SYMPOSIA

(UN)COMMON KNOWLEDGE & EXPERIENCE

JASMINE E. HARRIS*

CONTENTS

* Professor of Law, University of Pennsylvania Carey Law School. J.D., Yale Law School; A.B., Dartmouth College. Many thanks to Professors Aziza Ahmed, Zohra Ahmed, and Ngozi Okidegbe and the *Boston University Law Review* for organizing this symposium on Law and Expertise and the opportunity to participate in this timely and urgent discussion with my fellow panelists and the symposium participants. This Essay benefitted from faculty workshops at Ohio State University Moritz College of Law and Cardozo Law School, as well as helpful comments from Ruth Colker, Robert Dinerstein, and Julia Simon-Kerr. My gratitude to Penn Carey Law Biddle Research Librarian, Mary Shelly, and to my research assistants Sadie Basila, Dominique Malone, Zoe Verni, and Kate Walner for their excellent assistance. A special note of thanks to The Arc of the United States for permission to review and share certain results of a survey conducted by The Harris Poll in association with this project. I am currently (and at the time of the survey was) a member of the Board of Directors of The Arc of the United States. This Essay, the arguments contained herein, and any errors are solely my own.

INTRODUCTION

Our current system of dispute resolution presumes that lay fact finders enter the courtroom with a common base of knowledge and experience to adjudicate facts fairly and apply the law as instructed by the court. What happens when this assumption is incorrect or incomplete?

Debates about a "post-truth" society, the nature of expertise, and the malleability of facts that are unfolding in public spaces outside of legal institutions raise two related questions about the administration of justice.[1] First, if knowledge and experience are politicized, what information is reasonably within a jury's baseline, particularly in highly normative areas of law, such as antidiscrimination? And, second, if knowledge and experiential baselines are deficient, do current institutional mechanisms—education, media, political debate, law and legal procedures and rules—have ways of remedying or mitigating harm to litigants?[2] Institutional devices—such as the regulation of jury pools, the use of expert testimony, judicial notice, and jury instructions—designed to mitigate biases and educate a jury to carry out its charge may fall short in the context of certain kinds of information, social norms, and experiences.

[1] *See generally* JONATHAN RAUCH, THE CONSTITUTION OF KNOWLEDGE: A DEFENSE OF TRUTH (2021); LEE MCINTYRE, POST-TRUTH (2018); MATTHEW D'ANCONA, POST-TRUTH: THE NEW WAR ON TRUTH AND HOW TO FIGHT BACK (2017); RALPH KEYES, THE POST-TRUTH ERA: DISHONESTY AND DECEPTION IN CONTEMPORARY LIFE (2004).

[2] Scholars have studied "the idea that legal remedy regimes are subsidized by misunderstandings" in the context of laypeople's views on remedies for contractual breaches. Tess Wilkinson-Ryan, David Hoffman & Emily Campbell, *Expecting Specific Performance*, 98 N.Y.U. L. REV. 1633, 1644 (2023).

This Essay attempts to wrestle with these epistemic questions and their consequences in a specific area of public information deficits[3]: disability.[4] In this area, I make a descriptive intervention and lay the groundwork for further normative and prescriptive work. I argue that we now have information to suggest that society's common base of knowledge and experience about disability is so flawed that jurors may enter the courthouse ill-equipped to decide the substance of cases involving the rights and duties of people with disabilities.[5] Furthermore, current structural devices—in particular, the use of expert witnesses designed to account for information deficits—may be insufficient because information about disability is highly normative and less technical than people imagine it to be. For example, answering a threshold question of whether a person has a "disability" under antidiscrimination laws draws on moral, political, and social views and yet, by practice, has become a question for seemingly objective medical expertise.[6] The design of dispute resolution, the relatively short life of a trial, the defined role of the expert, and the presentation of expert evidence work better for the transfer of technical rather than adaptive

[3] Information deficits, misinformation, and biases are related, but not the same thing. "Information deficits" are when a person lacks knowledge about a relevant fact or concept, creating gaps in their understanding and lacking relevant inputs for their decision-making. "Misinformation" refers to factually false or misleading information that a person believes to be true. Like information deficits, misinformation may come from their education and life experiences. "Biases" are certain conscious or unconscious preferences or predispositions that affect how people evaluate information and make decisions. While all three operate in this Essay, I focus primarily on information deficits and misinformation, the foundations of unconscious and conscious biases. I also refer to "norms" throughout this Essay to refer to social norms (social standards or expectations) in some instances and legal norms (reflected in law) in other instances. *See* Jürgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 DENV. U. L. REV. 937, 937 (1999).

> [L]egal norms are particularly functional in virtue of an interesting combination of formal properties: Modern law is cashed out in terms of subjective rights; it is enacted or positive as well as enforced or coercive law; and though modern law requires from its addressees nothing more than norm-conformative behavior, it must nevertheless meet the expectation of legitimacy so that it is at least open to the people to follow norms, if they like, out of respect for the law.

Id.

[4] Scholars have raised similar questions in the context of race. *See, e.g.*, Jasmine B. Gonzales Rose, *Antiracist Expert Evidence*, 134 YALE L.J. 3000 (2025).

[5] This includes cases where the legal claims directly invoke disability laws (antidiscrimination and public benefits), such as the Americans with Disabilities Act, the Rehabilitation Act of 1973, or the Social Security Act, as well as those cases where the litigants, lawyers, witnesses, or other evidence relate to disability, such as criminal sexual assault or capital cases. *See infra* Parts II, III.

[6] *See* Deirdre M. Smith, *Who Says You're Disabled? The Role of Medical Evidence in the ADA Definition of Disability*, 82 TUL. L. REV. 1, 3 (2007) ("A key mechanism for fencing out disabled people's claims is the pernicious requirement . . . that medical evidence is required as a threshold matter . . . .").

knowledge because lay fact finders may react to the sociopolitical dimensions of information they view as less fact based or less objective.[7] Disability may appear both foreign and familiar to lay people, thus walking a fine line between information and experiences they believe they have and those they believe require expertise beyond their capacity.

The central argument proceeds in four parts. Part I contextualizes our evidentiary binary between common and specialized knowledge with a brief overview of its origins related to the jury. Part II then turns to the question of information deficits in jury decision-making in the context of disability. How do we know whether there is a problem with baseline norms? For one, Congress explicitly acknowledged the operation of outdated social norms of disability as a catalyst for the Americans with Disabilities Act.[8] Additionally, empirical studies over the past three decades have reinforced the dangers of problematic disability norms to the conceptualization, exercise, and adjudication of rights. Part II offers another source of support for the existence of information deficits in the general population: a recent survey conducted by The Arc of the United States. Key findings further suggest that the public lacks certain information and experience with disability and disabled people. Part III explores the current institutional mechanisms for mitigating knowledge and experiential deficits about disability and raises questions about their remedial capacity. Information deficits are typically addressed in courts: for example, through expert evidence regulated by federal and state evidentiary rules and doctrinal standards such as those articulated by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[9] and *Kumho Tire v. Carmichael*.[10] Yet these legal rules and doctrinal standards themselves may impose barriers to the introduction of curative evidence. Part IV considers other informational touchpoints with prescriptive potential and concludes with special considerations and open questions for further development.

Despite the decreasing role juries play in criminal and civil cases,[11] the arguments advanced here are important and timely. The role of lay fact finders

[7] The distinction between "technical" and "adaptive" knowledge comes from the management leadership literature. *See, e.g.*, RONALD HEIFETZ, ALEXANDER GRASHOW & MARTY LINSKY, THE PRACTICE OF ADAPTIVE LEADERSHIP (2009); Ronald Heifetz & Donald L. Laurie, *The Work of Leadership*, HARV. BUS. REV., Dec. 2001.

[8] *See infra* Part II.

[9] 509 U.S. 579, 597 (1993) (holding judges serve as gatekeepers to ensure reliability of extrinsic, scientific evidence helpful to fact finder).

[10] 526 U.S. 137, 147 (1999) (holding federal judges' gatekeeping responsibilities applicable to all expert evidence (scientific and nonscientific evidence)); *see* FED. R. EVID. 702.

[11] Generally, the role of the jury has diminished in both criminal and civil cases, in part because of procedural rules designed to increase judicial management of cases and promote settlement at the earliest stages. *See, e.g.*, Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, JUDICATURE, Winter 2017, at 26, 33.

influences decisions in the civil context to exercise rights, file lawsuits, and pursue settlements; it operates similarly in the criminal context to regulate incentives. In that vein, this Essay makes three contributions. First, it identifies information asymmetries and deficits that can materially affect the outcome of certain cases with legal standards that rely on highly normative assessments in the context of disability. This is a useful insight for disability law and other antidiscrimination scholars. Relatedly, the disability example offers an occasion to consider information asymmetries at a time when ideas of universal truths or experiences seem increasingly rare. Can a "post-truth" society practically resolve legal disputes and offer a fair, just process? Second, scholars of the American jury who tout its representativeness and value to the administration of justice,[12] as well as the jury's expressive and practical role in democratic governance,[13] may benefit from the insights in this Essay that raise questions about its just operation. Third, this Essay offers lessons for proceduralists, particularly evidence scholars thinking through the information deficit problem alongside how to mitigate biases in adjudicative decision-making. Importantly, it is not an argument for the elimination of a jury in favor of bench trials or a strike against the jury as a democratic institution. Judges can also suffer from information deficits and biases.[14] This is a much more modest attempt to surface assumptions and ask that we contend with the problem and see how our blanket solutions enshrined in procedural and evidentiary rules—such as those related to expert evidence—may not only fail to ameliorate the problem raised here but hide, possibly exacerbate, or create new challenges.

[12] *See, e.g.*, Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 32 (1994) ("The changes we envision in the jury's representative and deliberative function and decision-making role can give new meaning to the democratic participatory process."). Moreover, "jury deliberation can help individuals through their resolution of public controversies to realize the meaning of citizenship, thereby claiming a role in government." *Id.* at 52.

[13] Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1334 (2012) (internal citations omitted).

> The public debate and academic literature on the civil jury tend to focus on how well it performs as an adjudicative institution. Can it handle complex cases? Is it biased against defendants with deep pockets? The task for the defenders of the jury, then, has been simply to show that the jury does about as well as (or not much different than) the judge in adjudicating, and in that, they have largely succeeded.

Id. (footnote omitted).

[14] Mary Smith, Michael B. Hyman & Sarah E. Redfield, *Addressing Bias Among Judges*, STATE CT. REP. (Sept. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/addressing-bias-among-judges [https://perma.cc/3AV9-UQ8Q] ("One study found that a whopping 97 percent of judges consider themselves above average in their ability to avoid racial prejudice in decision-making. In contrast, studies also have found judges' susceptibility to the influence of cognitive bias is no better than that of the general population.").

