



2023 FORUM FOR STATE APPELLATE COURT JUDGES  
**EXPERT TESTIMONY: JUDGES, SCIENCE, AND TRIAL BY JURY**

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## **JUDICIAL GATEKEEPING, EXPERT TESTIMONY, AND THE FUTURE OF AMERICAN COURTS**

*By Anne Bloom*

“The strongest argument [in favor of the trial by jury in civil cases is] that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter.”

–Alexander Hamilton, Federalist No. 83<sup>1</sup>

“The life of the law has not been logic; it has been experience.”

–Oliver Wendell Holmes, Jr., *The Common Law*<sup>2</sup>

### **Introduction**

Public confidence in U.S. courts is careening downhill.<sup>3</sup> Multiple polls indicate that perceptions of the U.S. Supreme Court, in particular, are at historic lows.<sup>4</sup> While initially the

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<sup>1</sup> ALEXANDER HAMILTON, FEDERALIST NO. 83, “The Judiciary Continued in Relation to Trial by Jury.”

<sup>2</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

<sup>3</sup> See, e.g., NATIONAL CENTER OF STATE COURTS, STATE OF THE STATE COURTS PRESENTATION, 2022, at 4, available at [https://www.ncsc.org/\\_data/assets/pdf\\_file/0019/85204/SSC\\_2022\\_Presentation.pdf](https://www.ncsc.org/_data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf) (“Public trust measures (in the courts) continue to slide”).

<sup>4</sup> See, e.g., Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historic Lows*, GALLUP (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx> (noting a 20-percentage drop in public trust in the judicial branch in the federal government, the lowest on record). Annenberg Civics Knowledge Survey, *Over Half of Americans Disapprove of Supreme Court as Trust Plummets*, ANNENBERG PUBLIC POLICY CENTER (October 10, 2022), <https://www.annenbergpublicpolicycenter.org/over-half-of-americans-disapprove-of-supreme-court-as-trust-plummets/>; Pew Research Center, *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RESEARCH CENTER (September 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/>.

negative perceptions focused primarily on the U.S. Supreme Court, it is clear that the perception crisis now extends far beyond the U.S. Supreme Court and is impacting perceptions of local courts as well. While state courts fare somewhat better than lower federal courts, the overall picture is bleak.<sup>5</sup>

Confidence in state courts declined significantly in the past year – from 64 to 60 percent, as compared to 57 percent expressing confidence in federal courts generally and 53 percent expressing confidence in the U.S. Supreme Court.<sup>6</sup> Perhaps even more worrisome, a recent survey found that *less than half* of the individuals surveyed believe that judges “make rulings based on the Constitution, the law and the facts of each individual case.”<sup>7</sup> As the National Center on State Courts (NCSC) has concluded, “[i]f courts wish to remain the most trusted branch of government, this slide must be halted.”<sup>8</sup>

The growing evidence of this loss of public confidence in the courts is now so overwhelming that I doubt many would argue with these numbers. But what do these statistics have to do with judicial gatekeeping and expert testimony? The two are linked, I will argue, by the decline in civil jury trials and growing concerns about the politicization of science.

As the quote from Alexander Hamilton from Federalist No. 83 cited above makes clear, Americans have always been concerned about the potential for corruption in the courts. From the very earliest days, civil juries were seen as the antidote.<sup>9</sup> Notably, results from the recent NCSC survey tracking the growing discontent with state courts express a similar sentiment. When asked about practices that help to ensure the legitimacy of courts, survey respondents cited *jury trials* as one of the most important.<sup>10</sup> In light of recent events, it is particularly remarkable that

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<sup>5</sup> See generally NATIONAL CENTER OF STATE COURTS, STATE OF THE STATE COURTS, 2022, at 4, available at [https://www.ncsc.org/data/assets/pdf\\_file/0019/85204/SSC\\_2022\\_Presentation.pdf](https://www.ncsc.org/data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> See generally Richard L. Jolly, Valerie P. Hans, & Robert S. Peck, *Democratic Renewal and the Civil Jury*, GA. L. REV. 79 (2022). As these authors emphasize, it is worth remembering that attempts to restrain civil juries “motivated not only the First Congress of the American Colonies in 1755, but was also explicitly listed in the Declaration of Independence as a grievance justifying the Revolution.” *Id.* at 82 (2022), citing Resolution VII of the Stamp Act Congress (1765) (listing among grievances “[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies” and “[t]hat the late Act of Parliament . . . by extending the jurisdiction of the courts of Admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists”) and The Declaration of Independence para. 20 (U.S. 1776) (“For depriving us in many cases of the benefits of Trial by Jury”). A commitment to the preservation of civil juries in the Bill of Rights also helped to secure ratification of the Constitution. *Id.* at 83, see also U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

<sup>10</sup> See NATIONAL CENTER OF STATE COURTS, STATE OF THE STATE COURTS, 2022, at 13, available at [https://www.ncsc.org/data/assets/pdf\\_file/0019/85204/SSC\\_2022\\_Presentation.pdf](https://www.ncsc.org/data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf) (noting that 84 percent of respondents identified “trial by jury of peers” as a policy that helps “ensure[s] courts and judges only make decisions based on the Constitution, the law and the facts of each case”).

jury trials were ranked as even more important than a “code of conduct/discipline” for judicial officers.<sup>11</sup> For many Americans, at the time of our founding and today, juries – in civil cases as well as criminal – are key to ensuring the legitimacy of our courts. As we contemplate the role of judicial gatekeeping in evaluating expert testimony, this consistent expression of public faith in juries, as compared to courts, is worthy of our attention.

As is well known, civil jury trials have all but disappeared in this country.<sup>12</sup> In the most recent year for which full, pre-pandemic data is available (2019), juries decided less than one percent of all civil cases in both federal and state courts.<sup>13</sup> In Alaska, there were no civil jury trials at all.<sup>14</sup> During colonial times, in contrast, civil juries “retained the ultimate power to decide the great majority of cases.”<sup>15</sup> In light of the public faith in juries as a check on corruption, it is perhaps not surprising that Americans have grown more skeptical of courts as civil juries fade further and further from view.

At the same time, Americans have also grown increasingly distrustful of expert opinions in general.<sup>16</sup> Indeed, Americans’ trust in scientific experts is now even lower than their trust in the courts. This, too, presents a problem for perceptions of courts, which have become increasingly reliant on experts to resolve cases. Indeed, in many cases, a lawsuit cannot survive summary judgment without testimony from court-approved, *Daubert*-qualified experts. If these experts are also perceived negatively, courts may suffer from the decline in the perceived legitimacy of experts as well.

In light of the changing perceptions of both courts and scientific experts, my goal in this essay is to encourage a discussion about whether moderating the role of judges as gatekeepers in the context of expert testimony would be beneficial for courts and, more broadly, for the American legal and political system as a whole. I will argue that some rethinking of the role of judges in the expert testimony context *would* be beneficial, as current practices regarding the admissibility of expert testimony may be contributing to negative perceptions of courts. I will also try to encourage a discussion of potential paths forward by making some suggestions of practices that

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<sup>11</sup> *Id.*

<sup>12</sup> See Jolly, et al., *supra*, at 87-88 (noting that civil juries have come close to being completely “eradicate[ed] as a meaningful component of the American civil justice system”).

<sup>13</sup> *Id.* at 88 (citing statistics indicating that “juries disposed of just 0.53% of filed federal disputes” with similar numbers in state courts).

<sup>14</sup> *Id.*

<sup>15</sup> Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 419 (1999).

<sup>16</sup> According a survey conducted by Pew in late 2021, only 29 percent of American adults said they have “a great deal of confidence in medical scientists to act in the interests of the public.” Brian Kennedy, Alec Tyson & Cary Funk, *Americans’ Trust in Scientists, Other groups Declines*, PEW RESEARCH CENTER, Feb. 15, 2022, <https://www.pewresearch.org/science/2022/02/15/americans-trust-in-scientists-other-groups-declines/>. For an example of the politicization of expert opinions, see Abigail Cartus & Justin Feldman, *Motivated Reasoning: Emily Oster’s Covid Narratives and the Attack on Public Education*, *PROTEAN MAGAZINE*, March 22, 2022, available at <https://proteanmag.com/2022/03/22/motivated-reasoning-emily-osters-covid-narratives-and-the-attack-on-public-education/> (critiquing economist Emily Oster and noting the role of politicized donors, think tanks and others in promoting Oster’s views).

may help courts to be perceived more favorably. In particular, I will argue that it is possible for judges to take some steps toward defusing the current crisis in perceptions of U.S. courts by acknowledging and protecting the historic and politically important role of juries in weighing expert testimony.

I will begin with a revisiting of the history of the gatekeeping role of judges in the context of expert testimony (Part I). I will then turn to a discussion of some of the politics of how we arrived at this point (Part II), which I will argue is highly relevant to the current crisis in perceptions of U.S. courts. In Part III, I will explain why the current practices may be contributing to negative perceptions of courts, particularly at a time when scientific experts are themselves under fire. In Part IV, I will propose some ideas for more inclusive practices that courts might consider in the assessment of expert testimony which may, in turn, help to improve perceptions of courts more generally.

