagnostic tests and the absence of evidence of injury when X-rays were eventually taken. Although it is unclear which of these factors or combination of factors was responsible for the juror's verdict preference, the deliberations



reveal that the other members of his jury ignored this juror's reference to the plaintiff's insurance. Nonetheless, this juror's vote mattered. The verdict was formally unanimous,<sup>62</sup> but two of the eight jurors expressed serious doubts about a verdict in favor of the defendant, believing that even a soft collision could have aggravated the plaintiff's preexisting condition, a position the other jurors rejected.<sup>63</sup>

*b. Possible Influence of Trial Testimony on Talk About Insurance*

In three other cases, the influence of the trial testimony on jury room talk about insurance was more ambiguous, but the juror discussions about insurance may have been influenced by what was said at trial. In one case (MV18), the hint at insurance during the trial was indirect, but did suggest that the plaintiff was covered by insurance relevant to the claim at issue. (Plaintiff's chiropractor explained that he referred the plaintiff to a physician to order some tests because it is easier to get them covered when a physician orders them). Although no juror referred specifically to the insurance implications in the testimony, they raised the issue of the plaintiff's insurance coverage several times:

Juror #1: I wonder if we're allowed to ask if he [the plaintiff] has insurance.

Juror #2: He must have insurance.

Juror #8: I'm sure he had health insurance. He's a full-time employee.

Juror #2: Well, are these bills paid?

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<sup>62</sup> Jurors who have opposed the verdict of the majority sometimes agree to go along with the majority so that the reported verdict will be unanimous.

<sup>63</sup> Juries in Arizona civil cases typically have eight members. A verdict requires agreement from six of the eight. If additional jurors are seated at the beginning of the trial so that an alternate juror will be available, the identity of the alternate is determined by lot at the end of the trial, and that alternate typically is removed before the jurors begin deliberations. Occasionally, if more than eight jurors have been present throughout the trial, the parties may stipulate that all of them will deliberate. Among the 50 cases in the full sample, verdicts were returned by 41 eight-member juries, 6 nine-member juries, 1 seven-member jury, and 2 six-member juries.

Juror #7: That's the thing.

This jury never asked the judge about insurance and thus was never instructed on the propriety of considering whether the plaintiff had insurance or whether his medical insurance paid any of his bills. The jurors were not naïve, however: Although they returned to the question of insurance several times in the course of the trial and discussed asking the judge for information about it, they concluded that "the judge would just say it's irrelevant."

An inappropriate reference to insurance at trial produced a judicial instruction in the two remaining cases in this group.<sup>64</sup> In the first case (GT3), due to the mention of a workman's compensation hearing during the trial, the judge instructed the jurors to "ignore the existence, if any, of alleged proceeds from a workman's compensation hearing referred to at trial. The court and not the jury will decide this." Jurors referred to the issue later and disagreed about what to do about it, but the ambiguity about the existence and amount of previous compensation signaled in the judge's instruction seemed to offer support for the jurors who wanted to put the issue aside:

Juror #2: [The plaintiff] may have made a million dollars, or he may have made nothing, but it doesn't matter.

Juror #3: We aren't to speculate one way or another.

Near the end of deliberations, as the jurors were converging on a final award, one of the jurors characterized the defendant as "coming off cheaply." Another juror defended the award as sufficient in light of the fact that, "maybe we shouldn't discuss it, but there was an industrial compensation." Several jurors responded by chiding the juror for revisiting the forbidden issue.

In the second case that spawned a judicial instruction (MV22), the plaintiff mentioned insurance when describing what happened at the accident scene. The plaintiff said that the defendant made a statement to someone about wanting to exchange insurance num-

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<sup>64</sup> In both of these cases, a witness mentioned insurance. In another Pima County case that was not in the project, but which was tried during the same time period by a judge who ordinarily participated in the project, plaintiff's counsel referred to insurance in his rebuttal summation, the judge granted the defendant's motion for a mistrial, and the judge excused the jury.

bers and get going because the defendant was in a hurry. The defense attorney, out of the presence of the jury, asked for a mistrial based on a violation of Federal Rule of Evidence 411,<sup>65</sup> claiming that the reference was willful and that the plaintiff had been warned not to mention insurance. The judge agreed to admonish the jury to ignore the issue of insurance and warned the plaintiff's counsel that another violation would result in a mistrial. In their deliberations, the jurors discussed the plaintiff's preexisting injuries, his failure to get immediate medical attention, and his swift return to work. The jury, without referring to the particular disclosure, also discussed insurance at length in this case. The jurors speculated about whether the defendant's insurance would cover an award, and whether the plaintiff's insurance had already paid the medical expenses. Their focus on insurance may have been stimulated by the mention at trial. At least one juror expressed the view that the plaintiff suffered a long time and he would base his award on the doctors and insurance. In the conversation that followed, four different jurors reiterated that they weren't supposed to think about insurance, and the jury produced a \$2225 award designed to cover what the jurors decided was the amount that would pay for a reasonable number of doctor's visits, one-eighth of what the plaintiff asked for to compensate for lost wages and medical expenses, nothing for pain or inconvenience, and nothing for other general damages.

*c. No Influence of Trial Testimony on Insurance Talk*

In the five remaining trials where insurance was mentioned at trial, there was no evidence that it caused the jurors to discuss insurance in deciding the case for liability or damages. In one trial (MV19), insurance was mentioned twice at trial. An insurance adjuster testified for the defense about an evaluation of damage to the plaintiff's car. In addition, the treating physician was a chiro-

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<sup>65</sup> The plaintiff's attorney responded that Federal Rule 411 was not at issue because the plaintiff's statement did not go to the issue of negligence or liability. He was arguably correct that Federal Rule 411 did not apply, because negligence was conceded in this case. The mention of insurance, however, was irrelevant and potentially prejudicial, and Arizona has a longstanding prohibition against introducing the subject of insurance in trial proceedings, except under very limited conditions. *Michael v. Cole*, 595 P.2d 995, 997-98 (Ariz. 1979); *Blue Bar Taxicab & Transfer Co. v. Hudspeth*, 216 P. 246, 249 (Ariz. 1923).

practor who testified that Arizona allows chiropractors to co-admit patients even though some insurance carriers may not recognize them as primary group providers. The jury neither submitted a question nor mentioned insurance during discussions or deliberations. In the second case (GT15), the trial reference occurred in response to a question from the judge about the meaning of the phrase "outside debt." The only reference during discussions occurred when a juror wondered whether the defendant had malpractice insurance, an issue that another juror quickly labeled as irrelevant: "You don't consider that—you just look at the facts." Insurance was never mentioned during deliberations. In a third case (MV11), the plaintiff referred to the fact that he got a primary care physician after working three months at his job. The jurors discussed the insurance only in passing to explain why the plaintiff saw a particular doctor.

In the last two cases, the reference at trial was to the defendant's insurance, and the only jury discussion concerned the plaintiff's insurance. In another case (MV1), the reference at trial was tenuous. The defendant mentioned that he was on his way home to pick up his insurance card before going to a doctor's appointment when the accident occurred, but the case involved no injury to the defendant. In this case, the juror discussions and deliberations made no reference to the disclosure or to the defendant's insurance coverage. Jurors did speculate about whether the plaintiff's medical expenses had been covered by insurance, as they did in cases in which insurance was never mentioned, but they never referred to the defendant's insurance. The reference to insurance at trial in the other case (MV7) occurred when the defendant testified that she had insurance that covered the damage to her car. In contrast, the jury talk about insurance focused on the plaintiff's insurance and the appropriateness of trying to determine and take into consideration how much of the medical expenses had already been paid.