I. THE ORIGINS AND EVOLUTION OF (UN)COMMON KNOWLEDGE AND EXPERIENCE

Part I briefly explains the evolving role of the jury from "self-informing," active fact finders to contemporary recipients of specialized knowledge with varied common knowledge necessary to carry out their fact-finding functions. The move from highly localized jurors (white male property owners), with arguably similar experiences, knowledge, and values, to more demographically, geographically, and sometimes educationally and economically diverse juries means that juries today more often enter the courthouse and courtroom with potentially competing information, norms, and experiences to give meaning to highly normative legal standards and judge competing factual narratives.

The use of the jury was integral to first English, then American trial systems (and by extension, political governance[15]). Early models of dispute resolution focused on the local expertise of community members who presumably had knowledge of the facts in question in a case (for example, proper title to land). As such, they could be active investigators and apply their shared local knowledge and experience, under oath, to efficiently resolve disputes.[16] In fact, by the twelfth century in England, those assembled for trial by jury first swore under oath that they did have facts to share and resolve the matter before them.[17] If someone did not have relevant facts, they were dismissed and replaced.[18] The

---

[15] *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 444 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835).

> It would singularly narrow your thought to limit yourself to envisioning the jury as a judicial institution; for, if it exercises a great influence on the outcome of trials, it exercises a very much greater one on the very destinies of society. So the jury is before all else a political institution. You must always judge it from this point of view.

Id.; *see also* Flowers v. Mississippi, 588 U.S. 284, 293 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.").

[16] James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 250 (1892). Thayer describes the Germanic law and Norman origins of the English jury in the inquest or inquisition: "The characteristic of it is that the judge summons a number of the members of the community, selected by him as having presumably a knowledge of the facts in question, and takes of them a promise to declare the truth on the questions to be put by him." *Id.*

[17] *See* Albert E. Wilson Eastman, *The History of Trial by Jury*, 3 NAT'L BAR J. 87 (1945). Eastman explains:

> In the beginning the jury assumed the character of witnesses, rather than judges of the facts. "The decision upon questions of fact was left to them because they were already acquainted with them, or if not already so acquainted with them, because they might easily acquire the necessary knowledge. For this reason it has been said that the primitive jury were witnesses to, rather than judges of, the facts. They were in a sense witnesses. But they were more than witnesses. They were a method of proof which the parties were either obliged to or had agreed to accept."

Id. at 98 (quoting 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 317 (5th ed. 1931)).

[18] Thayer, *supra* note 16, at 261. In fact, the relevant guiding ordinance provided a cause of action for fraudulently taking the oath when someone lacked the factual predicate. *Id.*

substantive "knowledge required of [the jury] is their own perception, or what their fathers have told them, or what they may trust as fully as their own knowledge."[19] However, by the fifteenth century, "judicial experience and expertise replaced community knowledge as the center of litigation authority."[20] Reliance on lay fact finders led to the introduction of rules to regulate the admission of probative evidence and mitigate prejudice to the fact-finding process.[21]

James Thayer, writing in 1892, noted two main concerns with respect to the evolution of the jury across centuries (and across continents):

> (1) The methods of informing the jury and improving their quality as a body of witnesses whose answers "tried" the case; and (2) the methods of controlling the jury, of preventing improper influence over them, of punishing and checking them, and of reviewing their action. It is these things that have originated or shaped much in our law, and, among other things, our singular "law of evidence."[22]

Over time, the function of fact-finding became distinct from any personal role in the matter before the court. Today, personal knowledge of the facts, actors, or even general experience with the nature of the case is often disqualifying and may subject a potential juror to a preemptory strike for cause.[23] Juries went from "active knowers" to relatively "passive receivers of evidence"[24] provided to

[19] *Id.*; *see also* Bushell's Case (1670) 124 Eng. Rep. 1006, 1006-07.

[20] Haddon, *supra* note 12, at 39.

[21] Thayer, *supra* note 16, at 249 (1892) ("I am writing with the main purpose of throwing light upon the English 'law of evidence,' which is the child of the jury . . . ."); FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States . . . ."); *see also* Haddon, *supra* note 12, at 33 ("The historical foundations of the jury are useful to review because they suggest that active community participation in legal decision-making is consistent with the jury's institutional origins.").

[22] Thayer, *supra* note 16, at 273.

[23] *See, e.g.*, People v. Triplett, 267 Cal. Rptr. 3d 675, 688 (Ct. App. 2020) (Liu, J., dissenting) (questioning exclusion of prospective juror, a Black woman from Los Angeles, based on her experiences with or her attitudes toward law enforcement and criticizing precedent leading to "everyday experiences of Black Americans [being] considered legitimate grounds for a peremptory strike").

[24] John A. Phillips & Thomas C. Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and* Bushell's Case, 4 LAW & INEQ. 189, 220 n.167 (1986) (quoting John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, *in* SAINTS AND REVOLUTIONARIES 152, 155 (David D. Hall, John M. Murrin & Thad W. Tate eds., 1984)). Jurors, however, have never been "passive receivers" or tabula rasa. *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV.

them by courts; incidentally, courts also assumed a greater role in the regulation of proof in service of jury objectivity.[25] The once-localized jury became more anonymized and distant from the facts of a particular case,[26] yet jurors were still expected to resolve the matter before them based on the information provided during the trial, funneled through a presumed common base of knowledge and experience (albeit much broader and less connected).[27] The jury also serves an expressive function as a democratic institution where laypeople participate in the administration of justice and check judicial expertise in dispute resolution.[28]

Court-based adjudication focuses on a single case before the court; however, in order for fact finders to decide among disputed facts and accounts of an event, grievance, or claim, they must decide which accounts become legal facts. They do this based on the evidence presented and rely on their common base of knowledge and experience to assess credibility and assign probative weight to real and testimonial evidence.

1124, 1144 (2012) ("Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors.").

[25] *See* Haddon, *supra* note 12, at 65.

[26] Procedural, constitutional, and institutional design choices also shifted the nature and role of the jury in the United States in the nineteenth and twentieth centuries. For example, the introduction of the special and directed verdicts (and the general verdict) helped solidify the jury's role as fact finder and removed the jury's ability to decide questions of law. Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170 (1964) ("These procedural changes were the concrete manifestations of an underlying change, over the course of the [nineteenth] century, in the way people conceived the purpose and competence of the jury, and its role in the process of government."). "Underlying the conception of the jury as a bulwark against the unjust use of governmental power were the distrust of 'legal experts' and a faith in the ability of the common people." *Id.* at 172; *see also* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 306 (1978) (describing demise of "self-informing jur[ies]").

[27] Notably, although the U.S. Supreme Court tied the standard for an impartial jury to community representativeness, the principal means of populating federal and state venire—voter registration records—continue to be incomplete and less representative. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 100 (1970) ("[T]he number should probably be large enough to . . . provide a fair possibility for obtaining a representative cross-section of the community."); Stephen Knack, *The Voter Participation Effects of Selecting Jurors from Registration Lists*, 36 J.L. & ECON. 99, 99-100 (1993).

[28] *See, e.g.*, Haddon, *supra* note 12, at 30-31 ("Indeed the jury was seen not only as a buffer against unsympathetic government and power-wielding citizens, but also as the repository of community knowledge, distinguishable from the legal expertise of the judge."). Practically, over time, judges as evidentiary gatekeepers have assumed greater authority over the factual domain of jurors. For example, though the rules of evidence technically put a thumb on the scale in favor of liberal admission, judges screen proffered evidence for relevance and balance questions of admissibility against potential inefficiencies and biases that could improperly infect the fact-finding process. FED. R. EVID. 401, 403.

Legal fact finders have encountered information deficits when faced with increasingly complex legal, policy, and social challenges. That is, greater industry specialization and professionalization combined with increased diversity along multiple axes (for example, racial, ethnic, religious, gender, and socioeconomic) has produced jury pools charged with resolving complex disputes outside of their own knowledge and experience. Courts have addressed resulting information deficits through the increased use of expert evidence and exclusionary rules of evidence empowering judges to regulate the flow of information (and the quality of that information) to the jury.[29]

Figure 1. Informational Touchpoints.

T0 **Pre-jury Summons:** Potential jurors with a set of individual values, norms, or experiences which may vary geographically (locally, regionally, urban, rural) or demographically (race, gender, socioeconomic status, educational attainment, employment status, etc.) are summoned; eligibility for jury service varies as does the information available to the court system (treatment of felony convictions, conservatorship, disabilities, home address); society exists with a set of values and norms (nationally, may vary temporally).

T1 **Jury Summons and Voir Dire:** Jurors bring individual knowledge and experiential baselines to court and enter jury box; voir dire—court and lawyers give potential jurors information about the case, and instructions on voir dire process, during which lawyers' questions test biases and baseline, and some jurors are screened out or excused from service.

T2 **Preliminary Instructions and Trial:** Jurors receive information from court (opening jury instructions), lawyers (opening and closing remarks), sensory engagement with witnesses (lay and expert), physical evidence, and character and reputation evidence; they make observations to determine facts by assessing credibility and probative weight; they are sometimes allowed to take notes or ask questions.

T3 **Jury Charges:** Judge instructs and charges the jury.

[29] *See* United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973) ("The theory upon which expert testimony is excepted from the opinion evidence rule is that such testimony serves to inform the court [and jury] about affairs not within the full understanding of the average man." (alteration in original) (quoting Farris v. Interstate Cir., 116 F.2d 409, 412 (5th Cir. 1941))).

T4 **Jury Deliberations:** Jurors use their common base of knowledge and experience to assess information received in T2 and T3.

T5 **Verdict and Post-verdict Interventions:** Jury reaches verdict; parties may file post-trial motions, such as Judgment as a Matter of Law or Judgment Notwithstanding the Verdict, and formal appeals.