## I. The History of Judicial Gatekeeping in the Context of Expert Testimony

It has become commonplace for legal elites<sup>17</sup> to assume that judges are more competent than juries in understanding both the rule of law and complex scientific evidence.<sup>18</sup> But long before the advent of judicial gatekeeping of expert witnesses, and indeed, well before the founding of the United States, courts relied, at least in part, upon jurors for expert knowledge.<sup>19</sup> Much of what we know about these early practices comes from the research of a young Learned Hand.<sup>20</sup>

In an article entitled “Historical and Practical Considerations regarding Expert Testimony” that was published in the *Harvard Law Review*, Hand reports that while courts in an earlier time, like judges today, sometimes relied upon what Hand referred to as “skilled witnesses,” *jurors* with expertise were also called upon to assist with cases.<sup>21</sup> For example, a jury of butchers might be selected “when the accused was charged with selling putrid meat.”<sup>22</sup> This reliance on jurors as a valued source of scientific expertise is an interesting contrast to attitudes about the competence of jurors today.

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<sup>17</sup> My use of the term “elite” here is intended as sociological description and, in particular, as a reference to those who hold a disproportionate amount of wealth, privilege, or political power in society, not as a political critique. See, e.g., Stephen L. Rispoli, *Courting Access to Justice: The Rule of Law, the Rule of the Elite, and Non-Elite Non-Engagement with the Legal System*, 29 REV. OF LAW & SOC. JUST. 333 (2020) (characterizing judges and lawyers as political elites).

<sup>18</sup> See, e.g., Hans Zeisel, *The Debate over the Civil Jury in Historical Perspective*, 1990 U. CHI. LEGAL F. 25, 26, available at <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1065&context=uclf> (providing several examples of how legal elites have elevated judges over juries). As discussed below, it continues to be widely assumed that judges are more competent than juries to assess scientific matters, even though social scientists have repeatedly pointed out that the assumption has no basis in fact.

<sup>19</sup> Susan Haack, *An Epistemologist in the Bramble-Bush: At the Supreme Court with Mr. Joiner*, J. OF HEALTH POLITICS, POLICY & LAW 227, citing Learned Hand, *Historical and Practical Considerations regarding Expert Testimony*, 15 HARV. LAW REV. 40, 40-49 (1901) (describing expert practices from the 1600s).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

Thanks to Hand and other historians of early expert testimony practices, we also know that, even from the earliest days, the testimony of expert or “skilled” witnesses was considered suspect. An Evidence treatise from the 1800s, for example, identifies “skilled witnesses” as the *most untrustworthy* kind of witness in a list of “suspect witnesses” which also included women and “enslaved people.”<sup>23</sup> While it seems obvious from this grouping that our longstanding distrust of expert witness testimony is likely tainted at least somewhat by bias, the deeply rooted suspicion of expert testimony remains firmly entrenched, among both the general public and legal elites.

Many of us are familiar with the well-known quote from Roscoe Pound about the legal system turning experts into advocates.<sup>24</sup> Today’s emphasis on judicial gatekeeping of expert testimony appears to have arisen as a direct response to Pound’s critique. In a 1906 speech titled “The Causes of Popular Dissatisfaction with the Administration of Justice,” Pound decried the “sporting theory” of justice practiced in U.S. courts, which he claimed was increasingly prompting judges to act like referees, instead of independent seekers of truth and justice, and was turning witnesses, “especially expert witnesses, into partisans pure and simple.”<sup>25</sup> These critiques resonated with the practicing bar, particularly the critique of expert witnesses, who had long been viewed suspiciously.

In the years that followed, the Federal Rules of Evidence and various court decisions began to set parameters around admissibility of expert testimony. Professor Saks’s essay provides a helpful overview of how these parameters have undergone change over time. It is worth revisiting the various tests that have been utilized over the years as a way of excavating what is problematic about current judicial practices in the assessment of expert testimony.

As Professor Saks notes, early on, many judges adopted a “marketplace test” of admissibility, by which expert testimony would be admitted if the proffered expert had achieved some degree of financial success through their expertise.<sup>26</sup> Notably, the focus of the “marketplace test” of admissibility was not on the relevance or quality of the evidence itself but rather on *the perceived value of the individual offering the testimony* in the marketplace. This emphasis on *who* was testifying, rather than on the reliability of the evidence itself, was clearly problematic. Worse, it placed courts in the position of appearing to privilege the testimony of scientific elites, solely on

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<sup>23</sup> Samuel R. Gross, *Expert Evidence*, WIS. L. REV. 1113, 1114 (1991), citing JOHN PITT TAYLOR, TREATISE ON THE LAW OF EVIDENCE SECTIONS 45-50, at 65-69 (3d ed. 1858).

<sup>24</sup> More precisely, Pound wrote that the adversary system “turns witnesses, and especially expert witnesses, into partisans pure and simple.” Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 447-48 (1906).

<sup>25</sup> *Id.*; see also Jennifer L. Mnookin, *Expert Evidence, Partisanship and Epistemic Competence*, 73 BROOKLYN L. REV. 587, 593-97 (2008) (tracing the history of current approaches to expert evidence to Pound’s critique).

<sup>26</sup> See Michael J. Saks, *Expert Evolution of Rules and Practices* (on file with the author) at 3, citing David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying about the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799 (1994).

the basis of the experts' acceptance by other elites—those with the financial means to control the marketplace.

Following the “marketplace test” was the *Frye* or “general acceptance” test of admissibility, by which expert testimony is admitted if the expert testimony is generally accepted in the relevant scientific or intellectual field of study.<sup>27</sup> At first glance, the *Frye* standard appears to move away from the judicial practice of assessing expert testimony on the basis of *who* was speaking, rather than the reliability of the evidence itself. But, as Professor Saks explains, *Frye* essentially swapped the commercial marketplace test of earlier times for a “scientific or intellectual” marketplace test of admissibility.<sup>28</sup> As a practical matter, this means that, instead of deferring to the judgments of actors in the economic marketplace in the evaluation of expert testimony, under *Frye*, judges were now instructed to defer to the judgment of other scientists.

While the judgment of other scientists seems like a more appropriate touchstone for the assessment of reliability than the judgment of the marketplace, it is worth emphasizing that neither of these tests involves judges actually evaluating the reliability of the evidence itself. Instead, under both tests, judges look to other elites to make the assessment for them. Under the marketplace test, courts relied on the perceived commercial value of the expert in the marketplace to inform judicial assessments of the reliability of the proposed expert testimony. With *Frye*, courts switched to relying on what other *producers* of expertise—academics and the like—thought about the quality of the evidence that the proposed experts would present. In both instances, judges essentially turned over the question of the reliability of the expert testimony to someone else.

Although *Frye* continues to be employed in some jurisdictions today, there have been many critiques of *Frye* and its reliance on other scientists to determine the reliability of evidence that is to be offered in a courtroom. The most prominent of these critiques stems from concerns about the potential corruption of those who produce knowledge – a concern that is very much alive today.<sup>29</sup> In response to these concerns, the Supreme Court announced the *Daubert* or so-called “scientific validity” test, which makes another attempt to move the focus of the court’s assessment away from question of *who* is speaking or producing the expert opinion and focusing the inquiry instead on *how* the opinion was reached.<sup>30</sup>

Under *Daubert*, courts are directed to determine the reliability – and therefore admissibility – of the proposed expert testimony –through an assessment of *the reliability of the methods and principles that underlie the proposed evidence*. In other words, instead of focusing on the opinions of the *producers* of knowledge, courts would now focus on evaluating the *process* of knowledge production itself. As a practical matter, this means that, under *Daubert*, if a court

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<sup>27</sup> See Saks, *supra*, at 3; see also *Frye v. United States*, 293 F.1013 (D.C. Cir 1923).

<sup>28</sup> *Id.* (explaining how *Frye* replaced “consumers [of expertise] with producers [of expertise] as the crucial assessors of validity”).

<sup>29</sup> See, e.g., Cartus & Feldman, *supra* (critiquing the role of politicized donors, think tanks and others in shaping expert opinions in the context of the Covid epidemic).

<sup>30</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

concludes that the *process* by which the expert's knowledge was produced was flawed, even expert testimony that is widely accepted by other scientists (in other words, testimony that is admissible under *Frye*) can be excluded.<sup>31</sup> In practice, however, the *Daubert* test still relies heavily on others to determine the admissibility of expert testimony.

The problem is that judges are no better trained to evaluate the knowledge production process than they are the knowledge that results. Recognizing this, the Court in *Daubert* attempted to set forth a non-exclusive checklist for trial courts to use in assessing the validity of the experts' methods. The specific factors identified by the U.S. Supreme Court in *Daubert* are:

- (1) whether a "theory or technique ... can be (and has been) tested";
- (2) whether the method "has been subjected to peer review and publication";
- (3) whether there is a "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and
- (4) whether the method enjoys "general acceptance" within the "relevant scientific community."<sup>32</sup>

Although these factors were ostensibly drawn from the practices that scientists themselves engage in to determine the reliability of scientific findings, *Daubert* has been criticized from the start for asking judges to engage in an exercise for which they are plainly not trained.<sup>33</sup> It is also evident that only the first and third of the *Daubert* factors – whether a "theory or technique... can be (and has been tested)" and whether there is a "known or potential rate of error" hint at the actual methods employed by scientists to determine the reliability of a study's results (falsifiability and estimations of error, respectively). The other factors simply direct judges back to the opinions of other knowledge producers by way of "peer review and publication" and "general acceptance" within the relevant scientific community. Thus, to ascertain whether the expert testimony is based on sound methodology, as *Daubert* requires, judges seemingly must again rely upon knowledge producers to tell them.

