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THE FLORIDA JURY:  
TECHNICAL EVIDENCE AND BIAS

by

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A thesis submitted in partial fulfillment of the requirements  
for the Honors in the Major Program in Legal Studies  
in the College of Health and Public Affairs  
and in the Burnett Honors College  
at the University of Central Florida  
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## Abstract

The recent societal development of highly specialized evidence has brought new problems to the forefront of the jury system. Because of the constitutional right to jury trials citizens of the United States and Florida have, it is imperative that the problems facing juries be discussed and explored. The question of whether or not juries can be trusted to comprehend highly technical evidence must be answered for the Florida jury to move forward into modern era. The subsequent question of what biases regarding highly specialized evidence have arisen must also be examined and addressed. Furthermore, solutions designed to increase a jury's comprehension and decrease their bias must be discussed and propagated.

The purpose of this thesis is to explore the answers to those questions and provide potential solutions to the issues facing the modern Florida jury. Law journals, statutes, and case law all suggest that juror comprehension decreases substantially when faced with highly complex evidence. Biases are also commonly associated with these forms of evidence and are leading towards unfair verdicts. Despite these problems, there are solutions that are readily available in the areas of alternative dispute resolution. Further solutions may be created through a revision of the jury instruction process. This thesis seeks to raise awareness of the problems facing the Florida jury and contribute solutions that are practical and easily used.

## Dedication

This thesis is dedicated to my college mentors, Kelly Astro, Denise Crisafi, and Kathy Cook, for  
helping me to dream bigger,

And most importantly, to my best friends, Mitchell E. Albaugh and Leslie K. Albaugh, for  
inspiring me to dream.

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## Introduction

Truth and justice are two ideals that Americans hold above many others. The judicial branch of the United States Government is built upon finding the truth and meting out justice. The judicial branch has many tools at its disposal for following this mission such as: trials, hearings, mediations, arbitrations, judges, and juries. The American jury system is rife with problems that cause unfairness and manipulation of a system designed to bring about justice. This thesis will be scrutinizing the jury process for the increasing obstacles to fairness and analyze solutions to those obstacles. These problems are firmly rooted in two areas. First, jurors have many biases and expectations which sway their perceptions. Second, jury members also lack understanding of the complex jargon that they are expected to decipher, such as jury instructions and technical evidence. For the United States judicial system to be fair and just, alternatives and solutions must be examined and implemented to bring the American jury up to date.

Before addressing any issues it is first important to define terms that will be used throughout the thesis.

- **Jury** – “A group of women and men selected according to law to determine the truth. Juries are used in various types of legal proceedings, both civil and criminal.”<sup>1</sup>
- **Judge** – “A public officer who conducts or presides over a court of justice. The words ‘judge,’ ‘court,’ and ‘justice’ are often used interchangeably and, in context, have the same meaning.”<sup>2</sup>

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<sup>1</sup> Jonathan S. Lynton, *Ballentine’s Legal Dictionary and Thesaurus*, 354 (1995).

<sup>2</sup> *Id.* at 350.

- **Voir Dire Examination** – “Examination of a potential juror for the purpose of determining whether she is qualified and acceptable to act as a juror in the case. A prospective juror who a party decides is unqualified or unacceptable may be challenged for cause or may be the subject of a peremptory challenge.”<sup>3</sup>
- **Venire** – “The jury list.”<sup>4</sup>
- **Trial** – “A hearing or determination by a court of the issues existing between the parties to an action.”<sup>5</sup>
- **Mediations** – “The voluntary resolution of a dispute in an amicable manner. . .a mediator, unlike an arbitrator, does not render a decision.”<sup>6</sup>
- **Arbitrations** – “A method of settling disputes by submitting a disagreement to a person (an arbitrator) or a group of individuals (an arbitration panel) for decision instead of going to court.”<sup>7</sup>
- **Question of Fact** – “A question to be decided by the jury in a trial by jury or by the judge in a bench trial.”<sup>8</sup>
- **Trier of Fact** – “In a nonjury trial, the judge; in a jury trial, the jury.”<sup>9</sup>
- **Technical** – “Involved in detail or in form rather than in a principle or in substance.”<sup>10</sup>

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<sup>3</sup> Id. at 706.

<sup>4</sup> Id. at 355.

<sup>5</sup> Id. at 677.

<sup>6</sup> Id. at 409

<sup>7</sup> Id. at 41.

<sup>8</sup> Id. at 548.

<sup>9</sup> Id. at 678.

<sup>10</sup> Id. at 661.



- **Evidence** – “The means by which any matter of facts may be established or disproved. Such means include testimony, documents, and physical objects...”<sup>11</sup>
- **Bias** – “Prejudice; preconception; partiality; favoritism; something that turns the mind and sways the judgment.”<sup>12</sup>

This thesis also examines a brief history of jury trials in general. The focus of this section is to explain the constitutional, judicial, and historical reasons for a peer based system. Before delving into the current issues facing the Florida jury system, the Florida jury process will be discussed in detail. The importance of each step in the process must be understood before the full dangers of modern problems can be comprehended. These sections create a picture of the American (and specifically Florida’s) jury system from historical beginnings to the modern era and from the beginning of the process to the end of the case.

The first issue that this thesis addresses is that of highly technical trials involving juries. The University of Cincinnati Law Review revealed an unsettling trend in highly complex cases,

The results reveal that juror comprehension declines as complexity increases (particularly when the complexity arises from the presence of multiple claims or parties) even among relatively well-educated individuals with prior jury experience. The results suggest that existing concern about juror comprehension is not misplaced and that courts should "pull out all the stops" with respect to juror education and use all available devices to improve and assist jury decision making in these cases.<sup>13</sup>

This decrease in comprehension hinders the ability of jurors to fairly decide cases. This trend must be reversed for the numerous pieces of complex evidence that are commonly introduced in

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<sup>11</sup> Id. at 223.

<sup>12</sup> Id. at 63.

<sup>13</sup> Matthew A. Reiber & Jill D. Weinberg, *The Complexity of Complexity: an Empirical Study of Juror Competence in Civil Cases*, 78 U. Cin. L. Rev. 929, 932 (2010).

civil and criminal cases. Justice will not be meted out if the jury, as the finder of fact, cannot understand the evidence that is being presented.

The thesis will examine different biases: those towards people and those towards specific types of evidence used in trial. In many ways, there has been an increase in the amount of bias due to modern technology. The internet has enabled the modern juror to read about the background of the case, the plaintiff, defendant, and counsel. Other research has shown that those with exposure to certain types of media (primarily television viewing) are more likely to find certain types of evidence more reliable<sup>14</sup>. Since bias is becoming increasingly pervasive, all potential jurors develop a bias for or against something. In many cases the bias is caused by past experiences with witnesses, police officers, victims, or perpetrators. This thesis explains the dangers of these biases and how they can be effectively limited. The judicial process must be aware of the increasing threats to justice and address them in effective ways.

The Constitutions of the United States and all State governments clearly protect the right of their citizens to have a trial by jury. The Sixth and Seventh Amendments to the United States Constitution guarantee a right to jury trials in certain circumstances. The Sixth Amendment to the Constitution states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>15</sup>. The Seventh Amendment goes on to state that, “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be

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<sup>14</sup> Paul R. Brewer & Barbara L. Ley, *Media Use and the Public Perceptions of DNA Evidence*, 32 *Communication Science* 93, 107 (2010).

<sup>15</sup> U.S. Const. Amend. VI.

preserved.”<sup>16</sup>. Furthermore, the Florida Constitution reads, “The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.”<sup>17</sup> Both the highest laws of our country affirm that Americans have an inviolate right to a trial by jury.

Since the jury system plays an integral part in our legal process, all solutions must either be pre-trial or augment the jury process to mitigate the current problems. In regard to jury instructions, one simple solution that has been suggested is revising the administration of jury instructions. Other common pre-trial negotiations include mediation and arbitration. These kinds of pretrial solutions would solve many of the fairness issues caused by the current jury system by avoiding the jury system altogether.

The goal of this thesis is not to promote the dissolution of the jury process from the Florida or United States justice system. After explaining modern dilemmas facing juries this thesis will suggest ways that the current process can be improved to address these problems effectively. For technical evidence, changes to expert juries or revised jury instructions would go a long way toward fairer civil trials. As for bias, amended voir dire and stricter jury requirements could also effectively reduce the jury bias in the courtroom. If these issues continue to go unchallenged, then the jury process will continue to dangerously deteriorate. Biases will impede the deliberative process and jury instructions will continue to be misunderstood. These problems must be explored and solutions as well as alternatives should be developed when possible. Modern society and technology has introduced many new problems to the jury process and we can only have justice if the system operates efficiently and fairly.

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<sup>16</sup> U.S. Const. Amend. VII.

<sup>17</sup> Art. I, §22, Fla. Const. (1885).

## A Brief History and Purpose of Jury Trials

The modern jury trial can trace its' roots as far back as the medieval era. Although the similarities between the medieval jury and the modern jury are few, medieval practices set the stage for the progression and evolution of juries throughout the ages. As chronologically distant as the medieval ages and as geographically distant as multiple modern European countries, the primary purpose was delegating power to the people to prevent government abuse. Over time laws evolved to ensure that these fact finding individuals had the least amount of bias possible. Understanding the evolution of juries through the ages and cultures as well as their role in preventing government abuse of power is important when analyzing the modern American and Florida Jury.

The simplest purpose of a jury is to remove power from the government and empower the people to decide matters for their community. Juries provide both a safeguard for the people from judicial abuse of power, but also protect the government from accusations of the same. In short, by allowing a jury of peers to decide an issue, the government is precluded from acting on any interest it may have in the outcome of the case or in the politicization of the case. In turn, the integrity of the justice system is protected from skeptics who would claim judicial abuse. The Supreme Court held, “[I]t is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty”<sup>18</sup>. In America at least, the people must be convinced of the truth of a matter before a decision can be made. It is not the place of

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<sup>18</sup> *Williams v. Florida*, 399 U.S. 78, 113 (1970).

government to determine the facts; it is a constitutional right to (in most situations) have a case heard by average citizens so that the government cannot abuse defendants in trial.

