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Volume 48

Issue 2 Winter 1998: Symposium - *The American Civil  
Jury: Illusion and Reality*

Article 8

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## Recommended Citation

Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DePaul L. Rev. 327 (1998)  
Available at: <http://via.library.depaul.edu/law-review/vol48/iss2/8>

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# THE ILLUSIONS AND REALITIES OF JURORS' TREATMENT OF CORPORATE DEFENDANTS

Valerie P. Hans\*

This Article contrasts the illusions and realities of jurors' treatment of corporate defendants in civil litigation. Business leaders have voiced the opinion that they are often victimized by civil juries, who rule against them more on the basis of deep-seated hostility to business than on the grounds of actual negligence.<sup>1</sup> Claims that the jury engages in undeservedly negative treatment of the business corporation have been central to heated debate over the role of the jury and its place in an alleged litigation crisis, which in turn has fueled tort reform efforts across the nation.<sup>2</sup> To counteract the supposed negative consequences of jury misbehavior on the economy, many state legislatures have passed bills that place new limits on the role of the civil jury and caps on pain and suffering and punitive damages.<sup>3</sup> Tort reform bills aimed at reducing the federal civil jury's role have been regularly submitted to Congress, but have been less successful to date. At both the state and federal levels, the business community has been a forceful advocate of tort reform efforts to limit the civil jury's role.<sup>4</sup>

In this Article, I argue that the simplistic illusion of the anti-business jury fails to accord with a much more complex reality. Reflecting the citizenry from which they are drawn, civil jurors are largely sup-

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1. See *infra* notes 13-26 and accompanying text.

2. STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 1-27 (1995); Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 248-51 (1990); Richard B. Schmitt, *While Congress Debates, States Limit Civil Lawsuits*, WALL ST. J., June 16, 1995, at B1.

3. A summary of some recent state tort reform measures may be found in Darryl Van Duch, *Illinois Tort Reform: A Cautionary Tale*, NAT'L L.J., Dec. 9, 1986, at A1, A21.

4. Richard B. Schmitt, *GOP Drive to Curb Liability Suits Emboldens the Business Lobbyists*, WALL ST. J., Feb. 13, 1995, at B2; Richard B. Schmitt, *Powerful Companies Unite to Push for Legal Reform*, WALL ST. J., Mar. 10, 1994.

portive of the aims of American business and extremely concerned about the potential negative effects on business corporations of excessive litigation.<sup>5</sup> At the same time, they hold corporate defendants to more exacting standards compared to individual litigants, and expect businesses to exhibit a high degree of care for workers and consumers.<sup>6</sup> The application of this distinctive standard appears to be consistent with the political function of the American jury.

### THE ILLUSIONS

Do citizens enter the jury box consumed with hostility toward the corporate defendant? In his historical account of the civil jury, Professor Stephan Landsman suggests that the tendency to see the jury as anti-business dates to the very beginnings of the Republic.<sup>7</sup> He observes that the founders of the country were predominantly small business owners and creditors who waxed eloquent about the benefits of the criminal jury, but were far less enamored of the civil jury.<sup>8</sup> As Landsman describes the prevailing view at the time of the drafting of the Constitution:

[J]ury decisions were bound to be ad hoc and, quite frequently, anti-creditor. If America's financial system was to be rendered sound, it was arguably necessary to curtail jury action in favor of more predictable and consistent rulings protecting investors.<sup>9</sup>

Indeed, the right to a jury in civil cases was not enshrined in the text of the original Constitution but left to the Seventh Amendment.<sup>10</sup> As the judiciary became increasingly professionalized, and the needs of business in an expanding economy more pressing, there were new pressures to limit the jury's role.<sup>11</sup> During the nineteenth century, special rules of liability including the assumption of risk doctrine, fellow servant rule, and contributory negligence were developed to keep cases of industrial injury from the supposedly partial jury.<sup>12</sup>

Contemporary assessments of the jury's predispositions toward business corporations in the courtroom continue to reflect the view that juries are anti-business. Lawyer George McGunnigle, Jr. argues

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5. See *infra* notes 32-35, 42-45 and accompanying text.

6. See *infra* notes 36-41, 59-71 and accompanying text.

7. Stephan Landsman, *The History and Objectives of the Civil Jury System*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 22, 44 (Robert E. Litan ed., 1993).

8. *Id.* at 37.

9. *Id.*

10. U.S. CONST. amend. VII.

11. Landsman, *supra* note 7, at 43-44.

12. *Id.* See the historical account by LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 470-73 (2d ed. 1985).

that jurors' naive and unrealistic expectations of business people, their lack of experience and understanding about corporate affairs, and the American tradition of sympathizing with the underdog all place the corporate defendant at a disadvantage in the courtroom.<sup>13</sup> Many members of the business community share this belief that jurors are predisposed against business corporations and that this stance disadvantages them in the courtroom.<sup>14</sup> The supposedly negative predisposition of the jury is thought to stem from natural sympathies toward injured plaintiffs who sue corporations as well as other prejudices against business corporations.<sup>15</sup>

A common belief is that jurors are so prone to favor individual plaintiffs over corporate defendants that they pick the "deep pockets" of rich business corporations and deliver extremely high awards that are not merited by the company's actions or the plaintiff's injuries. In one national survey, senior corporate executives provided their assessments about the reasons that litigation and civil justice costs were high.<sup>16</sup> The top reason given was "the knowledge that major corporate defendants and their insurance companies have deep pockets."<sup>17</sup> "Juries that hand out excessively high awards" came in third as a reason for high costs.<sup>18</sup>

Professor John Lande interviewed business executives and attorneys who did a substantial amount of business litigation, questioning them about their opinions of the court system.<sup>19</sup> His interviews reveal that most business executives hold negative views of the courts in general and the civil jury in particular.<sup>20</sup> Most executives with whom he spoke think juries are to be avoided in cases that call for assessing the

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13. George McGunnigle, *Representing the Corporate Defendant in the Courtroom: Reflections of a Veteran Advocate*, in VIEWS FROM THE COURTROOM 1, 3-4 (Brookings Institution/ABA Section of Litigation 1993).

14. See *infra* notes 16-26 and accompanying text.

15. See *infra* notes 46-47 and accompanying text.

16. Michele Galen et al., *Guilty! Too Many Lawyers and Too Much Litigation. Here's a Better Way*, BUS. WK., Apr. 13, 1992, at 60, 64; *The Verdict From the Corner Office*, BUS. WK., Apr. 13, 1992, at 66 (surveying 400 senior executives regarding court costs, court reform, and other impacts of litigation on business) (*Business Week/Harris Executive Poll*).

17. *The Verdict From the Corner Office*, *supra* note 16, at 66.

18. *Id.*

19. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOTIATION L. REV. 1, 51 (1998). Professor Lande conducted telephone interviews with 50 business executives, 58 inside corporate counsel, and 70 outside counsel, and a small number of face-to-face interviews with members of each group. *Id.* at 10. Executives interviewed on the telephone included only very senior executives in the corporate hierarchy. *Id.* at 51.

