BLINDFOLDING THE JURY

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I

INTRODUCTION

The legal system calls upon the jury to perform numerous roles. The jury is asked to evaluate the factual evidence presented in the courtroom and to apply legal rules to these facts. The jury also acts as a buffer between legal rules and community norms and values, and is empowered to mitigate the harshness of the law.[1] As members of the community at large and not employees of the legal system, juries may reach politically unpopular decisions that are more readily accepted by the community than are the decisions of judges. Also, to the extent that the uncertainty of jury decisions introduces an arbitrary element into legal decisionmaking, the perception of uncertainty may serve as an incentive for parties to settle matters by negotiation.

The jury's basic role, however, is as factfinder; jurors are asked to ascertain the facts of a case and to apply legal rules to these findings in an impartial and accurate way.[2] Juries are expected to judge a case based on information presented at the trial, rather than on prejudices or biases they bring into the courtroom. They are also expected to understand and apply correctly the

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1. *See* Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW AND CONTEMP. PROBS., Autumn 1980, at 51, 71 ("Juries have been able to 'make' law in criminal settings by exercising their veto power over enforcement of unjust laws and just laws in unjust circumstances. At the beginning of the nineteenth century in England, persons convicted of violating any one of over 230 crimes were automatically sentenced to death. [citation omitted] Jurors refused to convict because, although they recognized the defendant's conduct as criminal, they could not condemn someone to death for an offense that they felt did not warrant such a penalty."); *see also* Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58 ("The jury serves as a check upon the judge's power in each case. More importantly, however, the jury's verdict provides the judicial process with a contemporaneous expression of the community values that bear on the issues in each case.").

2. *E.g.*, In Re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1079 (3d Cir. 1980) ("The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules.").

legal rules that are to govern their decision. The latter concern is the focus of this article.

Early research portrayed the jury as a decisionmaker generally responsive to the evidence presented at trial.[3] More recently, critics of the jury have raised a variety of questions about jury competence.[4] They have voiced doubts about the ability of juries to analyze complex data logically and to return verdicts based on evidence rather than on irrelevant considerations.[5] Critics have advocated various methods of reining in the jury, ranging from a due process exception to the seventh amendment right to a jury trial based on the complexity of the case being tried,[6] to less drastic measures like specially qualified juries[7] and rules that limit the information juries receive or are permitted to use in making their decisions.

This article will examine one type of legal policy aimed at harnessing and focusing the jury's use of evidence, an approach often called "blindfolding" the jury.[8] When certain types of information are thought to be unduly biasing, jurors are sometimes denied access to such evidence. We will consider the efficacy of this strategy, as well as its possible unintended consequences.

During a trial, the jury does not receive all available information about the case it will be asked to decide. The omissions are not accidental. In addition to strategic choices made by attorneys for either side about which evidence to present, the jury is often explicitly blindfolded to whole categories of available information. We will begin this article by describing the range of information juries cannot be given, and we will then examine some of the limitations of the traditional approach that attempts to blindfold juries to all potentially biasing information. In particular, we will explore the ways in which juror expectations may inhibit the effectiveness of blindfolds or may produce quite unintended consequences.

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3. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 158-62 (1966).

4. *See* Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 79, 199 (1976); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486 (1975); Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775 (1978) (authored by Douglas W. Ell).

5. In his August 7, 1979, address to the Conference of State Chief Justices, Chief Justice Warren Burger expressed concern that the information and legal issues that confront jurors are too complex to allow a competent finding of fact. *Cited in* J. CECIL, E. A. LIND & G. BERMANT, JURY SERVICE IN LENGTHY CIVIL TRIALS 5 (1987).

6. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970), suggests that courts should consider the practical abilities and limitations of juries in determining whether an issue is of a legal nature, and therefore triable by a jury. Some courts interpreted this note to imply a complexity exception. *See* In re Boise Cascade Sec. Litig., 420 F. Supp. 99, 105 (W.D. Wash. 1976); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 67 (S.D.N.Y. 1978).

7. *See* Nordenberg & Luneburg, *Decisionmaking in Complex Federal Civil Cases: Two Alternatives to the Traditional Jury*, 65 JUDICATURE 420 (1982).

8. Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157 (1954) lists several forms of blindfolding, among them:

> (1) not disclosing to the jury the real parties to the litigation; (2) obscuring the issues so that a jury cannot understand what they are deciding; (3) discouraging jurors from considering the effects of their verdicts on the ultimate judgment; [and] (4) limitations on the arguments of counsel indicating to the jury the significance of their verdicts.

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We will then turn to a discussion of a class of cases in which a strategy of blindfolding *does* appear to be the most effective approach. When evidence becomes so enmeshed in juror information processing that it will have a biasing effect regardless of judicial instructions or conscientious efforts by jurors to ignore it, blindfolding may be the only available way to reduce that effect. We thus begin to develop a prescriptive model that indicates the conditions under which blindfolding may or may not achieve its intended goals. Using the available evidence about the consequences of blindfolding, we will argue that decisions about blindfolding would be better informed by systematic empirical evidence than by the untested behavioral assumptions that have traditionally undergirded decisions about whether to deny jurors information.

II

THE SCOPE OF AND JUSTIFICATIONS FOR BLINDFOLDING

The types of information denied to jurors vary across jurisdictions and encompass a wide range of evidence. In criminal trials, for example, the criminal record of the defendant who does not testify generally cannot be made available to juries as evidence of his or her propensity to commit such acts.[9] While a defendant with such a record may be more likely to have committed the offense currently charged, the probative value of this information is seen as outweighed by its potential prejudicial effect.[10] Similarly, hearsay evidence is excluded unless it meets one of the recognized exceptions.[11]

Blindfolding is particularly prevalent in civil trials. Jurors may not be told: (1) that a plaintiff who bears 50 percent of the responsibility for his or her losses will be barred from any recovery;[12] (2) that the defendant carries liability insurance;[13] (3) that the parties have arranged for payment of attorneys' fees;[14] (4) that the award may not be subject to taxation;[15] (5) that original parties to the suit have settled;[16] (6) that settlement offers have been

9. FED. R. EVID. 609. Note, however, that the defendant's record can, and often is, introduced ostensibly for other purposes (for example, to show proof of motive or identity); *see generally* FED. R. EVID. 404(b)).

10. FED. R. EVID. 403.

11. FED. R. EVID. 801, 803, 804.

12. Comment, *Civil Procedure: Informing Comparative Negligence Juries What Legal Consequences Their Special Verdicts Effect*, 18 WASHBURN L.J. 606, 608-09 (1979) (authored by Michael D. Heck).

13. FED. R. EVID. 411. While evidence of presence or absence of liability insurance cannot be offered on the issue of negligence, it can be offered for other purposes, such as showing proof of ownership or the bias of a witness.