The original use of a jury bears little relation to fact finders of today. The duties of pre-modern juries were often two-fold. A juror's first duty was to act as a witness to facts that he or she had observed; not to be impartial:

The notion of the jury trial as judgment at the hands of one's neighbors had its roots in English medieval law and custom and retained some influence, however residual, until the end of the eighteenth century. By the end of the middle ages, local residents had become accustomed to being gathered in an inquisition in which they served as witnesses to facts about which they had some knowledge, not to act as impartial observers.<sup>19</sup>

The second duty that pre-modern juries often performed was literal fact-finding, “[b]efore the fifteenth century, the jury had taken on the role of investigating allegations and determining whether there was enough evidence for a trial, although in early modern times a private form of prosecution could be initiated merely by the oral accusation of a victim.”<sup>20</sup> This second duty bears a great similarity to that of the grand jury that decides whether or not to bring criminal charges against a person.

As time passed more restraints were placed on the jury that prevented jurors from bringing prior knowledge into the courtroom. Eventually, juries reached a point that prevented all prior knowledge of the issue from being brought in by a juror (with few exceptions):

By the middle of the eighteenth century, jurors were precluded from using information provided to them out of court. Although the jury still participated actively—as jurors they ‘joined in the unstructured conversation [of the court proceedings] by sometimes directly questioning witnesses, making observations

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<sup>19</sup> Linda S. Myrsiades, *Grand Juries, Legal Machines, and the Common Man Jury*, 35 *College Literature* 158, 159 (2008).

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

in open court as witnesses testified and asking for further witnesses to be summoned.<sup>21</sup>

Although jurors who were related to the issue or having any pre-existing knowledge of the issue were banned, they could still interject themselves into court proceedings. Furthermore, they could go so far as to argue for one side or another, "...as late as two decades into the nineteenth century, jurors could express such opinions as they wished unless they indicated ill will against the accused, a presumption that had to be proved by the accused."<sup>22</sup> As restrained as they were, juror opinions could run wild during trial proceedings and could be used at any time to sway other members of the jury or argue with the attorneys.

There are two key differences between the duties held by early juries and those held by modern juries, the first of which is partiality. Modern trials place heavy emphasis on keeping any prior knowledge or interest in the issue out of the jury pool. A juror who knew key facts would have been a great boon to a jury in the past. But now, that juror could only be a witness. Over time, attorneys and witnesses replaced the early roles of the jury in giving testimony and evidence to the judge and jury. Furthermore, modern jurors are strictly forbidden from looking to sources of evidence outside of the trial. Pre-modern juries could look to hearsay, their own individual investigation, and any other host of things that would break modern evidence codes. The modern jury requires that jurors be as separated (outside of the trial) from the issue in question as much as possible. Florida's Jury Instruction 1.01 states in great detail:

You must decide this case only on the evidence presented during the trial in your presence, and in the presence of the respondent, the attorneys, and myself. You must not conduct any investigation of your own. This includes reading newspapers, watching television, listening to the radio, or using a computer, cell

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<sup>21</sup> Id. at 160.

<sup>22</sup> Id. at 160.

phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else. Accordingly, you must not visit any of the places described in the evidence, or the scene of the occurrence that is the subject of the trial, or use the Internet to look at maps or pictures to see any place discussed during the trial, unless I direct you to view the scene.<sup>23</sup>

Clearly, the function of juries regarding being neutral and detached has greatly evolved since its inception. However, their purpose has also evolved. The second key difference is that of structure. Early juries acted as attorney, fact finder, and witness whenever they pleased, their role has been greatly reduced to that of a simple observer of evidence produced at trial. Modern rules permit little leeway for jurors to interact at all with the trial. Florida jury rules do permit an interesting exception; jurors are permitted to ask questions to witnesses through the judge. Florida Rules of Criminal Procedure and Florida Rules of Civil Procedure explain that a juror can submit a question for the witness to the judge for review. If the judge deems the question permissible, they may ask the question and allow opposing counsel to object, all of which takes place outside the presence of the jury. Jurors are not allowed to discuss their question with other jurors if the judge does not permit the question to be asked.<sup>24</sup> These questions must be related to the case at hand and the witness that is on stand. Questions for clarification about legal issues to further understanding are not permitted under the rules of procedure.

With the move towards fairness and impartiality, the noble goal of safeguarding the rights of the citizen continues to be recognized. However, as can be seen by the Florida jury instructions, there are an increasing number of disruptions to the meeting of a jury's task. Phones, computers, and numerous devices now provide ways for jurors to inform themselves of

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<sup>23</sup> Fla. St. Jury Instr. (Crim.) 1.01.

<sup>24</sup> Fla. R. Crim. P. 3.371. & Fla. R. Civ. P. 1.452.

the facts of the case and damage the objectivity of the fact-finding body. Worse still, while these disruptions are growing, the complexity and technicality of modern evidence is also increasing. As will later be discussed, the expertise of the average educated citizen is not enough to allow a fair trial in many circumstances. While juries have evolved and improved, there is still much work to be done in the modern era.

## The Jury Process

Now that the overall function of the jury has been established, the process through which its function is carried out must be scrutinized. There are many failings in the modern Florida jury, however they are spread throughout the process, which makes it difficult to understand and address them. To understand where juries are encountering problems one must first understand the system since one early event may increase bias or misunderstandings further along the process. The jury process has been put together via case law, state statute, and rules of procedure.

The first factor of the jury process that must be analyzed is that of juror requirements.

Florida Statute 40.01 states the most basic requirements for a potential juror:

Jurors shall be taken from the male and female persons at least 18 years of age who are citizens of the United States and legal residents of this state and their respective counties and who possess a driver's license or identification card issued by the Department of Highway Safety and Motor Vehicles pursuant to chapter 322 or who have executed the affidavit prescribed in s. 40.011.<sup>25</sup>

The very simplest requirement for a prospective juror is that they are a citizen of the United States and have documentation to prove it. Based on the jury's history of curbing government power, it is sensible that jurors be citizens for them to be qualified to be a juror. It is from these

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<sup>25</sup> Fla. Stat. 40.01 (2012).



registered citizens the jury pool is built. There are several factors that may in fact disqualify a citizen from being a member from the jury in addition to age or a lack of citizenship. By examining what disqualifies a juror, one may understand who is permitted to be on a jury. Florida Statute 40.013 lists all of the conditions. Primarily, people are disqualified if they have been convicted of a crime, they are high ranking government officials, they have an interest in the case, it would be a great burden to the juror or present a burden for the court, or if they are mentally incapable.<sup>26</sup> While these are reasonable things to disqualify a potential juror, there is no educational requirement. The juror must simply be a citizen that does not have disqualifying factors and can serve on a jury. There is no requirement that the juror be a high school graduate or have any knowledge about the area at issue.

From these qualified individuals the clerk of court selects at random no less than 250 names to comprise the juror list. As necessary, the clerk can replenish or supplement these names when jurors are used or excused.<sup>27</sup> Once a new list is compiled, the previous list is discontinued from further use. Once this list is amassed the Clerk of Courts picks from the list a pool for the venire and mails a summons to the potential juror at least two weeks before the sitting of the jury. If jurors fail to appear they may be fined and may be held in contempt of court.<sup>28</sup>

The next step in the jury trial process is for the potential jurors to be questioned by both side's attorneys. The purpose for this questioning is to weed out potential jurors that may be biased for or against a particular side. There are several ways that this questioning can be performed. The Florida Rules of Civil Procedure list one supplemental method as a

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<sup>26</sup> Fla. Stat. 40.013 (2012).

<sup>27</sup> Fla. Sta. 40.02 (2012).

<sup>28</sup> Fla. Stat. 40.23 (2012).

questionnaire (approved by the Supreme Court of Florida) that is handed out to potential jurors and returned to the clerk.<sup>29</sup> However, the primary method is an oral examination of the jury by the attorneys. Mostly, these questions attempt to establish a juror's relationship or thoughts on the matter at issue or related matters. For example, if the case revolves around a dog attack, a juror who has a fear of dogs will probably not be neutral, and may be challenged by one of the attorneys.

When an attorney decides to have a juror removed he or she must use either a challenge for cause or a peremptory challenge. The Florida Rules of Civil Procedure state that the challenge for cause encompasses the following:

“On motion of any party, the court shall examine any prospective juror on oath to determine whether that person is related, within the third degree, to (i) any party, (ii) the attorney of any party, or (iii) any other person or entity against whom liability or blame is alleged in the pleadings, or is related to any person alleged to have been wronged or injured by the commission of the wrong for the trial of which the juror is called, or has any interest in the action, or has formed or expressed any opinion, or is sensible of any bias or prejudice concerning it, or is an employee or has been an employee of any party or any other person or entity against whom liability or blame is alleged in the pleadings, within 30 days before the trial. A party objecting to the juror may introduce any other competent evidence to support the objection. If it appears that the juror does not stand indifferent to the action or any of the foregoing grounds of objection exists or that the juror is otherwise incompetent, another shall be called in that juror's place.”<sup>30</sup>

If a juror falls within a group that is obviously prejudiced (such as being related to either party or one of the attorney's) they may be dismissed on a challenge for cause. Also, they may be dismissed on a challenge for cause if during voir dire the attorney judges them to be prejudiced against a party for any other reason. However, these challenges must be justified to the judge with evidence as to the prejudice at issue. The second type of challenge that may be raised is a

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<sup>29</sup> Fla. R. Civ. P. 1.431(a)(2)(2012).