On remand, the Ninth Circuit in *Daubert* emphasized some additional considerations, including whether the knowledge production process occurred before the litigation was initiated and whether the research was published.<sup>34</sup> The relevance of the first of these factors to an assessment of "scientific validity" is a mystery. As the Ninth Circuit acknowledged, a vast amount of scientific inquiry takes place in the context of a specific inquiry for which someone in the marketplace needs or wants an answer. Does this make the researchers hired guns? Absolutely. The only question is who is paying. While the answer to this question is certainly worth knowing, the fact that the research is funded by someone with an interest in a particular outcome does not render the study scientifically invalid *per se* (just potentially biased, as all studies are).

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<sup>31</sup> For a fuller discussion of how *Daubert* operates in practice, see Saks, *supra*.

<sup>32</sup> *Daubert*, 509 U.S. at 593-595.

<sup>33</sup> See *Daubert*, at 600-01 (Rehnquist, C.J., dissenting).

<sup>34</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311 (9<sup>th</sup> Cir. 1995).

The requirement of publication is even further afield. Unpublished scientific research is not like an unpublished legal opinion, which cannot be relied upon for precedent. Indeed, people rely upon unpublished scientific research every day to make important decisions in industry and beyond. The purpose of publication in the two fields is quite different. When courts publish a legal opinion, they are seeking to establish to create some stability and finality in a particular rule of law that may be followed by others. Scientific publication, in contrast, aims to do the opposite. The goal is not to end discussion but to invite further testing and evaluation of the scientific conclusion proposed. Sometimes this is something the scientist conducting the research is interested in publishing; sometimes it is not.<sup>35</sup>

While publication is one indicator of the reliability of a scientific opinion, primarily because it has undergone peer review, it does not follow that unpublished scientific conclusions are inherently unreliable. They are simply unpublished. Here, an analogy to law to use of legal expert opinions is perhaps helpful. Many legal experts bring value to a case, even when the opinion that they express is unpublished. In reaching conclusions on matters of civil procedure, for example, it is not uncommon for the Supreme Court to cite from *amicus* briefs by prominent law professors on the history or meaning of the rule. In determining whether to give weight to the opinions expressed in these briefs, the courts do not ask whether the opinions expressed in them have been published in advance of the litigation. This is true even when the judges themselves have little to no experience or expertise on the particular legal question at hand. While the expert legal opinions of law professors are also commonly ignored, the fact of publication seemingly has no bearing on the court's assessment of the reliability of the opinion when citing it.

Similarly, the fact that the opinions expressed in most law review publications do not undergo peer review before publication does not render them legally invalid. Indeed, courts also routinely cite law review articles to support their own opinions even though only a handful of law reviews condition publication on anything resembling peer review. It is tempting to respond that this is a mistake too and that a scientist would never do this. But this is not true. Much like judges considering legal opinions, a "court" of scientific experts might rely upon the unpublished opinions of other scientific experts to reach a scientific conclusion or, perhaps more commonly, in determining the research design of a future study. The fact of publication (or the failure to publish) does not determine its reliability.

For all of these reasons, publication is not always a reliable indicator of scientific validity. As the Supreme Court emphasized in *Daubert*, whether the work has been published or not is something to consider but it is a mistake to rely solely on publication—peer reviewed or not—as an indicium of reliability. It is also important to recognize that peer review processes vary and rely heavily on the opinions of intellectual elites, who are often quick to recommend publication

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<sup>35</sup> As an example, several years ago, I worked with a team of social scientists to test and evaluate the adoption of new technologies by a local court. At the court's request, we did not publish the results. Nevertheless, the research served as a valuable tool to the court in determining future investments in technology and other policies. These types of unpublished "return on investment" studies are quite common and the fact that they are unpublished does not mean they are unreliable or based on "junk" methodologies.



of those who support their views.<sup>36</sup> In other words, reliance on peer review publication to assess the validity of a scientific study is just another example of deference to the views of intellectual elites rather than an actual assessment of the scientific validity of the proffered research.

To sum up, since the earliest days, the primary approach to judicial gatekeeping in the context of expert testimony has entailed deference to the opinions of others, who are perceived to be more expert than judges, to determine the reliability of the evidence that the expert seeks to present. Initially, the definitive imprimatur was the perceived value of the expert in the marketplace. If others were willing to pay the expert a lot of money for their opinion, then that was considered to be solid evidence of the opinion's reliability. Once that approach was dismissed as insufficiently rigorous, courts turned to the opinions of the knowledge producers themselves and then attempts to engage in independent judicial assessments of how well the knowledge producers followed their own rules, which ultimately led the courts back to scientific elites to inform their assessments. This is where we are today.

Although Federal Rule 702 was subsequently amended in response to *Daubert* and other Supreme Court opinions interpreting Rule 702, none of the *Daubert* factors currently appear in Rule 702, nor did they exist at the time of *Daubert*.<sup>37</sup> Nevertheless, these factors were widely adopted and followed by courts in interpreting FRE 702, *Daubert* and its progeny. And, as already noted, courts' reliance on these factors has been widely criticized by the scientific community.

Perhaps in response to this criticism, the Federal Rules Committee recently proposed, and the Supreme Court approved, changes to FRE 702 that will supplant the *Daubert* standard.<sup>38</sup> If not disapproved by Congress, the amendments will take effect on December 1, 2023. Because the pending changes are relevant to the question of the appropriate gatekeeping role of judges, the changes approved by the Committee are shown below. The new language is in italics. The old language is struck-through.

#### Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if *the proponent demonstrates to the court that it is more likely than not that:*

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

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<sup>36</sup> For a discussion of biases in peer review processes and resulting distortion of research results, see Samir Haffar et al., *Peer Review Bias: A Critical Review*, 94 MAYO CLIN. PROC. 670-76 (2019), available at <https://www.mayoclinicproceedings.org/action/showPdf?pii=S0025-6196%2818%2930707-9>.

<sup>37</sup> For a complete trajectory of the changes to FRE 702 over time, see Saks, *supra*, Appendix.

<sup>38</sup> See Letter from John G. Roberts, Jr. to Hon. Kevin McCarthy (April 24, 2023) and attached order, available at [https://www.supremecourt.gov/orders/courtorders/frev23\\_5468.pdf](https://www.supremecourt.gov/orders/courtorders/frev23_5468.pdf).

- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the ~~expert has reliably applied~~ *expert's opinion reflects a reliable application of the principles and methods to the facts of the case.*<sup>39</sup>

There is little doubt that these changes are intended to further enhance the role of the judge as gatekeeper. Specifically, according to the Rules Committee, the amendments are intended to make clear that the court is “empowered to determine whether the expert’s *ultimate opinion* is ‘within the bounds of what can be concluded from a reliable application of the expert’s basis and methodology.’”<sup>40</sup> In other words, the new rule appears to more expressly empower judges to not simply assess the validity of the methods and data that the expert utilized but also to weigh the evidence, which many judges have been reluctant to do, in light of the historic role of the jury.

Legal commentators are divided on whether the changes represent a new approach to the admissibility of expert testimony or simply yet another clarification of *Daubert* and its progeny.<sup>41</sup> In a nod to the confusion, one law firm headlined an article on the changes “Don’t Say *Daubert*—Reviving Rule 702”—a characterization which almost suggests that *Daubert* itself was a misinterpretation of the Rule.<sup>42</sup> What seems clear is that the Rules Committee did not intend a significant change, simply to clarify the judicial role.

That said, it is worth taking a moment to reflect on how differently the *Daubert* Supreme Court viewed the court’s gatekeeping role from the role that is contemplated by the approved changes. As noted above, *Daubert*’s focus was on the scientific validity of the knowledge production process. This is because, in the view of the *Daubert* court, the gatekeeping role of the court was appropriately limited to evaluating the “principles and methodology, not on the conclusions they generate.”<sup>43</sup> To be sure, subsequent decisions muddied the waters a bit.<sup>44</sup> But there is little doubt that the Supreme Court did not intend for the judicial gatekeeping authorized in *Daubert* to extend beyond an assessment of the scientific validity of the knowledge production *process*.

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<sup>39</sup> COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, AGENDA BOOK (June 7, 2022), 891–92.

<sup>40</sup> *Id.* at 892–94.

<sup>41</sup> See, e.g., Tim Kirkman, *Working with Experts after Proposed 702 Rule Changes*, JDSUPRA, January 12, 2023, <https://www.jdsupra.com/legalnews/working-with-experts-after-proposed-702-6262399> (initially quoting U.S. District Judge Patrick Schiltz, chair of the Advisory Committee on Evidence Rules for the point that “This does not change the law at all. It simply makes it clearer” and then, a few paragraphs later, noting that the amendment “will supplant the *Daubert* standard”).

<sup>42</sup> See Andrew Tauber & John Hardin, *Don’t Say *Daubert*—Reviving Rule 702*, WINSTON & STRAWN, LLP (June 29, 2022), available at <https://www.winston.com/en/product-liability-and-mass-torts-digest/dont-say-daubert-reviving-rule-702.html>.

<sup>43</sup> *Daubert*, *supra*, 509 U.S. at 580.

<sup>44</sup> The Court noted in *General Electric v. Joiner*, for example, that “conclusions and methodology are not entirely distinct from each other.” *General Electric v. Joiner*, 522 U.S. 136, 146 (1997).

The new language in FRE 702 (d), however, seems to encourage judges to take things a step further and suggest that judges may exclude testimony when, in the judge’s view, the expert’s opinion does not sufficiently reflect “*a reliable application of the principles and methods to the facts of the case.*”<sup>45</sup> Although the Rules Committee insists that they intended no substantive change<sup>46</sup>—just a clarification of the existing rule—some might read this language as opening the door for judges to exclude testimony based on how persuasive they find the expert’s testimony.