14. FED. R. EVID. 403.

15. I.R.C. § 104(a)(2) (1986); *see* Burns, *A Compensation Award for Personal Injury or Wrongful Death is Tax Exempt: Should We Tell the Jury?*, 14 DE PAUL L. REV. 320 (1965).

16. 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) (authored by Cynthia A. Sharo).

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rejected;[17] (7) that repairs were made following an accident;[18] and (8) that a jury award in a private antitrust suit is by statute automatically tripled by the court.[19]

The decision to blindfold the jury to a particular piece of information is typically justified on a number of grounds. First, it is assumed that if the suppressed information were disclosed, it would improperly influence the jury's verdict. Thus, if the jury learns about the criminal record of a defendant who does not testify, this knowledge may directly increase the jury's tendency to convict.[20] Second, litigants anticipating that the jury will modify its decision in light of the information may be discouraged from engaging in beneficial behavior. For example, litigants may be less inclined to discuss settlements if they think that the jury will learn about and modify its decision based on that information. Concern is also raised that some facts, particularly those involving the computation of damages in civil suits, are so complicated that they will confuse rather than inform the jury.[21] Finally, juries are blindfolded to all "irrelevant" evidence, which by definition lacks probative value and will thus at best waste the jury's time, and at worst improperly bias its decision.[22]

III

TWO FLAWED ASSUMPTIONS ABOUT BLINDFOLDING

A. The Appropriate Baseline

The theory of blindfolding assumes that if a jury is denied a particular piece of information, it will reach the most appropriate decision based only on available evidence. That is to say, it is assumed that the blindfolded jury provides the "baseline" from which nonblindfolded juries would be viewed as deviating.

This notion of a baseline may be illuminated by considering the rule that denies jurors information about whether the defendant in an automobile accident case is insured. The rationale for this rule is that jurors who possess such information will make inappropriate awards: Juries informed that a

17. FED. R. EVID. 408.

18. FED. R. EVID. 407.

19. 15 U.S.C. § 15 (1988); *see, e.g.*, Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240, 1243 (5th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); Cape Cod Food Prod. v. Nat'l Cranberry Ass'n, 119 F. Supp. 900, 911 (D. Mass. 1954).

20. Indeed, there is substantial evidence that the probability of conviction does increase when the jury learns of a defendant's record. For research on the effect of a defendant's record on jury verdicts, see Doob & Kirshenbaum, *Some Empirical Evidence on the Effect of S. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. LAW Q. 88 (1972); Hans & Doob, *Section 12 of the Canada Evidence Act and the Deliberation of Simulated Juries*, 18 CRIM. LAW Q. 235 (1976); Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction to Decide Upon Guilt*, 9 LAW & HUM. BEHAV. 37 (1985).

21. *See, e.g.*, Brewer v. Payless Stations, Inc., 412 Mich. 673, 678-79, 316 N.W.2d 702, 705 (1982).

22. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

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defendant *is* insured are thought to deviate from the appropriate compensation award because of a "deep pocket" effect that leads them to award more than reasonable compensation.[23] Juries informed that the defendant is *not* insured are suspected of reducing their awards below their view of true compensation because of sympathy for the defendant. Implicit in this view, then, is the assumption that the blindfolded jury will come closest to the "true" compensation amount that the law asks the jury to determine.

Yet these assumptions may be unwarranted or at least flawed. For example, as advocates of blindfolding predict, juries informed that the defendant *is* insured may increase their awards. Yet this result may actually be closer to a jury's view of the true compensation amount if blindfolded juries generally assume that the defendant was not insured and therefore generally award less than full compensation because they are unwilling to require even the negligent defendant to bear the entire burden of the damage. Of course, the legal system may favor such concern about the potential burden on the defendant as a healthy restraint on a blindfolded jury, particularly if an informed jury would be more willing to accept weak evidence of causation to make certain that an injured plaintiff receives assistance.[24] These speculations about the impact of information are just that: speculations about how juries, whether informed or blindfolded, might behave. The point is that one ought not assume that a blindfolded jury necessarily comes closer to the baseline or appropriate decision than a nonblindfolded jury.

B. The Role of Expectations in Jury Decisionmaking

The second, more pervasive flawed assumption of blindfolding is the legal fiction that the jury operates on a blank slate, influenced only by what it hears and sees in court, and uninfluenced by predispositions and expectations. According to the theory of blindfolding, if information presented to the jury during the trial can be controlled, the jury's decision will be based solely on what the court permits the jury to see and hear.[25]

In fact, jurors come to their task with a wide range of accurate and inaccurate perceptions about trials and conflicts between parties, which can influence how they assess evidence and make their decisions. In other

23. There is evidence that damage awards against corporate defendants in general are higher than damage awards against individuals. A. CHIN & M. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (1985); Hans & Ermann, *Responses to Corporate versus Individual Wrongdoing*, 13 L. & HUM. BEHAV. 151 (1989); Wittman, *The Price of Negligence Under Differing Liability Rules*, 29 J. LAW & ECON. 151 (1986). The evidence for inflated jury awards against insurance defendants, however, is minimal; and if jurors reflect the general public concern about rising insurance costs, the presumed bias may at least be exaggerated.

24. *See generally* Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 167, 168 (1958); Lloyd-Bostock, *Attributions of Cause and Responsibility as Social Phenomena*, in ATTRIBUTION THEORY AND RESEARCH: CONCEPTUAL, DEVELOPMENTAL AND SOCIAL DIMENSIONS 271-73, 278-81 (J. Jaspars, F. Fincham & M. Hewstone eds. 1983) (suggesting that the desire to compensate a needy plaintiff may increase willingness to find a defendant liable).

25. For the rationale behind keeping a jury blindfolded as to the non-taxability of a damage award in a wrongful death case, see Missouri-Kan.-Tex. R.R. Co. v. McFerrin, 279 S.W.2d 410, 419 (Tex. Civ. App. 1955), *rev'd on other grounds*, 156 Tex. 69, 291 S.W.2d 931 (1956).

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contexts, the legal system recognizes, and in fact values, the personal experiences and common knowledge that jurors bring to their task. For example, jurors are instructed to use their common sense in judging the credibility of witnesses.[26] Moreover, studies of jury behavior indicate that such beliefs play a role in the jury deliberation process. After interviewing jurors in sixteen civil cases and seven criminal cases, Broeder reported that "particularized knowledge or experience" appeared to affect the course of decision in eight of the sixteen civil cases.[27] James analyzed the content of deliberations by mock juries after they had listened to a criminal trial in which a plea of insanity had been entered in defense of an act of housebreaking.[28] She found that 22 percent of the "bursts of speech"[29] during deliberations referred to jurors' personal experiences.[30] While she did not measure the influence of those "bursts" on jury decisions, over half of the "bursts" were judged pertinent to the case.[31]

To the extent that the personal beliefs and expectations of jurors influence how they evaluate evidence, blindfolds may be ineffective or may have unanticipated negative effects. Our discussion below suggests how a blindfold may permit the jury to reach a verdict based on misinformation and may bypass opportunities to mold the jury's use of information through voir dire and jury instructions.