Figure 1 above offers an overview of different informational touchpoints to consider how courts use different procedures and rules to regulate the flow of information deemed relevant to carry out the fact finder's responsibilities. Our legal system assumes jurors bring knowledge and experience to the courtroom for limited purposes such as assessing credibility (and the court instructs them accordingly).[30] The bulk of the jury's receipt of information and instruction takes place in T1 through T3 through the court and the presentation of evidence. Jurors are generally instructed to be recipients of information presented during the trial; the common base of knowledge and experience will be that which develops within the four corners of the case. Their prior baseline of knowledge and experience from T0 comes in as a method of evaluation and engagement with the evidence presented in the case. Consider a model jury instruction from the Third Circuit Court of Appeals:

> You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.[31]

During T1 through T3, knowledge accumulation is regulated by rules of procedure and evidence. Judges sit as evidentiary gatekeepers pretrial and during trial to ensure evidence passes a low threshold for relevance (has legal and logical relevance); where the proffered evidence raises the potential for confusion, distraction and delay, or for bias for or against one of the parties, judges decide whether to exclude on those grounds or impose other proscriptions.[32] Where a matter is beyond the juror's common base of knowledge and experience at T0, the parties account for information deficits through the presentation of lay opinion, expert testimony, or scientific evidence.[33] In addition to content, juries receive instructions on the decision-

[30] *See, e.g.*, Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179, 201 (2023) ("More generally, fact-finder characteristics likely contribute to systematic problems with how witnesses' worthiness of belief is assessed.").

[31] MODEL CIV. JURY INSTRUCTIONS § 1.5 (COMM. ON MODEL CIV. JURY INSTRUCTIONS WITHIN THE THIRD CIR. 2024).

[32] *See, e.g.*, FED. R. EVID. 401, 403 (relevance and probative value); FED. R. EVID. 801-807 (hearsay exclusions); FED. R. EVID. 402, 405, 412-415 (character evidence).

[33] *See, e.g.*, FED. R. EVID. 701-706 (opinion and expert testimony). I am using the Federal Rules as a reference, but there are key differences in text and interpretation in some states with respect to lay and expert opinion and scientific evidence. For example, California and New York continue to use the "general acceptance" standard for expert evidence articulated

making process itself and how to evaluate what they have heard, seen, and experienced during the trial.[34] Studies suggest that the court's regulatory exercise in containment and directing jurors to compartmentalize the information provided, using certain pieces for one purpose but not another, may be challenging if not futile in some instances.[35]

Yet the work of the jury is highly normative.[36] This is true for some areas of law more than others—most notably criminal law and torts—despite general prohibitions on jurors using known facts from their experience rather than the information presented to them in the court. According to Valerie Hans, "[c]onventional wisdom holds that juries are the purest method for incorporating social norms and cultural understandings into the civil justice system."[37] Hans and other scholars such as Peter Schuck have argued for examining this claim in the context of tort law because "[t]he master ideas that drive tort law doctrine—

in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), rather than the evidentiary standard set forth in Federal Rule of Evidence 702. *See Frye*, 293 F. at 1014 (holding scientific evidence "must be sufficiently established to have gained general acceptance in the particular field in which it belongs" before being admitted). The U.S. Supreme Court in *Daubert* held that the enactment of the Federal Rules of Evidence implicitly overruled the Frye "general acceptance" standard in favor of judges taking a more active gatekeeping role to assess whether the proffered evidence is both relevant and reliable. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993).

[34] *See supra* note 31 and accompanying text.

[35] Consider the use of character evidence under Federal Rule of Evidence 404(b)(1), which states: "Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1). For example, evidence that D possessed marijuana at Time 1 cannot, under this rule, be used to show that D has a criminal disposition to have marijuana, and that D acted in accordance with this character in Time 2 by possessing marijuana in Time 2 or another occasion. However, Rule 404(b) offers other permitted uses, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Returning to the example, evidence of D's marijuana possession in Time 1 could be proffered by the prosecution to show that D had a particular state of mind in Time 2. This would require the jury to engage in a form of mental gymnastics and avoid using the evidence to show D's propensity for drug possession, something even limiting instructions may not cure. *See, e.g.*, H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 879 (1982) ("To the ordinary human mind, . . . the division between the prescribed and the proscribed uses . . . may be a bit difficult to perceive.").

[36] Solomon, *supra* note 13, at 1337 n.26 (citing to scholars discussing ways juries incorporate social norms into decision-making processes to decide criminal cases).

[37] Valerie P. Hans, *Juries as Conduits for Culture?*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 80, 80 (David M. Engel & Michael McCann eds., 2009).

reasonableness, duty of care, and proximate cause—are as loose-jointed, context-sensitive, and openly relativistic as any principles to be found in law."[38]

Hans describes jury deliberations as an opportunity for contestation of different conceptions of social norms and values while moving towards one objective vision of quintessentially porous concepts such as "reasonableness" in torts. What makes this norm infusion possible, however, is the presence of either a cohesive single baseline to start (as early English juries were white men of status) or alternatively, one or more competing conceptions that must be resolved through debate and exchange.

But what if the normative baseline is inherently flawed and lacks factually correct information in T0 (before jury service), T2 or T3 (at the start of the trial or during trial), and T4 (at the onset of deliberations), such that the information deficits are never cured or never even have the possibility of being cured? What if no alternative views are presented during trial (by the judge or the parties), and no one in the jury room has a different set of experiences to draw from?

Interestingly, tort law is not only highly normative but also an area of law where the use of expert evidence to manage knowledge deficits is frequent and widespread.[39] In civil trials, experts testified most frequently in tort cases, accounting for approximately 45% of such cases (primarily personal injury and medical malpractice cases), followed by civil rights cases, for which experts testified in 23% of cases.[40] With respect to the qualifications and substantive knowledge of experts, medical and mental health experts were the most common.[41] Some scholars argue that juries lack competence for resolving tort claims precisely because they lack the normative frameworks for proper resolution, which may help explain the proliferation of legal experts in these cases.[42]

---

[38] Peter H. Schuck, *Introduction: The Context of the Controversy*, *in* TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE 17, 18 (Peter H. Schuck ed., 1991).

[39] In some jurisdictions, such as New York, despite the ever-disappearing jury trial, cases with torts claims are more likely than average to go to trial. *See* Smith & MacQueen, *supra* note 11, at 32.

[40] MOLLY TREADWAY JOHNSON, CAROL KRAFKA & JOE S. CECIL, FED. JUD. CTR., EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: A PRELIMINARY ANALYSIS 1 (2000), https://www.fjc.gov/sites/default/files/2012/ExpTesti.pdf [https://perma.cc/BPQ9-523M].

[41] *Id.* at 2 ("Within this group, the specific types most frequently represented were treating physicians, surgeons, and psychiatrists (each 3.8% of the total experts). Mental health experts, particularly clinical psychologists, but also including social workers and counselors, accounted for almost 4% of the experts presented.").

[42] *See, e.g.*, Amanda M. Rose, *The "Reasonable Investor" of Federal Securities Law: Insights from Tort Law's "Reasonable Person" & Suggested Reforms*, 43 J. CORP. L. 77, 85 (2017) ("[I]n certain types of cases lay juries are poorly equipped to judge the reasonableness of conduct because they lack relevant personal experiences or background social norms upon which to draw."). Again, I am not arguing against jury resolution of highly normative areas

A brief note on Figure 1 and the informational touchpoints: The focus so far has been on T1 through T4 as these are the touchpoints within the confines of legal dispute resolution, regulated by rules of procedure and evidence. I will return to Figure 1 in Parts II, III, and IV to explore the other touchpoints and show why attention to T1 through T4 may limit remedial possibilities.

We now have lay juries with perhaps fewer points of common knowledge and experience entering (at least on the civil side) highly specialized spaces. Courts charge juries with deciding highly normative questions based on expert evidence and their own experiential baselines. Before a jury can hear expert evidence, however, judges must distinguish between matters within the jury's competence and those where specialized knowledge would be "helpful" or even "necessary."

II. DISABILITY AS (UN)COMMON KNOWLEDGE

Arguably antidiscrimination law—and disability law in particular—offers an opportunity to observe the jury's infusion of cultural norms in its decision-making with socially constructed concepts like "disability,"[43] "reasonable accommodation,"[44] and "direct threat."[45] Part II considers questions of juror competence about disability in the context of disability law, a highly normative area of law.

A. *Disability Law as Normative*

Disability rights laws, like other civil rights laws, are deeply tied to collective moral and ethical principles about equality, justice, and human dignity.[46] Law

of law; rather, this Essay examines the built-in assumptions and shows how, in disability law, current methods of correcting for information deficits may not operate as they should.

[43] The statute defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102.

[44] "Reasonable accommodation" is not explicitly defined because Congress intended such inquiry to be highly individualized and fact specific, but the statute includes examples:

> The term "reasonable accommodation" may include—(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12111(9).

[45] "Direct threat" means "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

[46] *See generally* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 834-36 (2003) (comparing relative normativity of accommodation and antidiscrimination principles as means of comparing disability to other civil rights laws); Brian H. Bix, *The Normativity of Law*, *in* THE

reflects a set of mandatory rules of behavior for a community; its interpretation and application to a set of facts will implicate social values, norms, and practices.[47]

Congress found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[48] The Americans with Disabilities Act ("ADA")[49] intended to "provide [that] clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[50] Interpretation of the ADA requires adjudicators (court and jury alike) to confront the meaning of disability discrimination as distinct from the look (and, at times, feel) of formal equality in the context of other civil rights statutes.[51] In the context of disability antidiscrimination laws, equality means differential treatment at times, whereas the push for civil rights often required equal treatment to advance equal opportunity.

Beyond the general intent expressed in the preamble, interpretation of key legal concepts and factual determinations requires engagement with community values, personal knowledge and experience to balance competing interests. The core of the ADA's remedial requirement to provide "reasonable accommodations," like the "reasonable person" or "reasonableness" standards in tort law, relies on individual and collective knowledge and experience to give it meaning. Title I of the Americans with Disabilities Act, for instance, prohibits discrimination on the basis of disability against a "qualified individual," defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[52] Failure to provide a reasonable accommodation to an otherwise qualified individual with a disability constitutes discrimination under Title I of the ADA.[53] The statutory modifier of "reasonableness" qualifies the provision

CAMBRIDGE COMPANION TO LEGAL POSITIVISM 585 (Torben Spaak & Patricia Mindus eds., 2021) (discussing, in context of legal positivism, theories of law's normativity); RONALD DWORKIN, LAW'S EMPIRE (1986) (discussing role of law in society and exploring legal theory).

[47] *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 55-56 (1961).

[48] 42 U.S.C.§ 12101(a)(7).

[49] References to the Americans with Disabilities Act include the Amendments to the ADA in 2008. I will make separate references to the ADA and the Amendments Act when necessary.

[50] § 12101(b)(1).

[51] *See* Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 897 (2019) (discussing integration norms and differential treatment vis-à-vis other civil rights statutes).

[52] §§ 12112(a), 12111(8).