<sup>30</sup> Fla. R. Civ. P. 1.431(c)(1) (2012).

peremptory challenge. This type of challenge requires no justification to be given to the judge. The attorney simply needs to raise this challenge and the challenged juror will be dismissed from further proceedings. However, this challenge is limited, “Each party is entitled to 3 peremptory challenges of jurors.”<sup>31</sup> The case of *Batson v. Kentucky* placed constitutional limitations on peremptory challenges; a juror may not be excluded simply for being a member of a racial group.<sup>32</sup>

When a potential juror has made it through voir dire and counsel for both sides have made peremptory challenges and challenges for cause against potential jurors, the jury is finalized for trial. They are then given jury instructions as per Florida Statute section 40.50, specifically sections one, two, and five. Subsection one explicates that following the swearing in of the jury, they shall be instructed on their role during the proceedings as well as how they are to behave. These instructions also explain the order of the trial, the legal issues that are present in the current trial, and the process by which a juror can submit a question to the judge.<sup>33</sup> According to subsection two, more instructions are given for civil cases that are expected to be longer than five days. Another statute allows for jurors to take notes about the case but require that their notes be kept confidential and be turned in to the bailiff after the verdict is rendered.<sup>34</sup> The case of *Coates v. State* further affirmed the statute by ruling against an appeal based upon

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<sup>31</sup> Fla. R. Civ. P. 1.431(d) (2012).

<sup>32</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>33</sup> Fla. Stat. 40.50(1) (2012).

<sup>34</sup> Fla. Stat. 40.50(2) (2012).

the jury's abilities to take notes at trial.<sup>35</sup> Before closing arguments are given, the court has the discretion to give final instructions to help the jury apply law to the facts.<sup>36</sup>

These instructions are extensive, complex, and rule intensive. This statute only explains the basic instructions to be given in civil cases and makes no mention of even more complex instructions that could arise given the requisite circumstances. In a complex civil case, more and more instructions could be given to a jury that has no legal background, no business background, and possibly not a very high educational background. These juries who are burdened with complex instructions filled with legal jargon are then required to make findings of liability, guilt, and damage awards.

Unfortunately for jurors, Florida shows little consideration for the financial security of jurors. The care they do show is meager. According to Florida Statute 40.24 jurors are entitled to the following compensation:

(3)(a) Jurors who are regularly employed and who continue to receive regular wages while serving as a juror are not entitled to receive compensation from the clerk of the circuit court for the first 3 days of juror service.

(b) Jurors who are not regularly employed or who do not continue to receive regular wages while serving as a juror are entitled to receive \$15 per day for the first 3 days of juror service.

(4) Each juror who serves more than 3 days is entitled to be paid by the clerk of the circuit court for the fourth day of service and each day thereafter at the rate of \$30 per day of service.

(5) Jurors are not entitled to additional reimbursement by the clerk of the circuit court for travel or other out-of-pocket expenses.<sup>37</sup>

The amount of money that is intended to prevent financial hardship from jurors who miss work to serve is trivial. To put this amount in perspective, according to the Department of Labor, the

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<sup>35</sup> *Coates v. State*, 855 So.2d 223, 225 (2003).

<sup>36</sup> Fla. Stat. 40.50(5) (2012).

<sup>37</sup> Fla. Stat. 40.24 (2012).

current minimum wage in the state of Florida is \$7.79 an hour. For the first three days of service jurors are given barely double that amount for a full day of service. Following the first three days, they are approximately paid four hours worth of minimum wage for a full day's work. To make matters worse, the last time that this was updated was in 1992 which increased the amount of money from ten dollars a day to fifteen.<sup>38</sup> While this bill did increase the amount per day, it also reduced the ability of the juror to be reimbursed for travel expense. The claim of preventing financial hardship is absurd under these conditions. In short, jurors make very little money for a full day missed from work; this compensation is simply too little to make up for the potential losses posed by being a member of a jury. In fact, if a juror is required to drive a substantial distance to the courthouse that juror could incur significant financial losses that will not be reimbursed.

However, due to the great purpose and respect that the jury demands, there are some protections created for jurors. The law is very clear on what happens to an organization or person that punishes a juror for participating as a juror. Anyone that is chosen to serve on a grand jury or petit jury may not be fired because of their service.<sup>39</sup> If an employer even threatens to fire someone for serving on a jury, the court may hold the employer in contempt of court.<sup>40</sup> If an employer fires their employee or even threatens to fire their employee, that employee is entitled to seek damages. Furthermore, the guilty party may be held in contempt of court and punished as well. While the court may not give much to jurors in regards to reimbursement for the burden of serving as a juror, it does at least protect their livelihoods.

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<sup>38</sup> Ch. 92-297, § 250, Laws of Fla.

<sup>39</sup> Fla. Stat. 40.271(1) (2012).

<sup>40</sup> Fla. Stat. 40.271(2) (2012).

The entire jury process from start to finish is incredibly complex and governed by many statutes and rules of civil or criminal procedure. Very little is required for a person to be eligible to serve on a jury and attorneys do their best to fill the jury with people that they believe will sympathize to their case. Then instructions are given to jurors who may or may not have any basic understanding of the jargon that they are expected to process. All the while, the future of businesses, people's ability to recover money for injuries, and in some cases their lives rest in the hands of the jury.

## Juries and Technical Evidence

The judicial system and the cases tried have come a long way since the founding of the American judicial system. With the advent of new business models, new financial programs, and ever developing science, the amount of technical evidence used has exploded. In regard to scientific evidence, every day brings new ways to uncover the truth of a matter at hand. What was once unheard of such as DNA, fingerprinting, or blood tests have now become a staple pieces of evidence. Some of these tests are easier to understand than others, but some scientific evidence baffles jurors who do not belong to the scientific community. Many civil cases involve mountains of discovery involving very specific jargon or highly technical banking information that no one without a specialized degree could understand. The focus of this chapter is to examine the trends and problems involved when the average jury encounters a case with evidence outside of its general knowledge.

There are unfortunate trends present in cases dealing with complex information. The University of Cincinnati Law Review details an unsettling trend that generally occurs as complex evidence is introduced:

The results [of the survey] reveal that juror comprehension declines as complexity increases (particularly when the complexity arises from the presence of multiple claims or parties) even among relatively well-educated individuals with prior jury experience. The results suggest that existing concern about juror comprehension is not misplaced and that courts should "pull out all the stops" with respect to juror education and use all available devices to improve and assist jury decision making in these cases.<sup>41</sup>

For a country that places such a high value on truth and justice, this trend is troubling to say the least. It also relates back to the issue of instructions and prior experience. When performing

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<sup>41</sup> Reiber & Weinberg at 932.

their empirical tests of juror comprehension, researchers found that both procedural complexity and factual complexity decreased comprehension.<sup>42</sup> Jurors without any knowledge of the legal language or the ideas governing the highly technical evidence are likely not to base their decision on the actual evidence. Juries simply do not comprehend the merits or a meaning of what is being presented by the attorneys. Currently, justice based on confusion, not truth, is the unfortunate result.

This trend towards an inability to comprehend important facts raises a second question that must be examined: what is the result that comes from jurors not understanding the evidence? One such study dealt with exactly that. In a study of information that would be presented to jurors, the participants were presented with testimony using two methods of predicting future risk in regard to sexual predators. One of the methods was more anecdotal and the other far more actuarial and technical.

This study directly compared college student mock jurors to a community sample recruited by a marketing firm across a 1-hr video reenactment of a [sexually violent predator] trial based on a trial transcript. Several substantial differences between the two samples were found including: (a) jurors in the community sample evidenced greater confidence in commitment decisions, (b) jurors in the community sample demonstrated a greater bias in favor of unstructured clinical expert testimony over actuarial expert testimony in their confidence of their commitment decisions...<sup>43</sup>

The mock juror's inability to understanding certain evidence results in decisions contrary to justice. The above study also used college students in the same situation that did not drift towards the simpler, easier to understand testimony. So those who were actively engaged in the

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<sup>42</sup> Id. at 960.

<sup>43</sup> Daniel A. Krauss Et. Al., *Dangerously Misunderstood: Representative Juror's Reactions to Expert testimony on Future Dangerousness in a Sexually Violent Predator Trial*, 18 *Psychology, Public Policy, and Law* 18, 23 (2011).



academic community proved to be more likely to either understand or at least err on the side of the technical. Such an attitude may in fact be another issue but will be addressed later in this thesis. Most importantly, the mock jurors not only clung to what they understood rather than what was technical or complex, they actually were more confident in their decisions. Such a result should give anyone considering a jury trial pause. Based on this case, the average community member, when faced with two explanations, one simple and one complex, he or she will vehemently hold to what they know simply because it is understandable.<sup>44</sup>

The decision to lean towards the simple rather than the complex is worrisome in cases in which there is the option of one type of evidence or the other. However, juries do not necessarily react poorly when solely given technical evidence. In a study on how juries react to technical evidence on bullet metals the researchers had four conditions:

Jurors were assigned to one of four conditions. In the Strong Condition, statistical data were presented indicating that the “match” was highly diagnostic—i.e.,  $p(SC|SB)$  was high and  $p(SC|DB)$  was very low. In the Worthless Condition, the statistical data indicated that the match had no diagnostic value—i.e.,  $p(SC|SB)$  and  $p(SC|DB)$  were equally low. In the Unknown Condition, no statistical data were presented on  $p(SC|SB)$  or  $p(SC|DB)$ . Finally, there was the Control Condition, in which the evidence of the bullet lead match was not presented. The goal of the study was to determine whether mock jurors distinguish evidence of a forensic match that is highly diagnostic from that which is non-diagnostic and to learn how they evaluate such evidence in the absence of statistical data about its diagnostic value.<sup>45</sup>

This research sought to uncover how juries analyze the validity of technical arguments. The results raise serious questions about the merits of using a jury trial when presenting specialized evidence. In regards to the Strong condition and the Worthless Condition, the Strong Condition

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<sup>44</sup> Id.

