The Review of Litigation

Summer 2013 Pages 431 to 589 Vol. 32, No. 3
Published by The University of Texas School of Law

THE REVIEW OF LITIGATION

VOLUME 32 SUMMER 2013 NUMBER 3

ARTICLES

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VOLUME 32 SUMMER 2013 NUMBER 3

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THE REVIEW OF LITIGATION

2012 Volume 32 2013

Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases

Stephen D. Susman & Thomas M. Melsheimer*

I. INTRODUCTION

For many years, trial lawyers and judges have been decrying attacks on the jury system.[1] These attacks have taken many forms and the participants have come from all branches of government and the citizenry. Some of the attacks are quite explicit. Legislatures can eliminate or make more difficult the pursuit of certain claims,

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1. *See, e.g.*, Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002) ("Ultimately, law unenforced by courts is no law. We need trials, and a steady stream of them, to ground our normative standards . . . . Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement."). *See also* Jennifer Walker Elrod, *Is the Jury Still out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 303 (2012) ("[T]he American jury system is under assault . . . . As an unabashed defender of the jury, I have come here today to set out the contrary case, to remind us why the jury is worth fighting for.").

such as medical malpractice.[2] This has sometimes been called "tort reform" and dates back several decades,[3] but the causes of action affected have not been limited to traditional torts. Courts can make it easier to dismiss claims by (1) heightening pleading requirements prior to discovery, (2) relaxing standards for granting summary judgment prior to a jury trial, and (3) making it impossible for the plaintiff to prevail by precluding expert testimony or refusing to certify class actions.[4] Potential litigants can, by written contract, force future disputes into binding arbitration, where the role of the court is limited, with a few exceptions.[5] Potential jurors too have had a hand in "attacks" on the system by refusing to show up for jury service or by aggressively seeking ways to avoid such service.[6]

Other attacks on the jury system are less explicit but also play a role in what several commentators have called "the vanishing jury

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2. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 74 (West 2011) (enacting restrictions on health care liability claims in Texas). *See also* CONGRESSIONAL BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES ix (June 2004), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5549/report.pdf (last visited Apr. 20, 2013) (listing several other types of tort reform such as modifying joint-and-several liability, modifying the collateral-source rule, limiting non-economic damages, and limiting punitive damages).

3. *See* CONGRESSIONAL BUDGET OFFICE, *supra* note 2, at vii (explaining how tort reform gained its prominence in the mid-1980s).

4. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (discussing heightened pleading requirements under Rule 8 of the Federal Rules of Civil Procedure); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–57 (2007) (same); Kelly J. Kirkland, *Motions to Dismiss Come to Texas*, LAW 360 (June 13, 2011), *available at* www.law360.com/articles/249786/motions-to-dismiss-come-to-texas (last visited Feb. 10, 2013) (discussing enactment of procedures for filing motions to dismiss in Texas). *See also* LaserDynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 81 (Fed. Cir. 2012) (holding that the expert's opinion regarding a royalty calculation was "arbitrary and speculative" and therefore required a new trial to be held for determining damages).

5. Stone v. E.F. Hutton & Co., 898 F.2d 1542, 1543 (11th Cir. 1990) (noting that "federal law favors arbitration").

6. *See, e.g.*, Courtney Zubowski, *Ditching Duty: 70 Percent of Summoned Jurors Never Show in Harris County*, KHOU 11 NEWS (July 20, 2012), *available at* http://www.khou.com/news/Ditching-duty-70-percent-of-summoned-jurors-never-show-in-Harris-County-163131306.html (noting that over 70% of jurors summoned failed to appear for jury service in one Texas county). *See also* ANDREW G. FERGUSON, WHY JURY DUTY MATTERS (2013) (arguing for the constitutional importance of jury duty in the face of general apathy towards it).

trial."[7] Judges, who are understandably interested in managing congested dockets in a court system that is often resource-strapped, encourage alternative forms of resolution outside the courtroom, such as mediation.[8] In the Old West, the iconic term "hanging judge" was used to describe a judge with a reputation for harsh sentencing.[9] Today, trial lawyers may often encounter a "settlement judge"—a judge who is willing to cajole, exhort, or even intimidate the parties into a settlement.[10]

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7. Patricia Lee Refo, *Opening Statement – The Vanishing Trial*, J. SEC. LITIG., A.B.A., Vol. 30 No. 2, Winter 2004, at 2. *See also* Stephen Landsman, *The Impact of the Vanishing Jury Trial on Participatory* Democracy, POUND CIVIL JUSTICE INSTITUTE, 2011 FORUM FOR STATE APPELLATE COURT JUDGES (2011); Craig Smith & Eric V. Moye, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH. L. REV. 281, 295–300 ("The Seventh Amendment right to a jury trial is vanishing before our very eyes."). *See also* Mark Curriden, *Number of Civil Jury Trials Declines to New Lows in Texas*, DALLAS MORNING NEWS, June 22, 2013, http://www.dallasnews.com/business/headlines/20130622-number-of-civil-jury-trials-declines-to-new-lows-in-texas.ece (last visited June 29, 2013) ("In 2012, there were fewer than 1,200 civil jury trials in state district courts in Texas . . . a 64 percent decline from 1997, when there were 3,369 jury trials. The federal courts in Texas have seen an equally significant decline. U.S. district court judges conducted 360 civil jury trials in 1997 but only 135 last year.").

8. *See, e.g.*, Paul L. Beeman & Scott L. Kays, *Opinion: Judges Encourage Use of Mediation*, THE REPORTER: AN EDITION OF THE SAN JOSE MERCURY NEWS (Mar. 3, 2013), http://www.thereporter.com/forum/ci_22708493/opinion-judges-encourage-use-mediation (stating that "because of budget cuts and increased filings, courts are unable to offer a speedy trial for every case" but that "[f]ortunately, alternative dispute resolution methods, such as mediation, exist"); Mediation and Conflict Resolution Office, *What is Mediation?*, MARYLAND JUDICIARY, http://www.courts.state.md.us/macro/whatismediation.html (last visited Apr. 20, 2013) ("The Maryland Judiciary recognizes that in appropriate cases people may achieve more satisfactory outcomes in a less time consuming and less expensive manner by using mediation. The courts function as problem solvers and realize the underlying problems in many disputes cannot be resolved by the decision of a judge or jury."). *See generally* Trace W. McCormack, Susan Schultz & James McCormack, *Probing the Legitimacy of Mandatory Mediation: New Roles for Judges, Mediators and Lawyers*, 1 ST. MARY'S J. OF LEGAL MALPRACTICE & ETHICS 150 (2011), *available at* http://www.stmaryslawjournal.org/pdfs/McCormack_Step12.pdf (last visited Apr. 20, 2013) (questioning the "predominant use of standing rules or judicial practices referring to mediation").

9. BLACK'S LAW DICTIONARY 917 (9th ed. 2009).

10. *See* Marc Galanter, *". . . A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States*, 12 J. L. SOC'Y 1, 6–8 (1985) (describing a variety of techniques employed by judges in which they actively encourage settlement).

Lawyers have also played a role in placing the jury system under attack.[11] Either because of a lack of experience or a lack of appropriate economic incentives to be efficient, lawyers have driven up the cost of litigation by unnecessary motion practice, unneeded discovery and a failure to seek cost-saving agreements and protocols. These practices all make the ultimate prospect of case resolution by a jury more expensive, more remote in time, and, consequently, less likely to occur.

The inefficiencies practiced by lawyers litigating cases before trial are not made harmless if the case actually makes it in front of a jury. In that event, those same inefficiencies will manifest themselves in an excessive use of exhibits, unnecessarily lengthy deposition testimony, and a bloated interrogation process that, in our experience, leads to the single most repeated comment by jurors after a trial has concluded: "There was too much repetition."[12]

Though we mourn the near-extinction of the jury trial, we do not address here the broader issue of ever increasing judicial and legislatives efforts to curtail jury trials, or the efforts by a broad segment of corporate America to keep disputes with their customers and employees out of court altogether through the use of boilerplate arbitration clauses.[13] All of these trends are real, and have been the subject of extensive commentary from a variety of viewpoints.

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11. *See* Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burden, or Can Significant Improvements Be Achieved Within the Existing Rules?*, 12 SEDONA CONF. J. 47, 49 (2011) (discussing the problems of excessive discovery and suggesting that "lawyers who profit from actions that increase the cost of civil litigation—notably, adopting a gratuitously confrontational approach to discovery—also contribute to the problem").

12. *See* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 289 (Robert E. Litan ed., 1993) (noting that a common juror complaint is "repetition and redundancy of trial testimony").

13. *See, e.g.*, Colleen Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, TEX. L. REV. 345, 353 (1995) (noting that the Supreme Court has upheld legislative initiatives curbing the reach of the Seventh Amendment); Landsman, *supra* note 7, at 10–14 (discussing how judicial policy favoring arbitration and dismissal has resulted in reduced access to jury trials); Refo, *supra* note 7, at 3 (stating some reasons why judges prefer to dispose of cases before trial). *See also* Michael F. Donner, *Litigation 101: Thinking Through the Use of Boilerplate Provisions for Arbitration, Mediation, and Attorney Fees in Real Estate Contracts*, PROBATE & PROPERTY, May/June 2003, at 20, *available at* http://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v17/03/2003_aba_rpte_pp_v17_3_may_j

It is worth noting, however, one important reason why arbitration is winning the dispute resolution competition against jury trials: jury trials are deemed more expensive and more dangerous.[14] Groups like the Judicial Arbitration and Mediation Service ("JAMS") and the American Arbitration Association ("AAA") have developed rules that are intended to make their services less expensive.[15] Yet there is no reason why the kind of rules JAMS and AAA have adopted cannot be used for jury trials, such as trial time limits and limits on discovery, practices we discuss in this Article.

In this Article, we advocate change that *trial lawyers* can do something about—today. What we seek to change is the hesitancy of judges and trial lawyers throughout the country, especially in Texas, to compel or to agree to practices that, in our experience, lead to more engaged and informed juries, more efficient trials and outcomes that clients on both sides will be more likely to accept or, at the very least, use as a legitimate guidepost for settlement. Some of these practices involve trial procedure while others involve lawyer conduct. None of these practices is particularly radical. All have been utilized successfully in courts throughout the country and some

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une_donner.authcheckdam.pdf (last visited Apr. 20, 2013) ("Today, almost as an instinctual reaction, lawyers frequently try to avoid placing their clients in a position in which litigation is the sole option if a dispute arises. ADR clauses have become so commonplace in real estate contracts that lawyers often insert them into the agreements first and then ask the necessary predicate questions later.").

14. *See* Refo, *supra* note 7, at 3–4 (finding that trial lawyers have made the process of getting to trial too expensive and litigants—particularly corporate litigants—can no longer abide the perceived uncertainty of a jury trial).

15. *See ADR Clauses, Rules, and Procedures*, JAMS, http://www.jamsadr.com/rulesclauses/xpqGC.aspx?xpST=RulesClauses (last visited Apr. 20, 2013) ("In order to save clients time and money, JAMS has instituted new procedural options that allow the crafting of a process that is commensurate with the dispute. With JAMS new Optional Expedited Arbitration Procedures, parties can choose a process that limits depositions, document requests and e-discovery."); *AAA Court – and Time – Tested Rules and Procedures*, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/aaa/faces/rules?_afrLoop=387753411397887&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D387753411397887%26_afrWindowMode%3D0%26_adf.ctrl-state%3D19rm2fq473_4 (last visited Apr. 20, 2013) (emphasizing that AAA's rules and procedures help "provide cost-effective and tangible value to users across a wide variety of industries and cases"). *See also* W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 658 ("A number of arbitration providers, including AAA and JAMS, have adopted 'due process' protocols designed to ensure minimally fair procedures in consumer and employment disputes.").

have been institutionalized in the rules of procedure.[16] Although, where appropriate, we cite to "success stories" and validation of the various practices, what we discuss here is not intended to be a comprehensive summary of every practice that can improve litigation generally, or even the conduct of jury trials specifically. Rather, what follows is a series of practices that we have personally utilized or experienced that, if adopted uniformly, will improve the quality of jury trials and perhaps even act as another rejoinder to those who see jury trials as something to be limited or avoided.[17]

The term "adopted uniformly" is important. We are not naïve enough to think that the practices we discuss in this Article, no matter how efficient and beneficial to the jury trial process they may be, will be as common as invoking "the Rule" before the first witness is called.[18] Yet they should be. None of the procedures we discuss ought to be unique to any particular jurisdiction or type of civil case. Each can be applied regardless of a case's simplicity or complexity. In fact, in all cases, the benefits of these changes are substantial, and the risks or costs are either non-existent or exaggerated.

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16. *See* ILL. R. CIV. P. 243 (allowing jury-initiated questions in civil trials). *See, e.g.*, S.E.C. v. Koenig, 557 F.3d 736, 741–42 (7th Cir. 2009) (approving juror-initiated questions); United States v. Richardson, 233 F.3d 1285, 1289 (11th Cir. 2000) (approving juror-initiated questions and collecting cases from other circuits to the same effect); Abraham v. Exxon Corp., No 14-98-00888-CV, 2001 WL 894261, at *6 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (ruling that a trial judge has "broad discretion to control a trial" and thus trial time limits were acceptable); Hudson v. Markum, 948 S.W.2d 1, 3 (Tex. App.—Dallas 1997, writ denied) (approving use of juror-initiated questions); Fazzino v. Guido, 836 S.W.2d 271, 276 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (approving use of juror-initiated questions); Ted A. Donner, *New Rule 243 Allows Jurors to Ask Questions of Witnesses in Civil Cases*, DUPAGE CNTY. BAR ASS'N BRIEF, June 2012, at 18–19, *available at* http://dcbabrief.org/vol240612art1.html (last visited Feb. 11, 2013) (discussing the new Illinois rule of civil procedure allowing juror-initiated questions).

17. *See generally* FERGUSON, *supra* note 6 (arguing for the constitutional importance of jury duty in the face of general apathy towards jury duty).

18. FED. R. EVID. 615 (allowing parties to prevent witnesses from hearing other witnesses' testimony in order to avoid fabrication and expose inaccuracies); TEX. R. EVID. 614 (same).

II. WHY SENSIBLE PRACTICES HAVE FAILED TO TAKE ROOT UNIFORMLY

One of the biggest obstacles to these practices, apart from simple inertia, is the presence of trial lawyers who do not try many cases and thus can neither rely on sufficient experience to be comfortable advocating these practices to their client, nor predict how they would be utilized in court.

We do not have a ready solution for this problem, and it has been the subject of extensive discussion elsewhere.[19] It is an unavoidable truth that most young lawyers today—and, by young, we mean almost any lawyer under 45—do not have the same experience in trying cases (and will not) as lawyers who graduated from law school in the 60s, 70s, or 80s.[20] And many young lawyers who claim trial experience are counting events like arbitration as

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19. *See, e.g.*, David W. Elrod & Worthy Walker, *Fact or Fiction: Are There Less Jury Trials & Trial Lawyers? If So, What Do We Do About It?*, 3 LITIG. COMMENT. & REV. 53 (June / July 2010), *available at* www.elrodtrial.com/docs/publications/good-reads-david-elrod.pdf (last visited Feb. 10, 2013) (exploring the decreasing number of trials and possible contributing factors); Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1417 (2002) (arguing that there is a general expectation that cases will settle before trial and that discovery ultimately becomes a means for settlement); Am. Coll. of Trial Lawyers, *The "Vanishing Trial": The College, The Profession, The Civil Justice System*, 12 (2004), *available at* www.actl.com/AM/template.cfm?Section=All_Publications&Template=CM/ContentDisplay.cfm/ContentFileID=57 (last visited Feb. 10, 2013) (discussing the "pro-settlement agenda" of federal courts); J. Gary Gwilliam, *Are Trial Lawyers Becoming Extinct or Are We Simply Becoming Negotiators?*, *in* J. GARY GWILLIAM: HOW TO GET A WINNING VERDICT IN YOUR PERSONAL LIFE (Jan. 22, 2010), *available at* http://garygwilliam.com/2010/01/are-trial-lawyers-becoming-extinct-or-are-we-simply-becoming-negotiators/ (last visited Feb. 10, 2013) ("With a lack of trial experience comes a lack of ability to easily and competently try a case before a jury."); Patrick E. Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REVIEW (2004), *available at* http://www.rand.org/publications/randreview/issues/summer2004/28.html (last visited Feb. 10, 2013) ("Because judges and lawyers are increasingly unskilled and inexperienced in the mechanics of a trial, the measure of what is relevant in discovery itself has become blurred at best.").

20. Of course, given that lawyers make up the pool from which judges emerge, diminished trial experience among lawyers will eventually translate into lawyers taking the bench with a decreasing amount of actual experience trying cases before juries.

trials even though arbitration is far removed from a jury trial in many significant ways.[21]

Consider the following scenario that occurs at some point in nearly every case of even modest complexity. Both sides amass a team of lawyers with a senior lawyer at the helm. The junior members of the team engage in extensive discovery efforts and invariably reach the point of a dispute. Lengthy single-spaced letters or e-mails are exchanged. The dispute eventually finds its way to a motion before the court to compel discovery and, at some point before the court actually decides the dispute—either because common sense has prevailed or because the court has ordered it—the lead counsel for the case meet by telephone or face-to-face to discuss the issue. Once this meeting occurs, the dispute is often reduced to either no dispute at all or is severely limited. Why? Are the senior lawyers simply more agreeable by nature or unwilling to abide conflict? Of course not. We believe the issue is resolved because experienced trial lawyers know that 90% of everything that happens in discovery never makes its way into court, which is another way of saying 90% of what happens in discovery is not important to the outcome of the case. As such, experienced trial lawyers can decide rather quickly if something is worth fighting about. Most of the time, it is not.

Another obstacle to practices to improve the jury trial is the tendency of lawyers in an adversary system to try to determine whether any particular practice is beneficial to their side while being detrimental to the other side. This issue arises from the assumption that "if the other side likes it, I don't." There is no easy solution to

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21. *See, e.g.*, Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV 366, 390 (1986) (discussing the fact that some "arbitrators are less representative of jurors" but that "an arbitrator who is an experienced trial lawyer may render a decision more representative of what the average jury would come up with than the decision of any single jury"; mentioning that, with some types of arbitration, "private attorneys may dislike submitting their disputes to other private attorneys, who in the nature of things are potential competitors for their clients"); Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within an Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1294, 1296, 1325 (1998) (commenting that (1) "ADR tends to be conducted mainly by private persons . . . rather than by public officials," (2) "[a]rbitration may be binding, and thereafter subject only to very restricted judicial review, or non-binding," and (3) "nominally, many arbitration rules and statutes recite that 'the rules of evidence shall not apply,' or words to that effect" but that these "declarations of non-applicability are frequently hedged").

this problem. This mindset generally diminishes with trial experience, but, as we stated, such experience is hard to come by. We suggest that discussions like those in this Article, supported by lawyers at bar conferences and training sessions within law firms, in addition to formal law school education in the efficacy and neutrality of such practices, may slowly ebb the fear that comes from inexperience.[22]

The final obstacle to sensible practices to improve the conduct of jury trials is the inherent conservatism of the bench.[23] Judges "have seldom been accused of being progressive."[24] They, as members of a tradition-driven institution, embrace what has been done before and are sometimes skeptical of new approaches.[25]

We offer two responses to these multiple concerns. First, the practices we discuss here are not new and are, in fact, proven to work well. Jury questions, for example, date back 100 years or more.[26] The other practices have been successfully utilized in courtrooms for decades.

Second, we place responsibility for improving jury trial procedures substantially on the counsel for the parties. They are in the best position to adopt these sensible practices by agreement and to cajole, if necessary, a skeptical court into allowing the parties to utilize agreed-upon procedures. Although many judges have written approvingly of the practices described in this Article,[27] these practices remain the exception rather than the rule for courts in Texas and throughout the country.[28] That is why it is up to counsel for the parties to adopt these improvements by agreement. Of course, a trial judge has the discretion to conduct the trial in a

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22. Hope Eckert, *Teach This Class!*, 3 FAULKNER L. REV. 95, 96 (2011) ("[A] new focus on teaching practical skills has emerged in law schools and legal education scholarship.").

23. Corey Rayburn Yung, *An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 10–13 (2011).

24. Robert M. Parker, *Streamlining Complex Cases*, 10 REV. LITIG. 547, 556–57 (1991).

25. *Id.*

26. *See infra* note 52 and accompanying text (citing to one use of jury questions in 1859).

27. *See, e.g.*, James F. Holderman, *As Generations X, Y, and Z Determine the Jury's Verdict, What Is the Judge's Role?*, 58 DEPAUL L. REV. 343, 343–44 (2009) (discussing a changing relationship between the judge and jury that requires making changes to the jury's role and courtroom procedures).

28. *Id.*

different way, but it is our experience that, when presented with an agreement of counsel, the court rarely objects.

The practices we present here do not advantage either side. They are lawful and fully within the discretion of every trial judge in nearly every jurisdiction we have encountered. They improve the process of the jury trial and can, in some instances, reduce the costs of such a trial. But due to a combination of special interest politics and inertia, these practices will likely never be legislated or uniformly imposed by court rule. For those among us serious about preserving the Seventh Amendment right to trial by jury, we think these practices are critical to the survival of that right.[29] Certainly, it's about time for advocates of the Seventh Amendment, which we hope includes every trial lawyer, to show at least as much passion for preserving those rights as those who advocate Second Amendment rights.[30]

There will most likely remain people who believe that jury trials are more dangerous than guns. The perceived danger of jury trials arises from two circumstances: the availability of punitive damages in many cases (though this availability has diminished significantly over the years)[31] and the perceived difficulties of juror

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29. *Cf.* THE FEDERALIST No. 83 (Alexander Hamilton) (arguing that civil jury trials will be preserved even without an enumeration in the Bill of Rights; stating that "the friends and adversaries of the plan of the convention, if they agree in nothing else concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government").

30. *See, e.g.*, Cameron Desmond, Comment, *From Cities to Schoolyards: The Implications of an Individual Right to Bear Arms on the Constitutionality of Gun-Free Zones*, 39 MCGEORGE L. REV. 1043, 1061 (2008) (describing the remarkable influence pro-Second Amendment groups such as the NRA have had on gun laws in the United States).

31. *See e.g.*, Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L. REV. 1297, 1298–99 (2005) ("Much of what is asserted about the nature of punitive damages is untrue . . . [E]mpirical studies unanimously conclude that high-end punitive damages are rarely awarded."). *See also* HOT COFFEE (HBO 2011) (a documentary proving that the jury system, specifically as it applies to the provision of punitive damages, is not broken despite the beliefs of many Americans). *Cf.* Tom Melsheimer & Craig Smith, *Businesses' Fear of U.S. Jury System Is Irrational*, VOIR DIRE, Summer 2011, at 30–31 (responding to criticisms of the jury trial; explaining that "the jury system cannot thrive and be defended from those who would criticize it without those of us who participate in it speaking out . . . . It is up to those who understand and appreciate the system to

comprehension, especially when it comes to complex issues.[32] Trial lawyers cannot diminish the risk of punitive damages, but they can take steps to ensure juror comprehension. Making things intelligible ought to be the trial lawyer's stock-in-trade. The innovations we discuss in this Article are primarily aimed at that very issue—making the trial easier to comprehend for the jury.

III. PRACTICES FOR IMPROVING JURY TRIALS

A. Hard Time Limits

Time limits are perhaps the most easily adopted, and most common form, of jury trial improvement, though the parties may not often see the practice in that light. The courts that have adopted the practice, such as in the Eastern District of Texas,[33] rightly see time limits as a way to allocate the precious resource of judicial time to as many cases as possible.[34] Time limits do more than just conserve

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defend it to the public at large. Our jury system, enshrined in the Constitution, works better than almost any other public institution").

32. Parker, *supra* note 24, at 553–55.

33. *See* McClain v. Lufkin Indus., Inc., 519 F.3d 264, 282 (5th Cir. 2008) (holding that the district court in the Eastern District of Texas did not abuse its discretion in limiting the time that each side had to present its case). The court further explained that a "district court has broad discretion in managing its docket and structuring the conduct of a trial. It may maintain the pace of the trial by setting time limits on counsel." *Id. See also* Pretrial Hr'g, SSL Services LLC v. Citrix Systems, Inc. and Citrics Online LLC (May 21, 2012) (Civil Action No. 2:08-cv-158-JRG) (demonstrating Judge Gilstrap's emphasis on strict times limits in the Eastern District of Texas: " . . . [Y]ou are not to use more than 13 hours to put on your case. If you use up your allotment, you have used up your allotment. So that is not a – that [is] not an approximation, that is a firm rule"); *Transcript of Trial*, Virnet X, Inc. v. Cisco Sys., Inc., No. 6:10cv417 (E.D. Tex. Mar. 4, 2013) (noting Chief Judge Leonard Davis's agreement that "length of trial was not a factor as far as the justness of the results; and that quicker trials led to the same degree of justice with much less expense"). *See also* Seymore v. Penn Maritime, Inc., 281 Fed.Appx. 300, 302 (5th Cir. 2008) (holding that, despite the Southern District of Texas's decision to limit the party's time to cross-examine witnesses and present its case to ten hours, the party had "sufficient time to develop its defensive theories and present its case"). "Penn fails to show that the district court abused its broad discretion to manage its docket and control the trial." *Id.*

34. Sequestration has made judicial resources even more limited. *See* Bruce Moyer, *January – February 2013: Federal Courts Brace for Budget Cuts*, FED. BAR ASS'N,, Jan./Feb. 2013, *available at* http://www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2013/January-February-2013-

judicial resources; they make for better trials—especially better jury trials. In our experience, when the parties are forced to decide how to fit their evidence into a strictly enforced maximum number of hours, the presentation invariably improves. By making hard decisions about which witnesses to call and what lines of inquiry to pursue in front of the jury, the trial lawyer streamlines the case in a way that will better hold the jury's interest and focus the jury's attention, itself a scare resource, on the important issues rather than on collateral ones.

We have observed several obstacles to the practice of setting hard time limits, none of which is insurmountable. First, parties who may have spent several years litigating a case, and who have strong feelings about what issues are important, may be reluctant to bind themselves to time limits. Second, inexperienced trial lawyers may resist time limitations in part because they do not understand how to use them to their advantage in presenting their own case. Finally, based on our experience, some judges view time limits as overly intrusive on the rights of the parties to present their cases as they see fit, or otherwise inappropriate for complex cases.

The first obstacle, the parties' fear of constraining themselves to time limits, can be overcome by the lawyers. The party's attorney can explain to his or her client that a shorter trial will be less expensive, which ought to be seen by the client as a benefit. Similarly, the attorney can explain that time constraints can lead to the improvement in the quality of the presentation which will also serve as an advantage for the client.

The second obstacle, the fears of the inexperienced trial lawyer, is rooted in lawyers not having had the opportunity to see the benefits of time limits in actual trials and can be overcome simply by experience. The benefits of time limits are widely discussed in professional journals and at professional seminars and bench/bar conferences.[35]

Federal-Courts-Brace-for-Budget-Cuts.aspx (last visited May 2, 2013) ("As a last resort, the courts could be forced to suspend civil jury trials because of insufficient money to pay jurors."). *See also Federal Judiciary Braces for Broad Impact of Budget Sequestration*, UNITED STATES COURTS (Mar. 12, 2013), http://news.uscourts.gov/federal-judiciary-braces-broad-impact-budget-sequestration (last visited May 2, 2013) ("Sequestration reduced the judiciary overall funding levels by almost $350 million – a 5 percent cut affecting people, programs, and court operations.").

35. *See, e.g.*, Andrew L. Goldman & J. Walter Sinclair, *Advisability and Practical Considerations of Court-Imposed Time Limits on Trial*, 79 DEF. COUNS.

Indeed it is our view, based on experience, that shorter trials produce better results. This is true for several reasons. First, the quality of jurors seated on the panel increases with shorter trials. We have all had the experience of a trial judge telling the venire panel that the trial will last several weeks or even as long as a month. Hands shoot up to offer a variety of hardships and objections, most of which are freely honored by the presiding judge.[36] But, based on our experience, if the jury is told the trial will last no more than a week or a week plus a day or two of the following week, the availability of a broader cross section of jurors increases.

Nor do juries lack the facility to digest complex cases in shorter time periods. An entire industry of trial consultants makes its living conducting focus group studies or mock trials which condense an entire case into a single day or at most two days.[37] These

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J. 387, 392–97 (2012) (arguing that time-restricted trials are advantageous for judges, juries, lawyers, and clients); Martha K. Goodling & Ryan E. Lindsey, *Tempus Fugit: Practical Considerations for Trying a Case Against the Clock*, 53 FED. LAW., Jan. 2006, at 42, 45–46 (2006) (giving practical advice on trying a case with court-imposed time limits); Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 667–68 (1993) (analyzing the assumptions behind the case for the use of time limits and offering suggestions on how courts can solve the practical problems of how to choose and enforce appropriate time limits); John E. Rumel, *The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials*, 26 U.S.F. L. REV. 237, 238 (1992) (arguing "that trial time limits must comport with due process standards, including both 'private' and 'public' aspects of the due process clause"). *But see* Bob McAughan, *Time to Justice: Seven Hours or Seven Days?*, LANDSLIDE, Jan./Feb. 2012, at 44 (arguing that time limits interfere with the proper administration of justice for patent cases).

36. For example, in a large Medicaid fraud/whistleblower case tried by co-author Thomas Melsheimer in Austin, Texas in 2012, the presiding judge, John Dietz, summoned more than double the normal number of jurors for the venire in part because of extensive publicity associated with the case and in part because of the anticipated length of trial. When informed that the trial may last a month or more, dozens of jurors, understandably, raised some claim of hardship. At the end of the exemption and hardship process, there were barely enough jurors to conduct voir dire with the required number of peremptory challenges per side. If the parties had agreed to a shorter trial time, both sides may well have been advantaged by a larger and more diverse venire. State of Tex. *ex. rel.* Jones v. Janssen LP, D-1GV-04-001288 (250th Dist. Ct., Travis County, Tex. 2012). *See also* TEX. GOV'T CODE ANN. § 62.106 (West 2011) (listing the exemptions from jury service).

37. *See Areas of Consulting*, THE AMERICAN SOCIETY OF TRIAL CONSULTANTS, http://www.astcweb.org/public/article.cfm/areas-of-consulting (last visited Apr, 21 2013) (listing the different types of services that trial consultants offer the legal community). *See also Services*, LUNDGREN TRIAL

exercises are routinely done in nearly every complex case, and trial counsel rely heavily on these studies to inform them about the strengths and weaknesses of the case, to predict a case outcome to some degree, and to guide settlement strategy.[38] If such important strategic information can be gained in a day or two of study, surely a case of nearly any complexity can be fairly tried in two weeks or less. Finally, as we discuss later in this Article, an increasing number of juror members come from a demographic accustomed to faster and more abundant receipt of information.[39]

The final obstacle, judicial reluctance, can also be overcome by the lawyers, though an agreement by both sides may be necessary to convince a skeptical or unwilling trial judge. Trial time limits are within the broad discretion of the district court in controlling the order and timing of the trial.[40] We note that for judges who routinely set time limits, they do so without any concern about limiting the rights of the litigants, as experience has proven that the time limits aid jury comprehension and, though lawyers may protest a particular

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CONSULTING, http://www.lundgrentrial.com/services/ (last visited May 2, 2013) (listing the "actual research specifications and rigorous methodologies custom-tailored to client's case and questions" that the consultants use); COURTROOM INTELLIGENCE, http://www.courtroomintelligence.com/index.htm (last visited May 2, 2013) ("As courtroom communication experts, we provide objective feedback on the non-legal dimensions of a case and insight into how jurors may perceive the facts associated with a lawsuit.").

38. *See supra* note 37 and accompanying text (explaining the role that trial consultants can have during the preparation for trial).

39. *See generally* Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV., 1, 2–3 (2012) (discussing the explosion of social media and its effects on jury trials). *See also infra* notes 56–58 and accompanying text (noting how quickly members of Generation X and Generation Y receive and assess large quantities of information).

40. *See* Sims v. ANR Freight Sys., Inc., 77 F.3d 846, 849 (5th Cir. 1996) ("[A judge] may maintain the pace of the trial by interrupting or setting time limits on counsel."). *See also* FED. R. CIV. P. 1 (providing that the rules of procedure must be construed to secure the "just, speedy and inexpensive determination of every action"); FED. R. CIV. P. 16 (further authorizing federal judges to issue pretrial orders limiting proof); FED. R. EVID. 403 (stating that evidence may be excluded if "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury, . . ." or by considerations of "undue delay, wasting time, or [needless presentation of] cumulative evidence"); FED. R. EVID. 611(a) (stating that "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: . . . make those procedures effective for determining the truth; [and] . . . avoid wasting time . . . "); Rumel, *supra* note 35, at 237 ("Trial judges . . . have increasingly placed time limits on the evidentiary portion of civil trials.").

time restriction as unreasonable, it is our experience that the parties almost always fail to use every minute allotted to them.[41] In contrast, where the court refuses to set hard time limits, but instead leaves open the possibility that the trial may last longer than the amount of time allotted, the lawyers usually end up exceeding the amount of time allotted.[42]

As far as what is a reasonable time limit for a trial of moderate complexity, we believe between fifteen and twenty hours per side is a generous amount of time.[43] In the Eastern District of Texas, for example, long known as one of the most active patent venues in the country,[44] cases involving complex technology and billions of dollars in alleged damages are routinely tried in two weeks or less, and less complex patent trials are often concluded with five or six total days of trial time.[45] No matter the time restriction, we are not aware of any reports from jurors in any of the Eastern District venues that a trial was hurried.

Time limits can be tailored to fit the specific needs of any case. Certain nuances can be agreed to by counsel before presenting the proposal to the court. For example, based on our experience, some judges include "all" the trial time in time limits, including

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41. Rumel, *supra* note 35, at 253.

42. *See supra* note 33 and accompanying text (discussing the reasons for Judge Gilstrap's and Chief Judge Davis's approval of strict time limits for trial).

43. *See, e.g.*, Centocor Ortho Biotech, Inc. v. Abbott Labs., 662 F. Supp. 2d 584 (E.D. Tex. 2009) (five day patent infringement trial, involving only one patent and one defendant, and resulting in a jury verdict of $1.6 billion).

44. Li Zhu, *Taking off: Recent Changes to Venue Transfer of Patent Litigation in the Rocket Docket*, 11 MINN. J.L. SCI. & TECH. 901, 902 (2010) (noting that "[m]any consider the Eastern District of Texas . . . to be a 'rocket docket,' because it boasts one of the most active patent dockets in the country").

45. *See, e.g.*, Saffran v. Johnson & Johnson, 778 F. Supp. 2d 762 (E.D. Tex 2011) (five day patent infringement trial, involving only one patent and defendant, and resulting in a jury verdict of $482 million); Synqor, Inc. v. Artesyn Techs., Inc., No. 2:07-CV-497-TJW-CE, 2010 WL 3860154 (E.D. Tex. Sept. 28, 2010) (seven day patent infringement trial, involving numerous patents and defendants, and resulting in a jury verdict of over $95 million); Eolas Techs Inc. v. Adobe Sys. Inc., No. 6:09-CV-446, 2010 WL 2026627 (E.D. Tex. May 6, 2010) (patent jury trial with time limits, involving multiples patents and defendants, and resulting in a jury verdict for the defendants on invalidity); Centocor Ortho Biotech, Inc. v. Abbott Labs., 662 F. Supp. 2d 584 (E.D. Tex. 2009) (five day patent infringement trial, involving only one patent and one defendant, and resulting in a jury verdict of $1.6 billion). *See also supra* note 33 and accompanying text (noting the use of time limits by Judge Gilstrap and Chief Judge Davis, two judges in the Eastern District of Texas which handles highly complex, high-dollar cases regularly).

opening statements and closing arguments. We think that approach carries the practice too far. Judges rightly impose equal time limits on each side's opening and closing remarks, and we do not see a benefit to the notion of one side "saving" its extra time to use for an extended closing argument. If anything, a party should be discouraged from taking excessive time in closing, a point in the trial where most jurors already have all the information they need to make a decision.[46]

Another nuance is "docking" time from the time allocation of the losing party for the time spent hearing an objection about the admissibility of an exhibit or testimony. This practice is inadvisable for two reasons. First, it requires too much precise timekeeping from the court in deciding, after a ruling that takes a middle ground on admissibility, to whom to allot the time. Second, as we discuss below, by agreeing to a practice that decides nearly all of the exhibit admissibility issues before the trial starts, the need for objections during trial can be almost eliminated.[47]

Simply put, time limits can be applied to every jury trial with beneficial effects for the parties, the court, and the jury. For trial counsel skeptical of this statement, we offer our own experience in trying complex commercial cases of all kinds in timed trials of an absolute maximum of four weeks, and many in one to two weeks. The work involved with time limits comes before lead counsel ever rises to address the jury. During preparation, lead counsel must come to grips with what the important issues are in the case, understand how he or she can best present them, and embrace the realization that the jury is only going to be able to take in so much information effectively. Each of these steps in the preparation process will help prevent trial counsel from overburdening the attention span of the jury with witness after witness, deposition clip after deposition clip, and document after document, none of which advances the trial counsel's cause. A leading jury consultant once famously observed that eighty to ninety percent of jurors make up their minds at the conclusion of the opening statements by both sides

46. *See* DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 181–210 (2012) (discussing the "integrative multi-level theory of jury decision making" and highlighting the importance of the "opening statement" and "what is perceived or learned during the trial itself").