4. *Summary: The Connection Between Trial Mentions and Juror Talk*

If we subtract the nine cases<sup>66</sup> in which trial evidence about insurance might have encouraged jury room discussions about insurance from the forty cases in the sample, then the jurors spontaneously initiated jury room discussions about insurance in four-fifths of the remaining thirty-one cases.<sup>67</sup> In these twenty-five cases, jurors did not require prompting from inadvertent or planned disclosures about insurance to consider whether one of the parties did or did not have insurance or how much the insurance had paid or would pay. Although many of the comments were not directly linked to verdict preferences, all of these juror speculations introduced legally inappropriate considerations into the discussions. Moreover, the other jurors were not in a position to evaluate the accuracy of many of the pronouncements in the particular case:

MV8:

Juror #1: I wondered if the medical insurance covered it.

Juror #5: Plaintiff waited too long.

Juror #2: Does insurance cover chiropractors?

Juror #5: It doesn't cover massage therapy.

Juror #4: It is like workers' comp, and it is up to the individual.

Juror #8: Does it cover acupuncture?

MV27 (the jurors are talking about who paid for the damage to an automobile):

Juror #2: It was the insurance companies that paid for the car.

Juror #4: Why did they bring up the \$1,200 for the rental?

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<sup>66</sup> This total includes the six cases in the category discussed supra Section III.B.3.a and the three cases in the category discussed supra Section III.B.3.b.

<sup>67</sup> Twenty-five of thirty-one (81%).

Juror #5: The \$1,200 were put in the costs of damages.

Juror #8: Some insurance companies do not do rental cars.

Thus, the jurors were left on their own to determine whether to accept, reject, or ignore their fellow juror's speculations.

### *5. Juror Questions About Insurance*

Jurors who are interested in obtaining information on the insurance status of one of the parties or on any other topic do have one potential mechanism available: They can submit a question to the court in the course of their deliberations. Researchers have generally underutilized these questions as a window to learning about what jurors are thinking.<sup>68</sup> The Arizona Jury Project provided an additional opportunity to track juror thoughts about insurance because Arizona permits juries to submit questions both during the trial and while they are deliberating.<sup>69</sup> Jurors submitted questions about insurance coverage to the court in at least twelve of the forty cases<sup>70</sup> (9/25 of the motor vehicle cases and 3/15 of the non-motor vehicle cases).

Jurors in 30% (12/40) of the cases asked questions about insurance: nine during the trial and five during deliberations.<sup>71</sup> During

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<sup>68</sup> For the first investigation of juror questions, see Bernard S. Meyer & Maurice Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 *Judicature* 105 (1971); see also Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 *Law & Soc'y Rev.* 153 (1982) (examining questions about jury instructions during criminal trials).

<sup>69</sup> We were able to identify all questions submitted during deliberations through our videotaped jury deliberations and the case files, but our set of juror questions submitted during the trial may be incomplete. Judges in Arizona inform the jurors at the beginning of the trial that the court may not be able to answer all of their questions. Questions about insurance generally fall in that category and some judges simply ignored the question without acknowledging that it had been submitted. Other judges responded by explicitly telling the jurors that they should not be concerned with the issue. In several instances we learned that a juror had asked about insurance because the case file included the written question, but occasionally we learned about it only because a juror referred to having asked it.

<sup>70</sup> In three cases, the question followed a reference to insurance during the trial; the remaining questions occurred in trials where no reference to insurance occurred.

<sup>71</sup> Two juries submitted questions about insurance during the trial and in the course of deliberations. In one case (MV27), the jury asked a follow-up question during deliberations. In a second case (MV21), the judge did not respond to the question on insurance submitted by the jurors at trial, and the jury asked again during deliberations.

deliberations, the judge generally responded with the traditional admonition not to pay attention to the topic of insurance, but when a juror submitted the question during the trial rather than in the course of deliberations, the judge simply ignored it half the time (5/9 of the cases). The following examples illustrate the character of the typical judicial response to questions about insurance:

MV2:

Question: Did either defendant or plaintiff have insurance that would cover the alleged injuries?

Answer: Do not concern yourself with why this question and question #3 were not answered. Please base your decision on the evidence you heard and the law as instructed.

MV25:

Question: Was plaintiff insured, was anyone compensated by insurance co.—and how much?

Answer: This is something you are not to consider. Rather, your focus should be on the evidence presented to you during the trial and the law as instructed.

GT13 (Discussion during break):

Juror #2: That's one of the questions I'm sure we're not allowed to ask. Was [the plaintiff] covered by an insurance policy? . . .

Juror #5: I think that would be a legitimate question.

(And later during deliberations):

Question: Did [the plaintiff] receive any compensation while she was out of work—did insurance cover all of her medical bills?

Answer: You are not to consider outside compensation.

Even when the jurors did not submit a question on insurance, they often talked about submitting one. In five cases, jurors wanted to know about insurance but refrained from submitting a question, not because they decided that the answer was not worth knowing but because they guessed that the judge would not provide the response they were seeking:

MV11:

Juror #3: I wonder who pays and why there was no mention of insurance.

Juror #8: Their insurance has to pay it.

Juror #2: The reason they don't [mention insurance] is because we are not supposed to take insurance into account as we might be more sympathetic to the source.

Juror #1: It's a good question.

MV15:

Juror #4: How [is it] some of these doctors got paid and not others?

Juror #1: Maybe insurance.

Juror #5: We're not supposed to think about insurance. Whether it's paid or not doesn't matter.

The judge's admonition generally did not eliminate conversation, but it often did prompt a rebuke from another juror when the subject was raised again:

MV6 (the attorney suggested two dollar amounts):

Juror #8: Is it possible that the difference between the two numbers is insurance?

Juror #6 (with #7 and #4):

No, because that's for the last two years.



Juror #3: We're not supposed to worry about that.

Juror #8: I know.

MV1:

Juror #3: And we don't know, do they have medical insurance? Maybe they [plaintiffs] didn't have to pay anything out of pocket.

Juror #1: I thought of that, too.

Juror #7: Yeah.

Juror #6: We're not supposed to worry about that, but I'm sure the medical insurance paid . . . .

Indeed, even in the absence of an explicit admonition from the judge, a member of the jury often responded to a reference to insurance by expressing the view that insurance was not relevant or should not be discussed. Thus, in more than half (18/34) of the cases in which insurance was mentioned by a juror, regardless of whether the jurors asked a question about it, at least one juror attempted to redirect the jury's attention to other matters when the subject was raised. These corrections were somewhat more common in the wake of an explicit instruction by the judge indicating that insurance was not a relevant consideration (6/9 or 67%) than when the jurors received no explicit instruction either because no juror question prompted an instruction and insurance was never mentioned at trial (9/20 or 45%) or because the judge ignored a juror question about insurance (12/25 or 48%). Although the higher rate of corrections following an explicit instruction suggests that admonitions to ignore may have some value in suppressing conversation on the forbidden topic, such inferences should be viewed as tentative due to the small sample. Moreover, the court's simple admonition not to consider insurance did not eliminate the jurors' interest in insurance and was only partially successful in controlling conversation on the topic among the jurors.

The juror questions are revealing in another way. According to traditional lore, the focus of juror interest in insurance is on the defendant. Nondisclosure regarding insurance is viewed as neces-

sary so that jurors will not be tempted to find for the plaintiff even if the defendant is not liable because a "deep pocket" insurance company is available to pay for the injuries of an accident victim.<sup>72</sup> The juror questions in the Arizona Jury Project tell a different story. The jurors in ten of the twelve cases with questions about insurance ask their questions about the *plaintiff's* insurance coverage. In only three of the cases was there a question about the *defendant's* insurance, and in the remaining case the target was unclear (that is, one juror asked in the jury room whether anyone had submitted "the insurance question" and it just did not get answered; another juror said he had asked about insurance).<sup>73</sup> As the analysis of talk about insurance in the discussions and deliberations reveals, this focus on the plaintiff appeared to arise from the jurors' concern that the plaintiff may have already been compensated wholly or in part for any injuries. The frequent worry expressed by jurors about overcompensating the plaintiff contrasts sharply with traditional assumptions about the role of insurance in juror thinking.