[53] "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." § 12112(a).

of accommodations; for example, "undue hardship,"[54] an affirmative defense in the employment context, reduces the reasonableness of the requested accommodation.[55] To make this determination, after hearing testimony from fact and perhaps expert witnesses, jurors will receive instructions from the court that characterize or describe an accommodation to help mitigate information deficits from T0 and, perhaps, remaining even after the trial in T2. The Third Circuit's Model Instruction describes "accommodation" in the following way and allows for the parties to negotiate the language needed to tailor the instructions to the specific case:

> [In deciding whether [plaintiff] was denied a reasonable accommodation, you must keep in mind that [defendant] is not obligated to provide a specific accommodation simply because it was requested by [plaintiff]. [Plaintiff] may not insist on a particular accommodation if another reasonable accommodation was offered. The question is whether

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes":

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant . . . .

§ 12112(b)(5).

[54] Under Title I of the ADA,

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this [Act];

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12111(10).

[55] *See* § 12112(b)(5)(A); *see also* Ruth Colker, *The Americans with Disabilities Act's Unreasonable Focus on the Individual*, 170 U. PA. L. REV. 1813, 1821 (2022).

> [defendant] failed to provide any reasonable accommodation of [plaintiff's] disability.]
>
> In general, an accommodation is a change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.
>
> . . . .
>
> [On the other hand, [defendant's] accommodation is not "reasonable" under the ADA if [plaintiff] was forced to change to a less favorable job and a reasonable accommodation could have been made that would have allowed [plaintiff] to perform the essential functions of the job that [he/she] already had. [Nor is an accommodation to a new position reasonable if [plaintiff] is not qualified to perform the essential functions of that position.]][56]

Regarding a defendant's affirmative defense of "undue hardship," which could mitigate the degree of reasonableness of the accommodation, the model instructions state:

> If you find that [plaintiff] has proved the . . . elements I have described to you by a preponderance of the evidence, then you must consider [defendant's] defense. [Defendant] contends that providing an accommodation would cause an undue hardship on the operation of [defendant's] business. Under the ADA, [defendant] does not need to accommodate [plaintiff] if it would cause an "undue hardship" to its business. Defendant must prove to you by a preponderance of the evidence that [describe accommodation] would be an "undue hardship." The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors [list all of the factors set out below that are relevant in light of the evidence] . . . .[57]

An expert in a Title I disability employment discrimination case, such as a qualified ADA compliance consultant, might further assist the jury in its service by testifying, for example, that the disabled plaintiff's request for a sit-stand desk and five minutes of stretch time every three hours is a common request for people with carpal tunnel syndrome, costs $2,000, and would help the disabled employee perform the essential functions of their position as a data analyst. The jury may hear from the employer's expert, also an ADA compliance consultant, who may say that the requested accommodation poses an undue hardship because it modifies the uniform aesthetic of the office (all other employees have built-in, uniform desks designed as part of the company's brand).

The jury's job would be to use this information, as well as testimony from fact witnesses and their common base of knowledge and experience, to evaluate the evidence and decide whether plaintiff's requested accommodation was

[56] MODEL CIV. JURY INSTRUCTIONS § 9.1.3 (COMM. ON MODEL CIV. JURY INSTRUCTIONS WITHIN THE THIRD CIR. 2024) (brackets in original).

[57] *Id.* (brackets in original).

"reasonable." Other judgments include, also in the employment context, whether the individual is otherwise "qualified" (meaning they could perform the "essential functions" of their job "with or without reasonable accommodation").[58] Defenses such as "direct threat"[59] challenge the individual's qualification, while "undue hardship" and "fundamental alteration"[60] defenses challenge the "reasonableness" of the accommodation requested.

Disability law, then, is not just about enforcing rules but about shaping society's values, protecting marginalized communities, and continuously negotiating what fairness and inclusion mean in different contexts, all of which is a highly normative exercise. Interpretations themselves are not static, a fact that is visible in the history of disability in society. Over time, social definitions, attitudes, and perceptions of disability have shifted from highly medicalized models of impairment to recognition of the social constructions of disability and the deep connection between social structures and individual impairments.[61]

Another key example of a highly normative concept in disability antidiscrimination law is the ADA definition of disability itself. To avail themself of the protections from disability discrimination enumerated in the ADA, a plaintiff must show that they meet at least one of the three possible statutory definitions of disability:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment . . . .[62]

Each word in this definition is a term of art, subject to years of judicial interpretation, misinterpretation—and ultimately, in 2008, a congressional amendment to correct the U.S. Supreme Court's interpretative errors (and those of lower courts after them) in the *Sutton* trilogy.[63]

---

[58] *See* § 12111(8).

[59] The "direct threat" defense concerns whether an individual poses "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." §§ 12111(3).

[60] Title II of the ADA "requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided." Tennessee v. Lane, 541 U.S. 509, 532 (2004); *see also* § 12131(2).

[61] *See, e.g.*, Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1256-58 (2007) (describing and defining social and medical models of disability).

[62] § 12102.

[63] The *Sutton* trilogy includes three cases before the Supreme Court in which the unifying question involved the scope of "disabled" under the ADA with respect to mitigating measures such as medication: Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Serv., 527 U.S. 516 (1999); and Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999). The Court interpreted Congress's intent narrowly to exclude from the definition those people

Interpreting the first-order definitional question of disability requires that jurors confront deeply rooted social norms of disability as exceptional, nonpervasive, visible, wholly incapacitating, and associated with dependency when evaluating factual scenarios where disabled plaintiffs may not meet these typical conceptions. In the context of employment, that a disabled person with a nonapparent disability—such as a learning disability like dyslexia—works in certain employment positions demanding intellectual rigor may produce cognitive dissonance among jurors and trigger questions about the legitimacy or authenticity of their claims to disability or discrimination.[64] Consider, for example, a tenured university professor with dyslexia or ADHD (two less apparent disabilities), who may request reasonable accommodations for teaching as well as service requirements such as extra time for governance reports or a particular teaching schedule to account for medical appointments. The fact that a university professor requests these accommodations may trigger cognitive dissonance in the fact finders, who may perceive performance at the highest levels of intellectual precision and excellence as inconsistent with the disabling nature of their dyslexia or ADHD. Their experiences or knowledge about disability and their judgments about whether the professor should be entitled to a reasonable accommodation when performing in a university setting may undermine their capacity to apply the instructions provided by the court.

The next Section traces and describes examples of these structural information deficits that suggest a deeply flawed base of common knowledge and experience at T0 and call into question jurors' ability to determine facts and apply the law as given to them in T1 through T4.

B. *Information Deficits and Flawed Social Norms of Disability*

One in four adults in the United States (over 70 million people) has one or more disabilities, according to the United States Centers for Disease Control ("CDC").[65] Though the prevalence is high (even if not widely understood as such), the public visibility is low because of a number of factors, some of which I address in previous work. For example, though people with more apparent markers of disability (e.g., wheelchairs, white canes, service animals) compared to those with fewer apparent markers of disabilities (e.g., intellectual and

who could mitigate their disability as excluded from protection under the Act. *See, e.g.*, *Sutton*, 527 U.S. at 475. Congress disagreed with the Court's overly narrow interpretation of disability and reiterated its broader intent with respect to the threshold definition of disability in the ADA Amendments Act. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

[64] Harris, *supra* note 51, at 942; *see also* Yaron Covo, *Reversing Reverse Mainstreaming*, 75 STAN. L. REV. 601 (2023).

[65] Press Release, CDC, CDC Data Shows over 70 Million U.S. Adults Reported Having a Disability (July 16, 2024), https://www.cdc.gov/media/releases/2024/s0716-Adult-disability.html [https://perma.cc/JF8F-DT49] (discussing data from 2022 Behavioral Risk Factor Surveillance System).

developmental disabilities, psychiatric, psychosocial, or learning disabilities) are a much smaller percentage of the overall number of disabled people in the United States, they account for a greater percentage of the public imagination of what constitutes legitimate disabilities.[66] The diversity of experiences with disability—such as severity of impairments, quality of life, social, programmatic, and architectural barriers encountered, educational and employment capabilities—is often lost; cultural and legal norms of privacy impact how society learns about disability, from being aware of national statistics to engaging with disabled people about the nature of their disabilities (also governed by individual willingness to "claim disability" as an identity).[67]

How do we know that information deficits about disability exist and the nature of the deficits? First, Congress said we have a problem through the promulgation of the Americans with Disabilities Act itself.[68] The rich legislative history, notably the contributions of disability advocates Justin and Yoshiko Dart, document the experiences of disabled people across the United States with deeply flawed assumptions about their capacity and lives. Justin Dart presented the "Disability Discrimination Diaries," a collection of those accounts, to Congress and helped shape Congress's understanding of the nature of disability discrimination[69]:

> "[I]n enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers."[70]

Second, empirical studies not only confirm that some disability norms are flawed, but also offer insights as to which ones may be problematic. For example, one recent study captured the attitudes of healthcare professionals with respect to disability. In a national survey of 714 practicing U.S. physicians, "82.4 percent of participants reported that people with significant disability have worse quality of life than people without disability."[71] Furthermore,

---

[66] Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681 (2021) (arguing privacy norms have stunted flow of information about disability that could advance antidiscrimination efforts).

[67] *Id.* at 1738; *see also* Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 555 (2021) (arguing for increased awareness of disability through practice of claiming disability).

[68] Harris, *supra* note 66, at 1693.

[69] Harris, *supra* note 51, at 928.

[70] ADA Amendments Act of 2008, Pub. L. 110-325, § 2(a)(2), 122 Stat. 3553, 3553; *see also* Alexander v. Choate, 469 U.S. 287, 296 (1985) (noting in context of ADA's precursor, Section 504 of the Rehabilitation Act of 1973, that "discrimination against [people with disabilities] is primarily the result of apathetic attitudes rather than affirmative animus").

[71] Lisa I. Iezzoni et al., *Physicians' Perceptions of People with Disability and Their Health Care*, 40 HEALTH AFFS. 297, 300 (2021).

> "[o]nly 40.7 percent of physicians were very confident about their ability to provide the same quality of care to patients with disability, just 56.5 percent strongly agreed that they welcomed patients with disability into their practices, and 18.1 percent strongly agreed that the health care system often treats these patients unfairly."[72]

Interestingly, research on the "disability paradox" paints a more complicated picture of quality of life than captured in this study. "The apparent paradox is: Why do many people with serious and persistent disabilities report that they experience a good or excellent quality of life when to most external observers these people seem to live an undesirable daily existence?"[73] "In practice, the anomaly is that patients' perceptions of personal health, well-being and life satisfaction are often discordant with their objective health status and disability."[74] These findings demonstrate the potential informational deficits that jurors may experience—deficits that, this Essay argues, may not be sufficiently addressed through the current methods of knowledge accumulation for fact finders. This may affect jurors' knowledge base but also shapes the nature and quality of expert opinion evidence meant to fill those informational gaps, as Part III will address.