I believe this would be a mistake, legally and otherwise. As I will explain in the sections that follow, the politics of judicial gatekeeping and federal rulemaking generally favors those who are perceived as political or intellectual elites and is increasingly exclusionary. In this context, judicial gatekeeping practices are easily read as elitist and biased, contributing to negative perceptions of courts. Instead of acting to further expand judicial gatekeeping, it is more prudent for courts to work within Rule 702 to embrace more diverse perspectives, even while taking steps, consistent with *Daubert*, to ensure the scientific validity of the expert evidence that is presented to a jury.

## II. The Politics of Judicial Gatekeeping

In the preceding section, we traced the evolution of judicial gatekeeping in the context of expert testimony to suspicions about the validity of expert testimony. But that is not the only factor at play. The expansion of judicial gatekeeping in all contexts, including in the context of expert testimony, has taken place in an environment in which civil litigation, and civil juries, in particular, have been increasingly disparaged in popular and legal discourse.<sup>47</sup> This broader context is highly relevant to the current crisis in perceptions of U.S. courts. While scholars have pointed out for years that these attacks on the civil justice system are wholly unfounded, these distorted understandings of what is going on have taken deep root in our culture, even among legal actors who know that the narratives are false.<sup>48</sup>

Social scientists have tracked these developments closely, tracing the origins of the distorted views to the campaigns of corporate actors and trade associations seeking to influence legal processes to minimize their liability.<sup>49</sup> Scholars have also shown how these corporate campaigns have prompted the media to characterize civil litigation in ways that benefit corporate elites at the expense of ordinary Americans and the civil justice system as a whole.<sup>50</sup> In light of this

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<sup>45</sup> COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, AGENDA BOOK (June 7, 2022), 891–92.

<sup>46</sup> *Id.* at 872.

<sup>47</sup> Jolly et al., *supra*, at 126 – 136 (summarizing “legal critiques and attacks on the civil jury”); see also Hans Zeisel, *The Debate over the Civil Jury in Historical Perspective*, 1990 U. CHI. LEGAL F. 25 (providing an historical overview of the growing disparagement of civil juries over time).

<sup>48</sup> See generally WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004); see also Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998) (debunking many of the false narratives through the presentation of empirical evidence disproving them).

<sup>49</sup> See generally WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

<sup>50</sup> *Id.*

broader context of sustained assault on the civil justice system, it is hardly surprising that perceptions of courts have begun to suffer as well.

Of particular note is the persistent portrayal of civil juries in a bad light.<sup>51</sup> As noted above, empirical research provides no support for the disparagement of civil juries. In fact, “judges and jurors reach very similar conclusions about liability, compensatory damages, and punitive damages.”<sup>52</sup> Empirical research also “do[es] not bear out the inaccurate caricature of juries completely befuddled by scientific evidence.”<sup>53</sup> Nevertheless, many of the narratives propagated by the campaigns push the view that civil juries lack the capacity to understand scientific and technical evidence – a claim that has absolutely no basis in fact.

More recently, social scientists have tracked the impacts of these political campaigns on the rules of evidence and procedure. As many scholars have now documented, since the early 1970s, changing procedural rules have steadily made it more difficult for people to sue.<sup>54</sup> The expansion of judicial gatekeeping has been one of the key ways in which this has been accomplished. Under *Iqbal/Twombly*, for example, federal judges are now making decisions about the merits of a case at the very earliest stages of pleading.<sup>55</sup> This represents a significant change from the past. While it used to be that civil juries played an active role in determining legal outcomes, today’s rules of evidence and procedure emphasize judicial management techniques aimed at minimizing trials.

What social scientists have also noticed is that judges have begun to dominate the Advisory Committee on Civil Rules in much greater numbers.<sup>56</sup> Following the 1971 reconstitution of the Civil Rules Committee under Chief Justice Burger, judges quickly became a majority on the Committee, rising from 19% to an astonishing 69%.<sup>57</sup> Meanwhile, practitioners and academics

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<sup>51</sup> *Id.*

<sup>52</sup> Jolly et al., *supra*, at 130, citing NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 148-152 (2007) (presenting research findings that judges and juries agreed on liability “in about four out of five cases”); *id.* at 299–302 (presenting findings that jurors and judges generally award approximately the same amount of compensatory damages); and Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002) (“Juries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards.”).

<sup>53</sup> Jolly et al., *supra*, at 136, citing RICHARD O. LEMPERT, *CIVIL JURIES AND COMPLEX CASES: TAKING STOCK AFTER TWELVE YEARS* 181–247 (Robert E. Litan, ed. 1993) (concluding that “the weight of the evidence indicates that juries can reach rationally defensible verdicts in complex cases”).

<sup>54</sup> ERWIN CHERMERINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (2017); STEPHEN BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017); SARAH STASZAK, *NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT* (2015).

<sup>55</sup> See generally Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 18-38 (2010) (comparing current practices to summary judgment at the earliest stages of the proceedings).

<sup>56</sup> BURBANK ET AL., *supra*; SARAH STASZAK, *supra*.

<sup>57</sup> Stephen Burbank & Sean Farhang, *Rights and Retrenchment: The Counterrevolution in Federal Rulemaking*, Published by the Civil Justice Research Initiative 4 (2020), available at <https://civiljusticeinitiative.org/wp-content/uploads/2020/03/Rights-and-Retrenchment-Whitepaper-FINAL.pdf>. Notably, these same studies also track the near absence of non-white judges on the Advisory Committee and the growing anti-plaintiff bias of the Committee during this time. *Id.*

almost disappeared from the Committee entirely.<sup>58</sup> As the social scientists further noted, this ascent of judges was followed by a flurry of proposed rule changes with a distinctly anti-plaintiff bias.<sup>59</sup> As judges dominated the Rules Committee in larger numbers, the changes proposed by the new Committee moved measurably in the direction of making it more difficult for plaintiffs to sue.

With the ascent of judges in both case law and the Rules Committees, it is perhaps not surprising that it has become commonplace for legal elites to express the view that judges are more competent decision-makers than juries in *all* respects.<sup>60</sup> Some scholars even claimed that judges are likely better at moral reasoning.<sup>61</sup> Remarkably, these views have persisted even though social scientists have repeatedly pointed out that they have no basis in fact.<sup>62</sup>

This disparagement of the capacities of civil juries has had particular salience in the debates around judicial gatekeeping and expert testimony. A recent example can be found in the discussions around the newly approved amendments to Federal Rule of Evidence 702. A Committee Report accompanying the proposed change claimed, in the face of readily available empirical evidence to the contrary, that:

“Judicial gatekeeping is essential because .... jurors may be unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion ... [and] unable to assess the conclusions of an expert that go beyond what the expert’s basis and methodology may reliably support.”<sup>63</sup>

After the Committee Report was made public, two law professors (one of whom is trained as a sociologist and widely considered one of the world’s leading empirical scholars on juries) submitted a letter to the Rules Committee pointing out that the Committee’s “critique of jurors’ capabilities [was] empirically unsupported.”<sup>64</sup> As the professors noted in their letter, contrary to what the Committee Report claimed, “studies have shown that ‘generalist judges may be no

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See Hans Zeisel, *The Debate over the Civil Jury in Historical Perspective*, 1990 U. CHI. LEGAL F. 25, 26 (providing several examples of how legal elites have elevated judges over juries).

<sup>61</sup> See, e.g., Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 415 (1999) (“My second assumption is that legal education, experience, and the perspective of a judge make a judge better at some, but not all, forms of moral reasoning”).

<sup>62</sup> See, e.g., Letter to Judge Schiltz and the Advisory Committee Members from Richard Jolly and Valerie Hans dated February 16, 2022 (stating the Committee’s “critique of jurors’ capabilities is empirically unsupported”), citing Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW. & HUM. BEHAV. 29, 49 (1994); RICHARD LEMPERS, CIVIL JURIES AND COMPLEX CASES: TAKING STOCK AFTER TWELVE YEARS, 181 (Robert E. Litan, ed. 1993).

<sup>63</sup> See Committee Report for the proposed changes to Rule 702 (e) CITE.

<sup>64</sup> See, e.g., Letter to Judge Schiltz and the Advisory Committee Members from Richard Jolly and Valerie Hans dated February 16, 2022 (stating the Committee’s “critique of jurors’ capabilities is empirically unsupported”), citing Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW. & HUM. BEHAV. 29, 49 (1994); RICHARD LEMPERS, CIVIL JURIES AND COMPLEX CASES: TAKING STOCK AFTER TWELVE YEARS, 181 (Robert E. Litan, ed. 1993).

more able to master the intricacies of complex, expert scientific testimony than a representative jury,’ and in fact, ‘judges may lack strengths jurors have in evaluating scientific evidence’” (citations omitted).<sup>65</sup>

Of course, the research presented by the professors to refute the Committee’s disparagement of juries was hardly new information. Legal and scientific experts alike have been expressing concerns about judicial competence to evaluate scientific evidence since the earliest days in which experts began to be utilized to assist in civil cases.<sup>66</sup> And the studies demonstrating that judges are no better equipped than juries to decide these matters have been around for decades.<sup>67</sup> What is remarkable is that the Committee continued to cite these false narratives as justification for the proposed rule change, despite all this.