#### 6. A Closer Look at Juror Talk About Insurance

We turn now to the discussions and deliberations for a closer analysis of the role played by insurance in the jury room in our forty tort cases. Juror talk about insurance occurred almost exclusively when jurors were considering issues of damages rather than issues of liability. In one instance, the jurors explicitly concluded that their insurance concerns simply did not relate to questions of liability. After the judge declined to answer a question about insurance directly, a GT14 juror responded: "Let's discuss this later. It's pointless until we decide if they are liable." The insurance issue that jurors most often speculated about was whether some or all medical costs had already been covered. They understood that they were responsible for compensating the plaintiff if they found liability, but they were often unclear about how to determine the amount necessary to make the plaintiff whole if the plaintiff had

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<sup>72</sup> See Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 *Hastings L.J.* 843, 855 (1998).

<sup>73</sup> In two cases the jurors asked about both parties' insurance (for example, Did either defendant or plaintiff have insurance that would cover the alleged injuries?).

already received some compensation.<sup>74</sup> The question of potential double recovery for the plaintiff came up frequently.<sup>75</sup> In fifteen cases, at least one juror explicitly raised concerns about double recovery or argued that the plaintiff did not need to be paid or paid the full amount because insurance had probably already paid some or all of the plaintiff's expenses:

GT12:

Juror #5: His insurance paid all his doctor's bills. He's not really out anything.

MV9:

Juror #6: This is what we have insurance for . . . . [O]ne of the Plaintiff's doctors said she sent the claims to Plaintiff's insurers so the Plaintiff is probably not paying for most of this . . . .

MV2:

Juror #7: Well, the insurance normally takes the tab on the car.

MV22:

Juror #2: The fees to Dr. X and Dr. Y were likely covered under insurance.

Juror #5: The plaintiff probably only paid a 'co-payment' of \$10-\$15.

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<sup>74</sup> This reaction suggests that jurors would be unsympathetic to the collateral source rule, which prevents defendants from profiting from the fact that a plaintiff's own insurance has covered some or all of the plaintiff's expenses.

<sup>75</sup> In interviews with jurors from thirty-eight civil cases brought against business defendants, Hans found that 44% of the jurors said that their juries had discussed insurance. Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* 199 (2000). Thirty-seven percent said they had discussed the defendant's insurance and 23% said they had discussed the plaintiff's insurance. *Id.* Quotations from the interviews reveal that some jurors wanted to avoid paying the plaintiffs for expenses that they might have already recovered from insurance. *Id.* at 200-01.

Juror #2: Then factor about \$20 for that.

Juror #8: We can't figure in insurance.

Juror #3: (Agrees).

MV7:

Juror #6: That is another thing that was not brought up: How much of this medical has been paid?

Juror #5: They never tell that.

....

Juror #3: Insurance usually covers chiropractic care. Why should we give her above and beyond what she is probably going to get [for future medical expenses] on her insurance?

The frequent juror questions and speculation about the plaintiff's insurance situation and prior recovery for medical expenses may have reduced jury awards in several cases as jurors attempted to prevent double recovery. The jurors in one case (MV27) asked a question that directly captured this concern. In a standard exchange, the jurors first asked about the plaintiffs' insurance coverage, and the judge told them not to discuss the issue. The jurors, however, followed up: "You stated not to discuss health insurance. The bills have payments from insurance. Plaintiffs are asking for full amounts including amount paid. Do we excuse amounts paid or include them as if they were not?" The judge answered: "You should disregard payments from insurance and include them as if they were not paid." One juror responded, "That's not right," but others agreed that they should not consider insurance. One juror suggested that the insurance company could bring suit to recover anything they had paid.

Although most jurors raised the issue of prior plaintiff recovery from insurance to argue in favor of limiting the plaintiff's recovery, one jury seemed to accept the collateral source rule as a reason to ignore the issue of any prior recovery:

MV1:

Juror #3: And we don't know, do they have medical insurance? Maybe they didn't have to pay anything out of pocket.

Juror #1: I thought of that too.

Juror #7: Yeah.

Juror #6: We're not supposed to worry about that, but I'm sure the medical insurance paid. Even if medical insurance paid, the law says if your medical insurance pays . . . [interrupted]

Juror #1: You're entitled to that \$10,000—not the insurance.

Juror #6: They pay the \$10,000, because that was your insurance. The \$10,000 goes directly to you. They don't keep it.

Other juries raised the possibility that the plaintiff would be required to repay an insurance company if it had provided some financial support:

MV28:

Juror #3: Why isn't it relevant to know how the plaintiff's expenses to date have been paid?

Juror #6: The reason is because if the jury awards the plaintiff a certain amount of money, the insurance company will go after her to get reimbursed out of the money she's awarded.

Some jurors guessed that the plaintiff had received a reasonable offer from the defendant's insurance company and had rejected it or that there was probably a limit on the defendant's insurance policy. Some wondered whether an insurance company was involved in bringing or defending the case. Jurors often made pronouncements about insurance coverage based on beliefs they attributed to their own previous experience with accidents. For example, one juror announced that if the plaintiff got an award from

the defendant's insurance company, the insurance company would double the amount for pain and suffering. The other jurors did not respond to this juror's claim, so it is unclear whether they accepted or rejected it.

Although jurors frequently mentioned insurance (in 34/40 of the cases or 85%), in many cases (45%) their conversation was casual or perfunctory, or it could not have affected the verdict (for example, the jurors mentioned that the defendant was probably insured, but found for the defendant). In the remaining cases in which insurance was mentioned (40%), the discussion was substantial enough that an effect on the verdict could not be ruled out. This group included three cases in which the verdict of the jury was probably affected by jurors' assumptions about insurance coverage.

In those three cases (MV17 and two others), a juror's verdict preference can be directly linked to the juror's expressed beliefs or attitudes about a party's insurance coverage or lack of coverage. In one case (GT17), the jurors discussed insurance extensively at the beginning of the deliberations and then proceeded to carry out an extensive reconstruction of the accident. Near the end of the deliberations, after they had decided that the defendant was at least partially liable and allocated comparative fault, they turned to an assessment of damages. One juror agreed to support another's suggestion for pain and suffering damages by raising her preferred award \$1800 in response to another juror's observation that the defendant's insurance company would pay for it. In a second case (MV9), several jurors expressed the view that the plaintiff's insurance company had paid for his medical expenses. These cases were unusual because of the explicit evidence they provided that assumptions about insurance influenced verdicts. Usually we could only infer from jury questions or speculations about the insurance situation of the parties that insurance may have influenced the jurors in reaching their verdicts.

Some cases were more likely than others to produce talk about insurance. Jurors mentioned insurance more often in cases in which partial liability and/or negligence was conceded (in 91% of those twenty-three cases) than in cases in which both were fully contested (in 65% of those seventeen cases). Whether or not liability was strongly contested, however, discussion of insurance

generally occurred as the jurors tried to determine an appropriate damage award.

Jurors were no more likely to talk about insurance in cases with business defendants than in cases with non-business defendants. Ten of the forty cases involved a business defendant. In eight of the ten (80%), the jurors mentioned insurance. Similarly, in twenty-six of the thirty cases (87%) with non-business defendants, insurance was discussed. There is little evidence, however, at least in our sample of cases, that defendants are disadvantaged by jury discussions about insurance even when the defendant is a business. Juries made only perfunctory comments in half of the eight business cases in which insurance was mentioned and engaged in a more extended discussion of insurance in the other four. In one of the ten cases involving a business defendant there was clear evidence that insurance had a modest effect on the size of the award.<sup>76</sup> When the defendant was not a business, perfunctory comments also occurred in half of the cases in which insurance was mentioned (13/26), and the discussion of insurance was more substantial in the other half. In two of the thirty cases involving a non-business defendant there was clear evidence that insurance affected the verdict.<sup>77</sup>

In sum, jurors frequently raised the topic of insurance during their deliberations. Although some of the conversation was casual or clearly unrelated to the verdict, in several cases the discussion had a clear impact on the verdict and in others an effect on the verdict cannot be ruled out.