Relatedly, a recent poll ("The Arc Poll") was conducted by The Harris Poll on behalf of The Arc of the United States, the largest national disability rights organization serving people with intellectual and developmental disabilities.[75] The Arc Poll offers additional support for the existence of a flawed base of common knowledge and experience with respect to people with intellectual and developmental disabilities ("ID/D").[76] For context, estimates vary with respect

---

[72] *Id.* at 297.

[73] Gary L. Albrecht & Patrick J. Devlieger, *The Disability Paradox: High Quality of Life Against All Odds*, 48 SOC. SCI. & MED. 977, 977 (1999) (citation omitted); *see also* Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1389 (discussing disability paradox and offering examples of moments when inside views of disability may conflict with outside views of disability).

[74] Albrecht & Devlieger, *supra* note 73, at 978.

[75] *Our Mission and Values*, ARC (Sept. 28, 2021), https://thearc.org/about-us/mission-values/ [https://perma.cc/E99L-FH72].

[76] While I did not conduct the original empirical study here, I draw from recently collected but unpublished data by The Harris Poll on behalf of The Arc of the United States gathered for the purpose of understanding disability norms to advance their work. The Harris Poll conducted two separate surveys, one targeting the general population and another targeting a community of people with ID/D (defined as either an individual diagnosed with ID/D or a caregiver or family member with ID/D):

> The general population survey was conducted online by The Harris Poll on behalf of The Arc within the United States between September 14 and September 30, 2021 among 1008 US adults aged 18+. Data were weighted by age by gender, education, race/ethnicity, region, income, household size, and marital status to be representative of the broader population. Propensity score weighting was also used to adjust for respondents' propensity to be online.
>
> The ID/D community survey was conducted online by The Harris Poll on behalf of The

to the exact percentage of people with ID/D in the United States, but one CDC summary reported that 3% to 5% of the U.S. population, or approximately one in twenty people, has an intellectual or developmental disability.[77] The Arc Poll focused primarily on statements about people with intellectual and developmental disabilities though some questions offer insights into a broader understanding of values such as independence or dependency with respect to other types of disability.[78]

Examples of information deficits and faulty norms uncovered by the study include general information about people with ID/D such as the following:

- 45% agreed with or weren't sure about the statement, "All people with autism are good at math."[79]
- 80% agreed with or weren't sure about the statement, "Individuals can grow out of certain disabilities."[80]

Perhaps most relevant to the finding of facts and application of disability rights law, The Arc Poll found that the general population continued to associate people with ID/D with dependency:

- 50% agreed with or weren't sure about the statement, "Individuals with IDD are dependent and always need help."[81]

Arc within the United States between September 14 and October 1, 2021 among 460 US adults aged 18+ who are members of the ID/D community (including 154 individuals diagnosed with ID/D and 306 family caregivers of someone with ID/D). A post-weight was applied to the total data to reflect the proportions of individuals with ID/D and family caregivers within the U.S. population.

The Harris Poll & The Arc, Building Support for the ID/D Community: General Population and ID/D Community Survey Results 3 (Oct. 2021) (unpublished report) (on file with author) [hereinafter "The Arc Poll"]. The Arc's goals for the poll included to better understand the challenges faced by the ID/D community and shed light on public attitudes and misperceptions about the ID/D community. Though these two goals specifically relate to a subset of people with disabilities—those with ID/D—some of the questions asked relate to public perceptions of people with disabilities more broadly. I will indicate where the operative questions relate to disability and when they relate to ID/D for purposes of the discussion in this Essay.

[77] *Understanding the IDD Community: Essential Data and Insights*, INST. FOR EXCEPTIONAL CARE, https://www.ie-care.org/about-IDD [https://perma.cc/WSG9-WFF4] (last visited May 15, 2025). Note that ID/D includes disabilities such as autism, cerebral palsy, Down syndrome, intellectual disability, and ADHD, among others. *Id.*; *see also Developmental Disabilities*, CDC (Feb. 9, 2024), https://www.cdc.gov/environmental-health-tracking/php/data-research/developmental-disabilities.html? [https://perma.cc/4FH4-B354] ("In the United States, about 1 in 6 children have a developmental disability.").

[78] *See generally* The Arc Poll, *supra* note 76.

[79] *Id.* at 12.

[80] *Id.* at 13.

[81] *Id.*

- 26% disagreed with or weren't sure about the statement, "People with IDD can contribute to society."[82]
- 35% said that when they picture someone with IDD, they picture a child.[83]
- 59% agreed "strongly" or "somewhat" agreed with the statement, "People often think that individuals with IDD are a burden on society."[84]

The vast majority of the general population agree that disability rights are human rights (95% strongly or somewhat agree), though approximately half qualify this by saying that "[t]he rights of individuals with IDD can depend on their abilities" (52% strongly or somewhat agreed).[85]

Other significant findings include those about the general public's views of independent living and decision-making, which are core parts of current and historic disability rights movements and are critical for matters related to community integration and conservatorship or guardianship. Respondents from the general population were asked to select which items from a list they believe might be realistic goals for someone with Down syndrome. The same question was asked regarding those with autism. The following are some notable results from the general population:

- "Around a quarter of the general population does not feel having a social life is realistic for someone with [D]own syndrome . . . ."[86]
- "Many do not feel that making decisions about living arrangements or living independently are realistic goals for someone with [D]own syndrome or autism."[87]
- 48% said it was realistic or possible for people with Down syndrome to make decisions around their medical care, and 51% said the same for people with autism.[88]
- 47% said it was realistic or possible for people with Down syndrome to manage their own finances, and 55% said the same for people with autism.[89]

[82] *Id.* at 14.

[83] *Id.* at 13.

[84] *Id.* at 14.

[85] *Id.* at 15.

[86] *Id.* at 16.

[87] *Id.* at 17.

[88] *Id.* at 18.

[89] *Id.* This 55% figure for the general population is significantly lower (at 95% confidence level) than the percent of caretakers who responded similarly (73%). *Id.*

While most of the respondents from the general population acknowledged that society has a responsibility to provide needed supports for people with ID/D,[90] "[m]any vastly underestimate the lack of supports for the IDD community."[91] For example:

- 70% believed or weren't sure about the statement, "There are plenty of supports and resources in place in our society for family caregivers of people with IDD."[92]
- 71% believed or weren't sure about the statement, "There are plenty of supports and resources in place in our society for people with IDD."[93]
- 59% believed or weren't sure about the statement, "Children with IDD generally get the supports they need in the school system."[94]
- 23% believed or weren't sure about the statement, "Individuals with IDD still face a lot of discrimination in employment."[95]

With respect to postsecondary opportunities for people with ID/D, respondents saw employment as a more realistic goal than a college education for individuals with Down syndrome or autism:[96]

- 70% said high school graduation is realistic goal for people with Down syndrome, and 73% said the same for people with autism.[97]
- 75% said employment is a realistic goal for people with Down syndrome, and 72% said the same for people with autism.[98]
- 53% said college graduation is a realistic goal for people with Down syndrome, and 59% said the same for people with autism.[99]

Finally, the general population's self-assessment of their own knowledge about contemporary disability reflects confidence in their knowledge base. On a scale from 1 (not at all informed) to 7 (very informed), the highest percentage of survey respondents among the general population rated their knowledge as informed (roughly "4")[100]:

[90] *Id.* at 23 (reporting 89% of respondents agreed with the statement "Society has a responsibility to provide the supports that people with IDD need").

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 24.

[95] *Id.*

[96] *Id.* at 25.

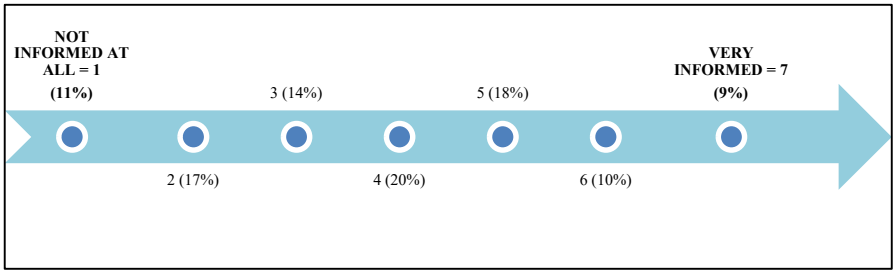
[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 41. Note that the median response was 3, selected by 140 respondents or 14% of the total respondents. *Id.* at 3, 41.

Figure 2. Information About Disability Issues.



We might understand the information deficits discussed in this Section as a part of T0, jurors' baseline common knowledge about and experience with disability. In what kinds of cases might information deficits or misinformation arise? Imagine a jury awarding suboptimal damages because of assumptions about whether a person with an intellectual or developmental disability could secure employment or whether, in a tort action, a defendant's actions truly resulted in a compensable loss of community participation for a disabled person. Consider cases where the defendants are individuals with ID/D and a jury may rule against them because, for example, jurors doubt the person has an intellectual disability given that they can do such things as cook a meal or drive a car, which jurors erroneously believe to be beyond the ability of someone legitimately with that diagnosis. Or in the context of criminal sexual assault cases or family law cases about the termination of parental rights, jurors may lack knowledge or experience or have misconceptions about a disabled person's sexual capacity (from inability to provide consent to asexuality or hypersexuality) or their capacity to be a parent.

III. EXISTING METHODS OF REGULATING INFORMATION DEFICITS

The current process of dispute resolution may put too much faith in jurors' common base of knowledge and experience in some areas, such as disability, and may overcorrect in ways that may privilege the wrong information. When there are problems with information deficits, we may be unable to catch them because of other systemic limitations and because adjudication is adversarial, with evidence brought by the parties (in civil litigation) or controlled by the state (in criminal cases). Legal actors may lack incentives to smoke out and remedy information deficits, preferring instead to use them strategically.[101] But without a more consistent or predictable base of common knowledge and experience about disability, the outcomes of cases relating to disability may be less predictable, may be subject to biases, and may undermine institutional

[101] *See, e.g.*, John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 523-34 (2000) (explaining lawyers' motivation to obtain strategic informational advantages via stretching and violating discovery rules in name of zealous advocacy).

legitimacy.[102] Part III examines the checks and remedies currently in the system for information deficits through the disability example and asks whether there are more active and intentional methods of intervention that could more effectively address existing information errors or deficits.

Several procedural and evidentiary rules seek to mitigate the lack of a common base of knowledge and experience and to remedy certain informational and decisional errors as well as biases.