20. *Id.* at 32-35.

liability of business corporations.<sup>21</sup> They are concerned about both competence and bias.<sup>22</sup> In the words of one executive:

Is it any surprise that many commercial contracts these days have a clause where each party waives its right to a jury trial? Doesn't that tell you something? That they are not willing to trust twelve peers off the street with the complexity of their business transaction.<sup>23</sup>

The attorneys were somewhat more positive than the executives about jury trials in business cases, but still expressed worry over bias and prejudice.<sup>24</sup> As the general counsel for one corporation argued:

Oh, a plaintiff's lawyer can get [jurors] all riled up on emotion. It's got nothing to do with the law. It's got nothing to do with real liability. It's got nothing to do with real facts. It's got to do with who's the better actor.<sup>25</sup>

Another observed:

I think jurors are sometimes willing to do justice . . . because they just view this rule . . . as one that kind of comes up with a harsh result in this case. And those are the cases that maybe will go to a jury more often than not because a plaintiff's lawyer knows that and [thinks], "God, if I get by this motion for summary judgment and get to a jury, I've got a real chance because that argument about, 'Well, the law says X' is just not going to be real persuasive to most folks on the jury."<sup>26</sup>

This brief description of the views of jurors' supposed tendencies in trials with business and corporate parties shows a remarkable degree of consistency. For a variety of reasons, whether it is sympathy for injured individuals, hostility to business institutions, or desires to transfer wealth from the deep pockets of business corporations, the civil jury is seen as anti-business.

### THE REALITIES

Let us set aside for the moment the specific charge that juries deliver unequal justice to business corporations. Commentators who have examined the broader question of how business fares in the civil justice system conclude that, on the whole, business corporations appear to enjoy *more* favorable experiences in court compared to other litigants.<sup>27</sup> First, of course, it is appropriate to mention that one of the

21. *Id.* at 34.

22. *Id.* at 34-35.

23. *Id.* at 34.

24. *Id.* at 29-35.

25. Lande, *supra* note 19, at 34.

26. *Id.* at 35.

27. Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 L. & SOC. INQUIRY 497, 515-17, 557-58 (1996) (reporting research

major advantages of the corporate legal form is its limited liability. In addition, historians maintain that beginning in the nineteenth century, societal desires to stimulate the economy led to generous treatment of business corporations in the developing tort system.<sup>28</sup> In his classic piece, *Why the Haves Come Out Ahead*, Professor Marc Galanter elaborated the many advantages that "repeat players" such as business corporations hold in civil litigation.<sup>29</sup> Compared to those who litigate only occasionally, repeat players are more likely to be able to structure legal transactions, engage in litigation with a long-term strategy in mind, have the ability to play for the rules, have bargaining credibility, possess specialized expertise, and benefit from economies of scale.<sup>30</sup>

### POTENTIAL REASONS WHY JURIES MIGHT TREAT CORPORATE PARTIES DIFFERENTLY

The broad context of business litigation suggests that the business community often fares quite well. However, let us now narrow the focus to considering jury trials involving business parties. What are the theoretical reasons why juries might treat corporate parties more harshly, or at least differently? Here I wish to draw on both popular perceptions of jury bias and theoretical work in psychology. Both sources provide some potential explanations for differential treatment.

#### 1. *Attitudes Toward Business*

One set of arguments revolves around the role of anti-business prejudice. From a theoretical perspective, just as attitudes influence decision-making about individual litigants, favorability or negativity toward business might influence legal decision-making about a business corporation's behavior. Psychological research on the role of attitudes in jury decision making has confirmed that pre-existing attitudes toward the parties or issues in a case can have some impact on how evidence is viewed and integrated into a trial story, and how

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data showing the litigation successes of large business in federal courts); see RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PRESERVATION OF JUSTICE IN AMERICA* (1996).

28. See, e.g., FRIEDMAN, *supra* note 12, at 300-01; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 80-85 (1977); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 20-21 (1956).

29. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 98-125 (1974).

30. *Id.* at 125 fig.3 and accompanying text.

the credibility of witnesses is assessed.<sup>31</sup> Usually, the effects of attitudes on liability or guilt judgments are rather modest.

Given the widespread belief in the anti-business jury, it is interesting to observe that surveys of attitudes toward business show that the public is on the whole quite favorable to many aspects of business. For example, the public strongly endorses the free enterprise system, seeing it as a necessary precondition for free and democratic government.<sup>32</sup> Americans express support for cultural values underlying a capitalist economy, such as the Protestant work ethic, personal ambition, and competition.<sup>33</sup> They also evaluate the functioning of business corporations in a positive way. For example, in a *Business Week*/Louis Harris national survey, six out of ten respondents rated the overall performance of American corporations as "pretty good" or "excellent."<sup>34</sup> In other national surveys, people express more confidence in the people running major companies than in the executive branch of government, Congress, organized religion, and the press.<sup>35</sup>

However, some negative perceptions of business co-exist with these largely positive views. The public seems to be particularly concerned about the possibility that business leaders could misuse their substantial power. A 1998 national survey<sup>36</sup> of the public co-sponsored by the *National Law Journal* and the jury consulting firm DecisionQuest found that about three-fourths of the respondents agreed that "[e]xecutives of big companies often try to cover up the harm they do."<sup>37</sup> Similarly, seven of ten respondents in the *Business Week*/Louis Harris poll agreed that business had gained too much power in the United States.<sup>38</sup> Significant minorities also thought that business would put workers' health and safety at risk, endanger public health, and harm the environment to turn a profit.<sup>39</sup> Perhaps because of

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31. Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts*, in *INSIDE THE JUROR* 42, 42-46 (Reid Hastie ed., 1993).

32. SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND* 255 (rev. ed. 1987); HERBERT McCLOSKEY & JOHN ZALLER, *THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD CAPITALISM AND DEMOCRACY* 101-03 (1984); BENJAMIN PAGE & DAVID SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES* 117-71 (1992).

33. McCLOSKEY & ZALLER, *supra* note 32, at 101-28.

34. *The Public is Willing to Take Business On*, *BUS. WK.*, May 29, 1989, at 29 (surveying American people regarding business performance and ethics).

35. RICHARD NIEMI ET AL., *TRENDS IN PUBLIC OPINION: A COMPENDIUM OF SURVEY DATA* 93-105 (1989).

36. Peter Aronson et al., *Jurors: A Biased, Independent Lot*, *NAT'L L.J.*, Nov. 2, 1998, at A1, A24-A25.

37. *Id.* at A1; see <[http://www.nlj.com/1998/decisionquest\\_survey/q01\\_12a.html](http://www.nlj.com/1998/decisionquest_survey/q01_12a.html)>.

38. *The Public is Willing to Take Business On*, *supra* note 34, at 29.