In addition to providing evidence that jurors do talk about, and are sometimes influenced by, insurance, these observations of the jury at work reveal a variety of beliefs about insurance coverage and its appropriate role in tort litigation. In some instances, they reflect inconsistencies that the tort system itself has not resolved. For example, Arizona recently passed a statute that permits medical malpractice defendants to introduce evidence of benefits a plaintiff might be receiving for disability or medical expenses from a collateral source.<sup>78</sup> Jurors in such cases are instructed that they

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<sup>76</sup> See discussion of GT17 *supra*.

<sup>77</sup> See discussion of MV9 and MV17 *supra* text preceding note 76.

<sup>78</sup> Ariz. Rev. Stat. § 12-565(A) (2000) ("In any medical malpractice action against a licensed health care provider, the defendant may introduce evidence of any amount

may give such weight as they choose to the evidence of collateral benefits.<sup>79</sup> Thus, the jurors in ordinary tort cases who are reluctant to award damages to plaintiffs whose medical expenses have been covered by insurance are expressing concerns that would be legally sanctioned in a medical malpractice case.

The current system of blindfolding juries, or attempting to blindfold them, on the topic of insurance breeds the variations revealed in these cases in how juries handle the issue of insurance. To the extent that jurors enter the courtroom unsure about the role that insurance should play and to the extent that courts decline to address the issue, the ground is laid for juries to rely on their own assumptions in determining how to treat the issue of insurance. Jurors vary in their beliefs about insurance and its appropriate role in tort litigation, in their impressions of whether they are entitled to consider insurance in reaching their verdicts, and in their use of questions to probe what the law demands with respect to the issue of insurance. The current judicial practice of ignoring or ducking the topic of insurance invites an unwarranted disparity across juries, ironically arising from the rules of evidence that were designed to produce order rather than encourage unjustified variability. We suggest a different approach in Part V.

American law is inconsistent in its treatment of insurance at trial, permitting the topic to be introduced in some situations and not in others. Thus, it is understandable that jurors respond to the topic inconsistently as well. A different pattern arises for the topic of attorney's fees.

### *C. Juror Talk About Attorney's Fees*

In contrast to insurance, the mention of attorney's fees is unequivocally prohibited in the courtroom. The jury is never told during the trial how the attorneys will be paid. In the exceptional

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or other benefit which is or will be payable as a benefit to the plaintiff as a result of the injury or death . . . to establish that any cost, expense, or loss claimed by the plaintiff . . . is subject to reimbursement or indemnification from such collateral sources.”).

<sup>79</sup> Ariz. Rev. Stat. § 12-565(B) (2000) (“Evidence introduced pursuant to this section shall be admissible for the purpose of considering the damages claimed by the plaintiff and shall be accorded such weight as the trier of the facts chooses to give it.”).



situations in which fees may be awarded to the prevailing party,<sup>80</sup> it is the judge who makes the award. An examination of juror talk about attorney's fees reveals, however, that the blindfolding approach of the legal system suffers from many of the same limitations with respect to attorney's fees as it does in the context of insurance.

### 1. Evidentiary Constraints

The general rule in American civil litigation is that each litigant pays his or her own attorney's fees and other costs associated with bringing or defending a suit (the so-called American rule).<sup>81</sup> The logic of the American rule is that it enables a poor plaintiff to obtain counsel to pursue a lawsuit without risking the plaintiff's assets in the event that partial or no recovery results. Although defendants in personal injury cases generally pay their attorneys based on an hourly rate, plaintiffs' legal expenses are typically paid under a contingency fee agreement.<sup>82</sup> The plaintiff pays the attorney who represented him only if recovery is obtained by settlement or judgment. If the plaintiff succeeds in obtaining any recovery, the attorney receives a percentage of the amount of the recovery. If the American rule is followed, the jury receives no information about the particular contractual relationships between the attorneys and their clients.

In contrast to the American rule, the English rule, used by several other countries, shifts responsibility for attorney's fees to the losing party so that the winning litigant is not saddled with litiga-

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<sup>80</sup> John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 *Am. U. L. Rev.* 1567, 1578-90 (1993) (listing exceptions to the American rule). These exceptions include some class actions in which the parties create a common fund for the benefit of others, cases in which the opponent exhibited bad faith, and public interest litigation where Congress has recognized private enforcement as a means of implementing public policy. See, e.g., 15 U.S.C. § 1640(a)(3) (1994) (noting that attorney's fees are recoverable in a successful action to enforce liability against a lender who fails to comply with the transaction and disclosure requirements of the Truth in Lending Act).

<sup>81</sup> Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 *Duke L.J.* 651, 651.

<sup>82</sup> See, e.g., Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 *UCLA L. Rev.* 29, 38-39 (1989).

tion expenses.<sup>83</sup> The English rule is championed by those who point out that a plaintiff in a civil suit will not receive full compensation for the damages caused by the negligent act of the defendant unless the award covers more than the total for medical expenses, lost earnings, compensation for pain and suffering, and other general damages. The successful plaintiff has had to hire an attorney as a result of the defendant's negligence. To be made whole, the attorney's fees and any litigation expenses (such as expert fees) would have to be shifted to the defendant in order to fully compensate the plaintiff for the damages.<sup>84</sup> A lively academic debate rages on the relative merits of the American and English rules, including their likely effects on the filing of meritorious and non-meritorious claims<sup>85</sup> and the nature and probability of settlements.<sup>86</sup> Some scholars have suggested that a one-way fee shifting rule would take advantage of the merits of both rules.<sup>87</sup> Jurors are not privy to these controversies about the merits of the current structure of attorney's fees: The topic of attorney's fees comes up only if the jurors raise it.

## 2. *Talk About Attorney's Fees*

Attorney's fees represent the prototype of a forbidden consideration that, unlike insurance, is never mentioned at all in the typical tort trial. Thus, when jurors ask questions about attorney's fees or

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<sup>83</sup> Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 *Law & Contemp. Probs.* 37, 37 (1984); William B. Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 *U. Colo. L. Rev.* 202, 204-07 (1966).

<sup>84</sup> Howard Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 *Vill. L. Rev.* 400, 401 (1964).

<sup>85</sup> Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 *Washburn L.J.* 317, 319-20 (1998).

<sup>86</sup> E.g., John J. Donahue III, *Opting for the British Rule, or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 *Harv. L. Rev.* 1093, 1093-94 (1991); Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 *Law & Contemp. Probs.* 125, 137-38 (1984); Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 *Law & Contemp. Probs.* 13, 13-15 (1988); Janice Toran, *Settlement, Sanctions, and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68*, 35 *Am. U. L. Rev.* 301, 337-38 (1986).

<sup>87</sup> E.g., Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 *Va. L. Rev.* 2039, 2088-89 (1993); John Leubsdorf, *Recovering Attorney Fees as Damages*, 38 *Rutgers L. Rev.* 439, 440-41 (1986).

discuss the topic amongst themselves, it is never the result of inadvertent or intentional introduction of the topic at trial.

The jury is ostensibly blindfolded on the subject of attorney's fees. Yet jurors bring their knowledge about the world into the courtroom. Many of them know from the media, their neighbors, or their own personal experience that attorneys in civil cases are generally hired by the parties. Some jurors are also familiar in general terms with the contingency fee arrangements that attorneys typically make with plaintiffs in tort cases. Thus, the jurors may come to the trial aware that the attorney for the plaintiff will receive a percentage of any damage award. An examination of juror talk reveals what they think about attorney's fees and just how common it is for the jurors to consider the topic. At least one member of the jury brought the topic up during deliberations in thirty-three of the forty cases (83%). Jurors in three additional cases introduced the topic after the jury settled on a verdict, suggesting that for at least some of the jurors, the subject of attorney's fees may not have been far from their thoughts when they were reaching their verdict.