A. *Expert Evidence*

Although expert evidence offers a path to supplement information deficits or address misinformation, the content and quality of evidence that can successfully pass through these evidentiary hurdles may not sufficiently address existing information deficits or may do so in ways that privilege one party over another. Lawyers must first decide to introduce the evidence, and judges must make a threshold determination regarding its reliability and utility.[103] Lawyers rely on expert witnesses to address issues beyond the jury's competence (that is, beyond their baseline knowledge and experience), while judges determine the admissibility of that expert testimony, in part, by distinguishing between matters within the common base of knowledge and experience of the jury and those matters beyond the base that require (or might benefit from) expertise.[104] This line drawing between expert testimony and the jury's competency illustrates what courts perceive to be the content of jurors' baseline knowledge and experience and the types of information deficits at work. Judges regulate the admission of relevant evidence in the first instance by asking whether the proffered evidence makes a fact of consequence (determined by the substantive law at issue) more or less likely. If the court believes that a jury lacks the knowledge and experience to find a particular fact, it may be more inclined to value the introduction of expert testimony.

Consider an ongoing doctrinal and factual tug of war concerning whether jurors can decide without medical expertise (and whether the plaintiff or other lay fact witnesses may testify about) whether a plaintiff has a disability under the ADA. Pre-2008, courts routinely required expert testimony to show that a plaintiff met the statutory definition of disability.[105] After the passage of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), some courts have held that "[n]o language in the ADA or implementing regulations states that medical testimony is required" to establish disability.[106] Despite

[102] *See* discussion *supra* Part I.

[103] *See* FED. R. EVID. 401.

[104] *See* FED. R. EVID. 702.

[105] *See* Smith, *supra* note 6, 19-24. *But see* Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996) ("There is certainly no general rule that medical testimony is always necessary to establish disability.").

[106] Equal Emp. Opportunity Comm'n v. AutoZone, Inc., 630 F.3d 635, 643 (7th Cir. 2010). A plaintiff, of course, can always present medical evidence as a means to establish a plaintiff's

changes in the law, however, courts continue to struggle with the proper scope of the definition of disability. In other words, courts (as well as litigants, lawyers, and juries) continue to wrestle with the breadth of disability in society (still viewing it as exceptional and limited) and who ought to receive the protection of the ADA.[107]

In turn, these struggles, despite the statutory changes, continue to shape the types of evidence of disability deemed probative and persuasive to meet the threshold analysis. For example, in *Morgan v. Allison Crane & Rigging LLC*,[108] a case alleging disability discrimination under Title I of the ADA and Pennsylvania disability antidiscrimination law, the court held that proof of pain does not require medical expert evidence, but a claim that plaintiff had a herniated disk does.[109] The district court held that Morgan was not disabled as a matter of law because "(i) Morgan's only evidence of a herniated or bulged disc diagnosis was his own testimony that his chiropractor had so diagnosed him, and that constituted inadmissible hearsay; and (ii) medical evidence is required to prove that he had a bulged or herniated disc."[110] While the Third Circuit agreed with the district court's second holding—that Morgan required medical evidence to prove he had a herniated or bulged disc—the Court also clarified that "[m]edical testimony is not always required to establish a disability."[111] More specifically, the Third Circuit noted that "[t]he necessity of medical testimony turns on the extent to which the alleged impairment is within the comprehension of a jury that does not possess a command of medical or otherwise scientific knowledge,"[112] a standard assessed on a case-by-case basis.[113] "Generally, ailments that 'are the least technical in nature and are the most amenable to comprehension by a lay jury' need not be established by medical evidence."[114]

disability. Carter v. Pathfinder Energy Servs., 662 F.3d 1134, 1142 (10th Cir. 2011) (holding plaintiff established "physical impairment" under ADA through submission of medical testimony).

[107] *See, e.g.*, Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 41-44 (2014) (describing various cases where courts failed to recognize various conditions, including complete hearing loss in one ear, monocular vision, ADHD, migraine headaches, and strokes, as disabilities); Nicole Buonocore Porter, *Troubling Trends: ADA Definition-of-Disability Cases 2019–2023*, 52 PEPP. L. REV. 455, 495-502 (2025).

[108] 114 F.4th 214 (3d Cir. 2024).

[109] *Id.* at 225.

[110] *Id.*

[111] *Id.*

[112] *Id.* (quoting Marinelli v. City of Erie, 216 F.3d 354, 360 (3d Cir. 2000)).

[113] With respect to determination on a "case-by-case basis" whether expert evidence is required, see also Tesone v. Empire Mktg. Strategies, 942 F.3d 979, 996-99 (10th Cir. 2019); and Mancini v. City of Providence *ex rel.* Lombardi, 909 F.3d 32, 39 (1st Cir. 2018) ("Whether medical evidence is necessary to support a disability discrimination claim is a determination that must be made on a case-by-case basis.").

[114] Morgan v. Allison Crane & Rigging LLC, 114 F.4th 214, 225 (3d. Cir. 2024) (quoting *Marinelli*, 216 F.3d at 361).

Thus, according to the Third Circuit, "arm and neck pain are among those ailments which do not require medical evidence," but "a herniated disk is a spinal injury that is not 'within the comprehension of a jury that does not possess a command of medical or otherwise scientific knowledge.'"[115] The line appears to be that diagnostic categories require medical expertise while details regarding the experience of pain and impairment may be more within the jurors' common knowledge and experience. Importantly, the text of the ADA does not require a formal medical diagnosis, only proof of the existence of an impairment that substantially limits a major life function.[116]

The First Circuit in *Mancini v. City of Providence ex rel. Lombardi*[117] distinguishes between the sufficiency of plaintiff's testimony to prove a knee injury and its insufficiency to establish a technical diagnosis of "chondromalacia" in the absence of medical evidence.[118] Interestingly, the distinction is because the law, in practice, has prioritized a diagnostic classification of disability and not just the experience or manifestations of the impairment, symptoms, and effects on the individual. If the law calls for a specific diagnosis for standing, eligibility or benefit, then it is by default saying that this knowledge is uncommon, and expert evidence is required to resolve the matter.[119]

Consider another Third Circuit case, *Diaz v. Saucon Valley Manor Inc.*[120] Appellees claimed that Diaz was required to offer expert evidence or other sufficient evidence that her alcoholism constituted a disability under the ADA.[121] In response, the Third Circuit affirmed the district court's rationale as proof of jurors' common knowledge and experience with alcoholism. The court held that alcoholism, although a diagnostic category, was one where there is a firmly rooted common base of knowledge and experience:

> We are not talking about evidence of some medical condition involving the central nervous system and nobody can pronounce the word and we don't

[115] *Id.* (quoting *Marinelli*, 216 F.3d at 360); *see also* Porter v. Merakey USA, No. 22-2986, 2024 WL 3581169, at *2 (3d Cir. July 30, 2024) (holding District Court erred in dismissing plaintiff's disability discrimination case on summary judgment because plaintiff failed to submit medical records to support his disability status and show his disability was "substantially limiting").

[116] *See supra* note 62 and accompanying text.

[117] 909 F.3d 32 (1st Cir. 2018).

[118] *Id.* at 41.

[119] The ADA's requirement that the impairment "substantially limits" a plaintiff is usually a question of fact for the jury to resolve. Some courts have held that a plaintiff's testimony is sufficient to establish a prima facie case if the jury can understand the condition without specialized knowledge. *See, e.g.*, Williams v. Tarrant Cnty. Coll. Dist., 717 F. App'x 440, 448 (5th Cir. 2018) (noting former employee's testimony of her "trouble sleeping, thinking, focusing, communicating, and caring for herself" was sufficient to show her impairments were substantially limiting).

[120] 579 F. App'x 104, 108-09 (3d Cir. 2014).

[121] *Id.* at 106.

> know what it means where we need an expert. Alcoholism is a commonly encountered form of substance abuse in our society, and I think you look at the jury voir dire how many hands went up when they said there was alcohol abuse in the family. There was a significant amount.[122]

Even this discussion of alcoholism, however, ignores the normativity embedded in the experience of alcoholism. What about even less-understood diagnostic categories of disability such as intellectual or developmental? The Arc Poll showed areas where the knowledge base was weaker.[123] Normative judgments about a disabled person's decisional capacity could impact factual findings in disability cases where a person with ID/D's capacity is at issue (such as in guardianship, civil commitment, or criminal cases). Will the introduction of expert evidence help in some cases? It depends on the content of that information and what the parties see as the actual informational deficits at work.

Notably, there may be a concern about further professionalizing knowledge about disability. If we agree that there are information deficits and misinformation at work, then the current institutional device to respond is to require more experts in disability cases. What kinds of expertise will be prioritized and deemed reliable to successfully survive judicial scrutiny under *Daubert* and its progeny? If it is medical expertise, then recall that many doctors are not confident in their ability to provide the same quality of care to people with disabilities[124]—doctors' perceptions of disabled patients could introduce qualitatively poorer information into proceedings. What about the introduction of lay opinion witnesses? Would this help? Potentially lowering the bar to allow people with lived experiences to testify from their own base of knowledge and experience about disability or reasonable accommodations could be a positive direction for certain cases.

Death penalty cases offer another context for examination of the high-stakes impact of information deficits on substantive case outcomes. Here, jurors are charged to determine whether a criminal defendant has an "intellectual disability" that can mitigate punishment under *Atkins v. Virginia* and related cases.[125] "[W]hen lay jurors arbitrate intellectual disability claims, they tend to believe that only persons with extreme impairments are intellectually disabled."[126] Scholars have explored the ability of experts to "cure"

---

[122] *Id.* (quoting District Court's appendix).

[123] *See supra* notes 71-95 and accompanying text.

[124] *See supra* notes 66-67 and accompanying text.

[125] 536 U.S. 304 (2002); *see* Sheri Lynn Johnson, John H. Blume & Brendan Van Winkle, Atkins v. Virginia *at Twenty: Still Adaptive Deficits, Still in the Developmental Period*, 29 WASH. & LEE J.C.R. & SOC. JUST. 55, 74 (2022) (citing Marcus T. Boccaccini, John W. Clark, Lisa Kan, Beth Caillouet & Ramona M. Noland, *Jury Pool Members' Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for* Atkins*-Type Cases*, 34 LAW & PSYCH. REV. 1 (2010) (studying norms of intellectual disability, capacity, and how they affected the outcome of *Atkins* motions)).