<sup>45</sup> Suzanne O. Kaasa Et. Al., *Statistical Inference and Forensic Evidence: Evaluating a Bullet Lead Match*, 31 Law and Human Behavior 433, 437 (2007).

was rated much higher than the evidence in the Worthless Condition. So jurors are somewhat sensitive to the reliability of evidence when it is presented to them.

However, the problem arises in the analysis of the other two conditions (Control and Unknown). The mere fact that there was technical evidence seemed to lend credence to the case, “Before deliberation, jurors in the Worthless Condition gave significantly higher ratings of strength of case and probability of guilt than jurors in the Control Condition, which suggests they were giving *some* weight to the non-diagnostic match, albeit much less weight than jurors in the Strong Condition were giving to the highly diagnostic match.”<sup>46</sup> At first glance, simply because a case has technical evidence, that case is given more weight than one without. Such an issue has more to do with bias than analysis of evidence and will therefore be discussed in a later chapter. When it came to evidence with an unknown diagnostic background, the juries seemed to land right in the middle:

Judgments in this group fell roughly between those in the Strong Condition and those in the Worthless and Control Conditions, suggesting that in the absence of data on diagnostic value jurors gave *some* weight to this evidence, although not as much weight as they gave to the strong (highly diagnostic) evidence.<sup>47</sup>

When the time is taken to explain to jurors the efficacy of certain scientific processes, they generally react in an appropriate manner. However, at face value, a case with technical evidence is given more weight than a case without.

This finding seems to contradict earlier evidence that showed how jurors tended to pick the simpler of two explanations rather than lean on technical explanations. That is not the case. The sexual predator study gave mock jurors two different and opposing thoughts on the matter:

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<sup>46</sup> Id. at 444.

<sup>47</sup> Id. at 444.

one was technical and one was simple. The bullet test instead presented a case without any evidence regarding a bullet match and a case that did have evidence regarding a bullet match. The problem that arises from this is that even absolutely worthless technical evidence is viewed more positively than the absence of evidence.

The judiciary is not unaware of the problems stemming from juries in regard to information competence due to them addressing it in several cases. There are already some measures available to address juries that perform below standards. Judgments notwithstanding the verdict allow for a judge to overturn a decision by the jury that is too extreme or that had insufficient facts to reach such a conclusion.<sup>48</sup> Mistrials are another way of overturning a jury that returns an improper verdict.<sup>49</sup> Unfortunately, these methods are reactive, not preventative. The entire trial process up to the point of error must be carried out for these kinds of things to occur. Nothing preventative exists past voir dire.

There is some contention in the court system as to what to do regarding complexity. Some courts argued that some subjects may be too complex for a jury,

If judicial decisions are not based on factual determinations bearing some reliable degree of accuracy, legal remedies will not be applied consistently with the purposes of the laws. There is a danger that jury verdicts will be erratic and completely unpredictable, which would be inconsistent with evenhanded justice.<sup>50</sup>

In this case, the United States Court of Appeals held that for due process to continue, limitations may be placed on citizen's Seventh Amendment right to the jury trial. They reasoned that justice based on only the facts and evidence revealed at trial must be the focus of the judicial system. The goal of the trial is for the jury to weigh the only the evidence and make their determination

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<sup>48</sup> Fla. R. Civ. P. 1.480.

<sup>49</sup> Fla. R. Crim. P. 3.530.

<sup>50</sup> *In re Japanese Electronic Products Antitrust Litigation*, 631 F. 2d. 1064, 1084 (3d. Cir. 1980).

regarding liability or guilt. If that goal is placed in danger, then the Seventh Amendment may be restricted to meet that goal. For example, given the context of complexity it is likely that the jury may not understand the full meaning of the evidence presented. As a result, the fairness of the trial itself would be called into question.

Another court that same year came to the opposite conclusion; the jury must be upheld regardless. The presiding court in *Kian v. Mirro Aluminum Co.* also addressed this issue,

Those who would seek an “elitist” approach to the use of the jury trial would undermine one of the most fundamental of our rights. There is no complexity exception to a jury trial that would authorize the denial of a jury when it is otherwise available under the Seventh Amendment.<sup>51</sup>

Obviously, the courts recognize that preventative measures may be helpful. However, they also place a burden on a citizen’s constitutional rights by limiting a citizens Fifth Amendment right or their Seventh Amendment right. Whether or not deference should be given to the Fifth Amendment right to due process or the Seventh Amendment right to be tried by a jury seems to be the heart of the debate on the complexity exception. It is also worth noting that both of these cases arose in the 1980’s, long before the scientific evidence was commonly introduced as it is in modern legal practice. Since these cases there has been little discussion within the legal community about whether or not a complexity exception should be applied now.

Other case law also addresses the issue of the inability to understand technical evidence and lays groundwork for reasons why a jury trial should be avoided in certain instances. One such basis is inadequate legal remedies caused by a jury’s inability to make an educated, logical decision based on the facts of the case.<sup>52</sup> These remedies are inadequate because they fail to

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<sup>51</sup> *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 355 (S.D. Mich. 1980).

<sup>52</sup> *Towers v. Titus*, 5 B.R. 786, 796 (N.D. Cal. 1979).

address the needs of the parties in a way that incorporates the evidence heard at trial. Obviously there are many factors that could render the jury unable to reach a rational verdict. However, there is also case law that recognizes that complex issues can cause a miscarriage of justice since, “A rational verdict can only be based on a comprehension of the evidence.”<sup>53</sup> Without a complete understanding of all the evidence presented at trial, the jury cannot make a rational decision and thus the justice system has failed. These cases agreed in theory on this issue. However, no concrete solutions ever came of these cases. However, even thirty years ago the court system recognized that there could be a point at which evidence surpasses the level of a juror’s understanding. Modern technology and science certainly could require specialized knowledge which would be outside the educational range of the average juror.

Specialized language and evidence places a tremendous burden on the judicial system. Not only do attorneys have to sift through mountains of discovery such as testimony and documents, but now they must find a way to simplify highly technical evidence to the point a layman can easily understand it. If an attorney fails to do so, he or she runs the risk of scaring a juror into confidently siding with the opposition. Furthermore, should an attorney find that the opposition is presenting no technical evidence at all; they can produce evidence of doubtful veracity. Unless opposing counsel is able to counter such evidence, the jury may favor the technical evidence simply because it adds to the aggregate evidence and is regarded as being reliable. The purpose of the judicial system is to come to the accurately find facts and deliver a legal remedy based on the facts. That purpose is currently impossible to meet in certain cases since jurors lose their grasp of the facts (and the law) as soon as highly technical jargon is

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<sup>53</sup> *Rosen v. Dick*, 83 F.R.D. 540, 543 (S.D.N.Y. 1979).

introduced. Based on the research above, technical (or highly complex) evidence presents an issue that must be addressed by the legal community to properly defend the rights of each party to a fair trial.

## Jury Bias

Bias is a complex concept that influences many decisions people make throughout a lifetime. Predisposed conclusions or tendencies are a part of life that in many cases just has to be accepted. The legal community and the judicial system have both attempted to eradicate potential bias by placing limitations on whether someone can be a juror if he or she has prior relationships with any of the parties involved.<sup>54</sup> The process of voir dire was also designed for the attorneys themselves to weed out biases that may be relevant to specific facts of the case.<sup>55</sup> Both of these methods are very effective for dealing with the specific cases that the juror has to hear, but the questions remains as to whether they address general bias trends that appear during jury trials. Jury bias can be found in far more varying ways than simply knowing a party to the case and the effect on the trial can be equally unjust. This chapter primarily examines the biases that could arise during trial and potential biases for or against certain forms of evidence.

### Bias in the Courtroom

Once bias has developed, much like a first impression, it is often hard to overcome. In researching the interviews conducted with jurors to establish how juror perceived their experience and made their decisions one glaring issue became apparent,

...one study found that most civil jurors formed at least a tentative opinion about the verdict before receiving jury instructions, with almost half admitting that they had made up their minds by that point. CJP researchers observed similar evidence of early judgment, as many jurors admitted making up their minds about the penalty before the end of the guilt phase of the trial and before hearing any evidence regarding aggravation and mitigation.<sup>56</sup>

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<sup>54</sup> Fla. R. Civ. P. 1.431(c)(1).

<sup>55</sup> *Id.*

<sup>56</sup> Barbara O'Brien Et. Al., *Ask and What Shall Ye Receive? A Guide for Using and Interpreting what Jurors Tell Us*, 14 U. Pa. J.L. & Soc. Change 201, 212 (2011).

Before being instructed on how to deliberate or what to take into consideration, many jurors have already formed their opinions on the matter. This alone is not evidence of bias; however this goes to demonstrate that even if one was to assume that juror's decisions are not influenced in any way by bias, they are still deciding on a verdict long before they should. Any bias that is present simply makes the problem worse.

The purpose of voir dire is to remove jurors that present latent biases that make them unsuitable to determine a case. However, the opposing sides will try to fill the jury with as many people sympathetic to their case as possible. In *Adkins v. State* for instance, a juror said he had a relative that had been in a situation similar to the case at bar and he was not sure if he would be able to set aside his feelings. Another juror then went on to say,

...that he knew 'of no circumstances where a police officer picked an innocent person off the street ... and assaulted [him], period.' Several times he stressed that he believed officers would not use excessive force on innocent people. Moreover, Stedke said he would lend more credibility to a police officer's testimony simply because he was an officer.<sup>57</sup>

Upon review, the appellate court found that both jurors should have been stricken based on reasoning from *Lazana v. State*, "If there is a reasonable doubt as to a juror's ability to be impartial, the juror should be excused for cause."<sup>58</sup>

Jurors must be scrutinized for any possibility of bias or lack of impartiality. The courts also realize that bias may not come from being against a person involved in the case. The case of *King v. State* slightly expands the concept of bias, "If there is any reasonable doubt that a prospective juror cannot render a verdict based solely on the evidence submitted and the trial

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<sup>57</sup> *Adkins v. State*, 736 So. 2d 719 (1999) at 720

<sup>58</sup> *Lazana v. State*, 666 So. 2d 588, 589 (1996).



court's instruction of the law, he should be excused.”<sup>59</sup> If there is anything factored into the decision except for the instruction and the evidence submitted, the court will excuse the juror. Since the net cast by the court for bias is fairly limited in scope, bias developed during the trial must also be considered. Bias against certain types of arguments or how a jury interprets evidence must be taken into consideration by attorneys.