Although some jurors believe that the plaintiff's attorney in a tort case is working on a contingency fee that will be deducted from any recovery that the plaintiff obtains, jurors vary substantially in their expectations about the typical arrangement:

GT3:

Juror #2: The lawyer is going to get a good deal of this, right?  
20 or 30%?

MV12:

Juror #2: What percentage does the attorney get?

Juror #? [unclear which juror spoke]: Half.

Juror #2: The lawyer gets half?

Juror #8: I have no idea.

MV9:

Juror #4: I want to ask another question that I wouldn't ask the judge because I know he wouldn't answer: Who pays the attorney's fees?

Juror #6: We should [specify] because probably each side is asking that whoever wins will have the other side pay for the attorneys.

Juror #5: That's exactly right.

Juror #4: Can we stipulate as a jury that each party pay their own attorney's fees?

Juror #7: We don't need to get into that.

The jury in this last case decided to ask the judge about attorney's fees. The judge responded by telling the jurors that they had not been given the issue of attorney's fees to consider. The question came at the very end of deliberations when all but one juror had agreed on a modest award. There was no further discussion about attorney's fees, and the verdict remained unchanged.

In a few cases where juries found for the defendant, they discussed the defendant's attorney's fees and mused over the fact that there was no way to pay for the defendant's legal fees in what they viewed as a non-meritorious case:

GT9:

Juror #4: I asked a question, I said, How much money would it take for you [defendant] to be compensated because this lawsuit was filed, including lawyer's fees?

Juror #1: The judge threw it out.

Juror #4: I know . . . .

. . . .

Juror #3: Can we compensate [the defendant] for attorney's fees or something?

Juror #1: How can we?

Juror #8: We can't. We didn't find in their favor.

There was a counter-claim in the case, but the jurors decided that the counter-claim was without merit and concluded:

Juror #1: That's the only thing we can award for.

Juror #2: I wish I could award attorney's fees. I'd do it right now. But he [the judge] ain't going to let us.

Jurors on only a few juries (five) submitted questions to the court about attorney's fees and at least one member on eighteen of the juries expressed the view that the jury was not supposed to consider attorney's fees. Several juries (four) predicted that the judge would not answer a question about who would pay the attorney's fees. As the jurors predicted, when they asked the judge about attorney's fees, the judge either ignored the question if it was submitted in the course of the trial (two cases) or provided a brief and evasive response (three cases).

The tendency of the court to respond tersely to a question about attorney's fees is understandable since the topic is so obviously forbidden. Yet, a terse response may miss the opportunity for clear communication. A common approach that judges use to avoid an error in legal instructions that an appellate court may find objectionable is to direct the attention of the jurors to a portion of the instructions that have already been given to the jury and have thus been vetted for legal accuracy. Arizona, like many states and federal courts, provides a list of potential bases for damage awards. Jurors typically receive the list, tailored only slightly to the particular features of the alleged injury in the current case:

If you find [any] defendant liable to plaintiff, you must then decide the full amount of money that will reasonably and fairly compensate plaintiff for each of the following elements of damages proved by the evidence to have resulted from the fault of [any] [defendant] [party] [person]:

(1) The nature, extent, and duration of the injury.

(2) The pain, discomfort, suffering, disability, disfigurement, and anxiety already experienced, and reasonably probable to be experienced in the future as a result of the injury.

(3) Reasonable expenses of necessary medical care, treatment, and services rendered, and reasonably probable to be incurred in the future,

(4) Lost earnings to date . . . .

(5) Loss of love, care, affection, companionship, and other pleasures of the [marital] [family] relationship.<sup>88</sup>

In three cases, juries asked about attorney's fees during deliberations. In one instance (MV9), the judge explicitly told the jury: "The issue of attorney fees has not been submitted to you for your consideration." The juries in the other two cases were referred back to the page of instructions containing the list of damages:

MV21:

Question: How are the attorney fees awarded?

Answer: Neither parties' attorneys fee are to be considered by the jury. The elements of damages are outlined on page 13 of the instructions.

Question: If we find in defendant's favor, who pays her attorney fee?

Answer: Refer to above.

GT17:

Question: To clearly determine measure of damages, we need to know the approximate dollar amount of legal fees incurred by the plaintiff. What is this amount?

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<sup>88</sup> RAJI (Civil) 3d (1997) (Rev. Ariz. Jury Instructions (Civil)). The instructions also include a modification: "Depending on the evidence in the case, some of the elements in Paragraphs 2, 3, 4, and 5 may be inapplicable or cumulative, and some unlisted elements may be applicable and not cumulative. Customize the instruction to fit the case." Id.

Answer: You need to calculate the damages based on the elements described in the 'measure of damages' instruction.

These judicial responses are unexceptional. They direct the jury to the appropriate portion of the instructions and assume that a closer inspection of the section will inform the jury that attorney's fees should not be considered in arriving at a verdict.

The only problem is that the limited response missed an opportunity to prevent an error by one conscientious jury (GT17) that followed the judge's instructions to the letter. The jury had been looking at the measure of damages section in the instructions when it decided to send a question to the judge. The jury focused on the list of potential damages and parsed section (3): "Reasonable expenses of necessary medical care, treatment, and services rendered." Having determined that attorney's fees were clearly "services rendered," the jury turned to the judge for assistance in evaluating how much the plaintiff would have to pay for those services. The court declined to provide that information and directed the jury's attention back to the page on which they found the phrase "services rendered." The jury reexamined the instructions and not unreasonably concluded that they would have to estimate the cost of the attorney's services themselves, so they added one-third to the damage award the group had already computed.

Arizona's jury instructions are not unique. The Ninth Circuit Federal Model Jury Instruction includes the following elements of damages: "The reasonable value of necessary medical care, treatment and *services received* to the present time."<sup>89</sup> The current Illinois pattern jury instruction includes: "The reasonable expense of necessary medical care, treatment and *services received* [and the present cash value of the reasonable expenses of medical care, treatment and *services reasonably certain to be received* in the future]."<sup>90</sup> In each of these instructions, the intention was to cover the variety of medical expenses that the damage award should reflect. Yet the language in the instruction is not unambiguous and

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<sup>89</sup> 3 Federal Jury Practice & Instructions: Civil § 128.02 (West 2000) (emphasis added) (quoting Manual of Model Civil Instructions for the District Courts of the Ninth Circuit, Instruction No. 7.2 (1997)).

<sup>90</sup> Illinois Supreme Court Committee on Jury Instructions in Civil Cases, Illinois Pattern Jury Instructions: Civil § 30.06 (West 1993) (emphasis added).

can be read to encompass non-medical services rendered or received—that is, attorney's fees and the cost of hiring experts. Thus, given any of the above instructions, a jury can reasonably conclude that a plaintiff is not fully compensated for the losses produced by the defendant's activities unless the plaintiff receives compensation to cover the attorney's fees that made the recovery of damages possible.

There is another side to this coin. Our data suggest that when the jury finds for the defendant, jurors are sometimes similarly troubled by the costs that the defendant has had to incur in defending what the jurors see as an unjustified suit by the plaintiff. Because the instructions leave no way to compensate the defendant directly, the concerns of juries in that situation are not reflected in their verdicts.

Although many juries referred to attorney's fees in their discussions and deliberations, most of the references (24/33 cases or 72%) were brief and perfunctory, and jurors rarely indicated, even in the more extended discussions, an explicit connection to their verdict preferences. In four cases, however, there was clear evidence that the jurors made an award that took attorney's fees into account. In two of the cases, jurors used the plaintiff's attorney's fees as a justification for a higher award but did not add an amount that would fully cover the likely attorney's fees. In the third case,<sup>91</sup> the jury estimated what the attorney's fees would be and explicitly added that amount to the award. In the fourth case, the jurors were restrained by their reluctance to pay the attorney more than they thought he deserved. They felt that the plaintiff was entitled to \$116,000 in damages and were convinced that the attorney would receive a third of the award. They accurately calculated that in order to pay the plaintiff's attorney one-third and leave \$116,000 for the plaintiff, the damage award would have to be \$174,000<sup>92</sup> and decided that the attorney's work had not warranted one-third of \$174,000. They vacillated before settling on the lesser amount of \$153,000.