47. *See infra* Part III.F (discussing the role of trial agreements).

or shortly thereafter.[48] Although our experience does not fully comport with that broad assessment, most trial lawyers acknowledge that jurors develop strong opinions long before the last witness takes the stand, and rarely would a longer presentation truly improve one side's chances of winning.[49]

We have long believed that trial length does not favor either side in a trial and thus limits on trial time are outcome neutral. Although it is sometimes couched as "conventional wisdom" that a shorter trial favors the plaintiff, we have not seen that play out in our experience. Recent empirical research supports this view. In a review of every patent trial conducted between 2001 and the middle of 2011, the researchers observed no statistical difference between the trial length of a plaintiff win or a defendant win.[50] These results should not surprise a seasoned trial lawyer in patent cases or in any kind of case. A contrary result defies logic and common sense. Regardless of the burden of proof, both sides in a civil jury trial have a story to tell, a position to advance. It simply does not take less time to put on a persuasive plaintiff's case than a persuasive defendant's case. Defense counsels who insist that they need more time to prevail in front of a jury instead may need to spend more time out of court evaluating their case and developing a compelling story. The axiom of "the more you say, the less people remember"[51] is rarely more true than in a civil jury trial.

Nonetheless, not every judge will set time limits as a matter of routine, even though the practice would seem to be squarely in their interests as stewards of scarce judicial resources. Comments such as "I'd like this case done by next Friday," from the court do

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48. DONALD E. VINSON, JURY TRIAL: THE PSYCHOLOGY OF WINNING STRATEGY 171 (1986).

49. *See, e.g.*, Lisa Blue et al., *Psychological Profiling in Voir Dire: Simple Strategies Any Lawyer Can Use*, 31 THE ADVOCATE (TEXAS) 20, 21 (2005) ("[J]udgers are likely to have their mind made up early in the case and will be less likely to change their minds in deliberations."); Eliot G. Disner, *Some Thoughts About Closing Statements: Another Opening, Another Show*, PRACTICAL LITIGATOR, Jan. 2004, at 61 ("[T]here is substantial evidence that juries normally make up their minds long before closing argument.").

50. *See generally* Mark Lemley et al., *Rush to Judgment? Trial Length and Outcomes in Patent Cases* (Stanford Public Law, Working Paper No. 2217690, 2012) (Chief Judge Davis of the Eastern District of Texas has noted Lemley's research with approval in ordering strict time limits.).

51. *See* ROBERT BLACKEY, HISTORY: CORE ELEMENTS FOR TEACHING AND LEARNING 18 (mentioning that François Fénelon, a Catholic archbishop, coined this phrase three centuries ago).

not count as hard time limits. Those kind of precatory statements do not result in the full advantages inherent in hard time limits. Like the other practices we describe in this Article, trial counsel must assume the responsibility for coming to an agreement on a time limit and should present it to the court.

B. Juror Questions

The practice of jurors asking questions of witnesses is not a new development. In one of the celebrated trials of lawyer Abraham Lincoln in 1859 involving an alleged homicide, a juror asked a question of one of the state's witnesses. No objection was raised by either side.[52] Military tribunals have long followed the practice of allowing the fact finders, known as "members," to ask questions of witnesses.[53]

Today, the practice is mandated in civil trials in four states (Arizona, Colorado, Florida, and Indiana),[54] meaning the trial judge must permit jurors in civil cases to pose questions to the witnesses. It appears to be prohibited in several other states and left to the discretion of the trial court in the remaining states.[55] In other words,

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52. Stephen R. Kaufmann & Michael P. Murphy, *Juror Questions During Trial: An Idea Whose Time Has Come Again*, 99 ILL. BAR J. 294, 294 (2011).

53. MIL. R. EVID. 614(b) ("*Interrogation by the court-martial.* The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.").

54. Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 747 (2010) (citing Gregory E. Mize & Paula Hannaford-Agor, *Jury Trial Innovations Across America: How We Are Teaching and Learning from Each Other*, 1 J. CT. INNOVATION 189, 214 (2008)). *See also* Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That Is the Question"*, 78 CHI.-KENT L. REV. 1099, 1100 (2003) (stating that Arizona, Florida, and Indiana "explicitly allow jurors to submit written questions to witnesses" and that a Colorado Superior Court Committee had "recommended that jury questions be permitted in both civil and criminal cases").

55. *See* Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1929 (listing a few states that strictly forbid juror questions during trial). *See also* Mott, *supra* note 54, at 1100 (explaining that Mississippi courts "condemn" and "forbid" the practice of

juror questions are the exception, rather than the rule, in the vast majority of courtrooms.

In an age of instant feedback by inquiries via Google and Twitter, we believe that allowing jury questions can be critical to engaging jurors. We do not make this comment as a mere anecdote. An increasing number of jurors come from the generations known as "Gen X" and "Gen Y," both demographics accustomed to receiving information, and assessing it, in ways far different from so-called "baby boomers."[56]

Many of the Generation Xers grew up with a relatively strong familiarity with computers and the Internet. Members of Generation Y came of age with an even more sophisticated understanding of the Internet as a learning tool, including the power of search algorithms like Google to put answers to questions at their fingertips.[57] Their attention spans are less than that of their parents.[58] The notion of not providing the opportunity for jury trials to be conducted with questioning by jurors, when an increasing number of jurors will be in the Generation X and Y profile, strikes us as myopic in the extreme.

Unlike the trial time limits discussed above, jury questions have been the subject of rather extensive judicial analysis and scholarly commentary. The distinguished Judge Easterbrook, writing for the Seventh Circuit in 2009, approved the use of jury questions and concluded that the practice kept the jurors alert and

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jurors asking questions and that Texas, Georgia, and Minnesota bar the practice in criminal cases).

56. *See* Peter Reilly, *Understanding and Teaching Generation Y*, ENGLISH TEACHING FORUM, 2012, at 1, 3 (2012), *available at* http://americanenglish.state.gov/files/ae/resource_files/50_1_3_reilly.pdf (defining Generation Y as being born between 1981 and 1999 and learning in different ways than prior generations); M.J. Stephey, *Gen-X: The Ignored Generation*, TIME (Apr. 16, 2008), *available at* www.time.com/time/arts/article/0,8599,1731528,00.html ("Generation X—roughly defined as anyone born between 1965 and 1980 . . . [who] 'can't manage to read anything longer than an instant message[.]'").

57. K.C. Jones, *Generation 'Y' Loves Google, Telecommuting, Survey Finds*, INFORMATION WEEK (Nov. 30, 2007, 4:25 PM), http://www.informationweek.com/generation-y-loves-google-telecommuniting/204400436 (last visited Mar. 8, 2013) (reporting survey results that found Generation Y federal workers preferred accessing information with Google and rarely used print publications).

58. R. Rex Parris & James Wren, *Reach Jurors Across the Generations*, 44 TRIAL, Mar. 2008, at 19, 22.

focused on the issues in the case.[59] Texas civil courts have repeatedly approved the practice.[60]

Yet in our experience, juror questions are not routinely used in complex litigation. Various objections have been offered, none of which has significant merit.

One objection to the use of questions is the supposition that the jurors will become advocates, as opposed to neutral fact finders, or that the questions will cause the jurors to formulate positions early in the trial before all the evidence is introduced and the instructions are provided by the court. Empirical evidence does not validate this fear and, in any event, strikes us as a naïve view of social science.[61] Jurors, like any of us, constantly come to conclusions about facts in the case, regardless of whether they are permitted to ask questions. Empirical research has shown, for example, that jurors embrace a "story model" of decision making and "jurors bring preconceptions and knowledge of the world to their task, [and] they actively construct narratives or stories from trial evidence . . ." to "increase the story's internal consistency and convergence with their world knowledge."[62] In other words, jurors are likely to construct a story

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59. *See* SEC v. Koenig, 557 F.3d 736, 742 (7th Cir. 2009) (referring to the benefits of allowing juror questions, "such as keeping jurors alert and focused").

60. *See, e.g.*, Fazzino v. Guido, 836 S.W.2d 271, 276 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (citing United States v. Callahan, 588 F.2d 1078, 1085 (5th Cir.) (1979)) ("There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it."). *See also* Hudson v. Markum, 948 S.W.2d 1, 3 (Tex. App.—Dallas 1997, writ denied) ("We agree with the Houston court that allowing jurors in civil cases to submit questions does not constitute fundamental error.").

61. *See Koenig*, 557 F.3d at 742 (stating, in response to the concerns that "allowing jurors to ask questions will lead them to take positions too early in the trial," that several studies "were designed to find out whether these risks are realized so frequently that they overcome the benefits, such as keeping jurors alert and focused. Now that several studies have concluded that the benefits exceed the costs, there is no reason to disfavor the practice"); Diamond et al., *supra* note 55, at 1971 ("The questions reveal that, rather than assuming the role of advocates during the trial, jurors are instead intensely engaged in the task of problem-solving."). *See generally* Mott, *supra* note 54 (discussing the overarching benefits and consequences of allowing juror questions). *See also* Marder, *supra* note 54, at 739 (citing opinion of Chief Judge Holderman of the Northern District of Illinois—based on thirty years of experience—that "that jurors want to be fair and that they will keep an open mind in evaluating the evidence that is presented" (internal citation omitted)).

62. Paula L. Hannaford et al., *The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination*, 67 TENN. L. REV. 627, 630 (2001). *See*

to fit the evidence regardless of whether they are permitted to ask questions. They may well keep an "open mind," but that is a far cry from saying that they are not making decisions about the evidence and the witnesses as the case proceeds. Concerns about jurors failing to keep an open mind can be dealt with as they are in every trial—with repeated cautionary instructions from the court to withhold judgment until the deliberation process.

Other opponents of jury questions offer the related concern that juror questions will tend to favor the plaintiff, because they are the party putting on evidence first.[63] These opponents argue that since the plaintiff bears the burden of proving its case, questions asked early in the trial process may facilitate the plaintiff's proof.[64] We have not seen this concern materialize in practice. Moreover, if defense counsel is worried about the plaintiff's case being too intelligible or that the fragility of her defense could not survive the plaintiff's case-in-chief, that concern should counsel the lawyer towards settlement, not towards the prohibition of jury questions.

Other opponents claim that the practice must be prohibited because jurors may ask impermissible questions, or ones calling for inadmissible evidence.[65] Yet, in every trial, the attorneys themselves pose *some* impermissible questions, and the court intervenes appropriately upon objection. Consequently, this fear fails to justify abjuring the practice. This can be avoided by having the jurors put their questions in writing and having the court screen them before they are asked to the witnesses. A related concern posits that an unasked juror question will result in the juror blaming one party or the other.[66] We have no experiences that have supported this fear.

Finally, opponents object based on the premise that the use of juror questions materially adds to the length of the trial.[67] This concern is overblown. Although it does take up court time to consider juror questions after each witness, and the questions may

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also DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 26 (2012).

63. Hannaford, *supra* note 62, at 635–37.

64. *Id.*

65. *See* Marder, *supra* note 54, at 734 ("Judges also might be concerned about adding a procedure that can form the basis for an appeal. The judge could make a mistake in allowing a question that should not have been asked or in prohibiting a question that should have been asked.").

66. Diamond et al., *supra* note 55, at 1929–30.

67. Marder, *supra* note 54, at 733 ("One of the main concerns that judges have about juror questions is that they will lengthen the trial.").

well provoke additional questions from counsel, the additional time is minimal—perhaps thirty to forty-five minutes in a two-week trial.[68]

The use of juror questions in a trial has enormous benefits to the fact-finding process and the juror experience. Based on our experience, the use of these questions increases juror understanding of the issues in real time, and does so in a way familiar to an increasing number of jurors from younger generations. It encourages jurors to pay attention to the trial by investing them with the power to inquire about an issue that is important in their mind.[69] This is especially true in a trial lasting more than a few days. Finally, the substance of questions asked can provide important insight to the lawyers about how their case is perceived by the jury, and what issues demand more clarification or attention.

Last year, the Chief Judge of the Eastern District of Texas, Leonard Davis, permitted the jury to ask questions in a patent case involving an online tool for seat selection in an airline and event ticketing website.[70] He did not seek the parties' advice on the process in advance and notified the parties of the process the day the case began.[71]

Judge Davis employed a process for jury questions that can serve as a model for questions in any court. He utilized safeguards and procedures that have been widely discussed and approved.[72] They strike us as the best "rules" for jury questions in practice. In Judge Davis's procedure, he explained that jurors were allowed to ask questions of every witness after a witness's testimony had concluded, but before he or she left the stand.[73] All jurors were provided a blank sheet of paper to ask questions.[74] After each

68. *See id.* at 733–34 (citing a New Jersey pilot program that found "permitting jurors to ask questions added thirty minutes to the trial").

69. *See* Diamond et al., *supra* note 55, at 1929 (stating that "proponents of allowing juror questions suggest that the opportunity to submit questions will enhance juror comprehension and encourage deeper involvement by jurors so that they pay more attention to the proceedings").

70. *See* John Council, *Jurors Submit Questions for Witnesses in Patent Trial*, 28 TEX. LAWYER, no. 2, Apr. 9, 2012, at 25 (discussing the trial in CEATS, Inc. v. Continental Airlines, No. 6:10-cv-120-LED (E.D. Tex. 2012)).

71. *See id.*

72. *See* Marder, *supra* note 54, at 732–33.

73. One of the authors, Thomas Melsheimer, was lead counsel for most but not all of the defendants throughout the *CEATS* trial. He offers this analysis based on his personal experience.

74. *Id.*

witness concluded testifying, each juror would pass the sheet of paper to the bailiff, whether or not the paper contained a question.[75] The court screened the written questions at side bar with the attorneys present.[76] The court and counsel evaluated the questions to determine if the question was appropriate, and the court afforded both sides an opportunity to make objections.[77] If the court agreed a question should be asked, the court read the question and the witness would answer.[78] Counsel for both sides was then allowed follow-up questions directed to the issue raised by the question.[79]

This process was quick, efficient and allowed the trial to proceed without undue delay. The questions were sometimes mundane—for example, "How long did you work at company x?"—and sometimes insightful. A key issue in the case ended up being why a fifteen-year-old version of a software program had not been preserved by a third party. One juror posed this question to the very first witness with an ability to answer the question. Yet, neither counsel for the parties thought to ask it first. Judge Davis found the process so successful that he publicly stated that he would probably continue to use it in future trials.[80]

Juror questions were also successfully utilized in a minority stockholder oppression and breach of fiduciary duty case in state

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75. *Id.*

76. *Id.*

77. *Id.* Sometimes the objection will be that the question is not appropriate for the particular witness and that a later witness will address that specific issue. In other situations, the question may be overly adversarial or slanted. An objection to one particular question, for example, was sustained because the judge felt that it would "cause more confusion than it will help." The question was: "In your experience as a patent agent, the last three patents . . . were not applied for until December 5, 2008, or later. Were any of these patent inventors already in common practice prior to when the patent application was filed in December 5, 2008?" The judge sustained the objection after the objecting counsel suggested that it would be misleading and that it could open up several minutes of additional examination. CEATS, Inc. v. Continental Airlines, Inc., No. 6:10-cv-120-LED, Dkt. No. 1025 at 168:20–170 (E.D. Tex. 2012). A court is also free to modify a question as phrased to omit reference to inadmissible or inappropriate information.

78. *Id.*

79. *Id.*

80. Council, *supra* note 70. *See* Allison K. Bennett, *Eastern District of Texas Experiments with Jurors' Questions During Trial*, THEBATTLEBLAWG.COM (Mar. 22, 2012), http://thebattleblawg.com/2012/03/22/eastern-district-of-texas-experiments-with-jurors-questions-during-trial.

court in Dallas in 2009.[81] Instead of the judge initiating the procedure, both sides agreed and presented to the judge a proposal for the jurors to ask questions in a manner similar to the procedure used by Judge Davis in Tyler.[82] The presiding judge of the 192nd District Court, Judge Craig Smith, embraced the procedure, along with time limits for the overall trial.[83] Juror questions in the case were plentiful and allowed both sides the opportunity to adduce clarifying testimony from the witnesses.[84]

One issue that arose in the case involved a potential concern with the use of juror questions, but it was easily managed by the trial judge. Although the jurors asked questions anonymously, over time the identity of a particular juror who had a question for nearly every witness became clear and, as the trial wore on, the juror became increasingly adversarial with his questions, prefacing one with: "Answer the following question yes or no."[85] Judge Smith did not allow these types of questions to be asked.[86] The court always retains the power to refrain from asking a juror question, and the best practice is for the court to inform jurors of this possibility at the beginning of the trial. An instruction that informs the jurors that sometimes a question will not be asked, either because it is not allowed under the rules or because it will be addressed with another witness, is a simple way of ensuring that jurors do not become confused or frustrated if one of their questions is not posed.

A final issue of concern regarding juror questions is to what extent the questions can be referenced by trial counsel in closing argument. Judge Smith allowed full use and reference to questions by the jurors;[87] Judge Davis did not, and instructed counsel to refrain from any reference to juror questions.[88] Although we understand

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81. *See* Indus. Recovery Capital Holdings Co. v. Simmons, No. 08-02589 (192nd Judicial Dist. Court, Dallas Cnty., Tex.) (2009). Both authors, Stephen Susman and Thomas Melsheimer, were co-counsel in this case. Mr. Susman was lead counsel for two of the plaintiffs and Mr. Melsheimer was lead counsel for an additional plaintiff. They offer this analysis based on their personal experience.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* There were other examples of questions that were objectionable. For example, one juror asked whether there was an "investigation" of the defendant, suggesting that at least one juror thought that the defendant had done something wrong.

87. *Id.*

88. *See supra* note 73 and accompanying text.

Judge Davis's concern with giving too much attention to juror questions, we think it is sensible to allow counsel to reference them in an appropriate way, just like references to questions from counsel or from the court.

As one of the authors of this Article was trial counsel for a group of defendants in the above-described patent trial (the *CEATS* case), and since both authors served as co-counsel for the plaintiffs in the state court case, we can endorse firsthand the overall benefits of this procedure.[89] In both cases, juror questions had all the traditional benefits of the practice and no visible disadvantages. The trial was not extended in any material way, and both sides came in under the time limits prescribed by the court. Because the questions frequently reached the heart of the matters in dispute, they allowed counsel on both sides to tailor their presentations more effectively. For example, in both trials described in this Article, there was rarely an instance when a question by a juror did not lead to clarifying questions on redirect or additional inquiries on the subject with subsequent witnesses. Finally, the questions allowed counsel for both sides to assess—admittedly in an imperfect way—how the jury was reacting to the evidence, and it provided both sides at least some assurance in advising their clients on their prospects.[90] Why any trial lawyer would not want to know this type of information is beyond us. Lawyers (or their clients) pay thousands of dollars in an imperfect attempt to recreate the actual jurors' perspectives and views when they hire a "shadow jury" to give feedback on the day's events in the courtroom. We believe the more effective practice is to hear this information straight from the horse's mouth.

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89. We note that the *CEATS* case resulted in a defense verdict in a jurisdiction seen as plaintiff friendly, while the *N.L. Industries* case resulted in a plaintiff verdict that was among the largest in the country that year. *See* Brenda Sapino Jeffreys, *$178.7 Million Verdict Includes $5 Million in Punitives Against GC*, TEX PARTE BLOG (July 20, 2009, 8:07 PM), http://texaslawyer.typepad.com/texas_lawyer_blog/2009/07/1787-million-verdict-includes-5-million-in-punitives-against-gc.html. These two examples confirm our view that juror questions do not, as a matter of principle, advantage one side over another.

90. *Cf.* Sec. and Exch. Comm'n v. Koenig, 557 F.3d 736, 743 (7th Cir. 2009) ("Koenig's position seems to be that ignorance is bliss: if some jurors have reached a tentative conclusion in mid-trial, it is best not to know it. Why? . . . Lawyers should want to *know* when some jurors are tending the other side's way, so that they can make adjustments to their presentations in an effort to supply whatever proof the jurors think vital, but missing.") (emphasis in original).

C. *Interim Arguments*

As with the other practices described in this Article, the use of interim arguments—statements about the evidence offered by counsel throughout the trial—is not a new concept. Judge Robert Parker, a former district court judge in the Eastern District of Texas and justice on the United State Court of Appeals for the Fifth Circuit, wrote encouragingly about the practice in 1991.[91] While it surfaces in some courts, it is far from routine and in our experience, most cases do not utilize it.

Interim argument, in Judge Parker's words, "permits counsel to respectfully focus the jury's attention on the significance of developments of a trial as they occur."[92] More specifically:

> Interim argument allows counsel to point out to the jury why a witness is being called, to highlight which aspect of the case the witness will address, to tell the jury the significance of an answer to a question, to direct the jury's attention to a particular instruction or rule of law and connect it to testimony or exhibits, and to comment on strategy of opposing counsel.[93]

Interim argument has been deemed especially effective in long trials where the time between hearing a piece of evidence and reaching a verdict may be many weeks.[94] Our strong preference for hard time limits and shorter trials does not, however, make the practice of interim arguments any less desirable. In fact, in timed trials involving complex issues—like a patent or antitrust case—interim arguments can help the jury make sense of evidence and issues about which they are likely to be very unfamiliar.[95]

Properly used, interim argument can expedite a trial's progress. This is especially true when a party needs to address testimony on a particularly nuanced issue, such as inducement in a patent case, or market definition in an antitrust case. The use of an interim statement to preview testimony or summarize its importance allows the party adducing the testimony to focus on the important

91. Parker, *supra* note 24, at 553–54.
92. *Id.* at 553.
93. *Id.* at 554.
94. *Id.* at 553.
95. *Id.* at 558.

facts without much testimonial wind up or explanation. By doing so, the proponent of the evidence can streamline her presentation—a lengthy deposition clip can, in many instances, be reduced to a few key minutes when combined with an explanatory introduction or preview. Or a witness whose testimony is legally important to a particular element of proof—in a way that may not seem obvious to the jury—can be highlighted and explained.

There are no legal or procedural obstacles to this practice, as it falls within the court's broad discretion in how to conduct the trial.[96] It can be effectively employed by giving each side thirty minutes, broken down into no more than five-minute segments, to use throughout the trial as the counsel deem fit. Perhaps in a shorter trial of only a few days, a briefer amount of time can be allotted.[97]

D. Use of Preliminary Substantive Jury Instructions

At first consideration, the notion of preliminary jury instructions may seem out of place in this discussion. After all, it is commonplace in almost every court for the trial judge to give a set of instructions to the jury before the trial begins. These instructions include information on how the trial is to be conducted, the schedule, and perhaps even a brief overview of the arguments to be offered by each side.[98]

Such general instructions are not what we are advocating here. Rather, we endorse the use, at the beginning of the trial, of more substantive legal instructions about the issues that the jury will confront in the case. This approach has been endorsed by judges and

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96. *Id.* at 553.

97. The trial judge can place various restrictions on the use of interim argument. It can be permitted any time during the trial or it can be limited to the beginning or end of each trial day. There can be notice requirements, such that, if a party intends to use some portion of their interim argument allotment, they must provide some period of notice to the other side. The trial judge can also limit any single interim argument to a set period of time, such as three minutes. *See, e.g.*, Data Treasury Corp. v. Bank of Am. Corp. and Bank of Am., Nat'l Assoc., No. 2-05-cv-292 (E.D. Tex. 2010).

98. *See, e.g.*, *Fifth Circuit Pattern Jury Instructions–Civil* § 1.1 (2006), *available at* http://www.lb5.uscourts.gov/juryinstructions/fifth/2006civil.pdf (last visited Apr. 21, 2013) (giving preliminary pattern jury instructions that include admonitions for the jury as well as a brief schedule for the trial).

commentators,[99] but like the other improvements advanced in this Article, is infrequently used in most courts.

For example, Chief Judge James Holderman of the Northern District of Illinois wrote approvingly of the use of such preliminary instructions outside of the patent context in a 2009 law review article.[100] He noted specifically that preliminary instructions on the law helped "orient" the jurors in the case and allowed them to more easily make factual connections between the evidence and the issues in the trial.[101]

The practice is frequently used in the Eastern District of Texas in patent cases. Typically, the court in an Eastern District patent trial will play the Federal Judicial Center's so-called "patent video," a video summarizing the patent process and providing some background legal instructions on the law of infringement and invalidity.[102] The video is approximately seventeen minutes in length and lays out, in a neutral fashion, the common issues that arise in many patent trials.[103] This practice normally occurs prior to voir dire, and helps orient the entire panel to the import of the attorneys' questions during jury selection. Nonetheless, outside the Eastern District of Texas and the Northern District of Illinois, the practice of pre-instruction is not widespread.

Perhaps an unwise belief that jurors from older generations would be able to completely and intelligently sift through days of testimonial and documentary evidence, and only at the end of trial receive guidance on the importance of the evidence, or its relation to proof of a cause of action or defense, led to this practice. However, it strikes us as bordering on foolhardiness to expect a juror from Generation X or Y, accustomed to assembling and processing a vast

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99. *See* PRINCIPLES FOR JURIES AND JURY TRIALS, A.B.A., Principle 6 (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.authcheckdam.pdf (last visited Apr. 21, 2013) (stating that the court should give preliminary instructions to the jury that explain the issues of the case and relevant legal principles); Holderman, *supra* note 27, at 354–55.

100. Holderman, *supra* note 27, at 354–56.

101. *Id.* at 355.

102. John D. Gilleland, *The Debate Is on: Is the Federal Judicial Center's Patent Tutorial Video Too Pro-Plaintiff?*, TRIALGRAPHIX 2 (May 1, 2012), *available at* www.trialgraphix.com/SiteAssets/file/Articles/patent-tutorial-video-too-proplaintiff-john-gilleland.pdf (last visited Apr. 21, 2013).

103. AN INTRODUCTION TO THE PATENT SYSTEM (Federal Judicial Center 2002). *See also* Gilleland, *supra* note 102, at 2 (analyzing the video).

amount of data over a short period of time,[104] to take in all the evidence in a trial without substantive guidance on the law to govern their decision.

Based on our experience, some opponents object that only after the trial concludes do the parties and the court truly know the issues before the jury. While perhaps technically true, it is only a poor trial advocate indeed who begins the trial without a largely complete sense of the legal issues in the case. Certainly, if there are issues dependent on the admission of a particular piece of evidence, whether documentary or testimonial, it is wise to avoid pre-instruction on those precise issues. But that strikes us, and has struck judges that use the practice, to be a rare exception rather than the rule.[105] Having the court provide general instructions about the legal issues in a case is always sensible, and will not vary regardless of the actual evidence adduced.

E. Juror Discussion of Evidence Before the Conclusion of Trial

The principle that the jurors should not discuss any issue in the case before the evidence has been concluded and the jury finally instructed is well established.[106] Nonetheless, we believe that a serious discussion of improving civil jury trials must include a re-evaluation of this longstanding approach.

The argument for prohibiting juror discussion before the conclusion of the evidence is easy to understand. The jury is supposed to consider all the evidence, keep an open mind, and only come to a conclusion after all the evidence has been presented and in light of the legal instructions provided by the court.

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104. *See* Holderman, *supra* note 27, at 348–49 (explaining how the influence of and dependence on technology have contributed to the different ways of learning and absorbing information for Generations X and Y).

105. *Id.* at 355.

106. *See, e.g.*, Tex. R. Civ. P. 226a (prescribing instructions to be given to the jury panel including the instruction to not discuss the case with anyone); *Step 3: Juror Conduct During the Trial*, Your Missouri Courts, *available at* http://www.courts.mo.gov/page.jsp?id=1014 (last visited June 12, 2013) ("During the trial, until you retire to consider your verdict, you must not discuss any subject connected with the trial among yourselves, or form or express any opinion about it . . . ."); *Jury Duty: A Handbook for Trial Jurors*, Trial Courts of the State of West Virginia, *available at* http://www.courtswv.gov/public-resources/jury/juryhdbk.htm (last visited June 12, 2013) ("During or before the trial, jurors should not talk about the case with each other . . . .").

But of course the notion that jurors remain passive recipients of information who store it for later consideration defies common sense. That is the description of a hard drive, not a human being. People learn in different ways, no doubt, but our experience as trial lawyers tells us that no one learns in the way presumed by the current practice of prohibiting jury discussion of the evidence during the trial. Indeed, every trial lawyer takes note at the end of the trial day of a particularly effective cross-examination or the admission of an important document. Why would we do so if, in fact, we didn't expect that at least some of the jurors drew the precise conclusions we hoped they would draw? In any event, it seems quite likely the current practice inhibits juror comprehension of the issues, especially in a trial lasting more than a few days.

Michigan lawmakers recognized the counterfactual characteristics of the traditional approach in adopting a rule in 2011 that allows jurors to discuss the evidence while the trial proceeds.[107] Under the Michigan practice, the court, as is customary everywhere, informs the jury that they are not to decide the case until after they hear all the evidence, legal instructions, and arguments of counsel.[108] However, the court may (but it is not required to) also instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during breaks in the trial so long as all the jurors are present and so long as those discussions are understood to be tentative and not final.[109]

Before Michigan adopted the new rules,[110] the courts conducted a pilot program for several years testing this approach

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107. *See* Timothy G. Hicks, *The Jury Reform Pilot Project—The Envelope, Please*, MICH. B. J. (June 2001), at 41, *available at* http://www.michbar.org/journal/pdf/pdf4article1864.pdf (last visited June 12, 2013) (discussing Michigan's innovation of allowing jury discussion of evidence before deliberations). *See also* MICH. CT. R. 2.513(K) ("In a civil case, after informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.").

108. MICH. CT. R. 2.513(K).

109. *Id.*

110. Michigan is not the only jurisdiction to adopt this practice. Arizona and Colorado both allow juror discussions of the evidence before deliberation. *See* ARIZ. R. CIV. P. 39(f) (allowing jurors to "discuss the evidence among themselves

along with other reforms, including some discussed in this Article.[111] The pilot program sought feedback on the rules from lawyers and the jurors themselves.[112] The feedback produced a startling finding. With respect to the new practice of allowing discussion of the case during the trial, over 90% of the participating jurors viewed the practice as increasing understanding of the issues and the fairness of the trial overall.[113] Only one in ten lawyers believed the new practice increased the fairness of the trial and barely two in ten believed that the process improved juror comprehension.[114]

That last point, the disparity between what jurors thought about their own comprehension and what lawyers believed about juror comprehension illustrates to us a common impediment to this kind of reform, as well as the other reform-minded practices we advocate in this Article. Lawyers and judges are used to conducting trials in a particular way, the way they learned how to do so or the way "it has always been done." This kind of inertia blocks sensible reforms, even when empirical evidence, such as that gathered in Michigan, demonstrates that real improvement can be had. We advocate here a fresh look at the conduct of civil jury trials and an embrace of procedures—some new, some not new but infrequently used, and some common practices that may not be universal. To achieve the reform we are seeking lawyers and judges are going to have to reevaluate previously held views and traditions. That jurors themselves find a particular approach almost unanimously helpful—like discussion of the evidence before deliberations—should cause

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in the jury room during recesses from trial when all are present" with additional limitations). *See also* David A. Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 MIL. L. REV. 92, 112 (2002) (discussing Colorado Supreme Court's approval of juror discussions prior to deliberations). Other jurisdictions have experimented with the practice. *See id.* at 107–10 (outlining the research conducted by California and D.C. in their evaluations of interim juror discussions). *See also* Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 4 (2003) (mentioning (1) the use of pilot programs by Maryland and Florida, (2) a judge in Massachusetts who allows interim jury discussion, and (3) a Delaware jury reform commission that considered interim juror discussion).

111. *See* Hicks, *supra* note 107. In addition to juror discussion, Michigan courts now allow for some of the practices that we have advocated for in this Article including preliminary instructions, interim commentary, reference documents, and juror questions. *See* Mich. C. R. 2.513 (A, D, E, I, K).

112. *Id.*

113. *Id.*

114. *Id.*

lawyers and judges to take notice that the civil jury trial not only can be improved, but must be.

What might be objectionable about interim juror discussion? It might be argued that it somehow creates "unfairness" for one side or the other. As with other practices we advocate in this Article, we do not see the logic of such a claim. Discussion of the evidence by the jurors should not advantage either side any more than the use of time limits, juror questions, interim argument, or preliminary jury instructions. If there are weaknesses in the plaintiff's presentation, for example, it seems to us those would be as easily identified by juror discussion as strengths in the presentation. As for defendants concerned that their evidence is presented later in the trial, we note that cross-examination is designed to bring out at least portions of the defense case and there is no reason to believe that defense-oriented evidence is any less likely to be discussed by jurors than plaintiff-oriented evidence. In short, we view an objection based on unfairness as illogical.[115]

F. Trial by Agreement

The final concept we discuss is not a single practice but an approach that we believe will improve every jury trial. This approach, first conceived by one of the authors, Stephen Susman, is one that embraces a process seemingly at odds with the adversary system—trial by agreement.[116]

In the Susman approach, the crux of conducting a trial by agreement is to enter into a series of agreements designed not to advantage either side, but instead to aid in an efficient and intelligent presentation of the case to the jury. There are other important benefits as well outside of the jury context, such as saving court resources by avoiding useless and time-consuming disputes, or reducing the expenditure of fees and costs by both sides.[117] Some of

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115. The benefits to juror comprehension of interim discussion of the evidence seem obvious to us. Equally obvious is the benefit such discussion would have on the use of juror questions. Jurors who have been able to discuss the evidence during the trial will be better informed to ask more intelligent and more relevant questions of the witnesses.

116. *See generally* Stephen D. Susman, *About Pretrial Agreements*, TRIAL BY AGREEMENT, http://trialbyagreement.com/about/about-pretrial-agreements (last visited Apr. 21, 2013) (advocating for the use of pretrial agreements).

117. *Id.* (advocating for the use of trial agreements and listing the different types of agreements).

the agreements concern pretrial matters where inefficiencies in litigation are most prevalent, such as limiting the length and number of depositions, setting clear provisions for electronic discovery, limiting expert depositions, and sharing a court reporter.[118]

Many of the proposed agreements focus directly on the conduct of the trial itself. These agreements do not simply save time and reduce the costs associated with unnecessary disputes; they also result in a trial process that produces more intelligent and informed results.[119] In that sense they are a substantive improvement to the jury trial.

This approach to trying a case can be seen as an exercise in improving lawyer civility. By reducing the issues in dispute to what is truly material and outcome determinative, attorneys eliminate fractious disputes that can disrupt the relationship between opposing counsel.[120] But that laudatory outcome is a side benefit to the trial by agreement approach, not a primary goal. The goal is an improved jury trial.