IV

WHEN JURORS SHARE EXPECTATIONS THAT ARE INCORRECT

Jurors hold expectations that influence their perceptions and judgments. Not all of those expectations are accurate, and when the inaccuracies go uncorrected at trial because of blindfolding, such false expectations may influence jury verdicts. For example, jurors may generally expect defendants to carry insurance that will cover the total cost of a damage award, but the general rule is that the jury cannot be told whether or to what extent the parties are insured against liability.[32] Faced with an injured plaintiff, the jury will presumably be overgenerous if it thinks that an insurance company will pay.[33]

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26. *See, e.g.*, the Illinois Pattern Jury Instructions (criminal) (Jurors are instructed to "consider all the evidence in the light of your own observations and experience in life."). ILLINOIS SUPREME COURT COMMITTEE ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL 5 (2d ed. 1981) (instruction 1.01).

27. Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U. L. REV. 1079, 1080 (1965). It did not seem to play a part in any of the seven criminal cases. *Id.* Moreover, in a study of simulated jurors' deliberations in response to a criminal homicide case, personal experiences were rarely discussed. R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 84 (1983).

28. James, *Status and Competence of Jurors*, 64 AM. J. SOC. 563, 564 (1959).

29. A "burst of speech" consists of the successive remarks of a speaker before he is interrupted by another. *Id.*

30. *Id.* at 566.

31. *Id.*

32. FED. R. EVID. 411.

33. *See generally supra* note 23.

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If the perception that insurance companies are deep pockets does lead juries to inflate awards when they learn that the defendant is insured, the blindfold will only be effective if blindfolded jurors presume that defendants are not insured. If jurors generally presume that defendants are fully insured for any damage award, and if this belief affects their awards, defendants with limited or no insurance will have to pay an inflated judgment because the jury inaccurately believes they will not personally pay the damage award.[34]

While the data are limited, they suggest that jurors do speculate about who will bear the cost of a damage award. Meyer and Rosenberg studied the questions juries ask while deliberating.[35] Insurance was one of the topics they mentioned, and while they did not report how often it came up, they used it to illustrate their point that "it is naive in the extreme to act on the premise that jurors close their eyes and minds to matters that are commonplace in their lives."[36]

More recently, we asked 192 registered voters in Illinois to consider how much a person injured in an automobile accident should receive from a defendant who caused, or at least contributed to, an accident. In the accident vignette, a driver of an automobile took his eyes off the road momentarily and struck a pedestrian who had suddenly appeared from between two parked cars. Respondents were asked to rate the driver's blameworthiness, and to determine whether he should be excused. They were then asked whether he should have to pay for the pedestrian's losses; if so, how much he should have to pay; and the purpose(s) that would be served by making him pay. Finally, they were asked what percentage of the fault should be assigned to the driver. Despite the fact that this set of questions took only a few minutes, nearly a quarter (24 percent) of the respondents spontaneously mentioned insurance in the course of answering the questions. This result suggests that the question of insurance was close to the surface for these respondents and likely to be brought out in deliberations by individual jurors, potentially affecting the rest. Although this study does not directly test whether concerns about insurance would have influenced the awards these respondents would have favored in a trial,[37] if 24 percent of jurors think about the topic, the probability that at least one member on a six-person jury would consider the question of insurance is greater than four in five.[38]

34. The situation is clearly worse when a defendant *lacks* insurance, or at least full coverage, and the jury presumes that the defendant is fully insured. The blindfold produces a verdict based upon an inaccurate presumption and may stimulate an inflated damage award that the defendant will personally pay.

35. Meyer & Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 JUDICATURE 105, 105-09 (1971).

36. *Id.* at 108.

37. Guinther reports results of a survey which asked 286 jurors in civil trials if they thought the defendant carried insurance. Over half (54%) said yes, 8% said no, and 38% said they had never thought about it. Nine jurors admitted it made an important difference in the verdict, and another 34 jurors said it had a minor effect. Thus, in all, 15% of the jurors reported that beliefs about insurance had affected their verdict. J. GUINTHER, THE JURY IN AMERICA 98 (1988).

38. The probability for a 12-person jury would be more than .96.

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If we knew that jurors generally presumed full coverage and gave larger awards when they held that presumption, blindfolding the jury when the defendant was fully insured—although it would not remove the jury's expectation that the defendant was insured—might at least cause the jury to focus less on insurance coverage. Blindfolding might be justified if the alternative—informing the jury—would reinforce the presumption and exacerbate its effect in inflating awards.[39] In fact, jurors may be given hints that alert them to the possibility of insurance coverage. They may, for example, be asked during voir dire whether they or anyone in their household work for an insurance company. Such a question is acceptable as part of the demographic profile of jurors that parties generally may elicit to help them exercise challenges on voir dire. Moreover, people who work for insurance companies may have prejudices that prevent them from being unbiased jurors in tort cases whether or not there is insurance.[40]

We have just suggested that blindfolding may not eliminate biases produced by juror reactions to insurance if juries generally assume that the defendant is insured. Alternatively, directly informing the jury about insurance may actually *increase* the likelihood of a well-founded jury decision because it provides relevant information. Data on the insurance status of the parties may inform the jury about the interests of the witnesses. For example, the defendant who has insurance that will cover a moderate award may have little concern about a finding of liability and a substantial concern about damages, a fact of some relevance to the decisionmaker evaluating the defendant's credibility. That defendant would have quite different incentives in testifying than a defendant who is fully covered by insurance or one who has no insurance. Blindfolding would deprive the jury of this source of information.

The potential distortions attributable to juror expectations and compounded by blindfolding are not limited to civil cases. They can also arise in criminal cases. For example, when the jury is called upon to decide a capital case, the jury is constitutionally required to weigh aggravating and mitigating factors to determine whether death is the appropriate punishment. However, the jury is generally not asked to decide what punishment the offender will receive if a death sentence is rejected. A number of states do not permit the parties or the court to inform the jury what sentence the offender would be eligible to receive if the jury refused to impose death. This exclusion assumes that the jury will make its decision in a vacuum,

39. A potential cost of the blindfold, however, is that forbidding disclosure of insurance also means that jurors should not be directly questioned during jury selection in ways that suggest that one of the parties has or does not have insurance coverage. While creative attorneys can elicit views on insurance during attorney-conducted voir dire, the growth of judge-conducted voir dire may limit such occurrences. Note, moreover, that few of the jurors (6%) questioned by the Roscoe Pound Foundation survey indicated that their belief that the defendant was insured came from what they learned in the courtroom. J. GUINTHER, *supra* note 37, at 299.