39. *Id.*

these concerns, there is substantial public support for governmental regulation of business enterprises.<sup>40</sup> After reviewing recent public opinion surveys of Americans concerning the regulation of business, Benjamin Page and David Shapiro concluded that “[a]t the beginning of the 1990s it was clear that the overwhelming majority of Americans was committed to government protection of consumers and the environment.”<sup>41</sup>

Although believing that such legal and governmental control over business is important, the public also recognizes its down side. The *National Law Journal/DecisionQuest* poll, for instance, uncovered widespread views that lawsuits have driven up the cost of insurance, medical care, and products.<sup>42</sup> Many participants in my research studies agree that “[t]he threat of lawsuits is so prevalent today that it interferes with the development of new and useful products;”<sup>43</sup> that “[t]he courts have meddled so much in the workplace that many businesses are not able to remain competitive;”<sup>44</sup> and that “[t]he government has gone too far in regulating business and interfering with the free enterprise system.”<sup>45</sup>

## 2. *Empathy for Injured Individuals*

Integrally related to the claim that jurors are anti-business is the argument that in any contest between a corporation and an injured individual, the individual has a decided advantage. In this perspective, observers’ sympathies “naturally, honestly and generously”<sup>46</sup> gravitate to the individual who is injured, especially when that individual sues a body-less, soul-less corporation. It is certainly a possibility that an individual observer may be better able to empathize with another individual than with a corporation. Indeed, trial tactics guides seem to intuit this possibility when they recommend to those representing businesses to humanize the corporation by emphasizing the people who work there and those who are helped by its products.<sup>47</sup>

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40. LIPSET & SCHNEIDER, *supra* note 32, at 255; McCLOSKEY & ZALLER, *supra* note 32, at 120; PAGE & SHAPIRO, *supra* note 32, at 157-59.

41. PAGE & SHAPIRO, *supra* note 32, at 159.

42. ARONSON et al., *supra* note 36, at A24; see <[http://www.nlj.com/1998/decisionquest\\_survey/q09\\_38.html](http://www.nlj.com/1998/decisionquest_survey/q09_38.html)>.

43. Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & SOC'Y REV. 85, 99 (1992).

44. *Id.*

45. *Id.*

46. Landsman, *supra* note 7, at 45 (citing *Haring v. New York & Erie R.R.*, 13 Barb. 2, 15 (N.Y. 1853)).

47. McGunnigle, *supra* note 13, at 5-6; Videotape: Handling Sympathy in Jury Trials (Federation of Insurance and Corporate Counsel) (on file with author).



Finis E. Cowan, from Baker & Botts in Houston, was co-lead counsel in American Airlines, Inc.'s successful defense of an antitrust lawsuit brought by other airlines for allegedly anti-competitive practices. He discussed how he attempted to develop a positive "human" face for his corporate client during the jury trial.<sup>48</sup> Because he believes that jurors approach a business case with prejudices against corporate executives, "you've got to get the jury to think that your executives are pretty nice folks."<sup>49</sup> One challenge to that strategy was a top American Airlines executive who had the reputation for saying about competitors: "Kill 'em. Crush 'em. Grind 'em up."<sup>50</sup> Cowan forewarned the jury in his opening statement that the executive could be crusty at times, and then during the executive's testimony, "I tried to make him relax. My approach was folksy and conversational . . . . I asked him how he met his wife. How long he was married. How he came up in business."<sup>51</sup> The executive's enthusiasm for American Airlines and its programs came through, and the jury delivered a complete defense verdict in thirty minutes, saying that the executive's testimony "turned the tide."<sup>52</sup>

The belief that an injured individual has an inherent advantage over the faceless corporation is strong. Yet, survey evidence, interviews with jurors, and psychological research all place some qualifications on the idea that jurors respond sympathetically to injured plaintiffs.<sup>53</sup> National surveys since the 1980s regularly find that the vast majority of the public believes that there is a great deal of frivolous litigation and that many plaintiffs bring unjustified lawsuits.<sup>54</sup> In my own research with jurors who decided cases with business parties, I often found jurors highly critical of plaintiffs who brought lawsuits against business corporations, even in cases where they ultimately concluded that negligence existed and an award was justified.<sup>55</sup> Psychological research on the need to believe in a just world has documented many instances in which people derogate, rather than sympathize with, in-

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48. Margaret Cronin Fisk, *Make Sure the Jury Sees Corporation Witnesses as Fellow Human Beings*, NAT'L L.J., Feb. 14, 1994, at S6.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. See *infra* notes 54-58 and accompanying text.

54. Aronson et al., *supra* note 36 (*National Law Journal Poll*); H. Taylor et al., *Public Attitudes Toward the Civil Justice System and Tort Law Reform* (Survey conducted for Aetna Life & Casualty by Louis Harris & Associates) (Copy on file with Louis Harris & Associates, 630 Fifth Avenue, New York, NY 10111); *To Sue or Not to Sue: Public Backs Liability Reform*, PUB. PULSE, Aug. 1991, at 6.

55. Hans & Lofquist, *supra* note 43, at 94-100.

jured victims.<sup>56</sup> Finally, new experimental research shows that plaintiffs are significantly disadvantaged when juries assess comparative fault.<sup>57</sup> In a recent study, mock jurors attributed some blame to plaintiffs who were legally blameless, and judgments of blameworthiness affected the award amount.<sup>58</sup>

### 3. *The "Reasonable Corporation" Standard*

Quite independent of whether jurors like or dislike business, they may hold distinct expectations of a commercial business enterprise that they do not have for individuals or other types of groups. Indeed, the law includes many special rules of liability for commercial enterprises.<sup>59</sup> Professor Robert MacCoun argues that commercial activities "may invoke specific norms and expectations that are distinct from the norms and expectations that govern other social contexts" and points out that commercial activities expose large numbers of people to the consequences of those activities.<sup>60</sup> Professor V. Lee Hamilton and her colleagues have found that persons in positions of authority are held to higher levels of responsibility compared to subordinates.<sup>61</sup> Similarly, Professor Neil Vidmar discovered that lay participants invoke the special role and higher responsibility of doctors in deciding medical malpractice cases.<sup>62</sup>

In the same way that people expect more of the boss and the doctor, citizens may expect more of corporations. In making decisions about the culpability of an organization, people may respond to structural differences between individuals and corporations. The typical corporation is organized in a rational structure and contains a number of individuals with specialized skills. Because of these characteristics,

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56. MELVIN LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* 39-41 (1990); KELLY SHAVER, *THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS* 133, 134 (1985).

57. Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 *LAW & HUM. BEHAV.* 597, 610-12 (1997).

58. *Id.* at 610.

59. See, for example, W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* (5th ed. 1984) or any treatise on business law!

60. Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 *L. & SOC'Y REV.* 121, 135 (1996).

61. V. LEE HAMILTON & JOSEPH SANDERS, *EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES* 75-88 (1992); HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* 195-210, 261-77 (1989).

62. NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* 3-22 (1995).

groups such as corporations may be assumed to possess greater rationality and more ability to anticipate the consequences of their actions than individuals.<sup>63</sup> In one study, Clark McCauley and Susan Jacques sought to determine why conspiracy theories of presidential assassination were so popular among members of the public.<sup>64</sup> In a series of studies, they found that groups are viewed as more effective than individuals, and thus are seen as more capable of assassinating a president.<sup>65</sup>

Adding to the group factor is the presence of expertise among the members of the corporation. Both of these features are likely to increase the perceived likelihood (if not the actual likelihood) of foreseeability of the consequences of corporate action, both negative and positive. If corporations are better able to foresee any negative effects of their behavior, then they should be judged more harshly if such negative effects occur. Intentionality is an important principle governing the attribution of responsibility.<sup>66</sup> In addition, both the criminal and the civil justice systems levy more punitive sanctions for intentional wrongdoing.<sup>67</sup>

A corporation's potential reach and impact, its collective expertise, or its profit-making nature could all influence expectations which in turn affect judgments in the courtroom. I want to underscore the point that these hypothesized greater expectations are theoretically distinct from pro-business or anti-business attitudes. Even if individuals have high confidence in business and believe business is a worthwhile endeavor, they might still feel that the singular role of the business enterprise requires it to follow special rules and standards of behavior that do not apply to individuals.