The standard list of proposed trial agreements includes the practices we have previously discussed—jury questions, trial time limits, and interim arguments. But the list includes a variety of other practices that will aid the jury trial process.[121]

One important practice concerns the treatment of exhibits. With competent trial counsel on both sides, there is no reason that agreements cannot be reached on all but a handful of exhibits. It should always be agreed, for example, that a document produced by either party is deemed authentic.[122] Further, in connection with the exchange of proposed trial exhibits, any exhibit not objected to should be deemed admissible.

We say "admissible" and not "deemed admitted" purposely. There are appellate risks inherent in simply "dumping" countless exhibits into evidence. This practice can provide a bloated and confused record on appeal. Consequently, the better practice is for counsel to offer the exhibits into evidence on at least a witness-by-witness basis to avoid an evidentiary "dump."

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118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

Counsel should also consider agreeing to the use and content of "juror notebooks."[123] Counsel can provide this resource to the jurors to aid their overall understanding of the case. These notebooks would not contain any argumentative material and would provide a glossary of anticipated terms used throughout the trial, a list of witnesses and other involved individuals, and a short chronology of the events that transpired.[124] Attorneys on both sides could consider including exhibits within the notebooks; however, this type of inclusion is likely to create some disagreement. Counsel could solve this problem by agreeing that each side can pick around five exhibits to include.[125]

Another important practice is the use of an agreed juror questionnaire. Given the limited attorney voir dire available in most federal courts, and the desire for state court judges who allow the practice to do so efficiently, an agreed questionnaire for each unique person to answer will streamline the process and make jury selection a more intelligent exercise.[126] An agreement is critical for this practice to be effective because few judges will have any interest in parsing each side's proposed questions and adjudicating the competing proposals.[127] Basic information that both sides can use should take precedence over questions designed by a psychologist or jury consultant to draw out some critical decision-making trait of a venire person based on what they are reading or whether they watch "reality television" or HBO.

The questionnaire must be brief enough so as not to burden the venire members in filling it out.[128] In some jurisdictions, it will be possible to mail the questionnaire to the venire in advance of the trial, and have it returned by mail so that it can be made available to

123. *Id.*

124. *Id.*

125. *Id.*

126. TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION STRATEGY & SCIENCE § 16.2 (3d ed. 2012) ("In smaller cases, juror questionnaires can be used to expedite the selection process, to weed out biased jurors without expending valuable court and attorney time. Similarly, in larger cases, questionnaires can be used to quickly reduce the potentially large number of potential jurors whose exposures and predispositions would interfere with their ability to render a fair verdict."). Additionally, Dr. Don Nichols, one of the country's leading jury consultants, who has consistently advised co-author Thomas Melsheimer over the last fifteen years, views a jury questionnaire as a bedrock element of intelligent jury selection.

127. Susman, *About Trial Agreements*, *supra* note 117.

128. *Id.*

both sides several days before jury selection.[129] In jurisdictions where this is not possible, and the form is filled out and delivered to counsel on the same day, brevity is critical to allow for a meaningful assessment of the information.

We note that the Texas Supreme Court recently adopted new rules for expedited actions.[130] These new rules establish quick trial settings, limited discovery, and hard time limits on trial.[131] However, they only apply to cases where the relief sought is under $100,000.[132] We praise the Texas Supreme Court for helping move the jury trial process in the right direction; however, as we have advocated throughout this Article, we strongly believe that the principles behind these new expedited trial rules should be applied universally and should not be limited to causes where relief is under $100,000. By limiting the application of the rules, larger cases will now potentially take longer to get tried and thus will be more expensive and quite possibly less likely to get tried at all. The relatively narrow reach of the new rules suggests to us that neither courts nor legislatures will likely adopt the changes that we have proposed in a broad way by law or by rule. It is therefore even more important for trial lawyers to push for agreements among each other and then to push judges to implement these agreements.

IV. CONCLUSION

Trial lawyers should be vocal supporters of the constitutional right to trial by jury in civil cases. They ought to be the "jury lobby." Unlike jurors, who experience the process infrequently and thus may lack the insight into how the system can be improved, or judges, who act as neutrals presiding over the process, and have

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129. *Id.*

130. *Final Approval of Rules for Dismissals and Expedited Actions*, SUPREME COURT OF TEXAS, Misc. Docket No. 13-9022 (Feb. 12, 2013), *available at* http://www.supreme.courts.state.tx.us/miscdocket/13/13902200.pdf (last visited June 12, 2013) (setting forth the expedited action rules that began taking effect on March 1, 2013).

131. *See, e.g.*, *id.* at R. 169 (granting each side "no more than eight hours hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments" and also stating that "[o]n motion and a showing of good cause by any party, the court may extend the time limit to no more than twelve hours per side").

132. *Id.*

significant responsibilities in addition to presiding over jury trials, trial lawyers ought to have a vested interest in making the jury trial function more intelligently. For reasons discussed in this Article, fewer lawyers have the kind of trial experience necessary to advocate sensible improvements. Others lack the passion we have for the jury system. But for those lawyers who do have the experience and passion, and the young lawyers who work with them, it strikes us that they are the ones who should support the practices we have outlined in this Article, and any others designed to make civil jury trials a continuing, intelligent, and efficient part of our democratic government.

Ethics Rules in Practice: An Analysis of Model Rule 5.6(b) and Its Impact on Finality in Mass Tort Settlements

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I. INTRODUCTION

As the late Richard Nagareda, a leading scholar in mass torts, explained: Settlement is the "endgame" of mass tort litigation.[1] But a settlement alone is insufficient; in the mass tort context, defendants require that their settlement include some sort of finality.[2] Defendants require finality in mass tort settlements because they want to ensure that they do not pay money to one set of claimants and their lawyers only to have those same lawyers use the money to finance the lawsuits of another set of claimants.[3] This Note

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* B.A., The University of California, San Diego, 2008; J.D., The University of Texas School of Law, 2013. I would like to thank Professor Lynn Baker for her insight as I prepared this Note, the entire staff of *The Review of Litigation* for their tireless efforts to make my work presentable, and my wife, Jessika, for her constant support.

1. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT ix (Univ. of Chi. Press 2007) ("As in traditional tort litigation, the endgame for a mass tort dispute is not trial but settlement.").

2. Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 979 (2010) [hereinafter Erichson, *All-or-Nothing Settlements*] ("A settlement that leaves significant exposure—or worse, that invites new claimants to join the fray by displaying easy money—holds little appeal.").

3. *Id.*

discusses one way that parties in mass tort litigation have attempted to achieve such finality, often in spite of ethical rules.

One way that parties can ensure this sort of finality is to enter into a "no-sue agreement." A no-sue agreement is an agreement made between plaintiffs' lawyers and defendants' lawyers, in which the plaintiffs' lawyers agree not to represent future claimants, or "not to sue the same defendant on behalf of a later client with a substantially related claim."[4] Unfortunately, such an agreement would be a direct violation of Model Rule of Professional Conduct 5.6(b).[5] However, parties in mass tort litigation have continuously found ways to achieve this valuable finality despite ethical rules. This Note is an analysis of the ways in which both plaintiff and defense lawyers attempt to subvert Model Rule 5.6(b). Additionally, by analyzing how courts treat such attempts, this Note will show that states should rethink their application of similar rules because lawyers' attempts to get around these ethical rules will lead to other, often more problematic, ethical considerations.

Part II of this Note discusses what finality in the mass tort context entails, why it is so important, and how it has traditionally been achieved. Part III is an analysis of Model Rule 5.6(b) and explains why a no-sue agreement would be a violation of the rule. Part IV introduces one way in which parties attempt to subvert the ethics rule: consultation agreements. Additionally, Part IV will discuss the ways in which courts have treated such agreements and will outline the policy concerns of consultation agreements as opposed to no-sue agreements. Part V discusses the practice of non-binding commitments as a way to pass Rule 5.6(b) scrutiny. Again, this section will analyze the treatment of these commitments by the courts and assess their policy implications. Finally, Part VI argues that because of the implications of Rule 5.6(b) in practice, specifically the ethical concerns that result from its subversion, states should reconsider their support for such a rule.

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4. Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 291, 292 (2005).

5. *See* MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2011) (prohibiting agreements made as part of a settlement that restrict the lawyer's right to practice law).

II. WHAT IS FINALITY AND HOW HAS IT TRADITIONALLY BEEN ACHIEVED?

The concept of finality—the knowledge that a significant portion of the defendant's liability has been capped—plays a significant role in the ultimate settlement of mass tort cases.[6] A mass tort is defined by "both the nature and number of claims; the claims must arise out of an identifiable event or product, affecting a very large number of people and causing a large number of lawsuits asserting personal injury or property damage to be filed."[7] Mass torts often involve significant financial liability[8] and are lasting concerns for defendants who fear the exposure of such liability and the expense of widespread litigation.[9]

When defendants settle, they want to be confident that they are settling as many claims as possible, especially the high-value claims.[10] Individual settlements are not preferred in mass tort cases because they are an inefficient way to deal with numerous claims and because they do not provide the defendants with a sufficient level of closure.[11] In fact, a defendant's underlying approach in discussing with the plaintiffs a possible settlement of a mass dispute will undoubtedly be: how do I get out of *all* of these cases, and how much will it cost me?[12] Ultimately, "[a] settlement that leaves

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6. *See* Erichson, *All-or-Nothing Settlements*, *supra* note 2, at 979 ("A settlement that leaves significant exposure—or worse, that invites new claimants to join the fray by displaying easy money—holds little appeal.").

7. DAVID HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.1 (2012).

8. *See, e.g.*, Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 267 (2011) [hereinafter Erichson, *Consent*] (discussing how Merck's expected liability in the Vioxx mass tort litigation may run as high as $25 billion).

9. *Id.* at 271.

10. *See* Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 99 (2011) ("When defendants decide to settle, they want finality. They thus want to sweep as many plaintiffs as possible under the settlement rug.").

11. Erichson, *Consent*, *supra* note 8, at 271 ("When defendants settle mass litigation, they prefer to settle wholesale. Not only do individual negotiations require greater resource expenditures, but piecemeal settlements simply do not provide sufficient peace to allow a defendant to put a dispute behind it.").

12. PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 14:17 (2009) ("Nothing is more natural than for the defendant in [a mass tort litigation] to want

significant exposure—or worse, that invites new claimants to join the fray by displaying easy money—holds little appeal."[13]

These sorts of comprehensive settlements are largely accepted and viewed in a positive light.[14] This is because settlements with finality add value and are attractive for all parties involved in the litigation.[15] Settlements with finality provide additional settlement value for claimants[16] and allow plaintiffs' lawyers to recoup high front-end costs and move on to other litigation.[17] Judges also find comprehensive settlements valuable because they want to clear their dockets of the many claims and achieve a positive resolution of the mass dispute.[18]

While finality is important to all parties for a variety of reasons, a comprehensive settlement with sufficient finality is of the utmost importance to defendants. After settling a mass tort dispute, defendants do not want to leave themselves open to future liability.[19] Mass tort settlements without finality involve a high degree of uncertainty for defendants, and defendants would prefer to control the uncertainty surrounding the value of their company when settling.[20] By controlling the uncertainty, a defendant can reassure investors of the strength of the company despite the litigation,

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to offer an attorney who represents a number of plaintiffs a lump sum which will settle all the cases.").

13. Erichson, *All-or-Nothing Settlements*, *supra* note 2, at 979.

14. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) (offering tips for judges on how to achieve global settlements, and stating that Multidistrict Litigation proceedings "afford a unique opportunity for the negotiation of a global settlement," and that transferee judges should "make the most of this opportunity").

15. *See* Erichson, *All-or-Nothing Settlements*, *supra* note 2, at 982 ("Defendants have good reason to seek peace, and inclusive settlements provide value for claimants as well as for defendants.").

16. Gillers & Painter, *supra* note 4, at 293 ("[T]he prospect of a no-sue promise may encourage defendants to make more generous or earlier settlement offers.").

17. Erichson, *Consent*, *supra* note 8, at 319.

18. *Id.* *See also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) (encouraging the use of multidistrict litigation to achieve the negotiation of a global settlement).

19. *See* Erichson, *All-or-Nothing Settlements*, *supra* note 2, at 979 ("A settlement that leaves significant exposure—or worse, that invites new claimants to join the fray by displaying easy money—holds little appeal.").

20. *See* Erichson, *Consent*, *supra* note 8, at 319 (listing reasons why closure is desirable in a settlement, including defendants' ability to "control uncertainty").

resulting in a resurgence of stock prices following the drop that often comes with a mass tort litigation.[21] Control of uncertainty and reassurance to investors are primarily achieved through a settlement with finality because the company can cap liability and indicate to the business world the ultimate amount of money that it will have to pay.[22] For example, in the Vioxx litigation, Merck originally had an expected liability of as high as $25 billion dollars.[23] After the settlement, Merck was able to reassure its investors that its ultimate liability would not be nearly as high as originally expected by capping its liability at just under $5 billion.[24] Of course, this is not an insignificant amount of money, but investors would undoubtedly be happy to see that the company's liability stopped at $5 billion, and not at some unspecified number up to $25 billion. Finally, a settlement with finality allows defendants to stop spending massive amounts of money on their defense litigation and allows them to move on with their business.[25] For all of these reasons, finality is crucial for any settlement agreement—plaintiffs (and their counsel) like it, judges approve of it, and defendants need it.

At this point, it is important to explain what finality or closure means. As described in this Note, there are two means by which parties can achieve finality. The first is to provide a settlement that resolves most of the currently filed cases (hereinafter "comprehensive finality").[26] These are comprehensive, inclusive

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21. *See id.* (listing reasons why closure is desirable in a settlement, including the ability for defendants to "reassure investors"). *See also* Georgene Vairo, *Mass Torts Bankruptcies: The Who, The Why and The How*, 78 AM. BANKR. L.J. 93, 93 (2004) (discussing how, in mass torts, "shareholder value may be diluted").

22. *See* NAGAREDA, *supra* note 1, at x ("For defendants, uncertain and potentially firm-threatening liability can cripple their ability to draw upon the capital markets to support their continued business operations.").

23. *See* Erichson, *Consent*, *supra* note 8, at 267 (stating that financial analysts initially predicted Merck's liability to possibly run as high as $25 billion).

24. *Id.* ("From Merck's perspective, settlement of under $5 billion seemed a reasonable price to pay . . . .").

25. *See id.* (discussing the Vioxx settlement and its success in the way that it "removed the distraction and expense of massive litigation and allowed the company to get back to business").

26. *See id.* at 275 (discussing the comprehensive style of closure by stating that "[o]btaining closure without Rule 23 or bankruptcy depends on two things: knowing who the claimants are and making sure the settlement binds them"). *See*

settlements that often require a settlement of a significant number of filed cases in order for the defendant to be held to the terms.[27] However, this Note focuses on the second type of finality. "Lawyer finality" settlements assure the defendants that the plaintiff lawyers they are negotiating with will not, post-settlement, bring a substantially related claim on behalf of a new client.[28] This type of finality is increasingly important to parties in mass torts because comprehensive finality is difficult to reach outside of the class action context, which is rare in modern mass torts.[29] Additionally, the implications for reaching a settlement that does not restrict the future practice of the plaintiffs' lawyer are a genuine threat to finality.[30]

Traditionally, the best way to achieve any sort of finality in the mass tort context was through class actions.[31] In many of those cases, the parties would reach a settlement on a class wide basis and then go to the court to seek both certification and approval of the settlement.[32] The benefit of the class action was that, aside from the opt-out option, defendants could achieve the desired level of comprehensive finality because the class action device required settlement for the *entire* class.[33]

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also id. at 267–68 ("[I]f too many claimants decide not to participate, the defendant faces substantial ongoing liability exposure and litigation expense.").

27. *See id.* at 279 (discussing the Vioxx settlement's inclusion of a "walkaway clause" that prefaced the settlement on the participation of 85% of the eligible claimants).

28. *See* Gillers, *supra* note 4, at 292–94 (discussing no-sue agreements, in which plaintiff lawyers agree not to sue the same defendant on behalf of a client with a substantially related claim).

29. *See* Erichson, *Consent*, *supra* note 8, at 274 (discussing how various Supreme Court decisions resulted in the decline of the use of the class action mechanism in mass torts).

30. *See, e.g.*, KIP PETROFF, BATTLING GOLIATH 87 (2011) (stating that Petroff, one of the main lawyers in Round 1 of the Fen-Phen mass-tort litigation, used his money from the first settlement to fund his cases in Round 2 of the Fen-Phen litigation).

31. *See* Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1996–97 (1999) (discussing the use of settlement class actions in mass torts beginning in the mid 1980s and the fact that they caught on extremely quickly).

32. *Id.* at 1996.

33. FED. R. CIV. P. 23(b)(2) (stating that judges determine whether the defendant has "acted or refused to act on grounds that apply generally to the class" such that the relief is appropriate for "the class as a whole").

However, the U.S. Supreme Court has significantly limited the ability for defendants to achieve finality through the use of class actions in mass torts. In *Amchem Products, Inc. v. Windsor*, the Court held that mass tort class action settlements must meet the requirements of the Federal Rules of Civil Procedure 23(a) and (b).[34] The *Amchem* Court had a problem with the number of conflicts of interest and individualized issues in the asbestos mass tort settlement and found that these issues could not meet the requirements of adequate representation and common issue predominance.[35] Fordham's Professor Howard Erichson states, "[b]ecause most mass tort personal-injury and wrongful-death claims present too many individual issues for class certification, the Court's holding in *Amchem* impedes parties' efforts to use Rule 23 to accomplish global peace in mass torts."[36]

The final blow to the use of class action settlement for mass torts came not through judicial imposition, but through the practical realities of what happens when parties attempt to fit into the narrow *Amchem* framework. In the Fen-Phen mass tort litigation, the parties attempted to achieve finality through class action settlement by structuring the negotiated settlement to withstand scrutiny under the *Amchem* framework.[37] Namely, the settlement did not place onerous requirements on who was allowed in the class, and allowed for opting out of the settlement.[38] Although the settlement and class received district court approval and was subsequently affirmed by the Third Circuit,[39] the success of the class settlement ended there. The number of claimants and the number of opt-outs far exceeded original expectations.[40] Rather than provide closure to the litigation,

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34. 521 U.S. 591, 621–22 (1997).

35. *Id.* at 622–23, 625–27.

36. Erichson, *Consent*, *supra* note 8, at 272.

37. *See id.* at 273 (discussing the negotiated settlement and the ways in which it attempted to assure fairness as a solution to the *Amchem* problem).

38. *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., Nos. 1203, 99-20593, 2000 WL 1222042, at *49 (E.D. Pa. Aug. 28, 2000) (describing ways in which the settlement has "structural protections" that distinguish it from the settlement in *Amchem*).

39. *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 282 F.3d 220, 242 (3d Cir. 2002); *In re Diet Drugs*, 2000 WL 1222042, at *69–72.

40. Erichson, *Consent*, *supra* note 8, at 274 ("The number of claimants far exceeded original expectations, as did the number of opt-outs.").

the settlement was merely the beginning of a long and expensive resolution process, and the settlement class action is considered by most to be a disaster for the defendants.[41] As described by Professor Erichson,

> *Amchem* imposed constraints that made it impossible for parties to settle mass torts on a classwide basis unless they bent over backward to ensure that all claimants were treated fairly in light of intraclass conflicts. Fen-phen showed that when a settlement class action provided sufficient assurances of fairness to garner post-*Amchem* approval, it exposed the defendant to the risk of being overwhelmed by class claims as well as by opt-outs pursuing individual claims.[42]

The Fen-Phen litigation is a good example of the dangers of a settlement that does not contain sufficient levels of finality. It demonstrates that finality is not merely a concept that exists simply because defendants *want* it; it shows that because of the serious repercussions that exist without it, defendants *need* it in their settlements.[43]

Because class action settlements are no longer a viable means of achieving finality in mass torts, parties are now seeking creative ways to achieve the level of finality that class actions once provided. One way is to continue to seek comprehensive settlements that settle all or most of the filed claims against the defendant.[44] Another way is to attempt to achieve lawyer finality—that is, to settle all existing cases and ensure that the plaintiffs' lawyers will not represent later clients with substantially related claims. By doing so, defendants

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41. *Id.*

42. *Id.*

43. *Cf.* Erichson, *Consent*, *supra* note 8, at 318–19 (discussing the "putative value of closure" and the "conflation of the desire for closure and the need for closure").

44. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 613 (E.D. La. 2008) (stating that attempts to achieve global peace similar to the settlement in the Vioxx litigation will become more common). However, these sorts of settlements are not without significant criticism. *See generally* Erichson, *Consent*, *supra* note 8 (criticizing the Vioxx settlement and its attempt to achieve closure at the expense of client consent).

can be sure that the plaintiffs' lawyers are not simply taking the money that they just received through the settlement, using that money to advertise to new clients, and bringing substantially related claims against the defendants.[45] Additionally, defendants prefer lawyer finality because they can be slightly more confident about the outcome in future substantially related claims knowing that some of the best lawyers capable of bringing these complicated and expensive mass tort claims are out of the picture.[46] Therefore, although unable to achieve comprehensive finality through class action settlements, the parties can assure finality by clearing out the existing claims and the lawyers that represent them. One way, in theory, to assure finality in the settlement is to have the plaintiffs' lawyers agree that they will not sue the defendant on behalf of another client with a substantially related claim.

III. NO-SUE PROMISES AND MODEL RULE 5.6(b)

The American Bar Association's Rules of Professional Conduct explicitly prohibit the kind of agreements that would produce the sort of finality created via no-sue agreements. Model Rule of Professional Conduct 5.6(b) (hereinafter "the Rule" or "Rule 5.6(b)") says that a lawyer shall not participate in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."[47] More explicitly, the official comment to Rule 5.6(b) says that the rule "prohibits a lawyer from agreeing not to represent other persons in connection

45. *See, e.g.*, PETROFF, *supra* note 30, at 87 (discussing his practice of using settlement money to fund future litigation against the defendants) ("After we settled my earlier Round One opt-outs, I took my share and put it all, plus some, into Round Two.").

46. *See, e.g.*, *id.* at 66–67, 87 (demonstrating the importance of settling out the best lawyers by stating that Petroff, one of the first lawyers to successfully try a Fen-Phen case and win millions of dollars, settled around 1,000 cases in Round One, but by the beginning of Round Two had nearly 20,000 Fen-Phen clients).

47. MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2011).

with settling a claim on behalf of a client."[48] Most states have adopted a similar rule.[49]

In 1993, the ABA issued an ethics opinion applying Rule 5.6 to mass torts.[50] The ethics opinion addressed, among other inquiries, whether a lawyer in a mass tort case could enter into a settlement agreement that would limit the work he could do for future clients.[51] The opinion recognized that the inquirer was making a "good faith attempt to settle enormously complicated litigation," but nevertheless concluded that "a lawyer may not offer, nor may opposing counsel accept, a settlement agreement which would obligate the latter to limit the representation of future claimants."[52]

In support of its conclusion forbidding any restriction on a lawyer's future availability on the subject of the underlying claims (even when that restriction is limited to future clients), the opinion cites several policy considerations. First, such an agreement might prevent the lawyer from representing future clients, even though the lawyer might be the very best available talent to represent these individuals.[53] Second, such agreements may provide clients with rewards that do not represent a relationship to the merits of their claim, as much as they are an attempt by the defendants to "buy off" plaintiffs' counsel.[54] Third, such agreements place the lawyer in a conflict between the interests of present clients and those of potential future clients.[55]

Because of the broad language of Rule 5.6(b) and an extensive construction of the rule in Opinion 371, there is an apparent scarcity of no-sue agreements.[56] However, because of the

48. MODEL RULES OF PROF'L CONDUCT R. 5.6(b) cmt. (2011).

49. *See Variations of the ABA Model Rules of Professional Conduct, Rule 5.6 Restrictions on Right to Practice*, A.B.A., CPR POLICY IMPLEMENTATION COMMITTEE, http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/5_6.authcheckdam.pdf (last visited Mar. 18, 2013) (documenting variations to Rule 5.6 among the states).

50. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 371 (1993).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *See* Gillers, *supra* note 4, at 293 (discussing reasons for the scarcity of no-sue agreements and concluding that it may be because of the fact that they are forbidden nearly everywhere, or because lawyers who enter them may have no intention of suing the adversary again and therefore the agreement is not tested).

importance of finality in mass tort cases, lawyers attempt to circumvent the rules by crafting the language of settlement agreements in such a way as to abide by the text of the rule, while ignoring its intent.[57]

IV. CONSULTATION AGREEMENTS AND MODEL RULE 5.6(b)

While Rule 5.6(b) clearly prohibits direct agreements to restrict practice, the application of the rule to indirect restrictions is not clear. Parties have attempted to flirt with the outer-bounds of the rule by abiding by its language but ignoring its intended effect. One way in which parties have attempted to get around Rule 5.6(b) is to enter into a side agreement with the adversary to serve as its legal counsel, or consultant, upon the resolution of the current matter, so that conflicts-of-interest rules will prevent the lawyer from handling claims against the adversary in the future.[58] In this sort of agreement, even though plaintiffs' counsel does not directly agree to forgo representation, this would be the agreement's indirect effect. While courts have been fairly consistent in their treatment of consultation agreements that occur as part of the settlement,[59] agreements made outside of the settlement agreement may not violate the ethical implications of Rule 5.6(b).[60] Additionally, although courts have been consistent about their treatment of consultation agreements made during a settlement,[61] parties continue to include them in their settlements.[62] We are then forced to ask whether these sorts of consultation agreements, made inside or

57. *See infra* Parts IV and V (discussing the use of consultation agreements and non-binding commitments to achieve finality outside of Rule 5.6(b)).

58. *See, e.g.*, Erichson, *All-or-Nothing Settlements*, *supra* note 2, at 999 (discussing a case in which the plaintiffs' firm, as part of the settlement, agreed to be retained as consultants for the defendant). Hereinafter such agreements are referred to as "consultation agreements" or "retainer agreements."

59. *See, e.g.*, Fla. Bar v. St. Louis, 967 So. 2d 108, 115 (Fla. 2007) (holding that a consultation agreement violated Rule 5.6(b)).

60. *See, e.g.*, *In re* Conduct of Brandt, 10 P.3d 906, 918 n.13 (Or. 2000) (stating that the timing of the agreement is significant).

61. *See St. Louis*, 967 So. 2d at 115 (holding that a consultation agreement violated Rule 5.6(b)); *In re Conduct of Brandt*, 10 P.3d at 918 (holding the same).

62. *See, e.g.*, Johnson v. Nextel Commc'n, Inc., 660 F.3d 131, 135 (2d Cir. 2011) (describing the consultation agreement negotiated as part of the settlement).

outside of settlement agreements, are better than allowing lawyers to make no-sue agreements.

A. Judicial Treatment of Consultation Agreements

One of the earliest cases dealing with lawyers who entered into a consultation agreement as an attempt to circumvent Rule 5.6(b) was *In re Conduct of Brandt.*[63] In *Brandt*, the Oregon Supreme Court held that an indirect restriction on a lawyer's right to practice law is prohibited by the ethics rules just as a direct restriction is.[64]

In *Brandt*, the Oregon State Bar sought disciplinary action against two lawyers for their involvement in a settlement that violated, among other rules, DR 2-108(B), Oregon's equivalent to Rule 5.6(b).[65] In the underlying case, the defendants represented forty-nine clients in their claims against a tool manufacturer and were also part of a larger group of lawyers and their clients who sought a global settlement with the manufacturer.[66] During the settlement negotiations, the manufacturer's lawyer expressed his desire that there be "no future litigation" against his company, and stated that the only way he could be sure of that was to retain the plaintiffs' lawyers to represent the manufacturer in the future.[67] Because the plaintiffs' lawyers consistently refused to discuss a settlement with such an agreement, resolution of the claims was at a significant impasse.[68] Ultimately, the parties agreed that the plaintiffs' lawyers would sign individual retainer agreements with the manufacturer, which would be held in escrow with a private

63. 10 P.3d 906 (Or. 2000).

64. *Id.* at 917. The defendants in *Brandt* were held to be in violation of Oregon Code of Professional Responsibility Disciplinary Rule 2-108(b), which is the functional equivalent of Model Rule 5.6. *See* Oregon Rule DR-2-108(B) (prohibiting, in connection with settlement, entering into an agreement that restricts a lawyer's right to practice law).

65. *In re Conduct of Brandt*, 10 P.3d at 909.

66. *Id.* at 910.

67. *Id.*

68. *See id.* at 911 (stating that the plaintiffs' lawyers walked out of the room when they found out that the manufacturer's lawyer insisted that there be a retainer agreement as part of the settlement); *id.* at 912 (stating that the plaintiffs' lawyers rejected the manufacturer's lawyer's attempt to find case law permitting retainer agreements in settlements and again insisted that they would not discuss retention until after settlement).

mediator until after the clients had executed the settlement agreements, all settlement amounts had been paid, and all pending actions had been dismissed.[69] The plaintiffs' lawyers sent letters to their clients informing them of their retainer agreement and advised them to seek separate counsel to determine if consent should be given.[70] Once all plaintiffs signed the settlement agreement, the retainer agreements were released from escrow.[71]

In *Brandt*, the Oregon Bar alleged that the accused knew that one of the reasons that the manufacturer offered to retain the plaintiffs' lawyers was to prevent them from representing similarly situated clients in the future and, therefore, the plaintiffs' lawyers agreed to a settlement which was conditioned on an agreement to restrict their practice.[72] Although the plaintiffs' lawyers conceded that the retention agreement was made in connection with the settlement, they argued that DR 2-108(B) addressed agreements that *directly* restrict a lawyers right to practice law, and that the agreement in the underlying case, via a retainer and conflict rules, was only an *indirect* restriction.[73]

The court was not persuaded by the defendant's distinction between direct and indirect restrictions.[74] It held that:

> DR 2-108(B) is undermined equally by direct and indirect agreements that restrict a lawyer's right to practice law. Accepting the accused's argument that indirect restrictions on the right to practice do not violate DR 2-108(B) would put this court's imprimatur on a method of drafting those agreements that would evade the purpose of the rule. We decline to do so.[75]

69. *Id.* at 913–15.
70. *Id.* at 914.
71. *Id.* at 915–16.
72. *Id.* at 917.
73. *Id.* at 917–18.
74. *Id.* at 918.
75. *Id.*

In this statement, the court essentially reiterated its acceptance of the rule on the restriction of a lawyer's right to practice and rejected a clever attempt to get around the rule.

Another case reiterating state courts' rejection of consultation agreements as a means to get around Rule 5.6(b) is *Florida Bar v. St. Louis*.[76] In that case, the Florida Supreme Court imposed significant penalties, including disbarment and disgorgement of fees, on an attorney for agreeing to be retained by the opposing party as a term of the settlement.[77] The facts of this case, and the punishment, are considerably worse than those in *Brandt* because here the defendant failed to disclose and actively hid the retainer agreement from his clients.[78]

In *St. Louis*, the defendant was a partner in a firm hired to represent twenty clients in their claims against DuPont Corporation alleging harm to the clients' crops caused by DuPont's Benlate fungicide.[79] At various points in the settlement negotiations, DuPont raised the prospect of St. Louis' firm not representing future Benlate plaintiffs against them.[80] Although initially rejecting the idea, St. Louis began to research the question of whether such an agreement was in violation of Florida's Rule 4-5.6(b).[81] In mediation, the parties agreed to a settlement, however DuPont insisted that the firm agree not to represent future clients in Benlate cases.[82] DuPont asserted that their policy was to secure engagement agreements.[83] In fact, the mediator even said that such agreements, in which the defendant retains the plaintiffs' lawyers, had been used before.[84] Ultimately, St. Louis agreed to DuPont's conditions and a settlement, which included a consultation agreement, was reached.[85]

In seeking to get client approval of the settlement, St. Louis did not disclose to his clients the engagement agreement, and gave

76. 967 So. 2d 108 (Fla. 2007).
77. *Id.* at 111.
78. *Id.* at 123.
79. *Id.* at 111.
80. *Id.* at 112.
81. *Id.* Rule 4-5.6(b) is Florida's equivalent of Model Rule of Professional Conduct 5.6(b).
82. *Id.* at 113.
83. *Id.*
84. *Id.*
85. *Id.*

only redacted copies of the settlement agreement to each client.[86] When clients complained to the Florida Bar, the Bar began an investigation.[87] In an appeal of the referee's findings, the Florida Supreme Court upheld the violation of Rule 4-5.6(b) and rejected St. Louis' argument that the rule is unconstitutional.[88]

As made clear by *Brandt* and *St. Louis*, and many practice manuals, consultation agreements made in connection with a settlement are not appropriate alternatives to no-sue agreements prohibited by Rule 5.6(b).[89] However, there is at least some precedent for a court to overlook the possible Rule 5.6(b) violation and uphold a consultation agreement's apparent purpose of barring plaintiffs' lawyers from bringing future substantially related cases.

In *Kaplan v. Emerson Radio Corporation*, the Eastern District of New York disqualified a plaintiff's lawyer who had been retained by the defendant as part of a prior settlement agreement when the lawyer brought another claim against the defendant.[90] In 1989 the plaintiff's lawyer threatened to bring a class action suit against the defendants.[91] As part of the settlement, the plaintiff's lawyer agreed to be retained by the defendant.[92] Upon completion of his retainer, the lawyer attempted to bring a similar action against the defendants.[93] Interestingly, the court did not analyze the conduct via Rule 5.6(b), but instead applied a straightforward conflicts analysis.[94] The court held that because the case that the plaintiff's lawyer attempted to bring was substantially related to the case that was previously settled and because the attorney had access to privileged information as part of his retainer, he was disqualified from bringing a case against the defendants.[95] The court's decision

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86. *Id.* at 114.

87. *Id.* at 115.

88. *Id.* at 121–22.

89. *See id.* (holding that a consultation agreement violated Rule 5.6(b)); *In re* Conduct of Brandt, 10 P.3d 906, 918 (Or. 2000) (same). *See also* ABA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT § 51:121 (2004) (same).

90. Kaplan v. Emerson Radio Corp., No. 90 CV 3166, 1991 WL 41846, at *1–2 (E.D.N.Y. Mar. 14, 1991).

91. *Id.* at *1.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

to conflict out the plaintiff's lawyer demonstrates by implication that the consultation agreement was upheld.

Because the court in *Kaplan* did not apply Rule 5.6(b),[96] this is not strong precedent to support an argument that consultation agreements made as part of settlements do not violate the rule and therefore should not be used by parties attempting to seek finality. However, the Oregon Supreme Court in *Brandt* did hint at a way for parties to achieve the level of finality without violating the ethics rules.[97] In a footnote, the court in *Brandt* quoted from a legal treatise stating that

> the defendant could retain the plaintiff's lawyer, *after the settlement*, as consulting counsel on any claims arising out of the same transaction. By operation of the conflict of interest rules, that arrangement would preclude the lawyer from representing any new plaintiffs in such cases.[98]

The court then stated that the quoted text, specifically the emphasized portion, "makes clear that the circumstances under which a retainer agreement is entered into is a critical factor under DR 2-108(B)."[99] If timing is the only thing that separates a violation of the ethics rules, then the court's analysis demonstrates the tension between the ethics rules and its application in practice. The court rejected the lawyers' argument that the rule only prohibits *direct* restrictions on practice and that the retainer agreement is an *indirect* restriction by saying that such a reading would evade the purpose of the rule prohibiting restrictions on a lawyer's right to practice law.[100] And then, almost immediately after that statement, the court laid out a road map for lawyers to evade the rule in direct opposition to the purpose of the rule previously upheld.[101]

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96. *Id.*

97. *In re* Conduct of Brandt, 10 P.3d 906, 918 n.13 (Or. 2000) (quoting Geoffrey C. Hazard, Jr. & William Hodes, 2 *The Law of Lawyering* § 5.6:301 (Supp. 1997)).

98. *Id.* (emphasis in original).

99. *Id.*

100. *Id.* at 918.

101. *Id.* at 918 n.13.