40. *Id.*

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uninfluenced by the concern or expectation that the offender will soon be released if he is not executed.

Yet incapacitation is a recognized goal of criminal sentencing, and it would be natural for a jury to be concerned about the future threat to the community posed by an offender eligible for the death penalty.[41] And there is some evidence that juries are concerned. For example, in the Illinois death penalty case *People v. Walker*,[42] the jury interrupted its deliberations to ask about the possibility of parole.[43] The jury wanted to know whether it could be assured that the offender would not receive parole at an age when he could again do harm to others.[44]

We do not know how often such speculation occurs, but the available evidence suggests that when it does occur, expectations about the alternative sentence may affect the probability of a death sentence. According to a Gallup Poll, support for the death penalty in cases of murder dropped from 72 percent to 56 percent when respondents were given the option of life imprisonment without parole.[45]

Statutes in a number of states provide that certain offenders will automatically be sentenced to life in prison without parole if they are not sentenced to death,[46] but the defendant is not entitled to an instruction informing the jury about that statutory provision.[47] Thus the jury,

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41. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 48-53 (1968).

42. 91 Ill. 2d 502, 440 N.E.2d 83 (1982).

43. *Id.* at 516, 440 N.E.2d at 90. The jury's note stated, "We, the Jury, were wondering that if we should find the defendant should serve time in prison—if we have the right and/or authority to be assured that the defendant cannot walk the streets again—determine if he should receive life or 100-999 years where he *cannot* receive parole at such an age where he *cannot* again do harm to others." (emphasis in original) *See also* Moore v. State, 231 Ark. 672, 676, 331 S.W.2d 841, 843 (1960); Strickland v. State, 247 Ga. 219, 226-27, 275 S.E.2d 29, 37, *cert. denied,* 454 U.S. 882 (1981); Tucker v. State, 244 Ga. 721, 730, 261 S.E.2d 635, 641-42 (1979), *cert. denied,* 445 U.S. 972 (1980).

44. *See also* Brewer v. State, 417 N.E.2d 889, 908 (Ind. 1981) (The jury in a capital case "interrupted its deliberations and inquired of the court as to when the defendant would be eligible for parole, if a life sentence were imposed."), *cert. denied,* 458 U.S. 1122 (1982).

45. THE GALLUP REPORT, Jan./Feb. 1985, at 3.

46. In Illinois, a defendant convicted of first-degree murder automatically receives a sentence of imprisonment for natural life when the jury fails to impose the death penalty only if (1) the defendant had been previously convicted of first-degree murder or had murdered more than one victim in the case at hand, or if (2) the murder was accompanied by exceptionally brutal behavior or if any one of several aggravating factors was present. ILL. ANN. STAT. ch. 38, para. 1005-8-1 (Smith-Hurd Supp. 1989). In California, a defendant found guilty of first-degree murder is subject to a penalty of death or life without parole if any of several "special circumstances" is proved and at least one aggravating circumstance is present and not nullified by mitigating factors. CAL. PENAL CODE §§ 190.2 - 190.5 (West 1988 & Supp. 1990).

47. *See* People v. Albanese, 102 Ill. 2d 54, 78-79, 464 N.E.2d 206, 218, *cert. denied,* 469 U.S. 892 (1984); People v. Kimble, 44 Cal. 3d 480, 514-15, 749 P.2d 803, 825, 244 Cal. Rptr. 148, 170-71, *cert. denied,* 109 S. Ct. 188 (1988); People v. Rich, 45 Cal. 3d 1036, 1115-16, 755 P.2d 960, 1011, 248 Cal. Rptr. 510, 560 (1988), *cert. denied,* 109 S. Ct. 884 (1989); People v. Stewart, 105 Ill. 2d 22, 70-71, 473 N.E.2d 840, 864 (1984), *cert. denied,* 471 U.S. 1131 (1985). Following a verdict of guilty in a Louisiana capital case, if a jury has found the existence of aggravating circumstances and those aggravating circumstances are not negated by any mitigating factors, and if the jury unanimously agrees that a sentence of death is not appropriate, a sentence of life without parole is required. LA. CODE CRIM. PROC. ANN. arts. 905.3 - 905.6 (West 1984 & Supp. 1989). However, in Louisiana the jury *must* be told that, if they cannot agree on a sentence, the court must impose a sentence of life without parole. State v. Williams, 392 So. 2d 619, 633-35 (La. 1980).

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blindfolded to the real alternative to the death penalty, may be spurred to choose death in order to insure that the offender will not be released.

When the jury holds false expectations about the facts of the case (for example, that the partially insured defendant is fully insured) or about the consequences of its decision (for example, that not imposing the death penalty will leave the offender eligible for eventual parole), the decision of the jury may be distorted unnecessarily. The justification for the blindfold is lost. To weigh the usefulness of a blindfold against its potential costs, the first step is to assess juror expectations and how they affect jury decisions. Despite the substantial attention that social scientists have given to juries, there has been surprisingly little work done on this topic.

V

WHEN JURORS DIFFER IN THEIR EXPECTATIONS

A jury's first ballot is rarely unanimous, even though all of the members of the jury have been exposed to the same evidence.[48] Hence we know that jurors bring to the trial individual differences that affect how they evaluate evidence.[49] One component of those differences is variation in expectations and beliefs. When jurors hold differing expectations or beliefs, blindfolding prevents the court and the parties from substituting consistent information for these differing expectations. The effect can be to promote uncertainty in decisionmaking.

One example that reveals the potentially deleterious effect of conflicting juror expectations occurs in those comparative negligence cases in which the jury is asked to render a special verdict. Most states now have some form of comparative negligence rule providing that injured plaintiffs are not automatically barred from recovery if they are partially responsible for their injuries.[50] Some states, however, forbid any plaintiff recovery if the plaintiff's degree of fault exceeds a specified threshold. In pure comparative negligence jurisdictions,[51] a plaintiff who is 80 percent at fault can collect 20 percent of his damages from the defendant who is 20 percent at fault. In a few states,[52] plaintiffs cannot recover if they are found to be equally or more at fault. In some states,[53] plaintiffs cannot recover if they are more than 50 percent at fault.

48. *See* H. KALVEN & H. ZEISEL, *supra* note 3, at 487-89.

49. *See, e.g.*, Johnson v. Louisiana, 406 U.S. 356, 396 (1972) (Brennan, J., dissenting) (arguing that a less than unanimous verdict permits the majority to ignore the minority's different evidentiary conclusions); *see also* Duncan v. Louisiana, 391 U.S. 145, 156-57 (1968) (general discussion of purposes served by juries).