On the other hand, those involved in the development of criminal codes for corporate misbehavior note that it is often difficult to determine responsibility for outcomes of group activity.<sup>68</sup> Sociologists Matt Lee and M. David Ermann have written about the problems inherent

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63. Valerie P. Hans, *Attitudes Toward Corporate Responsibility: A Psycholegal Perspective*, 69 NEB. L. REV. 158, 170-83 (1990).

64. Clark McCauley & Susan Jacques, *The Popularity of Conspiracy Theories of Presidential Assassination: A Bayesian Analysis*, 37 J. PERSONALITY & SOC. PSYCHOL. 637, 638 (1979).

65. *Id.*

66. SHAVER, *supra* note 56, at 88-90, 102-09.

67. R. EPSTEIN ET AL., *CASES AND MATERIALS ON TORTS* (4th ed. 1986).

68. *See, e.g.*, KATHLEEN BRICKEY, *CORPORATE CRIMINAL LIABILITY* 1-38 (1984); CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 1-8, 74-111 (1975); William S. Lofquist, *Legislating Organizational Probation: State Capacity, Business Power, and Corporate Crime Control*, 27 L. & SOC'Y REV. 741, 748-56 (1993).

in applying individual analogies to corporate behavior.<sup>69</sup> They write that the commonly received wisdom about the Ford Pinto injuries as the result of profit maximization is flawed because it overemphasizes the psychological characteristics of decision makers and downplays organizational, industrial, legal, and regulatory influences.<sup>70</sup> In addition, the well-known phenomenon of diffusion of responsibility among members of a group<sup>71</sup> could complicate the judgment of responsibility for the corporate entity as a whole.

#### 4. *The Deep Pockets Approach*

Yet another rationale for differential treatment is frequently advanced in critiques of the civil jury. A "deep pockets" approach might lead people to take the finances of the organization into account in determining damages and perhaps even liability. Lawyers consider it a truism that juries penalize corporations for their financial resources, using them as deep pockets from which to compensate undeserving plaintiffs, and the executive survey cited earlier showed widespread agreement that excessive jury awards were a serious problem for the business community.<sup>72</sup> A 1993 *National Law Journal* poll of 800 people who had served on civil or criminal juries found that about one-third of the civil jurors reported that *others* on their jury had considered the financial situation of defendants in the process of arriving at a damage award in civil lawsuits.<sup>73</sup>

Stating the deep pockets hypothesis more broadly, jurors might be motivated to consider the financial equities of their award, and how a plaintiff award would affect both parties. What might appear to be a corporate deep pockets effect could actually be an individual empty pockets effect, as jurors undercompensate plaintiffs who sue other individuals because they are concerned about the consequences to the individual defendant. If so, awards of plaintiffs who sue business corporations might actually be closer to an appropriate level of compensation.

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69. Matthew T. Lee & M. David Ermann, *1 Pinto "Madness" as a Flawed Landmark Narrative: An Organizational and Network Analysis*, 46 *SOC. PROBS.* (forthcoming Feb. 1999).

70. *Id.*

71. John M. Darley & Bibb Latane, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 *J. PERSONALITY & SOC. PSYCHOL.* 377, 377-78 (1968); see KELMAN & HAMILTON, *supra* note 61, at 165, 334.

72. *The Verdict from the Corner Office*, *supra* note 16.

73. *The View from the Jury Box*, *NAT'L L.J.*, Feb. 22, 1993, at S15.

## THE REALITIES OF JURY DECISION MAKING

There are a number of reasons to expect that juries might treat corporations differently. Some of those reasons, like anti-business prejudice, greater empathy toward injured individuals, or deep pockets, suggest that juries take arguably impermissible factors into account in deciding cases with corporate parties. Others, such as the reasonable corporation standard, suggest that even if juries treat corporate defendants differently, they could be exercising a completely appropriate fact-finding, equity, or political function.

I would now like to turn to the research evidence that I and other scholars have collected about how juries respond to business corporations as parties in civil litigation. The questions addressed by the research include: (1) whether or not juries appear to treat business corporations differently; and (2) if juries do treat them differently, why they do so.

## ANALYSES OF JURY VERDICTS AND AWARDS

Statistical analyses provide some initial evidence that jury verdicts and awards differ in cases with corporate defendants as compared to individual defendants. In one of the earliest studies pertaining to this issue, Audrey Chin and Mark Peterson analyzed civil jury verdicts in Cook County, Illinois, during the 1960s and 1970s, and determined that corporate defendants were more likely to be found liable and had to pay larger awards than corporate and governmental defendants.<sup>74</sup>

Similarly, National Center for State Courts researchers Brian Ostrom, David Rottman, and Roger Hanson analyzed tort cases and awards that were decided during 1989 in twenty-seven state courts of general jurisdiction.<sup>75</sup> They found that the individual or corporate identity of the parties was a highly significant factor in plaintiff success rate and awards.<sup>76</sup> Corporate and other institutional defendants were more likely than individual defendants to prevail at the verdict stage.<sup>77</sup> Individual plaintiffs suing corporations won 50% of their cases, compared to a 61% success rate when individuals sued other individuals.<sup>78</sup> However, when corporate defendants lost, they had to pay substan-

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74. AUDREY CHIN & MARK PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 41-44 (1985).

75. Brian J. Ostrom et al., *What Are Tort Awards Really Like? The Untold Story from the State Courts*, 14 *LAW & POL'Y* 77, 80 (1992).

76. *Id.* at 84-86.

77. *Id.* at 82-84.

78. *Id.* at 83.

tially higher awards.<sup>79</sup> Median awards for individual plaintiffs successfully suing corporations were more than three times higher than the awards in cases in which individuals sued each other.<sup>80</sup> A regression analysis indicated that the identity of the litigants was the most important determinant of the size of the jury award.<sup>81</sup>

A more extensive project analyzing civil jury trials across the country in 1992 also found that whether or not a litigant was a corporation made a large difference.<sup>82</sup> The Civil Trial Court Network Project, organized by the National Center for State Courts, found that close to half of the tort jury trials held in forty-five state courts in 1992 listed a corporation as a defendant.<sup>83</sup> Another 11% included a hospital or a medical company as a defendant, while 5% listed an insurance company as a defendant.<sup>84</sup> Ostrom and his colleagues compared cases in which individuals sued other individuals versus those cases in which individuals sued business corporations.<sup>85</sup> Although in this study the overall win rate for all tort cases was comparable, the win rate for plaintiffs suing businesses in specific types of cases (including automobile accident, medical malpractice, and premises liability) was higher than the win rate for plaintiffs suing other individuals.<sup>86</sup> In addition, confirming the pattern in the 1989 data, individual plaintiffs suing businesses received higher awards than individuals who sued other individuals, on average.<sup>87</sup>

Both the Chin and Peterson report and the Ostrom and his colleagues' article acknowledge that the cases against individuals and corporations in their samples might not be strictly comparable. Corporations and individuals often engage in different types of behavior or wrongdoing. The types of injuries, the number of claims, the legal theories about defendant liability, and the settlement practices of the attorneys might have contributed to the differential verdicts and awards. A selection effect, in which attorneys settle or select cases for judge versus jury trial somewhat differently when the defendant is an individual versus a corporation, seems to be a particularly likely candi-

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79. *Id.* at 84-85.

