

WHAT'S IT WORTH? JURY DAMAGE AWARDS AS
COMMUNITY JUDGMENTS

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*“The law wisely leaves the assessment of damages, as a rule, to juries, with the concession that there are no scales in which to weigh human suffering.”*¹

INTRODUCTION

In a recent article, *The Political Puzzle of the Civil Jury*, Jason Solomon questions whether the civil jury operates effectively as a political institution.² Civil juries are said to perform multiple political functions. They inject community perspectives and values into legal decision making.³ They act as a check on government and corporate power.⁴ They legitimize the civil justice system.⁵ Finally, they promote greater civic engagement among jurors.⁶ Solomon concludes, however, that these claims about the civil jury’s multiple political functions are overstated and understudied.⁷ He calls for more theoretical and empirical study of the civil jury’s performance of its political functions.⁸

This Article offers a response to Solomon’s piece, providing evidence about the political dimensions of jury damage award decision making.⁹ I argue that the damage award is a key part of the civil jury’s political activity. Indeed, in my view, it is just as significant as the political nature of the civil jury’s liability judgment, which up to now has been a more frequent topic of scholarly inquiry.¹⁰ This Article focuses on one of the dimensions Solomon identifies: the injection of community perspectives and values into

1. *Chesapeake & Ohio Ry. v. Arrington*, 101 S.E. 415, 423 (Va. 1919).

2. Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331 (2012).

3. *Id.* at 1335, 1338.

4. *Id.* at 1340-42, 1345, 1347.

5. *Id.* at 1353.

6. *Id.* at 1389-90.

7. *Id.* at 1336.

8. *Id.* at 1335.

9. *See infra* Part III.A-B.

10. Much discussion about the political role of the civil jury, including some of my own, has emphasized the political character of juries’ liability judgments rather than damage awards. *See* Valerie P. Hans, *Juries as Conduits for Culture?*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 80, 80 (David M. Engel & Michael McCann eds., 2009); Joseph Sanders, *A Norms Approach to Jury “Nullification”*: *Interests, Values, and Scripts*, 30 *LAW & POLY* 12, 21-23 (2008).

legal decision making.¹¹ I contend that damage awards and community values are deeply intertwined. The dollars that juries award, from the compensatory amounts they grant to auto accident victims to the punitive damages they deliver against large corporations, are very much products of community views and sentiments.¹² In my view, damage awards constitute powerful political actions by the civil jury. Civil jury damage awards serve to check or endorse private power, whether it is power over one's own neighbors or over business corporations.

To support my argument, I draw on theoretical accounts of jury decision making about damages, including the story model,¹³ insights from cultural cognition research,¹⁴ and a new gist model that cognitive psychologist Valerie Reyna and I have developed to explain the process of jury damage award decision making.¹⁵ Jurors' values constitute an important component of these and other models.¹⁶ I also describe the empirical research that documents and establishes the pervasive influence and content of community values in jury damage award judgments.¹⁷

I. DO JURY DAMAGE AWARDS REFLECT COMMUNITY NORMS? DIFFERENT PERSPECTIVES

The dollar amount of a jury damage award expresses community values in multiple ways. It reflects the socially assessed value of an injury, calibrated to take into account a specific context and the identities and circumstances of the injurer and the injured. The jury's damage award amount also incorporates the meaning of money held by community members.¹⁸ Community judgments are

11. See Solomon, *supra* note 2, at 1335, 1338.

12. See *infra* Part III.

13. See *infra* Part II.

14. See *infra* Part II.

15. See Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. (SPECIAL ISSUE) 120 (2011).

16. See *infra* Part II.

17. See *infra* Part III.A-B.

18. VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 2-4 (1994) (documenting ways that people ascribe multiple and symbolic meanings to money).

reflected in awards for economic damages, noneconomic damages, and punitive damages.

Solomon acknowledges that:

Community norms might also dictate how much certain wrongs or injuries are worth in damages.... One could say that the level of damages is a way that the community sends a message about how bad the wrong or injury is, and this is an important part of helping constitute a community—meting out justice ... is a way of articulating a community's values.¹⁹

On this, we completely agree with each other and with the great jury scholar Harry Kalven, Jr., who wrote eloquently about the jury's ability to measure the worth of human injury and suffering for each individual plaintiff: "There is in brief no standard man, no reasonable man afoot in the law of damages.... And the jury is of necessity left free to price the harm on a case by case basis."²⁰

The assessment of money damages is a profoundly ambiguous task. In a tort case, for example, winning plaintiffs are entitled to receive damages that compensate them for both economic and noneconomic losses "proximately resulting from the defendant's tortious act or omission."²¹ However, fact-finders are given limited guidance or direction about how to value damages.²² Consider, for example, the federal pattern instruction on compensatory damages:

The purpose of the law of damages is to award, as far as possible, *just and fair compensation* for the loss, if any, which resulted from the defendant's violation of the plaintiff's rights. If you find that the defendant is liable on the claims, as I have explained them, then you must award the plaintiff *sufficient damages* to compensate him or her for any injury proximately caused by the defendant's conduct. These are known as "compensatory damages." Compensatory damages seek to *make the*

19. Solomon, *supra* note 2, at 1382 (footnotes omitted).

20. Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958).

21. KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 241 (4th ed. 2012).

22. See Shari Seidman Diamond, Mary R. Rose, Beth Murphy & John Meixner, *Damage Anchors on Real Juries*, 8 J. EMPIRICAL LEGAL STUD. (SPECIAL ISSUE) 148, 148-49 (2011). See generally EMILY SHERWIN, THEODORE EISENBERG & JOSEPH R. RE, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS (2012).

plaintiff whole—that is, to compensate him or her for the damage suffered.... The damages that you award must be *fair and reasonable, neither inadequate nor excessive*.²³

The jury instructions exhort the jury to award “fair and reasonable” damages that are “sufficient,” “neither inadequate nor excessive.” The instructions leave the interpretation of these general descriptive terms up to the jury.

Even though some cases include information about concrete costs of an injury, such as medical expenses and work impact, the uncertainty of related projections that legal fact-finders are required to make even about these relatively concrete losses can be considerable. How long will a plaintiff survive? Will a disability have more or less impact on work performance over time?

There are also intangible injuries with no ready market value, including the pain of a severe injury, the emotional loss of a spouse, the inability to hug a child, or the lost opportunity to pursue a favorite hobby or sport.

The abilities to handle uncertainty and to price the intangibles are among the civil jury’s purported benefits. The jury award combines the evaluations of six or twelve diverse members of the community and thus provides a measure of the community’s assessment of the value. That the jury is given the freedom to assess the harm from the injury reflects a strong preference embedded in the institutional arrangement, a preference “for the community sense of values as the standard by which to price the personal injury.”²⁴

However, Solomon argues that the significance of community values in juries’ damage awards is limited:

As a practical matter, though, community values rarely come into play in damage awards because punitive damages are rare, and the only other category that is indeterminate is pain and suffering. So deciding damages in civil cases seems like a poor

23. 4-77 MODERN FEDERAL JURY INSTRUCTIONS-CIVIL § 77-3 (Matthew Bender) (emphases added).

24. Kalven, *supra* note 20, at 161.

way for members of a community to articulate their values and participate in government.²⁵

Some years ago, George Priest made a similar argument about the limited political role of the civil jury.²⁶ Like Solomon, Priest lamented the fact that the “political role of the civil jury has been largely neglected.”²⁷ After reviewing Jury Verdict Reporter data from civil jury trials in Cook County, Illinois state courts from 1959 to 1979, Priest concluded that “the dominant understanding of the justifiable role of the civil jury—as an institution for the resolution of disputes involving complex societal values and as a popular democratic counterforce—describes very few of the actual tasks of the modern civil jury.”²⁸

Analyzing the specific cases and injuries that juries in Cook County decided, Priest found that civil juries spent just under 20 percent of their time on cases that in his estimation required complex damage assessments.²⁹ These cases included such issues as libel and slander, catastrophic injuries, deaths of individuals without incomes, and loss of consortium.³⁰ In the Cook County cases, much jury energy was expended on the resolution of automobile accidents, not on cases involving governmental actions or police wrongdoing.³¹ Priest calculated that over half of the jurors’ time was spent in assessing routine damages such as fractures, sprains, and whiplash.³² Based on the most recently available national survey of state court civil trials, motor vehicle cases remain a substantial part of the contemporary civil caseload.³³

25. Solomon, *supra* note 2, at 1382 (footnotes omitted).

26. See George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 186.

27. *Id.* at 162.

28. *Id.* at 165.

29. *Id.* at 176.

30. *Id.* at 172-79.

31. See *id.* at 181-86 (finding that much juror time is spent evaluating auto accident cases, not cases involving governmental agencies or police power).

32. *Id.* at 179.