50. *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.1 (2d ed. 1986).

51. *E.g.*, N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976).

52. *E.g.*, ARK. STAT. ANN. § 16-64-122(b)(2) (1987).

53. *E.g.*, MICH. COMP. LAWS ANN. § 600.6304 (West 1987) (only for damages up to $400 to motor vehicles; for damages greater than $400, the pure comparative negligence standard is applied); *see also* WIS. STAT. ANN. § 895.045 (West 1983).

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In comparative negligence cases, juries called upon to render special verdicts assign a percentage of fault to the plaintiff and determine the total amount of damages, but not the amount the plaintiff will receive. Thus, when a jury in Arkansas finds that a plaintiff has suffered $500,000 in damages and was 50 percent at fault, the court, applying the Arkansas 49 percent rule, makes no award to the plaintiff. Under Arkansas law, the jury cannot be told about the 49 percent rule.[54] The blindfold is designed to prevent the jury from adjusting its fault apportionment to circumvent legislative intent; however, the blindfold may not operate in the way the legislature intended. Juries are likely to differ in their knowledge of the 49 percent rule, a difference that will promote inconsistent behavior across juries if knowledgeable juries do adjust their judgments about the apportionment of plaintiff's negligence. Moreover, because the application of the rule cannot be discussed, there is an increased probability that members of a jury who have heard of the rule will misunderstand how it affects the case at hand. It is by no means obvious what the rule requires when, for example, two defendants and two plaintiffs are involved. Inconsistent interpretations by juries will further promote inconsistent judgments.

Even if jurors are totally unaware of the 49 percent rule, a blindfold will cause verdicts to follow legislative intent more closely only if three assumptions are correct: (1) that jurors favor a pure comparative negligence rule in conflict with the legislative plan; (2) that jurors unaware of the 49 percent rule carefully distinguish between 49 percent fault and 50 percent fault; and (3) that jurors who assume a pure comparative negligence rule do not adjust the percentage of fault, rather than the estimate of total damages, in order to arrive at their verdict. We consider next why each of these assumptions is necessary to justify blindfolding the jury.

The information that plaintiffs are legally barred from recovery if more than *X* percent at fault should cause verdict distortions only if jurors self-consciously reject legislative intent. While research on the civil jury[55] indicates that juries with some frequency ignored the old contributory negligence standard that barred a plaintiff from recovery if the plaintiff was at all negligent, no evidence suggests that juries find the 49 percent or 50 percent rule similarly objectionable. Moreover, some jurors may favor the modified comparative negligence standard that prevails in their jurisdiction. Fifty percent of the respondents in our survey found that the pedestrian who was injured when he darted out in front of a car was at least 50 percent but not totally at fault. Twenty-one percent of those respondents said the driver of the car should not have to pay anything for the pedestrian's injuries, thus endorsing a bar to recovery by a plaintiff they viewed as more at fault than the defendant.

A 49 percent rule that bars recovery when the plaintiff is 50 percent, but not 49 percent, at fault assumes that the jury's judgment is carefully calibrated

54. ARK. STAT. ANN. § 16-64.122(b)(2) (1987).
55. Kalven, *supra* note 24, at 167-68.

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to distinguish between 49 percent and 50 percent. If, however, jurors tend to select round numbers, jury verdicts will not reflect such distinctions. The natural tendency to offer rounded percentages was suggested by results from our survey. While the percent of fault ranged from 0 to 100 percent, 88 percent of the responses were multiples of ten; all but 1 percent of the remaining responses were multiples of five. A jury made aware of the importance of the percentage allocation is likely to pay closer attention to the decision. If the jury is unaware of the allocation, it is unlikely to be concerned with the effect of rounding to the nearest 10 percent.

Finally, if the jury expects a pure comparative negligence rule, it assumes a perfect inverse linear relationship between fault and the award the injured plaintiff receives. We do not know whether juries determine the amount they think the plaintiff should receive and then allocate fault and total damages to achieve this amount, or whether, as the law assumes, each of the separate judgments—on percent of fault and total damages—is made independently of the other. A hypothetical illustrates this point. Suppose that a juror suggests that the jury assign 50 percent of the fault to the plaintiff and set the amount of damages at $100,000. The jurors expect that the plaintiff will receive $50,000 as the result of this verdict. Other jurors object that the defendant is more than 50 percent at fault, so the jurors agree to increase the damages to $110,000 so that the plaintiff will recover an extra $5,000 to compensate for his lesser fault. The adjustment actually fails to accomplish its legitimate purpose if, unbeknownst to the jury, the plaintiff cannot recover at all unless less than 50 percent of the fault is attributed to him. The jury may rarely explicitly substitute an adjustment in total damages for an adjustment in percent of fault, but blindfolding makes the prospect of such a choice more likely: If the jury assumes a pure comparative negligence rule, adjusting either total damages or percent of fault can achieve the same result. If a jury member happens to know about the effect of the special verdict, that error may not occur. The result is an uncertain effect of the special verdict procedures that divert some juries from focusing on crucial elements of their decision—distinguishing minority, equal, and majority apportionment of fault.

A blindfold applied over systematically incorrect or inconsistent juror expectations clearly can affect the judgments of the jury. Until we know what expectations jurors hold and how they affect jury decisions, it is difficult to evaluate the costs and benefits of applying a blindfold rather than pursuing some other approach to channeling juror behavior.

VI

INSTEAD OF A BLINDFOLD

Apart from the blindfold, the standard method used to direct the jury's attention away from biasing information is an instruction that tells the jury to disregard information or use it for a limited purpose. For example, a criminal jury is usually instructed to use a defendant's criminal record solely to assist in

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judging the defendant's credibility, but not as evidence that he is the kind of person who commits such acts. Such instructions may have limited effects if they simply ask the jurors to forget or ignore information the instructions have just made more salient, or if the information affects juror perceptions of other aspects of the case.[56]

Beyond blindfolding the jury or instructing it to disregard certain facts, a third strategy for dealing with such material is worth exploring. Jurors are human decisionmakers who search for the causes of the behavior they are asked to judge, and who are aware of and interested in the consequences of their decisions for the parties and the community at large. The law in some contexts may be able to deal most effectively with potentially biasing information if it acknowledges these characteristics of jurors by (1) informing them of the evidence or legal rule at issue and (2) explaining to them the reasons why they ought to ignore or discount such material in reaching their judgment.