B. Policy Implications of Consultation Agreements

Nevertheless, despite the apparent ease with which a party can potentially avoid Rule 5.6(b) problems by waiting until after the settlement to negotiate a retainer agreement, parties in mass tort cases seem to find more value in agreements that are made as part of the settlement of the claims.[102] As stated above, defendants in mass torts require finality in order to settle existing claims. A *possible* consultation agreement to be made *after* the negotiated settlement has been signed does not seem to hold the same level of assurance that the lawyers will not bring future claims. This may be why parties find value in consultation agreements as part of their settlement, as opposed to agreements signed *after* the settlement. And if this is the case, one has to ask if these agreements are better than the no-sue agreements prohibited by Rule 5.6(b).

Here, there are serious concerns with plaintiffs' lawyers negotiating deals for themselves, for future work and future gains, which are completely unrelated to their clients' claims. The concern demonstrates itself in these consultation agreements because the plaintiffs' lawyer switches from an adversary of the defendant seeking a mutually beneficial result for himself and his clients, to a legal professional negotiating advantageous terms for his own future employment with the defendant, instead of vigorously negotiating his clients' claims. The concern is that once you have two parties who are negotiating deals amongst themselves and for themselves, any benefit the clients derive from the agreement is secondary to the benefit of the negotiating parties. Of course, a consultation agreement facilitating an ultimate settlement benefits the client in that the client now has some compensation for its claim.[103] However, assuming that defendants were willing to pay an additional sum of money to ensure finality, a "finality premium," the problem with consultation agreements is that the finality premium is paid out to the lawyers alone, as opposed to being shared amongst the clients.

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102. *See, e.g.*, Johnson v. Nextel Commc'n, 07-cv-8473, 2009 WL 928131, at *1 (S.D.N.Y. Mar. 31, 2009) (stating that the parties in the litigation agreed to a consultation agreement as part of the settlement).

103. Erichson, *All-or-Nothing Settlements*, *supra* note 2, at 980 ("Academics describe global settlement as a value-generating enterprise and the natural endgame of mass litigation.").

So, while Ethics Opinion 371 cites the potential "buying off" of plaintiffs' counsel and the reward that it provides to clients that do not represent the merits of their claim as a policy reason against no-sue agreements,[104] the consultation agreements are allowing that premium and, arguably worse, ensuring that it *only* benefits the lawyers. When the benefit the client derives is secondary to some benefit that their lawyer derives,[105] consultation agreements may be no better than a simple no-sue agreement.

Johnson v. Nextel Communications, Inc. demonstrates the real policy concerns that result from parties attempting to get around Rule 5.6(b).[106] The plaintiffs' lawyers represented 587 individuals in their employment discrimination suit against Nextel.[107] The lawyers met with the defendants and the two parties negotiated a Dispute Resolution and Settlement Agreement (hereinafter "DRSA").[108] Per the DRSA, the plaintiffs' attorneys would receive money from the defendants (1) for persuading their clients to enter an Alternative Dispute Process, (2) upon ultimate settlement of the claims, and (3) for agreeing to consult for the defendant upon conclusion of the case.[109] For their largely undefined consultation assignment, the plaintiffs' law firm was to receive $2 million over two years.[110] In reversing the district court's grant of the defendant's motion to dismiss, the Second Circuit found the plaintiffs' lawyers breached their fiduciary duties and stated that, "the DRSA was an employment contract between Nextel and [the plaintiffs' lawyers] designed to achieve an en masse processing and resolution of claims

104. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 371 (1993).

105. Examples of such benefits include future work and future income for the firm.

106. 660 F.3d 131 (2d Cir. 2011).

107. *Id.* at 135.

108. *Id.*

109. *Id.* at 135–36.

110. Johnson, v. Nextel Commc'n, Inc., 07-cv-8473, 2009 WL 928131, at *2. (S.D.N.Y. Mar. 31, 2009). The agreement simply said that "immediately upon completion of the processing and resolution of all claims presented by claimants . . . [plaintiffs' lawyers] shall be available to be retained and Nextel will retain [plaintiffs' lawyers], for a period of two years thereafter, as a legal consultant . . . Nextel will pay [plaintiffs' lawyers] a consultancy fee of . . . [$2 million] for such services." *Id.*

that [the plaintiffs' lawyers were] obligated to pursue individually on behalf of each of its clients."[111]

Demonstrating the incentives consultation agreements create for plaintiffs' lawyers to encourage their clients to settle, the *Johnson* parties amended the DRSA when fourteen claimants refused to agree to its terms, stating that the amount that the plaintiffs' lawyers were to be paid for their consultancy was discounted to account for any litigation of the fourteen non-participating claimants.[112] This speaks to the core of what can go wrong when we have parties negotiating deals for themselves—collusion. Concern for this sort of collusion between the parties exists because the defendants need finality, and they may attempt to bribe the plaintiffs' lawyers into providing them with it by creating these sorts of advantageous relationships. The plaintiffs' lawyers struck a deal with the defendants in which the plaintiffs' firm stood to gain millions of dollars and future work, all on the condition that they persuade their clients to participate in the settlement. Rather than having a simple agreement that the plaintiffs' lawyers will not bring future substantially related claims against the defendant, the agreement at issue aligns the interests of the plaintiffs' lawyers with those of the defendants rather than with those of their current clients.

Of course it cannot be said with certainty that the plaintiffs' lawyers would not have received money had they entered a no-sue agreement instead of a consultation agreement. However, the consultation agreement undoubtedly served the same purpose as a no-sue agreement.[113] The encouragement of settlements, accomplished by providing a stipend for entrance into the alternative dispute process and a stipend for the ultimate settlement, was an attempt at the comprehensive finality, just like a no-sue agreement.[114]

One could argue that these types of cases implement Rule 5.6(b) and demonstrate why we have ethics rules and fiduciary duties

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111. *Johnson*, 660 F.3d at 141.

112. *Id.* at 136–37.

113. *See supra* note 58 and accompanying text (discussing consultation agreements).

114. *See* Erichson, *Consent*, *supra* note 8, at 274 (discussing how various Supreme Court decisions resulted in the decline of the use of the class action mechanism in mass torts).

to police these activities. However, these cases also highlight that parties in a dispute need finality and are continuing to find ways to achieve it.[115] Because of Rule 5.6(b), parties are attempting to achieve finality with consultation agreements. Forcing secretive agreements between plaintiffs' and defendants' lawyers to achieve this finality cannot possibly be effectively policed. For every case like *Johnson* that is litigated, many more may go unpunished. For example, in *St. Louis*, the defendant DuPont, a major corporation, said that it was their *policy* to negotiate consultation agreements to ensure finality.[116] Furthermore, the mediator, who undoubtedly sees numerous negotiations between plaintiffs and defendants, told the plaintiffs' lawyers that the consultation agreement negotiated was "common."[117]

This, of course, does not mean that every negotiated consultation agreement negatively affects the client. Nevertheless, the concern is that the ones that negatively affect clients involve significant money for the plaintiffs' lawyers and real harm to the plaintiffs whom that lawyer currently represents. In practice, examples like *St. Louis* or *Johnson* are most likely not anomalies. And if possible harm to clients could be easily mitigated by a rule that allows less complicated no-sue agreements, then we have to ask if the current prohibition is justified or whether it has costs that exceed the benefits.

V. NON-BINDING COMMITMENTS AND RULE 5.6(b)

Another way that parties have evaded Rule 5.6(b) in order to achieve finality is through non-binding agreements. These agreements allow plaintiffs' lawyers to agree not to bring future claims against the defendant, but to do so in a way that is not binding, and therefore, not a true agreement restricting the practice of law.[118] These are especially interesting because they seem to pass judicial scrutiny because of the fact that they are not true

115. *See supra* Part II (discussing why parties in mass tort want finality).

116. Fla. Bar v. St. Louis, 967 So. 2d 108, 113 (Fla. 2007).

117. *Id.*

118. *See, e.g.*, DeSantis v. Snap-On Tools Co., No. 06-cv-2231, 2006 WL 3068584, at *12 (D.N.J. Oct. 27, 2006) (holding that a "no present intention" clause was not a restriction on the right to practice law).

agreements.[119] However, it forces one to ask, if these are not true agreements, why are parties even drafting them? Additionally, if they are used in practice to operate as functional equivalents of no-sue agreements, why not just lift the rule and allow straightforward binding agreements?

A. Judicial Treatment of Non-Binding Commitments

As a reminder, Rule 5.6(b) states that a lawyer shall not participate in offering or making "an *agreement* in which a restriction on the lawyer's right to practice law is part of the settlement of a client controversy."[120] Because the rule prohibits the creation of an agreement, parties have attempted to avoid the rule by creating non-binding commitments that are not legally enforceable agreements. One successful attempt is the settlement of the Vioxx mass tort litigation.

In the Vioxx settlement agreement, the settling plaintiffs' counsel affirmed that, "nothing in [the] agreement [was] intended to operate as a 'restriction' on the right of any Claimant's counsel to practice law within the meaning of the equivalent to [Rule 5.6(b)],"[121] and that actions taken by the lawyers were to be done "to the extent permitted by the equivalents of [Rules 1.16 and 5.6] . . . ."[122] This seems to imply that, were a court to read any part of the provisions as a violation of Rule 5.6(b), that provision could be thrown out of the settlement agreement and could therefore not bind the parties. For example, part of the agreement states that the plaintiffs' attorneys affirm that they will recommend to 100% of their clients that they enroll in the settlement, and that the lawyers will attempt to disengage and withdraw as counsel of any claimant who disregards the recommendation.[123] While agreeing to attempt to withdraw from the representation of any client who refuses a settlement offer certainly sounds like a restriction on the lawyer's

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119. *See id.* (holding that a "no present intention" clause was not a restriction on the right to practice law).

120. MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2011) (emphasis added).

121. Vioxx Settlement Agreement § 1.2.8, *available at* http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf.

122. *Id.* § 1.2.8.2.

123. *Id.* §§ 1.2.8, 1.2.8.2.

right to practice, the steps to withdraw are to be done "to the extent permitted" by Rule 5.6 and nothing is "*intended* to operate as a 'restriction' on the right of any Claimant's counsel to practice law . . . ." [124] While the Vioxx settlement has received some criticism from academic commentators, [125] it has not been successfully challenged in the courts.

Another way parties circumvent Rule 5.6(b) is to include language in the settlement that certainly *sounds* like a no-sue agreement, but is in fact a non-binding agreement that is outside the scope of Rule 5.6. The language most commonly used states that the plaintiffs' counsel has "no present intention" of representing any other clients with similar claims against the defendant.[126] In fact, the settlement agreement in *Johnson v. Nextel* included similar language, stating that the plaintiffs' lawyers did not represent, nor did they intend to represent, any other clients with employment claims against Nextel. [127] Neither the Second Circuit nor the district court mentioned the language, let alone found it to be an ethical violation.

Some courts and state ethics opinions have gone so far as to say that such non-binding agreements are not violations of Rule 5.6. In *DeSantis v. Snap-On Tools Company*, a class action settlement provided that class counsel had "no present intention of representing any persons who are not Class Members with respect to defendants." [128] One class member objected to the settlement agreement, arguing that the language improperly restricted the class counsel's practice of law and that the class counsel had been prevented from representing potential clients against the defendants.[129] In rejecting the class member's arguments, the court said,

> [t]his is not an agreement but merely an attempt by one negotiating party to achieve finality through the

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124. *Id.* § 1.2.8

125. *See, e.g.*, Erichson, *Consent*, *supra* note 8, at 279–92 (discussing various legal ethics concerns with the Vioxx settlement).

126. *See, e.g.*, DeSantis v. Snap-On Tools Co., No 06-cv-2231, 2006 WL 3068584, at *12 (D.N.J. Oct. 27, 2006).

127. *See* William Simon, *The Market for Bad Legal Advice*, 60 STAN. L. REV. 1555, 1581 (2008) ("LM&B asserts that it does not intend to represent any new clients with claims against Nextel.").

128. *DeSantis*, 2006 WL 3068584, at *12.

129. *Id.*

> settlement. The Settlement Agreement does not restrict Class Counsel's right to represent any future clients and therefore does not create any impermissible conflict of interest.[130]

By linking the "no present intention" clause and the concept of finality, the court seems to be implying that it understands the difficulty of achieving finality and is implicitly approving of this method of achieving it.

In addition to the court in *DeSantis*, at least one state ethics opinion has held that similar language is not a violation of Rule 5.6(b).[131] In 1993, the Colorado Bar Association issued Ethics Opinion 92, discussing practice restrictions in settlement agreements. Stating that not all settlement agreements regarding a lawyer's future representations are improper, the opinion says, "it is 'close, but permissible' for a lawyer defending a class action lawsuit to ask the plaintiffs' lawyer for settlement purposes to state that he or she has no present intention of filing suit against the defendant in similar cases."[132] Similar to the reasoning in *DeSantis*, the ethics opinion states that "[s]uch conditions do not materially restrict a lawyer's ability to practice law."[133]

B. Policy Implications of Non-Binding Agreements

The language of the court in *DeSantis*, and that of the Colorado Bar Association in Ethics Opinion 92, present an interesting inquiry into the purpose of these non-binding commitments in mass tort settlement agreements: If these types of commitments are non-binding, why even include them in the settlements at all? Legal bodies that have interpreted these non-binding commitments, specifically "no present intention" clauses, find significance in the fact that they are not true agreements, and therefore do not truly restrict the lawyer's practice of law.[134] If that

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130. *Id.*

131. Ethics Comm. of the Colo. Bar Assoc., Formal Op. 92 (1993).

132. *Id.*

133. *Id.*

134. *See, e.g.*, *DeSantis*, 2006 WL 3068584, at *12 (discussing the "no present intention" clause and stating "[t]his is not an agreement . . . ").

is the case, then how do these agreements successfully achieve the type of finality desired?

Nobody can truly know what the parties' intentions are for placing these non-binding commitments into settlement agreements, but the fact remains that they are quite common and both defendants' and plaintiffs' lawyers like them. One possible reason that this type of language is included is that it certainly *sounds* like a no-sue agreement, and therefore may function as a signal to Wall Street that there is sufficient finality in this settlement. As stated above, finality is important to the defendants because it can reassure investors that the worst of the litigation is behind the company.[135] However, in order for this to be the case, we have to make some assumptions as to how this non-binding language is understood in practice. We have to either assume that Wall Street puts some faith into the fact that the plaintiffs' lawyers will abide by these non-binding agreements, or we have to assume that these non-binding commitments are simply memorializing what everyone already knows—that is, by "no present intention," the plaintiffs' lawyers are really saying they do not want to bring similar claims against the defendant.

Given the discussion on consultation agreements above, we know that consultation agreements made *outside* the agreement may pass judicial scrutiny.[136] It may also be the case that "no present intention" clauses function as a sort of placeholder until the settlement is negotiated, at which point the parties can create a consultation agreement. This would give defendants the peace of mind during the settlement negotiations that the plaintiffs' lawyers are not going to take their settlement money and use it to finance future claims against the defendants, but also allows the defendants and the plaintiffs' lawyers to finalize that commitment outside of the settlement in order to comply with Rule 5.6(b).

As we have seen, being able to achieve finality facilitates settlement agreements—defendants are willing to pay for it, and plaintiffs' lawyers seeking a favorable settlement are willing to give

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135. *See* Erichson, *Consent*, *supra* note 8, at 319 (listing reasons that closure is desirable in a settlement, including the ability for defendants to "reassure investors"). *See also* Vairo, *supra* note 21, at 1 (discussing how, in mass torts, "shareholder value may be diluted").

136. *See In re* Conduct of Brandt, 10 P.3d 906, 918 n.13 (Or. 2000) (quoting Geoffrey C. Hazzard, Jr. & William Hodes, 2 *The Law of Lawyering* § 5.6:301 (Supp. 1997) (stating that the circumstances under which the retainer agreement is entered into are critical factors)).

it to them.[137] But beyond that, it is often the case that the decision to include terms that give defendants finality is not a difficult decision for the plaintiffs' lawyers because they, in fact, have no intention of bringing future claims.[138] There are significant front-end costs to mass tort litigation, and the lawyers may be looking to recover those costs, receive their fee from the settlement, and move on to other cases.[139] Additionally, it may be the case, as it often is, that the best claims are already included in the current batch of claims, and any future claims may have significantly less value. All affected parties, Wall Street included, likely understand that the non-binding commitments in these agreements are simply the best that the parties can do without violating the rules, and in effect memorialize the fact that everyone wants this litigation to end.

There are also policy concerns surrounding these non-binding commitments. Similar to the discussion of consultation agreements, we have to ask if these are better than the alternative—simple no-sue agreements. Non-binding commitments, however, actually function similarly to the alternative. The fact is that parties are using ethically problematic means of achieving finality because they are trying to get around the rule.[140] Some courts have even upheld these non-binding commitments, even though they function much like no-sue agreements. But once we concede that actions that *function* like a violation of the rule are permissible, the legitimacy of the rule is weakened greatly.

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137. Gillers, *supra* note 4, at 314 ("Because a no-sue promise can make settlement more attractive to the defendant, in some cases the defendant will be more likely to settle, and to settle for a larger amount or earlier, than without the no-sue agreement.").

138. *See* Erichson, *Consent*, *supra* note 8, at 319 (discussing plaintiffs' lawyers' desire for settlement so that they can recoup costs and move on to other litigation).

139. *Id.*

140. *See* Johnson v. Nextel Commc'n, Inc., 660 F.3d 131, 135 (2d. Cir. 2011) (describing the creation of the consultation agreement as a part of the settlement).

VI. CONCLUSION: FINALITY IN MASS TORTS AND THE ETHICS RULES

In *Free the Lawyers*, Professors Stephen Gillers and Richard Painter wrote a strong critique of Rule 5.6(b), mostly directed at refuting three common policy explanations for the rule.[141] In regard to the argument that future clients wishing to sue the same defendant will be unable to hire a skilled lawyer, Gillers and Painter make two points.[142] First, they say that this argument requires a series of untested and dubious assumptions, namely that there will be no market for skilled lawyers and, more importantly, that lawyers who sign no-sue agreements would even take new clients against the same defendant anyway.[143] Second, they argue that no lawyer has a duty to remain available to serve specific future clients.[144]

Another common argument that Gillers and Painter refute is that if qualified lawyers promise not to sue the same defendant, the costs of having new lawyers acquire the skills and information in order to successfully prosecute future claims will be borne by society as a whole.[145] Gillers and Painter argue that this explanation lacks empirical evidence to support the claim that Rule 5.6(b) raises deterrence by making the subsequent lawsuits more efficient.[146] Finally, in response to the argument that no-sue agreements create possible conflicts of interest between clients who want to settle and lawyers who do not want to restrict their future practice, Gillers and Painter argue that this is not, in fact, an ethical conflict at all because the lawyer has no obligation to restrict their practice.[147]

While Gillers and Painter's article is an effective critique of Rule 5.6(b) from a conceptual point of view, the goal of this Note is to add a more practice-oriented critique to the argument. In practice, parties do not give up on their attempts at finality simply because

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141. *See* Gillers, *supra* note 4, at 307–19 (discussing the three policy explanations to be generally, (1) future clients' access to lawyers; (2) public interest in skilled, experienced counsel; and (3) conflicts of interest between plaintiffs who want to settle and a lawyer who does not want to restrict his practice).

142. *Id.* at 308–11.

143. *Id.* at 308.

144. *Id.*

145. *Id.* at 311–12.

146. *Id.* at 314–15.

147. *Id.* at 315–16.

Rule 5.6(b) prohibits restrictions on the right to practice law. Parties creatively seek alternatives that achieve the same effects as no-sue agreements but avoid violations of the rules. And so long as parties are attempting to subvert the rule, it is imperative that we ask if these attempts are better than the sorts of agreements that would happen if Rule 5.6(b) were to allow agreements not to represent future clients in substantially related claims.

As demonstrated, the current subversions of the rule are arguably worse, in certain respects, than no-sue agreements while functioning to serve the same purpose as a no-sue agreement.[148] Consultation agreements raise serious concerns about the possibility that plaintiffs' lawyers are negotiating for themselves and aligning their interests with those of the defendants, rather than those of the clients. And as seen in *St. Louis* and *Johnson*, lawyers whose interests so align with defendants run the risk of harming their current clients monetarily. Additionally, non-binding commitments are simply the parties' ways of achieving a sufficient level of finality without violating the ethics rules. In practice, they function almost essentially the same as no-sue agreements. At bottom, parties in mass tort settlements are willing to go to great lengths to achieve finality because of its importance to the parties, and because of Rule 5.6(b), parties are being forced to achieve finality in a way that raises serious concern for mass tort plaintiffs.

This distinction between the Model Rules as written and their application to mass torts is precisely why it is important to always consider the reality of practice and the alternative to the rules. One significant reason for this is that Rule 5.6, or its earliest version of the rule, was adopted prior to the large increase in the frequency of mass tort cases.[149] And since the increased occurrence of mass torts, academics and practitioners are being forced to ask questions and create compromises for problems that the ethics rules were not originally designed to address.[150] Here, finality in mass torts

148. *Supra* Parts IV and V.

149. *See* Gillers, *supra* note 4, at 293 ("The frequency of [mass torts and class actions] has increased since adoption of the rule prohibiting no-sue agreements in 1970.").

150. *See* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 773 (1997) (arguing for the amendment of Rule 1.8(g) to permit litigants to waive its requirements in mass torts because while the doctrine that a lawyer must abide by a client's decision to

becomes an absolutely crucial factor in any settlement. This was most clearly demonstrated in the Fen-Phen litigation as an example of what happens when mass settlements do not include finality and plaintiffs' lawyers take their settlement money and use it to finance more claims against the defendants.[151] If every player in mass tort litigation wants finality and is going to find a way to achieve it, in this case achieved via a no-sue agreement, then we cannot proceed without questioning the ethics rule that prohibits him or her from doing so. This is because ethics rules do not apply in an academic vacuum but in the more nuanced and complex world of legal practice.

Applied here, the rules restrict a practice that would facilitate settlement, which is something that all parties in the litigation want. For obvious reasons, defendants require finality and are willing to pay for it. Additionally, the settling claimants are not troubled by no-sue agreements because if it adds value to their claim, then it is seen as something positive, and either way, it will not affect them because they will not be bringing a future claim.

No-sue agreements' impact on the plaintiffs' lawyers presents an interesting scenario. The lawyer may approve of the no-sue agreement because it is entirely possible that they had no intention of bringing any more claims anyway. That is most likely because the claims that they are settling are probably the best claims (as far as likelihood of victory and settlement value)[152] and any future claims will be harder to profit from, considering added expenses. Additionally, it is difficult to imagine a situation in which a plaintiffs' lawyer *did*, in fact, want to bring additional substantially related claims. That is because defendants require finality in settlements, and settlements, by their very nature, require defendants.

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settle makes sense in single-client representation, the rule makes less sense in joint undertakings like mass torts where collective action is necessary and the various clients are affected by each other's decisions).

151. PETROFF, *supra* note 30, at 87 (stating that, as one of the main lawyers in Round 1 of the Fen-Phen Litigation, he took his money from the first settlement and used it to fund his Round 2 of Fen-Phen litigation of nearly 20,000 clients).

152. This assumption is based on the way mass torts work in practice, including, for example, the use of bellwether trials as means to assess the likelihood of success. *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2349 (2008) (discussing bellwether trials and the fact that when attorneys are able to select their bellwether cases, they are careful to select those that have the most likelihood of success at trial—or their best cases).

As seen in *St. Louis* and *Brandt*, defendants are willing to hold up settlement negotiations until they can achieve finality.[153]

Therefore, if we know that parties will do all they can to achieve finality, then we have to ask how we prefer that they do so. With Rule 5.6(b) as is, parties are doing so in ways that raise serious concerns. While an amendment to Rule 5.6(b) allowing for no-sue agreements is not without its problems as well,[154] as is often the case with mass torts, it has to be analyzed in terms of alternatives and deciding which pill we are more willing to swallow.

It has been shown that Rule 5.6(b) does not serve the policy considerations that it attempts to address because, in practice, it has forced parties to attempt creative ways to achieve the functionally equivalent effect that the rule prohibits. With this reality in mind, and an understanding that the current creative subversions of the rule create actual policy concerns for clients, we cannot let the ethics rules facilitate a less ethical practice environment.

153. *See* Fla. Bar v. St. Louis, 967 So.2d 108, 113 (Fla. 2007) (discussing DuPont's insistence on a consultation agreement as a means to achieve finality); *In re* Conduct of Brandt, 10 P.3d 906, 911 (Or. 2000) (discussing the fact that the defendant insisted that there be no future litigation against them and wanted a consultation agreement to ensure that).

154 *See, e.g.*, Gillers, *supra* note 4, at 321–22 (discussing various concerns, including the possibility of diverging interests between a client who wants to settle and lawyer who refuses to restrict her practice).

The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue

Paul M. Janicke*

I. INTRODUCTION

The Judicial Panel on Multidistrict Litigation, a group of seven United States circuit and district judges chosen for extra duty by the Chief Justice, is the highest-level arbiter of venue where related civil actions are pending in more than one district. Its task is to seek both judicial efficiency and overall convenience for the various parties involved. Its recent decisions show a marked emphasis on the former.

The panel's role is often misunderstood. Some of the language in the panel's governing statute may, if read alone, convey the impression that when the panel transfers a case to another district, the transfer is made merely to manage discovery, after which the case will return to its original district where the more serious decisions will be made.[1] However, the reality is quite different.

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* HIPLA Professor of Law, University of Houston Law Center. I am indebted to Dwayne Mason and his colleagues at Greenberg Traurig for assistance in gathering case materials for this Article.

1. For example, the governing section, 28 U.S.C. § 1407, provides in part:

Once a transfer is ordered by the panel, a case very rarely comes back to its original district for trial. We shall discuss herein why that is so. The transferee judge has far more extensive powers than might be apparent at first blush. That judge is, de facto, the end of the road. This is especially seen in patent infringement litigation, where since the creation of the panel in 1968 we find, out of the many hundreds of panel-transferred patent cases, only one case that was later remanded and tried in the originating district.[2]

Patent venue has been a hot topic in recent years. Legislative proposals to restrict patent venue to districts where the defendant's activities were centered have been introduced and debated in Congress during the past six years,[3] but to no avail. With somewhat more success, the courts took up the patent venue issue in the form of mandamus proceedings to compel district judges to transfer cases out of patent-friendly districts to districts that had more defendant contacts. Some writs were granted, as will be further discussed in Part IV. During the time of these legislative and judicial events, but

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> Each action . . . transferred [by the panel] shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . . The judge . . . to whom such actions are assigned . . . may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

28 U.S.C. § 1407 (2006).

2. *See* Columbia Broadcasting Sys. Inc. v. Zenith Radio Corp., 391 F. Supp. 780 (N.D. Ill. 1975). The case had earlier been transferred to the District of Massachusetts for coordinated proceedings; it was later remanded (*see In re* CBS Color Tube Patent Litig., 329 F. Supp. 540 (J.P.M.L. 1971)) and tried in the Northern District of Illinois. As will be described later herein, two other patent cases have been ordered remanded, but both settled shortly after the order and were not tried.

3. *See, e.g.*, H.R. 1908, 110th Cong. § 11 (2007) (proposing restricting patent venue in most cases to districts where defendants are headquartered or had committed a substantial portion of the accused infringing acts). This would have eliminated or greatly reduced patent suits in several currently favored districts, such as the Eastern District of Texas and the District of New Jersey. The bill passed in the House of Representatives in 2007, but failed to proceed through the Senate.

seemingly quite apart from them, the Judicial Panel on Multidistrict Litigation quietly became an important authority in patent venue determinations. Its role is restricted to cases where the same patent is allegedly infringed, or is challenged as invalid, in actions pending in more than one district. Such situations have increased in number due to 2011 patent legislation limiting the joinder of non-cooperating accused infringers in a single action.[4] The mere fact that several unrelated entities were accused of infringing the same patent will not suffice for joining them in a single action. Suing them in multiple actions tends to spread the cases geographically, either because the plaintiff chose multiple districts in the first instance or because some of the actions were now more readily transferred on convenience grounds by the courts in which they were initially filed. As a result, the panel's patent business tripled in 2012 as compared with the average of the three prior years. In 2012, the panel decided the proper forum settings for eighty-eight patent cases.[5] While this is not a huge portion of the more than 5,000 patent infringement cases filed in 2012,[6] it is substantial and growing. We shall discuss how and why the panel's role has developed that way.

In recent years, much of the focus in the patent venue-restricting debates has centered on so-called "non-practicing entities," which have constituted an increasing proportion of patent-owner plaintiffs suing for infringement.[7] Definitions of non-

4. *See* 35 U.S.C. § 299 (2006) (enacted by the Leahy-Smith America Invents Act, Pub. L. No. 112-29, amended by Pub. L. No. 112-274 (2013)) (allowing parties to be joined only if there is a right to relief against parties arising out of the same transaction or series of transactions, and with questions of fact common to all defendants).

5. This was comprised of seventy-five cases in the 2012 rulings listed in Appendix hereto, plus thirteen more transferred in "tag-along" rulings, the procedure for which will be discussed in Part III.B. These are later cases filed after the commencement of a panel transfer proceeding, in districts other than a transferee district determined by the panel. The panel usually conditionally transfers such cases to the transferee district, unless meaningful objections are lodged.

6. *Public Access to Court Electronic Records*, PACER.GOV (search was conducted in Pacer's National Locator folder using the dates from January 1, 2012 to December 31, 2012) (last visited Jan. 11, 2013).

7. *See, e.g.*, Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*,

practicing entity vary from writer to writer, but for our purposes they are entities that produce no product, sell no product, and provide no services.[8] It annoyed product-vending companies to find themselves sued for infringement by what some call "patent trolls," who in the companies' view were simply money-grabbers, taking away profits from seriously productive companies who happened to find themselves arguably operating within the scope of one or two of the millions of extant United States patents. Patent infringement liability does not hinge on the accused infringer's awareness that the patent exists or that she is infringing it.[9] Infringement is a strict-liability wrong, and observers have noted that most infringers know nothing about the patent until it is asserted against them.[10] The defendants' frustration is understandable, even if sometimes misplaced. What we shall here address is not who is guilty, but rather the tug of war over *where* such infringement suits are brought, and the extent to which the parties or the Judicial Panel can change that location.

HASTINGS L.J. 297, 334 (2010) (employing a broad definition of non-practicing entity to find that twenty percent of patent suits filed in 2010 were considered to be non-practicing entities).

8. Other possible definitions would include entities that make or sell things but not in the field of technology relevant to the patent involved in a given suit, or entities that do operate in the field but not with products covered by the patent in suit. In these latter senses, many significant industrial companies would be classed as non-practicing entities. For simplicity of discussion, we will not categorize them that way here.

9. *See* Intel Corp. v. U.S. Int'l Trade Comm'n, 946 F.2d 821, 832 (Fed. Cir. 1991) (stating that there is no intent element for direct infringement); Applied Interact LLC v. Vt. Teddy Bear Co., No. 04 Civ. 8713 HB, 2005 U.S. Dist. LEXIS 19070, at *13 (S.D.N.Y. Sept. 6, 2005) ("It is well-settled that knowledge and intent are not elements of direct infringement; hence, direct infringement may be innocent."); CHISUM ON PATENTS §§ 11.02, 16.04 (stating that there is no knowledge or intent requirement for direct infringement).

10. *See, e.g.*, Herbert Hovenkamp, *Antitrust and the Movement of Technology*, 19 GEO. MASON L. REV. 1119, 1142 (2012) ("Patent infringement does not require copying or even subjective knowledge of another's technology, and only a miniscule number of patent infringement suits even find that copying occurred."); Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525, 1526 (2007) ("In the information technology industries, it sometimes seems as though the overwhelming majority of patent suits are not brought against people who copied a technology, but against those who developed it independently.").

Large, high-tech companies have in recent years complained that they were being dragged into "patent-friendly" districts where they either had to pay what they regarded as extortionate sums to acquire licenses under the patents involved, or go to trial and risk a verdict rendered by a patent-favorable jury. The wrath of big-company defendants was most often directed at the Eastern District of Texas, which between 1995 and 2005 rose from almost total obscurity in patent jurisprudence to one of the two most frequently chosen districts for patent-owner plaintiffs today.[11] Much of the district's transformation into a center for patent litigation was brought about by a change in the corporate venue statute in 1988,[12] enabling a patent suit against a corporation to be brought in any district where the defendant company had minimum contacts in the constitutional sense.[13] No longer was it required that the accused infringer have a regular place of business in the district. Plaintiffs in patent infringement suits flocked to Marshall, Tyler, and Texarkana, in the belief that juries in these locales would treat them well.

In the 1990s and early 2000s, compared with national averages, very few juries in those cities found patents invalid or not

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11. A Lexis CourtLink search indicates that in calendar year 1990 only one patent case was filed in the Eastern District of Texas. By 1999 it had risen to 14, nowhere near any of the top 25 filing districts at that time. However, by 2005, filings in the Eastern District had risen more than tenfold to 149, placing the district third in patent filings, after Central and Northern California. In 2012 Lexis CourtLink indicates 1265 patent filings in the Eastern District of Texas (a search on the government's PACER site shows 1266), the highest number of filings in the nation, with the District of Delaware second at 997. The third-highest number of patent filings in 2012 occurred, per CourtLink, in the Central District of California, at 517.

12. The patent venue statute, 28 U.S.C. § 1400, provides for patent venue where the defendant "resides." Section 1391(c) of 28 U.S.C. in turn provides that for venue purposes, a corporation resides wherever it has minimum contacts:

> (c) Residency. For all venue purposes—
> . . . (2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question . . . .

13. *See* discussion *infra* Part II (noting that the minimum contacts test for corporate venue is only a minor constraint on venue).

infringed. More importantly, summary judgment as a tool of judicial disposition was somewhat culturally foreign in the Eastern District, the judges being more prone to resolve cases by trials. Nationwide, summary judgment is the primary tool for resolution of contested patent cases by more than a two-to-one margin over trial-based resolutions.[14] These summary judgments were nearly always in favor of the accused infringer[15] because the accused infringer needed to prevail on only one of the three main issues—validity, enforceability, or infringement—to achieve a complete victory and win a dismissal of the case. Patentees, by contrast, had to win on all three, if contested, to obtain a final judgment. Getting such a triple summary judgment was not easy, and it almost never happened. Hence, with summary judgment serving as primarily a defendant's tool, the comparative dearth of summary judgment dispositions in the Eastern District of Texas was a major incentive for patent owners to sue there, and was a disadvantage for accused infringers, who would likely need to go to trial in order to win in that district. Patentees who can reach trial have a nationwide 75% chance of winning a jury verdict.[16]

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14. *See* Richard S. Gruner, *How High Is Too High?: Reflections on the Sources and Meaning of Claim Construction Reversal Rates at the Federal Circuit*, 43 LOY. L.A. L. REV. 981, 1030 (2010) (indicating that, for patent cases resolved in 2008, 8.7% were disposed by summary judgment, 2.8% by jury verdict, 0.05% by bench trial, and 0.19% by judgment as a matter of law following jury trial); Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 274 (2006) (indicating that for the year 2000, 7% of contested patent cases were disposed of by summary judgment, 2% by jury trial, and 1% by bench trial).

15. *See, e.g.*, *Decisions for 2005–2009*, PATSTATS.ORG: U.S. PATENT LITIGATION STATISTICS, http://patstats.org/2005-2009_composite.htm (last visited Mar. 10, 2013) (reporting that for topic 23, literal infringement, 317 summary judgments were for accused infringers, and 112 were for patent owners, and on infringement under the doctrine of equivalents, 182 summary judgments were for accused infringers versus 14 for patent owners).

16. *See Jury Patent Damages Verdicts*, PATSTATS.ORG: U.S. PATENT LITIGATION STATISTICS, http://patstats.org/patstats2.html (follow the "Jury Patent Damages Verdicts (1-1-05 to 11-30-12)" hyperlink) (last visited Mar. 10, 2013) (reporting, from 2007 through 2012, 263 verdicts for the patent owner and 90 for accused infringers). Some of these verdicts are later set aside on motions for

The large high-tech companies expressed their displeasure along two fronts. First, during the lengthy patent law reform efforts in Congress from 2005 to 2011, these companies urged explicit and heavy restrictions on patent venue. For example, in 2007 the House of Representatives passed HR 1908.[17] HR 1908 would have put severe restrictions on patent venue, allowing suits only in districts where the defendant is incorporated, has its principal place of business, or has an established facility where it has committed "a substantial portion of the acts of infringement."[18] The bill died in the Senate. What was eventually enacted in 2011 as the Leahy-Smith America Invents Act ("AIA")[19] contained no explicit venue provisions, but did restrict the joinder of non-cooperating defendants in a single action based solely on the fact that the same patent is involved.[20] This provision arose in the context of then-recent case law developments on convenience transfers, making such transfers somewhat easier to obtain, as will be discussed in more detail later. With Congress as the first front in the patent venue battle, that body of case law constituted the second front. We now address the involvement of the JPML.