There are plenty of instances that a juror might hear or see something that the jury is not to consider. The process for impeachment of a witness may illicit information that may only be considered only for a limited purpose. Jurors may then be instructed to disregard certain evidence that they hear or see. To attack the credibility of a witness an attorney may bring to the attention of the court and jury evidence of prior convictions or prior inconsistent statements. However, the jury is only to take this evidence into a consideration only when deciding how much weight to give that particular witness’ testimony. Very few people could ever completely ignore that evidence when considering the defendant’s guilt. Juries are potentially making decisions that affect other people’s lives based on evidence that they legally may not consider.

### Bias Outside the Courtroom

While opportunities for biases arise within the courtroom, modern technology has unfortunately opened the door for a whole host of new problems. Smart phones, tablets, and other mass media have opened the door to instant access to a wide variety of information. Search engines such as Google have provided the means for human curiosity to be satisfied with incredible ease and speed. Applications such as Facebook or Twitter give instant access to

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<sup>59</sup>*King v. State*, 622 So. 2d 134, 135 (1993).

people all over the globe. Even a sequestered jury is not beyond the reach of media that may introduce new and forbidden information:

Jurors might similarly search for personal details about the defendant on the Internet or on social networking websites. Internet research carries the inherent risk that the information found is unreliable. Unless the website that the information is sourced from is a legitimate and authoritative website, the fruits of the research are likely to be unreliable. Where jurors are influenced in deliberations by information found as a result of such searches, the accuracy of the verdict may be questioned. Even where the information is reliable, jurors should not base their verdict on information that has not been subject to scrutiny by both the prosecution and defense in court.<sup>60</sup>

The potential for large scale bias and independent research is only a few clicks away. To fully understand the extent of the danger caused by the easily accessible information, one must understand a juror's duties outside of the courtroom. Florida Civil Jury instruction 2-1 instructs juries, "It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict."<sup>61</sup> The instruction goes on to list specifically the kinds of things that may be presented to the jury, but most importantly, only argument presented by the attorneys and evidence admitted by the judge may be considered. The same instruction goes on to state:

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.<sup>62</sup>

With the proliferation of mass media and instant communications, outside information is easily accessible. Jury members have access to news reports about the trial at hand and any history the

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<sup>60</sup> Nicola Haralambous, *Educating Jurors: Technology, the Internet and Jury System*, 19 Information and Communications Technology Law 255, 257 (2010).

<sup>61</sup> Fla. Std. Jury Instr. (Civ.) 2.1.

<sup>62</sup> Id.

attorneys may have (or the judge). It is unrealistic for any judicial system to think current methods of sequestering a jury are sufficient to prevent a jury from accessing increasingly pervasive outside evidence or opinions. As a result, the strict rules governing what can be considered during deliberation are easily undermined and evidence that has not withstood the scrutiny of the court can be considered. Easy access to information is tainting the justice system.

Even supposing that the court system was able to find a way to prevent all members of the jury from accessing social media, news networks, or any other outside influence, the problem of media bias would still remain. Media such as television may have an even longer lasting effect. Due to the rising popularity of procedural crime dramas a new trend in evidence may be rising. Shows like *CSI* all contain a theme that scientific evidence is infallibly correct. Prolonged exposure to this idea may change the way that audiences (potential jurors) consider scientific evidence.<sup>63</sup> Further research explains the effect more clearly,

The enormous attention to DNA evidence in the last decade contributes to its value as a primary heuristic cue. In fact, it is reasonable to believe that most jurors would have preconceived beliefs about the strength and reliability of DNA evidence on the basis of the popularity of high profile news stories and television programs...<sup>64</sup>

A consequence of the CSI Effect is that DNA has become a cue for jurors to accept the evidence as truth. Media has consistently shown it to be the last piece of the evidentiary puzzle. As was mentioned earlier, this effect is already being seen in mock jury experiments, “Before deliberation, jurors in the Worthless Condition gave significantly higher ratings of strength of

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<sup>63</sup> Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 New England Law Review 435, 442 (2007).

<sup>64</sup> Joel D. Lieberman, *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence*, 14 Psychology: Public Policy, and Law 27, 32 (2008).

case and probability of guilt than jurors in the Control Condition....”<sup>65</sup> In criminal cases, scientific evidence is expected and a case that has some is given more weight than a case without.

Other evidence supports the consequences of the alleged “CSI Effect.” As found in the study by Brewer and Ley, “Time watching television was positively and significantly related to perceptions of DNA evidence as reliable, likelihood of voting to acquit if the prosecution in a murder case did not present DNA evidence, and support for a national DNA databank.”<sup>66</sup> To say nothing about the misunderstandings and misconceptions that occur when presented with technical evidence, there is a bias that exists in criminal cases for the presentation of DNA evidence. Within the legal system there is already a heavy burden placed on the prosecution to prove their case beyond a reasonable doubt. A bias trend that favors specific types of evidence can make this burden even harder to meet. This bias may run contrary to evidence presented earlier stating that jurors will err on the side of evidence they understand.<sup>67</sup> Brewer and Ley addressed this issue:

Watching crime television was positively related to self-perceived understanding of DNA and to perceptions of DNA evidence as reliable. Compared with nonviewers, respondents who regularly viewed crime dramas such as *CSI* and “true crime” programs such as *Forensic Files* showed a stronger tendency to see themselves as having a clear sense of what DNA means (a .24 difference on a 0 to 2 scale) and to believe in the reliability of DNA evidence (.15 on a 0 to 2 scale).<sup>68</sup>

As our society, including potential jurors, watch shows dealing with criminal elements and scientific evidence (DNA, etc.) they perceive themselves to understand it better. Their self

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<sup>65</sup> Kaasa at 437.

<sup>66</sup> Brewer & Ley at 107.

<sup>67</sup> Krauss Et. Al. at 23.

<sup>68</sup> Brewer & Ley at 107.

perceived understanding is the reason the inclination towards simpler evidence is not present in these kinds of cases. An increased perception that DNA is infallible will make it more difficult for either side to fairly overcome the evidence.

It is worth noting however that some researchers are not convinced of the validity of the “CSI Effect.” Judge Donald Shelton wrote in his research article that,

The use of the term “CSI effect” is too crude. This article suggests that these increased expectations of and demands for scientific evidence is more likely the result of much broader cultural influences related to modern technological advances, what we have chosen to call a “tech effect.”<sup>69</sup>

Perhaps laying all of the blame on television is reaching too far. However, Judge Shelton also states that the results of his research clearly indicate a larger amount of jurors expecting scientific evidence than ever before. He concludes that many modern jurors will acquit the defendant in a case relying on circumstantial evidence unless the prosecution can present a science based rebuttal.<sup>70</sup> Whether it is television or simply modern technology causing this trend, there is no denying the trend exists.

The CSI effect is creating the functional equivalent of a presumption that scientific evidence is factually accurate and diagnostically sound, which may not always be the case. Prior cited evidence showed that jurors rightfully placed less weight on evidence that was shown to have unreliable diagnosticity but more weight on the case overall than the same case without the scientific evidence.<sup>71</sup> Cases in which this sort of evidence is present usually contain the risk of

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<sup>69</sup> Donald E. Shelton, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?* 9 *Vanderbilt Journal of Entertainment and Tech Law* 331, 362 (2006).

<sup>70</sup> *Id.* at 362.

<sup>71</sup> Kaasa at 437.

heavy punishments. The results of a survey investigating the effects of DNA evidence specifically compared to other forms of evidence confirmed initial expectations:

The results of the survey indicated that jurors placed high value on DNA evidence and that these attitudes carried over to verdict decisions. The results demonstrated that DNA evidence led to high rates of convictions when the evidence was incriminating, as well as high rates of acquittals when the evidence was exculpatory.<sup>72</sup>

The bias towards certain forms of evidence is impossible to ignore. Further study on bias in general found that, “. . . we have an oddly stubborn tendency to “anchor” to numbers, judgments, or assessments that we have been exposed to and use them as a starting point for future judgments.”<sup>73</sup>

Despite case law such as *Frye v. United States* and *Daubert v. Merrill Dow Pharmaceuticals* that attempted to place significant obstacles in the way of unaccepted scientific processes or experts, there are still issues to be addressed. The core issue of *Frye v. United States* stems from the defendant trying to produce a witness to testify about the Systolic Blood Pressure Deception test. However, the test itself had not yet gained scientific recognition or acceptance. The court’s holding resulted in a requirement that scientific principles and expert testimony regarding these principles must be “sufficiently established to have gained general acceptance in the particular field in which it belongs.”<sup>74</sup>

Another landmark case regarding the admission of technical evidence is *Daubert v. Merrill Dow Pharmaceuticals* in which families brought suit against a pharmaceutical company for birth defects. The respondent presented evidence from their published expert showing that

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<sup>72</sup> Lieberman Et. Al. at 40.

<sup>73</sup> Jerry Kang Et. Al. *Implicit Bias in the Courtroom*, 59 UCLA Law Review 5,11 (2012).