Apart from the irony of the Committee ignoring well-vetted empirical evidence in the context of shaping a rule governing the admissibility of expert testimony, the Committee Report’s attempt to justify an expansion of judicial gatekeeping on the basis of unsupported assumptions about juror capacity hints at what might lie just beneath the surface of the public’s growing distrust of the courts. There is a sense conveyed in these types of comments and the near disappearance of civil jury trials over the last several decades that laypeople are no longer welcome in court. Worse, some of the comments by legal (intellectual) elites about civil juries have the stench of, well, elitism.<sup>68</sup> It is not unreasonable to think that this is, at least in part, a source of the people’s growing discontent with courts.

### **III. Why Current Gatekeeping Practices May Be Read Negatively by Laypeople**

At a recent family gathering, I asked my extended family (none of whom are lawyers) whether they thought judges were more qualified to evaluate scientific evidence than ordinary people on a jury. They laughed their heads off.

I offer this story not to suggest that judges are perceived by non-lawyers as less scientifically literate than the general public. To my knowledge, they are not. What my family members found

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<sup>65</sup> See Letter to Judge Schiltz and the Advisory Committee Members from Richard Jolly and Valerie Hans dated February 16, 2022, citing Valerie P. Hans & Michael J. Saks, *Improving Judge & Jury Evaluation of Scientific Evidence*, 147 DAEDALUS 164, 166, 172 (2018).

<sup>66</sup> For expressions of concerns on the legal side, see, e.g., Learned Hand, *Historical and Practical Considerations regarding Expert Testimony*, 15 HARV. L. REV. 40-49 (1901) (describing, among other things, how judges in the 1600s relied on expert *jurors* to assist judges lacking in technical expertise). For expressions of concern from scientific experts, see CITE.

<sup>67</sup> See, e.g., Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW. & HUM. BEHAV. 29, 49 (1994); RICHARD LEMPert, CIVIL JURIES AND COMPLEX CASES: TAKING STOCK AFTER TWELVE YEARS 181 (Robert E. Litan, ed. 1993).

<sup>68</sup> For an enlightening discussion of elitism in law and its implications for access to justice, see Stephen L. Rispoli, *Courting Access to Justice: The Rule of Law, the Rule of the Elite, and Non-Elite Non-Engagement with the Legal System*, 29 REV. LAW & SOC. JUST. 333 (2020) (using Franz Kafka’s *Before the Law* to illustrate the elusiveness of justice for nonelites in the United States and the role of political elites, including lawyers and judges, in preventing nonelites from accessing or influencing courts).

laughable was that *anyone* would think that judges generally are more qualified than members of a jury of ordinary people, many of whom have worked for years in technical or scientific fields, to understand scientific evidence. And, yet, this is precisely what our current judicial gatekeeping practices with regard to expert testimony presume.

As my family members pointed out, the assumption of greater judicial competence is particularly problematic in today's climate of rapid scientific and technological changes. From their perspective, it was more likely than someone operating "in the real world" would understand scientific and technical matters better than judges, many of whom have simply not had the same level of training or exposure to advancements in science and technology that many American workers have had. In this context, the expansion of judicial gatekeeping in the assessment of expert testimony seems especially vulnerable to being scoffed at, by laypeople as well as scientists.

From the NCSC survey data, it is also clear that many Americans are concerned about judicial bias.<sup>69</sup> These concerns, as well, suggest the wisdom of a more cautious approach to the expansion of judicial gatekeeping. It is truly troubling to contemplate on the fact that the single largest net drop in the recent survey of perceptions of state courts was in response in questions about whether courts are fair and impartial.<sup>70</sup> While judges who strive every day for impartiality may find this difficult to hear, the public's concerns about judicial bias are not wholly without empirical support.

Studies have consistently found links between judicial outcomes and the previous legal experience of judges,<sup>71</sup> campaign contributions,<sup>72</sup> and personal attributes, such as race or gender.<sup>73</sup> Worse, some social science research suggests that judges may be uniquely susceptible—that is, more susceptible than others—to certain kinds of biases. For example, judges are thought to be potentially more vulnerable to "confirmation" bias — the unconscious psychological process in which people interpret evidence in ways that are consistent with their already existing views—particularly when judges are hearing lawyers or experts who have

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<sup>69</sup> *Id.*

<sup>70</sup> See 2022 State of the State Courts – National Survey Analysis, Memo from GBAO to National Center for State Courts (November 21, 2022), available at [https://www.ncsc.org/data/assets/pdf\\_file/0033/85965/NCSC-State-of-the-State-Courts-Analysis\\_2022.pdf](https://www.ncsc.org/data/assets/pdf_file/0033/85965/NCSC-State-of-the-State-Courts-Analysis_2022.pdf).

<sup>71</sup> See Joanna Shepherd, *Jobs, Judges, and Justices: The Relationship between Professional Diversity and Judicial Decisions*, DEMAND JUSTICE (Mar. 8, 2021), at 12–16, available at <https://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf> (concluding that "certain types of career experiences are associated with judges favoring individuals over corporations, or vice versa").

<sup>72</sup> See Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L & SOC. SCI. 203, 211 (2017).

<sup>73</sup> See, e.g., Stephen Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231 (2020) (describing how the gender of judges impacts class certification decisions); see also Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, at 185-86 (2005) (describing the biases of legal actors about disability).

appeared before them before.<sup>74</sup> Some legal commentators have also speculated that judges may be more susceptible than others to racial and gender stereotypes, in part because of the relative lack of diversity of the bench.<sup>75</sup>

While in most cases judges and juries seem to reach strikingly similar outcomes despite these biases,<sup>76</sup> the growing dominance of judges in legal outcome determinations may make judges particularly susceptible to the criticism of being unrepresentative and “out of touch” with the realities of the world around them. Research on perceptions of a police car chase video that was included in the Supreme Court’s decision in *Scott v. Harris* provides a somewhat disturbing illustration of the problem.<sup>77</sup> The Court included the video in its opinion because it was convinced that anyone who saw the video would, like them, conclude that no “reasonable jury” could conclude that the police chase posed a risk of deadly harm.<sup>78</sup> But when social scientists showed the video to a sample of 1,350 Americans, large numbers of people concluded otherwise.<sup>79</sup>

Apart from casting doubts on the Court’s conclusion, the study suggested that the Court was remarkably out of touch with community sentiments. It was not only flat out wrong in its assumptions about others’ perceptions; it did not even seriously consider the possibility that others – large numbers of others – could have a different view. Thus, the Court was seemingly oblivious to its own biases, even though a lone dissenter tried to draw their attention to them.<sup>80</sup> Opinions like these contribute to a sense that courts are out of touch with their communities and, as a result, “detract from the law’s legitimacy.”<sup>81</sup>

Meanwhile, scientific experts are struggling with their own perception crisis. In addition to losing confidence in the Courts, the public is also becoming increasingly skeptical of the assessments of those who hold themselves out as scientific experts.<sup>82</sup> As others have noted,

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<sup>74</sup> See Jolly et al., *supra* at 100; see also JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW*, 80–81, 212 (2016); see Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 216 (2017) (“[E]xperience might induce judges to adopt mental shortcuts that they did not use when they were new judges.”); Jordan M. Singer, *Gossiping About Judges*, 42 FLA. ST. U. L. REV. 427, 435, 468 (2015)(noting that judges often recall conduct of attorneys from previous interactions in future interactions).

<sup>75</sup> See, e.g., Sherilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 444-45 (2000) (noting that judges may be even more susceptible than jurors to stereotypes).

<sup>76</sup> Cite to studies showing judge-jury agreement

<sup>77</sup> *Scott v. Harris*, 127 S. Ct. 1769 (2007).

<sup>78</sup> *Scott v. Harris*, 127 S. Ct. 1769 (2007).

<sup>79</sup> Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

<sup>80</sup> Justice Stevens was the dissenter. See *Scott v. Harris*, 550 U.S. 372 (2007).

<sup>81</sup> Kahan, et al, *supra*, 122 HARV. L. REV. at 841.

<sup>82</sup> See, e.g., Brian Kennedy et al., *Americans’ Trust in Scientists, Other Groups Declines*, PEW RESEARCH CENTER (Feb 15, 2022), <https://www.pewresearch.org/science/2022/02/15/americans-trust-in-scientists-other-groups-declines/> (noting that only 29% of U.S. adults report that they have a “great deal of confidence in medical scientists to act in the best interests of the public” down from 40 % in 2020); see also Cary Funk et al, *Trust and Mistrust in Americans’ Views of Scientific Experts*, PEW RESEARCH CENTER (August 2, 2019), available at <https://www.pewresearch.org/science/2019/08/02/trust-and-mistrust-in-americans-views-of-scientific-experts/>



public perceptions of experts were declining even before Covid and the politics of Covid did them no favors.<sup>83</sup> While some in the scientific community find this growing skepticism problematic, others have noted that it is appropriate for the public to be concerned about the political or otherwise partisan biases of those who hold themselves out as experts.<sup>84</sup>

In the legal world, experts are treated with *both* skepticism and reverence. Even as *Daubert* arose in part out of concerns about the scientific validity and party partisanship of some experts' testimonies, experts continue to receive a great deal of deference in courtrooms.<sup>85</sup> As noted above, *Daubert* itself largely turns the question of scientific validity back to the experts, by assessing the admissibility of expert testimony on the basis of criteria like whether the method has been subjected to peer review and publication and enjoys "general acceptance" within the "relevant scientific community."<sup>86</sup>

This heavy reliance on the judgements of experts ignores that they, too, may be biased or out of touch with community practices and sensibilities, with real implications for the reliability of expert conclusions.<sup>87</sup> It has long been recognized within the scientific community that the health care field, in particular, suffers from professional biases, such that differences in training give rise to very different assessments and medical recommendations.<sup>88</sup> This is particularly apparent in the historical schisms between Western and Eastern medicine and the turf battles between doctors and nurse practitioners, which include profound disagreements over the standard of care. But these biases are not limited to the health sciences.