Because the subject of attorney's fees is controversial, it seems appropriate here to draw attention to the fact that jurors

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<sup>91</sup> See *supra* text preceding note 76 (discussing GT17).

<sup>92</sup>  $\$174,000 - 1/3 (\$174,000) = \$116,000$ .



may not be unique in their concerns about lawyer's fees. Neil Vidmar and Jeffrey Rice conducted an experiment in which jurors and a sample of senior lawyers, including five persons who had served terms as judges, were presented with a detailed fact summary of a medical malpractice case in which the female patient had suffered a severe burn during surgery, leaving her with a large scar on her knee.<sup>93</sup> Liability and economic losses were stipulated, and the evidence indicated no functional loss of mobility in the knee.<sup>94</sup> Thus, the only issue was the amount of damages for pain and suffering and disfigurement. The jurors and senior lawyers did not differ in the amounts awarded. Both lawyers and jurors were also asked to explain in their own words the reasoning underlying their awards. There were no major differences in the perceptions of the injury, but in contrast to the jurors, some of the lawyers referred to the formula that "non-economic damages are 'worth at least three times medical expenses and lost wages,'" and several also explicitly stated that they considered attorney's fees in arriving at their awards.<sup>95</sup> Further discussions with attorneys who had not been participants in the study yielded admissions that they too would consider attorney fees if they were serving as arbitrators.<sup>96</sup> Additionally, subsequent interviews yielded opinions that the "three times" formula also took into account attorney fees. In short, attorneys, as well as jurors, may not be in synchrony with the stated policy of tort law.<sup>97</sup>

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<sup>93</sup> Neil Vidmar & Jeffrey J. Rice, Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals, 78 Iowa L. Rev. 883, 891 (1993).

<sup>94</sup> Id. at 891-92.

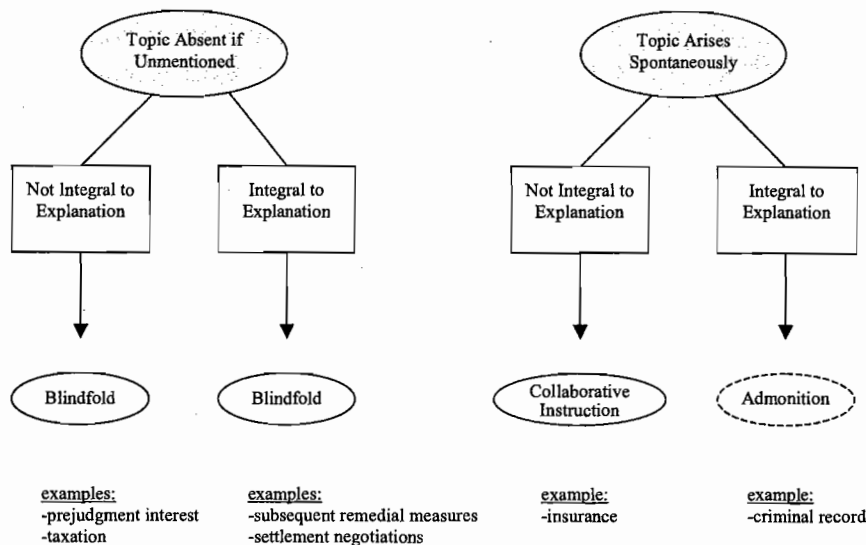
<sup>95</sup> Id. at 895.

<sup>96</sup> Id. at 896.

<sup>97</sup> A subsequent replication experiment by Neil Vidmar and David Landau (reported in Neil Vidmar, Medical Malpractice and the American Jury: Confronting the Myths About Jury Incompetence, Deep Pockets, and Outrageous Damage Awards 221-35 (1995)), using a different set of case facts and different participants, also produced remarks indicating that lawyers considered attorney's fees in making their awards. Vidmar retains the raw data on file.

IV. A BEHAVIORALLY INFORMED APPROACH TO BLINDFOLDING<sup>98</sup>

Figure 1. Handling Forbidden Topics



The promise of blindfolding as a method of jury control depends on two conditions diagrammed in Figure 1: whether or not the topic is likely to arise if it is not mentioned by the court, and whether or not the topic is integral to the explanation of the events that led to the trial. When the forbidden topic is unlikely to be raised spontaneously by the jury, it is an appropriate subject for blindfolding. Our evidence from the Arizona Jury Project suggests that prejudgment interest and taxability of damage awards fall in this category. Prejudgment interest may be awarded by statute to a plaintiff in order to compensate for the delay between the time of the injury and the jury's verdict. If the jury were to include prejudgment interest in its award and the court then added the interest as mandated by statute, the plaintiff would be receiving a double recovery for the interest. In the cases we have examined thus far, we have seen few references to prejudgment interest, no juror questions submitted

<sup>98</sup> An earlier version of some of the ideas in this Section appeared in Diamond et al., *Blindfolding the Jury*, 52 *Law & Contemp. Probs.* 247 (1989).

on the issue, and no instance in which a jury explicitly considered the issue of prejudgment interest in reaching its verdict. This reinforces the inference that blindfolding is a satisfactory way to handle this issue. Similarly, the fact that most personal injury awards are not subject to taxation might cause some jurors who know this fact to view a modest award as a windfall. Yet, our review of juror talk indicates that jurors rarely mention taxation as they determine how much to award, so blindfolding functions appropriately to prevent it from being considered.

The second situation that favors a blindfolding approach occurs when jurors are unlikely to have expectations about information which is likely to cognitively restructure their perceptions of other evidence. Subsequent remedial measures and settlement efforts fall in this category. As jurors attempt to construct an explanation for what led to the trial, the intrusion of story-relevant but inadmissible information is likely to affect the narrative that emerges. For example, in trying to figure out whether the condition of the sidewalk where the plaintiff fell was dangerous or the plaintiff was merely clumsy, jurors might reasonably use the post-accident repair of the hole in the sidewalk as a cue. A defendant may be more likely to repair a dangerous sidewalk following the fall and plaintiff's injury than to repair a sidewalk that does not actually pose a threat to the safety of passersby. Jurors with the best of intentions are likely to be unable to follow judicial instructions that direct them to ignore such information. As numerous studies have shown, even intentional efforts at thought suppression (for example, "I'm trying not to think about a white bear") tend to be unsuccessful and may even stimulate greater attention to the unwanted thought.<sup>99</sup> The only trustworthy way to prevent these intrusions is to prohibit their disclosure, as Federal Rule 407 does.<sup>100</sup> In none of the three slip and fall cases in our sample did ju-

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<sup>99</sup> See generally Daniel M. Wegner, *White Bears and Other Unwanted Thoughts: Suppression, Obsession, and the Psychology of Mental Control* 2-4 (1989) (observing that people are not good at suppressing an unwanted thought).

<sup>100</sup> Fed. R. Evid. 407. As in all exclusions, there will be times when a party has a legitimate reason to present the information. Under these circumstances, some effort to balance the costs and benefits of disclosure (for example, in light of Federal Rule 403) must be made.

rors assume that the premises were or were not altered following the alleged accident. The topic simply did not come up.

An analogous situation arises with settlement negotiations. Jurors exposed to such information might reasonably use the offers and counter-offers as cues to the responsibility or lack of responsibility of the parties.<sup>101</sup> Occasionally, the jurors in the Arizona Jury Project were curious about whether such negotiations might have occurred but were unable to pursue that interest because they received no information about it and could not rely on their own experience to form an impression of what the settlement talks might have revealed.

When is blindfolding both futile and potentially unnecessary? When jurors come to the trial with experiences that reliably lead them to speculate about an issue that has few implications for constructing an explanation for how the event came about. Ignoring their attention to the issue is tantamount to behaving like an ostrich. Our analyses from the Arizona Jury Project indicate that insurance and attorney's fees have both of these characteristics. Juror talk about insurance and attorney's fees is common, and these references occur not in the process of deciding how the injury took place or how much damage the plaintiff suffered from the event itself, but rather in assessing how much it will take to compensate the plaintiff who has gone to trial. Under these conditions, alternative strategies may be both necessary and available.