80. *Id.* at 85.

81. Ostrom et al., *supra* note 75, at 89.

82. Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 236-37 (1996).

83. *Id.* at 237.

84. *Id.* at 240.

85. *Id.*

86. *Id.* at 236.

87. *Id.* at 237.

date for explaining the divergent results.<sup>88</sup> For example, if corporations settle small cases at a rate higher than individuals, then that would leave a greater proportion of high value cases with corporate defendants in the mix. Vidmar warns about the dangers of relying on jury verdict data to draw conclusions about the jury decision making process:

Rather than jury biases, the verdict differences may result from the fact that the juries are hearing very different evidence or responding to different substantive law. We are comparing apples and oranges.<sup>89</sup>

Thus, cases that business corporations bring to trial may differ in some significant ways from the cases that individuals bring to trial. Other aspects of the system, including legal rules and settlement practices, may favor—or disadvantage—repeat players such as business corporations, and it is difficult to reach definitive conclusions about even the existence of differential treatment, let alone the reasons for it, on the basis of verdict statistics alone.

#### EXPERIMENTAL STUDIES COMPARING REACTIONS TO CORPORATE VERSUS INDIVIDUAL DEFENDANTS

The difficulty of controlling for these extraneous factors makes it imprudent to rely solely on jury verdict statistics for assessing how juries react to corporate litigants. But what if we could control all of the other factors that differentiate individual and corporate cases? Adopting Vidmar's terminology, what if we could compare apples and apples?<sup>90</sup>

If jury differential treatment of the corporate litigant is real, as opposed to a spurious artifact of other differences between individual and corporate lawsuits, then we should be able to detect differences in jurors' reactions even when we hold constant other significant aspects of a case. That is, corporations and individuals will be treated differently even if they engage in the same behaviors, cause identical harm, and are governed by the same legal rules. Of course, any differential treatment would not automatically be evidence of anti-business prejudice; one would also have to assess why jurors treat business distinctively if they do.

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88. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1128-33 (1992).

89. Neil Vidmar, *Making Inferences about Jury Behavior from Jury Verdict Statistics: Cautions about the Lorelei's Lied*, 18 LAW & HUM. BEHAV. 599, 605 (1994).

90. See *id.*

## NEW RESULTS FROM A FIELD EXPERIMENT

A recently completed study of Arizona jury reform provides some relevant data about the degree to which judges and juries agree about the outcomes of cases with business defendants.<sup>91</sup> In that study, which examined the impact of jury discussions about the evidence during trial, judges were asked to indicate their views of the degree to which the evidence favored the defendant or the plaintiff on a seven-point scale. They also rated their degree of surprise and satisfaction with the jury's verdict. The researchers obtained information about the jury verdict and other aspects of each case, including whether the principal litigants for each side were individuals or businesses.

These data provide an ideal way to use actual jury decisions to test assertions that the jury is anti-business. The judge's evaluation of the merits of the case can serve as a control. If juries are governed by unusual hostility to business defendants, then jury cases in which individuals sue business defendants should result in a higher proportion of plaintiff wins and greater dissatisfaction and disagreement with the verdict on the part of the trial judge, compared to cases in which individuals sue other individuals.

Statistical analyses of the Arizona data set, however, show no evidence that juries in business cases reach verdicts that are disproportionately at odds with judicial views. The sample included eighty-six cases in which individual plaintiffs sued individuals and forty-six cases in which individuals sued businesses. Plaintiff win rates in the two types of cases were roughly comparable (60% of the individual defendant cases versus 63% of the business defendant cases). More significantly, judicial ratings of surprise and satisfaction with the verdicts in the two types of cases were no different.<sup>92</sup> Generally speaking, judges were satisfied with jury outcomes and expressed little surprise at jury decisions. Judicial evaluations were very similar in cases with individual and business defendants. This was true even though cases

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91. For further discussions of the methodology, see Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform* (1998) (unpublished manuscript, on file with the National Center for State Courts) and Valerie P. Hans et al., *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REFORM (forthcoming 1999).

92. *T*-tests comparing judges' ratings of surprise and satisfaction with the jury's decision show no statistically significant differences between individual defendant and business defendant cases. Surprise *M*'s = 2.85 for Individual Defendant and 2.70 for Business Defendant cases; *t* (123) = .45, *ns*; Satisfaction *M*'s = 5.21 for Individual Defendant and 5.30 for Business Defendant cases; *t* (122) = -.31, *ns*.



with business defendants were longer and more complex than cases with individual defendants.<sup>93</sup>

There was no evidence that juries were more pro-plaintiff in cases with business defendants. Table 1 presents the percentage and number of cases in which individual plaintiffs sued individual or business defendants, the jury verdicts in these cases, and the degree to which the judge rated the evidence in these cases as favoring the plaintiff, evenly balanced, or favoring the defense.<sup>94</sup> To facilitate interpretation, the table provides the percentage of plaintiff and defense verdicts within each category of evidence strength. So, for example, in cases in which the judge rated the evidence as favoring the defense, it presents the percentage of those cases that resulted in plaintiff and defense verdicts. The number of cases in the table is relatively small, so it is important to be cautious in interpreting the results. Nevertheless, the results reveal more similarity than difference in individual versus business defendant case outcomes.

TABLE 1  
JUDGE-JURY AGREEMENT FOR PLAINTIFF AND DEFENSE VERDICTS  
IN INDIVIDUAL VERSUS BUSINESS DEFENDANT CASES

INDIVIDUAL DEFENDANT CASES			
	Plaintiff Verdict	Defense Verdict	Totals <sup>95</sup>
Evidence favored plaintiff	88% (21)	13% (3)	100% (24)
Evidence evenly balanced	59% (16)	41% (11)	100% (27)
Evidence favored defense	40% (12)	60% (18)	100% (30)
BUSINESS DEFENDANT CASES			
	Plaintiff Verdict	Defense Verdict	Totals
Evidence favored plaintiff	81% (13)	19% (3)	100% (16)
Evidence evenly balanced	67% (10)	33% (5)	100% (15)
Evidence favored defense	31% (4)	69% (9)	100% (13)

93. The average length of the cases in which individuals sued other individuals was 13 hours, compared to 22 hours for cases in which individuals sued businesses ( $t(54) = -3.44, p = .001$ ). A composite Case Complexity Scale, which included judge and jury ratings of trial complexity and the natural log of the trial's length, showed that business defendant cases were more complex ( $t(124) = -2.63, p = .01$ ).

94. Judges responded on a seven-point scale, in which responses of 1, 2, or 3 indicated that the evidence favored the plaintiff, a response of 4 indicated that the evidence was evenly balanced, and responses of 5, 6, or 7 indicated that the evidence favored the defense.