Like everyone else, scientific experts are prone to what psychologists refer to as a "normality bias."<sup>89</sup> As with judges, the normality bias can cause experts to assess scientific information in light of what they have been trained to see.<sup>90</sup> For some experts, this makes it almost impossible

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(noting pre-pandemic that while trust in scientists is generally improving, Americans are divided along party lines in terms of how they view the objectivity of scientists).

<sup>83</sup> *Id.*

<sup>84</sup> Cartus & Feldman, *supra* (discussing the influence of politics on expert opinions).

<sup>85</sup> On the deference to medical experts in civil litigation, see generally Anne Bloom, *Plastic Injuries*, 42 HOFSTRA L. REV. 759 (2014).

<sup>86</sup> *Daubert*, 509 U.S. at 593-595.

<sup>87</sup> See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 126-28 (2010) (discussing the biases of experts).

<sup>88</sup> See Carl B. Meyer, *Science and the Law: The Quest for the Neutral Expert Witness: A View From the Trenches*, 12 J. NAT. RESOURCES & ENVTL. L. 35, 46 (1996-1997) (noting that different treatment modalities require specialist training and that specialists tend to recommend the modalities with which they are most familiar and that, due to differences in background and training, medical advice is necessarily "colored by personal bias"); see also Joseph P. Simmons et al., *False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant*, 22 PSYCH. SCI. 1359, 1359-60 (noting that "[a] large literature documents that people are self-serving in their interpretation of ambiguous information, and remarkably adept at reaching justifiable conclusions that mesh with their desires" and noting the problematic implications of this for scientific validity).

<sup>89</sup> See CHAMALLAS & WRIGGINS, at 127 (providing an overview of the "normality" bias and its implications for expert testimony).

<sup>90</sup> *Id.*; see also Carol J. Hill, *Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Empirical Evidence and Reply to Batavia*, 6 PSYCH. PUB. POL. & L. 526, 530 (2000) (describing the disability biases of medical experts).

to discuss scientific findings in the language of legal discourse. For example, it has been noted that it is fundamentally inaccurate, from a scientific point of view, to discuss causation in the way that law demands.<sup>91</sup> When this is considered, it is a bit odd that courts pay such deference to expert opinions on causation.

Scientific research suffers from many other types of biases that skew outcomes as well. For example, many studies now decry the structural biases of science and the implicit biases of scientists and health experts that have given rise to racist, sexist and ableist practices and conclusions.<sup>92</sup> Concern has also been expressed about scientific research that is designed to reach a particular outcome, through data fishing<sup>93</sup> or other practices that are clearly intended to skew the result.

Along similar lines, the influence of industry sponsorship on academic research, is also well documented.<sup>94</sup> While such sponsorship does not of itself render the research invalid, it does raise questions about what data might be missing and whether the researchers might have employed different methods or reached different conclusions if alternative funding sources had been available. Indeed, the concern about this is so great that some educational institutions have begun to regulate the funding of academic research more closely to minimize excessive donor interference.

Apart from the biases that accompany how scientific conclusions are produced, it is also important to consider how rapidly changing scientific and technological developments may impact assessments of the validity of scientific opinions, particularly opinions published in peer review journals for which there is often an extended period of delay due to the time-consuming peer review process. In this regard, it is worth reflecting for a moment on the fact that, when *Daubert* was argued, the World Wide Web was not yet available to the general public.<sup>95</sup> In the years since then, expert information is being produced and reproduced at a pace that may be quickly rendering the *Daubert* criteria potentially meaningless. Indeed, in the not-too-distant future, we may well be asking whether a Chatbot can qualify as a witness under revised Rule 702.<sup>96</sup> And these opinions may change daily as more and more information is produced and processed, more and more rapidly.

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<sup>91</sup> See, e.g., Maria Cuellar, *Short Fall Arguments in Court: A Probabilistic Analysis*, 50 U. MICH. J. L. REFORM 763 (2017) (explaining the distortions that occur when probability statistics are utilized in legal causation decisions).

<sup>92</sup> For an overview of the problem, see Chloe FitzGerald & Samia Hurst, *Implicit Bias in Healthcare Professionals: A Systematic Review*, 18 BMC MED. ETHICS 19 (2017); see also Melissa Nobles et al., *Science Must Overcome its Racist Legacy: Nature's*, NATURE (June 8, 2022), <https://www.nature.com/articles/d41586-022-01527-z>.

<sup>93</sup> See Hillel J. Bavli, *Credibility in Empirical Legal Analysis*, 87 BROOKLYN LAW REVIEW 502, 509-520 (2022) (describing the practice of data fishing and its problematic implications for discerning scientific validity).

<sup>94</sup> See, e.g., Alice Fabbri, Alexandra Lai, Quinn Gundry & Lisa Anne Bero, *The Influence of Industry Sponsorship on the Research Agenda: A Scoping Review*, 108 AMER. J. PUB. HEALTH e9-e16 (November 2018).

<sup>95</sup> The world wide web became available to the general public in April of 1993. Google was founded five years later.

<sup>96</sup> While the knee-jerk response may be that a Chatbot is only as smart as its programming, when you actually run through the *Daubert* criteria, the only real question is likely to be whether the Chatbot's opinion reflects a reliable application of generally accepted scientific principles and methods to the facts of the case (as per 702(d)), as the other three criteria seem easy to meet. Moreover, some might argue that the expert opinion of a machine is far

As the Supreme Court acknowledged in *Daubert*, it is much more appropriate to think about scientific research in terms of an ongoing process.<sup>97</sup> On one level, the *Daubert* decision acknowledges this by emphasizing consideration of the methodologies employed by particular experts. But these methodologies can also rapidly become obsolete or irrelevant for the particular question at hand. Moreover, the latest revisions to Federal Rule 702 seem to encourage judges to make assessments about not just the methodology employed but also about the appropriateness of the conclusions that experts draw in light of the methodologies that they relied upon. But since judges are not experts, and information is snowballing at unprecedented rates, it seems unlikely that judges could possibly keep touch with all the latest information and conclusions that are being generated in any *one* field, much less have sufficient expertise to assess the appropriateness of the conclusions in the large variety of cases in which courts rely upon expert testimony.

I fear that these new revisions to Rule 702 place judges at great risk of reaching conclusions on the basis of scientific methodologies and conclusions that may already be obsolete, without the court's knowledge. Even other scientists exercise caution when evaluating interpretation of data. While it is not uncommon to question others' conclusions that have been drawn, they typically do so only after careful review of the same data and then subjecting their second-guessing to peer review. It is truly astonishing that the Rules Committee is inviting judges to engage in this type of second-guessing, without any sort of check or other cautionary note about the limitations of their own training.

A popular misconception of first year law students is the idea that the law exists somewhere, in a book or electronic database perhaps, and what law professors do is hide the book from you.<sup>98</sup> One can only surmise that the Rules Committee suffers from a similar misconception about science.<sup>99</sup> In fact, science does not offer definitive truths on which judges may unquestionably rely. Rather, science—much like law—is a better understood as a process, in which the methodologies and the conclusions are undergoing constant change.

The story of the drug at issue in the *Daubert* case illustrates this point well. The plaintiffs in *Daubert* were the parents of two children born with serious medical conditions.<sup>100</sup> Their lawsuit against Merrell Dow Pharmaceuticals alleged the medical conditions of their children were caused by the consumption of Bendectin, a prescription anti-nausea drug produced by the

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more reliable than that of a human “expert” who has also been “programmed” (by their doctoral advisors) to think about the problem in more limited ways.

<sup>97</sup> See *Daubert*, 509 U.S. 579, 590 (noting that scientific conclusions are uncertain and undergoing constant change and acknowledging that mainstream science may be wrong).

<sup>98</sup> My recollection is that Justice Scalia popularized this misperception.

<sup>99</sup> For an excellent discussion of how legal perceptions of science intersect with those of scientific experts, see Joseph Sanders, Shari S. Diamond and Neil Vidmar, *Legal Perceptions of Science and Expert Knowledge*, 8 PSYCH. PUB. POL. & LAW 139 (June 2002).

<sup>100</sup> *Daubert*, 579 U.S. at 582.

defendants.<sup>101</sup> In support of their case, plaintiffs offered the testimony of an expert who, after reanalyzing published studies on Bendectin, found a statistically significant association between the drug and birth defect.<sup>102</sup> The study was unpublished, however, and at the time the case was argued, the general consensus of the scientific community was that there was no evidence strong enough to tie Bendectin to birth defects.<sup>103</sup> Ultimately, under both *Frye* and *Daubert* (after remand), the testimony was deemed inadmissible. Today, there continues to be significant concern about Bendectin but the drug is no longer prescribed, both because of concerns about its toxicity and because, probably more importantly, *subsequent research uncovered that the initial recommendations for prescribing the drug were based on faulty science*.<sup>104</sup> Notably, this conclusion was reached after a subsequent re-analysis of the published (but, notably, not peer reviewed) research that supported prescribing the drug revealed problems with the initial conclusion that the drug was effective.