<sup>74</sup> *Frye v. United States*, 293 F. 1013, 1014 (1923).

the drug had not caused defects in humans and the petitioner responded with eight unpublished, non peer reviewed experts who had tested the drug on animals. The appellate court held that since the petitioners experts were not peer reviewed or published they had not gained general acceptance under the *Frye* test. The Supreme Court held that the adoption of the federal rules of evidence regarding scientific evidence overruled the *Frye* test. The federal rules of evidence regarding scientific evidence are far more extensive even though they did away with the general acceptance clause of the *Frye* test. Rather, it is up to the judge to make sure that admitted evidence is relevant and reliable.<sup>75</sup>

*Kumho Tire Co. v. Carmichael* also addressed the issue of technical or skill expert testimony. The respondent, Carmichael, tried to introduce an engineer to testify about the tire that blew out while he was driving. Kumho Tire Co. argued that the methodology of the engineer was insufficient to meet the requirements set forth by *Daubert*. The respondent then rebutted Kumho Tire Co.'s argument by arguing that *Daubert* only applied to scientific testimony or evidence, not simple expert testimony. The Supreme Court extended their ruling in *Daubert* by placing the burden on the judge to evaluate all expert evidence before it reaches the jury because they understood how heavily expert testimony could be weighted.<sup>76</sup> The goal of these tests was to prevent the jury from being misled by technical evidence that was not sufficiently reliable. The current culture has shifted such that now jurors are demanding to see highly technical evidence even if it may not be reasonable for such evidence to be produced. The presumption within the minds of the juror is increasingly that science always holds the truth.

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<sup>75</sup> *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993).

<sup>76</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1998).

It is incredibly important to the justice system that all evidence be treated fairly and that biases that may endanger our jury system are thoroughly understood and addressed.



## Pre-Trial Solutions

The constitution and prior case law make it very clear that trials are to be carried out with a jury of peers. While there are benefits to a trial by jury, the populace should be aware of the issues modern juries face. Furthermore, there are solutions that could obviate the need for a jury entirely; the courts recognize and in many cases encourage these. One such solution would be to simply opt not to have a trial by jury and allow the judge to decide issues of fact as well as issues of law. Other solutions include complete pre-trial settlements through mediation or arbitration. There are also other modes of pre-trial discussion that will be discussed in this section that are being used, specifically in the area of family law. Each of these jury trial alternatives has its own merits and demerits but entirely avoid the complex problems raised by a jury trial.

### Trial by Judge

The judge is one of the most influential people in the judicial system. Many decisions come down to the judge's discretion or interpretation of the law. Most of what the jury ends up hearing will be because the judge made a ruling on the admissibility of evidence. As a rule, judges are given more discretion and more power than the jury due to their experience and education in the legal field. In fact, judges have the power to overturn decisions by the jury or render them null through the use of Judgments Notwithstanding the Verdict.<sup>77</sup> A judgment notwithstanding the verdict may be given if a jury fails to follow instructions or perform duties appropriately, and they may direct the verdict towards either the plaintiff or defendant. Similarly, judges over criminal cases may issue a Judgment of Acquittal if they decide there is

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<sup>77</sup> Fla. R. Civ. P. 1.480.

insufficient evidence for a conviction.<sup>78</sup> If a jury fails to follow instructions or fails to perform duties appropriately, it will be the judge that makes the decision that a new trial is necessary.<sup>79</sup> Training, experience, and objectivity make judges an ideal choice for deciding complex matters.

One of the first things that must be addressed is the question of whether there is really a significant difference in the way judges rule compared to juries. The data indicates yes. In an analysis of punitive damage awards given by juries and judges the data showed several interesting trends. The first trend is that, “[t]he table shows a reasonably consistent pattern of higher punitive award rates in jury trials. The overall difference is large, 43.2 percent (34.1 percent weighted) compared to 25.0 percent (20.0 percent weighted).”<sup>80</sup> In cases when punitive damages are awarded, the jury consistently awards higher amounts to plaintiffs than judges. In addition, the award rate gap between juries and judges is noticeable. For cases in which the punitive damages were between \$0 dollars and \$9,999 dollars, the rate of a punitive award from a jury is 28.6%. In contrast, judges made a punitive award at a rate of 5.3%.<sup>81</sup> When the punitive damages are small the judge and jury are vastly different. However, when the amounts of punitive damages are significantly higher, the rates begin to grow closer. This tends to show that judges are cautious in meting out punitive awards when the amount is negligible. It also shows that when the issue is glaring, like the kind of issue that would merit a several hundred thousand dollar award, the judges are equally as likely award punitive damages. Overall, their

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<sup>78</sup> Fla. R. Crim. P. 3.380.

<sup>79</sup> Fla. R. Civ. P. 1.530.

<sup>80</sup> Theodore Eisenberg Et. Al., *The Decision to Award Punitive Damages: An Empirical Study*, *Journal of Legal Analysis*, 577, 601 (2010).

<sup>81</sup> *Id.* at 602.

experience, their education, their caution in dealing with higher evidentiary requirements, and their objectivity make judges a fair alternative to untrained juries.

## Mediation

Parties agree to meet with an impartial mediator (usually jointly paid for by the parties) who then listens to the case and attempts to negotiate a settlement. If a party remains unsatisfied then litigation continues as planned. One of the primary benefits of mediation is that there is a chance that the mediator will be able to help the parties draft their own agreement. The goal of mediation is to entirely remove the adversarial nature from the issue and try to foster a collaborative settlement. Unlike other pretrial alternatives, mediation is not a definite alternative to a jury trial; meaning, that even if those in dispute go through mediation, they may still go to trial. Yet, mediation is still the most widely used pre-trial solution partially because solutions are malleable and not limited to what the court can and cannot do. A trained mediator may be able help parties understand the real issues involved in the case, suggest how to handle these issues, and garner the areas in which the parties agree. These things often cannot be accomplished by a negotiation between the opposing attorneys due to their goal of seeking the best deal for their client. A mediator's primary goal is for the clients to agree to a resolution of the dispute by the end of the mediation.

Florida has already taken many steps to include mediation as a part of the litigation process. Florida Statute 44.102 reads:

A court under rules adopted by the Supreme Court: must, upon request of one party, refer to mediation any filed civil action for monetary damages, provided the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties. . .<sup>82</sup>

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<sup>82</sup> Fla. St. 44.102 (2013).

If only one party requests mediation and the party has the means to pay for it, then the court must refer the issue to mediation. There are a few exceptions to this statute and most relate to cases involving personal injury or if the parties have already agreed to a different pre-trial alternative. The Florida rules of Civil Procedure give the judge even more discretion, "Except as hereinafter provided or as otherwise prohibited by law, the presiding judge may enter an order referring all or any part of a contested civil matter to mediation or arbitration."<sup>83</sup> Under the rules, individual issues within a case may each be subject to mediation.

Mediation benefits both the court system and the clients. The courts may not have to decide on every issue and they also may not have to hear the case any further; relieving a congested legal system. When clients reach an agreement, they save considerable time and money, they cooperatively settle their issue, and they avoid an unpredictable jury. The article *Forget the Mechanics and Bring in the Gardeners* lists many of the benefits,

The fact that mediation is cheaper than litigation increases peoples' access to justice. Unlike the adversarial process, which gives power to those who can afford the financial burdens, mediation gives many who may not have had an opportunity to submerge themselves in legal waters a chance to be heard. Mediation's cost effectiveness turns the process into an "open system." An open system is more adaptable because mediation takes into account that not everyone can afford litigation.<sup>84</sup>

Mediation is a more cost effective way for parties to obtain access to justice. Mediation lowers costs to the point that disputes would be able to be resolved fairly for anyone. The costly nature of extensive litigation allows those with the deepest pockets to bring suit when others could not.

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<sup>83</sup> Fla. Civ. P. 1.700.

<sup>84</sup> Danny Ciraco, *Forget the Mechanics and Bring in the Gardeners*, 9 U. Balt. Intell. Prop. L.J. 47, 70 (2000).

Admittedly, the richer party could still potentially seek to outlast the opponent. But the fact remains that lowered cost due to mediation is a tremendous boon to all parties.

While reduced cost is a substantial factor in client satisfaction, it is not the sole factor. The court usually resolves disputes through monetary damages. Outside of damages, there are very few resolutions available from the court system. Mediations are not so limited. Mediation can end in a financial agreement; however, they can also be resolved in any number of ways. Sometimes all it would take for a dispute to end is something as simple as a public apology or something slightly more complex like amendments to ongoing contracts, “Generally, these issues are more likely to be addressed in mediation; and additionally, if dealt with by a mediator experienced in the relevant industry, they may be able to help find a unique solution appropriate to the particular situation.”<sup>85</sup> The possibilities for dispute resolution are only limited by what the parties would be willing to accept, “. . . [s]uch a process typically promotes additional flexibility and allows the parties to negotiate a settlement with a greater chance of success.”<sup>86</sup> Because of the reduced costs and increased ability to resolve disputes, mediation should be either mandated by the Florida court system, or parties should be strongly advised to consider mediation before litigation. If mediations were more commonly used in civil trials, clients would be more satisfied, there would be a less congested court system, and problems associated with the jury system would be avoided.

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<sup>85</sup> Ciraco at 11.

<sup>86</sup> Scott H. Blackmand & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 Am. U.L. Rev. 1709, 1716 (1998).