Part II will discuss case-coordination mechanisms that do not involve the JPML. Part III will describe the statutory structure and rules governing the JPML. In Part IV we shall describe what has happened in the past four years to patent cases that have come before the panel, and how the panel's rulings have influenced patent venue nationally. Some general conclusions will be set out in Part V.

II. ALTERNATIVE INFORMAL COORDINATION MECHANISMS

District courts have long had at their disposal a considerable array of procedural tools for dealing efficiently, in some

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judgment as a matter of law or on appeal; but others are enlarged due to willful infringement and prejudgment interest.

17. H.R. 1908, 110th Cong. § 11 (2007).

18. *Id.*

19. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

20. *See id.* § 19(d) (codified as amended at 35 U.S.C. § 299 (2011)).

circumstances, with multiple cases that have common subject matter or issues. The first tool is for situations where multiple cases are pending in the same district. The solution here is simply for the clerk to assign them to the same judge.[21] Where the cases are pending in more than one district, it is often because an infringement suit has been filed by the patent owner in one district, and a declaratory judgment suit has been filed by the accused infringer in a different district, either before or after the infringement suit was filed. One or more convenience transfers can be arranged by the judges involved, either upon motion or sua sponte, placing all the cases in the same district.[22] The only constraint is that, absent consent, a case can be transferred only to a district in which it "might have been brought," usually a fairly minimal constraint given the minimum contacts test for corporate venue.[23] This informal process of coordinating cases, including patent infringement suits where the same patent is involved, has long been in use. Typically, unless there are overriding efficiency concerns, the first-filed district takes on the later-filed cases.[24] This tool works fairly well when the

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21. *See* MANUAL FOR COMPLEX LITIGATION § 20.11 (4th ed. 2004) (providing, in part: "All related civil cases pending in the same court should initially be assigned to a single judge to determine whether consolidation, or at least coordination of pretrial proceedings, is feasible and is likely to reduce conflicts and duplication").

22. *See id.* § 20.12 (quoting 28 U.S.C. § 1404(a), which provides: "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented").

23. *See supra* note 12 and accompanying text (discussing patent venue statutes).

24. For examples of the first-filed preference, see Serco Serv. Co. v. Kelley Co., 51 F.3d 1037, 1039 (Fed. Cir. 1995) (holding that absent overriding considerations, "[t]he first-filed action is preferred, even if it is declaratory"); Cianbro Corp. v. Curran LaVoie, Inc., 814 F.2d 7, 11 (1st Cir. 1987) (holding that the first-filed action is "generally preferred in a choice-of-venue decision"); Holley Performance Prods., Inc. v. Barry Grant, Inc., No. 04 C 5758, 2004 U.S. Dist. LEXIS 25892, at *14 (N.D. Ill. Dec. 20, 2004) (same); E.I. Dupont de Nemours & Co. v. Diamond Shamrock Corp., 522 F. Supp. 588, 592 (D. Del. 1981) (transferring first-filed suit for declaratory judgment against manufacturer to district of suit against customer for the reason, inter alia, that manufacturer would only be liable for contributory infringement, proof of which depended on showing direct infringement by customer use).

number of districts involved is only two or three. The procedure has the advantage of allowing, at the transferee judge's discretion, for a single judgment that will be binding on all parties as to the common issues (typically patent validity, enforceability, and scope), because all will have had their day in court.[25] Another option is to dismiss the declaratory action, especially if it is the later-filed one, since declaratory jurisdiction is always discretionary.[26]

Another informal device for coordinating patent cases to minimize wasteful duplication of judicial effort and parties' costs is for some of the judges to stay their cases while a lead case, usually the first-filed, goes forward to judgment, either a summary judgment or a trial-based resolution.[27] In such circumstances the stayed defendant would not be bound by the outcome in the lead case, although realistically it is unlikely that a different result on the common issues would occur. Moreover, due to the Supreme Court's ruling in *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*,[28] a judgment finding a claim of the patent invalid is preclusive against the patent owner in all subsequent cases. In other words, it is a kind of one-way street. If the claim is found valid, the absent defendant gets another bite at the apple when her case comes

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25. *See, e.g.*, United States *ex rel.* Heathcote Holdings Corp. v. Mabelline LLC, No. 10 C 2544, 2011 U.S. Dist. LEXIS 27128, at *22–24 (N.D. Ill. Mar. 15, 2011) (holding that related litigation should be transferred to a single forum for consolidation, where feasible); Emerson Elec. Co. v. Robertshaw Controls Co., No. 68 C 13462, 1968 U.S. Dist. LEXIS 9711, at *3–5 (E.D. Mo. June 7, 1968) (stating that it is desirable to have all interested parties bound by a single judicial determination to avoid duplicative judicial efforts).

26. *See, e.g.*, TT Techs. Inc. v. PIM Corp., 1993 U.S. Dist. LEXIS 6254, at *2 (N.D. Ill. May 11, 1993) (dismissing later filed declaratory action); Ropat Corp. v. Scovill Mfg. Co., 182 U.S.P.Q. (BNA) 594, 595 (N.D. Ill. 1974), *aff'd*, 506 F.2d 1404 (7th Cir. 1974) (dismissing rather than transferring declaratory action); Original Tractor Cab Co., Inc. v. Int'l Harvester Co., 179 U.S.P.Q. (BNA) 70 (N.D. Ind. 1973) (same).

27. *See, e.g.*, Amersham Int'l PLC v. Corning Glass Works, 618 F. Supp. 507 (E.D. Mich. 1985) (holding that a suit against a customer may be stayed pending resolution of another suit against the manufacturer); Huston v. FMC Corp., 190 U.S.P.Q. (BNA) 66 (N.D. Ill. 1975) (staying infringement claim against customer); Eutectic Corp. v. Metco, Inc., 346 F. Supp 845, 847 (E.D.N.Y. 1972) (staying later-filed declaratory action pending an earlier infringement suit's proceeding).

28. 402 U.S. 313 (1971).

to adjudication; if found invalid, the claim is dead as to everyone in the world. Accordingly, significant savings might be accomplished by a stay. On the other hand, courts today are rather conscious of their backlog statistics and may be reluctant to issue stays for that reason.[29]

Finally, district courts have sometimes grappled with the multiple-forum situation by using the tool of enjoining parties who are before them in one case from proceeding with cases pending in other courts.[30] While it accomplishes the purpose of judicial efficiency, this solution is somewhat awkward in that it leaves the enjoined case in a sort of procedural limbo. Perhaps for that reason, it is much less utilized than the convenience transfer solution.

Helpful as these informal coordinating tools are, they are somewhat impractical when three or more districts are involved. In such circumstances it may be difficult for the judges to agree on how to handle the whole set of cases. In addition, informal transfer rulings are subject to mandamus review by the courts of appeals sitting over the transferring courts, potentially complicating the questions and possibly leading to inconsistent results. A more generalized forum is needed to decide where the cases should be handled. This is the primary role of the Judicial Panel on Multidistrict Litigation.

III. STRUCTURE AND OPERATION OF THE JUDICIAL PANEL

A. Powers of the Panel

The Judicial Panel on Multidistrict Litigation, called simply "MDL" by many lawyers, has been around for some time now.

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29. Some judges who issue a stay will also administratively close the case, so that their workload output statistics are not negatively affected by a seemingly lingering case. The case can be reopened. *See, e.g.*, Chicago Mercantile Exch., Inc. v. Tech. Research Grp., LLC, 276 F.R.D. 237 (N.D. Ill. 2011) (dismissing the action without prejudice, but restoring it upon conclusion of reexamination proceedings in the Patent & Trademark Office).

30. *See, e.g.*, Kewanee Oil Co. v. M&T Chem., Inc., 315 F. Supp. 652, 656 (D. Del. 1970) (enjoining parties from proceeding with a later-filed case in a different district).

Congress created the panel in 1968 by enacting a provision in the Judicial Code with the objectives of achieving greater judicial efficiencies in administration of civil cases and reducing the costs of some of the more complex kinds of litigation, namely, situations where multiple cases involving common issues are pending in more than one federal district. Section 1407 of the Judicial Code addressed these problems by creating a panel of seven existing federal judges from district courts and courts of appeals who serve on the panel as an additional duty for a period of several years while remaining on their respective courts.[31] The members of the panel are

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31. 28 U.S.C. § 1407 (2006) provides in part: § 1407. Multidistrict litigation

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded. (emphasis added).
>
> (b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the

appointed by the Chief Justice, but the statute requires that no two of them be from the same circuit.[32] The panel hears requests from litigants to centralize all or some portion of the related cases in a single district and before a single district judge. If, after the hearing, the panel is of the view that centralized handling of a group of cases in a particular district and by a particular judge will aid efficiency, it confers with the prospective judge and orders transfer of those cases in the group that are not already pending in that district to be moved there and assigned to that named judge. The transferee district might even be one in which none of the cases is presently pending.[33] The statute specifies that the transfer is for "pretrial proceedings."[34] If a trial were needed, each case then theoretically would, absent consent to trial in the transferee district, need to go back to where it came from for trial. It is this theoretical possibility that has misled many lawyers into thinking that the transferee district will be for procedural matters only. However, while remands do occur occasionally, trial in the original district seldom happens in any type of case.[35] In patent litigation, for example, out of the many hundreds of patent cases transferred by the panel, as mentioned earlier we found only one report of any case having been remanded and then tried.[36] The reason: within the rubric of "pretrial proceedings," the

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> purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

32. 28 U.S.C. § 1407(d) (2006).

33. *See, e.g.*, *In re* Webvention LLC ('294) Patent Litig., 831 F. Supp. 2d 1366, 1367 (J.P.M.L. 2011) (transferring five pending actions, two in the Eastern District of Texas, and three in the District of Delaware, to the District of Maryland, noting that while the panel is "typically hesitant to centralize litigation in a district in which no constituent action is pending," it would do so here because of the large civil caseloads in the pending districts).

34. 28 U.S.C. § 1407(a) (2006).

35. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 21, § 20.132 ("Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court.").

36. The *CBS* case is the sole one to be remanded and tried, as discussed in Part I, *supra*. One other set of cases came close, but none of them were actually tried. The Judicial Panel ordered remand to the original districts in *In re* Molinaro/Catanzaro Patent Litig., 402 F. Supp. 1404, 1405 (J.P.M.L. 1975). The plaintiffs were able to reach the pretrial conference in one of the remanded cases,

transferee district is empowered to dismiss cases when grounds for dismissal appear, to issue consent judgments when agreed to by the parties, and, most importantly, to *issue summary judgments.*[37] And, of course, there is the matter of settlements. In patent litigation the settlement rate is around 88%.[38] Where the JPML has ordered the coordinated handling of cases in a transferee court, the transferee judge is in an excellent position to foster settlements. As the Manual for Complex Litigation aptly puts it:

> One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. *Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court.* As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.[39]

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but that case was then dismissed. *See* Molinaro v. Hart Elecs. Corp., 516 F. Supp. 19, 19–20 (M.D. Pa. 1981) (indicating a pretrial conference was held, after which the court granted summary judgment and no trial was to be held). Other remanded cases were dismissed on summary judgment. *See, e.g.*, Molinaro v. Fannon/Courier Corp., 745 F.2d 651 (Fed. Cir. 1984) (dismissing the district court on summary judgment).

37. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 21, § 20.132 ("Although the transferee judge has no jurisdiction to conduct a trial in cases transferred solely for pretrial proceedings, the judge may terminate actions by ruling on motions to dismiss, for summary judgment, or pursuant to settlement, and may enter consent decrees."). *See also In re* Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 367–68 (3d Cir. 1993) (holding that a MDL transferee court has authority to hear motions for summary judgment as part of pretrial proceedings); Humphreys v. Tann, 487 F.2d 666, 667–68 (6th Cir. 1973) (same).

38. *See* John R. Allison, Mark A. Lemley & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 697 (2011) (noting that software patent cases have a settlement rate of 89.5%, and other kinds of patent cases a rate of 86%); Mark A. Lemley, *The Limits of Claim Differentiation*, 22 BERKELEY TECH. L.J. 1389, 1390 n.2 (2007) (stating that patent case settlement rates are somewhere between 80 and 98%).

39. MANUAL FOR COMPLEX LITIGATION, *supra* note 21, § 20.132 (emphasis added).

Thus we see that a tribunal that seemingly is intended to bring about efficiencies in the discovery process actually has a major substantive role on the merits.

B. Overview of Panel Procedure

The procedures for action by the panel are set out in its rules.[40] In this discussion we draw examples from patent litigations, but it should be understood that the panel's rules are not case specific, and any kinds of civil actions would be handled in much the same way.

Where actions pending in more than one district involve common issues of fact, the potential exists for action by the panel to coordinate them before a single judge. The panel will do so only if it appears from the timing postures of the various cases, and the number and nature of common issues, that coordination will be helpful for convenience of the parties and for promoting "the just and efficient conduct of such actions."[41] The process normally starts with one or more parties to the actions lodging a motion with the panel to transfer some or all of the cases to a particular district, giving notice to the clerks of all the courts where the actions are pending[42] and to all counsel in those cases.[43]

The clerk of the panel then sets briefing and hearing dates for the panel to consider the views of all interested parties. The panel sits once every two months to hear all the cases that are then ready for hearing, at a location that moves to a different part of the country for each sitting.[44] Hearings are normally limited to only twenty

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40. *See generally* R.P. U.S. J.P.M.L. (establishing the procedural rules for panel action).

41. 28 U.S.C. § 1407(a) (2006).

42. *See* R.P. U.S. J.P.M.L. 6.2(9) (Rule 6.2., Motions to Transfer for Coordinated or Consolidated Pretrial Proceedings, provides that "[a] party to an action may initiate proceedings to transfer under Section 1407 by filing a motion in accordance with these Rules. A copy of the motion shall be filed in each district court where the motion affects a pending action.").

43. R.P. U.S. J.P.M.L. 4.1.

44. For example, the panel will sit in Orlando in January 2013, in San Diego in March, and in Orlando in May. *Hearing Information*, JUDICIAL PANEL ON

minutes *per matter*, with the parties dividing that time among those espousing different positions.[45] The positions may be for or against coordination, or the parties may be in harmony on the need for coordination but differ as to the best transferee district.

Shortly after the hearing, and generally in less than four months from the initial filing, the panel issues a written opinion that either denies the motion for coordination—finding that the asserted grounds for coordination are not likely to enhance justice or efficiency—or transfers some or all the cases to a single district before a named judge who has consented in advance to take on the chore.[46] The grounds used for deciding in favor of coordination are mainly: (1) the degree of commonality of issues in the various cases; and (2) the stage of the respective litigations.[47] If coordination looks attractive, the criteria for choosing a transferee district and judge mainly include: (1) present handling of some of the cases; (2) experience in managing patent litigation; and (3) docket condition (lighter-docketed judges are more likely to be assigned as transferee judges). The panel mentions these particular factors in most of its transfer opinions in patent cases. The decisions on their face have nothing to do with whether the transferee judges are regarded as pro- or anti-patent in attitude or judicial philosophy, although those factors undoubtedly do shape the arguments of the parties. Convenience of the transferee for parties and witnesses is sometimes a factor, but it appears to be a relatively minor one in most decisions.

Once ordered, the group of transferred cases is by no means static. More cases may be filed in various districts after a transfer

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MULTIDISTRICT LITIGATION, *available at* http://www.jpml.uscourts.gov/hearing-information (last visited Mar. 10, 2013).

45. R.P. U.S. J.P.M.L. 11.1(f).

46. *See* 28 U.S.C. § 1407(b) (2006) ("With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district."). In practice the panel contacts the desired judge first to obtain her consent, and then procures the formal consent of the chief judge of the district.

47. For example, if two cases are advanced, with discovery complete or nearly so, and the other cases are newly filed, coordination could be detrimental to efficiency of disposition, by slowing down the advanced cases while the others catch up. Moreover, the opportunities for common discovery are reduced in such situations.

order has been entered by the panel or while the issue is pending before the panel. The panel rules refer to the later cases as "tag-along" actions.[48] All counsel in transferred cases are under a duty to notify the panel of any potential tag-along cases in which they appear or in which their client is named a party.[49] If a transfer order is made in the case, the panel then usually issues a conditional transfer order moving the tag-along cases to the transferee judge as well. The tag-along order is conditional in the sense that the affected parties have a right to be heard on whether their cases are appropriate for such transfer. If they oppose transfer, they must file a motion to vacate the conditional order, and they will be heard at the panel's next session.[50] The usual ground of resistance is that the tag-along actions are much less developed than the transferred ones, and hence should stay where they are, at least for the time being, rather than impede the resolution of the earlier-filed actions.

The panel's transfer order is subject to mandamus review in the court of appeals that embraces the transferee district.[51] If transfer is denied by the panel, the statute forbids any appellate review.[52] Realistically, transfer rulings cannot be overridden by mandamus. While petitions for mandamus against the panel are not unheard of,[53] we have not been able to find any instance where such a writ was granted, in any type of case, since the panel's creation in 1968.[54]

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48. R.P. U.S. J.P.M.L. 7.1(a)

49. *Id.*

50. R.P. U.S. J.P.M.L. 7.1(c)–(f).

51. *See* 28 U.S.C. § 1407(e) (2006) ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code . . . . Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.").

52. *Id.*

53. *See, e.g.*, *In re* Progressive Games, Inc., 1998 U.S. App. LEXIS 34132 (Fed. Cir. 1998) (denying petition for mandamus against JPML); *In re* Regents of the Univ. of Cal., 964 F.2d 1128 (Fed. Cir. 1992) (same).

54. Indirectly, the panel was reversed by the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss*. 523 U.S. 26, 43 (1998). There, a party challenged the transferee district court's decision to transfer to itself for trial one of the cases previously transferred to it by the panel for pretrial proceedings. Such full

The transferee judge takes charge of all the transferred actions for all purposes other than trial. As mentioned above, this includes many powers beyond controlling discovery. Motions for rulings on substantive points of law, motions for partial or dispositive summary judgment, interpretations of legal documents such as contracts or patents, are just a few of those powers. These rulings are often case-dispositive, and the transferee judge enters a final judgment accordingly.[55] Many cases settle during the process. If one or more cases survive the dispositive motions and require a trial, the transferee judge often holds the remaining cases in abeyance, thus delaying remand of those cases by the panel. The panel has sole authority to order a remand,[56] but it will normally not do so without the suggestion of the transferee judge.[57] Thus, a typical judicial strategy might be to move forward to trial on the cases that were originally filed in the transferee district in order to obtain verdicts and judgments in them prior to recommending remand in the others. Very likely nothing will be left that anyone wants to take to a further trial at that point.

Remands, when they do occur, arrive back at the transferor court with a large number of rulings in place from the transferee court. These rulings are subject to deference under law of the case principles.[58] Once again, there is not much left to try in the original

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transfers by the transferee judge were explicitly allowed by the panel rules at the time. The Supreme Court invalidated the panel rule and held that a transferee court lacks power to transfer the whole case to itself. *Id.* at 40. However, the panel was not a party to the *Lexecon* case, and the only mandamus relief sought in the lower courts was against the transferee judge.

55. A transferee court has authority to enter dispositive orders terminating cases transferred under 28 U.S.C. § 1407. *See, e.g.*, *In re* Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 364–68 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994).

56. *See, e.g.*, *In re* Roberts, 178 F.3d 181, 184 (3d Cir. 1999) ("The statutory power to order a remand under § 1407(a) from the transferee district to the transferor district lies in the Panel, not the transferee district judge.").

57. R.P. U.S. J.P.M.L. 10.3(a) ("[T]he Panel is reluctant to order a remand absent the suggestion of the transferee judge.").

58. *See* Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 169 (3d Cir. 1982) ("A disappointed litigant should not be given a second opportunity to litigate a matter that has been fully considered by a court of coordinate jurisdiction, absent unusual circumstances. Adherence to law of the case principles is even more

court, which perhaps explains the high settlement rate for remanded cases.[59] The bottom line appears to be that the Manual on Complex Litigation was right in stating that few JPML-transferred cases are ever remanded for trial. The panel is thus the effective policeman for venue in multiple-related-case scenarios.

IV. IMPACT ON PATENT LITIGATION

A. General Observations on Trends

The Judicial Panel on Multidistrict Litigation has seen its MDL filings in patent cases increase more than threefold in 2012 (to seventeen hearings and dispositions), as compared with the average number of filings in the three-year period 2009–2011 (fourteen rulings over the three-year period, an average of 2.8 per year). A listing of the 2012 cases and the 2009–2011 cases appears in the appendix to this article. What has caused the increase?

Two factors seem to be the main ones at play, both primarily involving suits by non-practicing entities. As mentioned earlier,

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important in this context where the transferor judge and the transferee judge are not members of the same court. Here, the principles of comity among courts of the same level of the federal system provide a further reason why the transferee court should not independently re-examine an issue already decided by a court of equal authority."); Beech Aircraft Corp. v. Edo Corp., 1993 WL 545255, at *2 (D. Kan. Dec. 9, 1993) (explaining that when the transferee judge and transferor judge are not members of the same court, principles of comity, as well as principles of the law of the case, counsel against a transferee court reexamining issues already decided by a court of equal authority).

59. In patent cases over the past fifteen years, we have found only two remand orders from transferee courts, and neither actually went to trial. *See In re* Recombinant DNA Tech. Patent and Contract Litig., MDL Docket 912, D.I. 23 (Jan. 30, 1997) (remanding from S.D. Ind. to N.D. Cal.); *In re* Dippin' Dots, Inc., Patent Litig., MDL Docket 1377, D.I. 25 (Aug. 22, 2003) (remanding from N.D. Ga. to N.D. Tex.). In the *DNA* case in the Northern District of California, no further action can be found, and the case presumably was settled. In the *Dippin' Dots* case, settlement was achieved by mediation, even before the remand order could be carried out. *See* Dippin' Dots v. Mfg. Parties and Distrib. Parties, Civil Action No. 1:00-cv-907-TWT, D.I. 425 (N.D. Ga. Sept. 3, 2004) (indicating all issues resolved by mediation).

these entities are thought to file a significant proportion of the patent infringement suits in the United States. The first, and probably most important of the two main drivers of JPML work, is the line of cases beginning in 2008 that put meaningful constraints on district court rulings on motions for convenience transfer. Most practitioners had thought convenience transfers were in the total discretion of the district judge and beyond any effective appellate review. Mainline industrial entities felt themselves confined in the Eastern District of Texas, with no way out. That feeling was somewhat exaggerated, as I demonstrated in two articles.[60] Nonetheless, the feeling persisted until the Federal Circuit's 2008 decision in *TS Tech*.[61] There the Federal Circuit issued a writ of mandamus compelling the district judge in the Eastern District of Texas to grant a convenience transfer to the Southern District of Ohio. The Federal Circuit relied to a large extent on a Fifth Circuit mandamus ruling, *In re Volkswagen of America Inc.*,[62] also directed against the Eastern District of Texas but in a personal injury case, that was decided *en banc* at the time *TS Tech* was pending in the Federal Circuit.

The ruling in *TS Tech* opened the Federal Circuit to a substantial number of venue mandamus petitions, some granted and some denied.[63] This array of cases has led to a shift in thinking of counsel for non-practicing entities. As we shall see, many patent-owner plaintiffs have in the past three years filed suits in a number of different districts, all with clear venue for the particular defendant

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60. *See* Paul Janicke, *Venue Transfers from the Eastern District of Texas: Case by Case or an Endemic Problem?*, LANDSLIDE, March–April 2010, at 16 (demonstrating that the rate of granting transfer motions in patent cases in the Eastern District of Texas could not support the perception that it was impossible to transfer); Paul Janicke, *Patent Venue and Convenience Transfer: New World or Small Shift?*, 11 N.C.J.L. & TECH. ON. 1 (2009) (demonstrating that the Eastern District of Texas did not hold on to civil cases more often than other courts or keep more patent cases than other high-patent-volume districts).

61. *In re* TS Tech USA, 551 F.3d 1315 (Fed. Cir. 2008).

62. 545 F.3d 304 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1336 (2009).

63. *See, e.g.*, *In re* HTC Corp., Misc. 130, 2012 U.S. App. LEXIS 19948 (Fed. Cir. Sep. 20, 2012) (denied); *In re* Biosearch Techs., Inc., Misc. 995, 2011 U.S. App. LEXIS 25688, at *4 (Fed. Cir. Dec. 22, 2011) (granted); *In re* Nintendo Co., 589 F.3d 1194, 1200 (Fed. Cir. 2009) (granted); *In re* Volkswagen of America, Inc., 566 F.3d 1349, 1351 (Fed. Cir. 2009) (denied); *In re* Telular, 319 Fed. Appx. 909, 911 (Fed. Cir. 2009) (denied).

involved. The strategy is seemingly to avoid the expense and delay of fighting a convenience transfer motion by that defendant, followed by a mandamus petition if the motion is unsuccessful. Non-practicing entities are usually represented by contingent-fee counsel. While they would prefer to have the leverage of being in what is perceived as a patent-friendly court, that advantage is probably not worth the cost of a venue fight. In any event, the vast majority of the cases are destined to settle well short of summary judgment or trial. In addition, these plaintiffs may find their cases ordered coordinated by the Judicial Panel into a single district, basically immunizing them from the trouble and expense of further convenience transfer motions.

The second factor leading to the increased use of the JPML is the provision in the 2011 Leahy-Smith America Invents Act prohibiting the joinder in a single civil action of multiple non-cooperating defendants whose only common feature is that they are accused of infringing the same patent.[64] Curiously, this has turned out to be the same rule of law that would have applied under existing Rule 42 of the Rules of Civil Procedure, but the case law was not so defined at the time of enactment.[65] More importantly, the new law added an additional constraint by prohibiting joint trials when the actions are filed separately, unless there is more commonality than involvement of the same patent or the defendants' consent to a joint trial.[66] So perhaps the thinking of plaintiffs was to hope for transfers by the JPML, which as we have seen comes close, for practical purposes, to being a permanent assignment to a single judge.

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64. *See* 35 U.S.C. § 299(b) (2006) ("For the purposes of this subsection, accused infringers may not be joined in one action as defendants or counterclaim defendants, or have their actions consolidated for trial, based solely on allegations that they each have infringed the patent or patents in suit.").

65. *See In re* EMC Corp., 677 F.3d 1351, 1359 (Fed. Cir. 2012) (noting that where the same patent is allegedly infringed by multiple defendants, "[c]laims against independent defendants (i.e., situations in which the defendants are not acting in concert) cannot be joined under Rule 20's transaction-or-occurrence test unless the facts underlying the claim of infringement asserted against each defendant share an aggregate of operative facts").

66. *See* 35 U.S.C. § 299(b) (2006) ("[A]ccused infringers may not . . . have their actions consolidated for trial, based solely on allegations that they each have infringed the patent or patents in suit").

In reviewing the JPML cases listed in the appendix hereto, we see a number of different scenarios playing out. Overall, the panel refused transfer in four 2012 proceedings, a "proceeding" here referring to a request for coordinated treatment; each such request involves at least two and usually many more underlying member cases. Eleven proceedings resulted in transfer orders, seven of them original orders and four follow-on transfer orders for tag-along cases, totaling eighty-eight underlying cases. The 2012 proportion of transfers ordered had not changed much from the 2009-2011 period, where requests were denied in four proceedings and granted in ten proceedings. All of the proceedings were original sets of cases rather than tag-alongs.

New patterns might be hard to find in the four years of data. On the question of which side is making the motion for coordination, patent owners resorted to the panel, seeking coordination of actions they themselves had brought in multiple districts in seven[67] of the seventeen proceedings ruled upon in 2012. In the past it was usually aggrieved defendants who sought panel relief in the hope of saving litigation costs. These days, given the line of court decisions somewhat restricting venue to more convenient fora, patentees are saving themselves the grief of forum fights by suing defendants in solidly convenient districts, and then moving to have the cases coordinated by the panel. Even in some of proceedings where the accused infringers are seeking coordination,[68] the underlying cases were all brought by the patentee, and only a few were declaratory actions brought by the accused infringers. Between 2009 and 2011, eight[69] of the fourteen panel proceedings were brought by the patent owners.

For context in reading the above numbers, and those that follow, patent proceedings make up only a small portion of the JPML's work. In 2012 the panel issued 381 rulings, and only seventeen of them were in patent proceedings which can be found in the appendix.

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67. These are Appendix case numbers 1, 2, 4, 6, 9, 11, and 12.
68. *See, e.g.*, Appendix case numbers 5 and 7.
69. These are Appendix case numbers 21, 24–29, and 31.

B. *Specific Observations on JPML Rulings*

Some features of recent JPML rulings in patent proceedings may be of particular interest. While we know the panel's patent-proceeding workload tripled in 2012 as compared with the average for 2009–2011, in general there are a panoply of reasons supporting a given transfer decision, and from the reported results no general rule can be drawn about which factors predominate, if any. We now look at a few of the possibilities.

1. Sending to Where the Largest Numbers of Cases Are Pending

Not surprisingly, the panel tends to give considerable weight to the number of cases pending in the various districts involved in a group of cases brought up for transfer. In 2012 the numbers of underlying cases pending in reported JPML transfer rulings (excluding later tag-along rulings) ranged from a low of two to a high of sixteen, with a median of five. The transferee district is commonly the one where most cases are already pending. The panel chose such a district in all but one[70] of the 2012 transfer orders listed in the appendix.

Not much change is seen for this factor in the 2009–2011 rulings. Transfers were granted in proceedings where the number of constituent cases ranged from three to eleven, with a median of six. The cases generally were sent to the district that already had the largest number pending, with three exceptions: Appendix #21, transferred to the Western District of Oklahoma, where one case was pending, rather than to Eastern Texas, where two were pending; #24, where the transferee court, Southern District of New York, had only one case pending, rather than the Eastern District of Pennsylvania, which had four pending; and #26, where Southern Indiana (one case pending) was chosen over Southern New York (two cases pending) and Northern Oklahoma (two cases pending).

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70. Appendix case number 12 is the exception, wherein a district with one action pending (W.D. Pa.) was chosen over a second district (E.D. Tex.) where five were pending.

2. Judicial Workload as a Factor

The workload of the possible transferee judges, relative to that of the transferor judges, is often mentioned as a factor supporting a panel transfer order. However, it is somewhat difficult to assess the weight given to that factor in most cases. Many cases in the past four years have been transferred to high-volume districts like Delaware and Northern Illinois. In only one proceeding did the panel explicitly say that its decision was driven by workload: in Appendix #19 the constituent cases were transferred to the District of Maryland on that ground, even though none of them had been pending there.

3. Draining Cases from Eastern Texas?

With all the furor over venue in Eastern Texas, and the extraordinarily high volume of patent cases pending there, it might be assumed that the judicial panel would be motivated to move many patent cases out of that district. However, such a motivation is difficult to find in the actual results. In 2012 the district lost only eight cases by panel rulings; from 2009 to 2011 it lost just five. There is no basis to believe that the panel is bent on relieving Eastern Texas of very much of its current annual filing level of patent cases: there were 1266 filings in 2012,[71] and only 120 cases total transferred over the four-year period from 2009 to 2012.

4. First-Filed Forum Preference

This traditional venue-choice factor, first-filed forum, was mentioned in eight of the eighteen original transfer orders. While this factor obviously carries considerable weight, it is not necessarily controlling, since it was not mentioned or not determinative in the majority of panel decisions.

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71. *Public Access to Court Electronic Records*, PACER.GOV (search was conducted in Pacer's National Locator folder using the dates from January 1, 2012 to December 31, 2012) (last visited Jan. 11, 2013).

V. CONCLUSION

As seen above, the patent workload of the JPML has increased significantly in the past year. Much of this increase is due to the delay and expense of trying to hold venue in the plaintiff's chosen forum, as against a convenience transfer ruling by the district judge, followed by a mandamus petition by a defendant against that ruling. Some of the increase is undoubtedly due to the venue phenomena flowing from the AIA's restrictions on joinder of unrelated accused infringers in a single civil action. Those restrictions invite the filing of separate actions in the same district, but with an increased likelihood of one or more convenience transfer motions being granted, potentially scattering the cases hither and yon. All this can be short-circuited by seeking coordination by the Judicial Panel on Multidistrict Litigation, and that is probably why patent owners are going there.

As we have seen, a transferee court designated by the panel is for practical purposes much more than a facilitator of efficiency in discovery efforts. It has realistically been the court of final judgment in patent cases since the panel's creation in 1968, with powers to issue claim construction orders, make summary judgment dispositions both dispositive and partial, supervise settlement efforts, and delay remands to the original courts in the (relatively unlikely) event a trial is needed in any transferred cases until after trial is completed in the cases originally filed in the transferee forum.

The panel is rapidly becoming a monitor of more patent venue outcomes. This writer expects that trend to increase with time.

VI. APPENDIX

[Note: The cases are here listed in reverse chronological order. As used here "transfer" means an order sending a case to another district for coordinated pretrial handling, as distinguished from a full transfer under 28 U.S.C. § 1404.]

JPML patent cases 2012:

1. Order Denying Transfer, *In re* Droplets, Inc., MDL No. 2403, 2012 U.S. Dist. LEXIS 177688 (J.P.M.L. Dec. 12, 2012).

2. Order Denying Transfer, *In re* Oplus Techs., LTD., MDL No. 2400, 2012 U.S. Dist. LEXIS 144173 (J.P.M.L. Oct. 3, 2012).

3. Transfer Order, *In re* TR Labs Patent Litig., MDL No. 2396, 2012 U.S. Dist. LEXIS 144174 (J.P.M.L. Oct. 1, 2012).

4. Transfer Order, *In re* Body Sci. LLC Patent Litig., MDL No. 2375, 2012 U.S. Dist. LEXIS 129261 (J.P.M.L. Sept. 10, 2012).

5. Order Denying Transfer, *In re* Select Retrieval, LLC, ('617) Patent Litig., MDL No. 2377, 883 F. Supp. 2d 1353 (J.P.M.L. Aug. 9, 2012).

6. Transfer Order, *In re* Body Sci. LLC Patent Litig., MDL No. 2375, 883 F. Supp. 2d 1344 (J.P.M.L., Aug. 6, 2012).

7. Transfer Order, *In re* Unified Messaging Solutions LLC Patent Litig., MDL No. 2371, 883 F. Supp. 2d 1340 (J.P.M.L. Aug. 3, 2012).

8. Order Denying Transfer, *In re* Genetic Techs. Ltd. '179 Patent Litig., MDL No. 2376, 883 F. Supp. 2d 1337 (J.P.M.L. Aug. 3, 2012).

9. Conditional Transfer Order, *In re* Maxim Integrated Prods., MDL No. 2354, 2012 U.S. Dist. LEXIS 91627 (J.P.M.L. June 26, 2012).

10. Transfer Order, *In re* Parallel Networks, LLC, 867 F. Supp. 2d 1352, 1353 (J.P.M.L. June 12, 2012).

11. Transfer Order, *In re* Nebivolol ('040) Patent Litig., 867 F. Supp. 2d 1354 (J.P.M.L. June 12, 2012).

12. Transfer Order, *In re* Maxim Integrated Prods., 867 F. Supp. 2d 1333 (J.P.M.L. 2012).

13. Transfer Order, *In re* Bear Creek Techs., Inc., (722) Patent Litig., 858 F. Supp. 2d 1375 (J.P.M.L. 2012).

14. Conditional Transfer Order, *In re* Innovatio IP Ventures, LLC Patent Litig., MDL No. 2303, 2012 U.S. Dist. LEXIS 54369 (J.P.M.L. Apr. 17, 2012).