The point here is not that the study that plaintiffs attempted to introduce in *Daubert* provided definitive proof of the adverse effects claimed by the plaintiffs in that case. The point is that the court's approach to determining what constitutes scientifically reliable results is quite different from that of the scientific community itself. As the medical community's response to Bendectin illustrates, the scientific and medical conclusions evolve over time and do not turn on publication or peer review. In the case of Bendectin, the medical community relied upon research that had not been peer reviewed to *prescribe* Bendectin for pregnancy related nausea. The courts, on the other hand, rejected the well-vetted and falsifiable but nevertheless unpublished research that the plaintiffs offered in *Daubert* to avoid summary judgment. Importantly, the two sets of studies were not necessarily at odds with each other from a scientific point of view. The different studies were simply different assessments of the drug at different points in time, utilizing different methods – both of which were widely considered scientifically valid.

As many in the scientific field now emphasize, many scientific conclusions are best understood as socially constructed or, put differently, as products of a particular place and time, and even of the epistemic views of the researchers at a particular place of time.<sup>105</sup> *Daubert* actually accepts this premise and, indeed, the enhanced gatekeeping role of judges that is prescribed by *Daubert* is, in many ways, a response to it.<sup>106</sup> The criteria set out in *Daubert* and the proposed revisions to Rule 702 direct judges to “become sufficiently knowledgeable about scientific methods so that they can fairly assess the validity” of expert testimony in light of these limitations.<sup>107</sup> But,

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<sup>101</sup> *Id.* at 583

<sup>102</sup> *Id.* at 584.

<sup>103</sup> *Id.*

<sup>104</sup> See Navindra Persaud et al., *Doxylamine-pyridoxine for Nausea and Vomiting of Pregnancy Randomized Placebo Controlled trial: Prespecified analyses and Reanalysis*, 13 PLOS ONE (2018), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5771578/>.

<sup>105</sup> See generally Sheila Jasanoff, *Science, Common Sense & Judicial Power in U.S. Courts*, 147 DAEDALUS 15 (2018).

<sup>106</sup> See Sanders, Diamond and Vidmar, *Legal Perceptions of Science and Expert Knowledge*, 8 PSYCH. PUB. POL. & LAW 139, 149 (2022).

<sup>107</sup> *Id.* at 149-150.

unfortunately, judges are ill-equipped to perform this role. Indeed, research suggests that judicial understanding of scientific methods is relatively weak.<sup>108</sup>

But even if a judge is well-trained in science, there is no reason to think that judges are somehow exempt from the cognitive biases that color the perceptions of experts themselves or, for that matter, the general public. As is the case with everyone else, judicial views of science are products of a particular place and time and of particular assumptions about the nature of expert knowledge.<sup>109</sup> For all of these reasons, laypeople may view the expanding gatekeeping role of judges in the context of expert testimony with some skepticism.

#### IV. A Path Forward

*Daubert* purports to “make[s] the judge, not the expert community, the final arbitrator of what constitutes acceptable expertise.”<sup>110</sup> The pending amendments to FRE 702 seek to expand this role further. While many judges seemingly welcome this gate-keeping role, they would do well to be attentive to how their own assumptions may color their assessment of the testimony.<sup>111</sup> What seems like “common sense” to a judge today may look quite differently tomorrow.<sup>112</sup> Moreover, some might perceive the “common sense” of judges to be at odds with the “common sense” of others in the community, as was seen in the case of the police chase in *Scott v. Harris*.

Although some commentators have called for scrapping *Daubert* in its entirety,<sup>113</sup> that project strikes me as unrealistic at this point. Instead, in this section, I want to suggest some potential strategies that judges might pursue, within the existing legal framework, for enhancing public engagement with civil legal proceedings and perhaps helping to improve perceptions at the same time. As a starting point, I think it is helpful to remember that, although perceptions of the courts are now at a crisis point, the fundamental challenge that is posed by *Daubert* and the assessment of expert testimony is not a new one. Courts in earlier times also struggled to develop tools for legal decision-making that incorporated both the uncertainty of scientific conclusions and an awareness of how their own biases might be influencing their view of the evidence.

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<sup>108</sup> See Sophia Gatowski, Shirley Dobbin, James T. Richardson, Gerald Ginsburg, Mara Merlino, and Veronica Dahir, *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433 (2001). For example, while *Daubert* counsels court to consider “falsifiability” and error rates as part of the reliability assessment, research suggest that very few judges have a clear understanding of what these terms mean, much less the assumptions that underlie them (which are actively debated in the scientific community). See also *id.* (reporting survey results indicating that only about 6 percent of judges had a clear understanding of falsifiability and only 4 percent exhibited a clear understanding of error rates).

<sup>109</sup> Sanders et al., *supra*, at 139.

<sup>110</sup> *Id.* at 151.

<sup>111</sup> See generally Gatowski et al., *supra*.

<sup>112</sup> Sanders et al., *supra*, at 139.

<sup>113</sup> See, e.g., Edward Cheng, *Consensus Rule: A New Approach To Scientific Evidence*, 75 VAND. L. REV. 407, 407 (2022).

One of the leading legal scholars (and judges) to consider how to conduct legal decision making in light of scientific uncertainties and cognitive biases was Oliver Wendell Holmes. Like most scientists today, he recognized that perceptions are a product of both the physical world and how the mind has been trained to see it.<sup>114</sup> Put another way, Holmes recognized that there are no “neutral” experts on which courts might rely.

As a result of his beliefs, Holmes was dedicated to hearing a variety of viewpoints and was especially interested in hearing what “legal outsiders” and those with direct experience on an issue had to say.<sup>115</sup> In addition, Holmes’s jurisprudence teaches the importance of continuously revisiting and interrogating what we think to be true, in light of current and past biases. It is worth quoting from *The Common Law* (1881) at length on this point:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Legal practices which place excessive deference on the generally accepted expert opinions of the moment – or which attempt to tie legal conclusions to scientific conclusions at a particular point in time—ignore these realities and, in doing so, may raise questions about the impartiality and fairness of legal processes, both for the reasons Holmes cites (legal decision-making is plainly influenced by the perceived exigencies and prejudices of the moment) and because an over-reliance on elite perspectives (of scientific experts and judges alike) is not likely to bring us closer to “truth” or justice.

One oft-mentioned solution to the problem of potentially biased expert witnesses is to make them “neutral” or court-appointed. As far back as 1901, Learned Hand proposed the creation of a system of neutral, court-appointed experts, not unlike those used in countries such as France, that are not based on an adversarial system of justice.<sup>116</sup> I have already discussed some of the reasons why this is problematic. From a scientific perspective, “neutral” expert witnesses are a fantasy. Like all of us, experts carry the baggage of their training and own implicit biases. But it is also true that relatively few disputes, and especially those that eventually find their way to trial, involve a question around which there is a clear scientific consensus. Indeed, it is not uncommon for the relevant science to be changing as the case proceeds. Under these circumstances, a panel of so-called “neutral” experts are unlikely to provide courts with more meaningful assessments or to be the best evaluators of the relevant evidence.

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<sup>114</sup> See Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 556–557 (1988).

<sup>115</sup> *Id.* at 78-79.

<sup>116</sup> Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 55 (1901).

Another proposed solution is to restrict the juror pool to those with scientific competence.<sup>117</sup> As was the case in an earlier time, special juries, “in which individuals are selected for specific education, training or experience to serve as civil jurors, remain an option in the United States.”<sup>118</sup> Sometimes this idea is posed as a jury of professional scientists.<sup>119</sup> As this idea is typically deemed impractical, the idea is quickly dismissed.<sup>120</sup>

That said, there is nothing preventing a judge from inquiring into the scientific competence of prospective jurors, if that is a concern. Of course, this also threatens to introduce bias, as the jurors with the most significant scientific training are likely to suffer from the same sorts of biases as expert witnesses, whose views are shaped by the field in which they are trained and the personal biases that they bring to the case from their own backgrounds. More importantly, we have no reason to believe that jurors with scientific expertise are, as an empirical matter, more competent to sort through scientific testimony.

If these oft-proposed potential solutions are not the answer, what other steps might courts take in the context of assessing the admissibility of expert testimony, to minimize perceptions of illegitimacy and bias? The most important thing to consider is this: *research suggests that including laypeople in the decision-making process improves perceptions of fairness and legitimacy.*<sup>121</sup> What follows then, are some proposals that take this research seriously by helping to restore and protect the important role of laypeople in civil legal processes.

### **Proposal #1: Thoughtful Moderation of the Judicial Gatekeeping Role in the Expert Testimony Context**

As we have discussed, the rationale for the enhanced gatekeeping role of judges in *Daubert* and the revised rules regarding the admissibility is empirically dubious. As an empirical matter, there is no reason to believe that judges are more qualified than juries to evaluate scientific evidence. As explained in Part II, the expansion of judicial gatekeeping is better explained by political strategies that sought to elevate judges and other elites over laypeople in the legal decision-making process. In light of this, a prudent—and empirically informed—approach might be to engage in judicial gatekeeping in ways that recognize the value of juries in assessing scientific evidence.

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<sup>117</sup> Mnookin, *supra*, at 1030. Mnookin refers to this as “epistemic competence.” I am using the term “scientific competence” because I think it more accurately reflects what is required, particularly in light of the most recently proposed changes to the Federal Rules of Evidence.

<sup>118</sup> Jolly et al, *supra*, at 99, citing JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 174–212 (2006) (reviewing the history of special juries in the United States).

<sup>119</sup> Mnookin, *supra*, at 1029.

<sup>120</sup> *Id.*

<sup>121</sup> See Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 105 (1988) (presenting evidence that involvement in the decision-making process enhances the participants’ perception of fairness).