## Arbitration

Much like mediation, arbitration involves bringing an impartial third party or parties to hear the cases. Unlike mediation, at the end of the process of arbitration the arbiter's decision is binding. Since the decision is made by an outside third party and not as a result of collaborative negotiation between parties, the adversarial nature of litigation is still present. The procedure of arbitration can be relatively flexible,

General rules and regulations on arbitration have been promulgated by various organizations, however, parties may agree to tailor the regulations to fit their individual situations. Depending on the structure the parties have selected, the arbitration itself can offer the parties limited discovery, freedom from some or all of the rules of evidence, an opportunity to examine and cross-examine witnesses, and the option to use briefs and oral argument.<sup>87</sup>

Typically arbitration is used as an alternative to trials while retaining the decision making that would be found at trial. Arbitration does not have the judgmental flexibility found in mediation. However, arbitration does maintain the benefit of significantly lower costs than trial litigation. The price is generally going to be higher than mediation though since mediation can take place at any step along the way. Since arbitration is still adversarial, and the attorneys are still making their cases, arbitration sensibly takes place near the end of discovery. Many of the costs would have already been incurred by the client at that point. Arbitration really bears much similarity to a trial by judge while being significantly cheaper and slightly more casual. Additionally, the parties may agree to have their case heard by more than one arbitrator and the arbitrators may also be experts in the field at issue.<sup>88</sup> The use of relevant experts would negate any danger of the

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<sup>87</sup> Blackmand & McNeill at 1713.

<sup>88</sup> Id.

decision maker not understanding important pieces of evidence. Arbitration is a cost effective, a reasonable way to resolve disputes before trial.

### Other Alternatives

Lawyers who are actively practicing recognize the potential dangers in going before a jury. Their unpredictability makes even the most solid of cases possible losses. As a result, legal minds actively seek out various means of settling an issue before it reaches the jury's ears. For criminal cases plea negotiations with the state will prevent the case from going to trial with or without a jury. For instance, should the defendant agree incarceration for a certain number of years, the state will not press for a higher punishment. In civil cases many attorneys work very hard to solve their cases through mediation, arbitration, or simple meetings. However, since there are no limits on the way conflicts can be resolved, some attorneys are beginning to develop new methods of alternative dispute resolution.

A method of alternative dispute resolution that is slowly making its way through the legal community is the practice of collaborative law. What makes collaborative law so special and unique is its dismissal of the adversarial nature of the American judicial system. To achieve this, special contracts are drafted,

The essential element in the collaborative process is a disqualification clause providing that, if negotiations fail, the attorneys will be barred from participating in any ensuing litigation between the disputants. In addition to the disqualification clause, the typical agreement contains provisions in which the attorneys and their clients agree to employ respectful, good-faith bargaining and to provide early, complete and voluntary discovery.<sup>89</sup>

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<sup>89</sup> Judge Tommy Bryan, *Saying "No" to Court? An Introduction to the Collaborative-Law Process*, 2009 *Alternative Dispute Resolution in Alabama* 434 (2009).

From the beginning of the dispute attorneys agree to not let the conflict spill into the courtroom. The aspect of voluntary discovery also makes a huge difference between collaborative law and other methods of dispute resolution. Normally discovery can make a case take years because of sheer volume and the number of objections and responses that need to be filed to move forward in an adversary system. By keeping discovery open and amicable cases can move forward much faster and reach a much wanted resolution.

Collaborative law is a huge benefit to the client for many reasons. The first and simplest is that the parties avoid having to air conflicts and potential secrets in front of complete strangers. They also avoid having strangers with unknown educational backgrounds decide their future. Secondly, the clients avoid having to absorb many of the fees associated with proceedings going to court. Finally, clients can resolve their issues faster and safer than attempting to navigate complex legal waters. Collaborative law is focused purely on giving clients the most benefit for their money. Currently, collaborative law is used primarily in family law situations (that does not have a jury) but is not limited to those sorts of cases. Any civil case has the potential to be resolved in a cooperative manner before turning to adversarial litigation.



## Trial Solutions

The jury trial has long been seen by Americans as a beneficial safeguard for both the government and the population. For those benefits to outweigh the unaddressed dangers, the jury process must be revised. Specifically, jury instructions need to provide the simplest and most understandable language possible. Modern science and technology present new methods of determining guilt or liability every day and judiciary must be constantly vigilant to these changes. A means of dealing with technical evidence must be crafted to avoid jurors misunderstanding the evidence or unfair advantages occurring simply because one side has certain kinds of evidence. Should these changes be carried out, the jury trial system may continue to be a beacon of fairness and citizen governed justice. This section will discuss options to improve the jury process.

### Jury Instructions

One of the most significant changes that must be made is to the jury instructions. As earlier established, the legal jargon found in the base jury instructions is complex and difficult to understand for someone without a legal background. Throughout the trial it may be necessary for new instructions be given when certain circumstances arise. Jury instructions are given at the end of the trial with few exceptions. However, the sheer amount of technical language heard by the jury by the time of deliberation can be overwhelming. There are two key attributes to consider in revising jury instructions: the substance of the instructions and the way in which they are presented.

In terms of substance, there have been legislative movements towards the simplification of government proceedings. The Plain Language in Government Communications Act of 2008

began requiring plain language in any document issued or revised by a United States' federal agencies after the bill passed.<sup>90</sup> Revisions made to documents that were created before the bill's passage was encouraged to be done using plain language as well. The government does understand the need for simpler, more concise communications with those who are not specialized in a particular field. Unfortunately, legal terminology and concepts are very difficult to simplify for laypersons. It will take more than conciseness and clarity to promote understanding in the average juror. In their article, Katharine Miles and Jacqueline Cottles (professors of English and psychology, respectively) discussed this idea,

A number of studies. . . have demonstrated that a juror's comprehension of the judge's instructions is often no better than that of the average person who has not been instructed in the law (and one rather disturbing study found that in some cases, the juror's understanding was worse after receiving instructions).<sup>91</sup>

It is clear that legally uneducated layperson cannot be expected to perform at a level of understanding equal to someone with a legal background. However, there are things that can be done to address the issue.

One such method is a shift in the thought process behind the delivery of instructions. Rather than instructions devised to inform the jury of how to deliberate and what to take into consideration, the process could be augmented to be more learner-centric. In their study, Miles and Cottle go on to state, "In the case of pattern jury instructions, the judicial system is placed at the center of the interpretive process to try to reduce judicial inconsistencies and thus the likelihood of appeal, rather than remaining focused on the jurists' ability to perform their task

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<sup>90</sup> 110th Congress, *Plain Language in Government Communications Act*, (2008).

<sup>91</sup> Katharine Miles & Jacqueline Cottles, *Beyond Plain Language: A Learner-Centered Approach to Pattern Jury Instructions*, 20 *Technical Communications Monthly* 92, 93 (2011).

successfully.”<sup>92</sup> The current formulaic structure does avoid any problematic variations that may occur when giving case oriented instructions. Comprehension of the instructions is low and hurts the overall integrity of the judicial process. Rather than a onetime instruction given to the jury, the judge’s role could be extended to that of a guide as well. “The judge would be well advised in taking more responsibility for instructing and guiding the jurors, as he or she is the expert in the law.”<sup>93</sup> The judicial experience and expertise of a judge could very well make a huge difference in how jurors deliberate. By opening a channel for the jurors to freely communicate and question an impartial expert on the law their deliberation could be both free from misunderstanding and still a decision by peers.

### Handling Bias Prior to and During Trial

The problem of bias is probably the most complex issue and nearly impossible to solve in an all encompassing way. That stated, it by no means should be ignored. Modern problems require modern thought and modern solutions. The American judiciary cannot look backwards for the answers on this issue; they must instead look to modern research. While the issue of bias is further reaching than issues of misunderstanding, there are some methods that can be used to weed out more bias. Some methods could be more subliminal to deal with implicit biases, while others would require changes to the overall trial process.

In dealing with broader biases, such as biases against particular genders or race or anything with notable stereotypes, the answer may be found in inconspicuous methods. In an article on implicit biases (unknown or unintentional biases), UCLA law review details the simplicity that would move the judicial system forward in terms of implicit bias:

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<sup>92</sup> Id. at 99.

<sup>93</sup> Id. at 101.

Especially for jurors, then, the goal is not anything as grand as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.<sup>94</sup>

Biases are too deeply ingrained in a person's thought process to fully change during the short time they are involved in the system. Instead, the courts must do what they can to remind jurors that an open mind is necessary to preserve justice. Counter typical situations are a method for dealing with biases involving stereotypes. These situations expose the biased individual to a person of a stereotyped group in a non-stereotypical situation to call the latent stereotype into question. For instance, placing a picture of a racial group performing an atypical action may provoke deeper consideration of that racial group from the viewer. That viewer would then be reminded that not every member of that racial group, or any racial group, will fit a stereotype. Unfortunately, presenting counter typical situations can become more difficult when the bias is more complex. For instance, racial stereotypes can be critiqued through the use of one image; a simple image would not be enough to cause jurors to question scientific evidences. The matter of technical bias is too complex for it to be resolved to subtly.

One potential, albeit difficult to manage problem involves more individual screening of the jurors.<sup>95</sup> Allowing opposing counsel to individually speak to each juror gives the attorney an opportunity to get a deeper understanding of the juror's honest view of the issues. It removes the juror from the desire to tailor their answer to fit in with the other jurors. The removal of biases during voir dire allows attorneys have a honest conversation with the juror about issues that are

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<sup>94</sup> Kang Et. Al. at 46.

<sup>95</sup> Kang Et. Al. at 53.

material to the case. Increased honesty and openness would help attorneys to limit biases of the jury and ensure fairness for the clients.

Dealing with technological bias is far more complex. Since modern media and technology currently grows at an incredible rate, it is understandable that juries would demand evidence is equally high tech and modern. It is the task of the attorneys to weed out jurors that demonstrate the heaviest of the CSI or “tech” effect through challenges. Attorneys must also take steps to be clearer about when and why specialized evidence like DNA should not be expected. The problem could also be diminished through action from the bench:

Court officials could also take action to preserve the opportunity for fair trials. More judges could actively acknowledge the existence of the *CSI* effect and take steps during voir dire to prevent biased jurors from improperly influencing the jury. When they instruct juries before deliberations, judges could also mention that jurors should not use outside standards like those presented in forensic crime television shows.<sup>96</sup>

This is not a problem solved by dramatic change to the court system, but rather simple awareness. Helping the jury to understand the important differences between fact and fiction from the very beginning of the trial process will make a large difference in how the case is handled.