95. The total number of cases represented in the analysis is slightly lower than the actual number of individual and business defendant cases, because the Table 1 analysis included only those cases that included information about the type of primary plaintiff and defendant, the verdict, and the judicial rating.

If jurors were markedly more pro-plaintiff in business defendant cases, then one would expect the percentage of plaintiff verdicts within each category of evidence to be higher in cases with business defendants. However, that does not occur. The overall percentages of plaintiff verdicts within each evidence category are generally comparable. When the judge rates the evidence as favorable to the plaintiff, juries reach plaintiff verdicts in 88% of the individual defendant cases and 81% of the business defendant cases.

If juror anti-business sentiment was so strong as to lead to unjustifiable plaintiff verdicts, one would expect a greater number of plaintiff verdicts when the evidence favored the defense in business defendant cases compared to individual defendant cases. That does not happen either; there are just four cases (31%) in which judges in business trials rated the evidence as favoring the defense and the jury reached a plaintiff verdict, and twelve instances (40%) in which the same occurred in individual defendant cases. When the judge reports that evidence is evenly balanced and presumably either verdict could be justified, juries reach plaintiff verdicts in 59% of the individual defendant cases and 67% of the business defendant cases. While the number of cases in the analysis is not large, nevertheless, the overall pattern of similarity between individual and business defendant cases is striking. At least when we use the judge's evaluation of evidence as a control, there is simply no support for the notion that juries are more pro-plaintiff in business cases.

#### EXPERIMENTAL STUDIES

Experimental studies done in research laboratories have taken a different approach than the field study just described to compare reactions to individual versus business corporation defendants.<sup>96</sup> A number of mock jury experiments have explored the effect of varying the identity of the defendant while controlling other factors. The independent studies show similar patterns and are worth summarizing here.<sup>97</sup> In an initial experiment, along with my colleague M. David Ermann, I explored the potential for differential treatment by conducting an experiment in which we varied the defendant's identity in a personal injury lawsuit but kept everything else about the scenario the

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96. See *infra* notes 97-124 and accompanying text.

97. See Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 *LAW & HUM. BEHAV.* 151 (1989); MacCoun, *supra* note 60; Joseph Sanders et al., *Corporate Actor Responsibility in Three Societies* (paper presented at the 1994 annual meeting of the Law & Society Association, Phoenix, AZ).

same.<sup>98</sup> Participants read a scenario in which some workers were harmed by clearing debris from an empty lot, debris which was later found to contain toxic waste.<sup>99</sup> Respondents then evaluated the negligence of the key actors in the scenario and decided on an appropriate award for the injured workers.<sup>100</sup> Half of the participants learned that a "Mr. Jones" had hired the workers, while the other half read that the "Jones Corporation" had done so.<sup>101</sup>

The results provided some interesting evidence that when a corporation is a party in a case, it affects the way liability is assessed. Compared to the subjects in the Mr. Jones condition, subjects in the Jones Corporation condition were significantly more likely to hold the defendant morally and legally responsible for the workers' injuries from clearing the toxic waste.<sup>102</sup> Respondents saw the corporation as more reckless, more likely to have known beforehand that the workers might be harmed, and more blameworthy.<sup>103</sup> Furthermore, compensatory awards to the workers injured by the actions of the Jones Corporation were significantly higher than the awards to the workers injured by Mr. Jones.<sup>104</sup> Multiple regression analyses found that judgments of corporate culpability and recommendations of awards were linked most strongly to perceptions of the Jones Corporation's recklessness, not its perceived financial resources, suggesting that rather than responding to deep versus empty pockets, respondents appeared to be applying a different standard of recklessness to the corporation and the individual.<sup>105</sup> However, there were a number of limitations to this study, including a college student sample, the brief scenarios, and the fact that the subjects did not deliberate with others as real jurors would.<sup>106</sup> Furthermore, the design of the Jones experiment did not allow a test of competing explanations for the differential treatment of the corporation.<sup>107</sup>

In two other experimental studies I conducted, I attempted to overcome these limitations. In the first replication, I created a more realistic mock jury simulation by using community residents, providing a more detailed set of facts and legal instructions, conducting the exper-

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98. Hans & Ermann, *supra* note 97, at 155.

99. *Id.* at 155-56.

100. *Id.* at 156-57.

101. *Id.*

102. *Id.* at 157-58.

103. *Id.*

104. Hans & Ermann, *supra* note 97, at 157, 161.

105. *Id.* at 159-61.

106. *Id.* at 162.

107. *Id.* at 163-64.

iment at a courthouse, and allowing people to deliberate to a group verdict as actual juries would do. I used a slip-and-fall case where a woman plaintiff was injured in a fall that occurred either in a furniture store or at a tag sale in a private home. Thus, in one experimental condition, the defendant was an individual, while in the other condition, all of the facts were the same but the defendant was a corporation. Participants in the study also completed questionnaires that probed their attitudes toward civil litigation and business, and thus I was able to examine whether these attitudes affected subjects' decisions in the mock jury trial.

In the mock jury study, whether the defendant was an individual or a corporation again significantly influenced judgments about the case. Although there was substantial overlap in how the participants viewed the individual and corporate defendant's actions, there were also differences. In their initial, individual reactions to the case, those people evaluating the slip and fall in the store were more likely to see the defendant as negligent, compared to the people assessing the slip and fall in the private home at a tag sale. Although the group verdicts were no different, the percentage of fault that the juries attributed to the parties diverged sharply (with the individual plaintiff given much more of the blame when she fell in a home than in a store) and the awards were very different as well (with higher awards to the plaintiff who sued the corporation).

A second replication was included in a state telephone survey. I designed a scenario experiment to find out why people might respond differently to corporate parties in civil litigation. Poll participants first gave their views on civil litigation, business, and other social attitudes. Then, each respondent listened to a single scenario description, and answered questions about their evaluations of the incident described by the scenario. Different scenarios were constructed to test the study's hypotheses. To examine the impact of corporate identity, the defendant to a personal injury claim was described in different scenarios as an individual, a nonprofit corporation or association, or a for-profit business corporation. Financial resources were varied to test the "deep pockets" hypothesis. Statistical analyses of attitudes toward business and civil litigation were conducted to determine whether and how these attitudes influenced judgments of corporate litigants.

In this scenario experiment, the defendant's identity again had a consistent effect on the poll participants' assessments of negligence and recklessness. The individual defendant was held the least negligent and reckless, the business corporation defendant was seen as the most negligent and reckless, and responses to the nonprofit group fell

in between. Thus, the greater degree of organization of the business, and the use of the "corporation" label, led to higher levels of presumed negligence.

Interestingly, the "deep pockets" hypothesis was not supported in the study. If jurors operate with a deep pockets approach, then we should see higher awards when a defendant (whether an individual, a nonprofit corporation, or a for profit corporation) is described as having more financial resources. However, the study participants were completely unaffected by information that the defendant had ample or limited resources. Neither their negligence judgments nor their awards were influenced by knowing about the financial resources of the defendant.