With this in mind, it is important to recognize that the criteria that *Daubert* presents for consideration in determining whether to admit expert testimony were intended to be flexible and not necessarily applicable in every case.<sup>122</sup> While some judges treat the criteria as if they were rigorous tests, this is not what *Daubert* itself or the rules require. Moreover, in *Kumho Tire v. Carmichael*, the Supreme Court expressly recognized that the *Daubert* factors do not fit all cases.<sup>123</sup> The publication and peer review criteria, for example, may not provide helpful information in every case.<sup>124</sup> In other words, in some circumstances, these criteria might not take precedence.

Going further, Courts might seek additional input from others whose perspectives are relevant, even if they are not recognized in the relatively exclusive and elite world of academic publication. Here, it is worth noting that the Advisory Committee has recognized that experience alone may provide a sufficient basis for admitting expert testimony.<sup>125</sup> This opens up all sorts of possibilities for the inclusion of diverse and non-elite perspectives, as Holmes advised.

To give a few examples—people with disabilities may have highly relevant experience to consider in cases involving disabling injuries, particularly with regard to the experience of pain and suffering that accompanies the transition to life as a disabled person.<sup>126</sup> Public health experts, environmental activists, and other members of the community with uniquely relevant experience on the issues may also have relevant testimony to share, particularly on what scientists call the “external validity” or relevance to the real world of the scientific findings. To be sure, some lawyers and judges may object to the admissibility of experiential testimony on the ground of prejudice.<sup>127</sup> But, from another perspective, testimony from people with direct experience is no more prejudicial, and perhaps less prejudicial, than that of experts drawing conclusions on the basis of their particular trainings or biases. And, as Holmes also emphasized, the life of the law has not been logic, but experience. Since it is not possible to eliminate cognitive biases entirely, incorporating diverse experiences into the decision-making process can be helpful.

One way of incorporating the views of lay people into the process of judicial gatekeeping might be to experiment with special expert evaluation panels made up of both “experts” and laypeople. Courts in other countries routinely employ “mixed-court” practices in which laypeople and

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<sup>122</sup> *Daubert*, 579 U.S. at 590.

<sup>123</sup> See *Kumho Tire v. Carmichael*, 526 U.S. 137, 153 (1999) (“whether *Daubert*’s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine”).

<sup>124</sup> See, e.g., *Daubert*, 579 U.S. at 590.

<sup>125</sup> See Fed. R. Evid 702 Advisory Committee Notes.

<sup>126</sup> See DANIEL GILBERT, *STUMBLING ON HAPPINESS*, 165- 88 (2006) (summarizing the relevant research and concluding that experience provides uniquely valuable insight into the experience of pain and suffering).

<sup>127</sup> See Fed. R. Evid. 403 (providing for the exclusion of evidence that poses a danger of unfair prejudice).



professionally trained judges serve side by side to decide cases.<sup>128</sup> Recent research on these practices have found them to be extraordinarily efficient, effective, and well received.<sup>129</sup>

While the practices in other countries involve judges and jurors working together to decide all aspects of the case, U.S. courts might experiment with mixed court advisory panels on scientific issues, with the parties' consent. The dialogue that might take place has the potential to be helpful to everyone involved and might even help to facilitate settlement. More importantly, it sends a message that the court considers the quality of the evidence, vetted by those with experience in the field, to be as important as the social, educational, or economic status of the messenger (the elite scientific experts). The point is not to abandon expert testimony, but to find ways to create more space for the testimony to be considered in light of human experience, both to minimize the prejudicial effects of implicit and other biases and to ensure that courts are considering a fuller range of perspectives in their quest to provide equal justice to all.

## **Proposal # 2: Encourage Thoughtful Discourse About Civil Juries and How to Revive Them**

It should now be obvious that the empirically insupportable badmouthing of civil juries and the civil justice system needs to stop. Individual judges can take steps in both their personal and professional lives to check the proliferation of this misinformation and to provide more accurate information about how the civil justice system works and the important role of civil juries in it.

Members of the judicial branch might also consider actively supporting other proposals to restore the jury, including adopting a jury-trial default rule, removing damage caps which inhibit jury trials, and experimenting with procedures that permit both speedier trials and greater engagement by laypeople, such as remote trials.<sup>130</sup> As some scholars note, it is also important to ensure representative juries and perhaps consider a return to 12 person juries.<sup>131</sup> The motivating consideration in all of these proposals is *greater engagement by laypeople with court processes* as research suggests that public engagement with courts is critical to perceptions of courts' legitimacy.<sup>132</sup>

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<sup>128</sup> See John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 6 AMERICAN BAR FOUNDATION RESEARCH JOURNAL 195-219 (1981) (describing the mixed court practices employed in Germany and assessing their potential value for U.S. courts).

<sup>129</sup> See Jeremy Boulanger-Bonnely, *Civil Lay Judges Across the Globe*, Presentation at the Annual Meeting of the Law and Society Association, San Juan, Puerto Rico (June 4, 2023) (summarizing research on the efficacy and perceptions of legitimacy of civil lay judges around the world).

<sup>130</sup> See Jolly, et al., *supra*, at 141-155. See also Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 120, 144 (2020) (discussing the impacts of damage caps on jury trials).

<sup>131</sup> See Jolly, et al., *supra*, at 141-155.

<sup>132</sup> See, e.g., Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 105 (1988) (presenting evidence that involvement in the decision-making process enhances the participants' perception of fairness).

### Proposal #3: Support Efforts to Diversify the Bench

The American judiciary is overwhelmingly white, and male. Despite significant efforts to diversify it, it has actually grown *less* representative of American demographics in recent years.<sup>133</sup> Unfortunately, President Trump's overwhelmingly white and male judicial appointees exacerbated the imbalance.<sup>134</sup> While President Biden's appointments have made significant strides in the direction of greater diversity for the federal bench, it is still the case that what most people see when they look at U.S. courts is white men with disproportionate control of a branch of government that has historically been viewed as an important venue for political participation by under-represented minorities.<sup>135</sup> This is another problem for perceptions of court legitimacy.

Research has also tracked the imbalanced representation on rules committees, including the near absence of non-white judges on the Federal Civil Rules Advisory Committee in recent years.<sup>136</sup> This, too, presents a threat to the legitimacy of courts, particularly since social science research has identified a link between the ascent of judges on the Rules Committee and increased restrictions on access to justice.<sup>137</sup> While it may be that non-white judges would reach the same conclusions as white judges, the optics are problematic for courts in the face of public perceptions that courts do not provide equal justice for all.

While it's clearly not possible to address the history of imbalance in the making of federal rules all at once (rule-making is a slow process), courts can be more attentive to perceptions of exclusivity and bias, in light of the somewhat exclusionary history of the Rules Committee and current imbalances. And individual judges can and should support efforts to diversify the bench.

### V. Conclusion

Courts (and civil courts, in particular) play an important role in American Democracy. Historically, they have served as a significant site of political participation.<sup>138</sup> Civil courts are also a critically important venue for confronting the misuse of power.<sup>139</sup> Judicial gatekeeping practices which exclude laypeople from some of the key decisions that take place in civil courts are at odds with this important history and likely to lead to questions about the legitimacy of the courts themselves.

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<sup>133</sup> See *Diversity on the Bench*, BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/issues/strengthen-our-courts/promote-fair-courts/diversity-bench>.

<sup>134</sup> See Andrew Cohen, *Trump and McConnell's Overwhelmingly White Male Judicial Appointments*, BRENNAN CENTER FOR JUSTICE (July 1, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/trump-and-mcconnells-overwhelmingly-white-male-judicial-appointments>.

<sup>135</sup> Frances Zemans, *Legal Mobilization: The Neglected Role of Law in the Political System*, 77 AM. POL. SCI. REV. 690 (2003).

<sup>136</sup> Burbank and Farhang, *supra*.

<sup>137</sup> *Id.*

<sup>138</sup> Zemans, *supra*, at 690.

<sup>139</sup> MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND THE AMERICAN LAW 383 (1990).

The political assessments that gave rise to the expansion of judicial gatekeeping did not consider this part of the political equation. Instead, their focus was on false narratives about the limitations of juries and perhaps on the interests of courts in increasing judicial efficiency and some of the parties appearing before courts in which expert testimony plays a role. What the rule-makers apparently did not consider is how these practices might be perceived outside the courthouse doors.

False and misleading claims about juries have real implications for law and the political system as a whole. In other legal contexts, social scientists have presented extensive empirical research demonstrating how misleading claims about the law become incorporated into American political culture, in ways that favor corporate interests and stigmatize those who attempt to challenge them.<sup>140</sup> The courts, long heralded as the most trusted branch – particularly among those whose views are largely excluded from majoritarian based legislative processes – should not be party to legal practices that traffic or otherwise rely upon these false narratives. They should also be wary of how the factually inaccurate disparagement of juries and the operation of the civil justice system has implications for the political legitimacy of courts more broadly.

As judges consider the expansion of their roles as judicial gatekeepers, they would do well to keep in mind the jurisprudential values of Oliver Wendell Holmes. Holmes's jurisprudence teaches the importance of hearing from multiple perspectives on the issues raised<sup>141</sup> and for courts to be especially attentive to giving more voice to legal outsiders.<sup>142</sup> These insights seem especially salient today, in this time of rapid scientific and technological change and growing distrust in both legal and scientific elites.

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<sup>140</sup> See generally WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004) (documenting how repeat player defendants have invested heavily in misinformation campaigns).

<sup>141</sup> See Wells, *supra*, at 70-72.

<sup>142</sup> *Id.* at 78-79.