33. LYNN LANGTON & THOMAS H. COHEN, BUREAU JUSTICE STATISTICS, BENCH AND JURY TRIALS IN STATE COURTS (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf> (surveying the types of civil cases decided by juries and judges in courts nationwide and finding that motor vehicle cases constituted a major part of the civil jury’s workload).

Both of these fine scholars take, I think, an overly limited view of the political dimensions of the civil jury's role. In their view, politics apply to a relatively narrow range of cases and tasks. They view political dimensions of the civil jury's role mostly in cases involving government or big businesses as the parties, and in the determination of punitive damages. Whiplash in car crashes, not so much.

Here, we part company. Even in the modest case in which a jury must assign money damages for whiplash suffered in a car accident, the civil jury's dollar awards for the plaintiff's physical and noneconomic injuries are inevitably infused with the community's values. Those values do not always support the little guy against Goliath, but they reflect community judgment all the same, and in that sense are political. Juries police the boundaries of acceptable wealth distribution through the civil justice system, deciding exactly how much money to shift from the harmdoer to the harmed.

II. MODELS OF JURY DAMAGE AWARD DECISION MAKING

Explaining how community values influence jury damage awards requires an understanding of the mechanisms by which those values are incorporated into a civil jury's monetary award. Although the process of damage award decision making is understudied, recent theoretical advances and empirical research have shed some light on this topic.³⁴

First, there is the question of what mechanisms might allow community values to be incorporated into damage award judgments. Jury researchers have developed and tested several models to describe how jurors go about integrating evidence and arriving at a decision.³⁵ The most frequently discussed model of jury decision making is the story model, in which jurors construct narrative summaries of the events in a case.³⁶ Jurors develop a narrative or

34. For an overview, see EDIE GREENE & BRIAN H. BORNSTEIN, *DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS* (2003).

35. See DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* 21-40 (2012) (describing different models of individual and group decision making).

36. See Reid Hastie, *What's the Story? Explanations and Narratives in Civil Jury Decisions*, in *CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES* 23, 24-25, 33 (Brian H. Bornstein et al. eds., 2008) [hereinafter Hastie, *What's the Story?*] (applying insights from story model to civil jury); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519, 521-33

story that explains the evidence they hear. In turn, they rely upon that story to reach a verdict in the case.³⁷ The story model envisions three processes: evaluating evidence through constructing a story; learning the verdict alternatives; and selecting the verdict alternative that best fits the story that the juror has constructed.³⁸ The processes vary with the demands of the task.³⁹

One limitation for our purposes is that much of the original work testing the story model used criminal cases and asked mock jurors for judgments about guilt.⁴⁰ The application of the story model to civil cases, particularly to the compensatory damage award decision, has not been fully developed. One project found that stories mediated liability decisions in sexual harassment disputes, but the study did not ask about damage award preferences.⁴¹ Another research program incorporated features of the story model into an “outrage model” to explain how jurors determine whether to give punitive damages, but did not consider compensatory damages.⁴²

Valerie Reyna and I used the story model as a jumping off point to propose a new gist model of jury damage award decision making, applicable to all types of damage award assessments, including economic, noneconomic, and punitive damages.⁴³ The gist model is a dual process model that builds on Valerie Reyna and Charles Brainerd’s fuzzy trace theory, which assumes that people encode

(1991) [hereinafter Pennington & Hastie, *A Cognitive Theory*] (providing an overview of how the story model operates in legal cases); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992) (same); Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 521, 523 (1988) (testing the story model).

37. Hastie, *What’s the Story?*, *supra* note 36, at 23.

38. *Id.*

39. *Id.* at 23-24.

40. *See id.* at 25.

41. *See* Jill E. Huntley & Mark Costanzo, *Sexual Harassment Stories: Testing a Story-Mediated Model of Juror Decision-Making in Civil Litigation*, 27 LAW & HUM. BEHAV. 29, 33, 45-49 (2003).

42. *See* Daniel Kahneman, David A. Schkade & Cass R. Sunstein, *Shared Outrage, Erratic Awards*, in PUNITIVE DAMAGES: HOW JURIES DECIDE 31, 32-33 (Cass R. Sunstein et al. eds., 2002) (providing an overview of the outrage model); *see also* Hastie, *What’s the Story?*, *supra* note 36, at 26-29 (describing how mock jurors who were asked to consider punitive damages also constructed a narrative summary of the evidence).

43. *See* Hans & Reyna, *supra* note 15, at 129. In this section, I draw substantially from our description of the model. *See id.* at 129-32.

two parallel mental representations of information: verbatim and gist.⁴⁴ Verbatim representations are literal; they reproduce the exact and detailed surface form of the information.⁴⁵ In contrast, gist representations involve the bottom-line meaning that people derive from the information.⁴⁶ Gist representations are labeled as fuzzy because they are not as precise as verbatim representations. Experiments have confirmed the basic tenets of fuzzy trace theory. People engage in both verbatim and gist thinking, but when they make decisions, gist tends to be more important in determining the outcome.⁴⁷ Task demands can push people in the verbatim direction, such as when finer distinctions or numerical estimates are required.⁴⁸ This theory has been used in previous research to predict decision making about medical, health, and risky behavior options.⁴⁹

One of the insights from fuzzy trace theory that is important for damage awards is that people seem to prefer to encode material in fuzzier categorical or ordinal representations, and experience some difficulties in assigning exact numbers.⁵⁰ Numerical estimates are not typically stored in long-term memory; instead, people appear to use the gist or bottom-line sense of the numbers to generate numerical estimates in new contexts.⁵¹

Reyna and I applied the framework to juror damage award decisions.⁵² The Hans and Reyna model, displayed below, proposes a series of stages that a juror will proceed through as he or she engages in the valuation of an injury for the purpose of damage award determination.

44. See Valerie F. Reyna, *A Theory of Medical Decision Making and Health: Fuzzy Trace Theory*, 28 MED. DECISION MAKING 850, 850-51 (2008) (citing, for example, Valerie F. Reyna & Charles Brainerd, *Fuzzy-Trace Theory and Framing Effects in Choice: Gist Extraction, Truncation, and Conversion*, 4 J. BEHAV. DECISION MAKING 249 (1991)).

45. *Id.* at 851.

46. *Id.* at 850.

47. *Id.*

48. Hans & Reyna, *supra* note 15, at 130.

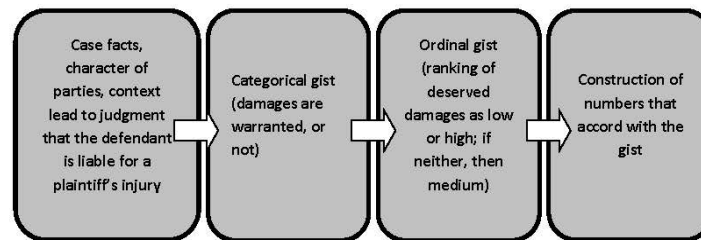
49. Reyna, *supra* note 44, at 851.

50. See *id.* at 850-51, 854-55.

51. Hans & Reyna, *supra* note 15, at 127.

52. See *id.*

Figure 1. Hans and Reyna's Gist Model of Juror Damage Award Decision Making.⁵³



Jurors are hypothesized to develop a narrative or story based on case facts, their estimates of the character of the parties, the context of the case, and their own attitudes, views, and world knowledge.⁵⁴ In the gist model, we assert that the juror arrives at two categorical decisions, shown in Figure 1's first two boxes: first, a judgment that the defendant is liable or legally responsible, and second, whether damages are warranted or not. In addition to this yes or no determination about whether damages are warranted, the juror makes an ordinal judgment about whether the damage award that is deserved is low or high. Jurors are likely to make largely overlapping ordinal assessments of the plaintiff's injury and the deserved damages, but deserved damages may also be influenced by other contextual factors such as the intentionality of the defendant's actions and the identity of the defendant.⁵⁵ These contextual factors may influence the perceived severity of the injury itself. If the injury and deserved damages are neither high nor low, the juror will decide as a default to give them a medium value. Finally, the juror constructs a number that is, to him or her, low, medium, or high, in order to match the perceived deserved damages. Figure 1 presents the ordinal scale as a three-point scale, for purposes of illustration. However, it may be more finely calibrated.⁵⁶

53. A version of the figure originally appeared in *id.* at 129.

54. The development of a narrative story is akin to the first stage of the story model. See Pennington & Hastie, *A Cognitive Theory*, *supra* note 36, at 521.

55. For example, intentionally caused injuries lead to higher damages, compared to the same injuries caused accidentally. John M. Darley & Charles W. Huff, *Heightened Damage Assessment as a Result of the Intentionality of the Damage-Causing Act*, 29 BRITISH J. SOC. PSYCHOL. 181 (1990) (finding, in a scenario experiment, that damage estimates were greater when the harms were done intentionally).