#### V. MINIMIZING DELETERIOUS EFFECTS WHEN BLINDFOLDING IS NOT A PLAUSIBLE STRATEGY

The traditional remedy for the introduction of inadmissible evidence is to admonish the jury to ignore it. The same approach is generally taken if the jury submits a question to the court about an impermissible topic such as insurance. As the data from the Arizona Jury Project indicate, a simple admonition cannot be depended upon to terminate juror conversations about insurance

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<sup>101</sup> We have seen a similar response to the damage figures suggested by the parties at trial. The defense argued for a pain and suffering award of \$4000, and the jurors treated it as a floor even though several of them said they would otherwise have awarded less for pain and suffering. Future reports on the Arizona Jury Project will examine how jurors use such suggestions as anchors.

even though an admonition may be more successful than simply ignoring a juror question on the topic.<sup>102</sup> The jurors rarely reveal a direct connection between their thoughts about insurance and their verdicts, but the evidence from their often extensive discussions about insurance suggests that some further effort by the courts may be appropriate.

One possibility would be simply to permit full disclosure of the insurance status of the parties.<sup>103</sup> This approach would cut off juror speculation about insurance coverage and would prevent jurors from drawing inaccurate conclusions about the insurance status of the parties (for example, concluding that the defendant lacks insurance because no insurance company is a named party in the suit). A court permitting full disclosure of the insurance status of the parties could then instruct jurors that insurance is not relevant in assessing liability or the appropriate level of damages. Although some jurors might ignore this admonition, it would avoid the current situation in which some jurors believe that insurance is a relevant consideration and others do not.

The problem with a simple admonition is that it generally fails to deter jurors from discussing insurance. In contrast, a more reasoned approach would recognize the jury's predisposition to speculate about matters like insurance. Shari Seidman Diamond and Jonathan Casper tested the effects of both simple admonitions and a reason-based explanatory instruction by measuring juror responses to several versions of an antitrust jury instruction.<sup>104</sup> Mock jurors watched a videotaped trial involving a price-fixing agreement and were then asked to decide on appropriate damages. Some jurors were informed that their award would be automatically tripled by statute, and these jurors gave significantly lower awards as a result of that information in an attempt to

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<sup>102</sup> See *supra* Section III.B.5.

<sup>103</sup> Some critics have argued that full disclosure is appropriate because jurors should be entitled to consider the resources of each party in reaching a verdict. McCormick on Evidence § 201, at 597 (3d ed. 1984); 23 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5362, at 428 n.10 (1980) (citing Charles Clafin Allen, *Why Do Courts Coddle Automobile Indemnity Companies?*, 61 *Am. L. Rev.* 77, 79-81 (1927)); Leon Green, *Blindfolding the Jury*, 33 *Tex. L. Rev.* 157, 159-60 (1955). Here we assume that optimal decisionmaking should not be influenced by party resources.

<sup>104</sup> Diamond & Casper, *supra* note 6, at 521-24.

avoid a plaintiff windfall. Other jurors were told about the trebling provision and were simply admonished not to lower their awards. That bald admonition did not prevent them from giving reduced awards. In contrast, a third instruction treated the jurors as collaborators and explained why Congress had passed the automatic trebling provision—for purposes of punishment and deterrence—and how they would be undermining Congress's purpose if they reduced their award below the amount necessary to compensate the plaintiff. In this third condition, the jurors did not give reduced awards; the explanation-based instruction effectively eliminated what the simple admonition could not.<sup>105</sup>

The issue of insurance presents a similar situation. The jury is tempted to modify its damage award in light of beliefs about whether the parties have insurance or how much insurance coverage they have. The story construction that the jurors engage in when reconstructing how the event at issue occurred is unrelated to insurance. It is when jurors consider the damage award that the insurance issue seems relevant. Indeed jurors often appear to be at odds with the collateral source rule that permits a plaintiff to recover medical expenses even if his own medical insurance has already paid some or all of his bills.<sup>106</sup> Nonetheless, assuming that the collateral source rule remains in effect because lawmakers are reluctant to permit a defendant to profit from the fact that the plaintiff was insured, a modified jury instruction offers the possibility of persuading jurors that they are wasting their time in speculating about the parties' insurance coverage. A promising instruction would highlight the complexity of gauging coverage and (accurately) undermine the claims of any member of the jury who purports to know more about the party's insurance than the trial has revealed. Here is a proposed instruction for a standard motor vehicle case:

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<sup>105</sup> *Id.* at 534.

<sup>106</sup> The jurors are not alone in resisting what they perceive as double recovery. A major justification for the rule is that the defendant should not be entitled to avoid payment or to pay less just because the plaintiff is insured. Critics of the collateral source rule argue that it reflects a punitive attitude toward defendants and is inconsistent with modern trends in the allocation of risk and compensation. Robert Allen Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach—Part I*, 58 *Ky. L.J.* 36, 63 (1969).

In reaching your verdict, you should not consider whether any party in this case [John Smith or Jane Doe] was or was not covered by insurance. As you may know, some plaintiffs are covered and some are not, and some have various forms of partial coverage. The same is true for defendants. The law does not allow the parties to present any evidence about insurance or lack of insurance or amount of insurance, and there is no way that you can accurately determine whether any party in this case has insurance coverage or, if they have it, how much insurance they have.

More importantly, insurance or lack of insurance has no bearing on whether the defendant [Jane Doe] was or was not negligent or on how much damage, if any, the plaintiff [John Smith] has suffered.

The instruction not only admonishes the jurors to avoid speculating about insurance, it also accurately informs them that what they think the facts are (for example, the plaintiff has medical insurance or the large corporation has sufficient insurance to cover any award they choose to give) may be inaccurate or incomplete (for example, the policies have limits or do not cover all types of accidents).

Currently, some juries discuss their different perceptions about the presence or absence of insurance in their case and whether the plaintiff has already been reimbursed or will have to reimburse the insurance company out of any award the jury makes, ultimately concluding that they cannot determine the true state of affairs regarding insurance. In several instances jurors have rejected the notion of considering insurance on the ground that they cannot figure out who has it and how much they have:

MV27 (The topic of insurance re-emerges after the judge has responded to a juror question by telling the jurors to ignore the issue of insurance):

Juror #7: If they have already paid for that medical [expense], why should [the plaintiff] get a payment for that?

Juror #6: We need to ask whether we can take into consideration whether the medical has already been paid. I don't feel comfortable considering insurance until I know what's there.

The proposed instruction could be offered to jurors on a routine basis as part of the ordinary jury instructions, or it could be reserved for occasions on which a jury asks a question about insurance. The latter strategy would avoid introducing the topic of insurance to a jury that had previously not considered it. In light of the high frequency of insurance talk among jurors in the Arizona Jury Project and the reluctance of some of them to ask the court about insurance, however, simply ignoring the topic generally will not prevent it from being raised. The alternative strategy of routinely incorporating the instruction in the jurors' normal instruction package promises to be the most effective way to combat misinformation about, and inappropriate influence from, jury discussions about insurance.