This point is illustrated by the current practice in private antitrust litigation of preventing the court or counsel from informing the jury that its damage award will automatically be trebled by the court. Congress provided for automatic treble damages to punish and deter antitrust violations and to provide incentives to plaintiffs to pursue such suits.[57] Before the early 1970's, judicial instructions generally informed juries that their verdict would automatically be trebled.[58] Then, beginning in 1974 with *Pollock & Riley, Inc. v. Pearl Brewing Co.*,[59] several courts of appeals reached decisions denying disclosure of trebling to the jury. The justification for withholding this information was that the jury would then reduce its award below compensation level in an effort to prevent a plaintiff windfall.[60] No empirical research had tested the validity of this assumption about how juries behave, although jurors interviewed after several major antitrust cases expressed surprise and dismay when they learned for the first time that their award would be trebled, claiming that had they known, they would have awarded less.[61]

Uninstructed on trebling, most jurors are unaware that their antitrust awards will be automatically trebled. In our survey of 192 registered voters in Illinois, only two knew about the rule; and most were surprised to learn of its existence. Rather, most jurors expect that the award of the jury will constitute the total burden placed on a defendant who violates the antitrust statutes. As

56. *See infra* text accompanying notes 66-72 (discussing situations in which a blindfold is generally useful).

57. 15 U.S.C. § 15 (1988); *see supra* note 19; *see, e.g.*, Pfizer, Inc. v. India, 434 U.S. 308, 314 (1978); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977).

58. E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 90.39 (3d ed. 1977).

59. 498 F.2d 1240 (5th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

60. *Id.* at 1242-43.

61. *See* Cummings, *Anti-trust Administration and Enforcement and the Attorney General's Committee Report, A General Survey and Critique*, 50 NW. U.L. REV. 307, 308 (1955) (noting that "a recent poll of a Philadelphia jury revealed their dismay when they learned that their already generous antitrust verdict would automatically be trebled").

a result, jurors inclined to consider punishment or deterrence as appropriate responses to antitrust violations believe that their award must reflect those considerations. It would not be surprising if jurors were motivated to punish antitrust violators or to attempt to deter them through a warning message. Congress had those aims when it formulated the treble damages rule.[62] If jurors, unaware of automatic trebling, already increase their damage awards to achieve punishment and deterrence, the result is an inflated damage award that itself is trebled.

We know very little about how jurors respond to the automatic trebling rule or about the considerations that affect their damage awards. Some preliminary data, however, indicate that many jurors might react favorably to the rule, and that concerns about reduction of awards to avoid plaintiff windfalls may be exaggerated. Respondents in our survey were told about the automatic trebling provision and were asked whether they thought it was a good or a bad idea. Sixty-seven percent thought automatic trebling was a good idea. Fifty-four percent of these individuals cited the deterrent value of trebling as a factor in their evaluation. Twenty percent reported that they had based their favorable evaluation at least in part on the trebling provision's punishment value. Seventy-five percent mentioned one or both of these values as a basis for their evaluation.

Our survey also included a very preliminary attempt to explore the potential effects of informing jurors that awards would be trebled and explaining the purpose of this policy. Half the respondents were asked to evaluate the trebling rule before they were informed that the purposes suggested for the rule included punishment, individual deterrence, and general deterrence. The other half evaluated the rule after they were informed of the rule's suggested purposes. Providing the respondents with the suggested purposes of the rule had a significant effect. Seventy-five percent of the respondents who were informed of the rule's purposes supported the trebling provision. By comparison, 60 percent of the respondents who were not informed of the rule's purposes supported the provision.[63] The question that remains, of course, is whether instruction on the purposes of the rule would also affect jury damage awards. Our preliminary evidence suggests that jurors provided with a justification for the rule may be persuaded of its merit and thus be less inclined to undermine it than has been feared.

A decision to remove the blindfold still leaves open the question of how the information will be conveyed to the jury. In our research, we tested the ability of college students to understand a typical instruction designed to inform the jury that its verdict would automatically be trebled.[64] Although

62. At least some members of Congress also intended the treble damages provision of the statute to encourage private attorneys general to bring antitrust suits.

63. A Chi-square (X^2) test was used to compare the percentage of respondents who supported the rule when they were and when they were not informed of the rule's purposes. $X^2 = 4.12$, $p < .05$.

64. We instructed the students as follows:

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respondents generally had little difficulty understanding the testimony in the simulated antitrust case, less than half the respondents actually understood that the court would multiply the jury's damages award by three. In contrast, when we altered the language of the instruction to convey the idea of trebling more clearly, the respondents were able to describe accurately the size of the ultimate award.[65]

In general, we need to assess jurors' responses when they are fully instructed on the rationale for ignoring evidence or discounting facts and the justification for legal rules that affect the consequences of their decisions. Based on what we have already learned about the jury, blindfolding will be necessary in some, but not all, situations in which it is currently used.

VII

WHEN BLINDFOLDING IS REQUIRED

We have discussed above a set of examples in which blindfolding the jury may not achieve its asserted purposes. The arguments depend greatly on the extent to which jurors bring expectations and knowledge to their task, the relationship between such expectations and legal rules, and the ways in which expectations and rules will influence verdict choices under conditions in which evidence is denied or supplied to jurors. We turn now to a class of information for which, based on the available evidence about juror decisionmaking, blindfolding may indeed be an appropriate policy. We will first describe two examples and discuss their general theoretical attributes. We will then attempt to formulate a more general set of principles to differentiate between that information which is appropriately provided to jurors and that to which jurors ought to be blindfolded.

Perhaps the most studied and clearest case involves information about the criminal record of defendants who take the stand to testify on their own behalf. Rules in most federal and state courts permit the prosecutor to introduce such information, but only for the purpose of impeaching the credibility of the witness.[66] When criminal record information is introduced,

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> [U]nder the antitrust laws, if the plaintiff ultimately prevails, the judgment which he could be awarded would be three times the amount of damages which the jury finds. But you are instructed that you are to calculate damages, if any, only upon the basis of a single, not treble, damages. The trebling of the amount of damages is not part of the jury's function and is solely a matter for the court.

See AMERICAN BAR ASSOCIATION, ANTITRUST CIVIL JURY INSTRUCTIONS 188 (citing Sulmeyer v. Coca-Cola Co., 515 F.2d 835 (5th Cir. 1975)). With these traditional instructions, only 10 out of 21 respondents in the first part of our study correctly indicated that the judge would award the plaintiff damages in an amount three times the size of the jury's damage verdict.

65. We revised the traditional instruction as follows:

> Now under the antitrust laws, the judge will award to [the plaintiff] three times the amount of damages which the jury finds. That is if you decide that [the plaintiff] suffered X dollars in damages, I will order the defendants to pay a total of three times that amount to [the plaintiff]. Your job, however, is to decide only on the amount of damages, if any, suffered by [the plaintiff]. The fact that the damage award will be tripled should in no way affect your decision.

66. *See, e.g.*, FED. R. EVID. 609(a).