56. See KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW: PSYCHOLOGICAL AND

Some commentators believe that the final step of matching the ordinal judgment of deserved damages to dollars is quixotic, even erratic.⁵⁷ However, the gist theory of damages posits that the matching is governed by understandable processes. Jurors are hypothesized to draw on symbolic numbers from everyday life or from the case that have meaning to them as low or high numbers.⁵⁸ If jurors (or judges, for that matter) have background and experience in the relevant domain, they will likely draw on that background to consider the “going rate” for a specific injury. If not, they will rely more on the numbers in the case itself, or on symbolic numbers, to arrive at a damage award.⁵⁹ Importantly, gist theory predicts that numbers are not already in the heads of the jurors (or judges) but are instantiated at the time they are required, for a particular injury in a specific context.⁶⁰ Even for very savvy number crunchers, numbers do not have meaning by themselves; their meaning depends on context.⁶¹ This sensitive contextual valuation of an injury is exactly what we ask juries to do. The jurors’ individual backgrounds and characteristics as well as local community norms feed into their evaluation of the financial worth of an injury, as discussed below.⁶²

The model is displayed in an idealized and simplified linear form. It is highly likely, though, that the actual process is not a linear one in which a juror progresses invariantly from one stage to another, never to return. Stages may be combined or bleed over into each other. In some cases, liability judgments and damage award determinations are integrated together, rather than undertaken in separate phases as the law imagines. Experimental studies show

LOGICAL BASES FOR THE STANDARD OF PROOF, HERE AND ABROAD 166-68 (2013) (suggesting a seven-point natural scale); Yanlong Sun, Hongbin Wang, Jiajie Zhang & Jack W. Smith, *Probabilistic Judgment on a Coarser Scale*, 9 COGNITIVE SYS. RES. 161, 165-66 (2008) (finding that coarser scales with about five points better captured participants’ judgments than finer scales, which required additional cognitive processing).

57. See Cass R. Sunstein, *Introduction*, in PUNITIVE DAMAGES: HOW JURIES DECIDE 29, 29-30 (Cass R. Sunstein et al. eds., 2002).

58. Hans & Reyna, *supra* note 15, at 130.

59. *Id.*

60. *Id.* at 127.

61. *Id.*

62. See *infra* Part III.A.

that liability and damage awards are sometimes fused together, as are compensatory and punitive damage awards.⁶³

The model indicates that the meaning, value, and significance of an injury—its gist—are assessed within a particular context. These evaluations of the worth of an injury, and whether damages should be low, medium, or high, depend upon each juror's background and experiences. In turn, each individual juror contributes to the group determination of damages as they discuss and debate the appropriateness of a particular dollar award. Reyna and I anticipate that individual jurors who have strong high and strong low gist will be more influential during deliberation than those who favor a medium gist.⁶⁴ Hence the gist model envisions a large role for community judgment in all types of damage award determinations, and not solely for punitive damages, hard-to-assess pain and suffering, or damages that have no ready market figure.

In the gist-based model, gist is the core or central meaning of the story and includes both categorical judgments about whether damages are warranted and ordinal judgments about whether damages are high or low. As jurors search for numbers to match their ordinal judgments, the meaning of their constructed stories might lend significance and symbolic importance to a particular dollar value. For example, consider the famous McDonald's coffee spill case in which an Albuquerque jury awarded both compensatory and punitive damages to a woman who spilled hot coffee on herself and suffered third degree burns.⁶⁵ A defense expert admitted that

63. GREENE & BORNSTEIN, *supra* note 34, at 141 (concluding that liability and damage award judgments may be fused together and that information about defendants' conduct relevant to liability may affect damage awards as well); Catherine M. Sharkey, *Crossing the Punitive-Compensatory Divide*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES, *supra* note 36, at 80-81 (summarizing mock juror research showing that mock jurors who were prevented from assigning punitive damages assigned more in compensatory damages).

64. Hans & Reyna, *supra* note 15, at 131.

65. See *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994). The jury awarded \$160,000 in compensatory damages and \$2,700,000 in punitive damages. *Id.* at *1. The trial judge reduced the punitive award to \$480,000. *Liebeck*, 1994 WL 16777706 (N.M. Dist. Ct. Sept. 16, 1994). The case was ultimately settled, presumably at a lower figure. See Andrea Gerlin, *A Matter of Degree: How a Jury Decided that a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1. For recent retrospectives on the McDonald's coffee spill case, see Bonnie Bertram, *Storm Still Brews Over Scalding Coffee*, N.Y. TIMES (Oct. 25, 2013), <http://www.nytimes.com/2013/10/28/booming/storm-still-brews-over-scalding-coffee.html>; Hilary Stout, *Retro Report: Not Just a Hot Cup*

other patrons had also suffered serious burns from McDonald's coffee, but asserted that they were "statistically insignificant" when one considered that McDonald's sold on the order of a billion cups of coffee a year.⁶⁶ In response, one of the jurors concluded: "There was a person behind every number and I don't think the corporation was attaching enough importance to that."⁶⁷ The plaintiff's attorney recommended punishing McDonald's with an award of one to two days of their company-wide coffee sales.⁶⁸ The jury's punitive damage award, \$2.7 million, equaled two days of McDonald's coffee sales.⁶⁹ This example illustrates how a good lawyer who generates a meaningful number can persuade the jury.

In our article proposing the gist-based model and assessing the extent to which it is consistent with what was already known about jury damages determinations, Reyna and I predicted that jurors would search for meaningful numbers that correspond to their ordinal gist judgments, and that there would be ordinal regularities in damage awards.⁷⁰ In the model, context is an important factor, and the strong effects of contextual anchors confirmed that expectation.⁷¹ We also expected, and found, patterning and scalloping around round numbers.⁷² Gist judgments are easier to map onto round, approximate numbers rather than precise numbers.⁷³ The round number effects are intriguing. Both judges and juries show a strong preference for round numbers.⁷⁴ We also described several case examples that were consistent with the idea that jurors search for meaningful numbers in arriving at dollar damage award judgments.⁷⁵

Reyna and I, in collaboration with our colleagues, conducted an experimental study designed to test predictions from the gist-based

Anymore, N.Y. TIMES (Oct. 21, 2013), <http://www.nytimes.com/2013/10/21/booming/not-just-a-hot-cup-anymore.html>.

66. Gerlin, *supra* note 65, at A4.

67. *Id.*

68. *Id.*

69. *See id.*

70. *See* Hans & Reyna, *supra* note 15, at 130.

71. *Id.* at 137.

72. *Id.* at 134.

73. *Id.*

74. *Id.* at 137.

75. *Id.* at 137-39.

model.⁷⁶ The experiment, conducted online, presented participants with a description of one of two civil lawsuits involving a plaintiff injured in a motor vehicle accident. The defendant had been found liable, and the economic expenses (medical bills and other direct economic costs of the injury) had already been paid. The participants were asked to act as mock jurors and decide on appropriate money damages for the plaintiff's pain and suffering.⁷⁷

The experiment manipulated the meaningfulness of numerical anchors. We predicted that a more meaningful number (median income) would have greater effects on damage awards than a meaningless figure (courtroom renovation cost).⁷⁸ As expected, meaningful anchors had more impact than meaningless anchors on mock jurors' damage judgments.⁷⁹ In addition, suggestions that the anchor number was a relatively high amount succeeded in pushing awards downwards, compared to suggestions that the anchor number was a relatively low amount, which had the opposite effect.⁸⁰ Thus, awards were responsive to contextual cues about the meaningfulness and relative size of a dollar figure, in line with predictions from the gist-based model. Although the experiment provided less contextual information than that provided to real civil jurors, the experimental results show how contextual information, such as the meaning of money and perceptions of a dollar figure's relative size, can influence jurors' choice of dollar awards.

In addition to the story model and gist model, both of which place central importance on context and narrative in juror fact finding,⁸¹ research done in connection with the Cultural Cognition Project offers another potential vehicle for understanding jurors' incorporation of community values.⁸² The Cultural Cognition Project

76. Valerie P. Hans, Valerie F. Reyna, Jonathan Corbin, Ryan Yeh, Caisa Royer & Kelvin Lin, *Testing a Model of Jury Damage Awards* (2013) (unpublished manuscript) (on file with author); Ryan Yeh, *Not Just a Number: Effects of Anchors and Relational Gist on Jury Decisions for Pain and Suffering Awards* (2013) (unpublished B.A. thesis, Cornell University) (on file with author).

77. Hans et al., *supra* note 76.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See supra* notes 35-38, 42-49 and accompanying text.