The collaborative instruction approach may also be appropriate when rules of exclusion fail to prevent the jury from hearing irrelevant and potentially prejudicial information. For example, if a damaging piece of hearsay evidence is declared inadmissible, simply sustaining an objection and admonishing the jury to ignore the excluded evidence may be an insufficient remedy. A more effective approach might be to explain why the evidence is excluded (for instance, the danger that the witness is recalling the hearsay inaccurately or the inability of the opposing side to cross-examine the source of the hearsay information). Professor Saul Kassin and Samuel Sommers used an analogous approach to instruct mock jurors who had heard a police officer testify about an illegal wiretap in which the defendant allegedly confessed to the crime for which he was on trial.<sup>107</sup> Jurors who were told by the judge to disregard the wiretap because it had been obtained without a proper warrant were more likely to convict than jurors who heard the same trial without the wiretap confession (though less likely to convict than jurors who heard the wiretap confession and no admonition to disregard it). When the jurors were told, however, that the wiretap evidence was inadmissible because it was barely audible and it was difficult to determine what was said, the conviction rate was no higher than it was for jurors who were not exposed to the wiretap

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<sup>107</sup> Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 *Personality & Soc. Psychol. Bull.* 1046, 1047-49 (1997).



testimony at all.<sup>108</sup> Provided with a reason why the inadmissible information was untrustworthy, jurors were not motivated by reactance to resist the instruction to disregard,<sup>109</sup> and therefore it was unnecessary for them to engage in monitoring to insure that they did not use the information.<sup>110</sup> The instruction that discredited the value of the information as a way to reconstruct the events that led to the trial was thus more effective than the instruction that simply appealed to due process concerns.

The differential effectiveness of the due process and reliability explanations in this study suggests the difficulty that courts face in their attempts to control juror considerations of attorney's fees through judicial instructions not to consider them. The merits of the American rule arise from its impact on the justice system as a whole rather than on its equities in a particular case. The jury inclined to award attorney's fees to a prevailing plaintiff is merely attempting to fully compensate the particular plaintiff. Thus, an instruction explaining the purpose of the American rule does not counteract the fact that a failure to recognize the plaintiff's legal fees will undercompensate the plaintiff's losses. Perhaps that is why informal inquiries<sup>111</sup> and comments from some candid judges<sup>112</sup> suggest that the system finds it appropriate to tolerate some juror willingness to consider the reality of attorney's fees as an argument for an increased award. In other words, what Harry Kalven, Jr. described as an ambivalence to the rule<sup>113</sup> may support our inclination not to provide a standard instruction on the applicable law govern-

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<sup>108</sup> Id. at 1049.

<sup>109</sup> See supra text accompanying note 26.

<sup>110</sup> See supra text accompanying note 27.

<sup>111</sup> See supra text accompanying note 93-97.

<sup>112</sup> See *Renuart Lumber Yards, Inc. v. Levine*, 49 So. 2d 97, 102 (Fla. 1950) (Hobson, J., dissenting), in which a dissenting appellate judge would have approved the jury's verdict in a case in which the court ordered a remittitur. He noted that the plaintiff would have little of the award left after paying for the services of his attorney and considered this to be a "circumstance [that] cannot be ignored by the writer . . . [in determining] whether the judgment is so grossly excessive as to shock the judicial conscience." Id.

<sup>113</sup> Kalven, *Personal Injury*, supra note 33, at 163. Kalven, writing in the days when contributory negligence officially barred recovery by a plaintiff who shared responsibility, compared these situations, suggesting "as with contributory negligence we may not mind too much the jury eroding the rule as a crude de facto reform." Id. (citation omitted). We note that the current law of comparative negligence matches what some juries were doing in eroding the contributory negligence rule of the 1950s.

ing attorney's fees. The difficulty, of course, is that some juries are aware that attorney's fees are not to be considered and do in fact exclude them from consideration. Others are aware of the exclusion but are either unmotivated or unable to ignore it. Finally, some juries may simply add attorney's fees because they assume that the law permits them to do so (for example, they understand attorney's fees to be a part of "services rendered"<sup>114</sup>). Such variations in understanding can contribute to an unnecessary disparity across cases.

At the same time, the most common use of attorney's fees in juror discussions was as an additional argument in favor of a higher award, rather than the explicit add-on that occurred in a few cases. At the very least, it seems inappropriate to avoid sharing the current rule with the jury on a topic that the Arizona Jury Project tells us is very likely to be raised during deliberations.

In each of these instances, the next step is to test the effect of the collaborative instructional approach in redirecting and refocusing juror attention when either expectations and beliefs or inappropriate disclosures threaten to lead the jury astray. Because of the special problems we have identified with the issue of attorney's fees, we have hesitated to suggest an instruction on attorney's fees at this time. We have proposed, however, an instruction regarding insurance and suggested why it may undermine the frequent attention that jurors currently give to the issue of insurance. Although the type of collaborative instruction proposed here is designed to reduce the impact of irrelevant material or material inadmissible for other reasons, the danger is that any instruction will increase the salience and thereby enhance the influence of that material.<sup>115</sup> Only by testing the impact of the

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<sup>114</sup> See *supra* notes 88–90 and accompanying text (discussing GT17).

<sup>115</sup> Only two experimental studies to date have tested juror reactions to admonitions to disregard insurance and neither used the type of collaborative explanation-based instruction we are proposing here. Professor Dale Broeder and his colleagues from the Chicago Jury Project tested the effect of mentioning the defendant's insurance situation on the awards of thirty mock juries. The average award when the defendant disclosed that he was uninsured was \$33,000; when he indicated that he had insurance and there was no objection, the average was \$37,000; and when the defendant said he was insured, there was an objection, and the judge instructed the jury to disregard the insurance disclosure, the average award rose to \$46,000. Dale W. Broeder, *The University of Chicago Jury Project*, 38 *Neb. L. Rev.* 744, 754 (1959). The study did

suggested instructions can we evaluate whether they can fulfill their theoretical promise.

The final category of forbidden topics shown in Figure 1 includes those that arise spontaneously and are integral to the construction and interpretation of the events that led to the trial. Although we do not have data on criminal trials comparable to the data from the Arizona Jury Project, we suspect that jurors discussing whether the defendant committed a crime frequently guess that the defendant has a criminal record if he does not testify. We know that when the defendant testifies and reveals a prior record, jurors have difficulty following a limiting instruction that admonishes them to consider the defendant's record only for the purpose of evaluating his credibility.<sup>116</sup> Under these conditions, blindfolding cannot eliminate juror awareness of the issue and an admonition may meet with limited success because jurors evaluating the defendant's probable behavior and mental state find it difficult to ignore the probative value of a criminal record. Thus, Figure 1 provides no new strategy for dealing with forbidden topics in this category. The current approach of admonishing the jurors may at least give jurors who wish to use it an argument to reinforce the admonition if the topic is raised, but we recognize the potential weakness of the admonition strategy by the dotted outline used to encircle it in Figure 1.

The categories identified in Figure 1 thus provide a preliminary guide to blindfolding prospects that acknowledges what jurors expect and how they reason. Collaborative instruction offers an approach to handling some, but not all, forbidden topics, and Figure 1 shows when collaborative instruction offers the greatest promise.

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not include a condition in which the plaintiff's insurance or noninsurance was mentioned, or a control group in which the topic of insurance was not raised at all. Moreover, juror treatment of insurance may have changed during the last forty years because jurors come to the courtroom with different insurance experience and different exposure to insurance through the media. In a second study, student mock jurors who were told that the defendant had liability insurance gave more severe verdicts, but an instruction to disregard eliminated this effect. M. Cox & S. Tanford, *Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Rules of Admissibility*, 4 Soc. Behav. 31, 38-39 (1989). An attempted replication of the experiment with nonstudents, however, found no effect of the inadmissible evidence on verdicts. *Id.* at 46.

<sup>116</sup> See *supra* note 24.

## CONCLUSION

The juries in the Arizona Jury Project talked about insurance and attorney's fees frequently in their deliberations, even though the evidentiary rules of Arizona, like those of most states, bar insurance evidence except under limited conditions and bar information about attorney's fees in all cases. The behavior of the juries is inconsistent with the image of the jurors as passive recipients of courtroom communications. It closely matches the picture that behavioral science has amassed of the jury as an active and interactive participant at trial. Efforts to assist the jury in reaching decisions grounded in relevant evidence must recognize how jurors cope with the expectations and questions they bring to the courtroom. The traditional approach of merely forbidding evidence on certain topics is of limited value when jurors draw on life experiences and peek through their blindfolds.