To examine whether attitudes toward business affect liability judgments, in both the mock jury simulation and the scenario experiment I attempted to correlate the participants' views about business with their decisions in the studies.<sup>108</sup> In the scenario experiment, I tested the prediction that attitudes toward business would be significantly related to negligence and award decisions for the experimental conditions that included business defendants. However, they were not. Instead, to my surprise, there were small, statistically significant relationships between attitudes toward business and judgments of negligence in the individual and nonprofit experimental conditions. In the mock jury study, there was a statistically significant relationship between attitudes toward business and judgments of negligence and awards, but it occurred in both conditions of the experiment, when the defendant was an individual and when the defendant was a corporation. As is typical in studies of the link between general attitudes and specific decisions, the size of the statistically significant correlations was typically modest, ranging from .17 to .40. In sum, if business attitudes (at least my measures of general business attitudes) do affect civil juror decision making, they do not appear to be particularly strong determinants of those decisions, and they do not appear to be limited to cases in which businesses are defendants.

I had somewhat more success in linking attitudes and case judgments with another factor, the study participant's endorsement of the view that corporations should be held to higher standards than individuals. In both the mock jury study and the scenario experiment, judgments of negligence of the for-profit business corporations were positively and significantly related to the respondent's agreement that

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108. Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (unpublished manuscript, at ch. 6, on file with author).

corporations should be held to a higher standard than individuals. Once again, however, the correlations between attitudes and judgments were rather modest, ranging from .21 to .30. However, unlike the findings with general attitudes toward business, this effect occurred only in the business defendant conditions.

Another research project, this one conducted by V. Lee Hamilton and Joseph Sanders and their colleagues as part of public opinion surveys in the United States and Japan, found some evidence that people in both the United States and Japan regard corporate wrongdoing distinctively.<sup>109</sup> In the surveys, they asked survey participants their opinions about specific acts of injury and wrongdoing in corporate settings.<sup>110</sup> One of the stories was based on the Hans and Ermann worker injury scenario, in which workers hired by either an individual or a corporation were injured while working in an area that had toxic waste.<sup>111</sup> Some versions of the scenario described the actor as stopping the work when alerted of the potential harm (a relatively low level of negligence), while other scenarios presented the actor as more reckless by instructing the workers to continue working near the potentially toxic waste.<sup>112</sup>

Analyzing the Japanese and American data, the researchers found that participants in both countries distinguished between individual and corporate actors mostly when the situation involved low levels of recklessness.<sup>113</sup> When there was a high degree of recklessness, both the individual and the corporate actor were treated similarly and held to high levels of responsibility.<sup>114</sup> But when the level of negligence was less extreme, respondents believed that the corporation should have been better able than the individual to anticipate and avoid the injury to the workers.<sup>115</sup>

Other researchers looking at the question of a corporate identity effect have found similar results. MacCoun asked California jurors who were waiting to serve on a trial to give their reactions to six personal injury lawsuits.<sup>116</sup> The jurors read brief descriptions of the

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109. Sanders et al., *supra* note 97. For a fuller description of the study methodology, see V. Lee Hamilton & Joseph Sanders, *Corporate Crime Through Citizens' Eyes: Stratification and Responsibility in the United States, Russia, and Japan*, 30 L. & Soc'y Rev. 513, 526-31 (1996).

110. Sanders et al., *supra* note 97, at 7-9.

111. *Id.* at 8.

112. *Id.* at 7-9.

113. *Id.* at 11 & figs.1, 2, 3, & 4.

114. *Id.*

115. *Id.*

116. MacCoun, *supra* note 60, at 127-28.

cases, which varied the identity of the defendant.<sup>117</sup> Depending on the experimental condition, the defendant was described as a poor individual, rich individual, or a corporation.<sup>118</sup> Most of the cases centered around injuries in a business setting.<sup>119</sup> In one slip-and-fall case, some jurors read about Mr. Brock, the “poor” defendant, who was described as the operator and owner of “Chowdown Palace,” a small take-out fast food stand (representing a Mom-and-Pop type of business), and an injury that occurred in his business.<sup>120</sup> Other jurors read about the same injury, but this time the defendant was a “rich” Mr. Brock, again the operator and owner of Chowdown Palace, which was now one of a chain of take-out food stands.<sup>121</sup> A third set of jurors read about the same injury but with the defendant described as a corporation, Chowdown Food Enterprises, which owned the Chowdown Palace, a chain of take-out fast food restaurants.<sup>122</sup> The results of the MacCoun study were interesting: There were no overall differences in the liability judgments of jurors who read the poor versus rich individual defendant scenarios, but the liability decisions of jurors who decided the individual scenario cases versus the corporate scenario case were different.<sup>123</sup> The corporation was more likely to be seen as liable than either the rich or the poor individual.<sup>124</sup>

Vidmar’s study of medical malpractice juries also did not provide support for a deep pockets approach.<sup>125</sup> He tested the deep pockets explanation of jury awards in medical malpractice cases.<sup>126</sup> In one part of the project, participants were presented with the case of a woman who had broken a leg and suffered complications, and were asked to recommend a figure for pain and suffering.<sup>127</sup> The injury was described to some participants as being due to the negligence of health care providers and to others as the result of a car accident.<sup>128</sup> Furthermore, the negligence was attributed to one person, two people, or a hospital/corporation.<sup>129</sup> If people take a deep pockets approach, then the award should have been higher in the medical

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117. *Id.* at 128.

118. *Id.*

119. *Id.*

120. *Id.* at 146-47, 127-34.

121. *Id.*

122. MacCoun, *supra* note 60, at 146-47, 134-39.

123. *Id.* at 136-38.

124. *Id.* at 137-38.

125. VIDMAR, *supra* note 62, at 212, 219.

126. *Id.* at 204-06, 212-15.

127. *Id.* at 205.

128. *Id.* at 205-06.

129. *Id.*

malpractice conditions and when the hospital and corporate defendants were to blame.<sup>130</sup> However, consistent with my research, the awards were not significantly different across these conditions.<sup>131</sup>

A final study aimed at examining punitive damages varied the net worth of the defendant in a complex products liability case.<sup>132</sup> The net worth figures were \$11 million for the low net worth company and \$611 million for the high net worth company.<sup>133</sup> However, the variation in net worth did not make a difference in liability judgments or in compensatory damage awards.<sup>134</sup> Surprisingly, the difference in net worth did not significantly influence punitive damage judgments either, even though it would be expected to increase for the wealthier company.<sup>135</sup>

In sum, the experimental research that I and other scholars have conducted shows that corporations are treated differently in at least some instances. Because of the limited range of cases studied, the generality of the phenomenon is not yet known. However, some of the reasons are becoming clearer. For-profit organizations are held to the highest standards; attitudes toward business play if anything a minor role in differential treatment; and there is little evidence that jurors take a deep pockets approach in deciding liability or reaching awards. The comparability of the treatment of individual and business defendant cases in the Arizona study, controlling for judicial evaluations of the strength of the evidence, hints that if there is differential treatment in actual cases it is a phenomenon likely to be shared by judges and jurors alike.

#### JUROR INTERVIEWS

The jury verdict statistics and experiments point in the same direction—toward differential treatment of business corporations. To provide further insight, I interviewed 269 civil jurors in cases with business and corporate parties.<sup>136</sup> One of my major goals was to find out how jurors reacted to the task of determining the negligence of a business corporation. I asked jurors during the interview a set of questions about the impact of the corporation in the case they de-

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130. *Id.* at 206-08, 212.