82. *See* YALE LAW SCHOOL, THE CULTURAL COGNITION PROJECT, <http://culturalcognition.net> (last visited Jan. 29, 2014).

emphasizes people's tendency to engage in motivated reasoning.⁸³ Related research provides some independent evidence that individuals' political and social values help to shape the assessment of facts: "Cultural cognition refers to the tendency of individuals to conform their beliefs about disputed matters of fact ... to values that define their cultural identities."⁸⁴ In a variety of demonstrations ranging from police chases to political protests, researchers in the Cultural Cognition Project have discovered that people engage in motivated reasoning as they evaluate the factual evidence before them.⁸⁵ In discussing the mechanisms that underlie culturally-shaped cognition, the researchers posit that "cognitive dissonance avoidance ... might incline individuals to resolve contested empirical claims in a manner compatible with their cultural identities [and] biased assimilation ... [and might] induce them to credit or discredit factual information in a manner supportive of their prior, culturally grounded views."⁸⁶ They also point to "in-group and out-group dynamics" that might lead people to trust those who have similar cultural values and distrust those with dissimilar values.⁸⁷

The insights of cultural cognition have yet to be applied to the process of damage award decision making.⁸⁸ But they are clearly relevant. As jurors assess a plaintiff's pain and suffering, or the worth of a lost limb, their cultural understandings are likely to

83. *See id.*

84. *See id.*

85. *Facts and Law*, YALE LAW SCHOOL, THE CULTURAL COGNITION PROJECT, <http://culturalcognition.net/projects/facts-and-law.html> (last visited Jan. 29, 2014). For a survey of research and theory about motivated cognition, see Avani Mehta Sood, *Motivated Cognition in Legal Decision Making—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307 (2013).

86. *Mechanisms of Cultural Cognition*, YALE LAW SCHOOL, THE CULTURAL COGNITION PROJECT, <http://www.culturalcognition.net/projects/mechanisms-of-cultural-cognition.html> (last visited Jan. 29, 2014).

87. *Id.*

88. Email message from Dan Kahan, Professor of Law and Professor of Psychology, Yale University, to Valerie Hans (Jan. 29, 2013, 6:57 EST) (on file with author) ("I share the intuition that [cultural cognition] dynamics would be relevant, and potentially in multiple ways ... but we definitely have not studied this."). In other work, Kahan and his colleagues have shown that numerical facility and scientific knowledge do not eliminate the importance of cultural values in the perception of contentious numbers. In fact, in some studies, the most knowledgeable people show the greatest polarization of judgment. *See, e.g.*, Dan Kahan, Ellen Peters, Maggie Wittlin, Paul Slovic, Lisa Larrimore Ouellette, Donald Braman & Gregory Mandel, *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732, 734 (2012) (using cultural cognition theory to study climate change beliefs).

shape all phases of the determination of damages. Motivated reasoning will help to mold perceptions of the facts underlying jurors' judgments of whether the injury and deserved damages are low or high. The gist model also theorizes that culturally significant values will influence the generation of specific numbers that accord with these worth judgments.⁸⁹

III. VALUES AND DAMAGE AWARDS

The story model, the gist model, and cultural cognition all offer mechanisms by which jurors incorporate community values as they decide on damages. In the actual cases that juries decide, what evidence shows that their damage awards are influenced by these values? If jury damage awards reflect community judgments, we would expect to see confirmation at two levels. First, jurors' experiences and political, social, and other values should be significantly related to their damage award assessments. Second, juries in communities that differ along political and social lines might well produce characteristically different damage awards.

A. Individual Jurors' Experiences and Values

Many studies of civil jury decision making have found that the strength of the trial evidence is the strongest predictor of verdicts.⁹⁰ Likewise, statistical analyses of jury damage awards in personal injury cases regularly find that injury severity is strongly and positively correlated with damage awards.⁹¹ More serious injuries result in larger awards.⁹² Noneconomic damages such as for pain and suffering are strongly related to economic damages; punitive damage awards are proportionate to compensatory damages.⁹³

89. Hans & Reyna, *supra* note 15, at 137.

90. Hans, *supra* note 10, at 92-93 (summarizing research evidence showing that ratings of evidence strength are most strongly related to verdicts, whether the evidence is rated by the jurors or by the presiding judge).

91. Theodore Eisenberg, Jeffrey J. Rachlinski & Martin T. Wells, *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239, 1241 (2002); Hans & Reyna, *supra* note 15, at 125.

92. Hans & Reyna, *supra* note 15, at 125.

93. See Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Relation Between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, in

Although the major determinant of damage awards appears to be injury severity, there is room for individual jurors' perceptions, attitudes, and values to influence damage awards.⁹⁴

Perceptions, attitudes, and values may affect the assessment of injury severity itself. In a compelling book on race and gender bias in the measurement of injury, Martha Chamallas and Jennifer Wriggins observe that "tort measurements of lost earnings potential, pain and suffering, and other types of damages can be affected by negative attitudes toward social groups and are not immune to conscious and unconscious gender and race bias."⁹⁵ They criticize the use of gender- and race-based earnings tables because such tables replicate historical patterns of wage discrimination and result in inequitably lower awards for women and for minorities.⁹⁶ Noneconomic losses might seem to be gender-neutral; after all, both men and women experience pain and suffering. But Chamallas and Wriggins argue that tort law privileges physical harm, especially physical harm that interferes with the ability to work at a job.⁹⁷ The privileging of physical harm disadvantages women who work at home or those who experience injuries that are hard to express in market terms.⁹⁸ To the extent that individual juries incorporate traditional assumptions about gender and race into their valuation of harms, they may reinforce tort law's biases. On the other hand, if they are given the flexibility to do so, representative juries that include men and women of different races and ethnicities may depart from tort law biases to reach damage awards that are more equitable.

Much of the work attempting to relate broad demographic characteristics of individual jurors to their damage award judg-

CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES, *supra* note 36, at 105, 106 (finding a strong punitive to compensatory award relationship); Hans & Reyna, *supra* note 15, at 141-42 (finding strong relationships between economic and noneconomic damages and compensatory and punitive damages).

94. Roselle L. Wissler, Allen J. Hart & Michael J. Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 783 (1999). Wissler et al. found that a modest 2 percent of the variance in recommended awards given in response to mock scenarios could be accounted for by demographic variables.

95. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 156 (2010).

96. *Id.* at 158-70.

97. *Id.* at 172.

98. *Id.* at 172-73.

ments indicates that such easily identifiable factors as gender, race, ethnicity, and education have little consistent impact on recommended awards. In their 2003 survey of research on the subject, Edie Greene and Brian Bornstein concluded that most demographic characteristics are only weakly or inconsistently related to civil case judgments.⁹⁹ A juror's income is a plausible exception. In some (although not all) research projects on civil damages, juror income is correlated with damage award preferences. Neil Vidmar and Jeffrey Rice found a correlation between a juror's income and education and the amount awarded in a hypothetical medical malpractice case.¹⁰⁰ Jurors with lower incomes and less formal education tended to award less for pain and suffering and disfigurement.¹⁰¹ Likewise, Roselle Wissler and her colleagues found, in a national survey using case scenarios, that higher income participants recommended larger dollar awards than lower income participants.¹⁰²

Demographic characteristics, however, may be inadequate to capture how individuals differ. Women and men differ tremendously both within and across genders, for example. Case-relevant perceptions, attitudes, and values offer greater promise, and suggest how community judgments are incorporated into dollar damage awards.

Attitudes toward civil litigation in general, and support for business, have been shown to influence civil jury damage awards. Research I undertook to examine jury decision making in cases with corporate and business parties showed significant correlations between jurors' attitudes and jury damage awards.¹⁰³ In one study, I interviewed actual jurors who decided cases with a business or corporate party.¹⁰⁴ In two mock juror experiments, one conducted as part of a telephone poll and the other a full mock jury study, I

99. GREENE & BORNSTEIN, *supra* note 34, at 83.

100. Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 895 (1993).

101. *Id.*

102. Wissler et al., *supra* note 94, at 783. *But see* Shari Seidman Diamond, Michael J. Saks & Stephan Landsman, *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 315 (1998) (finding no significant relationship between participants' background characteristics and recommended awards).

103. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 76 (2000).