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the judge gives a limiting instruction to tell jurors to consider a defendant's criminal record only in evaluating the credibility of the defendant's testimony, and to ignore the defendant's record in deciding on the issue of guilt or innocence. Common sense suggests that adhering to these instructions will be difficult; much research demonstrates that it is probably impossible.[67] Jurors told about the defendant's prior record tend to convict at a higher rate than those not told of the defendant's record, particularly if a defendant has a prior conviction for a crime identical to the current charge.[68] Moreover, there is persuasive evidence that this effect is not a product simply of discounting the defendant's exculpatory testimony, but rather is produced by the existence of the criminal record itself.[69] Given these findings, replacing admission of the evidence for a limited purpose with a policy of complete blindfolding seems appropriate.[70]

Blindfolding also seems appropriate in civil suits filed under 42 U.S.C. section 1983 against police officers alleged to have engaged in illegal searches.[71] Legal rules permit introduction of evidence obtained in an illegal search, but jurors are admonished to disregard such evidence in determining both the liability of the police and the extent of damages. Casper and co-authors found that despite this admonition, jurors who were told that the search had turned up evidence of illegal behavior by the plaintiff gave significantly fewer and lower damage awards than those who were told that the search had not turned up such evidence.[72] As with the criminal record example, blindfolding appears necessary to prevent jurors from being biased by this information.

We have now discussed examples in which blindfolding appears both to help and to hinder the jury in its decisionmaking. How might we draw conceptual distinctions that would suggest the conditions under which denying information is likely to be a desirable or undesirable policy? The

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67. *See, e.g.*, Doob & Kirshenbaum, *supra* note 20; Hans & Doob, *supra* note 20; Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982); Wissler & Saks, *supra* note 20.

68. *See, e.g.*, Wissler & Saks, *supra* note 20, at 43.

69. *Id.* at 45.

70. A policy to blindfold the jury in cases of rape to the alleged victim's prior sexual history was enacted in 1978. FED. R. EVID. 412. Rape Victim Shield laws arose to protect rape victims from embarrassment and other potential consequences of having their sexual histories made public. Such laws create a "presumption of inadmissibility" regarding the victim's prior sexual conduct, except when the defendant's need to present such information is deemed by a judge to be so great that to prevent it would be a violation of the defendant's rights. Proponents of the law argue that evidence of the victim's past sexual behavior lacks relevance and is prejudicial in that such evidence may arouse jurors' emotions and/or sympathies and, in so doing, will result in a trial of the victim's character rather than of the accused's culpability. Opponents argue that the defendant is entitled to present any evidence having probative value and claim that jurors can be given cautionary instructions to ensure that they make proper use of the information. *See* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980).

71. *See* Casper, Benedict & Kelly, *Cognitions, Attitudes and Search and Seizure Cases*, 18 J. APPLIED SOC. PSYCHOLOGY 93 (1988); Casper, Benedict & Perry, *Juror Decisionmaking, Attitudes, and the Hindsight Bias*, 13 LAW & HUM. BEHAV. 291 (1989).

72. Casper, Benedict & Kelly, *supra* note 71, at 104; Casper, Benedict & Perry, *supra* note 71, at 294.

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answer may lie in the ways jurors comprehend, process, and recall testimony presented at trial. If a piece of evidence is likely to become so embedded in jurors' comprehension of evidence that admonitions or other techniques will clearly be ineffective, blindfolding may be necessary. When this is not the case, other remedies may be preferable.

Pennington and Hastie argue that jurors' use of testimony often involves the creation of a story about what happened in the case.[73] A story is a logically coherent account of what happened in the set of events that led to the court proceeding.[74] It includes such elements as who did what, motivations for actions, and the intentions of the actors.[75] According to Pennington and Hastie, jurors test their stories against the set of verdict categories provided by the judge and then select the verdict category which best fits their story.[76] Thus, the jurors' mental representations of the evidence are the crucial determinants of verdicts. Pennington and Hastie found that although jurors' recollections of the verdict categories themselves were not systematically related to verdicts, the jurors' stories were.[77]

The so-called "hindsight bias" presents a somewhat related cognitive explanation that may point to certain circumstances in which jurors cannot adequately limit their use of information.[78] In their work on civil damage suits against police officers alleged to have engaged in illegal searches, Casper and co-authors found that the outcome of the search—that is, whether the plaintiff possessed evidence of illegal conduct or was an innocent citizen mistakenly searched—becomes integrated into jurors' recall of testimony. The jurors are consequently often unable to follow judicial instructions to ignore this issue in reaching a verdict.[79] Jurors who heard cases in which the plaintiff was guilty of a crime recalled testimony about ambiguous or omitted matters in ways less favorable to the plaintiff than those jurors who were told that the police had searched an innocent person.[80] Such matters included the experience of the police officers, the reliability of the informants, and the suspicious behavior of the plaintiff.[81]

To take two other examples which have not been studied, we would hypothesize that testimony about previous settlement offers in civil suits or subsequent repairs in slip-and-fall cases might have similar effects if it was

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73. Pennington & Hastie, *Evidence Evaluation in Complex Decision-making*, 51 J. PERSONALITY & SOC. PSYCHOLOGY 242, 243 (1986).

74. *Id.*

75. *Id.* at 244-45.

76. *Id.* at 244. Verdict categories in Pennington and Hastie's study of a murder case included first- and second-degree murder, manslaughter, and killing in self-defense.

77. *Id.* at 253.

78. *See, e.g.*, Fischoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 15 J. EXPERIMENTAL PSYCHOLOGY: HUM. PERCEPTION & PERFORMANCE 288 (1975).

79. *See* Casper, Benedict & Kelly, *supra* note 71, at 104; Casper, Benedict & Perry, *supra* note 71, at 294.

80. Casper, Benedict & Kelly, *supra* note 71, at 106; Casper, Benedict & Perry, *supra* note 71, at 296.

81. Casper, Benedict & Kelly, *supra* note 71, at 106; Casper, Benedict & Perry, *supra* note 71, at 296.

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made available to jurors. Offers to settle, or to shoulder substantial responsibility for an injury or a repair subsequent to injury might well influence crucial elements of the story that jurors develop from the testimony. Neither of these last two examples has been the subject of empirical work, but they suggest the range of evidence whose biasing effects might be so embedded in the ways that jurors process and recall information that blindfolding may be a reasonable antidote.

Thus, there is a range of situations in which pieces of evidence may have a powerful effect on how jurors construct and recall the total evidence in a case. Jurors' mental representations affect their application of legal rules in a fashion that may be impervious to judicial instructions about how much weight—if any, and for what purpose—to give to the evidence. When information-processing effects are very strong, blindfolding may be the only way to deal with the potentially biasing effects of such information. We believe that more theoretical and empirical work on juror information-processing can provide a fruitful framework in which to evaluate those contexts in which blindfolding is a necessary or unnecessary policy to employ.