131. VIDMAR, *supra* note 62, at 206-08 (describing the deep pocket studies).

132. Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 310-28 n.59.

133. *Id.* at 312.

134. *Id.* at 317 tbl.3 (Liability Judgments) & 319-20 tbl.4 (Compensatory Awards).

135. *Id.* at 324 tbl.6.

136. For a brief description of these studies, see Hans, *supra* note 63 and Hans & Lofquist, *supra* note 43. A fuller description is provided in Hans, *supra* note 108.



cided. First, I asked them how they were influenced by the fact that one of the parties in the case was a corporation; a follow-up question inquired whether they would have thought about the case any differently if all of the other circumstances were the same but the defendant had been an individual rather than a corporation. Finally, I asked them whether they thought it was appropriate to hold a corporation to a different standard than an individual person. Their replies, and the reasons they gave for them, proved to be quite interesting. Only a minority of jurors said that the corporate identity of the party affected their decision making. Similarly, when jurors were asked about whether they would have decided the case differently if there had been no corporation—if it had been a dispute between individuals, just 23% said that if the case had been between individuals, it would have changed their approach.

Regarding the deep pockets approach, the majority of jurors I interviewed said that the financial wealth of the parties did not affect them. A number of jurors, however, said that their juries discussed either the defendant's or the plaintiff's insurance coverage at some point during the deliberation. Jurors often wondered whether or not insurance companies had already paid for the medical and other costs of injury.

One point should be mentioned: It is quite difficult after the fact to assess the factors influencing one's own decision making. This is even more challenging in the jury context when judges often admonish jurors to treat corporations the same as individual parties. Thus, it is important to look at where results of studies using different methodologies converge. However, whatever reliance we might place on juror statements that they are or are not affected by corporate identity, the reasons they give for treating corporations the same or differently are worth cataloguing.

#### REASONS FOR SIMILAR TREATMENT

In arguing in favor of equivalent treatment for individuals versus corporations, some jurors I interviewed emphasized the fairness issue: "It didn't really affect me. I try to be fair with people."<sup>137</sup> Others said they simply focused on the testimony in the case and gave little thought to the fact that a corporation was a party in the litigation: "I really wasn't thinking on the fact that it being a company. Mostly what I was personally thinking was the fact of which one was negligent in the case. . . . I don't remember us even talking about it."<sup>138</sup> Several

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137. Hans & Lofquist, *supra* note 43, at 100.

138. Confidential Research Interview with Juror 10, Case 18.

other jurors observed that the corporation was really just a collection of individuals, and in some cases with small businesses, only one individual. Therefore, it was inappropriate to treat the business party in a different way: "No, basically I saw the business as being [the individual who was the owner] . . . . It wasn't really a corporation that we were dealing with, it was really one man's kind of operation . . . . He still bore the responsibility of the work that was done."<sup>139</sup>

Other jurors observed that when the corporation takes on particular roles, it has the duty to carry out those roles responsibly, but this would be just the same if an individual adopted the same roles:

If the company's going to be the owner or a house or the individual, they both should have responsibility of keeping it up, keeping it up to standards. It doesn't matter . . . they should live up to the responsibilities whether they are an individual or a company.<sup>140</sup>

#### REASONS FOR DIFFERENT TREATMENT

Jurors used a range of justifications for treating corporations differently. Not surprisingly, virtually no jurors stated that their own biases against business led them to treat a business corporation differently. Instead, they offered rationales that included the corporation's status, role, organizational resources, size, and potential impact. Jurors asserted that the corporation had greater organizational assets than typical individuals, which in turn increased their potential to anticipate the potentially negative impact of their products and workplace conditions.

For any given situation, you take something like this, you take the environment, you take anything, it's a lot easier for a corporation to give the information that they need to make an intelligent decision than it is for an individual. They also have the resources of capital to make an informed decision. I think they should be held to a set of higher standards.<sup>141</sup>

Other jurors mentioned the specific roles and responsibilities that business corporations have with respect to their customers, their employees, and the public at large. A desire to hold those with expertise to a greater degree of accountability was particularly evident in the medical malpractice cases: "I think doctors should be held to a higher standard . . . because they hold themselves out to be an expert in that field."<sup>142</sup> Similarly, a juror who agreed that the medical profession

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139. Confidential Research Interview with Juror 3, Case 8.

140. Confidential Research Interview with Juror 8, Case 10.

141. Confidential Research Interview with Juror 2, Case 28.

142. Confidential Research Interview with Juror 8, Case 33.

had to adhere to a higher standard than individuals observed: "Well, yes in a sense that that is their business. You know, for their line of work. But, if you're an engineer and the bridge falls down, you have a responsibility there too."<sup>143</sup>

Also important was the impact or potential impact of a corporation's activity: "Of course they've got to exercise a great deal more safety awareness, they've got many more people in there to worry about."<sup>144</sup> In an identical vein: "Corporations are looking out for thousands of people; an individual doesn't look out for that many people. . . . The effect of the corporation's actions affects more than an individual would other people in society."<sup>145</sup> There are a number of reasons, then, that jurors might treat the business corporation differently quite apart from the anti-business tendencies they are reported to have.

### CONCLUSION

Having reviewed the charges relating to the civil jury's hostility to business and corporate parties in civil lawsuits, and having surveyed recent research on how juries treat business and corporate parties in civil litigation, it is time to take stock. Contrasting illusions and realities: Is the jury guilty as charged?

The jury verdict analyses and the experiments both point in the same direction, that juries respond differently in at least some cases to business and corporate defendants. In certain instances, a corporate defendant might be held liable when an individual defendant might not. Or, a corporate defendant might have to pay a larger award than an individual defendant might be expected to pay. But looking more closely for reasons for this differential treatment, juror hostility to business is not a particularly strong candidate. Instead, in assessing corporate liability, civil jurors appear to adopt a distinctive standard of responsibility, taking into account features of the corporation such as its role, its duties to consumers and employees, its collective expertise, and the potential impact of its actions. The Arizona study failed to find any evidence that juries disproportionately reward plaintiffs who sue business defendants. Using judges' ratings of the strength of evidence as a control, we found that the rate of plaintiff verdicts was about the same for individual and business defendants. Finally, in contrast to the rhetoric about juries in business cases, several studies

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143. Confidential Research Interview with Juror 3, Case 23.

144. Confidential Research Interview with Juror 1, Case 32.

145. Confidential Research Interview with Juror 5, Case 26.

question the conventional wisdom that the financial resources of the corporate defendant encourage a deep pockets approach.

Of course, it may be cold comfort to corporate counsel that although a raging anti-business jury is more likely to appear in works of fiction<sup>146</sup> than in the courtroom, their clients will be evaluated by citizens who expect businesses to uphold high standards of behavior. Nevertheless, the empirical realities presented in this Article add a new dimension to the policy debate over the civil jury's political role. They inform us what would be lost if sometime in the future illusions prevailed over realities and the civil jury no longer played a significant part in the resolution of business and corporate disputes.

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146. See, for example, the best-seller by JOHN GRISHAM, *THE RUNAWAY JURY* (1996).