104. *See id.* at 59.

examined the links between the participants' recommended damage awards and their attitudes toward business and litigation.¹⁰⁵

To study the impact of business attitudes, I combined a number of questions about confidence in business and views about its appropriate role into a Business Attitudes scale, measuring overall support for business, views about business safety, and attitudes toward business regulation.¹⁰⁶ The size of the relationship was modest, but all three studies pointed in the same direction: more favorable attitudes toward business were associated with lower plaintiff awards.¹⁰⁷ In the juror interview study, I combined the individual Business Attitudes scale scores of those jurors I interviewed after trial into one group measure, then assessed how much I could predict the final jury award, counting defense verdicts as zero awards.¹⁰⁸ Juries whose members were more supportive of business tended to give lower awards to plaintiffs, but the relationship was not statistically significant.¹⁰⁹ Of course, the causal arrow could point the other way; jurors who gave a high award in a case in which there was substantial business wrongdoing might have adjusted their views of business accordingly. The mock jury study was more successful in demonstrating a link. Favorable attitudes toward business were significantly associated with lower awards to a plaintiff suing a business.¹¹⁰ Indeed, more favorable attitudes toward business also predicted lower awards to a plaintiff suing an individual defendant, suggesting that business attitudes are linked to broader views about lawsuits and civil litigation.¹¹¹

In another set of attitudinal analyses, I examined these broader civil litigation views.¹¹² One of the striking discoveries I made in interviewing jurors was their strong belief in a "litigation

105. *See id.* at 17.

106. *Id.* at 171.

107. *Id.* at 174.

108. *Id.* at 171.

109. *Id.*

110. *Id.* at 172-74.

111. *Id.*

112. *See* Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85, 109-10 (1992) [hereinafter Hans & Lofquist, *Jurors' Judgments*]; Valerie P. Hans & William S. Lofquist, *Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil Jurors*, 12 BEHAV. SCI. & L. 181, 182 (1994) [hereinafter Hans & Lofquist, *Perceptions of Civil Justice*].

explosion.”¹¹³ Although empirical research on civil litigation has raised doubts about whether a litigation explosion actually exists,¹¹⁴ the jurors themselves regularly weighed in with their thoughts about our “sue-crazy” society.¹¹⁵ Most agreed that there are “far too many frivolous lawsuits today,” that many lawsuits are unjustified, and that the size of damage awards has outpaced inflation.¹¹⁶ I combined responses to these and other questions tapping concerns and doubts about civil litigation into a Litigation Crisis scale, and then analyzed the relationship between participants’ scale scores and damage awards in the jury study and in the two mock juror studies.¹¹⁷ For the juror interview study, I combined the individual Litigation Crisis scale scores of those jurors I interviewed after trial into a group measure for each jury, and assessed how accurately I could predict the final jury awards from the group Litigation Crisis scores, counting defense verdicts as zero awards.¹¹⁸ Juries whose members were more critical of civil litigation were significantly more likely to give lower awards to plaintiffs.¹¹⁹ Of course, as with Business Attitudes, the correlation is open to interpretation. It could be that the juries who gave high awards served on meritorious cases that shifted their views of civil litigation. In the public opinion survey, however, the questions about the civil justice system were asked before the damage award judgment, and the same pattern held.¹²⁰ The more that individuals believed in a litigation crisis, the lower the damage award.¹²¹ In fact, these civil litigation views had a stronger impact on damage awards than business attitudes.¹²²

Reinforcing the attitudinal analyses, I also observed substantial differences in judgments of negligence and damage awards in response to mock trial scenarios when I varied the identity of the

113. See Hans & Lofquist, *Jurors’ Judgments*, *supra* note 112, at 85; Hans & Lofquist, *Perceptions of Civil Justice*, *supra* note 112, at 182.

114. HANS, *supra* note 103, at 52-58 (describing empirical evidence that casts doubt on the existence of a litigation explosion).

115. *Id.* at 61.

116. *Id.* at 60-63.

117. *Id.* at 67, 75-76.

118. *Id.* at 75.

119. *Id.*

120. *Id.* at 76.

121. *Id.*

122. *See id.* at 174.

defendant.¹²³ For example, in a mock trial study, half the mock juries learned about a personal injury occurring in an individual defendant's (Mr. Wilson) home, and the other half heard about the same injury occurring in the business corporation defendant's (the Wilson Corporation) store.¹²⁴ The average award for the plaintiff who sued Mr. Wilson was \$500,000, whereas the average award for the Wilson Corporation was \$1,180,000, a statistically significant difference.¹²⁵ What is more, the plaintiff's claim of pain and suffering was treated very differently in the two scenario versions.¹²⁶ When a plaintiff sued another individual, mock juries rarely included compensation for pain and suffering. In contrast, most of the mock juries who heard about the injury occurring on the premises of the Wilson Corporation included compensation for pain and suffering.¹²⁷ Apparently, the legitimacy of the pain and suffering claim was perceived quite differently depending on the context.

Several other studies have also found that attitudes toward civil litigation or support for business influence civil damage awards. In a recent M.A. thesis, Kelly Rebeck found in a mock juror experiment that beliefs that corporations should be held to higher levels of responsibility than individuals were significantly correlated with total compensatory damage awards.¹²⁸ A similar belief that "individuals and corporations should not be treated equally under the law" was also related to higher recommended damages.¹²⁹ The jury consulting firm Persuasive Strategies reported finding significant relationships between responses to its Anti-Corporate Bias Scale and juror judgments, but the firm's materials did not

123. *Id.* at 99; Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Responsibility*, 13 LAW & HUM. BEHAV. 151, 157 (1989); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121, 140-43 (1996).

124. HANS, *supra* note 103, at 99.

125. *Id.* at 101.

126. *Id.*

127. *Id.*

128. Kelly R. Rebeck, *Understanding the Corporate Identity Effect: An Examination of How Legal Standards Are Applied to the Behavior of Corporate Versus Individual Defendants in a Civil Lawsuit Scenario* (July 18, 2012) (unpublished M.A. thesis, University of Chicago), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163246.

129. *Id.* at 18 (emphasis omitted).

specify whether the relationships held for both liability decisions and damage awards.¹³⁰

However, individual juror characteristics or attitudes are not always reliable predictors of jury damage awards. For example, Shari Diamond, Michael Saks, and Stephan Landsman found that mock jurors' attitudes toward business and government regulation of business were related to liability judgments in a product liability case, but there was no statistically significant link to damage award judgments.¹³¹ Instead, the researchers found that awards were related to responses to questions about "internal guideposts."¹³² Participants made estimates of the minimum and the maximum awards they would recommend to compensate for four different types of injuries.¹³³ The combined estimates were significant predictors of damage award judgments in the mock jury case.¹³⁴

Although I have limited the immediately preceding discussion to cases involving business and corporate cases, the research evidence indicates that attitudes toward civil litigation and views about the appropriate standard for evaluating business corporations have an impact on civil damage awards.

B. Community Effects

As noted above, in communities that differ along political, economic, and social lines, juries may reflect political judgments in their varied damage awards in line with their experiences and attitudes. The "Bronx jury" invokes a popular stereotype linked to Tom Wolfe's novel, *Bonfire of the Vanities*, in which a forum-shopping lawyer moved his case from Westchester County to Bronx County to take advantage of the presumed pro-plaintiff tendencies

130. For the Persuasion Strategies Anti-Corporate Bias Scale, see Ken Broda-Bahm, *Measure Your Potential Juror's Anti-Corporate Bias: Get the Scale Here*, PERSUASIVE LITIGATOR, <http://www.persuasivelitigator.com/2011/12/measure-your-potential-jurors-anti-corporate-bias.html> (last visited Jan. 24, 2014) (describing a seven-item scale that relates to juror judgments in cases with corporate parties). The website does not provide detailed scale validity information.

131. See Diamond et al., *supra* note 102, at 307.

132. *Id.* at 305, 307.

133. *Id.* at 305.

134. *Id.* at 307-08, 324-25.

and generosity of Bronx juries.¹³⁵ As one decidedly nonfictional New York defense attorney opined: “The Bronx civil jury is the greatest tool of wealth redistribution since the Red Army.”¹³⁶ In particular, the presence of substantial numbers of poor and minority jurors is thought to drive up damage awards.¹³⁷

A handful of studies have explored whether community characteristics can explain something that has long been observed: the average damage awards for the same injuries can vary dramatically across communities.¹³⁸ The inferential challenge is considerable, however. Although damage awards on average might differ across communities and might be related to community characteristics, the political urges of the jury may not be the cause. Issa Kohler-Hausmann identifies the hazards of making such cross-level inferences.¹³⁹ The fact that a community’s aggregate demographics relate to trial outcomes is not proof that jury award preferences are responsible.¹⁴⁰

Theodore Eisenberg and Martin Wells analyzed nationwide data, examining the relationships between a jurisdiction’s population demographics and state and federal jury award statistics.¹⁴¹ They found only limited evidence that population demographic characteristics were related to jury awards.¹⁴² In counties with high poverty rates, state courts had slightly larger tort awards.¹⁴³ Mary Rose and Neil Vidmar compared New York counties, including the famed Bronx County, in medical malpractice and products liability cases.¹⁴⁴ Contrary to the assumed generosity of the Bronx jury, awards in

135. See NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 286 (2007); see also TOM WOLFE, *THE BONFIRE OF THE VANITIES* 406 (2008).