15. Conditional Transfer Order, *In re* Innovatio IP Ventures, LLC, MDL No. 2303, 2012 U.S. Dist. LEXIS 9902 (J.P.M.L. Jan. 27, 2012).

16. Conditional Transfer Order, *In re* TransData, Inc., MDL No. 2309, 2012 U.S. Dist. LEXIS 7853 (J.P.M.L. Jan. 24, 2012).

17. Conditional Transfer Order, *In re* Innovatio IP Ventures, LLC, MDL No. 2303, 2012 U.S. Dist. LEXIS 9478 (J.P.M.L. Jan. 13, 2012).

JPML patent cases 2009–2011:

18. Transfer Order, *In re* Innovatio IP Ventures, LLC, Patent Litig., 840 F. Supp. 2d 1354 (J.P.M.L. 2011).

19. Transfer Order, *In re* Webvention LLC ('294) Patent Litig., 831 F. Supp. 2d 1366 (J.P.M.L. 2011).

20. Order Denying Transfer, *In re* Charles R. Bobo Patent Litig., 829 F. Supp. 2d 1374 (J.P.M.L. 2011).

21. Transfer Order, *In re* TransData, Inc., 830 F. Supp. 2d 1381 (J.P.M.L. 2011).

22. Transfer Order, *In re* Vehicle Tracking & Sec. Sys. ('844) Patent Litig., 807 F. Supp. 2d 1380 (J.P.M.L. 2011).

23. Order Denying Transfer, *In re* ArrivalStar S.A. Fleet Mgmt. Sys. Patent Litig., 802 F. Supp. 2d 1378 (J.P.M.L. 2011).

24. Transfer Order, *In re* Fenofibrate Patent Litig., 787 F. Supp. 2d 1352 (J.P.M.L. 2011).

25. Transfer Order, *In re* Armodafinil Patent Litig., 755 F. Supp. 2d 1359 (J.P.M.L. 2010).

26. Transfer Order, *In re* Method of Processing Ethanol Byproducts & Related Subsystems ('858) Patent Litig., 730 F. Supp. 2d 1379 (J.P.M.L. 2010).

27. Order Denying Transfer, *In re* Plastic Injection Molding Mfg. Process Patent Litig., 706 F. Supp. 2d 1376 (J.P.M.L. 2010).

28. Transfer Order, *In re* Tramadol Hydrochloride Extended-Release Capsule Patent Litig., 672 F. Supp. 2d 1377 (J.P.M.L. 2010).

29. Transfer Order, *In re* Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig., 657 F. Supp. 2d 1375 (J.P.M.L. 2009).

30. Order Denying Transfer, *In re* Porcine Circovirus Vaccine Prods. Patent Litig., 655 F. Supp. 2d 1348 (J.P.M.L. 2009).

31. Transfer Order, *In re* Bill of Lading Transmission & Processing Sys. Patent Litig., 626 F. Supp. 2d 1341 (J.P.M.L. 2009).

Name the Harm: Betrayal Aversion and Jury Damage Awards in Safety Product Liability Cases

Jim Norman*

"Every patient you are seeing you have in the back of your mind whether the device is causing them harm."[1] The "device" is an implanted heart defibrillator.[2] A physician who was researching problems caused by the device's wires protruding through their protective coating made the statement in the spring of 2012.[3] These wires connect the defibrillator to the heart, and the maker of the device had received reports about the problem since 2010.[4] Even with this knowledge, however, the manufacturer only last November alerted doctors to the problem.[5] Unfortunately, the faulty wiring

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* B.S., U.S. Air Force Academy, 1990; J.D., The University of Texas School of Law, 2012. Many thanks to all the members of *The Review of Litigation* for their dedication to the journal and their selfless help with bringing this Note to press. Mostly I wish to thank my wife, Kellie, and my children for their love, support, and patience through three intense years of law school.

1. Barry Meer & Katie Thomas, *Device Malfunction Casts Doubt on Industry Pledge*, N.Y. TIMES, Apr. 18, 2012, *available at* http://www.nytimes.com/2012/04/19/business/st-judes-defibrillator-heart-device-safety-pledge-falls-short.html?_r=1&pagewanted=all.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

may have contributed to the death of twenty patients. One reads the above narrative and thinks, how would this look in front of a jury? [6]

Imagine that you are a patient with the defibrillator. Imagine that you hope to get another decade or two out of life, to see your children get established, maybe even see your grandkids come along. You have seen the best doctors. You have traveled to a medical center of excellence. Everyone recommends the surgery, and you get the device installed. You trust the doctors and the defibrillator. What if the device did not just fail to save you, but killed you?

This Note addresses how plaintiffs and juries deal with situations that include betrayal. Betrayal, it will be shown, is an especially salient aspect of harm: when someone has placed his or her trust in a person or product and is subsequently harmed, the emotional impact of the injury is particularly strong. Research into how people react to betrayal strongly suggests that jurors in negligence cases award higher damages for acts of betrayal than for acts that do not involve betrayal. If this is true, is it appropriate? Do damages for betrayal have a place in the civil justice system? If so, is there a better way to address them than the current ad hoc approach?

Part I of this Note describes the psychological research into the phenomenon known as betrayal aversion. Betrayal aversion is the strong emotional reaction people have to broken trust and broken promises. Betrayals by non-human objects—for example, safety products like our implanted defibrillator—can make people angry, just as betrayal by humans can. Part I will conclude by considering some possible causes of betrayal aversion.

Part II looks more closely at research that shows mock jurors give increased damage awards in hypothetical betrayal scenarios, and establishes the likelihood that actual juries award higher damages in response to betrayals. Part III considers whether awarding higher damages is an appropriate response to acts of betrayal. Both punitive and compensatory damages are analyzed as possible approaches, and both are found to be acceptable. However, it may be preferable from a law and economics perspective to include betrayal aversion damages only in the compensatory award.

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6. *Id.*

In Part IV a more rational approach called "name the harm" is considered.

I. BETRAYAL AVERSION EXPLAINED

A. The Basics of Betrayal Aversion

Before there can be a betrayal, there must first be a relationship that involves trust. Betrayal aversion researchers identify three components of trust: (1) a dependency among the parties in a relationship, (2) the vulnerability of at least one of the parties involved, and (3) the confident expectation that the trusted party will act as believed.[7] A betrayal is the violation of that confident expectation.[8]

The violation of trust is what makes betrayal aversion so powerful. People have very strong reactions to betrayals. In their seminal 2003 study of betrayal aversion, Jonathan J. Koehler and Andrew D. Gershoff wrote that "[t]he emotional experience associated with betrayal typically includes visceral, intense, and protracted negative feelings," and cited numerous other studies describing the intense and long-lasting emotions that arise from betrayals.[9] Abused children, for example, have "unrelenting anger" and view the world as disordered.[10] Likewise, employees who feel that their employer's promises to them have been broken will leave their jobs for ones that pay less.[11]

In their study, Koehler and Gershoff showed that it is indeed the broken promise component of a betrayal that arouses people's

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7. Jonathan J. Koehler & Andrew D. Gershoff, *Betrayal Aversion: When Agents of Protection Become Agents of Harm*, 90 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 244, 244 (2003) [hereinafter Koehler & Gershoff, *Betrayal Aversion*].

8. *Id.*

9. *Id.* at 245.

10. *Id.* (citing L.R. Larson, *Betrayal and Repetition: Understanding Aggression in Sexually Abused Girls*, 21 CLINICAL SOC. WORK J. 137, 139–40 (1993)).

11. *Id.*

ire.[12] The researchers performed a series of experiments designed to better understand the phenomenon of betrayal aversion. One of the experiments was created to ferret out which of three possible factors elicited enhanced punishment by participants: a broken promise, the indetectability of the act, or the harmed person's vulnerability to access by the perpetrator.[13] When the employee had broken a promise to be an honest and trustworthy employee, participants meted out more severe punishment than they did when the employee made no such promise.[14] There were no significant effects found for the other two factors: indetectability and vulnerability to access.[15]

Thus, the researchers isolated the broken promise as the specific aspect that made betrayal aversion different. The reason broken promises are punished more severely than other types of betrayals seems to be that such betrayals create a special type of harm by "defying the social norm that forbids this abuse of trust."[16] This special harm is further discussed in Part II.

B. Betrayal Risk Aversion vs. Betrayal Aversion

To better understand betrayal aversion, it is useful to distinguish between an aversion to the risk of potential betrayal and the feelings evoked after a betrayal has occurred. These can be referred to as *ex ante* betrayal risk aversion and *ex post* betrayal aversion. Although this provides a way to clarify the precise phenomenon at work, the distinction may be more theoretical than real; the same emotions appear to be at work in both situations. It could be that people in the *ex ante* position are imagining how they will feel *after* a proposed betrayal has occurred.

Koehler and Gershoff looked at both types of betrayal aversion in their 2003 study.[17] One experiment focused exclusively on *ex ante* betrayal risk aversion. Researchers showed that participants were willing to accept a higher risk of harm from a

12. *Id.* at 248–49.
13. *Id.* at 247–48.
14. *Id.* at 248–49.
15. *Id.*
16. *Id.* at 249.
17. *Id.* at 244.

product in order to avoid the risk of being betrayed by a product.[18] They found that most people would prefer a 2% chance of death in an accident to a 1% chance of death caused by the failure of a safety product that was designed to protect against the same kind of death.[19] Because the decision tested *ex ante* aversion to betrayal, the researchers concluded that individuals experience emotions from the "mere possibility" of betrayal.[20]

Much of the other research has focused on *ex post* betrayal aversion and has provided evidence that people tend to punish betrayals more severely than non-betrayals in both criminal[21] and civil matters.[22] Furthermore, research on civil actions shows a very high correlation between jurors' feelings of outrage and jurors' intent to punish.[23] The research on outrage will be looked at more closely in Part II, but it presents striking evidence that people's emotional reactions to outrageous acts strongly affect their intent to punish.[24] Although the test subjects' feelings of outrage were influenced by several factors,[25] these feelings are analogous to feelings of betrayal in their intensity and negativity.[26] Outrage and betrayal aversion are close enough in emotional content that one can look at the results of the outrage study—that jurors punish more when they are more outraged—and see that, as jurors punish *ex post* betrayals more than

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18. *Id.* at 252–56.

19. *Id.*

20. *Id.* at 257 ("That people are willing to accept an increased risk of the very thing they wish to prevent (death) to eliminate the mere chance of betrayal strikingly illustrates the depth of betrayal aversion.").

21. *Id.* at 245–47 ("The recommended jail sentences were longer in the betrayal conditions for all five [criminal] offenses [studied] . . . . These data support a betrayal effect such that people wish to punish betrayers more than non-betrayers for identical crimes.").

22. *Id.* at 245, 249–50.

23. Daniel Kahneman, David Schkade & Cass R. Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49, 61–62 (1998).

24. *Id.* at 59–61.

25. *Id.* at 51–53.

26. *See, e.g.*, Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 249–50 ("For example, Kahneman, Schkade, and Sunstein (1998) argued that the severity of punishments reflects an emotional response to bad acts.").

non-betrayals, they are likely experiencing strong emotions similar to outrage.

To summarize the research on both forms that betrayal aversion takes—*ex post* and *ex ante*—strong emotions are evoked when people are faced with the prospect of betrayal in the future or in the past, and, in either case, they will react strongly either by attempting to avoid betrayal or by punishing a betrayal that has already occurred.

C. *Do Objects Betray?*

When looking at the role of betrayal aversion in safety-product litigation, it is important to know if people actually experience betrayals by inanimate objects. In other words, do we only experience betrayal aversion when a person betrays us, or do we also experience it when a safety product breaks its promise to protect us?

Koehler and Gershoff demonstrated that people can indeed feel betrayed by impersonal objects. They explained that, although objects like safety products "do not make explicit promises, we do make ourselves vulnerable to them and rely on implicit expectations that they will both protect us from and not cause the very harm they are entrusted to protect against."[27] Therefore, our relationship to safety products can indeed meet the definition of trust—a dependency among the parties in a relationship, the vulnerability of at least one of the parties involved, and the confident expectation that the trusted party will act as believed—and safety products can betray that trust. In fact, Koehler and Gershoff showed that people's emotional reactions to betrayals by safety products can be very intense.[28]

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27. *Id.* at 249.

28. *Id.* at 244, 250. It is unclear whether the experiment tested participants' emotions in reaction to the object or to the manufacturer. However, it appears that the researchers interpreted the reactions as being directed toward the manufacturer: "[P]eople assigned larger punitive damage awards and reported stronger negative feelings against the *manufacturer* of a betraying product than against the *manufacturer* of a non-betraying product that caused identical harm." *Id.* at 257 (emphasis added).

D. *Why Are People Averse to Betrayal?*

What is it that makes humans respond to broken promises with such "visceral, intense, and protracted negative feelings"?[29] Perhaps if we know where these emotions come from, we can better answer the normative question of whether juries should or should not be awarding higher damages when addressing acts of betrayal. It may not be possible to definitively discover the source of betrayal aversion, but the research presents a few possibilities. This section will suggest a number of explanations for why betrayal aversion is such a powerful force.

First, returning to the 2003 Koehler and Gershoff study, betrayals may threaten people's perceptions of the social order. The authors explained how "people have a powerful need to believe that the social world is orderly, predictable, and fair."[30] When a promise to protect is broken, there is a violation of trust that "threaten[s] the very social order that permits us to have a positive expectation of safety."[31]

Koehler and Gershoff tested their hypothesis on study participants, each of whom was exposed to one of two car accident scenarios: the death of a friend from the force of an airbag (betrayal condition) and the death of a friend from the inhalation of fumes (non-betrayal condition).[32] Participants reported greater feelings of social disorder from the betrayal scenario.[33] Koehler and Gershoff then performed a mediation analysis on how those feelings of social disorder interacted with the feelings of betrayal, and determined that the social disorder feelings were a mediator of the betrayal feelings.[34] A mediator in this context is a process internal to the participant that transforms an external stimulus into a psychologically significant event.[35] For example, one type of

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29. *Id.* at 245.

30. *Id.* at 247 (citing M. J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION (1980)).

31. *Id.*

32. *Id.* at 251.

33. *Id.*

34. *Id.* at 252.

35. Reuben M. Baron & David A. Kenny, *The Moderator–Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and*

mediator is the cognitive dissonance arousal reduction process, which some theorists argue reduces the internal discomfort a person feels from a dissonant state by inducing a change in the person's attitude: the external stimulus that caused the person's discomfort is mediated into a new attitude toward the stimulus.[36] Thus, if a factor (feelings of social disorder) in an emotional reaction is shown to be a mediator in that reaction, this is significant because it means that the factor plays an important role in the interpretation of the initial stimulus (the betrayal). Koehler and Gershoff's discovery of the importance of the sense of social disorder in interpreting betrayals led them to believe that people who have been betrayed experience an additional and unique kind of harm: "[O]ne could argue that betrayals evoke strong negative reactions, in part, because they harm us in multiple ways. Not only do they cause the focal harm associated with the offense, but they also undermine our sense that the social world is fair and orderly."[37]

The processes behind betrayal aversion may also be understood in relation to two other cognitive biases: the omission bias and the normality bias. The omission bias is at work when people choose to risk harm from inaction over risking harm from action.[38] For example, the risk of harm from vaccinations looms larger in people's minds than the risk of catching the disease targeted by the vaccination, and many people would prefer to risk the latter.[39]

Omission bias is "closely related to people's special antipathy to betrayals,"[40] but it is not the same as betrayal aversion.[41] In

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Statistical Considerations, 51 J. PERSONALITY & SOC. PSYCHOL. 1173, 1176 (1986).

36. Roger A. Elkin & Michael R. Leippe, *Physiological Arousal, Dissonance, and Attitude Change: Evidence for a Dissonance–Arousal Link and a "Don't Remind Me" Effect*, 51 J. PERSONALITY & SOC. PSYCHOL. 51, 63–64 (1986).

37. Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 252.

38. *See id.* at 256 ("Omission bias predicts that bad outcomes that arise from actions are worse than bad outcomes that arise from inactions."). *See also* Andrew D. Gershoff & Jonathan J. Koehler, *Safety First? The Role of Emotion in Safety Product Betrayal Aversion*, 38 J. CONSUMER RES. 140, 141 (2011) [hereinafter Gershoff & Koehler, *Safety First*] ("The omission bias . . . is the tendency to react to harmful actions more strongly than equally harmful omissions . . . .").

39. Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531, 538 (2005).

40. *Id.*

41. Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 256.

assessing *ex ante* betrayal risk aversion, Gershoff and Koehler tested participants' preferences for air bags that failed under one of three different conditions: an active betrayal (the air bag deployed too forcefully, causing death that otherwise would not have occurred), a passive betrayal (the air bag failed to deploy, allowing the occupant to be killed in an accident), or an indirect betrayal (the engine block was forced back, adding to the air bag's force and killing the occupant who otherwise would have survived).[42] The study showed that people experienced less aversion to passive betrayals than to active betrayals, and the least amount of aversion to indirect betrayals.[43] While the difference between reactions to active and passive betrayals is likely affected by the omission bias,[44] that should not be the case for the difference in how people react to passive betrayals and indirect betrayals. Therefore it appears that the omission bias and betrayal aversion interact with each other, but that they are also distinct from each other.

The normality bias is another cognitive phenomenon that may interact with betrayal aversion. This bias involves a propensity for people to punish acts that deviate from normality more than acts that do not deviate.[45] For example, test participants in one study gave higher damage awards in medical malpractice cases where doctors used non-routine procedures than in cases where doctors followed common, routine procedures yet were equally negligent and caused equivalent harm.[46] Gershoff and Koehler note that the normality bias may interact with betrayal aversion because the conventional betrayal risk is an abnormal risk.[47] It therefore appears that the normality bias interacts with betrayal aversion, but how this interaction takes place is less well-understood than the interaction between betrayal aversion and the omission bias. This would be a good area of study for researchers interested in how cognitive biases affect jury awards.

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42. Gershoff & Koehler, *Safety First*, *supra* note 38, at 143.

43. *Id.* at 143–44.

44. *Id.* at 141–42.

45. *Id.* at 141.

46. Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 622–27 (2003).

47. Gershoff & Koehler, *Safety First*, *supra* note 38, at 141.

II. BETRAYAL AVERSION AND JURY DAMAGE AWARDS

A. Punitive Damage Awards

There is apparently no research on the responsiveness of actual jury awards to the presence or absence of betrayal in a trial's fact pattern. However, studies that have been done on test jurors strongly suggest that juries probably do award higher damages when the defendant, or the defendant's product, has betrayed the plaintiff. For example, the Koehler and Gershoff research on betrayal aversion asked test subjects to choose levels of punishment (years in prison) for persons guilty of one of five different crimes: credit card fraud, bank robbery, treason, child molestation, or rape.[48] Each of these crimes was presented randomly to test subjects in one of two versions: a betrayal version and a non-betrayal version, with the key variable being the identity of the perpetrator.[49]

	Identity of Perpetrator: Betrayal Version	**Identity of Perpetrator: Non-Betrayal Version**
Credit Card Fraud	Telephone Salesperson	Administrative Assistant
Bank Robbery	Security Guard	Janitor
Treason	Military Leader	Orchestra Conductor
Child Molestation	Day-Care Worker	Grocery Clerk
Rape	Campus Police Officer	Construction Worker

The professions were chosen so that for each crime, test subjects rated the professions as equally prestigious, in order to ensure that punishments were not influenced by unequal levels of social prestige.[50] The test subjects chose jail punishments that were longer (and often significantly so) for the betrayal conditions than for the non-betrayal conditions.[51] The results provide support for the

48. Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 246.
49. *Id.*
50. *Id.*
51. *Id.* at 246–47.

proposition that crimes involving betrayals are probably fetching longer jail terms than non-betrayal crimes.

In another experiment, Koehler and Gershoff found that betrayal also influenced civil damages awards. This study, mentioned earlier, showed that people react to betrayal by an object (a safety product), and not just by a strictly human agent.[52] In this study, participants were told that a warehouse had been extensively damaged by a fire.[53] In the betrayal condition, the fire was caused by faulty wiring in the fire alarm, and in the non-betrayal condition, the fire was caused by wiring in a refrigerator.[54] Subjects were asked specifically whether they, as jurors, would award damages as additional punishment.[55] Once again, betrayal was found to have a strong effect on punishment, both in the number of persons electing to give punitive awards and in the amount of the awards, with the mean betrayal awards being nearly twice that of non-betrayal awards.[56] This experiment showed that betrayal aversion influences not only criminal sanctions, but civil sanctions as well.

Another study by Daniel Kahneman, David Schkade, and Cass Sunstein, looked at the effects of feelings of outrage on punishment in the form of punitive damages. The researchers asked participants to read one of ten different personal injury scenarios and rate their levels of outrage, their intent to punish, and the dollar amounts they would award.[57] The results of the study showed a very high (.98) correlation between mean feelings of outrage and punitive intent.[58]

That outrage should be such a strong driver of punitive intent fits well with the betrayal aversion studies noted above. *Ex post* aversion to betrayal is likely a form of outrage—perhaps a subset of outrage, as outrage is an emotion that can be caused by a greater variety of situations than just betrayal. In any case, Koehler and Gershoff noted that the outrage study findings were consistent with

52. *Id.* at 249.
53. *Id.* at 250–51.
54. *Id.*
55. *Id.*
56. *Id.*
57. Kahneman et al., *supra* note 23, at 57.
58. *Id.* at 60.

their own results.[59] Two other findings from the outrage study were also consistent with the betrayal aversion effect. First, Kahneman and his colleagues found that levels of outrage were independent of the amount of harm done: outrage depended on the act and not on its consequences.[60] This finding supports the theory of betrayal discussed above, which posits that the strong feelings from betrayal arise from the broken trust and not the harm done.[61] Recall that the Koehler and Gershoff studies clearly showed that betrayal elicited higher punishments than non-betrayals, even when the harms were equal.[62] The second finding consistent with betrayal aversion is that participants in the outrage study shared a strong consensus about their levels of outrage and about how much a defendant should be punished.[63] This effect was seen even between different social groups.[64] Both of these findings are consistent with the existence of a universal aversion to acts of betrayal that manifests itself in higher punitive damage awards.

Another reason to find that the outrage study supports the idea that jurors grant increased awards for betrayals comes from the field of neuroscience. Consider that imaging studies of the brain, using fMRI scans, show that emotions are essential for making moral judgments; for example, studies show that emotional centers of the brain are aroused when normal test subjects are asked to judge the morality of moral scenarios.[65] On the other hand, psychopaths have reduced neural activity in emotion-related brain regions, yet engage in extreme anti-social behavior and instrumental aggression.[66]

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59. *See* Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 250 ("This result [the result of Koehler and Gershoff's third study, which looked at awards in safety product betrayal cases], and the appearance of a positive relationship between the size of damage awards and amount of feelings of betrayal, anger, and resentment, are consistent with the positive correlation between outrage and punitive damage awards reported in Kahneman et al. (1998).").

60. Kahneman et al., *supra* note 23, at 52, 62.

61. Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 250.

62. *Id.*

63. Kahneman et al, *supra* note 23, at 61–62.

64. *Id.*

65. Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS IN COGNITIVE SCI. 517, 518 (2002).

66. *Id.* Instrumental aggression is distinguishable from reactive aggression. Instrumental aggression is generally emotionless, controlled, premeditated, and directed toward the achievement of a goal that will benefit the aggressor, whereas

These neuroscience findings support both the outrage study and the betrayal aversion study by explaining that emotions are necessary for making moral judgments. This finding supports the not surprising observation that people become upset when moral norms are violated. Because betrayal is a violation of a social norm that most people take very seriously, it should be expected that betrayals evoke strong emotions. Here we can see a link between the outrage study and betrayal aversion: both involve the violation of moral norms, and both involve strong moral emotions. It is very likely that had Kahneman and his partners studied the punishment of betrayal specifically, rather than outrage generally, their results would have been the same—a strong correlation between outrage from betrayal and higher punitive intent on the part of jurors.[67]

Finally, there is one more link between the outrage study and betrayal aversion: a close reading of the Kahneman, Schkade, and Sunstein study finds that betrayal aversion may have been at work in their participants' reactions. The researchers found outrage in ten different scenarios,[68] some involving betrayal and some not.[69] Those scenario descriptions that did involve betrayal[70] all fell within the upper part of the overall research results in terms of mean levels of outrage as well as mean levels of punitive intent.[71] While this 1998 study did not look specifically at betrayal aversion (and pre-dated the 2003 Koehler and Gershoff research), the results suggest betrayal aversion was lurking in the background. To summarize the link between the outrage studies and betrayal aversion, we can see that

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reactive aggression is emotional and impulsive aggression. For example, psychopathic criminals are predatory, whereas non-psychopathic criminals are generally not. Andrea L. Glenn & Adrian Raine, *Psychopathy and Instrumental Aggression: Evolutionary, Neurobiological, and Legal Perspectives*, 32 INT'L J.L. & PSYCHIATRY 253, 253 (2009).

67. The author thanks Professor Sean Williams for help in articulating these arguments.

68. Kahneman et al, *supra* note 23, at 56.

69. *See id.* at 79–84 (detailing the scenarios used in the study).

70. *See id.* (describing the facts of scenarios involving betrayal: Thomas Smith (mistaken shooting by drunk security guard), Susan Douglas (unexpected air bag deployment), and Joan Glover (child overdose of allergy medicine due to defective child safety cap)).

71. *See id.* at 69 (reporting the Synthetic Jury Response Distributions by Scenario in Table 7).

while the outrage study predated researchers' understanding of betrayal aversion, it is consistent with and, in important ways, very supportive of the betrayal aversion research findings that show increasing damage awards in response to betrayal. In work that postdates both the outrage study and Koehler and Gershoff's 2003 study, Cass Sunstein makes this link explicit: "A betrayal of trust is likely to produce a great deal of outrage."[72]

The studies we have looked at give us a number of clues about what kinds of cases would involve betrayal that would lead to increased punitive awards. Recall that a betrayal is the breaking of a trust defined by (1) a dependency among the parties in a relationship, (2) the vulnerability of at least one of the parties involved, and (3) the confident expectation that the trusted party will act as believed.[73] Recall as well that it was the broken promise that Koehler and Gershoff's research participants punished most severely in comparison to the indetectability of an act or the perpetrator's exploitation of access to the injured party.[74] Types of litigation that would similarly involve trust that was broken might include child support proceedings where one parent has abandoned the children, suits against fiduciaries for breach of trust, administrative licensing proceedings where a professional has taken advantage of a vulnerable client, and medical malpractice lawsuits.[75] We could expect to see increased punitive damage awards from any of these actions when compared to similar, non-betrayal fact patterns.

B. Compensatory Damage Awards

The question of whether juries award compensatory damages to plaintiffs for harm suffered from betrayals is more difficult. First, it is not clear that a betrayal creates a compensable harm, and if it does, it has not been directly shown that juries are attempting to make victims of betrayal whole through compensation for that harm.

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72. Sunstein, *supra* note 39, at 537.

73. Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 244.

74. *Id.* at 248–49.

75. *See* Boaz Shnoor, *Loss of Chance: A Behavioral Analysis of the Difference Between Medical Negligence and Toxic Torts*, 33 AM. J. TRIAL ADVOC. 71, 71–72, 75 (2009) (arguing that betrayal aversion may explain why more courts have allowed loss of chance claims in medical negligence cases, while denying such claims in toxic tort cases).

However, the studies on betrayal aversion do suggest the possibility that real harm results from betrayals.[76] Additionally, forms of psychological harm that are similar to betrayal aversion receive jury compensation, and it is therefore likely that juries also attempt to make the victims of betrayal whole through compensatory damages.[77]

We begin with the question of whether betrayal harm is real. For the purposes of compensatory damages, if a person is not actually harmed by betrayal, there should be no award for being betrayed. There is, however, significant empirical evidence that betrayal does cause certain forms of psychological harm. Koehler and Gershoff noted research showing that betrayal is associated with "visceral, intense, and protracted negative feelings."[78] In their own research they found that participants exposed to scenarios involving betrayal experienced "stronger feelings of broken trust, more social disorder, and stronger negative emotions" than participants exposed to similar scenarios not involving betrayal.[79] Recall that one of their studies found that feelings of social disorder were crucial to how people interpret betrayals, and that this pointed to a special kind of harm caused by betrayals.[80] Betrayals, Koehler and Gershoff concluded, "harm us in multiple ways."[81] Koehler and Gershoff are in effect pointing out that betrayals cause independent harm beyond the physical harm done to the plaintiff—a harm that could be independently compensable.

People intuitively understand that betrayals cause extra harm. If they did not, they would not be averse to betrayal risks while in the *ex ante* position. In fact, test participants find betrayal so

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76. Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 245 (discussing how "we trust foods, medicines, and safety devices to preserve our health and to protect us from injury or death" and, therefore, they "*seem* to 'betray' us when they cause the very harms they were designed to guard against") (emphasis in original).

77. *See* Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 U. ILL. L. REV. 557, 574 (2008) (discussing compensatory damages for emotional distress).

78. Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 245.

79. *Id.* at 251.

80. *Id.*

81. *Id.*

"psychologically intolerable" that they are even willing to double their risk of death from accidents in order to avoid being betrayed.[82] Cass Sunstein also argues that betrayals are an "independent harm"[83] and explains compellingly why this is so:

> A family robbed by its babysitter might well be more seriously injured than a family robbed by a thief. The loss of money is compounded and possibly dwarfed by the violation of a trusting relationship. The consequence of the violation might also be more serious. Will the family ever feel entirely comfortable with babysitters? It is bad to have an unfaithful spouse, but it is even worse if the infidelity occurred with your best friend, because that kind of infidelity makes it harder to have trusting relationships with friends in the future.[84]

Experiencing betrayals as extra harmful is common to the human experience. It is not surprising that the law already recognizes certain types of psychological harms. Damages for emotional distress, for example, are not uncommon.[85]

If betrayals cause a unique type of harm that is independent of and in addition to other kinds of injury, are juries perhaps already in the practice of increasing compensatory awards when a defendant has betrayed a plaintiff? The answer seems to be yes; as we will see in the following paragraphs, it does appear that juries are prepared to recognize the existence of psychological harms through increased compensation awards.[86] As psychological harms in general receive increased compensatory damages, it is likely that betrayal harms do as well because they are a specific type of psychological harm.

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82. *Id.* at 255.

83. Sunstein, *supra* note 39, at 537..

84. *Id.*

85. RESTATEMENT (SECOND) OF TORTS § 905 (1979). *See also* Hirsch & Mitchell, *supra* note 77, at 571 ("A tort victim can recover compensatory damages even for transient emotional distress that accompanies injury, and the Restatement explicitly identifies 'anxiety' as one such form of emotional distress . . .").

86. *See generally* Hirsch & Mitchell, *supra* note 77, at 571–76 (discussing compensation of psychological pain from proximity to harm).

Psychological harm may receive increased compensation in cases involving proximity to harm. The effect of proximity to harm was shown in a series of studies by Hirsch and Mitchell.[87] In a hypothetical wrongful-death scenario, mock jurors were asked to determine *compensation* awards to a survivor of a plane crash in a remote area.[88] Participants awarded higher damages for a survivor who almost reached safety than for one who died 75 miles from safety.[89] The reason people suffer from proximity to harm is explained by a tendency to engage in counterfactual thinking, a process where a person imagines how an outcome could have been different.[90] Counterfactual thinking is further reinforced when the preferable alternative outcome is closer to actually taking place because a person anticipates the positive outcome, and when it fails to occur, "a hedonic reckoning" takes place and the loss of the anticipated reward is especially acute.[91] Studies of mock jurors in hypothetical criminal cases have found that harsher penalties are assigned where there is proximity to harm.[92] Mock jurors assigned harsher penalties "where a criminal act was almost avoided" or where a criminal act "occurred under unusual circumstances," or, in other words, almost did not occur.[93]

Indeed, injury from proximity to harm appears to be very real, and can manifest itself vividly: for example, close calls with physical injury can cause chronic anxiety and depression.[94] Chronic anxieties qualify as a physical manifestation; however, some courts do not even require a physical manifestation of emotional distress for recovery of damages.[95]

The results of the proximity to harm studies are good analogies for betrayal aversion. Research shows that people, perhaps intuitively, understand the increased emotional content of a near-

87. *Id.* at 571.
88. *Id.*
89. *Id.*
90. *Id.* at 561.
91. *Id.* at 563.
92. *See id.* at 576 n.85 (discussing studies where mock jurors assigned harsher penalties for proximity to harm in hypothetical criminal cases).
93. *Id.*
94. *Id.* at 506.
95. *Id.* at 574 n.74.

escape from harm, and award higher compensatory damages in response. Similarly, acts of betrayal have more emotional salience than non-betrayals, and there is every reason to think (especially based on the psychological studies cited earlier) that jurors intuit increased harm from betrayals and compensate accordingly.

One last piece of evidence that betrayal injuries are receiving compensation comes from a study of the differences in how courts treat medical malpractice cases and toxic torts.[96] It appears that courts are more willing to award compensation for medical negligence than for toxic torts.[97] These damages are being awarded under the nontraditional theory of "loss of chance," a doctrine that allows a finding of liability when causation and actual harm may not be provable, by allowing evidence of statistical probabilities of causation and harm to be used instead.[98] What is interesting about the difference between medical malpractice and toxic tort cases is that the loss of chance doctrine is being used in unexpected ways. Between medical malpractice cases and toxic tort cases, loss of chance seems tailor-made for toxic tort cases, where ill-defined harms may not be as obviously connected to the defendant's negligence. Instead, the reverse is happening, and loss of chance is showing up in medical malpractice cases more than in toxic tort cases.[99] One likely reason for this outcome is that medical malpractice involves a betrayal of trust (people trust doctors to make them better, not worse) and toxic torts do not, and juries are stretching the loss of chance further in the former because of this betrayal than they are in the latter.[100]

Given that juries and courts already effectively allow compensatory damages for psychological harms like emotional distress, proximity to harm, and loss of chance, it is reasonable to believe that they are also compensating for betrayal harms.

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96. Shnoor, *supra* note 75, at 75.

97. *Id.* at 72–73.

98. *Id.* at 71–72 ("Compensation for [loss of chance] is based on statistical evidence and reflects the probability that the injury the claimant suffered was caused by the negligence of the defendant. It represents a departure from 'traditional categories of legally cognizable harm and rules of proof of causation' . . . ." (quoting RESTATEMENT (THIRD) OF TORTS § 26 cmt. n (Proposed Final Draft No. 1, Apr. 6, 2005)).

99. *Id.* at 73.

100. *Id.* at 75.

III. SHOULD JURIES AWARD HIGHER DAMAGES FOR BETRAYAL?

A. *Punitive Damages*

Is there a theoretical justification for awarding punitive damages in cases involving betrayals?[101] To answer this question, consider two common theories of punitive damages: (1) the law and economic deterrence theory, and (2) the traditional common law theory of retributive justice. The discussion that follows will show that punitive damages for betrayal do not fit within the consensus law and economics theory of deterrence, but are well-justified by retributive justice rationales.

The deterrence theory of punitive damages, what Polinsky and Shavell call the "standard" theory of deterrence, has wide support among law and economics scholars.[102] This theory starts with the basic understanding that to properly deter risky behavior, overall damages need to equal the amount of harm done.[103] Damages for an injury that are too low will result in underdeterrence—too few precautions will be taken and too much risk will remain in society because consumers will pay too low of a price to reflect the actual level of risk posed by the product. For example, if a precaution to prevent a harm costs a company $50,000, but potential damages for the harm are only $40,000, the company will not take the additional precautions.[104] But if the actual harm from the injury is $100,000, there is a problem of underdeterrence.[105] The firm's liability is not high enough to deter it from marketing the product without taking the necessary precautions, and society is faced with harm that is greater than the resources necessary to eliminate the harm. Automobile drivers not paying the costs to

101. *See, e.g.*, Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1017 (2007) ("A theory of retribution should link punishment to that which makes the wrongful action wrong.").

102. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877 (1998).

103. *Id.* at 873.

104. *Id.* at 884.