VIII

EVALUATING THE EFFECT OF BLINDFOLDING IN ANTITRUST CASES

We have suggested a variety of issues that might be fruitfully explored for proceduralists to better understand the costs and benefits of blindfolding juries to various types of evidence. Such exploration might employ a variety of research strategies, including surveys of potential jurors,[82] retrospective interviews from actual cases,[83] and experimental designs.[84] We are currently using several of these approaches to explore the effects of blindfolding jurors to the treble damage rule in antitrust cases. A discussion of the utility and limitations of some of our strategies may stimulate work on blindfolding in other contexts as well.

A. Gauging Expectations

As we have suggested, the consequences of blindfolding may differ depending on the expectations of jurors. Gauging those expectations, however, is problematic. For example, if jurors are asked whether they are familiar with the automatic trebling rule or whether they considered the defendant's insurance in arriving at a damage award, the question itself may insert the idea into their minds. We described the automatic trebling rule to our survey respondents and asked them if they had heard of it previously. In order to make it easy for people to admit unfamiliarity, we prefaced the question with the observation that most people had not heard of the rule.

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82. As used in this study.

83. *See, e.g.*, A. AUSTIN, COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY (1984); THE RAND CORP., THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE (M. Selvin & L. Picus eds. 1987).

84. *See, e.g.*, Wissler & Saks, *supra* note 20.

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Eight percent of the respondents claimed that they had already known of the rule. Responses to other questions suggest that even this relatively low percentage was probably artificially inflated. For example, earlier in our survey we told respondents that a jury in a hypothetical antitrust case had found that the plaintiff sustained losses of a given amount. We then asked how much the plaintiff would be awarded. Only 1 percent (two respondents) named an award that was triple the amount of the loss specified by the jury. We also asked why respondents identified the amounts they did. The same two respondents were the only ones who gave the automatic trebling rule as the explanation. The evidence suggests that most of the respondents who had claimed familiarity were inaccurate, or at least that their familiarity was not strong enough to enable them to apply their knowledge.[85]

B. Experiments to Test the Effects of Blindfolding

A true field experiment would provide an ideal test of the effects of blindfolding. Such a test would randomly assign juries to one of two conditions.[86] Half of the juries would be given the information that the blindfold would deny them while half would not be given that information. In the antitrust example, half of the juries would be told about the automatic trebling rule and half would be given no information about the rule. Deliberations would be taped and the jurors interviewed to gauge the effects of the information on the focus of deliberations, the evaluation of the evidence, and the stories that the jurors constructed to evaluate the case. Juror recall would be examined to see whether the information generally subject to blindfolding changed jurors' perceptions and recall of rule-related information.

Such a true field experiment on blindfolding, in which real jurors in real cases would be given different sets of information, is not possible. Random assignment of actual cases to conditions of jury knowledge or blindfolding about the treble damage rule is not feasible legally, nor is observation or taping of jury deliberations. But an approximation of the ideal experimental design can be achieved by using a simulation in which members of the jury pool are recruited to view a videotaped trial and then asked to reach a verdict based on that trial. This approach has been used to study the effects of jury size[87] and a unanimity requirement for jury decisions.[88] Juror perceptions

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85. Retrospective interviews with jurors in real cases suffer from these as well as other difficulties. For example, answers to questions about the expectations that preceded the trial and deliberation may be distorted by the deliberation process.

86. For the advantages of true experiments in studies of law, see Diamond, *Methods for the Empirical Study of Law,* in LAW AND THE SOCIAL SCIENCES 637 (L. Lipson & S. Wheeler eds. 1986).

87. *See, e.g.,* M. SAKS, JURY VERDICTS 65 (1977).

88. *See, e.g.,* Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation,* 8 LAW & HUM. BEHAV. 53 (1984). While the approach of this study has the limitations of all simulations, it is generally accepted as convincing evidence by the research community. The courts, however, have not always been so favorably impressed. *See, e.g.,* Lockhart v. McCree, 476 U.S. 162 (1986).

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can be assessed before, during, and after deliberations; and juror reports can be compared with the content of the deliberations.

By blindfolding half of the experimental juries to the treble damage rule, we can examine the effect of the blindfold on verdicts. Moreover, we can observe the formulation of the damage award during deliberations, measure the amount of discussion spent on considerations of punishment and deterrence, and question the jurors on the determinants of their preferred awards. We can also trace the unintended effects of the instruction on automatic trebling. For example, an instruction on automatic trebling may influence jurors to give larger awards because it suggests to them that the behavior was more serious or that the harm was greater. Alternatively, jurors who are blindfolded to trebling may give greater awards because they think that juries have the sole responsibility to impose punishment and to provide for deterrence.

An additional benefit of the experimental method is its ability to test conditions not legally permitted. For example, to get an estimate of what a purely compensatory award would be in the antitrust case, we can instruct one set of experimental juries to give a compensatory award and, if they choose, a separate punitive damage award.

C. Experiments to Test the Effect of Instructions

If knowledge or ignorance of information affects jury verdicts, the impact of knowledge or ignorance on the way jurors perceive the evidence may suggest whether instructions are likely to improve the quality of jury decisionmaking.[89] If jurors informed of trebling characterize the defendant's behavior as more blameworthy, so that their entire construction of the antitrust violation is altered, an instruction on the rationale for trebling may cause little change in damage awards. If knowledge of trebling does not change the jury's story, and if blindfolding encourages jurors' inclinations to punish or deter, information and instructions may remove costs imposed by blindfolding.

The fundamental test of the effect of instructions, however, is an experiment in which juries are exposed to instructions that describe the trebling provision and clarify its purposes.[90] With estimates of (1) the expectations jurors have about information to which they may be blindfolded, (2) the effects of the blindfold, and (3) the ability of instructions to control undesirable effects of the information subject to blindfolding, the costs and benefits of blindfolding can be more accurately assessed.

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89. Severance and Loftus, *supra* note 67, at 181-82, 191, found that significantly improved specific instructions resulted in correctly limited use of a defendant's criminal record.

90. Other potential instructions never given in a real courtroom can be tested as well. For example, mock jurors could receive instructions that do not inform them about automatic trebling, but tell them that the court will add to the damage award if appropriate in order to punish and/or deter.

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IX

CONCLUSION

Legal rules forbidding juries access to available information have often been imposed to improve jury decisionmaking. Such policies are based on untested assumptions about how jurors make decisions. These policies ignore the role of juror expectations and beliefs that mold jury interpretation of evidence and affect jury decisions. We have begun here the task of developing a prescriptive model that will assist in more effective classification of the contexts in which policies of blindfolding appear beneficial. Such a model requires additional empirical research about jury decisionmaking, as well as the application of theoretical models of the process to the task of understanding the consequences of blindfolding.

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