136. *The Bronx Effect*, LOWERING THE BAR (Aug. 17, 2011), <http://www.loweringthebar.net/2011/08/the-bronx-effect.html> (quoting New York defense attorney Ron Kuby).

137. See Issa Kohler-Hausmann, *Community Characteristics and Tort Law: The Importance of County Demographic Composition and Inequality to Tort Trial Outcomes*, 8 J. EMPIRICAL LEGAL STUD. 413, 413-14 (2011).

138. STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 91 (1995).

139. Kohler-Hausmann, *supra* note 137, at 413-14.

140. *Id.* at 414.

141. Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a “Bronx Effect”?*, 80 TEX. L. REV. 1839 (2002).

142. *Id.* at 1839-40.

143. *Id.* at 1840.

144. Mary R. Rose & Neil Vidmar, *Commentary, The Bronx “Bronx Jury”: A Profile of Civil Jury Awards in New York Counties*, 80 TEX. L. REV. 1889, 1890 (2002).

these two types of cases in the Bronx were not statistically different from those in other New York counties.¹⁴⁵

Two other efforts were more successful in identifying links between community characteristics and damage awards. Eric Helland and Alexander Tabarrok examined the links between civil case awards and demographic characteristics of jurisdictions.¹⁴⁶ The results were complex, and they varied depending on the dataset and whether or not the case was heard in federal or state court. In a number of instances, higher poverty rates for particular demographic groups were correlated with higher expected damage awards.¹⁴⁷

Kohler-Hausmann analyzed a national sample of civil trials and damage awards along with various county characteristics and found that county poverty rates and income inequality were significantly related to damage awards.¹⁴⁸ Kohler-Hausmann speculated about micro-level mechanisms that might explain the community characteristics effect. She postulated that low-income juries might be more generous; alternatively, income inequality might create a broader attitudinal change among jurors from different economic strata in the community.¹⁴⁹ It might also be that the courts in communities with greater poverty or income inequality have dramatically different types of civil cases than wealthier or more income-egalitarian communities.¹⁵⁰

In sum, the effort to relate community characteristics to awards has met with only partial success. Higher rates of poverty and inequality are sometimes associated with higher damage awards.¹⁵¹ In contrast, studies of individual juror decision making find that the impact of income tends to go the other way: wealthier jurors tend to be more generous.¹⁵² It is premature to conclude that jury attitudes are the cause of these community patterns, but the data are

145. *See id.* at 1891-95.

146. Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27, 33-42 (2003).

147. *See id.* at 51-52.

148. Kohler-Hausmann, *supra* note 137, at 435. There were no county characteristics related to the likelihood of plaintiff wins. *Id.*

149. *Id.* at 436-37.

150. *Id.* at 436.

151. *See supra* notes 138-49 and accompanying text.

152. *See supra* notes 100-02 and accompanying text.

consistent with the idea that damage awards reflect differential community judgments about worth.

C. Judges Versus Juries

Concerns about jury damage awards have led a number of commentators to recommend that the task be removed from the civil jury.¹⁵³ Judges, for example, might replace juries in determining damage awards. Cass Sunstein and his colleagues assert that problems they identified in mock jury studies of punitive damages might be lessened if judges—who are better educated, know more about the law, and have more experience—were to make punitive damage awards instead of juries.¹⁵⁴ Other approaches, such as damages schedules with preordained amounts for different injuries or charts with award distributions in comparable cases, might be employed.¹⁵⁵ What might be gained or lost if the civil justice system moved away from civil jury damage award determinations? Would judges be as good as juries in incorporating the community's norms into award judgments?

This raises the empirical question about the overlap and similarity of juries and judges in their approaches to deciding damage awards. In a series of impressive studies with judges, Jeffrey Rachlinski, Andrew Wistrich, and Chris Guthrie presented judges with civil trial scenarios and found that their recommended damage awards were influenced by some of the same cognitive biases and heuristics that influence lay fact-finders.¹⁵⁶ A substantial body of research in political science has examined the impact of judges' backgrounds on their decisions, finding that judges' determinations,

153. See, e.g., Cass R. Sunstein, *What Should Be Done?*, in PUNITIVE DAMAGES: HOW JURIES DECIDE, *supra* note 42, at 252-53.

154. *Id.*; W. Kip Viscusi, *Do Judges Do Better?*, in PUNITIVE DAMAGES: HOW JURIES DECIDE, *supra* note 42, at 186-207. *But see* Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867, 882-85 (1999) (criticizing claims of judicial superiority).

155. See Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 777-80 (1995) (suggesting that a chart summarizing damage awards in comparable cases be provided to jurors); Wissler et al., *supra* note 94, at 817 (suggesting that summaries of jury awards in similar cases be presented to jurors).

156. See Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Arbitrary Adjudication: How Anchoring and Scaling Distort Awards and Sentences* (Aug. 19, 2013) (unpublished manuscript).

like those of juries, are influenced by their experiences and cultural perspectives.¹⁵⁷ But judges' and juries' cultural perspectives might well differ, because judges come from a narrower, more educated, and more elite slice of the community. As a group they underrepresent women and racial and ethnic minorities, and their backgrounds tend to be more homogeneous compared to juries,¹⁵⁸ characteristics that might lead them to interpret injury differently and to prefer different damage awards. I conclude that overall, judges would not provide the comprehensive range of community perspectives on damages that juries can offer.

Another source of judge-jury divergence is their different roles in the legal system. Juries look at each case with a fresh perspective, and are usually unaware of past cases and going rates. Judges may be able to evaluate injuries and claims within a particular context because of their easier access to previous cases. However, although this might give judges an advantage in allowing them to compare cases, the influence of these other cases on damage awards could be problematic. To illustrate, consider a recent study by Alexander Colvin, who analyzed thousands of employment arbitration decisions and discovered a repeat arbitrator-employer pairing bias.¹⁵⁹ When the same arbitrator heard more than one case with the same employer, the employees had on average lower win rates and smaller damage awards.¹⁶⁰ Juries might lessen a repeat-player advantage.¹⁶¹

Comparing the awards reached in bench and jury trials is challenging because these groups of cases are usually not comparable.¹⁶² For example, Kevin Clermont and Theodore Eisenberg compared verdicts and awards given by juries and by judges in

157. For reviews of this substantial literature, see generally LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); JEFFREY A. SEGAL & HOWARD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

158. CIARA TORRES-SPELLISCY, MONIQUE CHASE & EMMA GREENMAN, BRENNAN CTR. FOR JUSTICE, *IMPROVING JUDICIAL DIVERSITY* 1 (2010).

159. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 *J. EMPIRICAL LEGAL STUD.* 1, 13-15 (2011) (finding significantly lower win rates and lower damage awards for repeat arbitrator-employer pairings).

160. *Id.*

161. *But see* Solomon, *supra* note 2, at 1351-53.

162. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 *CORNELL L. REV.* 1124, 1171-72 (1992).

bench trials.¹⁶³ In medical malpractice cases, the judges' awards were 1.78 times larger than those rendered by juries.¹⁶⁴ Although it is possible that judges are simply more generous than juries, Clermont and Eisenberg concluded that most of the gap between judge and jury awards is likely due to differences in the sorts of cases selected for bench and jury trials.¹⁶⁵

Researchers have assessed judge-jury overlap and divergence both by comparing damage awards and by using experimental methods.¹⁶⁶ In a 1950s study comparing judge and jury awards, Harry Kalven and Hans Zeisel asked judges presiding over civil jury trials to report the jury's verdict and award along with the verdict and award the judge himself would have reached if he had been deciding the case.¹⁶⁷ Kalven and Zeisel reported that although judges agreed with the jury's verdict 78 percent of the time, the jury's award was on average approximately 20 percent higher than the judge's.¹⁶⁸ In a more recent but smaller study of fifty Arizona civil juries, judges and juries agreed in most cases on liability, but Arizona judges would have been about 10 percent more generous than juries were.¹⁶⁹

Using the experimental approach, Roselle Wissler and her colleagues undertook an ambitious research project that examined whether lay and law-trained fact-finders differed in their approaches to damage award decision making.¹⁷⁰ They presented judges, lawyers, and lay citizens with case scenarios that involved injuries, asking each group to determine the severity of the injury

163. *Id.* at 1133-48.

164. *Id.* at 1141.

165. *Id.*

166. For reviews, see Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 471 (2005); Shari Seidman Diamond & Jessica Salerno, *Empirical Studies of Juries in Tort Cases*, 24-25 (Northwestern L. & Econ. Research Paper No. 12-19), available at http://papers.ssrn.com/sol3/paper.cfm?abstract_id=2171938 (concluding that the collected evidence comparing judge and jury damage awards presented something of a "mixed picture").

167. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 63-65 (1966).

168. *Id.* at 64 n.13. Although full details about judge-jury agreement in civil cases were promised, they did not materialize.

169. Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 64 (2003).