105. *Id.*

society of pollution from car engines because those costs are not included in their cost of burning fuel is another example.[106]

On the other hand, sometimes the costs of taking precautions to reduce risk are higher than the harm that would be caused by the risk. In such a case, overdeterrence will result if damages are higher than the amount of harm caused.[107] For example, if the actual harm to society caused by a product is $40,000, and the precautions necessary to eliminate the harm cost $50,000, the firm should not take the precaution because to do so would be an inefficient allocation of resources—it would be wasteful.[108] However, if the company is subject to $100,000 in potential liability, the company will pay for the precaution so as to avoid $50,000 in liability. The price of the product will rise to incorporate those costs, and consumers will be presented with a product with utility that may be lower in value than its cost.[109] The company may even find it necessary to stop offering the product, and society will have lost the utility offered by the product.[110] Such may be the case for some childhood vaccines.[111]

Optimal deterrence is achieved when damages equal harm.[112] For example, if a firm can spend $50,000 on a precaution that reduces the total harm from their product by $100,000, then liability for the harm if the firm fails to take the $50,000 precaution should be $100,000.[113] This is the best outcome for society; the problems of underdeterrence and overdeterrence are both avoided.[114] The company has the correct incentives to reduce harm—no more and no less.

Punitive damages play a very specific role in deterrence theory. Punitive damages can correct underdeterrence that might

106. *Id.* at 882.
107. *Id.* at 879.
108. *Id.*
109. *Id.* at 882.
110. *Id.*
111. *Id.* at 882–83.
112. *Id.* at 879.
113. *Id.*
114. *See id.* (describing the balance between spending too much or too little on precautions to avoid liability).

result when injurers escape liability.[115] Injurers could escape liability because the victim does not know that the harm resulted from the injurer's act, instead of from another reason, like a natural occurrence or simple luck.[116] A victim might also have difficulty proving that the harm was caused by the injurer, or might choose not to sue for other reasons.[117] To address these problems of underdeterrence, punitive damages are used to bring liability up to the level of the harm caused by acts otherwise not held to account.[118] Thus, if an injurer is only held liable 25% each time he is at fault, and the amount of harm done per incident is $100,000, the injurer's liability average is only $25,000.[119] In this case, punitive damages in the amount of $375,000 should be assessed, bringing total damages to $400,000.[120] The injurer's average liability is now the optimal amount—$100,000 per incident, or exactly the amount of harm caused.[121]

The problem with using deterrence theory to justify punitive damages for acts of betrayal is that the theory has no place for it. If betrayal is an actual harm, then compensatory damages are the appropriate remedy because the sole purpose of punitive damages is to make up for the underdeterrence caused by a victim's failure to bring suit or to prove negligence. If betrayal is not a harm, and if juries are nonetheless awarding higher punitive damages when betrayal is involved, then overdeterrence results, and overall social utility is decreased.[122] Alternatively, if juries are making punitive damage decisions on the basis of a negligent act's reprehensibility, but not on the basis of the act's costs to society (the purpose of punitives), underdeterrence could result when punitive damages

115. *See id.* at 887 (discussing the need for a punitive multiplier to account for harm caused by defendants not held liable for their actions).

116. *Id.* at 888.

117. *Id.*

118. *Id.* at 889.

119. *See id.* at 888–89 (discussing the use of punitive damages to account for harm caused by defendants for which they are not held liable).

120. *Id.*

121. *Id.* at 889–90.

122. *See id.* at 906–07 (explaining that overdeterrence can occur when punitive damages are based on the reprehensible nature of the act).

should be assigned but are not because the act does not "outrage" the jury.[123]

The second theory that could be used to justify punitive damages for acts of betrayal comes from Anthony J. Sebok's explanation of the evolution of punitive damages in the common law. Sebok shows how the original, traditional understanding of tortious harms was used to justify punitive damages when a "moral injury" had been done to a plaintiff.[124]

According to Sebok, the common law linked "exemplary damages" to the particular right that was violated.[125] Courts awarded punitive damages in response to fact patterns that involved certain kinds of wrongful treatment of, and attitudes towards, plaintiffs— treatment that belied a defendant's lack of respect for the plaintiff.[126] This kind of injury—injury that resulted from "insult"—was redressed by higher punitive awards.[127] This kind of harm was not considered simply an emotional harm. It was not, for example, recognized under the doctrine of emotional distress by 19th century courts, and was instead deemed to be an objective harm that arose from the violation or denial of a private right.[128]

Current legal scholarship explains this harm as a "moral injury" that arises from the "lack of respect for rights."[129] Punitive damages are justified for a moral injury because of the equal worth of all individuals, an assumption Sebok describes as "Kantian."[130] When a person violates or denies another's rights as an equal person, "[m]oral reality has been denied" and "the false claim [must] be corrected."[131] Punitive damages are justified because they are

123. *Id.* at 907–08.

124. Sebok, *supra* note 101, at 1017.

125. *Id.* at 1006. Sebok points out that punitive damages cannot be justified under economic efficiency arguments. He bases many of his arguments on the Polinsky & Shavell analysis described here in preceding paragraphs. *See also id.* at 976–89 (explaining the dynamics of exemplary damages in tort law and the notion that these damages are often awarded as a means of patrolling powerful interests that remain untouched by criminal law).

126. *Id.* at 1007–08.

127. *Id.* at 1023.

128. *Id.* at 1016.

129. *Id.* at 1017. A moral injury is described as a form of diminishment that involves the act of lowering the value and rank of someone. *Id.*

130. *Id.* at 1018.

131. *Id.*

connected with the wrongfulness of the immoral act. They affirm that the victim has value, and that the "value judgment contained in the wrongdoer's act was wrong."[132]

This common law theory of punitive damages is a form of retributivism. It is described as "a commitment to asserting moral truth in the face of its denial."[133] When a false moral claim is made and moral reality denied, "the retributivist demands that the false claim be corrected."[134] Sebok claims that this theory "reflects the reality of the tort system we actually have."[135]

Sebok's explanation offers potentially solid grounds to award punitive damages for acts of betrayal. For example, we may notice one initial similarity between Sebok's moral injuries and acts of betrayal. Sebok observes that punitive damages are justified based on the violation of the right, and not on whether the victim has had any subjective experience of harm. This accords with the Kahneman, Schkade, and Sunstein study's findings that the amount of outrage that test jurors experienced was independent of the harm caused; the amount of outrage was solely focused on the outrageousness of the act itself.[136]

The lynchpin of Sebok's theory is the violation of an individual's right to be treated as an equal: "What the wrongdoer expressed was not only that the victim was of less value than she really is, but that the victim was of less value than the wrongdoer."[137] For an act of betrayal to deserve punitive damages under this theory, it must, in like manner, demean the victim's value to a level lower than that of the wrongdoer.

Recall that Koehler and Gershoff theorized that betrayal aversion might be explained in part by people's need to believe the "social world is orderly, predictable, and fair."[138] Remember also how critical the component of a *broken promise* was to mock juror's

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132. *Id.* at 1019.

133. *Id.* at 1018 (quoting Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 125 (1988)).

134. *Id.* (quoting Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 125 (1988)).

135. *Id.* at 1036.

136. Kahneman et al, *supra* note 23, at 62.

137. Sebok, *supra* note 101, at 1019.

138. Koehler & Gershoff, *Betrayal Aversion*, *supra* note 7, at 247.

awarding of sanctions. Broken promises were the single critical factor in jury sanctions.[139]

Perhaps we can narrow these ideas down to the concept of reciprocity. Reciprocity is a social norm. It is the expectation that people will respond to each other in kind. If a person relies on another person's promise, he or she is putting trust in the person making the promise. In return, the promisor is expected to keep the promise, and if he or she fails to do so, the norm of reciprocity is violated, and there is an insult—an implication that the person to whom the promise was made is inferior to the person making the promise. A social world that is "orderly, predictable, and fair"[140] is one where the norm is respected by keeping promises. A person relying on a promise expects the other party to act in a predictable way (by keeping the promise) and sees that expectation as justified based on the norm of reciprocity. In other words, we expect human society to be ordered on rules of fairness. Where a promise is betrayed, reciprocity has been abrogated. The person who relied on the promise infers that he or she has been devalued by the other party.[141] Thus, the right to be treated as an equal has been violated.

As was seen from the Koehler and Gershoff studies, test jurors have no trouble perceiving betrayals not only by humans but also by safety products. Recall the higher sanctions awarded for air bags that kill and for fire alarms that allow burn injuries. The jurors perceived a broken trust or promise when safety products betray. It appears that the sale of a consumer safety product includes an implicit promise that the product will not actually hurt the consumer. When the product betrays that promise, the victim feels that the manufacturer has acted in a way that undermines the victim's value, perhaps by putting the victim on the wrong end of a cost-benefit analysis that pointed toward accepting a higher risk instead of paying to lower it.

One sticking point may arise in awarding punitive damages for betrayal acts: traditionally, for a jury to award punitive damages,

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139. *Id.* at 248–49.

140. *Id.* at 247.

141. *See* Sebok, *supra* note 101, at 1022 (explaining that resentment occurs as a result of feeling devalued by another through the violation of a personal right).

more than mere negligence is required.[142] However, courts have also upheld punitive damages in negligence cases when an exacerbating factor is present, such as when a manufacturer has prior notice of a product's risks or has failed to inspect a product properly.[143] Safety product betrayals could fit this requirement because notice and failure to inspect might be common in safety product betrayals, or perhaps because betrayal itself could be argued as an exacerbating factor.

We have found good justification, therefore, for increasing punitive damages in response to acts of betrayal. What about compensatory damages?

B. Compensatory Damages

The argument for compensation damages for betrayal is fairly straightforward: if betrayals cause harm, that harm should be compensated under the law and economics theory of deterrence. As discussed earlier in this Note, there are several good reasons to treat betrayal harms as real.

If we accept that betrayals cause actual harm, the deterrence theory described by Polinsky and Shavell becomes relevant. Recall that the goal of damages under this theory is deterrence, and that optimal deterrence is achieved when damages equal harm.[144] Damages that are too low, for example, result in underdeterrence and an overall decrease in social welfare in the case of product safety because precautions that would have been less expensive than the actual harm caused are not taken.[145] If betrayal harm is real and is accepted in the calculation of overall social welfare (as are other psychological harms such as emotional distress), then deterrence theory not only allows compensation, it requires it. Because betrayal harms appear to be real, they should be compensated accordingly.

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142. LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 14.03(1)(a) (LexisNexis 2012).

143. *Id.* at § 1403(1)(a) n.3.

144. Polinsky & Shavell, *supra* note 102, at 878.

145. *Id.* at 873.

IV. PRESCRIPTION: NAME THE HARM

First, it should be noted that even if we believed that juries should not award higher damages for betrayal harms, there may be no realistic way of putting a lid on the practice. The study by Kahneman, Schkade, and Sunstein, showing that levels of outrage strongly affect punitive damage awards, is powerful evidence that no amount of judicial admonition will keep juries from punishing defendants when they find their behavior reprehensible.

Nor should we necessarily discourage this practice. From both a consequentialist and retributivist point of view, betrayals cause real problems. From the consequentialist perspective, which holds that an action's value depends on its consequences, a law and economics theorist will notice that each time trust is broken, not only may physical harm result, but the harmed party may also become a little more cynical and find it harder to trust next time.[146] This decreased trust could increase economic inefficiencies because the marginally higher trust barrier will involve higher transaction costs. Contracts may also become marginally harder to negotiate. As parties demand more value in return for trusting others, their zones of possible agreement will narrow, causing some deals not to be made, resulting in forgone opportunities for value creation. Furthermore, from a retributivist point of view, any act that wrongly demeans a person requires redress. A broken trust is a denial of the reliant party's value, and for a retributivist, this cannot stand.

However, even if increased damages are justifiable, they may still be problematic. There is a risk of overdeterrence if betrayal harms are compensated in vague, ill-defined ways, according to juries' intuitive sense of what is fair or just. Recognizing concerns of economic inefficiency, it would perhaps be worthwhile to adopt a new and specific approach to betrayal awards. We might call this approach the "name the harm" approach. Instructions could be given to juries that would identify betrayal harm as a specific harm for which jurors would then be asked to assign a dollar amount as compensation. The main advantage of this approach would be to attempt to make the award economically rational. If specifically

146. Iris Bohnet & Richard Zeckhauser, *Trust, Risk and Betrayal*, 55 J. ECON. BEHAV. & ORG. 467, 471 (2004).

addressed as a harm, the tort system would then be directed toward the economically sound goal of deterring betrayal.

There are a few other possible advantages of the name the harm approach. First, under current practice it is likely that juries are awarding punitive damages for acts of betrayal because they are outraged and want to punish. The problem with this practice is that it is an ill-defined approach to betrayal, and probably leads to unpredictable awards.[147] For the tort system to work best, it would be more helpful for potential tortfeasors to have specific knowledge of the precise areas of liability they should address, and also the amount of liability to which they are exposed. This would enable them to make more accurate efficiency analyses that would increase social welfare. For example, in an automobile accident that results in a death from an improper air bag deployment, it would help the manufacturer to allocate resources properly if juries clearly signaled the fact and amount of the betrayal damages. Otherwise, collateral issues such as contributory negligence or unclear causation chains might obscure the importance of the air bag's failure.

Another advantage of the name the harm approach is that current practice may actually be overdeterring betrayal. If the only aspect of a case that outrages a jury is the betrayal, and it is the only basis for the punitive damages, then juries may be awarding too much for betrayal harm. Focusing the jury's attention on the betrayal by naming the harm and asking the jurors to thoughtfully address it may result in fewer high awards based mostly on the passion of outrage.

Finally, name the harm could address the problem pointed out by Cass Sunstein's study of punitive intent and punitive damages. This study shows that, while jurors have a strikingly high amount of consensus on their intent to punish a given fact pattern, when they translate that intent to a dollar award amount, the awards can vary greatly.[148] Perhaps name the harm, by shifting attention from punishment to compensation, could result in a tort system that is more consistent and credible.

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147. Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171, 172 (2003).

148. *Id.*

There are of course a number of unknowns from a new approach like name the harm. The hoped-for results are purely speculative. It is difficult to know exactly what juries would do with such a new way of dealing with a novel harm. Perhaps they would continue to punish for acts of betrayal, but just call it "compensation." Maybe they would increase compensation and then also include a "betrayal premium" in punitive damages, thereby inflating the overall award and aggravating the problem of inconsistent jury awards. To say the least, putting a dollar amount on betrayal is difficult.

V. CONCLUSION

People react very strongly to betrayals, and this fact is probably reflected in jury awards. The problem is that juries are likely awarding increased damages for acts of betrayal in ad hoc ways. Interesting research has already been undertaken on betrayal aversion and its effects on jury awards. If we believe that proportionality, rationality, and consistency are important for the credibility and effectiveness of the tort system, how humans react to factors such as betrayals needs to be understood so that we can adjust awards accordingly. Name the harm is one possible response to what we already know about betrayal aversion. However, it would be helpful for researchers to go deeper and fully map out the interactions between betrayals, juries, and awards in order to help us have the tort system we desire.

The Next Generation of Disparate Treatment: A Merger of Law and Social Science

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I. INTRODUCTION

Title VII operates to prohibit four main types of employment discrimination: individual disparate treatment, systemic disparate treatment, disparate impacts on certain protected groups, and harassing conduct at work. While antidiscrimination law under Title VII is expansive, the focus of this analysis will be to discuss the doctrinal framework necessary to establish a disparate treatment claim. In particular, this Note will address the two most critical words in establishing liability in a disparate treatment case—what it means to discriminate *because of* a protected characteristic. While courts have historically interpreted "because of" to entail a certain degree of awareness or control on the part of the discriminator—that he is consciously acting on his prejudice—social science gives us reason to reexamine the narrow lens through which we are viewing disparate treatment law. The goal of this Note is to explain the current disparate treatment framework under Title VII; to show how social science undermines judicial assumptions about the process of decision making; to propose solutions that might prevent biased errors before they happen; to correct problems when they do arise; and to shift the legal presumption when a defendant fails to carry his or her burden.

Two important issues are necessarily implicated throughout this Note. The first concerns how we view the role of antidiscrimination law and, more specifically, Title VII. We must ask: What is the goal of Title VII and how can we implement its protections in a fair and equitable way? Second, we must address the harms that result from discrimination, and whether we should hold employers liable for discriminatory practices of which they were, in some sense, *unaware*. This raises the question: When the requisite harm occurs, but the necessary mental state is lacking, how

should we go about trying to remedy the harm suffered by plaintiffs? These questions are complex and largely involve normative conceptions of how we view the law as a tool for social change and remedial action. This Note will attempt to strike a balance between properly addressing the harms suffered by plaintiffs who have experienced discrimination and the interests of employers to avoid being unfairly labeled as prejudiced. To do this, we must embrace the spirit of the law, remain loyal to the text of Title VII, and correct erroneous judicial speculation about the source of human decision making. Thus, we must be a philosopher, a social scientist, and a litigant—all at once.

II. THE LAW

A. The Civil Rights Act of 1964 and Title VII

In 1963, President Kennedy noted that employment and educational opportunities had long been out of reach for the African American community and, despite his pleas to employers to end segregated work forces, the problem could not be solved without congressional intervention.[1] Thus, as a result of the massive struggle of ordinary citizens and civil rights efforts, the spirit of President Kennedy, and the forceful arm of newly sworn-in President Lyndon B. Johnson, the Civil Rights Act of 1964 came to fruition. One of the most important provisions of the Civil Rights Act of 1964 was Title VII, a statute that governs the employment practices of private employers and prohibits discrimination on the basis of certain protected characteristics. Pursuant to Title VII, it is an "unlawful employment practice" for an employer to "fail or refuse to hire or to

1. John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963) (transcript available at http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx) (last visited April 7, 2013) ("I have recently met with scores of business leaders urging them to take voluntary action to end this discrimination and I have been encouraged by their response, and in the last 2 weeks over 75 cities have seen progress made in desegregating these kinds of facilities. But many are unwilling to act alone, and for this reason, nationwide legislation is needed if we are to move this problem from the streets to the courts.").

discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[2] In addition, it is an unlawful employment practice to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[3]

B. Disparate Treatment Under Title VII: The Burden-Shifting Framework

Under Title VII, if an employee has been discriminated against because of a protected characteristic, there are a few basic elements she will need to prove in order to make out a prima facie case of disparate, or "unequal," treatment. First, she must show by a preponderance of evidence that her employer intended to discriminate, or that the employer "intended to treat [her] differently than others because of her race, sex, or other prohibited ground."[4] Second, she must show that "the employer took an action that had an adverse effect on the individual's employment."[5] Finally, she must show that "the employer's action was linked to its intent to discriminate"[6] or that there were circumstances that would give rise to an inference of discrimination.[7]

For example, in *McDonnell Douglas Corporation v. Green*, the Supreme Court noted that when a plaintiff is challenging discriminatory hiring practices,

> the complainant . . . must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he

2. 42 U.S.C. § 2000e-2(a)(1) (2006).
3. *Id.* § 2000e-2(a)(2).
4. MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 2 (7th ed. 2008).
5. *Id.*
6. *Id.*
7. *Id.*

> applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[8]

While these requirements vary slightly depending on whether the plaintiff is challenging a hiring, firing, or adverse employment decision, [9] the general requirements are the same: standing, qualification for the job, an adverse action, and circumstances giving rise to an inference of discrimination.[10]

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8. 411 U.S. 792, 802 (1973).

9. For example, if a plaintiff wanted to challenge a discriminatory firing, he would have to prove that he was a member of a protected class, he was qualified for the position, he suffered an adverse employment action, and he was replaced by a person outside his protected class or was treated less favorably than similarly situated individuals outside of his protected class. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). Another variant on this model would require a plaintiff complaining of discriminatory employment decisions that did not involve hiring or firing to show that he was "[] competent to perform the job or is performing his duties satisfactorily; [] he suffered an adverse employment decision or action; and [] the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class." Dawson v. Bumble & Bumble, 398 F.3d 211, 216 (2d Cir. 2005).

10. In *Teamsters v. United States*, the Supreme Court explained the rationale for this burden shifting framework:

> Although the McDonnell Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

431 U.S. 324, 358 n.44 (1977) (emphasis removed).

Thus, where a plaintiff can eliminate the most common, non-discriminatory reasons for an adverse employment decision and develop the facts to suggest that unequal treatment was based on a prohibited characteristic, the plaintiff

Under the burden shifting framework of *McDonnell*, after the plaintiff has met this prima facie showing, the employer will have an opportunity to refute that showing by providing a legitimate, non-discriminatory reason (or "LNR") for the adverse employment decision.[11] What is striking about this particular burden is that the defendant does not have to provide a *good* reason for the employment decision that was made.[12] All that must be shown is that the reason was independent of an intention to discriminate on the basis of a prohibited characteristic.[13]

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will have met the burden of showing a prima facie disparate treatment claim. *See McDonnell Douglas*, 411 U.S. at 802 (laying out four requirements for establishing a prima facie case of racial discrimination: (1) belong to a racial minority; (2) applied and was qualified for the job at issue; (3) rejected despite qualifications; and (4) after rejection, the job stayed open and employer continued to seek applicants).

11. *McDonnell Douglas*, 411 U.S. at 802 ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

12. This assumes the employee is hired under conditions of at-will employment, as opposed to employment contracts providing that firing decisions will be based on good cause or other provisions to that effect. At-will employment, under traditional common law, allows either party to terminate a contract that lacks a specified time for any, or no, reason. ZIMMER, SULLIVAN & WHITE, *supra* note 4, at 4.

13. For example, in *Hazen Paper Company v. Biggins*, the plaintiff brought a disparate treatment claim under the Age Discrimination in Employment Act of 1967 (ADEA) alleging that he was discriminated against because of his age. 507 U.S. 604, 606 (1993). In that case, the Supreme Court noted, "the disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear." *Id.* at 609. *See also* ADEA, 29 U.S.C. § 623(a)(1) (2006) (prohibiting an employer from failing or refusing to hire, or discharging any individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"). While the jury found for Biggins on his ADEA and ERISA claims, the Court of Appeals "relied heavily on the evidence that [the employer] had fired [Biggins] in order to prevent his pension benefits from vesting." *Hazen Paper*, 507 U.S. at 607. As the Supreme Court noted, "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes [and] [t]he ADEA commands that 'employers are to evaluate [older] employees on their merits . . . not their age.'" *Id.* at 610–11. Accordingly, the Court held that "a disparate treatment claim cannot succeed unless the employee's trait *actually played a role* in [the decision-making] process and *had a determinative influence* on the outcome." *Id.* at 610 (emphasis added). In essence, "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Id.* at

An important point to emphasize here is that the defendant's burden to prove a legitimate, non-discriminatory reason is light. In *Purkett v. Elem*, the Supreme Court relied on Title VII to note that even a "silly or superstitious reason" may satisfy the defendant's burden of production.[14] Similarly, in *Forrester v. Rauland-Borg Corporation*, Judge Posner noted how easily the employer might rebut a plaintiff's prima facie case: "[T]he question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason *was* his reason: not a good reason, but the true reason."[15] Thus, there are only two meaningful requirements for a defendant's rebuttal. First, the defendant must clearly set forth, through admissible evidence, the reasons for the plaintiff's rejection.[16] Second, the defendant must provide a sufficiently specific reason to carry its burden of production.[17] Under this framework, the employer does not need to *persuade* the trier of fact that the employment decision was lawful; instead, it "need only *produce* admissible evidence which would allow the trier of fact to rationally conclude that the employment decision had not been motivated by discriminatory animus."[18]

If the employer makes a showing of a legitimate, non-discriminatory explanation (or an explanation that does not discriminate on the basis of a characteristic protected by Title VII), the presumption of discrimination created by the plaintiff's prima

611. The Supreme Court thus held that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609.

14. *See* Purkett v. Elem, 514 U.S. 765, 768 (1995) (using Title VII analysis of the defendant's burden in the context of discriminatory peremptory challenges of jurors on the length of their facial hair and not race).

15. 453 F.3d 416, 418 (7th Cir. 2006) (emphasis in original).

16. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) ("[T]he defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.").

17. *See id.* ("The explanation provided must be legally sufficient to justify a judgment for the defendant.").

18. *Id.* at 257 (emphasis added).

facie case is then extinguished,[19] and the burden shifts back to the plaintiff to show that the defendant's reason was a pretext and not the real reason for the adverse employment action.[20] Under this burden-shifting framework, it is the "plaintiff [who] retains the burden of persuasion" as to the prima facie case and, once a legitimate non-discriminatory reason has been proposed, that burden of persuasion "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination."[21] In short, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question."[22]

The distinction between the plaintiff's burden of persuasion and the defendant's burden of production is significant. First, it means that if the plaintiff has satisfied her showing of a prima facie case and the employer "is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact

19. *See Burdine*, 450 U.S. at 254–55 ("If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.").

20. As the Supreme Court noted in *Burdine*, "[p]lacing this burden . . . on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 255–56. In effect, this operates to give the plaintiff a bulls-eye to strike down in order to uncover discriminatory motive lurking behind an employer's stated reason, which helps narrow the factual inquiry and clarify the strength of the plaintiff's arguments against the employer's stated reason. Other circumstances that indicate pretext may be in the form of similarly situated employees, who do not share the employee's protected characteristic, receiving better treatment under conditions similar to the plaintiff's. For example, an employer "may justifiably refuse to hire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." McDonnell Douglas, Corp. v. Green, 411 U.S. 792, 804 (1973). Other evidence that might be relevant to a showing of pretext would be how the plaintiff was treated during his employment, the general policy and practice of minority employment, and whether statistics (absent some reasonable explanation) conformed to a general pattern of discrimination against the protected group. *Id.* at 805.

21. *Burdine*, 450 U.S. at 256.

22. *Id.* at 253 (citations omitted).

remains in the case."[23] However, if the employer presents a reason that is shown to be false, the plaintiff still carries the burden of persuasion that the employer acted with intent to discriminate against the plaintiff on the basis of a protected characteristic.[24] In essence, "[I]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."[25] While "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, *suffice* to show intentional discrimination," this ultimately means that "rejection of the defendant's proffered reasons will *permit*, [but not *require*] the trier of fact to infer the ultimate fact of intentional discrimination."[26]

While the Court notes that a finding of pretext would not automatically *require* judgment for the plaintiff as a matter of law, it recognizes the power that a jury has in considering the defendant's dishonesty as "affirmative evidence of guilt."[27] The Court even goes so far as to say that "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."[28] The Court here makes two important observations that should not be overlooked. First, that when a defendant's legitimate, non-discriminatory reason is shown to be untrue, "discrimination may well be the most likely alternative explanation."[29] Second, the Court notes that this is especially true because "the employer is in the best position to put forth the actual reason for its decision."[30] I will address both of these points once I have discussed the social science of discrimination, concluding that

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23. *Id.* at 254.

24. *Id.*

25. Reeves v. Sanderson Plumbing Prod's, Inc., 530 U.S. 133, 147 (2000).

26. *Id.* at 134 (emphasis added).

27. *Id.* at 147 (quoting Wright v. West, 505 U.S. 277, 296 (1992)).

28. *Id.* at 134. *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration . . . .") (emphasis in original).

29. *Reeves*, 530 U.S. at 134.

30. *Id.*

in certain situations a change in the doctrinal framework of disparate treatment analysis may be warranted.

C. *Intentional Animus, Rational Discrimination and Stereotyping: The Development of Disparate Treatment Jurisprudence*

In early disparate treatment jurisprudence, courts seemed to read Title VII to readily impose liability when the "intent to discriminate" was closely aligned with a particular kind of *mens rea,* or animus, against a protected group.[31] Later, the Supreme Court moved away from any requirement that the discriminatory conduct be connected to a nefarious motive to discriminate, holding that even certain forms of rational discrimination against a protected group would also be actionable under Title VII.[32] In addition, the Supreme

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31. For example, in *Slack v. Havens*, an early disparate treatment case from 1975, the Ninth Circuit found that the plaintiffs (four black female employees) were intentionally discriminated against when they were required to engage in the heavy cleanup of the bonding and coating department, while their white coworker had been excused and replaced with another black employee. 522 F.2d 1091, 1092–93 (9th Cir. 1975), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Yartzoff v. Reilly, 42 F.3d 1405 (1994). After protesting against the heavy cleanup work, which was not part of any of the plaintiffs' job descriptions, their supervisor threatened that they would do the work "or else" and stated that "[c]olored people should stay in their places," and that "[c]olored people are hired to clean because they clean better." *Slack*, 522 F.2d at 1092–93. The plaintiffs were eventually fired for insubordination and brought suit under Title VII alleging that they had been discriminated against on the basis of their race. In finding that the employer had intentionally discriminated against the plaintiffs, the court refused to entertain the notion that the supervisor's words and actions were not attributable to the company because Title VII expressly includes "any agent" of an employer within the definition of an employer. *Id.* at n.1 (citing 42 U.S.C. § 2000e(b) (2006)).

32. For example, in *Los Angeles Department of Water & Power v. Manhart*, the Court held that an employer's requirement that its female employees make larger contributions to its pension fund than male employees because they (as a class) tended to live longer, and thus drew more from the fund, violated Title VII. 435 U.S. 702, 702–03 (1978). While the employer was concerned that payouts would be greater to women because on average women tended to live longer, the Court found that requiring each woman to individually contribute more money from each paycheck than her male counterpart was impermissible because it discriminated against each woman individually. As the Court noted, "[Title VII]'s focus on the *individual* is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* at 708

Court has found stereotype or "prescriptive" discrimination to be an unlawful employment practice, i.e., where an employer imposes certain norms or beliefs on an employee about how they should behave based on his or her group membership.[33] For example, in *Price Waterhouse* the Court faced a situation where the plaintiff had been up for partnership at her firm, but her aggressive and abrasive nature was at odds with how the people evaluating her candidacy thought that she, as a woman, *ought* to behave.[34] Her evaluations, which were considered in making the promotion decisions, included comments to the effect that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[35] In regards to sex stereotyping under Title VII, the Court noted:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. . . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[36]

(emphasis added). Thus, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an *individual* to whom the generalization does not apply." *Id.* (emphasis added). Furthermore, the court went on to note that while "the parties accept as unquestionably true [that] Women, as a class, do live longer than men," neither Congress nor the courts have recognized Title VII to contain a cost-justification defense. *Id.* at 708, 716–17.

33. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike out the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

34. *Id.* at 233.

35. *Id.* at 235.

36. *Id.* at 251.

1. The Beginning of Mixed-Motive Analysis

Price Waterhouse was an important case, not only because it prohibited sex-stereotyping based on how members of one group *ought* to behave, but also because the plurality interpreted Title VII to encompass a "mixed motive" type of analysis. In other words, "because of" under Title VII did not mean "solely because of," and therefore, if an employer factored a plaintiff's gender into a decision, that would be an unlawful employment practice as envisioned by Title VII.[37] In contrast to the requirement in earlier disparate treatment cases that the protected characteristic was the "but-for" cause of the plaintiff's harm,[38] the plurality in *Price Waterhouse* found it impermissible that the plaintiff's gender (or protected characteristic) even entered into the decision-making equation.[39] In the words of the Court, "When . . . an employer considers both gender and legitimate factors at the time of making a decision . . . that decision was 'because of sex'" in addition to other legitimate considerations.[40] So, "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."[41]

D. The 1991 Amendments, Codifying Mixed-Motive Analysis, and Evidentiary Burdens

In 1991, Congress responded to the decision in *Price Waterhouse* by codifying the plurality's mixed-motive analysis. However, Congress went even further than the plurality in amending Title VII to provide an alternate form of liability. Accordingly: "Except as otherwise provided . . . an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any

37. *Id.* at 241 n.7 (noting that under Title VII, "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of'").

38. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

39. *Price Waterhouse*, 490 U.S. at 228.

40. *Id.* at 241.

41. *Id.* at 228.

employment practice, even though other factors also motivated the practice."[42] With respect to "a claim in which an individual proves a violation under [the above section], the employer has a limited affirmative defense that *does not absolve it of liability*, but restricts the remedies available to a plaintiff."[43] Further, "in order to avail itself of the affirmative defense, the employer must 'demonstrat[e] that [it] would have taken the same action in the absence of the impermissible motivating factor.'"[44] Thus, if an employer can prove that it would have made the same decision absent the improper consideration, the plaintiff's remedies are effectively limited to declaratory relief, injunctive relief, and attorney's fees and costs.[45]

But what, exactly, does it mean to be a motivating factor? The text of the 1991 Amendments seems to indicate that a motivating factor exists when the plaintiff's protected characteristic improperly enters into the decision-making calculus.[46] But in the *Price Waterhouse* plurality opinion, Justice Brennan makes an important observation which this Note aims to address. According to Justice Brennan:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.[47]

This assumes, however, that the employer is cognizant of his discriminatory thoughts, or at least that he is aware that they are affecting his decision-making process. While this concept of human cognition might fit neatly into a judicial psychology box, there is a growing amount of research that seems to contradict this underlying assumption about the decision-making process. In the next section, I

42. 42 U.S.C. § 2000e-2(m) (2006) (emphasis added).

43. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003) (emphasis added).

44. *Id.* (citation omitted).

45. 42 U.S.C. § 2000e-5(g)(2)(B)(I) (2006).

46. *Id.*

47. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

discuss the "lack of fit"[48] between disparate treatment law and the mechanisms causing the discrimination, and the harm that Congress intended to eliminate with the passage of Title VII.

III. THE SCIENCE: DISCRIMINATION AND DECISION MAKING

A. Causation v. Intent

Since 1964 we have come a long way. The world has seen dramatic innovations in science, medicine, and technology—while our understanding of mental processing, as envisioned by judges interpreting Title VII, remains deeply rooted in concepts dating back almost half a century. Accordingly, some have argued the lay theories that dominated disparate treatment jurisprudence on the issue of discriminatory intent have not withstood empirical scrutiny.[49] Those theories—which rely on a belief in the transparency of mental processing and the modeling of perception and decision making as two discrete processes—seem to have outlived their utility in our disparate-treatment framework.[50] Below, I develop the arguments of both legal scholars and behavioral psychologists in a critique of intentional discrimination, as interpreted by the judiciary, and how our concept of "intent" seems out of touch with reality. As Linda Krieger and Susan Fiske point out, "[i]f a legal doctrine . . . rhetorically relies on a testable social science claim, then that claim should be open to scrutiny under empiricism's evaluative standards."[51] Thus, if the law presumes that employers do not discriminate *unless they know* and are *consciously aware* that they are discriminating, then judicial interpretations about

48. "Because of the lack of fit between the present disparate treatment model and the phenomenon it purports to represent, courts and litigants are presented with a confusing array of increasingly ill-defined and questionably premised analytical paradigms." Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161 (1995).

49. *See, e.g.*, Linda H. Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment Law*, 94 CAL. L. REV. 997, 1010 (2006) (noting that these "two 'common sense' theories about the nature of discriminatory motivation . . . have not withstood empirical scrutiny").

50. *Id.*

51. *Id.* at 1061.

how the mind works ought to be put to the test. My goal is to show that by bringing disparate treatment law up to date with what we know about the decision-making process, we can start to bring the law back to what anti-discrimination and Title VII are really meant to achieve.

It is important at the outset to distinguish between causation as motive as opposed to conscious intent. "[C]ourts equate intentional discrimination with a conscious decision to take action based on a target person's membership in a particular group"[52] and, under Justice Brennan's "moment of decision" analysis in *Price Waterhouse*,[53] seem to "suppose an awareness on the employer's part that it is taking sex into account."[54] However, if we look to the plain meaning of the text in the 1991 Amendments,[55] mixed-motive analysis seems to suggest that we should be engaging in a factual inquiry (i.e. did the trait *enter* the employer's decision making process) rather than an inquiry about what the employer wanted (i.e. did the employer *consciously desire* that trait to be a part of the decision making calculus). As the Seventh Circuit noted in *Burlew v. Eaton Corporation*, "motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted."[56] While the law of disparate treatment seems to be looking for a particular *mens rea*, the command of the mixed-motive statute seems to call our attention to an empirical phenomenon about causation. As White and Krieger note, "a

52. Rebecca H. White & Linda H. Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 506 (2001).

53. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ("In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.").