[126] *See, e.g.*, Johnson et al., *supra* note 125, at 74.

misinformation about intellectual disability in the capital context and have discussed the ways in which psychological processing, such as "motivated cognition"—unconscious bias similar in operation to confirmation bias when there is some bias in support of preexisting preferences or mixed evidence to support those preferences—works against the ability of expert evidence to remedy information deficits.[127]

B. *Jury Pool Representativeness*

Some may argue that the jury's representativeness and pooling from a broad crosssection of society can bring different perspectives together to contest problematic baseline norms during deliberations (T3), a time when jurors reconcile the evidence presented and the court's instructions with their individual knowledge and experiential baselines. However, in the context of disability, legal rules and procedures sometimes screen out people with visible disabilities who might bring greater experiential knowledge. Such is the case of Colorado attorney, Spencer Kontnik. In July 2021, Denver County summoned Kontnik, who is deaf, for jury duty. Kontnik arranged for an interpreter with Communication Access Realtime Translation ("CART") with the court, something he had done on countless occasions as a practicing attorney in the same courthouse.[128] People who are deaf or hard of hearing use CART, similar to a closed captioning system, to communicate effectively and accurately.[129] Before allowing the prospective jurors to come into the courtroom, the presiding judge discussed Kontnik's potential service without hearing from him or asking him any questions.[130] The transcript provided in Kontnik's complaint included the following statement by the court:

> All right. So, an issue's come up with a juror who is hearing impaired and under the ADA we have a Court Interpreter who's here and present and all set up to help him.
>
> But the parties have approached and stipulated to allowing him to be excused just on the grounds that things might be tough for him and also the

[127] *Id.* ("The reader may imagine that such prejudice may be cured by information from an expert, but both the broader literature on motivated cognition and our own research on intellectual disability determinations strongly suggests that it will not."). "[W]here that outcome is implicated by the resolution of an issue, she may evaluate the issue based her outcome preferences and then look for evidence that confirms her judgment, rather that evaluating the evidence independent of those preferences." *Id.*

[128] Amended Complaint at 8, Kontnik v. Denver Cnty. Ct., No. 2022CV32599 (Denver Dist. Ct. Jan. 15, 2024).

[129] *See Communication Access Realtime Translation*, NAT'L ASS'N OF THE DEAF, https://www.nad.org/resources/technology/captioning-for-access/communication-access-real time-translation/ (last visited May 15, 2025).

[130] Order on Defendant Denver County Court's Motion to Dismiss at 2-3, *Kontnik*, No. 2022CV32599 (Denver Dist. Ct. Feb. 11, 2023).

> court would be required to have [an] alternate just in the event there's . . . issues with the interpretation or with the juror's ability to serve.
>
> So, just based on that and given that this will likely be a one-day trial I'll agree with the stipulation and allow for that juror to be excused.
>
> And I want to say thank you so much to the Interpreter for being here.[131]

Kontnik's suit survived a motion to dismiss, but the court ultimately granted summary judgment to the defendant, finding that Kontnik was not entitled to relief despite the court's violation of the antidiscrimination act at issue.[132]

Hurdles to jury service exist for people with other disabilities such as intellectual and developmental disabilities. Some states continue to exclude people with ID/D from jury service if they are under a court-ordered guardianship or conservatorship without a separate inquiry into whether the individual has the capacity for service.[133] Orders of plenary guardianship used to be the default, most common form of substitute decision-making operating under the assumption that if a person lacks decisional capacity in one area, it is indicative of their lack of capacity across the board. Orders of guardianship are difficult to reverse,[134] so there may be individuals who have been under plenary guardianship for years even though they can actually have a less restrictive limited guardianship that might allow for the removal of decisional agency over medical decisions, for example, but allow them to retain decisional capacity in other areas such as voting or, in this case, jury service.

Moreover, knowledge and experience are typically grounds for juror dismissal (for cause or preemptory challenges) under our jury selection processes. Lawyers under the current system claim to value jurors who can be "blank slates" and receive the information required to fairly resolve a dispute

---

[131] Amended Complaint, *supra* note 128, at 9 (emphasis omitted).

[132] *See* Order on Defendant Denver County Court's Motion for Summary Judgment at 11, *Kontnik*, No. 2022CV32599 (Denver Dist. Ct. Jan. 15, 2024). Though the court found a violation of the antidiscrimination statute in Kontnik's case, another major obstacle these types of cases face is permissibility of a stipulated dismissal on the grounds of disability as opposed to the grounds of race or gender. Some of this has to do with the constitutional standard of review of state action which differs for state action on the basis of race or gender (entitled to strict and intermediate scrutiny respectively) and on the basis of disability (entitled to rational basis review). *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41, 446 (1985).

[133] *See, e.g.*, 5 INDIANA PLEADING AND PRACTICE ¶ 47.11(f) (2024) (requiring attestation under oath that person is "not under a guardianship appointment because of mental incapacity," among other things, to qualify for jury service and without further inquiry into scope of guardianship or individual incapacity); *see also* Anna Offit, *Reimagining the Inclusive Jury*, 57 U.C. DAVIS L. REV. 2691, 2706 (2024) (describing laws in North Dakota, Rhode Island, and West Virginia, among other states, where prospective jurors with intellectual disabilities may be excused at court's discretion on basis of capacity).

[134] *See, e.g.*, Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 85 (2015).

before the court. The reality may be that all agree biases exist and, instead, seek to identify positive biases for their client (or the state) as a strategic lawyering matter. Another model could be to accept that biases are rampant and difficult to capture during voir dire. Rather than invest in smoking out and dismissing jurors with relevant experience or knowledge, another approach could embrace knowledge and experience as valuable, seek to limit discretionary dismissals, and redesign the voir dire process and trial processes that follow to manage that knowledge and experience in ways that could improve jury deliberations.

C. *Post-verdict Processes*

Post-verdict processes (T5) may allow parties and courts to correct the use of impermissible information in the jury's decision-making but only in narrow circumstances when issues become known. As a result, such processes may not reach the type of structural deficits described here.

The rules protect the sanctity of the jury verdict both for continued institutional legitimacy and for finality. Procedural rules on post-verdict pleadings such as judgment as a matter of law (Federal Rule of Civil Procedure 50(b))[135] or motions for a new trial (Federal Rule of Civil Procedure 59) are available to the parties when there is no "legally sufficient evidentiary basis to find for the party"[136] or the party wishes to petition the court for a new trial on the basis of such errors as incorrect jury instructions, insufficient evidence, or juror misconduct.[137] A party may also appeal as of right or with permission of the appellate court (depending on the governing statute) and challenge the jury verdict as the product of underlying legal errors or insufficient evidence. If the appeal is based on purported evidentiary errors, the appellate court will narrowly review the case based on an abuse of discretion standard, deferring to the lower court's temporal proximity to the facts.[138] Challenges to juror decision-making or the exclusion of evidence designed to mitigate normative biases are unlikely to rise to the level of error required under these rules.

Some challenges to the verdict, however, may affect constitutional rights, at least in criminal cases. For example, the Supreme Court confronted racial bias

[135] FED. R. CIV. P. 50(b) deals with post-verdict motions and 50(a) deals with motions for directed verdict anytime during the trial but before the case is given to the jury for deliberations. Both require the articulation of the grounds for the assertion that no reasonable jury could find for the nonmoving party on a given issue. Motions under Rule 50(b) require a prior motion under 50(a) before the jury verdict is rendered. The idea is that if there are no factual disputes, the court can resolve the issue before it as a matter of law.

[136] FED. R. CIV. P. 50.

[137] FED. R. CIV. P. 59.

[138] *See, e.g.*, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (holding that, when reviewing trial court's decision on admission of expert testimony, proper standard of review is abuse of discretion).

in jury deliberations in *Peña-Rodriguez v. Colorado*.[139] More specifically, the Court considered whether the default "no impeachment rule"—which prevents jurors from testifying about what happened during deliberations to protect juror competency and the finality of the verdict—could be pierced when it conflicted with a criminal defendant's constitutional rights.[140] The defendant, Miguel Peña-Rodriguez, was convicted of sexual assault in Colorado. After the trial, two jurors informed Peña-Rodriguez's attorney that another juror had made racially biased remarks about Peña-Rodriguez and his Mexican heritage during deliberations: specifically, that Peña-Rodriguez was guilty because "Mexican men take whatever they want" and that he did not trust Mexican men.[141] Peña-Rodriguez moved for a new trial, arguing that the verdict was tainted by racial bias.[142] In a five-to-three decision, the U.S. Supreme Court held that the Sixth Amendment guarantees a criminal defendant a right to an impartial jury and that racial bias in jury deliberations violates that right, thus carving out an exception to the otherwise impenetrable no-impeachment rule.[143]

However, it is unclear whether a court hearing a similar case where racial bias was replaced with disability bias would similarly pierce the no-impeachment rule based on competing constitutional considerations. Unlike state action based on race which receives the highest level of constitutional scrutiny (strict scrutiny) and lowest level of judicial deference, courts apply the lowest tier of constitutional scrutiny (rational basis review) to state action based on disability with the greatest deference to states.[144] In addition to the status of disability in this constitutional pecking order (or perhaps related to this status), law and society have framed disability bias and discrimination as less animus driven, more rational, and more likely a product of misguided benevolence. Imagine, for example, a sexual assault case where the defendant has an intellectual disability. The jury returns a guilty verdict. Post-verdict jury interviews by defense counsel reveal that one juror said on a number of occasions that he knew that men with intellectual disabilities are innately sexually aggressive and "can be predators." The juror interviewed said that he and others found this very convincing, and it helped him (and others) reach the verdict. This hypothetical is similar to *Peña-Rodriguez*, but as a matter of law and culture, it might produce a different result, though the bias is no less harmful.

---

[139] 580 U.S. 206 (2017).

[140] *Id.* at 227.

[141] *Id.* at 213.

[142] *Id.*

[143] *Id.* at 229.

[144] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442-43 (1985); *see also* Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 531 (2014); Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. 839, 900 (2024); Jasmine E. Harris, Karen M. Tani & Shira Wakschlag, *The Disability Docket*, 72 AM. U. L. REV. 1709, 1724 (2023).

Thus, although procedural and substantive mechanisms exist to identify and remedy jurors' informational and experiential deficits with respect to disability, Part III demonstrates the limitations of these devices. At best, the mechanisms discussed offer opportunities for the circulation of additional information that could mitigate existing information deficits; at worst, these mechanisms block the flow of relevant and potentially curative information.