170. Wissler et al., *supra* note 94.

and provide an appropriate damage award.¹⁷¹ The different groups overlapped substantially in how they rated injury severity and assessed appropriate damage amounts.¹⁷² There were, however, a few intriguing differences that suggested contextual influences on both lay and legal actors. Lay participants in Illinois gave higher awards, on average, than the Illinois judges, whereas in New York, there were no significant differences between judges and lay participants in their average awards.¹⁷³

Vidmar and Rice presented a case description that involved noneconomic damages to twenty-one experienced North Carolina lawyers who served as arbitrators and eighty-nine citizens from a North Carolina jury pool.¹⁷⁴ The medical malpractice case description, based on an actual trial, featured a woman who as a result of clear medical negligence suffered serious knee pain, required skin graft surgery, and was left with scars.¹⁷⁵ Arbitrators and jurors made judgments about the injury and recommended damage awards. Their perceptions about the case, the correlations between their perceptions and the recommended damage awards, and the awards themselves were comparable across the legally-trained and lay participants.¹⁷⁶

Eric Helland and Alexander Tabarrok examined the extent to which damage awards decided by state and federal trial judges were influenced by the method by which the judges were selected.¹⁷⁷ They theorized that judges who are elected to their posts have to cater to local voters, and therefore might show more in-state favoritism in their damage award determinations, compared to judges who are selected through an appointment process.¹⁷⁸ Cases that pit an out-of-state corporation and in-state plaintiffs, for example, might produce more judicial generosity for elected than appointed judges. They quote (twice) the words of a retired West Virginia Supreme Court judge, Richard Neely, who confessed:

171. *Id.* at 762-63.

172. *Id.*

173. *Id.* at 798-99.

174. *See* Vidmar & Rice, *supra* note 100, at 890.

175. *Id.* at 891.

176. *Id.* at 896.

177. ERIC HELLAND & ALEXANDER TABARROK, JUDGE AND JURY: AMERICAN TORT LAW ON TRIAL 67-78 (2006).

178. *Id.* at 71.

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.¹⁷⁹

To test their predictions, Helland and Tabarrok compared damage awards in states in which the judiciary was elected through partisan elections, which tend to be more competitive than nonpartisan elections, versus other selection methods, such as appointment, merit selection, or nonpartisan election.¹⁸⁰ The damage awards in these jurisdictions were made by both juries and judges, and jury tort trials far outnumbered judge tort trials. Even so, Helland and Tabarrok argued that judges have significant control over the trial outcome by ruling on key issues, instructing juries in the law, and upholding or setting aside the jury's damage award.¹⁸¹ Awards against out-of-state businesses were substantially larger in partisan judicial election states than in nonpartisan judicial election states.¹⁸²

D. Jury Damage Awards: Admittedly Imperfect Mirrors of Community Sentiment

Although I believe that juries are well-suited to the political task of incorporating community sentiment into damage awards, I acknowledge Solomon's point that jury damage awards are unlikely to be exact mirrors of community sentiment about the value of an injury.¹⁸³

First, juries do not fully represent their communities.¹⁸⁴ Although there is no right to a petit jury that fully reflects the community, juries must be selected from a group that is a fair cross-section of the community, a principle upheld by the U.S. Supreme Court as

179. *Id.* at 71, 126 (quoting RICHARD NEELY, *THE PRODUCT LIABILITY MESS* 4 (1988)).

180. *Id.* at 71-79.

181. *Id.* at 74.

182. *See id.* at 93.

183. *See* Solomon, *supra* note 2, at 1378-83.

184. VIDMAR & HANS, *supra* note 135, at 71-81 (summarizing historical and contemporary problems in achieving representative juries).

“fundamental to the American system of justice.”¹⁸⁵ Juries that include the full range of a community’s life experiences and social, economic, and political perspectives are superior at incorporating community values into their damage award determinations. Yet, despite considerable strides over the past forty to fifty years, courts have difficulty assembling fully representative venires.¹⁸⁶ Some problems are linked to the source lists of citizens from which community residents are to be randomly drawn. Voters’ lists are a prime source used by many courts, but not all eligible citizens register to vote, lessening the representativeness of the list.¹⁸⁷ Next, juror qualification questionnaires and jury summonses garner uneven responses, with lower responses among the poor, those who move frequently, and racial and ethnic minorities.¹⁸⁸ Excuses, exclusions, and exemptions from jury duty can also undermine the court’s ability to generate a representative cross-section.¹⁸⁹ Once in the courtroom, peremptory and for cause challenges can further lessen the representativeness of the civil jury.¹⁹⁰

Other features of the contemporary civil jury in state and federal courts can make it challenging for the jury to function effectively as the voice of the full community. Many states and the federal government now employ smaller civil juries consisting of six or eight jurors, and research shows that smaller juries are much less representative of the population.¹⁹¹ What is more, although federal civil juries must be unanimous, over half the states permit majority verdicts in civil cases.¹⁹² Individuals who hold minority positions are less empowered to make their arguments in juries that decide by majority rule as opposed to unanimous rule.¹⁹³

185. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

186. VIDMAR & HANS, *supra* note 135, at 81.

187. *Id.* at 76-77.

188. *Id.* at 76.

189. *Id.* at 77-81.

190. *Id.* at 93-100 (describing the operation of peremptory and for cause challenges).

191. See AM. BAR ASS’N, PRINCIPLES FOR JURIES & JURY TRIALS 5-6 (2005); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1 (2001).

192. BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION (2004), 233-37 (Table 42: Trial Juries: Size and Verdict Rules), available at <http://www.bjs.gov/content/pub/pdf/sco04.pdf>.

193. Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 229-30

Another challenge lies in the demands of the task. The qualitative sense of the severity of an injury or the outrageousness of the defendant's behavior is not perfectly translated into quantitative judgments on the dollar scale. There has been a great deal of debate and research over the civil jury's determination of money damages, with some scholars and policymakers asserting the general soundness of the civil jury's decisions and others hotly disputing it.¹⁹⁴ As noted above, one group of scholars has suggested that the translation from outrage to dollars in the punitive damages domain is so poor that juries should be removed from the process entirely.¹⁹⁵

Indeed, the challenges of reflecting community judgment on a dollar scale are substantial. Jurors' preferences and juries' judgments may be affected by low numeracy and by reliance on cognitive heuristics or shortcuts. Many people hate math and have trouble with numerical calculations.¹⁹⁶ Numerical judgments are regularly affected by errors like overestimating frequencies compared to probabilities, low attention to base rates, and neglecting denominators in ratios.¹⁹⁷

In their readable and engaging *Why Smart People Make Big Money Mistakes ... And How to Correct Them*, Gary Belsky and Thomas Gilovich detail the ways in which decision-making heuristics can lead people to make errors in financial decision making.¹⁹⁸

(2006).

194. See GREENE & BORNSTEIN, *supra* note 34, at 81-85 (summarizing empirical research on jury damage awards); Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1512-17 (2003) (same); Jennifer K. Robbennolt, *Punitive Damages Decision Making: The Decisions of Citizens and Trial Court Judges*, 26 LAW & HUM. BEHAV. 315, 333-37 (2002) (comparing lay and professional judgments in punitive damages).

195. Sunstein, *supra* note 153, at 242 ("Serious consideration should be given to moving away from the jury and toward a system of civil fines, perhaps through a damages schedule.") (emphasis omitted).

196. See Valerie F. Reyna, Wendy L. Nelson, Paul K. Han & Nathan F. Dieckmann, *How Numeracy Influences Risk Comprehension and Medical Decision Making*, 135 PSYCHOL. BULL. 943, 943 (2009) [hereinafter Reyna et al., *How Numeracy Influences Risk Comprehension*]; Valerie F. Reyna & Charles J. Brainerd, *Numeracy, Ratio Bias, and Denominator Neglect in Judgments of Risk and Probability*, 18 LEARNING & INDIVIDUAL DIFFERENCES 89, 89-90 (2008); Valerie F. Reyna & Charles J. Brainerd, *The Importance of Mathematics in Health and Human Judgment: Numeracy, Risk Communication, and Medical Decision Making*, 17 LEARNING & INDIVIDUAL DIFFERENCES 147 (2007).