54. White & Krieger, *supra* note 52, at 507.

55. 42 U.S.C. § 2000e-2(m) (2006) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

56. White & Krieger, *supra* note 52, at 509 (citing Burlew v. Eaton Corp., 869 F.2d 1063 (7th Cir. 1989)).

causation-driven inquiry would not focus on whether the decision maker was aware that he was basing his decision on race, but on whether the plaintiff's race *in fact* caused the decision to be made, in whole or in part."[57] In order to unpack this concept of causation as operating outside the realm of conscious intent, we must explore how certain stimuli can affect, on an unconscious level, the decision-making process. To that end, the next section will explore the effects of implicit bias, how stereotypes can influence perception and judgment, and what we can learn from the phenomenon of "mental contamination."

B. The Decision-Making Process Dissected

"Every man has reminiscences which he would not tell to everyone but only his friends. He has other matters in his mind which he would not reveal even to his friends, but only to himself, and that in secret. But there are other things which a man is afraid to tell even to himself, and every decent man has a number of such things stored away in his mind." —Fyodor Dostoyevsky[58]

1. Social Cognition Theory and the Source of Bias

Under the social cognition theory, there are certain cognitive structures and forms of "information processing [that] can, in and of themselves, result in stereotyping and biased intergroup judgment."[59] Here I will briefly explain three important points about the social cognition theory. First, it tells us that "stereotypes, like other categorical structures, are cognitive mechanisms that *all* people, not just 'prejudiced' ones, use to simplify the task of perceiving, processing, and retaining information about people in memory."[60] Second, social cognition theory tells us that "once in place, stereotypes bias intergroup judgment and decision making."[61] In

57. *Id.* at 510 (emphasis added).

58. *Origins and Measurement with the IAT*, PROJECT IMPLICIT, http://pi.psyc.virginia.edu/implicit/demo/background/posttestinfo.html (last visited Feb. 13, 2013) (citing FYODOR DOSTOYEVSKY, NOTES FROM THE UNDERGROUND 29 (Charles Guignon & Kevin Ano eds., Hackett Publ'g 2009) (1864)).

59. *See* Krieger, *supra* note 48, at 1187.

60. *Id.* at 1188 (emphasis added).

61. *Id.*

essence, stereotypes operate as "person prototypes" or "social schemas" which act as "implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people."[62] These biases are also "cognitive [in origin] rather than motivational: They operate absent intent to favor or disfavor members of a particular social group."[63] Finally, these biases operate to distort how information is interpreted, coded, stored, and eventually retrieved from the memory.[64] In some ways, "[t]hese biases 'sneak up on' the decision maker, distorting bit by bit the data upon which his decision is eventually based."[65]

From an evolutionary perspective, it is easy to see why our brains might operate this way. As Linda Krieger notes, "categories and categorization permit us to identify objects, make predictions about the future, infer the existence of unobservable traits or properties, and [enable us to] attribute the causation of events."[66] As Krieger further explains "[people] will rely on availability and representativeness heuristics to estimate frequency and predict the future. And, because race, ethnicity, and gender have been made salient by our history and by observable patterns of economic, demographic, and political distribution, people will continue to categorize along those lines."[67] What is problematic, however, is when those categories contain harmful and negative images about certain groups that serve to perpetuate inequality and, ultimately, discrimination. While this may occur in consciously held beliefs, there is also reason to believe such thoughts occur below the level of cognition.[68]

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62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1189.
67. *Id.* at 1239–40.
68. Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, at 7 (Harvard Law School John M. Olin Ctr. for Law, Econ., and Bus. Discussion Paper Series, Paper No. 495, 2004), *available at* http://lsr.nellco.org/harvard_olin/495 (subsequently published in 35 J. LEGAL STUD., no. 1, 2006, at 199–241).

2. Unconscious Bias

Christine Jolls and Cass Sunstein define bias as involving "the unwarranted attribution of negative traits to members of racial or other discrete groups," which, in many cases, "people are wholly unaware of."[69] Jolls and Sunstein also note the wide range of fields and diverse ways of assessing racial and other forms of unconscious bias, but focus on the leading technique from modern social psychology literature for measuring racial or other group-based unconscious bias: The Implicit Attitudes Test, or "IAT."[70] In brief, the IAT represents a collaborative research effort between researchers at Harvard University, University of Virginia, and University of Washington to "examine thoughts and feelings that exist either outside of conscious awareness or outside of conscious control."[71] For example, by measuring the amount of time it took a test taker to make certain associations between "black" and words that were good or bad, as opposed to "white" and words that were good or bad, [72] unconscious racial bias was defined as "faster categorization when the 'black' and 'bad' categories are paired than when the 'black' and 'good' categories are paired."[73] As Jolls and Sunstein note, "[t]he results of the IAT are striking[:] Three-quarters of respondents exhibit faster categorizations with the stereotype-consistent pairing (black-bad and white-good) than with the

69. *Id.* ("A striking feature of this form of bias in its modern incarnation is that often people are wholly unaware of the negative attributions they make. Even those who sincerely and consistently disclaim racial and other prejudice often show substantial signs of racial or other group-based unconscious bias.").

70. *Background Information*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/backgroundinformation.html (last visited Feb. 13, 2013).

71. *Id.*

72. "In the IAT, respondents are asked to categorize a series of stimuli (words or pictures) into four groups, two of which are demographic categories (such as 'black and white'), and two of which are the categories 'good' and 'bad.' Groups are paired, so that a respondent would be asked to press one key on the computer for either 'black' or 'bad' and a different key for either 'white' or 'good' (a stereotype-consistent pairing); or would be asked to press one key on the computer for either 'black' or 'good' and a different key for either 'white' or 'bad' (a stereotype-inconsistent pairing). Stimuli are (for example) pictures of black faces, pictures of white faces, 'good' words such as joy, love, peace, wonderful . . . and 'bad' words such as agony, terrible, horrible, [etc.]." Jolls & Sunstein, *supra* note 68, at 7–8.

73. *Id.* at 8.

stereotype-inconsistent pairing (black-good and white-bad)." [74] Furthermore, "[t]he tendency can be found among both whites and African-Americans, but looking at whites alone, the tendency to exhibit faster categorizations with the stereotype-consistent pairing [(black-bad, white-good)] is even more pronounced."[75]

Even if we ignored the results of the IAT, however, it is still beyond question that we continue to live in a world where negative stereotypes abound. So, if we assume that (1) our brains automatically process information about groups in certain ways, and (2) negative stereotypes continue to exist, the question remains: How exactly do stereotypes *cause* discrimination? Disparate treatment jurisprudence has already given us a few answers to this question by recognizing that,

> stereotypes, operating as role expectations, may cause discrimination when members of certain groups are excluded from certain roles or occupations deemed "inappropriate" for members of their groups. In this circumstance, an employer doesn't even consider [a] prospective employee's qualifications; group membership trumps all other factors.[76]

In addition, disparate treatment jurisprudence also recognizes that "stereotypes cause discrimination when group status is consciously used as a 'proxy' [or substitute] for another trait."[77]

As Krieger notes, the social cognition theory "provides a fundamentally different explanation of how stereotypes cause discrimination. Stereotypes are viewed as social schemas or person prototypes[,] [which] operate as implicit expectancies that influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory." [78] In other words, "stereotypes *cause* discrimination by biasing how we process information about other

74. *Id.* at 7.
75. *Id.* at 8.
76. Krieger, *supra* note 48, at 1199.
77. *Id.*
78. *Id.*

people." [79] This phenomenon is also known as the "mental contamination" theory.

C. *Mental Contamination*

In 1994, Timothy D. Wilson and Nancy Brekke described a phenomenon known as "mental contamination" whereby "a person has an unwanted judgment, emotion, or behavior because of mental processing that is unconscious or uncontrollable."[80] By "unwanted," they suggest that "the person making the judgment would prefer not to be influenced in the way he or she was."[81] While not exhaustive, their study documents some of the major findings in mental bias research and the ways in which people would prefer not to be influenced,[82] as well as some possibilities for avoiding this kind of "contamination" by controlling how we expose ourselves to certain types of information.[83]

Wilson and Brekke argue that "[m]ental contamination is difficult to avoid because it results from both fundamental properties of human cognition (e.g., a lack of awareness of mental processes) and faulty lay beliefs about the mind (e.g., incorrect theories about mental biases)."[84] What is worse, mental contamination is often impossible to detect because it has no observable symptoms.[85] Thus, while "[o]ne can put a radon detector in the basement and send off samples of tap water to labs that will test the lead content...[t]here are few such devices that measure how much people's judgments

79. *Id.* (emphasis added).

80. Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 117 (1994).

81. *Id.*

82. For example, Wilson and Brekke cite studies where teachers would rather not give students a high grade because the student is attractive, yet there have been repeated demonstrations of such "halo effects." The authors also discuss how consumers would prefer not to be affected by advertising for products, yet there is ample evidence that such advertising has powerful effects on preferences. Finally, they note how most people would not want their decisions about how to behave towards other people to be influenced by news broadcasts, yet there is ample evidence about the "priming effects" such broadcasts can have on people's behavior. *Id.*

83. *Id.* at 117–18.

84. *Id.* at 117.

85. *Id.* at 121.

and inferences are biased."[86] However, we know from experience that there are often subtle ways of manipulating how people perceive certain events, such as by using priming mechanisms, repetition, leading questions, and other forms of framing to influence the perception of an issue.[87] Decisions arrived at under these circumstances will seem logical to the decision maker, even though certain forms of unconscious persuasion were at work in arriving at that conclusion.[88]

Wilson and Brekke also note that people tend to underestimate their own susceptibility to bias and incorrectly assume they are able to control their thoughts and feelings to a greater degree than might actually be the case.[89] One study they note is quite relevant to the discussion here because it involved knowing the gender of a potential job applicant.[90] According to Wilson and Brekke,

> [m]ost people [in the study] reported that they would *not* want gender to influence their decision but believed that it *would* influence them more than they would want it to. Nonetheless, 87% [of those involved in the study] indicated that they would [still] like to know the gender of a job candidate, presumably because they believe they are able to avoid any contaminating effects of such information. Only 5% stated that they would not want to know to avoid being biased.[91]

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86. *Id.*

87. *See id.* at 121 (explaining how our perception of certain events can be manipulated by memorizing words related to the event, the halo effect, and other priming mechanisms).

88. *See id.* (explaining that people are unaware of the manipulations at work that influence their opinion—for example, "when teachers assign a C to a student's paper, they probably believe that they have given it a fair and unbiased evaluation, even if they were biased by how much they like the student").

89. *Id.* at 125.

90. *Id.* at 124.

91. *Id.* at 125 (emphasis added).

After reviewing many of these types of studies, Wilson and Brekke conclude that "the available evidence suggests that people are concerned about having biased judgments but . . . they underestimate their own susceptibility to bias, and they overestimate the extent to which they can control their judgments and feelings."[92]

Wilson and Brekke also discuss the legal rules of evidence and procedure, which "can be considered codified versions of lay theories about judgment and decision making that are believed to prevent [certain] biases."[93] For example, "legal procedure is based on the assumption that jurors can easily discount testimony that they are told is inadmissible, [but] there is considerable evidence that they cannot."[94] In addition, outside the courtroom context, other studies have found that instructing people to disregard information that was confidential or mentioned improperly tended to have no effect on people's judgments; they considered the information anyway, "presumably because they viewed it as highly relevant and diagnostic."[95] Wilson and Brekke conclude, "contamination results if people are unaware of these processes, if they are unmotivated to correct for them, if they are unaware of the direction in which they have biased their responses, . . . or if they are unable to control their responses enough to correct for the bias."[96] This is compounded by the fact that "humans are prone to quick categorization . . . [and] stereotypes of social groups are learned at an early age and are invoked automatically when people encounter members of that group."[97]

In the earlier discussion of *Price Waterhouse*, it was easy to see how sex stereotypes played a role in the plaintiff's evaluations. Because Ann Hopkins did not fit the categories or schemas her male co-workers envisioned for her group, she was demonized for her aggressiveness even though the quality was prized in the position she sought.[98] While the evidence in *Price Waterhouse* suggested that the plaintiff's co-workers were aware of their preference for Ann

92. *Id.* at 126.
93. *Id.* at 123.
94. *Id.*
95. *Id.* at 131.
96. *Id.* at 126.
97. *Id.* at 127.
98. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

Hopkins to conform to the expectations associated with her group,[99] other studies have aimed to uncover types of discrimination that people would not so easily admit. For example, in one study, Marianne Bertrand and Sudhil Mullainathan sent out identical resumes to employers who posted help-wanted ads with one difference: They manipulated the racial component of the applicant and randomly assigned African-American- or White-sounding names ("Lakisha or Jamal" versus "Emily or Greg").[100] Although these resumés were identical, Bertrand and Mullainathan found that White names received 50 percent more callbacks for interviews, and that callbacks were also more responsive to resumé quality for White names than African-American ones.[101] In short, this study confirmed what many minority groups have known through experience for a long time: "Differential treatment by race still appears to still be prominent in the U.S. labor market."[102]

D. Mental Correction: What Works and What Doesn't

While Wilson and Brekke note that knowledge of a negative stereotype can taint judgments automatically in an unwanted way, they also caution against trying to suppress those very thoughts. In their words, "the very act of trying to suppress stereotypic responses can increase their frequency [and the] adjustment process can be very difficult to get 'just right,' . . . especially . . . when one's cognitive capacity is taxed."[103] Furthermore, it is entirely possible that people who are confronted about their discriminatory thoughts or actions will experience cognitive dissonance and, instead of looking for ways to mitigate their bias, will seek to justify their thoughts and beliefs as having a completely non-discriminatory,

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99. *Id.* ("[a co-worker] advised, Hopkins should 'walk more femininely, talk more femininely, dress more femininely . . . .'").

100. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004), *available at* http://www.economics.harvard.edu/faculty/mullainathan/files/emilygreg.pdf.

101. *Id.* at 991.

102. *Id.*

103. Wilson & Brekke, *supra* note 80, at 127.

rational basis.[104] One possible solution proposed by Wilson and Brekke is to try using exposure control.[105] For example, they discuss the possibility of controlling access to certain kinds of source information such as a process calling for the blind review of academic manuscripts.[106] This form of exposure control through blind evaluation has shown promise in other areas, such as efforts to conceal the identities of musicians auditioning for spots in symphony orchestras which have significantly boosted the chances for women to succeed.[107]

Jolls and Sunstein also note that exposure control through workplace employee diversity could help in reducing certain forms of implicit bias.[108] This is because "social science literature demonstrates that the composition of leadership in the workplace often shapes the degree of unconscious bias workers exhibit" and "role models or authority figures in the individual's environment have a significant effect on the degree of unconscious bias."[109] Social science also suggests that "unconscious bias may . . . be reduced by the promotion of counter-stereotypes or elimination of negative stereotypes in the physical or sensory surroundings."[110] For example, "[i]n one study, . . . participants who spent five minutes creating a mental image of a strong woman showed markedly reduced levels of unconscious bias against women. In another study, exposure to pictures of counter-stereotypical group members altered levels of unconscious racial bias."[111] As these studies suggest, "reforms of this kind can have real effects on perceptions of particular groups"[112] and might be exactly what Wilson and Brekke

104. "Cognitive dissonance" is defined as "[t]he theory that the tension-producing effects of incongruous cognitions motivate individuals to reduce such tension." Richard Gerrig & Philip Zimbardo, *Glossary of Psychological Terms*, APA.ORG, http://www.apa.org/research/action/glossary.aspx#c (last visited Mar. 12, 2013).

105. Wilson & Brekke, *supra* note 80, at 136.

106. *Id.*

107. Marilyn Marks, *Blind Auditions Key to Hiring Musicians*, PRINCETON WKLY. BULL. 7 (Feb. 12, 2001), *available at* http://www.princeton.edu/pr/pwb/01/0212/7b.shtml.

108. Jolls & Sunstein, *supra* note 68, at 24.

109. *Id.*

110. *Id.* at 27.

111. *Id.*

112. *Id.* at 30 (discussing the different studies where environments were changed to incorporate more diverse faces and authority figures).

would envision for controlling exposure to potentially biasing sources of information.[113]

IV. A WAY FORWARD

As the earlier discussion of disparate treatment jurisprudence illustrates, the law seems to conceive of discrimination as occurring under conditions of awareness and control, whereas social psychology seems to suggest something very different regarding the way in which implicit forces can influence the decision-making process.[114] I propose that, based upon what mixed-motive analysis already provides and what social science literature has demonstrated, we can adjust our approach to disparate treatment litigation in a way that attempts to prevent discrimination, to credit employers when they take proactive measures, and to shift the presumption in cases where it seems most fair and equitable to do so.

A. Exposure Control, Objective Criteria and Promoting Workplace Diversity

1. "What's in a Name?"[115]

As research has already shown, blind evaluations can have a dramatic effect on curbing unwanted mental contaminations.[116] Whether it is a blind review of academic papers, holding auditions for musicians behind a curtain, or changing names on a resumé, we know that a significant amount of discrimination happens at the front door. I propose that one way we can curb unconscious discrimination is by undertaking exactly the kind of exposure control that Wilson and Brekke suggest.[117] To accomplish this, we might

113. *See* Wilson & Brekke, *supra* note 80, at 136 (offering exposure control as a possible solution to curb discriminatory thoughts or actions).

114. *See supra* Part III.

115. WILLIAM SHAKESPEARE, ROMEO AND JULIET, Act 2, Sc. 2.

116. *See* Bertrand & Mullainathan, *supra* note 100, at 993 (discussing studies that have shown the positive effects of blind auditions on decreasing gender discrimination).

117. Wilson & Brekke, *supra* note 80, at 117.

encourage certain employers to cloak the race, sex, religion, and national origin of the applicant during the application process. For example, if employees applied to jobs online we might encourage employers to utilize different forms of cloaking software that would remove names and other identifying information that signal a protected characteristic. Each applicant would be randomly assigned a numerical identifier to take the place of names (which have the potential to signal racial, ethnic, and gender characteristics). Therefore, a numerical identifier "by any other name"[118] would signal the same characteristics whether its owner was named Greg, Emily, Lakisha, or Jamal and could be a step in the right direction to opening the door to an interview. Admittedly, this proposal is antithetical to Wilson and Brekke's findings that people would still want to know the sex of the applicant, even though they would not want that information to bias their decision.[119] I argue, however, that employers would also opt for solutions that could help reduce the effect of bias in the hiring process, particularly if disparate treatment jurisprudence provides the legal and economic incentives to do so.[120]

2. Objective Criteria

In circumstances where such an option is not feasible, or where it would be too costly or impractical, employers might also consider moving from fluid, subjective criteria to more formal and objective evaluations in assessing potential job candidates and in evaluating current employees. This is because "subjective decision making provides an opportunity for unlawful discrimination,"[121] and might allow implicit bias to seep into subjective evaluations. As Justice O'Connor noted in *Watson v. Fort Worth Bank & Trust*, "[i]f an employer's undisciplined system of subjective decision making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply."[122]

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118. SHAKESPEARE, *supra* note 115.

119. Wilson & Brekke, *supra* note 80, at 125.

120. *See infra* Section IV.B (proposing that if an employer has recognized the problems of implicit bias and taken steps to effectively reduce it, the law should reward him or her and extinguish automatic liability when an employee brings a mixed-motive claim against the employer).

121. Bauer v. Bailar, 647 F.2d 1037, 1046 (10th Cir. 1981).

122. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988).

While every job is different, an objective evaluation system could attempt to pre-determine what characteristics are of paramount importance to the job and might utilize a pre-made system of ranking candidates before and after interviews. As a rough sketch, this might include creating a hierarchy of needs for the employer along the lines of education, experience, training, skills, professional organizations and memberships, outside activities, and other factors that might be relevant to the position at hand. Those categories could then be divided and given a different weight according to their relative importance to the employer, and each candidate would be ranked according to each individual component. Therefore, instead of being rejected or passed over because of gut feeling, intuition, or for some other vague, generic reason, an employer could point to a low overall score, or low scores on the characteristics most important to the job. Large statistical disparities that begin to appear between high rankings pre-interview and low rankings post-interview for certain protected groups could alert an employer that implicit bias might be factoring into the interview evaluations. Additionally, if a disproportionately large number of protected groups are scoring low on a given factor, the employer might want to reconsider whether that factor is essential to the job at hand.

3. Controlling the Environment

We also know from research and experience that one's environment can affect one's perception about oneself and those who surround them.[123] However there is reason to believe that once an environment has been contaminated, it can also be decontaminated. This correction does not necessarily have to be done through a heavy-handed affirmative-action approach. It can be done, as Jolls and Sunstein suggest, by simply changing the physical and sensory characteristics of the workplace.[124] Thus, instead of having an office adorned with pictures of only prominent, white male figures, employers might consider diversifying the faces of the people to

123. *See* Jolls & Sunstein, *supra* note 68, at 27–30 (explaining various social science studies that demonstrate environmental effects on a person's perception).

124. *Id.* at 21 (arguing that the workplace can be de-biased by making small changes in the work environment).

convey images of strong women, important racial minorities, and other groups historically excluded from employment opportunities.[125] Employers could also change images that have a strong tendency to suggest a preference for the dominant group to images that are more artistically expressive and culturally diverse.

4. Workshops, Team Building, and Training

In addition, employers might consider investing in workshops and team-building exercises that require diverse groups of employees to interact, work, learn from, and socialize with each other. As Jolls and Sunstein note, contact with members of other groups can help to effectively reduce implicit bias.[126] Additionally, there are already resources that can tailor workshops and training programs based on an employer's specific needs.[127] This might include exercises such as discussing differences and commonalities openly, speaking about unique backgrounds, learning how to confront inappropriate behavior, and managing diversity-related conflict.[128]

B. Prevention as an Affirmative Defense to the Mixed-Motive Framework

If employers utilize these measures to reduce and help control implicit bias, the law should credit such steps when an employee or applicant brings a mixed-motive claim. Thus, I propose an amendment to the mixed-motive framework to provide that if a plaintiff has proved a prima facie mixed-motive claim, an employer should be able to use their existing affirmative steps to correct unconscious bias as a new affirmative defense under the mixed-motive framework. As mixed-motive law currently stands,

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125. Employers may already be doing this through programs as simple as having an "employee of the month" where superlative workers are chosen and their photographs are displayed to signify their importance to the company.

126. Jolls & Sunstein, *supra* note 68, at 25.

127. *See, e.g.*, *Designing Effective Workforce Diversity Training Program: A PACT Training Resource Guide*, PACT TRAINING INC. 8 (2006), *available at* http://www.Pacttraining.com/pact/pdf/devdivprograms.pdf (last visited Mar. 12, 2013) (describing a program called "The Structured Improvisation," which offers drama-based training exercises to promote diversity).

128. *Id.*

employers can only *limit* the remedies available to a plaintiff under the "same decision" test.[129] However, I propose that if the employer has taken steps to prevent implicit bias from entering the decision-making calculus, we should not just limit—but extinguish—automatic employer liability. In short, where an employer has recognized the problems of implicit bias and taken steps to effectively and voluntarily reduce the contamination effect (as illustrated in subsection A), the employer's proactive efforts should operate to shift the burden back to the plaintiff, to extinguish automatic liability, and to require the plaintiff to prove the employer's reasons were a pretext.

This proposal for a change in doctrine is grounded in two complementary considerations: fairness and efficiency. With regard to fairness, mixed-motive law is about preventing prohibited factors from even entering the decision-making calculus; if an employer has taken preventative measures to reduce that occurrence, then the law is arguably fulfilling its intended purpose. Therefore, where an employer has taken effective measures to overcome implicit bias it should not, as current doctrine provides, be held liable for considerations it took every opportunity to eliminate. Second, I argue that this modification in doctrinal framework would encourage employers to voluntarily implement changes in the workplace. Such changes have the potential to diffuse tension, harmonize the workplace environment, and promote greater equality with the added benefit of less employment-related litigation in the courts.

C. *Judgment for the Plaintiff When an LNR Has Been Disproved Under the Traditional Disparate Treatment Framework*

The second change in doctrine I propose is when a plaintiff has proved her prima facie case and an employer's legitimate, non-discriminatory reason has been conclusively proven false, judgment

129. *See* Daniel B. Moar & Stacey L. Budzinsky, *Mixed-Motive Causation Under the Americans with Disabilities Act*, 35 N.Y. ST. B.A. LAB. & EMP. L.J. 29, 29 (2010) (discussing how § 107(a) of the Civil Rights Act of 1991 limits a plaintiff's remedies to declaratory relief, an injunction, and attorney's fees and costs if the employer has met the requirements of the "same decision" test).

should be entered for the plaintiff as a matter of law. As the law currently stands, "rejection of the defendant's proffered reasons will *permit* [but not require] the trier of fact to infer the ultimate fact of intentional discrimination." [130] The change I propose would effectively amend disparate treatment analysis to *require*—rather than *permit*—a finding of intentional discrimination under these (very limited) circumstances. I propose such a change because, as the Court in *Reeves* noted, "once the employer's [non-discriminatory] justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." [131] As we have seen, the first reason appears to be supported by social science literature about the way we make decisions, and if an employer's proffered reason is conclusively false then we may have good reason to believe that "discrimination may well be the most likely alternative explanation." [132] Second, the Court in *Reeves* calls our attention to ideas about fairness and where the burden of persuasion should ultimately fall based on the availability of information. [133] Under the approach I propose, when an employer's proffered reason is shown to be definitively false, it is as if the defendant has not carried its burden of production in any meaningful way. Therefore, because the employer is in the best position to articulate why an employment decision was made, has the best access to information, and ultimately controls the employment situation of all workers, I argue that under the traditional disparate treatment (non-mixed motive) framework, once an employer's LNR has been fully discredited, judgment should be entered for the plaintiff as a matter of law.

One important caveat to this second proposal is that it should exclude situations where "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was *abundant* and *uncontroverted* independent evidence that no

130. Reeves v. Sanderson Plumbing Prod's, Inc., 530 U.S. 133, 147 (2000) (emphasis in original).

131. *Id.* at 147–48 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration.") (emphasis in original)).

132. *Id.*

133. *Id.* at 143.

discrimination had occurred."[134] This would describe a situation where an employer gave a "false explanation to conceal something *other* than discrimination,"[135] for example, firing someone because of a personality conflict or other circumstances where employers might not want to be truthful about the real, non-discriminatory reasons. Where, however, the plaintiff has made a strong prima facie case, and the employer's false reason was not clearly for the purpose of concealing something other than discrimination, we ought to recognize that "discrimination may well be the most likely alternative explanation" and create a presumption of liability where an employer, who is in the "best position to put forth the actual reason for its decision" has not carried its burden of production.[136]

V. COUNTERARGUMENTS AND OBJECTIONS

A. Exposure, Environment, and Evaluations: Would Employers Lose Control?

Considering some of the proposals mentioned in Part IV, one might question whether employers would actually agree to implement these kinds of measures. This might be especially true for an employer who would want to know the composition of the applicant pool in attempting to reach out to underrepresented groups and achieve its own affirmative action goals. In addition, employers may not have facilities that are conducive to these kinds of changes, may not have the budget to invest in new décor, and may be unwilling to depart with a sense of individuality conveyed by the design of their workspace. Finally, one could argue that in moving from subjective evaluations to formal criteria, there are "[s]ome qualities . . . [such as] common sense, good judgment, originality, ambition, loyalty, and tact [that] cannot be measured accurately through standardized testing techniques" and that "success at many jobs in which such qualities are crucial cannot itself be measured

134. *Id.* at 148 (emphasis added).
135. *Id.* (emphasis added).
136. *Id.* at 147.

directly."[137] As Justice O'Connor noted in *Watson v. Fort Worth Bank*, "[o]pinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling."[138]

At the outset, three points should be noted about the reforms this Note suggests. First, employer efforts to reduce implicit bias would be *entirely voluntary*. That is, there would be no requirement that employers would have to do any of this unless they sought to avail themselves in advance of an affirmative defense under the mixed-motive framework. Second, I note that the proposals are meant to represent a floor—not a ceiling—for the kinds of workplace reforms that employers should ideally embrace. The proposals are intended to give guidance to employers as to how to overcome some of the problems that arise in reviewing applications, conducting interviews, and operating in potentially contaminated work environments. Third, I note that these proposals are not appropriate for each and every employment situation. Instead, they are meant to suggest some ways that we might go about controlling exposure to unwanted contamination. While not exhaustive, these proposed reforms are meant to give employers an idea about how to utilize and deploy social science in reforming the workplace environment. The common thread running throughout these proposals is an emphasis on making an employer aware of how implicit bias works and how it can invade the decision-making process at every level from hiring to firing. Most importantly, this Note illustrates how employers can ultimately benefit from implementing these types of reforms by promoting equality, reducing conflict, providing litigation protection, and creating a positive public image in an increasingly diverse economic climate.

Furthermore, while some of the measures outlined above will be inappropriate in many employment contexts, there are ways of incorporating the social science that can still reduce the contamination effect. For example, where a police force is looking to recruit more officers with the same racial background as the neighborhood it is patrolling, knowing the race of an applicant at the outset might be an important way to help the police force build trust

137. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991–92 (1988).
138. *Id.*

among the residents of the community.[139] In this context, cloaking an applicant's identity may not be an ideal solution.[140] However, to remedy an implicit bias this might create, the police force could attempt to implement more objective evaluations in work-performance reviews, and evaluate the work environment and sensory surroundings for their potential to contribute to implicit bias, while also engaging in sensitivity, diversity, and conflict-resolution training. Thus, where a compelling interest in knowing the applicant's identity is clear from the outset, other methods of preventing mental contamination could still help reduce implicit bias along the way, depending on the objectives of the company, its resources, size, and current workforce composition.

B. An Ounce of Prevention Worth a Pound of Defense?

A possible critique of the first suggested doctrinal change is: What must an employer do to avail themselves of an affirmative defense, or stated differently, what steps will count in showing that the employer has attempted to reduce and eliminate implicit bias? Under the framework I propose, there would be a three-part test to determine whether an employer could use such a defense. First, we would ask if the employer made a *good faith* effort to reduce implicit bias. Second, we would want to know if the employer took *substantial steps* toward that end. Finally, it would be important to know if the implemented measures were actually *effective* in showing improvement in the dynamics of the workplace.

Under the first prong of this three-part test, one could measure the good faith effort on the part of the employer by examining the nature and extent of the changes that were implemented in the workplace. For example, having a "diversity day" would be a trifling and unsatisfactory attempt at reducing implicit bias. On the other hand, the following measures would all demonstrate meaningful, good faith attempts at reducing implicit bias: educating managers and supervisors about the social science of implicit bias, employing psychologists or sociologists to evaluate the

139. Example provided by Cary C. Franklin, Assistant Professor at the University of Texas School of Law, Austin, Texas.

140. *Id.*

workplace environment, or overhauling former systems of evaluation to incorporate lessons learned from social science research.

The second prong, the "substantial steps" test, would, like the first prong, necessarily be a fact-based inquiry involving an assessment of where the company began and the nature and degree of the reforms that were implemented. Thus, the inquiry would take into account the unique situation of the particular employment context at issue in determining whether measures aimed at reducing implicit bias were "substantial" *for that particular employer.* Considerations that might be relevant include how much the evaluation systems were changed, for example, whether the employer implemented an entire overhaul or merely added two or three new questions to the interview process (which would not be sufficient). Additionally, we would need to know the extent and nature of physical and sensory changes, if they were implemented, such as including diverse images or illustrations that do not signal subliminal preferences for the dominant group. Lastly, we might inquire whether diversity training and exposure (if implemented) was a one-time, thirty-minute endeavor, or whether the employer was committed to engaging in annual, semiannual, or quarterly workshops and the nature, duration, and depth of that diversity training.

Under the third prong, in order to use an affirmative defense, the employer would have to show that the implemented measures actually reduced the effects of implicit bias in some way. While a complete understanding of implicit bias is still elusive and might be difficult to measure, there are ways we might gauge positive effects from implementing bias-reducing measures. For example, if a greater number of protected groups are being interviewed, hired, or promoted after these measures are implemented, that correlation might serve as strong evidence of the effectiveness of the employer's efforts. In addition, a reduction in the total number of conflicts among current employees involving harassing, intimidating, or demeaning conduct or remarks might also signal positive effects of implementing bias-reducing mechanisms. Finally, the employer might even require its employees to take IATs before and after such measures are implemented, and perhaps have the employees anonymously submit their results to HR for subsequent evaluation and processing. If there is an overall decline in the measure of

implicit bias towards protected groups, the evidence could be worthy of an affirmative defense.

C. *Destabilizing Legal Doctrines that Rely on an Intent Standard?*

It has been said that one of the major problems with actually incorporating what social scientists tell us about implicit bias into anti-discrimination law is that it has the power to undermine all legal doctrines that rely on an intent standard.[141] In other words, if the law attaches liability or guilt under presumptions of how the mind operates, and that presumption is shown to be faulty, we might worry about undermining and unraveling many areas of legal jurisprudence. However, what is especially important about the reforms that I propose is that they are narrowly tailored and limited in scope. That is, the burden shifting framework and affirmative defense are not appropriate to utilize in every employment discrimination context and are only triggered once certain conditions have been met.

For example, pursuant to the change in doctrine that I propose under the traditional disparate treatment model, judgment would be entered for the plaintiff only under three conditions, all of which must be satisfied. First, the plaintiff must make a strong prima facie case of employment discrimination. Second, the employer must give a reason that is shown to be conclusively false. Finally, there cannot be abundant and controverted evidence that the false explanation was to conceal something *other* than discrimination. If, and only if, all of these conditions are met, I propose that in the spirit of fairness, pragmatism, and efficiency, we attach liability where "discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."[142]

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141. *See* Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210, 219–21 (2012) ("Implicit bias research shows that traditional understandings of conscious intent fail to tell the whole story.").

142. Reeves v. Sanderson Plumbing Prod's, Inc., 530 U.S. 133, 134 (2000). *See also id.* at 147–48 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not

Under the mixed-motive analysis, social science research would also come in under very narrow circumstances, i.e. where an employer had actually taken meaningful steps to learn about implicit bias and had implemented measures to reduce the contamination effect in the workplace. Under the "same decision" test, the law still holds employers liable for allowing a plaintiff's protected trait to enter the decision-making calculus, though it does limit the plaintiff's remedies. I propose that extinguishing automatic liability in cases where employers have voluntarily undertaken proactive measures to correct for contaminated decision making holds more promise for the future of anti-discrimination law than litigation does, because it utilizes the legal system as an incentive for voluntary compliance and positive change. Therefore, when an employer has taken measures to prevent and reduce the likelihood of contaminated decision making, the law ought to reward and encourage efforts that attempt to extinguish discrimination at its roots.

VI. CONCLUSION

As John F. Kennedy once noted, "Every American ought to have the right to be treated as he would wish to be treated, as one would wish his children to be treated."[143] In some ways, this admirable notion is in tension with judicial interpretations that "Title VII is not to be used as a 'general civility code.'"[144] What can be said, however, is that Title VII does not command employment to be pleasant or conflict-free. It requires only that prejudice against employees and applicants on account of race, sex, religion, and national origin should not arbitrarily prevent individuals from succeeding in the workplace.[145] While the proposals and changes in

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the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration.") (emphasis in original)).

143. *See* Kennedy, *supra* note 1.

144. Gonzalez v. N.Y. State Dep't of Correctional Srvs., 122 F. Supp. 2d 335, 343 (2000).

145. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–31 (1971) ("The objective of Congress in the enactment of Title VII is plain . . . . It was to achieve equality of employment opportunities . . . [by] the removal of artificial, arbitrary, and unnecessary barriers."); Humphrey v. Moore, 375 U.S. 335, 350 (1964) (discussing the difference between "wholly relevant considerations" and "capricious or arbitrary factors").

doctrine included in this Note reflect modest steps in the right direction, they should be viewed as a floor from which employers can build and tailor their own solutions to fit the nuances of their particular work environments. In short, the ideas proposed here suggest that anti-discrimination law can serve more than a purely punitive function. It can also, when coupled with social science research, be part of discrimination's prevention and cure.