Some members of the legal community do not find the CSI effect to be a bias at all however. The court system has rightfully placed a heavy burden on the state to prove their case. In these cases perhaps the right direction to move would be to provide more resources to the state so that they can scientifically test evidence when the option is available. Modern technology may create a reasonable expectation that a certain caliber of evidence for cases that could potentially end a man’s life such as rape or murder cases. Judge Shelton stated in his research,

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<sup>96</sup> Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 Yale L.J. Pocket Part 70, 72 (2006).

The criminal justice system must adapt to the ‘tech effect’ rather than fight against it. The constitutional stature of juries in our system is based on the principle that individual judgments of guilt or innocence, like issues of other governmental representation, should be made by ordinary citizens. It is not only appropriate but constitutionally expected that those jurors and their verdicts will reflect the changes that have occurred in popular culture.<sup>97</sup>

If the CSI or “tech” effect is truly a shift in popular culture, then simple awareness of the problem will not adequately address it. This shift in popular culture and subsequently what jurors expect to see at trial can only be fully addressed by adapting to new expectations. While it may mean simply educating jurors about false expectation, it may also mean spending more money on producing the kinds of evidence that are expected. .

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<sup>97</sup> Shelton at 368.

## Conclusion

The modern problems that the Florida judiciary faces right now are complex and intricate. The influence of the inability to understand technical evidence and biases pervades the jury process from beginning to end. The jury's overall performance may be satisfactory under the rules, but taints the jury's purpose. Justice is not obtained by merely following the rules of court. Without action, Florida loses its' opportunity to move the judicial process forward. The two primary jury problems that can be addressed are the issue of technical language and evidence that is misunderstood or misinterpreted en masse and biases that are not being caught or handled during the trial.

## Discussion and Recommendations

The issue of technical evidence may require the most extensive solutions since the problems are far more complex. Misunderstanding the legal jargon involved in the overall legal process or misunderstanding technical practices presented by experts at trial can be addressed simply. Two solutions stand out as both mitigating the problem and being fairly simple to implement. First, jury instructions should be revised in both content and form to increase jury understanding. Under the Plain Language in Government Communications Act of 2008, government communications were required to be simplified for ease of access by the public. Even the somewhat simplified content required after 2008 is not enough to clarify misunderstandings. Unfortunately, legal issues are complex and require lengthy explanations. As a result, the time allotted for jury instructions should be increased to allow for fuller explanations by the judge. These instructions should be given before and during the trial to

facilitate the juror's comprehension of issues during trial. While this certainly would not fully address the issue, it would at least increase the base level of understanding.

Judges are currently required to make rulings of law (responding to objections for example) during the course of a jury trial since. Because judges are experts on the law, they are in the ideal position to instruct juries. By acting as a guide throughout the trial process and through deliberation juries would have constant access to an expert that understands the law. Presently, juries are allowed to pose questions to the judge for the judge to ask of witnesses. Questions regarding rules of law, procedure, or explanations of legal jargon are not currently allowed under the rules of procedure. If the jury has questions, having the judge as a resource to explain the law may help the jury to more effectively operate as finders of fact. Case law has established that the judge must act as a gatekeeper in regard to scientific or technical evidence. As a result, the judge also holds a key position in explaining how technical evidence can be used by the jury during deliberation.

The combination of the aforementioned solutions would help to address many of the issues regarding misunderstanding of technical and legal jargon. While the complete elimination of misunderstandings is impossible, providing these changes would decrease bias. The overall goal of any change should be to mitigate misconstruction of evidence or juries being completely baffled by instructions or the evidence. Revisions of jury instructions combined with a judge that guides the jury throughout the trial would definitely increase the baseline of understanding in the jury. Juries would also be more comfortable asking questions about the procedure. As a result, understanding regarding both legal jargon and any technical jargon that might arise would increase substantially.



Bias requires a more creative and more aversive approaches. One creative approach to bias is the use of counter typical imagery. A counter typical image subverts a stereotypical expectation by presenting an image that goes against the stereotype. The purpose is to remind the viewer those stereotypes are not applicable in every instance. In a courtroom setting it could be as simple as attempting to remind jurors that someone's race should not affect their proclivity for crime or the inverse. Simple things like this could go a long way towards keeping jurors focused on being open-minded and listening only to the evidence.

The most effective solution to the problem of bias is to avoid situations where bias occurs entirely. Totally removing bias is simply impossible. As a result, there is inherent risk to trial by jury. Two methods of alternative dispute resolution are regularly used already: mediation and arbitration. Both methods should be increasingly encouraged for several reasons. First, the price of both of them is far lower than following through with the entire litigation process. Second, legal professionals are substituted for the jury, which increases likelihood of educated decisions and advice. Third, mediation allows for solutions that are not limited by the constraints of the law. Law typically dictates only financial solutions for disputes whereas mediation has the potential to solve disputes creatively and to both party's benefit.

This thesis also discussed the use of the collaborative law process. Increasingly used in family law disputes, this concept could be extended into areas of law. The process requires an agreement between parties to settle their dispute outside of the courtroom or find new attorneys. As a result, the normally adverse nature of litigation is mitigated and both parties have a vested interest in finding a middle ground that is acceptable to both. Collaborative law can and should be implemented in other areas of civil law. The benefits to be found are quite similar to

arbitration and mediation. The added benefit of the compelling reason to settle and avoid the courtroom as a whole due to having to restart the whole process with new attorneys is a plus. Lawyers, clients, and the judiciary should keep an open mind when deciding how to settle disputes. While the processes available do accomplish their purpose, other processes that have yet to be thought of may be more desirable.

The overall recommendations of this thesis are to implement many of the solutions that have been already discussed. Namely, jury instructions should be revised for simplicity and to be more focused on teaching the overall concepts. The judge's role should be expanded to both include the current role and allow for them to be an accessible advisor to the jury. Both of these will go a long way towards dealing with juror incompetence in terms of both legal and technical jargon. The legal community should be aware of the dangers of using the modern jury. Small measures such as counter-typical imagery and prolonged voir dire could also minimize jury bias. However, avoiding the jury as a whole would be the most effective in many cases, especially when there is technical evidence; mediations, arbitrations, and other methods of dispute resolution should be encouraged to clientele. Implementation would reduce the overall juror incompetence in dealing with specialized information and mitigate or avoid current biases.

### Areas for Future Research

Obviously there are many constraints on what can be done to deal with an ailing constitutional right. It cannot be restricted too much without being unconstitutional. However, there are two major additions to the legal process that may prove helpful in dealing with modern jury problems. The first potential would be in the form of stipulations. Stipulations regarding the veracity of technical evidence would remove incompetence from the jury during deliberation.

The second potential solution would be the creation of a complexity exception. While a complexity exception would limit the constitutional right to a jury trial, the overall benefit could greatly reduce both bias and incompetence.

The modern jury currently must decide many factors about technical evidence that are presented in the court. For the jury to decide whether technical evidence is credible there are many factors they must consider. They must judge the testimony's honesty, whether the science was carried out properly, whether or not the science is to be believed, and whether or not the margin for error is acceptable. The process of stipulating to technical evidence would require both attorneys to submit technical evidence to a neutral expert. The neutral expert would then verify that any technical processes were carried out correctly. This would remove the entire technical evidence process from the jury's view. The jury would instead receive the stipulated list of technical evidence that is properly verified and be allowed to hear testimony that explains the evidence and its' meaning. Research should be carried out to determine whether or not a stipulation process such as this would affect how a jury's deliberation. The study could be carried out much like the earlier study done in "*Statistical Inference and Forensic Evidence: Evaluating a Bullet Lead Match.*" If juries that are given stipulated evidence reach conclusions that are appropriate given the evidence, then the further research regarding the form of the stipulations should be carried out. The removal of many factors regarding technical evidence from the jury's deliberation should improve the overall competence of deliberation.

Another area for the legal community or the legislature to examine is that of the complexity exception. *Japanese Electronic Products* discussed this very idea by weighing the Fifth Amendment right to due process against the Seventh Amendment right to a jury trial. As

discussed earlier, the court held that there could be a point at which complexity would render due process invalid during a jury trial. However, not all courts agreed with the Court of Appeals' decision. A complexity exception would be a manner to avoid issues involving the jury interacting with highly complex evidence. However, its implementation is the most troublesome. The limitation of a constitutional right must be carefully considered before being put in place. The amount of complexity would have to be concrete and not arbitrary. Research regarding what evidence is the most perplexing to juries would need to be carried out to help establish the test under which an exception would exist. Procedure would also need to be investigated to determine the point at which juries fail to understand complex instructions and evidence. As effective as a complexity exception would be, the details required to enact it fairly would be staggering. The creation of system that measure evidentiary complexity or volume would need to be perfect to limit the Seventh Amendment. If such an exception did exist, limiting potential bias and incomprehension would be as simple as making a motion.

The researched solutions presented by this thesis and the areas for future research are promising avenues for the reduction of jury bias and the lack of jury comprehension. The lack of comprehension can be addressed through a myriad of ways, but primarily through two methods. First, increased involvement by the judge to explain procedure and answer questions throughout the trial. Second, revised jury instructions and procedure to ensure learning focused delivery of jury instructions. On the issue of diminishing bias, avoiding juries entirely would be the most effective means. Measures such as mediation, arbitration, and newer methods like collaborative law provide a wider base of solutions at a lower cost to the parties while retaining only highly trained individuals. However, there are other measures that can be implemented to resolve issues

of bias such as prolonged voir dire and counter typical imagery. Further research into other solutions may provide further relief from issues plaguing the modern Florida jury. Both stipulations agreed to by the parties and a complexity exception ruled on by the court would go a long way towards reducing bias and incomprehension. These solutions discussed within this thesis would greatly improve the safety of Floridian's due process right when faced with a trial by jury.

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