197. Reyna et al., *How Numeracy Influences Risk Comprehension*, *supra* note 196, at 966.

198. GARY BELSKY & THOMAS GILOVICH, *WHY SMART PEOPLE MAKE BIG MONEY MISTAKES ... AND HOW TO CORRECT THEM: LESSONS FROM THE NEW SCIENCE OF BEHAVIORAL ECONOMICS*

Anchoring, in particular, has profound effects on damage award judgments for both juries and judges.¹⁹⁹ In addition, people think round numbers are bigger than precise numbers of similar magnitude.²⁰⁰ People also tend to pay much more attention to the left as opposed to the right digits of multi-digit numbers, hence the ubiquity of \$0.99 prices.²⁰¹

Solomon has raised another problem in the process by which individual juror preferences combine together to create a group damage award judgment.²⁰² Researchers who have asked mock jurors for individual predeliberation judgments and examined their relationship to the final group award find they are significantly related, which offers positive support for the idea that juries reflect the community's combined perspectives.²⁰³ However, jury damage award decisions may reflect group polarization. In mock jury studies of punitive damage award decision making, Sunstein and his collaborators explored how juries reached collective punitive damages decisions.²⁰⁴ Although individual mock jurors typically agreed on the relative merits of the different cases, their dollar awards varied substantially.²⁰⁵ People with similar assessments of the reprehensibility of the defendant's behavior nonetheless generated different dollar awards.²⁰⁶ When individual mock jurors met in groups to arrive at a group determination of punitive damages, the group's eventual damage awards were more extreme

(2009) (describing heuristics that lead to money mistakes); *see also* ANNAMARIA LUSARDI & OLIVIA S. MITCHELL, UNIV. OF MICH. RETIREMENT RES. CTR., HOW MUCH DO PEOPLE KNOW ABOUT ECONOMICS AND FINANCE?: FINANCIAL ILLITERACY AND THE IMPORTANCE OF FINANCIAL EDUCATION (2008), *available at* <http://www.dartmouth.edu/~alusardi/Papers/Lusardi-Mitchell08.pdf> (finding low levels of financial literacy).

199. Diamond et al., *supra* note 22, at 176 (finding that anchors generally influenced real civil juries); Rachlinski et al., *supra* note 156, at 37-39 (showing anchoring effects in judges).

200. Manoj Thomas, Daniel H. Simon & Vrinda Kadiyali, *The Price Precision Effect: Evidence from Laboratory and Market Data*, 29 *MARKETING SCI.* 175, 176 (2010).

201. *See* Kaushik Basu, *Consumer Cognition and Pricing in the Nines in Oligopolistic Markets*, 15 *J. ECON. & MGMT. STRATEGY* 125, 126-27 (2006) (discussing the common practice of pricing in the nines); Manoj Thomas & Vicki Morwitz, *Penny Wise and Pound Foolish: The Left-Digit Effect in Price Cognition*, 32 *J. CONSUMER RES.* 54, 55 (2005).

202. Solomon, *supra* note 2, at 1369-70.

203. VIDMAR & HANS, *supra* note 135, at 144.

204. *See* Reid Hastie, *Overview: What We Did and What We Found, in PUNITIVE DAMAGES: HOW JURIES DECIDE*, *supra* note 42, at 17-28.

205. *Id.* at 43-61 (describing study results).

206. *Id.*

and polarized versions of the group's majority preferences.²⁰⁷ Yet polarization does not always occur. Groups with greater initial diversity of opinions are less apt to polarize in their group judgments.²⁰⁸ And even when this does occur, one might argue that at least this feature of group decision making moves the decision strongly in the direction of the community's judgment.

Statistical analyses of actual jury damage awards suggest that whatever the problems that individual jurors and juries face, their decisions reflect striking regularities.²⁰⁹ As described above, the overall severity of an injury is a robust predictor of jury damage award amounts.²¹⁰ The amount of economic damages in a case is the strongest explanatory factor in the amount of noneconomic damages.²¹¹ Likewise, punitive damage awards tend to be proportionate to compensatory damages.²¹² Theodore Eisenberg and his colleagues put it well:

[Although there is] convincing experimental evidence that people lack the basic cognitive skills necessary to translate qualitative moral judgments into quantitative numeric scales the research on quantitative judgments demonstrates substantial consistency in judgments.... In civil lawsuits, the worst-behaved

207. Daniel Kahneman, David A. Schkade & Cass R. Sunstein, *Deliberating About Dollars: The Severity Shift*, in PUNITIVE DAMAGES: HOW JURIES DECIDE, *supra* note 42, at 43-61; *see also* Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1168-69 (2002); Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error and Overreaching in Sunstein et al.'s Punitive Damages*, 53 EMORY L.J. 1359, 1388 (2004) (criticizing the research program on methodological grounds); Richard L. Weiner, *Point and Counterpoint: A Discussion of Jury Research in the Civil Arena*, 23 LAW & HUM. BEHAV. 703, 703 (1999) (introducing a special section of the journal devoted to scholarly assessments of the punitive damages research project as well as author responses).

208. Zachary Corey & Valerie P. Hans, *Japan's New Lay Judge System: Deliberative Democracy in Action?*, 12 ASIAN-PAC. L. & POL'Y J. 72, 79-80 (2010) (describing mixed results in research on group polarization).

209. *See* VIDMAR & HANS, *supra* note 135, at 310-11; *see also* Eisenberg et al., *supra* note 91, at 1270-71.

210. Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 941 (1989) (finding that injury severity and damage awards were strongly related).

211. *See* Herbert Kritzer, Guangya Liu & Neil Vidmar, *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 1012-13 (2014).

212. Eisenberg et al., *supra* note 93, at 1257.

defendants who caused the most harm are the most likely to lose and pay the most damages.²¹³

The variability and unpredictability in compensatory and punitive damage awards is troubling from one perspective. However, it probably has an additional effect of strengthening the hand of the civil jury. Plaintiffs' attorneys would be unable to operate in a completely predictable environment because there would be no disputes for them to bring to the jury.²¹⁴ Furthermore, an unpredictable jury may generate a more powerful incentive in terms of deterrence.²¹⁵

CONCLUSION

Theories of jury decision making, including the story model, the gist model, and cultural cognition, all include mechanisms for the incorporation of community values into jury decision making about damages. The review of collected research shows many instances in which the perceptions, views, and attitudes of jurors influence civil jury damage awards, thus reflecting community values and fulfilling one of the civil jury's political functions. Indeed, through their decisions about damage awards, civil juries police the boundaries of wealth distribution. And what could be more political than that?

Admittedly, the representation of community values is not exact. Juries do not fully represent the community, both because of problems inherent in assembling representative cross-sections and because many jurisdictions have moved toward smaller and nonunanimous juries that do a poorer job representing the community.²¹⁶ The act of translating qualitative sentiment into dollar values poses challenges. Finally, group processes may generate jury

213. Eisenberg et al., *supra* note 91, at 1240-41.

214. See Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers: Dealing with the Possible but Not Certain*, 60 DEPAUL L. REV. 337, 344-50 (2011).

215. Stephan Landsman, *Introduction*, 60 DEPAUL L. REV. 271, 271 (2011) ("All of this denigrates the value of uncertainty, [which] may be critical to the deterrence of misconduct."); Yuval Feldman & Henry E. Smith, *Behavioral Equity* 6 (May 20, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2267613> (describing the assumption in rational actor models that ambiguity generates greater compliance, even over-compliance).

216. See VIDMAR & HANS, *supra* note 135, at 71-81.

awards that are not precise combinations of the award preferences of the jury's individual members.

This raises an important policy question. Are there ways to make jury damages better reflect community judgment? One set of reforms involves the selection of citizens for jury service. Courts should adopt approaches that have been very successful in increasing the representativeness of juries.²¹⁷ These include using multiple source lists; energetically following up with nonresponders; using replacement mailings to areas with low response; and limiting disqualifications, exemptions, and excuses.²¹⁸ The courts might also adapt for the jury context some of the innovative methods pioneered and tested by psychologists and behavioral economists to increase voting and other forms of civic engagement.²¹⁹ Returning to larger juries is a surefire and straightforward way to enhance the representativeness of those who sit on juries. On the more fundamental difficulty of translating qualitative sentiments into dollar awards, basic research on the translation process is needed.²²⁰

In conclusion, although we might disagree about the implications of theory and research on jury decision making about damages for the political role of the civil jury, Jason Solomon and I are in strong agreement that more work needs to be done to explore the political dimensions of the civil jury's work. This issue of the *William & Mary Law Review* is an excellent contribution toward that goal.

217. Valerie P. Hans, *Jury Representativeness: It's No Joke in the State of New York*, CORNELL J. L. & PUB. POL'Y BLOG (Jan. 20, 2012, 1:00 AM), <http://www.jlpp.org/2012/01/20/jury-representativeness-its-no-joke-in-the-state-of-new-york/> (describing traditional and innovative methods for improving citizen responses to juror summons).

218. *Id.*

219. *Id.*

220. Valerie P. Hans, Jeffrey J. Rachlinski & Emily G. Owens, *Editors' Introduction to Judgment by the Numbers: Converting Qualitative to Quantitative Judgments in Law*, 8 J. EMPIRICAL LEGAL STUD. (SPECIAL ISSUE) 1, 1 (2011) (calling for basic research on the translation of qualitative sentiment to quantitative judgments in law).