IV. THINKING OUTSIDE THE BOX

This Part offers a few initial thoughts on how we might begin to address information deficits by focusing on other informational touchpoints,[145] potential prescriptive barriers, and questions for further consideration. Existing processes assume that when jurors step into the jury box, it is possible to identify and address information deficits or inaccuracies to assist in their decision-making process. They assume, for example, that the jury room is a deliberative space of active engagement and contestation where jurors naturally invoke their individual values, collective social norms, and more localized sets of social norms (within families, communities, towns, cities, states, regions, etc.). But this is not just about curing one or two factual inaccuracies or indoctrinating people to the importance of disability rights. There are few opportunities for self-correction of factual inaccuracies, or the development of equality norms related to disability.[146] In fact, there are deliberate barriers to information flows that cabin what information people can discuss and a lack of safety nets in place for when this information is disclosed and discussed but misused as a ground for discrimination and exclusion.[147]

Most of the interventions discussed above take place during T1 through T4 in terms of informational touchpoints.[148] Part IV suggests potential interventions inside and outside of the courthouse. The overall goal is to invest in more upstream structural interventions to tackle the baseline of common knowledge and experience before a jury summons and, once in the courthouse, to mitigate

[145] *See* Emens, *supra* note 73, at 1387 (advancing "one novel way to help attitudes toward disability catch up with the law: using *framing rules* to target the moments when nondisabled people make decisions that implicate their future relationship to disability").

[146] Recent efforts to regulate the content of public education (and, in some instances, history) raise important questions about effects on widening existing information gaps, misinformation, and strengthening biases. *See, e.g.*, Madison Markham, Tasslyn Magnusson, Sabrina Baêta & Kasey Meehan, *Cover to Cover: An Analysis of Titles Banned in the 23-24 School Year*, PEN AM. (Feb. 27, 2025), https://pen.org/report/cover-to-cover/ [https://perma.cc/TT3J-MLCR] ("During the 2023-2024 school year, 36% of all banned titles featured characters or people of color and a quarter (25%) included LGBTQ+ people or characters. . . . About 10% of titles banned featured characters or people who are neurodivergent or have a physical, learning, and/or developmental disability.").

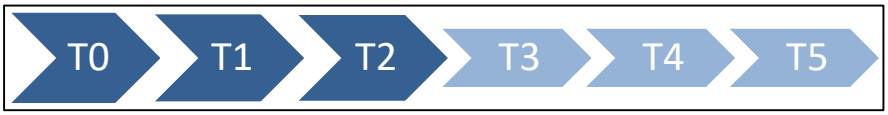
[147] *See generally* Harris, *supra* note 66.

[148] One caveat here is the difference between social science literature on what actually helps in terms of shifting social norms and what we actually can do in these adjudicatory spaces.

the information deficits by providing information about flawed social-structural norms themselves. Examination of specific prescriptions is beyond the scope of this Essay.

A. *Other Informational Touchpoints*

Figure 3. Other Informational Touchpoints.



1. Pre-jury Summons (T0)

Prescriptions for flawed social norms include investment in antidiscrimination enforcement and education outside of the context of dispute resolution. Here, consider The Arc Poll[149] responses and how some, such as the responses on people with autism being good at math or those with Down syndrome being happy all the time signal a real disconnect between the everyday life experiences of the general population in the United States with disabled people. Are there opportunities for meaningful contacts of the sort that may produce norm changes, or will the existing forms of interactions reinforce stereotypes? For example, the Individuals with Disabilities Education Act, in theory, establishes a legal default for integrated education where nondisabled and disabled students might interact meaningfully in schools; however, have the desired norm shifts been stunted by factors such as the design or implementation of the law or negative aesthetic and affective responses to disability in integrated settings?[150] Enforcement of disability antidiscrimination laws may create the conditions for norm shifts by reducing architectural, programmatic, and practical barriers to the meaningful participation of disabled people in all facets of society, from employment and education to marriage and parenting. The interpretation of legal rights and responsibilities, as this Essay has shown, depends on the content of existing norms and frameworks used to decide the law and apply it to a set of facts.

2. Jury Summons and Voir Dire (T1)

During jury selection in cases involving disability (either disability laws or a party with a disability), a special juror selection questionnaire could operate as an opportunity for the court and the parties to understand the knowledge and experiential baselines of the jurors with respect to disability. This would be more than a general question during voir dire about whether the person has anyone

[149] *See supra* Section II.B.

[150] *But see* Harris, *supra* note 51, at 896-904 (describing challenges to norm shifts based on contact theory and calling for more intentional examination of conditions required for meaningful contacts that can generate stronger equality norms over time).

with a disability in their orbit. The questions may be more direct and reflect the structural norms of disability that would operate in the background and inform jury deliberations.

This could be an intervention that disrupts the ordinary adversarial process in civil cases where the parties can manipulate informational imbalances as part of their strategy (such information may have value for settlement or plea-bargaining purposes as well). However, given how sticky disability norms are and the existing information deficits,[151] an intervention like this may be warranted.

3. Preliminary Instructions and Trial (T2)

During T2, there could be a mandatory opening jury instruction on the operation of disability norms and information deficits as another potential intervention. During the trial itself, two ideas may offer paths for further exploration. First, the use of lay opinion evidence in disability cases should be reexamined. Current rules (such as Federal Rule of Evidence 701) caution against the introduction of opinion testimony by lay witnesses who are not fact witnesses because they lack personal knowledge of the events at issue in the case. Instead, they opine on a matter at issue in the case informed by their own knowledge and experience. The rules do not subject lay opinion testimony to the same degree of judicial review under the expert evidence rules (such as Federal Rules of Evidence 702 and 703). As a result, courts tend to proceed carefully with respect to the admissibility of lay opinion testimony. That said, courts routinely allow police officers to offer general opinion testimony about drug dealers' behaviors based on their experience, sometimes as lay witnesses and other times as experts.[152] Without endorsing this specific example, courts could reduce the barriers to the introduction of lay opinion testimony from people with lived experience about local norms of disability surrounding a particular case, that is, what people may or may understand in everyday life. They would not be fact witnesses opining about the events at issue but might instead offer lay opinion testimony on "social norms" under Rule 701; for example, an individual with Down syndrome not connected to the case could testify about their experiences interviewing in the job market in a case about employment discrimination and failure to hire a plaintiff with Down syndrome. Second, it is worth considering the further development of a category of "social norms" experts who could similarly testify with no factual connection to the case before the court. These social norms experts could be qualified on the basis education, training, or experience under Rule 702. The content of that testimony would need to pass muster under the expert rules of evidence; perhaps precedent like

[151] *Id.* at 940; Harris, *supra* note 66, at 1685.

[152] *See, e.g.*, Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 PEPP. L. REV. 551, 554 (2012) ("Law enforcement officers are routinely permitted to testify as experts based on their law enforcement experience.").

Kumho Tire Co. v. Carmichael,[153] calling for a more flexible application of the *Daubert* reliability factors,[154] offers a path for the development of social norms expertise and relevant qualifications.

B. *Open Questions and Considerations*

This final Section raises a set of challenges and questions for further development.

In terms of curing information deficits, does the nature of the information matter? Can the information deficit be easily remedied through the transfer of (some, better, different) information and received by jurors within the current adjudicative framework? For example, the literature on management leadership distinguishes between "technical" and "adaptive" challenges:

> While technical problems may be very complex and critically important (like replacing a faulty heart valve during cardiac surgery) they have known solutions that can be implemented by current know-how. They can be resolved through the application of authoritative expertise and through the organization's current structures, procedures, and ways of doing things. Adaptive challenges can only be addressed through changes in people's priorities, beliefs, habits, and loyalties. Making progress requires going beyond any authoritative expertise to mobilize discovery, shedding certain entrenched ways, tolerating losses, and generating the new capacity to thrive anew.[155]

Arguably, the challenge of information deficits in the case of disability presented in this Essay is mixed but may lean heavily on the adaptive side. That is, having an expert testify that more people with ID/D attend college than people know may solve a technical challenge, but having the same expert testify that people with intellectual disabilities have the necessary capabilities to be parents may present a more stubborn adaptive challenge.

Another question here concerns the tension (apparent or actual) between two empirical facts: that disability is pervasive (70 million adults)[156] and yet there are pervasive information deficits about it. If one in four people has a disability, then why are there not more people with disabilities in jury pools and selected as jurors? Spencer Kontnik's case helps explain that even when disabled people are present in the pools, they may be intentionally dismissed. But this raises an important question as well: Would a jury of all disabled people cure the representativeness problem? The answer is that it might create relatively better conditions to bridge the knowledge and information deficits but would not be fully prescriptive because disability is not a monolith *and* because the problem is not limited to one's identity alone.

---

[153] 526 U.S. 137 (1999).

[154] *See id.* at 147 (expanding *Daubert* test to nonscientific expert testimony).

[155] HEIFETZ ET AL., *supra* note 7, at 19.

[156] *See supra* note 65 and accompanying text.

The questions above address the quality of the information but would improving the quality of the information be dispositive? It is unlikely that it would because the space provided for and methods of meaningful engagement with that information also matter. What if the court administered the Implicit Association Test ("IAT") to every prospective juror?[157] In a disability case, the IAT might be disability-specific (although the test suffers from essentializing identity axes). The results could offer the parties and the court information on the biases of jurors in the pool as a starting point. As mentioned previously, rather than exclude jurors because of these findings, could lawyers and the court consider how to use this information and imagine ways to address these biases through the proceeding itself? One possibility could be to construct a more directive jury deliberation process and create prompts or processes for deliberation based on the rich literature of human decision-making. This means more than using a special verdict form or giving a foreperson a handout on best practices for difficult conversations and hoping for the best. It may mean piercing the black box of jury decision-making not after a verdict but creating additional processes around facilitation of the decision itself. Furthermore, could artificial intelligence transcribe jury discussions and detect bias in the deliberative process? Could an AI assistant prompt the foreperson to ask certain questions or communicate with the court when the jury has a question? One benefit of this move would be to shift the conversation from removing matters from the jury to how to ensure better jury decision-making by increasing their competency and capacity.

CONCLUSION

The questions raised in this Essay challenge conventional wisdom about preexisting knowledge and experiential deficits of lay jurors and whether the current system of knowledge accumulation for purposes of dispute resolution properly accounts for these deficits. Using disability as a case study reveals the dearth of information about disability in circulation, how uninformed jurors may be before they enter the courthouse, and how the devices in place to provide relevant and necessary information about disability for dispute resolution may be insufficient. This Essay intends to spark broader discussions to further explore the implications for scholars, courts, and practitioners thinking and working in highly normative areas of law where underlying social norms are unstable and less rooted.

Although this Essay focused on the disability case study, disability could be the canary in the coal mine, offering a useful lens for thinking about information deficits in other contexts. Epistemic injustices are intimately tied to power. In this sense, and putting aside the one-dimensional examination of disability thus far, the problem of information deficits, misinformation, and biases extends to

[157] *About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html [https://perma.cc/7PEJ-WWSG] (last visited May 15, 2025).

other subordinated identities that should be examined together, independently and intersectionally.